

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.15659 of 2014

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Shiv Shankar Sah

.... Petitioner/s

Versus

Binod Kumar & Ors

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Dinesh Kumar Gupta

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO
ORAL ORDER

- 10 30-11-2015 **1.** Heard the learned counsel for the petitioner and learned counsel, Mr. Kumar Nayan, appearing on behalf of the respondent.
- 2.** This application under Article 227 of the Constitution of India has been filed by the petitioner against the order dated 11.07.2014 and 11.09.2004 passed by the learned Munsif Ist Munger in Misc. Case No.15 of 1985.
- 3.** It appears that the plaintiff respondent filed partition suit No.132 of 1950. The said partition suit was decreed and thereafter in title appeal, the preliminary decree was modified. The Second Appeal was filed by the plaintiff respondent which was dismissed. Thereafter, the plaintiff respondent filed Execution case No.1 of 1985. In the said Execution Case, the present petitioner filed application under Section 47 of the Code of Civil Procedure which was registered as Misc. Case No.15 of 1985. In the said Misc.



case, the petitioner filed application under Order XXVI Rule 9 for appointment of survey knowing pleader commissioner. The said application was rejected earlier on 11.09.2004. Thereafter, again the present petitioner filed an application under Order XXVI Rule 9 CPC for appointment of pleader commissioner which is again rejected by the impugned order dated 11.07.2014. The petitioner is praying for setting aside the earlier order dated 11.09.2004 as well as the present order dated 11.07.2014.

4. From perusal of the impugned order, it appears that the Court below has found that three pleader commissioners had already been appointed in Title Suit No.132 of 1950 and the decree passed in Title suit No.132 of 1950 were confirmed by the High Court. Therefore, it is not reasonable to appoint another survey knowing pleader commissioner. The learned counsel for the petitioner submitted that after the final decree, the plaintiff respondent has encroached more than the share granted by the decree which can only be ascertained by appointment of pleader commissioner.

5. It may be mentioned here that the plaintiff has filed this execution case for obtaining of delivery of possession of the land allotted to him in the final decree. So far the submission of the

learned counsel for the petitioner is concerned, it is regarding encroachment.

6. **Order XXVI Rule 9** provides that **‘in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit.’** According to this provision, the jurisdiction is conferred on the Court to appoint pleader commissioner if the Court finds it necessary for local investigation. Therefore, considering the pros and cons and the statements of the parties, the Court found that it is not necessary to appoint pleader commissioner in the present execution case and further that the execution case is of the year 1985 and the suit filed by the plaintiff respondent is of the year 1950.

7. In view of the above facts and circumstances of the case, in my opinion, the Court below has acted within its jurisdiction, therefore, the impugned order cannot be interfered with in exercise of supervisory jurisdiction under article 227 of the Constitution of India. Accordingly, this writ application is

dismissed. The Court below is directed to dispose of the Misc.
Case and Execution Case expeditiously considering the age of the
case.

(Mungeshwar Sahoo, J)

Sanjeev/-

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