

# THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED : 26<sup>th</sup> March, 2024

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SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

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WP(C) No.59 of 2023

**Petitioner** : Bishnu Maya Rai

**versus**

**Respondents** : Dr. Rameshwar Prasad and Others

Application under Article 227 of the Constitution of India

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**Appearance**

Mr. N. Rai, Senior Advocate with Mr. Yozan Rai and Ms. Tara Devi Chettri, Advocates for the Petitioner.

Mr. Sudhir Prasad, Advocate for the Respondents No.1 and 2.

None present for the Respondent No.3.

Dr. (Mrs.) Doma T. Bhutia, Additional Advocate General with Mr. S. K. Chettri, Government Advocate for the Respondents No.4 to 7.

Ms. Tamanna Chettri, Advocate for the Respondent No.8.

Mr. Dewen Sharma Luitel, Advocate (Legal Aid Counsel) for the Respondent No.9.

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## **ORDER**

Meenakshi Madan Rai, J.

**1.** Aggrieved by the Order dated 21-11-2023 of the Court of the Learned Principal District Judge, at Gangtok, in Title Appeal No.05 of 2022 (*Dr. Rameshwar Prasad and Others vs. Chief Secretary, Government of Sikkim and Others*), which allowed an application filed by the Respondents No.1, 2 and 3 herein, under Order XXVI Rule 9 and 10 read with Section 151 of the Code of Civil Procedure, 1908, (hereinafter, the "CPC"), the Petitioner has invoked the jurisdiction of this Court under Article 227 of the Constitution of India.

**2.** The Learned First Appellate Court having heard and considered the application filed by the Respondents No.1, 2 and 3,

the Appellants before the said Court, under Order XXVI Rule 9 and 10 read with Section 151 of the CPC ordered *inter alia* as follows;

“..... Commission for local investigation can be made even at the appellate stage to determine the identity/location/demarcation of the suit property and also when there is conflicting in the documentary and oral evidence about the suit property (*sic.*).

For the reasons mentioned above and also invoking Section 107 of the CPC, 1908, the application is allowed in the interest of justice.

All the parties have agreed to the name of Shri Pramit Chettri, Ld. Counsel to be appointed as a Commissioner for making local investigation in this case. The Commissioner shall accordingly verify the location of plot no.882 and demarcate the same in the presence of all the parties. Apart from the other documents of this case, the cadastral survey records of 1952-56 should be referred while making the local investigation. A report along with maps and photographs will be submitted before this Court on 28.12.2023.

.....”

**3.** Before this Court, Learned Senior Counsel for the Petitioner contends that the Learned First Appellate Court has appointed the Commissioner for local investigation for one of the suit properties i.e., plot no.882, although many aspects of the said plot of land have already been determined and attained finality. That, there is enough oral and documentary evidence including the admission of the Respondents No.1, 2 and 3 herein about the physical location of the said plot. Reverting to the facts of the case, it was urged by Learned Senior Counsel for the Petitioner that initially Title Suit No.02 of 2010 (*Dr. Rameshwar Prasad and Others vs. Chief Secretary, Government of Sikkim and Others*), was filed before the Court of Learned District Judge, Special Division – II, East Sikkim, at Gangtok. Issues no.5 and 6 framed by the Learned Court were as follows;

“.....  
5. Whether the suit land falls under plot No.882? If it does fall under plot No.882, then in whose name the plot No.882 stands recorded?

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6. Whether the plot No.882 measures only 38 feet by 25 feet?

.....”

The Learned Court vide its Judgment dated 30-03-2011 concluded that plot no.882 which the Respondents No.1, 2 and 3 herein claimed to have been purchased by their ancestors, measures an area of 38' x 25' on 10-03-1955. It also further concluded that as far as continuous possession of the Respondents No.1, 2 and 3 herein over the suit property is concerned, they have not been able to prove their possession over the suit property since plot no.882 measures an area of 38 feet x 25 feet only and not 2280 sq. feet. as claimed by them. The suit of the Respondents No.1, 2 and 3 was ultimately dismissed.

**(i)** An Appeal against the dismissal was preferred before this High Court being Regular First Appeal No.01 of 2011 (*Dr. Rameshwar Prasad and Others vs. The Chief Secretary, Government of Sikkim and Others*), where this High Court in Paragraph 27 of its Judgment dated 30-06-2011 was pleased to determine as follows;

**“27.** It is also clear from the above that the house purchased by the ancestors of the appellants vide sale deed, Ext.2 was only a double storied wooden house measuring 38' x 25' bearing plot no.882. Even assuming that the appellants and their ancestors were in possession of the vacant land surrounding that wooden house as claimed by them, no right would flow in their favour for want of their title and ownership over the land, as the seller lacked the necessary saleable right over it. At best they can in law be termed as squatters on Government land who would be liable to be evicted by the Government under the relevant provisions of law. The site allotted to respondent no.4 is a distinct and separate plot on plot no.881.”

**(ii)** It was further submitted that against the Judgment of this Court, Special Leave to Appeal (Civil) No(s).24765/2011 (*Dr. Rameshwar Prasad and Others vs. Chief Secretary, Government of Sikkim and Others*), was filed before the Hon'ble Supreme Court of

India, which came to be dismissed *in limine* vide Order dated 06-02-2012. Hence, the findings in the suit attained finality.

**(iii)** That, the present suit being Title Suit No.12 of 2014 (*Dr. Rameshwar Prasad and Others vs. Chief Secretary, Government of Sikkim and Others*), has been filed by the Respondents No.1, 2 and 3 herein, before the Court of Learned Civil Judge, East Sikkim, at Gangtok, alleging encroachment of plot no.882 by the Petitioner while furthering the construction of her building on plot no.881, after the disposal of the previous suit. That, the matter having reached finality on plot no.882, the Learned First Appellate Court was in error in allowing the appointment of a Commissioner to make local investigation, hence the assailed Order of the Learned Principal District Judge, at Gangtok, be set aside.

**(iv)** The Petition under Article 227 of the Constitution of India is accompanied by an application for Stay wherein the Petitioner prays that the operation of the Order of the Learned First Appellate Court, dated 21-11-2023 be stayed until further orders.

**4.** Learned Counsel for the Respondents No.1 and 2 on the other hand submits that no error arises in the impugned Order of the Learned First Appellate Court, dated 21-11-2023 as admittedly this High Court has held in its Judgment, dated 30-06-2011 (*supra*) referred to by Learned Senior Counsel for the Petitioner that a double storied wooden house, measuring 38 feet x 25 feet stood on plot no.882 which was purchased by the ancestors of the Respondents No.1, 2 and 3 vide Sale Deed, Exhibit 2. That, although in their application under Order XXVI Rule 9 and 10 read with Section 151 of the CPC before the Learned First Appellate Court the Respondents No.1, 2 and 3 have prayed for

ascertainment of the true location of plot no.882 and to demarcate plot no.882 as per Exhibit 33 (Map of 1952-56) leaving the road reserve area on the eastern side, set back area and boundaries on all four sides, however now they seek to confine their prayer only to demarcation of the area of 38 feet x 25 feet on which a double storied wooden house existed on plot no.882, based on the finding of this High Court in Paragraph 27 of the Judgment dated 30-06-2011 (*supra*).

**5.** The parties also filed their respective applications before this Court seeking to place additional documents on record, being I.A. No.02 of 2024 by the Respondent No.2 and I.A. No.03 of 2024 by the Petitioner. These documents admittedly have already been exhibited before the Learned Trial Court and are not fresh additional documents. These documents I find at this juncture do not require perusal, the issue before this Court being circumscribed to whether at the Appellate stage an application under Order XXVI Rule 9 and 10 read with Section 151 of the CPC can be considered by the Learned First Appellate Court.

**6.** Learned Additional Advocate General for the State-Respondents No.4 to 7 for her part submitted that she has no objection to the appointment of the Commissioner as ordered by the Learned First Appellate Court in the impugned Order. Learned Counsel reasoned that there is Government land around the disputed plots between the private parties which are being encroached by all and sundry and demarcation of the area as prayed for by Respondents No.1, 2 and 3 would give the matter finality and closure and in fact would not be adverse to any party.

7. Learned Counsel for the Respondents No.8 and 9 had no specific submissions to make.

8. I have given due consideration to the submissions put forth by Learned Counsel for the parties and perused the pleadings and all documents on record.

9. In the context of the matter at hand it would be advantageous to refer to ***M.P. Rajya Tilhan Utpadak Sahakari Sangh Maryadit, Pachama, District Sehore and Others vs. Modi Transport Service<sup>1</sup>***, where the Supreme Court observed as follows;

**"37.** Order 26 Rule 9 of the Code gives wide powers to the court to appoint a Commissioner to make local investigations which may be requisite or proper for elucidating any matter in dispute, ascertaining the market value of any property, account of mesne profit or damages or annual net profits. Under Order 26 Rule 11, the court has the power to issue a commission in a suit, in which examination of adjustment of accounts is necessary, to a person as it thinks fit directing him to make such examination or adjustment. When a court issues such a commission to such a person, it can direct the Commissioner to make such an investigation, examination and adjustment and submit a report thereon to the court. **The Commissioner so appointed does not strictly perform a "judicial act which is binding" but only a "ministerial act". Nothing is left to the Commissioner's discretion, and there is no occasion to use his judgment or permitting the Commissioner to adjudicate and decide the issue involved; the Commissioner's report is only an opinion or noting, as the case may be with the details and/or statement to the court the actual state of affairs. Such a report does not automatically form part of the court's opinion, as the court has the power to confirm, vary or set aside the report or in a given case issue a new commission.** Hence, there is neither abdication nor delegation of the powers of functions of the court to decide the issue. Sometimes, on examination of the Commissioner, the report forms part of the record and evidence. [A. Nagarajan v. A. Madhanakumar, 1996 SCC OnLine Mad 17] **The parties can contest an expert opinion/Commissioner's report, and the court, after hearing objections, can determine whether or not it should rely upon such an expert opinion/Commissioner's report. Even if the court relies upon the same, it will merely aid and not bind the court. In strict sense, the Commissioners' reports are "non-adjudicatory in nature", and the courts adjudicate upon the rights of the parties."**

(emphasis supplied)

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<sup>1</sup> (2022) 14 SCC 345

**10.** Earlier in time in ***Suryanarayana Reddy and Others*** vs. ***Nawab Md. Kabiruddin Khan (Dead) by Lrs. and Others***<sup>2</sup>, the Supreme Court was pleased to hold as follows;

**"3.** The power to appoint a Commission to make local investigation conferred on the Court by **Order 26 Rule 9 CPC is available to be exercised by the trial court and also by any court of appeal.** Whether the High Court would interfere with the findings of fact or not, is a question which will be gone into at the time of final hearing and all the pleas which are sought to be urged before this Court, are available to be urged before the High Court."

(emphasis supplied)

**11.** In light of the said pronouncements and bearing in mind the purpose of the application, the Commissioner appointed by the Learned First Appellate Court as agreed to by the parties, shall now demarcate the area measuring 38 feet x 25 feet on which a double storied wooden house stood on plot no.882, in terms of the finding of this Court in Paragraph 27 of its Judgment, dated 30-06-2011, in Regular First Appeal No.01 of 2011 (*Dr. Rameshwar Prasad and Others vs. The Chief Secretary, Government of Sikkim and Others*) already extracted hereinabove.

**12.** As elucidated in ***M.P. Rajya Tilhan Utpadak Sahakari Sangh Maryadit, Pachama, District Sehore and Others*** (*supra*), the parties can contest the Commissioner's report, and the Learned Court, after hearing objections, can determine whether or not it should rely upon the Commissioner's report. That, even if the Court relies upon the same, it will merely aid and not bind the Court as the Commissioner's report would not be adjudicatory in nature as the Courts adjudicate upon the rights of the parties. The assistance of the cadastral survey records of 1952-56 can be referred to while demarcating the above stated area. The assailed Order of the

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<sup>2</sup> (2004) 13 SCC 703

Learned First Appellate Court, dated 21-11-2023, stands modified to the extent detailed above.

**13.** Petition stands disposed of accordingly as also all other pending applications.

**14.** Copy of this Order be forwarded to the Learned Court below for information.

**( Meenakshi Madan Rai )**  
**Judge**

26-03-2024

Approved for reporting : **Yes**