

**CIRCUIT BENCH OF CALCUTTA HIGH COURT  
AT JALPAIGURI  
APPELLATE SIDE**

**15.03.2019  
01  
Ct. No. 2  
ag/sc**

**C.O. NO. 05 OF 2019**

**Tridip Mukherjee & Ors.**

**-vs-**

**Sadhan Dutta & Ors.**

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Mr. Saumyajyoti Dutta - for the Petitioners

The suit wherefrom the order impugned emanates is a suit filed by the legal heirs of the erstwhile tenants, inter alia, seeking declaration of their tenancy right and protection against eviction without due process of law.

In the above suit, the defendants have already filed their written statement. The defendants have thereafter filed an application under Order 39 Rule 7 of the Code of Civil Procedure, 1908. The learned court below has allowed such application.

Being aggrieved by the said order allowing such application being order dated 21<sup>st</sup> February, 2019 (Order No. 33), this instant revisional

application has been filed by the plaintiffs in the said suit.

Records reveal that the application under Order 39 Rule 7 of the Code of Civil Procedure, 1908 was filed on 1<sup>st</sup> February, 2018 when direction for filing of written objection was given. No written objection has been filed by the plaintiffs/petitioners till the application was heard and allowed.

The learned advocate on behalf of the petitioners submits that the court below has ordered for local investigation, though the application itself is for local inspection under the provisions of Order 39 Rule 7 of the Code of Civil Procedure, 1908. According to the learned advocate, investigation can be allowed only under the provisions of Order 26 and not under Order 39 Rule 7 of the Code of Civil Procedure, 1908. It has been further contended by the learned advocate appearing on behalf of the petitioners that on the date of hearing the petitioners had made an application for adjournment to enable them to file written objection which was not considered by the learned court below. The learned advocate thereafter submits that the

application for local inspection is actually for fishing out evidence.

After going through the application under 39 Rule 7 of the Code of Civil Procedure, the plaint, the impugned order and considering the submissions made by the learned advocate on behalf of the petitioners, I find that the order impugned requires interference for the following reasons :

1. The nature of the suit is declaration and injunction filed by a tenant. In such a suit, the question of holding a local inspection under the provisions of Order 39 Rule 7 of the Code of Civil Procedure, 1908 has to be sparingly used and that too after exercising all check and balance, so that the same does not amount in the Court helping out a party to collect evidence. It is submitted by the learned by the learned advocate on behalf of the petitioners that the landlords have not filed any suit for eviction nor have they issued any notice determining the tenancy. In such a situation according to the learned advocate for the petitioners by allowing an application for local inspection on the points of reference mentioned below will amount to assisting the landlords to collect evidence as to

the nature and character of the suit property, which may be used in a suit for eviction that may be filed at a subsequent stage by the landlords. The learned advocate relies upon the judgment of this Court reported in 82 CWN 210 for this purpose. There is some substance in the submissions of the said learned advocate for the petitioners.

The points of reference given by the learned court below are as follows:

- a) To see the nature and character of the suit land.
  - b) Any other local feature or features.
2. The learned court below if had arrived at a conclusion that for certain reasons, the learned court wanted the local inspection, the said court would have been well within its limit. The learned court below while passing the order impugned did not give any reason as to why the application under Order 39 Rule 7 of the Code of Civil Procedure has been allowed. There is no discussion as to why the learned court below felt that local investigation on the points of reference is required for the purpose of adjudicating the suit.
  3. It is also well settled that local inspection and local investigation are two different things and

cannot be equated as the selfsame provisions. Even if, I discount that the recording, “the prayer for local investigation stands allowed”, is erroneous by reading the order as a whole, where in the other parts it has been clearly held that the court is adjudicating an application for local inspection, then also the order being devoid of reasons cannot be sustained.

In such circumstances as aforesaid, the order dated 21<sup>st</sup> February, 2019, being order no. 33 passed by the learned Civil Judge, Junior Division, Jalpaiguri, in Title Suit No. 240 of 2913 is set aside. The matter be considered afresh.

Ordinarily on having not filed written objection for over a year, the petitioners are not entitled to any further opportunity of filing written objection. However, since the order impugned is set aside, purely in the interest of justice, I peremptorily grant the petitioners ten days’ time to file their written objection in the court below. In the event such written objection is filed, the defendants in the suit shall be entitled to file their reply within a period of ten days therefrom. The learned court below should hear out the application as expeditiously as possible but not later than six weeks from the date of completion of the affidavits as indicated above. In the event, any of the parties fail to comply

with the direction for filing of affidavit as given hereinabove, the learned court below shall proceed to hear out the application after expiry of time frame for affidavits without any written objection or reply as the case may be and dispose of the said application within the period as indicated above.

The revisional application is, thus, allowed.  
There shall, however, be no order as to cost

**(Arindam Mukherjee, J.)**

