

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 198 of 2021

Parsuram Mallick and others* *Petitioners

Mr. Narayan Prasad Parija, Advocate

-versus-

Krushna Chandra Mohapatra and others* *Opp. Parties

Miss Deepali Mahapatra, Advocate
(For Opposite Party Nos.1 to 4)

**CORAM:
JUSTICE K.R. MOHAPATRA**

**ORDER
16.08.2022**

Order No.

- 4.
1. This matter is taken up through Hybrid mode.
 2. Order dated 23rd March, 2021 (Annexure-9) passed by learned District Judge, Cuttack in FAO No.99 of 2019 is under challenge in this CMP, whereby allowing the appeal learned Appellate Court set aside the order dated 15th November, 2019 (Annexure-8) passed by learned Civil Judge (Junior Division) 1st Court, Cuttack in IA No.1 of 2019 (arising out of CS No.322 of 2019).
 3. Mr. Parija, learned counsel for the Plaintiffs/Petitioners submits that CS No.322 of 2019 has been filed for a decree of permanent injunction over the suit schedule property, i.e., Plot No.602 under Khata No.595 to an extent of Ac.0.02 decimal situated in mouza Nuapada (now Madhupatna) in the district of Cuttack (for convenience, referred to as 'the suit land'). It is his submission that one Sailabala Mallick (wife of Plaintiff No.1 and mother of Plaintiff Nos. 2 to 5) along with one Prafulla Dei

had jointly purchased Ac.0.075 decimal from Sabik Khata Nos.459 and 460 for construction of their residential houses thereon. They had left Ac.0.002 decimal (1.8 kadi) (the suit land) for joint passage. Both of them constructed their residential houses thereon and are using the suit land as their common passage. In the Hal map, the suit land (road) was erroneously shown as 15 links instead of 10 links for which the Plaintiffs/Petitioners have filed RP Case No.544 of 2017 under Section 15(b) of the Odisha Survey and Settlement Act, 1958, which is sub-judice. Taking advantage of wrong recording of the suit land in the Hal map, the Defendants (legal heirs of said Prafulla Dei) created disturbances in their possession and threatened to demolish the building of the Plaintiffs over the excess area erroneously recorded in the Hal map. An UC Case was also initiated by Cuttack Development Authority (CDA) in UC Case No.174 of 2015 under Section 91 of the Odisha Development Authorities Act, 1982 (for short, 'ODA Act') against said Sailabala Mallick for construction of the building over Plot No.602 (suit plot). Eviction order was passed in the said UC Case, which was challenged before Commissioner-cum-Secretary in the Housing and Urban Development Department of Government of Odisha in Appeal Case No.27 of 2016 and the order of eviction was confirmed. Assailing the same, Sailabala (being substituted by the Plaintiffs/Petitioners) filed W.P.(C) No.22558 of 2017, which was disposed of vide order dated 28th January, 2019 with the following direction.

“Considering the rival contentions of the parties and taking into account that the possession of the petitioner was dependant on the old map prevailing in the area and the dispute having been taking place

after creation of the new map, it appears, there may be dispute in the event of measurement is undertaken taking into account the new map only. This Court, therefore, clarifying the impugned order modifies the order dated 23.09.2017 passed in appeal case no.27/2016 to the extent directing the Cuttack Development Authority to make measurement with the Revenue Authority in presence of the appellant as well the other affected parties and the same will be construed to be a measurement taking into account both the existing as well as non-existing maps. It shall be the duty of the Revenue authority to provide both the maps, any other document relevant for the purpose, for facilitating an affective measurement.

With this modification only in the order dated 23.09.2017 passed in appeal case no.27/2016, the writ petition stands disposed of."

Although the measurement was taken up by CDA with the help of revenue authority, but no notice whatsoever was served on the Petitioners to appear at the time of such measurement. Thus, the direction of this Court in W.P.(C) No.22558 of 2017 was not complied with by the authorities in its letter and spirit. When steps were taken for demolition of the house of the Petitioners situated over the suit land they filed the aforesaid suit. Along with the plaint, Petitioners also filed an application under Order XXXIX Rules 1 and 2 CPC in IA No.1 of 2019 praying, *inter alia*, to restrain the Defendants from making any illegal act or demolishing the residential house of the Plaintiffs without following direction in the aforesaid writ petition. The said IA was disposed of on 15th November, 2019 (Annexure-8) directing the parties to maintain *status quo* over the suit property till disposal of the suit. Being aggrieved, Opposite Parties preferred FAO No.99 of 2019, which was allowed vide judgment and order dated 23rd March, 2021 (Annexure-9)

setting aside the order under Annexure-8. Assailing the same, the present CMP has been filed.

3.1 Mr. Parija, learned counsel for the Petitioners vehemently submitted that this Court, while disposing of W.P.(C) No.22558 of 2017, specifically directed that the measurement should be undertaken by the CDA along with the revenue authority in presence of the present Petitioners as well as other parties likely to be affected by superimposing the Hal and Sabik maps.

3.2 The report of the Amin along with observation of learned trial Court as well as Appellate Court, clearly indicate that Petitioners were absent at the time of measurement of the suit land. Thus, it is manifest that direction of this Court in the aforesaid writ petition was not complied with in its letter and spirit. Due to erroneous publication of the Hal map, a portion of the building of the Plaintiffs standing over Plot No.600 comes within the area of Plot No.602 (suit plot). Taking advantage of the same, Defendants as well as CDA with the help of revenue authorities are making attempts to demolish the said portion of the residential building of the Plaintiffs. Law is well-settled that the suit property should be preserved during pendency of the *lis*. In the event, the building standing over erroneously published map of Plot No.602 is demolished, the Petitioners will be highly prejudiced and they will suffer irreparable loss. The balance of convenience also leans in favour of the Plaintiffs as they will suffer more if the order of injunction is not granted in their favour during pendency of the suit. These material aspects were lost sight of by learned District Judge while adjudicating the

appeal. Hence, the impugned order is not sustainable in the eyes of law and is liable to be set aside.

4. Miss Mahapatra, learned counsel for Opposite Parties objecting to such submission contended that the Civil Suit, i.e., CS No.322 of 2019 filed by the Plaintiffs/Petitioners is not maintainable in view of the provisions under Section 97 of the ODA Act. Plaintiffs/Petitioners, having failed in their attempt to protect the illegal construction made over Plot No.602 by availing statutory remedy, have filed the aforesaid suit to harass the present Defendants/Opposite Parties. It is her submission that the issue involved in the suit is with regard to construction made over Plot no.602. In UC Case No.174 of 2015, the authority under the ODA Act considering the case of the parties, directed for eviction. Petitioners also unsuccessfully challenged the same in Appeal Case No.27 of 2016 before the Commissioner-cum-Secretary, Housing and Urban Development Department, Government of Odisha. Assailing the said order, they had also moved this Court in W.P.(C) No. 22558 of 2017 in which, this Court has directed the CDA to measure the land by superimposing Hal and Sabik maps in presence of the Petitioners as well as persons likely to be affected. Although notices were served on the Petitioners but they preferred to remain absent at the time of measurement of the land. Thus, in compliance with the direction of this Court, the CDA had undertaken measurement with the help of revenue authorities. Thus, no exception can be taken to the actions of the CDA. If the Petitioners have any grievance with regard to measurement of the suit land, they could have moved this Court by filing a properly constituted writ petition. Petitioners

realizing that they would not succeed in moving this Court assailing the action of CDA, filed CS No.322 of 2019 for injunction simplicitor. Learned trial Court, without appreciating the matter from its proper perspective and that Plaintiffs/ Petitioners have made construction encroaching upon a common road, directed the parties to maintain *status quo* over the suit property during pendency of the suit. Thus, Defendants finding no other alternative assailed the said order under Annexure-8 and the impugned order under Annexure-9 has been passed. Learned Appellate Court, while considering the matter, has discussed the rival contentions of the parties, scrutinized the materials on record as well as relying upon the case law has passed the order impugned herein. It has been categorically observed in the impugned order under Annexure-9 that in spite of service of notice on the Petitioners, they preferred to remain absent during measurement done by the CDA. Thus, the impugned order passed under Annexure-9 cannot be faulted with. In view of the above, she prays for dismissal of the CMP.

5. Heard learned counsel for the parties at length; perused the materials on record and the case laws cited by learned counsel for the parties, as well.

6. The realm of controversy between the parties is with regard to existence of a common passage in Plot No.602. It is contended by Mr. Parija, learned counsel for the Plaintiffs/ Petitioners that width of the common passage was 10 links in the Sabik map, but it has been erroneously shown to be 15 links in Hal map of Plot No.602.

6.1 In view of the above, the Plaintiffs/Petitioners have filed RP Case No.544 of 2017, which is pending for consideration before Board of Revenue. It is the admitted case of the parties that there is a common passage, which is being used by both Plaintiffs and the Defendants for access to their respective residential houses. After the said mouza came under the jurisdiction of the Cuttack Development Authority, UC Case No.174 of 2015 was initiated against said Sailabala Mallick for unauthorized construction over Plot No.602 (road) and eviction order was passed by the CDA. Assailing the same, said Sailabala Mallick moved the Appellate Authority in Appeal Case No.27 of 2016, which was also dismissed. The order passed by the Appellate Authority was challenged by the Petitioners/Appellants in W.P.(C) No.22558 of 2017, which was disposed of on 28th January, 2019 modifying the order passed in Appeal Case No.27 of 2016 and also directing CDA to undertake measurement of the suit road (Plot No.602) along with the revenue authorities in presence of said Sailabala Mallick and other persons, such as Petitioners and persons likely to be affected. It is alleged by Mr. Parija, learned counsel for the Petitioners that the Petitioners were never served with notice during the said measurement. If that be so, the Petitioners had remedy to assail the action of the CDA authorities before this Court, which has not been done so far. Instead, the Petitioners thought it proper to file CS No.322 of 2019 seeking relief of permanent injunction. Learned trial Court, while considering the interim application under Order XXXIX Rules 1 and 2 CPC in IA No.1 of 2019, failed to appreciate that the measurement was undertaken pursuant to

the direction of this Court and thus the grievance of the Petitioners, if any, with regard to said measurement can only be raised before this Court. On perusal of order under Annexure-8, it goes to show that learned trial Court proceeded under a misconception that the order of this Court has not been complied with. There is no dispute to the fact that the measurement of the suit land was undertaken by the CDA along with the revenue authorities pursuant to the direction of this Court in the aforesaid writ petition. Although the Petitioners alleged that they were not served with any notice by the CDA, but learned Appellate Court on perusal of materials on record came to hold that in spite of service of notices on the Petitioners they remained absent at the time of measurement.

7. Further, the ratio decided in the case of ***Puri-Konark Development Authority Vs. Ratna Bhadra and others***, reported in 2002 (I) OLR-128, clearly indicates that in view of availability of statutory remedy jurisdiction of the Civil Court is impliedly bared. In the instant case, Petitioners had a statutory remedy to assail the order of eviction, which they had resorted to; having failed they had also moved this Court by filing the earlier writ petition. It appears that this Court modified the order of the Appellate Authority under the ODA Act by directing the CDA to undertake a measurement, which has already been done. The said action/order of the CDA was never challenged, although the Petitioners allege that the measurement was not done as per the direction of this Court.

8. In view of the above, the balance of convenience leans in favour of the Opposite parties because they will suffer more owing to obstruction of the common passage than the

Petitioners, in the event the construction made over Plot No.602 is demolished. Admittedly, the Hal map indicates that Plot No.602 is a common passage and there is no dispute to the fact that the building of the Plaintiffs/Petitioners stands on a portion of the suit Plot, i.e., Plot No.602. The ROR and the corresponding maps having not yet been corrected, the Defendants/Opposite Parties will suffer irreparable loss, if their right of access to their respective residential house is obstructed.

9. Learned District Judge, taking into consideration the above, has passed the impugned order, which in my considered opinion warrants no interference being a reasoned one; I find no infirmity in the same.

10. In view of the above discussions, the CMP being devoid of any merit, stands dismissed.

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

(K.R. Mohapatra)
Judge