

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. No.723 of 2017

Rokkam Rani and another* *Petitioners

Mr. P. V. Balakrishna, Advocate

-versus-

Yernagula Prahavathi and another* *Opp. Parties

Mr. Biraja Prasanna Das, Advocate

(For Opposite Party No.1)

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

25.11.2022

Order No.

- 5.
1. This matter is taken up through Hybrid mode.
 2. Though the matter is listed for orders, on consent of learned counsel for the parties, the same is taken up for final disposal.
 3. Petitioners in this CMP seek to assail the order dated 9th May, 2017 (Annexure-5) passed by learned District Judge, Gajapati-Parlakhemundi in RFA No. 7 of 2015, whereby an application under Order XLI Rule 27 CPC filed by the Appellant/Opposite Party No.1 has been allowed subject to payment of cost.
 4. Mr. Balakrishna, learned counsel for the Petitioners submits that CS No.24 of 2011 was filed for partition. Learned Civil Judge, while decreeing the suit did not take property under Khata No.133 of mouza Batua under Kasinagar PS into consideration, as no document in respect of the said Khata was filed. Further, during cross-examination, the Plaintiff-Opposite Party No.1 had also categorically stated that she would not adduce any further evidence in the matter. Since no document with regard to Khata No.133 was filed, learned Civil Judge

(Senior Division), Paralakhemundi has rightly omitted the said Khata from partition. Assailing the same, the Opposite Party No.1 filed RFA No.7 of 2015. When the matter became ready for hearing, the Opposite Party No.1 filed an application under Order XLI Rule 27 CPC for adducing additional evidence by filing document in respect of Khata No.133. It is his submission that by the time an application under Order XLI Rule 27 CPC was filed six years had already elapsed from the date of filing of the suit. Further, the self-same counsel, who pursued the suit on behalf of Opposite Party No.1, was appearing on her behalf in the appeal. It is his further case that CS N.24 of 2011 was earlier decreed *ex-parte* and assailing the same the Petitioners, who were Defendants in the suit preferred RFA No.23 of 2013 and the *ex-parte* decree was set aside. All throughout the Plaintiff/Appellant did not make any endeavour to produce the record in respect of Khata No.133. Thus, filing of such application at a belated stage is contrary to the scope and ambit of Order XXVI Rule 27 of CPC. Learned District Judge holding that due to mistake of learned counsel for the Plaintiffs, she should not suffer, allowed the application. Such a ground is not available to be raised under provisions of Order XLI Rule 27 CPC. Hence, the impugned order is not sustainable in the eye of law.

4.1 In support of his submission, Mr. Balakrishna, learned counsel for the Petitioners placed reliance upon the case law in the case of ***Indramani Pati (dead) after him Sarojini Pati and others Vs. Krushna Chandra Pati and others***, reported in AIR 2004 Ori 30, wherein it is held as under:-

“.....The rule specifically says that the parties seeking to produce additional evidence must establish that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after exercise of due diligence, be produced by him at the time when the decree appealed against was passed.”

5. Mr. Das, learned counsel for the Plaintiff/Opposite Party No.1 submits that she being a lady was ignorant about the intricacies of procedure of trial of the suit. However, Petitioners/Defendants in their written statements have categorically admitted that Khata No.133 is a joint family property. Thus, non-inclusion of Khata No.133 in the decree will amount to partial partition, which should be avoided. By inclusion of Khata No.133 there may be some delay in disposal of the matter, but there will be a complete partition and it will avoid multiplicity of litigations. Due to inadvertent error of her Lawyer, document with regard to Khata No.133 could not be produced. But considering the relevancy of such document learned Appellate Court allowed the application subject to payment of cost. In view of the above, learned Appellate Court has committed no error in passing the impugned order.

6. Taking into consideration the submission of learned counsel for the parties and on perusal of record, it is apparent that Khata No.133 is a joint family property. Due to non-inclusion of document with regard to said Khata, learned trial Court while answering issue Nos.1 and 2 ignored the same and passed decree of partition omitting said Khata.

7. Since it is admitted that Khata No.133 is joint family property, non-inclusion of the same in the decree due to absence of document, will certainly amount to partial partition, more particularly when pleadings to that effect have been made by the

parties. No doubt, the rigors of Order XLI Rule 27 CPC have to be taken into consideration while considering the application under the said provision. In the instant case, the Plaintiff/Opposite Party No.1 has a little role to play with regard to production of document in respect of Khata No.133 when she had handed over the same to her Lawyer. It appears that inadvertently the same was not presented at the time of adjudication of the suit. Be that as it may, due diligence was exercised by the Plaintiff by handing over the document to her Lawyer, but due to inadvertence or otherwise, the same could not be produced in Court. In that view of the matter and more particularly to avoid a partial partition, learned appellate Court has committed no error in allowing the petition under Order XLI Rule 27 CPC by accepting the document, i.e., ROR with regard to Khata No.133 in evidence.

8. In view of the discussions made above, the case law in the case of ***Krushna Chandra Pati (supra)*** as relied upon by learned counsel for the Petitioner is of no assistance to the Petitioner. As such, I find no infirmity in the order impugned herein.

9. Accordingly, the CMP being devoid of any merit, stands dismissed.

10. Interim order dated 10th July, 2017 passed in Misc. Case No.823 of 2017 stands vacated.

(K.R. Mohapatra)
Judge