

A.F.R

IN THE HIGH COURT OF ORISSA AT CUTTACK

C.M.P. No.581 of 2018

Dasarathi Mallik

....

Petitioner(s)

Mr. D.P. Mohanty,
Advocate

-versus-

Pir Sayad Bukhari & Ors.

....

Opposite Party(s)

Mr. A.P. Bose,
Advocate

**CORAM:
JUSTICE BISWANATH RATH**

**ORDER
20.04.2022**

Order No.

05. 1. This C.M.P. involves rejection of an application U/o.26 Rule 9 of C.P.C.
2. Taking this Court to the pleadings made in paragraph no.10 of the plaint together with prayer no.C at page 13 & 16 of the brief respectively and also the map at page 19 of the brief, Mr. Mohanty, learned counsel for the Petitioner claims, being the owner of the property vide plot no.3036 the Petitioner has only access through the north portion of the plot no.3037 belonging to the defendants from the main road bearing plot no.11125. Taking this Court to the flat denial of the defendants in their written statement and further reading through the evidence of both the sides and the cross examination also Mr. Mohanty, learned counsel for the Petitioner attempted to impress the Court on the background of the case requiring exercise and report of a public Amin under the provision of the Order 26 rule 9 of C.P.C.

For there is affidavit versus affidavit and for not making the question no.5 in the application U/o.26 Rule 9 of C.P.C clear, taking this Court to the impugned order Mr. Mohanty, learned counsel for the Petitioner submitted that there has been no appropriate consideration of the issue and accordingly submitted that unless the question No.5 is answered by a Amin, there cannot be effective adjudication of the suit.

3. Mr. Bose, learned counsel for the contesting Opposite Parties taking this Court to the pleadings and the prayer attempted to submit that for the Petitioner concentrated his case on plot no.3037 and for the statement of the plaintiff himself in the cross-examination by the defendant, there is no necessity of such exercise and there is also no need of such report. Mr. Bose, learned counsel also contended that if the plaintiff wins, it has to win on the strength of its own pleadings and evidence already there. Further taking this Court to the question formulated in the application U/o.26 Rule 9 of C.P.C., Mr. Bose, learned counsel for the Opposite Parties submitted that the Petitioner in the guise of exercise of Order 26 Rule 9 C.P.C is attempting to enlarge the scope of the suit. It is, in this view of the matter, Mr. Bose, learned counsel for the Opposite Parties while claiming that the impugned order is justified, prays this Court for not interfering in such order.

It is, at this stage of the matter, Mr. Mohanty, learned counsel for the Petitioner giving his further response confined it's submission to the question Nos.5 & 7 involving the application U/o.26 Rule 9 of C.P.C.

4. Considering the rival contentions of the parties, this Court on examination of the issue as to whether the suit also involves consideration of the prayer therein vis-à-vis the plot no.3036 and reading the paragraph no.10 of the plaint in C.S. No.648/299/2016-I finds, in paragraph no.10 the following averments has been made:-

“ 10. That, the defendant No.1 Kamal Lochan Mallik is brother of defendant No.4 Anjana Mallik. Lt no.2 property is located on the North of Lot No.1 property. C.S. Plot No.3329 is corresponding to Hal Plot No.3036 and 3037. The plot No.3037 is recorded in the name of defendant No.4 Anjana Mallik. The original Plot No.3329 is divided into Hal Plot Nos.3036 and 3037. The Plaintiff is owner of Lot No.1 property pertaining to Plot no.3036. The public road is laying to the North of Plot No.3037. The Plaintiff after his purchase approached the public road through rest of Northern portion C.S. Plot No.3329 and that portion which is being used by the plaintiff to approach the public road is measuring Ac.0.00700 dec. on the Eastern portion of M.S. Plot No.3037 shown in Lot No.3 of the Schedule. Except that passage there is no other passage of the plaintiff to approach the public road. The plaintiffs ever since the date of purchase and prior to him his vendor has been using Lot No.3 property as passage as of his own right more than thirty years openly continuously, peacefully to the knowledge of the defendant No.4 and others as of right. The plaintiff is required Lot No.3 property to use that strip of land as his passage to approach the public road.”

5. Further this Court here also takes into account the prayer particularly at prayer No.‘C’ & ‘D’, which reads as follows:-

- “(c) It be declared plaintiffs to have right of passage on Lot No.3 property.
- (d) the defendants be permanently restrained from creating disturbance in peaceful possession of plaintiffs, from dispossessing, from encroaching and from changing nature and character of the Lot No.1 and 3 of the property.”

6. Reading the pleadings and the prayer this Court finds, unless there is involvement of plot no.3036, there cannot be a direction involving plot no.3037 and there is definite pleadings in this regard. Here on examination of the evidence already laid by this time, this Court finds, there has been evidence in chief as well as X-Examination to great extent involving both the sides. Reading the whole evidence, this Court finds, still there exists doubt on the availability of the passage running by the side of plot no.3037 to the plot no.3036. The case involves pleadings versus pleadings and Affidavits versus Affidavits. Even though there is specific pleading but this Court finds,

there is no clarity in the evidence already laid by both the sides leading to just determination of the prayer Nos. 'C' & 'D' and such grave issue cannot be decided on the basis of evidence already existed. There is definite requirement of an Amin report that too a public Amin report to arrive a proper answer to the questions involving the application U/o.26 Rule 9 of C.P.C. Such attempt is also required to block any doubt in the further stage of the litigation. It is, keeping this in view, this Court here also examining the decision involved herein and reading the same, finds, there is no application of the decision in the light of the discussion made hereinabove and there is on the other hand a casual decision.

In the circumstance, this Court while interfering in the impugned order at Annexure-5, sets aside the same and for there is requirement of deputation of a public Amin, this Court allowing the application involved directs both the parties to appear before the trial court along with a copy of this order on 26th April, 2022 and file application for posting the case to the next date alongwith service of copy of such application on the learned counsel for the defendants. In such event the matter will be taken up on 27th April, 2022 and there shall be appropriate order. Since this Court allows the application U/o.26 Rule 9 of C.P.C consequent upon setting aside of the impugned order, on the posting of the case the trial court shall appoint a Civil Court Commissioner, but however at the cost of the plaintiff and the Amin should be directed to conduct inquiry in presence of both the parties and submit its report within seven days to the Court. Upon submission of report by the Amin, in the event any of the parties files application for further chief or cross examination of any of the witnesses involving such Amin report, such application shall be allowed. Since the case is already fixed to judgment, the trial court is

directed to complete the entire exercise and dispose of the suit within a period of three months.

7. The Civil Miscellaneous Petition stands disposed of with the above direction.

(Biswanath Rath)
Judge

Ayaskanta Jena

