

**(2011) 08 CAL CK 0009**

**Calcutta High Court**

**Case No:** C.O. No. 4026 of 2010

Sri Sudhindra Lal Barua

APPELLANT

Vs

Sri Hari Gobinda Jhunhunwalla  
and Others

RESPONDENT

---

**Date of Decision:** Aug. 18, 2011

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 26 Rule 10, Order 26 Rule 9, 151
- Transfer of Property Act, 1882 - Section 108

**Hon'ble Judges:** Prasenjit Mandal, J

**Bench:** Single Bench

**Advocate:** Asish Sanyal, Tapan Mitra and Arijjit Pradhan, for the Appellant; S.P. Roychowdhury and Sukanta Chakraborty, for the Respondent

**Final Decision:** Dismissed

---

### **Judgement**

Prasenjit Mandal, J.

This application is at the instance of the Defendant and is directed against the Order No. 13 dated December 7, 2010 passed by the learned Judge, City Civil Court, 4th Bench, Calcutta in Title Appeal No. 43 of 2009.

2. The Plaintiffs/opposite parties obtained a decree for recovery of possession against the Petitioner in respect of the premises No. 26A, Creek Row, Kolkata on the ground of default and violation of Clauses (m), (o), (p) of Section 108 of the Transfer of Property Act. Thereafter, the Defendant/Petitioner preferred an appeal being Title Appeal No. 43 of 2009. That appeal is pending before the learned Judge, City Civil Court, Calcutta. At the appellate stage, the Petitioner filed an application for local investigation contending, inter alia, that though, an advocate-commissioner was appointed earlier, she exceeded her jurisdiction and she was not an expert to say about the construction and the unauthorised construction made by the Appellant and as such, an engineer-commissioner should be appointed. That application was

rejected by the impugned order. Being aggrieved, this application has been preferred.

3. Upon hearing the learned Counsel for the parties and on going through the materials on record, I find that in respect of the contention of the ground for recovery of possession under the Clauses (m), (o), (p) u/s 108 of the Transfer of Property Act, a Commissioner was appointed and the learned Commissioner submitted her report which had been marked as Exhibit 13. There was a clear finding in the report that there was an access to the roof of the suit premises through a hole in the ceiling and the learned Trial Judge held that the Defendant had made the hole in the ceiling of the premises without the consent in writing of the landlord and as such, the decree for recovery of possession was granted on that ground also.

4. At the time of holding the commission, No. objection was raised before the learned Trial Judge, and the learned Commissioner held commission in presence of both the sides and thereafter, she submitted the report.

5. During argument, Mr. Asish Sanyal, learned advocate appearing for the Petitioner has referred to the decisions of [Pormusamy Pandaram Vs. The Salem Vaiyappamalai Jangamar Sangam](#), , particularly paragraph No. 6, the decision of [Babu Manmohan Das Shah and Others Vs. Bishun Das](#), and the decision of [Allahabad Bank Vs. Sourendra Nath Shaw and another](#), and thus, he submits that according to these decisions, the Court may exercise jurisdiction properly so that a clear picture may come with regard to the matter in dispute. The prayer for repair as made by the Petitioner, may be considered.

6. The decisions as referred to above are on the general proposition when an application for local investigation should be allowed and what is the value of the report as per Order 26 Rule 10 of the CPC So, I am of the view that such general principles need not be discussed more. Further, the decision of one case in the matter of investigation may not be applicable in the other case [as decided in the Ponnusamy Pandaram case (supra)].

7. With due respect to Mr. Sanyal, I hold that such an application, I am of the view that at the time of holding the first commission, the Petitioner had the opportunity to raise appropriate objection suitable to him. But he did not do so and the learned Commissioner submitted her report after completion of the commission.

8. Further, during the pendency of the trial, the Appellant did not pray for local investigation at all and he participated in the work of the commission. So, the appellate court was justified in rejecting the application under Order 26 Rule 9 of the CPC I have also gone through the judgment passed by the learned Trial Judge which lays down that the Defendant No. 1 has specifically admitted in his cross-examination that he had made the hole in the ceiling of the suit premises and he was using the roof as situated above suit premises. But, he failed to show any

written permission from the landlord to make the hole. The learned Trial Judge came to the conclusion that the Defendant had made the hole in the ceiling of the suit premises without the consent in writing of the landlord.

9. The said judgment was delivered on June 30, 2009. Subsequently, an appeal was preferred and an application for repair was filed by the Petitioner on September 2, 2010 and thereafter, a local investigation was sought for. I think, under the circumstances, that the proposed attempt is nothing but to prolong the litigation. Since, the Petitioner has suffered a decree for eviction on the ground of (m), (o), (p) of Section 108 of the Act, if the repairing work is permitted at this appellate stage, the other side may raise objection that the Petitioner is trying to make new construction. In this way, the appeal and other proceedings may continue for an unending period. The learned Trial Judge has rightly rejected the application for repair u/s 151 of the CPC. A commission was held at the trial stage and that was necessitated for the purpose of determination of the matter in dispute between the parties.

10. Accordingly, I am of the view that this application is devoid of merits and there is No. scope of interference with the impugned order. The revisional application is, therefore, dismissed.

11. Considering the circumstances, there will be No. order as to costs.

12. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.