

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. No. 25 of 2022

Rajendra Prasad Pradhan ***Petitioner***
Mr. Soumya Mishra, Advocate

-versus-

Dr. N.Kishore Patnaik and others ***Opp. Parties***
Mr. Sidharth Prasad Das, Advocate
(For Opposite Party No.1)

CORAM:
JUSTICE K.R. MOHAPATRA

Order No.

ORDER
14.09.2022

6. 1. This matter is taken up through Hybrid mode.
2. Petitioner in this CMP seeks to assail the order dated 18th December, 2021 (Annexure-9) passed by learned Senior Civil Judge (LR & LTV), Berhampur in CS No.1 of 2018, whereby he allowed an application filed by Plaintiff/Opposite Party No.1 under Order XXVI Rule 9 CPC.
3. Mr. Mishra, learned counsel for the Petitioner submits that the suit has been filed for declaration that Plaintiff/Opposite Party No.1 has acquired title over the suit land by adverse possession and for consequential relief. Before commencement of trial, he filed an application under Order XXVI Rule 9 CPC to depute a Survey knowing Commissioner for identification and location of the suit plot. In the petition, it is contended that Defendants by encroaching upon the land occupied by the Plaintiff-Opposite Party No.1 has constructed a boundary wall. Since the matter involves boundary dispute, Plaintiff/Opposite

Party No.1 contended that a Survey knowing Commissioner should be deputed to demarcate the land and submit its report, which can be taken into consideration along with other materials that will come up in the trial.

4. He further submits that law is well-settled in the matter of deputation/appointment of a Survey knowing Commissioner. A Survey knowing Commissioner is deputed for elucidation of a matter in dispute, but all matters in dispute should not be elucidated by appointing a Survey knowing Commissioner. The parties seeking deputation of a Commissioner must, at the first instance, should produce material to prove his case. In the event, the material is insufficient or the party is not capable of producing material for proper identification / elucidation of the dispute then the Court may consider appointment of a Survey knowing Commissioner. In support of his case, he placed reliance on judgment of this Court in the case of **Santosh Kumar Parida Vs. Narayan Chandra Dash and others**, reported in 2020 (II) ILR-CUT-629, wherein it is held as under :-

“5.1 Thus, from the reading of the provision it is manifest that if a matter in dispute in a suit needs any clarification or further explanation, the Court may consider issuance of a commission for that purpose. The language employed in the provision makes it abundantly clear that the Court exercises its judicial discretion while making order for issuance of a commission. But, it must be kept in mind that all matters in dispute in a suit cannot be elucidated through issuance of a commission. Thus, the party seeking issuance of a Commission must establish a prima facie case to invoke the provision. He cannot use the Court to collect evidence on his behalf in the guise of invoking the power of the court under the provision, unless the occasion so arises. Thus, the party to the suit seeking issuance of a commission must, at the first instance, make an endeavour to lead

evidence to prove his case on the issue involved. Only when the evidence or material on record is insufficient or needs clarification or the parties are unable to lead evidence on any particular matter in dispute or it becomes expedient to make a local investigation by a Commission to lead further evidence in the matter, to pass an effective decree, then the Court has the power to exercise its discretion under the provision and issue such a commission for any purpose mentioned in the provision itself."

Learned Civil Judge, without applying its judicial mind either to the provisions of law or facts and circumstances of the case, allowed the application mechanically. Hence, he prays for setting aside of the impugned order.

5. Mr. Das, learned counsel for the Plaintiff/Opposite Party No.1 vehemently objected to the above submission. It is his contention that there is ample material on record to show that the Petitioner/Defendants have encroached upon the suit land and constructed boundary wall, but for identification of the exact location of the same, deputation of a Survey knowing Commissioner is necessary. It is his submission that when there is a boundary dispute between the parties, learned trial Court without wasting judicial time should resort to the provision under Order XXVI Rule 9 CPC for deputation /appointment of a Commissioner. He placed reliance upon an order of this Court dated 22nd December, 2020 passed in CMP No.334 of 2020, wherein this Court relying upon the ratio in the case of **Santosh Kumar Parida (supra)**, opined that when learned trial Court has held that there is a boundary dispute between the parties, demarcation of the land in question is necessary to elucidate the matter in dispute. Thus, learned trial Court has committed no error in

deputing Survey knowing Commissioner even at pre-trial stage. He, therefore, prays for dismissal of the CMP.

6. Upon hearing learned counsel for the parties and on perusal of record including the case laws cited, it is clear that trial of the suit has not yet commenced. In a suit for declaration of right and title by prescription, the Plaintiff has to establish that he is in possession over the suit land. Thus, burden of proof is on the Plaintiff/Opposite Party No.1 in the facts and circumstances to prove that he is in possession over the suit land. In view of the ratio decided in ***Santosh Kumar Parida (supra)***, it is clear that the party seeking issuance of Commission must establish *prima facie*, case of invocation of such provision. He cannot use the Court to collect evidence on his behalf. He cannot use the power of the Court under the provisions unless occasion so arises. In the instant case, no such endeavour has yet been made by the Plaintiff/Opposite Party No.1 to show *prima facie* case in his favour, as the trial of the suit has not yet commenced. There is also no material on record to come to the conclusion that Plaintiff/Opposite Party No.1 is prevented by sufficient cause to enter upon to measure the land in question. In that view of the matter, the impugned order directing deputation of a Survey knowing Commission is premature and is not sustainable. In view of the above, the impugned order under Annexure-9 is set aside.

7. Accordingly, the CMP is allowed to the aforesaid extent.

8. Interim order dated 1st August, 2022 passed in IA No.31 of 2022 stands vacated.

Issue urgent certified copy of the order on proper application.

(K.R. Mohapatra)
Judge