

IN THE HIGH COURT OF ORISSA AT CUTTACK
C.M.P. No.44 of 2018

Chinari Appana @ Chinnari ***Petitioner(s)***
Venkata Appana & Anr.

Mr. U.K.Samal,
Advocate

-versus-

R.Jagan Naikulu & Anr. ***Opposite Party(s)***

CORAM:
JUSTICE BISWANATH RATH

ORDER
10.05.2022

Order No.

04.

1. Heard the submission of learned counsel appearing for the parties.
2. Order-sheet discloses in spite of service of notice and only the A.Ds. have not come back, there is appearance on behalf of the opposite party Nos. 1 and 2, the plaintiffs. Petition involves allowing an application under Order 26 Rule 9 of C.P.C. at the instance of the plaintiffs. Taking this Court to the relief sought for in the suit and the written statement claim, Mr. Samal, learned counsel for the petitioner contended that even assuming that the plaintiffs have a claim that they are in possession and the defendants puts up their written statement claiming that they are in possession, unless there is adducing of evidence in proof of their respective position, there is no contingency in considering an application under Order 26 Rule 9 of C.P.C. Mr. Samal, learned counsel for the petitioner thus contended that there has been failure in appreciating the legal position involving contingency through Order 26 Rule 9 of C.P.C. by the trial court. Thus there is

illegal allowing of the application under Order 26 Rule 9 of C.P.C. ahead of confusion being ascertained through evidence.

3. Considering the submission of Mr. Samal, learned counsel for the petitioners looking to the plaint relief, this Court finds plaintiffs have a clear claim of their possession. Thus there is claim for confirmation of their possession in the suit. Undisputedly, the defendants claim that they are in possession. It is in the stage of affidavit verses affidavit. For the opinion of this Court, looking to the provision of Order 26 Rule 9 of C.P.C. bringing in such contingency only after the pleading and evidence complete and the dispute involving the possession of the parties still remain unidentified. There is no stage for considering application under Order 26 Rule 9 of C.P.C. it is in the above view of the matter, this Court finds filing of application under Order 26 Rule 9 of C.P.C. was premature.

4. As a consequence this Court finds there is mechanical consideration of such application by the trial court resulting illegal order which is hereby interfered with. This Court setting aside the impugned order dated 16.11.2017 rejects the application under Order 26 Rule 9 of C.P.C. preferred by the plaintiffs. This Court makes it clear that rejection of the application under Order 26 Rule 9 of C.P.C. at this stage of the matter shall not stand as a Bar in bringing such application if such contingency arises, in the ultimate trial of the suit.

5. This CMP thus stands disposed of.

(Biswanath Rath)
Judge