

IN THE HIGH COURT OF ORISSA AT CUTTACK
CMP NO. 219 of 2017

Jayabati Dutta and others *Petitioners*
Mr. Samir Kumar Mishra, Advocate
-versus-

Gaya Prasad Dutta and others *Opp. Parties*
None

CORAM:
JUSTICE K.R. MOHAPATRA

ORDER
10.11.2022

Order No.

IA No.34 of 2022 & CMP NO. 219 of 2017

6.
 1. This matter is taken up through hybrid mode.
 2. The CMP is listed today for consideration of IA No.344 of 2022 for extension of interim order dated 27th February, 2017 passed in Misc. Case No.249 of 2017.
 3. In course of hearing, this Court feels that merits of the CMP has to be gone into. Hence, on consent of learned counsel for the Petitioners, the matter is taken up for final disposal, as the notice being sufficient on the contesting Opposite Parties and they are being represented by learned counsel; but, none appears today on their behalf.
 4. This CMP has been filed assailing order dated 13th July, 2017 (Annexure-2) passed by learned Civil Judge (Senior Division), Baripada in CS No.107 of 2011, whereby it directed to transpose Defendant Nos.19 to 24 as Plaintiffs and to pay ad valorem court fee.
 5. Mr. Mishra, learned counsel for the Petitioner submits that the Petitioner is the wife of late Pitambar Dutta and

Defendant Nos.19 and 24 are his children. The suit has been filed to declare the sale deed executed by Defendant No.18 in favour of Defendant Nos.25 to 30 as illegal and void and hence the same is not binding on the Plaintiff. In the alternative, the Plaintiff also prayed for partition and permanent injunction. A prayer for preemption was also made in the said suit. After closure of the argument, the matter was reserved for pronouncement of judgment. But instead of pronouncing the judgment, the impugned order has been passed. It is submitted by Mr. Mishra, learned counsel for the Petitioner that no application was ever filed by any party to transpose Defendant Nos.19 to 24 as Plaintiffs. When the Defendant Nos.19 to 24 have never sought to prosecute the suit along with the Plaintiff, the Court should not compel them to prosecute the suit. If the suit is not maintainable in law, the Plaintiff will fail in her suit. But, the Court could not have passed the impugned order as it is against the settled position of law. Hence, he prays for setting aside the impugned order and direct learned trial Court for hearing the matter afresh and pronounce the judgment.

6. None appears for the contesting Opposite Parties, although they are represented by learned counsel. On perusal of the impugned order, it appears that after closure of the argument, the suit was posted to 28th February, 2022 for pronouncement of judgment. But, while preparing the judgment, learned Court on perusal of record, observed that the widow of late Pitambar Dutta could not have filed the suit. Although the Petitioner valued the suit at Rs.49,50,000/-, she being a lady was exempted from payment of ad valorem court fee. Learned trial Court expressing his astonishment for joining the children of

late Pitambar Dutta, as Defendant Nos.19 to 24, has passed the impugned order, as aforesaid.

7. Admittedly, none of the parties to the suit had prayed for implemen- tion of Defendant Nos.19 to 24 as Plaintiffs to the suit. Hence, the Court could not have compelled Defendant Nos.19 to 24 to be transposed as Plaintiffs to prosecute the suit, when they preferred to defend their case as Defendants. Only because ad valorem court fee has not been paid, Defendant Nos.19 to 24 could not have been directed to be transposed as Plaintiffs. Further, the Court cannot compel a party to prosecute suit, until and unless she/he shows interest for the same. The Plaintiff has to prove his case both facts and law to succeed in the suit. In that view of the matter, the impugned order is not sustainable.

8. Accordingly, the impugned order 13th July, 2017 (Annexure-2) is set aside and the matter is remitted back to learned trial Court to proceed with the suit from the stage of argument and pronounce judgment at an early date giving opportunity of hearing to the parties concerned.

9. The CMP is disposed of with the observation and direction, as made above.

10. Interim order dated 27th February, 2017 passed in Misc. Case No.249 of 2017

Issue urgent certified copy of the order on proper application.

(K.R. Mohapatra)
Judge