

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP NO. 163 OF 2020

Sachindra Patra and others *Petitioners*
Mr. Devendra Kumar Sahoo, Advocate
-versus-
Rajkishore @ Purusottam Biswal and *Opp. Parties*
others

Mr. Amit Prasad Bose, Advocate

CORAM:
JUSTICE K.R. MOHAPATRA

Order No.

ORDER
20.10.2022

4. 1. This matter is taken up through hybrid mode.
2. Although this matter was listed for orders, on consent of learned counsel for the parties, the CMP is taken up for final disposal.
3. Order dated 6th December, 2019 (Annexure-5) passed by learned 1st Additional Civil Judge (Senior Division), Balasore in C.S. No. 792 of 2010 is under challenge in this CMP, whereby an application under Order VI Rule 17 C.P.C. filed by the Plaintiff-Opposite Party No.1 is allowed.
4. Mr. Sahoo, learned counsel for the Petitioners submits that the suit has been filed for partition. The Petitioners are some of the Defendants in the suit. After closure of the evidence, the Defendants have already completed their arguments. When the matter was posted for argument from the side of the Plaintiff, they took several adjournments and ultimately they filed an application under Order VI Rule 17 C.P.C. seeking correction of some typographical errors and also to delete nine plots from 'Kha' Schedule property. It is his submission that admittedly those properties are recorded jointly and

partition of those properties has been sought for. If those properties are deleted from the schedule of the plaint, then there will be no complete partition and a decree of partial partition should be avoided by the Court. Since the Petitioners have come up with a definite case and the evidence has already been led by the parties, amendment of the plaint at the fag end of the suit will certainly prejudice the Petitioners. He, however, submits that he has no objection with regard to typographical errors as mentioned in paragraphs-1 to 4 of the schedule of proposed amendment. He has serious objection with regard to deletion of properties from paragraph-5 of the schedule of proposed amendment. Learned trial court without discussing the materials on record and only relying upon the decision of this Court in the case of **Jujesti Dalei and others –v- Guru Charan Behera, 2017 (I) OLR 106**, held that change of plot numbers will not change the nature and character of the suit and allowed the petition for amendment. Hence, this CMP has been filed.

5. Mr. Sahoo, learned counsel for the Petitioners also relied upon the decision in the case of **Trinath Rao –v- Sudhansu Prasad Padni and others**, reported in AIR 1992 Ori 168, wherein it has been held at paragraph-3 as under:

“3. I shall deal with the acceptance of cost aspect first. Undisputedly, the cost awarded was offered to the learned counsel for the defendant No.2 in the Court below, who accepted the same under protest. The cost having been accepted with reservation, there was no disentitlement from challenge.”

He, therefore, submits that acceptance of cost by the Petitioners with objection, will not disentitle them from challenging the order impugned herein.

6. Mr. Bose, learned counsel for the Opposite Party No.1 objecting to such submission contended that the Plaintiff-Opposite Party No.1 is the master of the suit and does not want that nine plots of Khata No. 125 under 'Kha' Schedule property should be put to partition. Hence, he sought for deletion of these nine plots from the schedule of the plaint. In effect, those plots will stand recorded jointly in whose names the same are recorded. It is his submission that the Plaintiff will not adduce any further evidence, if the order impugned herein is confirmed. The Petitioners have already accepted the cost of Rs.2,000/- for allowing the application for amendment. Hence, the CMP is not maintainable. As such, he prays for dismissal of CMP.

7. Taking into consideration the submissions made by learned counsel for the parties, this Court finds that at paragraph-7 of the plaint (Annexure-1), the Plaintiff has categorically stated that the plots he wants to delete are recorded jointly in the names of Defendants. Thus, if the amendment with regard to deletion of plots is allowed, it will lead to an incomplete partition, which should not be encouraged. In a suit for partition, parties enjoy similar status. Although no counter claim is filed, it is the duty of the Court to see that there is a complete partition between the parties. Moreover, even if the Plaintiff does not adduce any evidence, the Defendants have right to file additional written statement to the amendment and their right to lead evidence cannot be denied even by recalling the witness by the Plaintiff. Thus, the submission of Mr. Sahoo, learned counsel for the Petitioners that there will be a de-novo trial, cannot be brushed aside.

8. It is the admitted case of the parties that the Defendants have accepted the cost with objection. Since the Defendants have accepted the cost with objection, that does not prevent them from challenging the order of amendment. The ratio decided in the case of **Cudise Trinath Rao** (supra) also supports the submission of Mr. Sahoo, learned counsel for the Petitioners.

9. In view of the above, I am of considered opinion that even if the Petitioners have accepted the cost with objection, their right to challenge the order of amendment cannot be taken away. Accordingly, this Court while allowing the amendment so far as paragraphs-1 to 4 of the schedule of proposed amendment are concerned, rejects the prayer for amendment for deletion of plots at paragraph-5 of the schedule of proposed amendment. The impugned order under Annexure-7 is modified to the aforesaid extent.

10. It is made clear that learned trial court shall proceed with the matter from the stage by allowing the Plaintiff to advance his argument in the suit.

Urgent certified copy of this order be granted on proper application.

bks

(K.R. Mohapatra)
Judge