

**(2011) 09 CAL CK 0040**

**Calcutta High Court**

**Case No:** C.O. No. 2023 of 2011

Ayub Ali Molla

APPELLANT

Vs

Majid Ali Khan and Others

RESPONDENT

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**Date of Decision:** Sept. 6, 2011

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

**Bench:** Single Bench

**Advocate:** Shyamal Kr. Chakraborty, A. Rahmani and S. Das, for the Appellant; D. Bhattacharya, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

Prasenjit Mandal, J.

This application is at the instance of the plaintiff and is directed against the Order No. 47 dated March 16, 2011 passed by the learned Civil Judge (Junior Division), Barrackpore, North 24 Parganas in Title Suit No. 210 of 2007 thereby allowing an application for local investigation filed by the defendant/petitioner herein on contest.

2. The plaintiff/petitioner herein instituted a suit being Title Suit No. 210 of 2007 against the opposite parties for declaration of title, permanent injunction and other reliefs in respect of the suit properties as described in Schedule to the plaint before the learned Civil Judge (Junior Division), Barrackpore, North 24 Parganas. At the time of filing of the said suit, the plaintiff filed an application for temporary injunction and that application for temporary injunction was allowed. Subsequently, the plaintiff sought for police help to enforce the order of injunction and that prayer was also granted so that the order of injunction as passed by the learned Trial Judge was not violated by the defendants, their men and agents.

3. The defendants are contesting the said suit by filing a written statement denying the material allegations raised in the plaint. The learned Trial Judge fixed the suit for peremptory hearing. The evidence of the plaintiff had been closed accordingly. At

that time, the defendant came up with an application for local investigation to determine who was in possession of the suit property. That application was allowed by the impugned order. Being aggrieved, this application has been preferred.

4. Now, the question is whether the learned Trial Judge is justified in allowing the said application for local investigation at that stage.

5. Upon hearing the learned counsel for the parties and on going through the materials on record, it is apparent that the above facts are not in dispute. At the stage of close of the evidence on behalf of the plaintiff, the defendant came up with the application for local investigation and his prayer as noted in the application for local investigation appearing as Annexure "P-6" at page no. 40 is quoted below:

Point for local investigation:

Whether the defendants are in actual possession of the suit property or not?

6. This is the only point to be investigated by the Survey Passed Commissioner as proposed by the defendants. On perusal of the application for local investigation and also the other materials on record, it appears that the suit properties comprise many plots and those are the agricultural in nature and as such, it will be difficult to hold local investigation in respect of each and every plot for its proper identification particularly with reference to the fixed points etc. and then to determine who is in actual possession of the suit properties. Moreover in order to determine the question as to who is in actual possession of the suit properties, the learned Commissioner has to examine the witnesses and to record their statements which is the function of the court to be done in the Court room. The learned Trial Judge is to decide who is in possession of the suit properties upon recording evidence on behalf of the both the sides and such power cannot be delegated to the Commissioner for determination by examining the witnesses at the spot. The local investigation is generally done to investigate the matter which is of peculiar nature, that could be seen or observed only by holding a survey at the spot but not for enquiry by examination of the witnesses at the spot.

7. Mr. Shyamal Kr. Chakraborty appearing for the petitioner has referred to the decision of [Union of India \(UOI\) and Another Vs. Kripal Industries](#), and the decision of Puttappa v. Ramappa reported in AIR 1996 Karn 257 which lay down that the question as to who is in possession of the property in dispute cannot be decided by the Commissioner on the said question of possession. No doubt, a Commissioner may be appointed to determine elucidation of any matter in dispute under certain circumstances, but it is not the situation. The function of the Court to collect evidence as to possession of property by either of the parties, cannot be delegated to the learned Commissioner to be appointed. Therefore, these two decisions are applicable in the instant case.

8. On the other hand, Mr. D. Bhattacharya appearing on behalf of the opposite parties has referred to the decision of Shyamal Das @ Shyamal Kumar Das v. 54 Block Congress Committee reported in (2007) 3 WBLR (Cal) 223, the decision of Sital Chandra Das v. The State of West Bengal and Ors. reported in 1988 (2) CLJ 510 and thus, he submits that the report of the Commissioner may show which party is in possession. These two decisions are not at all applicable in the instant situation. The decision of Sital Chandra Das (supra) lays down about the entries in the record of rights and the impact of the judgment on the record of rights in view of the provisions of the West Bengal Estate Acquisition Act and that the record of rights may be corrected in accordance with the judgment delivered in the civil suit. So, this judgment has no impact at all in the matter in dispute. As regards, the decision of Shyamal Das @ Shyamal Kumar Das (supra), I find that the matter relates to the prayer for mandatory injunction by the defendant for restoration of possession of the suit property when the local inspection shows possession of the defendant. In the instant case, as noted above, the suit properties comprise many agricultural plots and not with respect to one particular premises as described in Shyamal Das @ Shyamal Kumar Das (supra) wherein inspection was held on identification of the premises in suit by both the parties.

9. Since rival possession is claimed, it is the function of the court to decide upon analysis of evidence to decide as to which party is in possession of the suit properties.

10. Mr. Bhattacharya has also referred to the decision of [Basanta Kumar Swain Vs. Baidya Kumar Parida and Others](#), . On perusal of this decision, I find that it lays down that the basic principles as to grant of the prayer for local investigation. It was held that when a party was not able to produce the desired evidence for reasonable circumstances, the court might assist a party to appoint a Commissioner to get the evidence. It is not at all the situation in the present case. Since, the suit properties are involved several agricultural lands, the parties are free to adduce evidence in support of their respective contentions before the Trial Court by producing evidence oral or documentary. So, this decision will not be applicable in the instant situation.

11. In that view of the matter, the impugned order cannot be supported. The learned Trial Judge has committed errors of law in passing the said order particularly at the time when the evidence on behalf of the plaintiff has already been closed. The impugned order cannot, therefore, be sustained.

12. So, the revisional application is allowed. The impugned order is hereby set aside. The application for local investigation stands rejected. The learned Trial Judge shall proceed with the suit for disposal at an early date.

13. Considering the circumstances, there will be no order as to costs.

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