

**IN THE HIGH COURT OF ORISSA AT CUTTACK**

**C.M.P. No.305 of 2022**

***Ullash Kumari Behera & Ors.***

....

***Petitioner(s)***

Smt. S. Jena,  
Advocate

*-versus-*

***Lingaraj Sahoo & Ors.***

....

***Opposite Party(s)***

**CORAM:  
JUSTICE BISWANATH RATH**

**ORDER  
25.04.2022**

**Order No.**

02.

1. Undisputedly after the order of status quo some of the defendants applied for modification of the order and accordingly sought for permission of the court for going ahead with the temporary construction, which was also allowed by the trial court. It is, at this stage of the matter, a set of defendants suffering on account of the construction undertaken in the guise of temporary status, came up with an application to recall such order and further also filed interim application U/o.39 rule 1 & 2 of C.P.C. along with an application U/o.39 Rule 7 of C.P.C. It appears, undertaking the exercise U/o.39 Rule 7 of C.P.C. the trial court came to reject the application, thus the present C.M.P.

2. Making her appearance Smt. Jena, learned counsel for the Petitioners submitted that for there is clear violation of the order of the lower court by a set of defendants and looking to the specific allegations in the matter of undertaking of permanent construction in

the guise of temporary permission, the trial court ought to have allowed the application U/o.39 Rule 7 of C.P.C.

3. Considering the submission of Smt. Jena, learned counsel for the Petitioner, on perusal of the impugned order and further looking to the pleadings in the application U/o.39 Rule 1 & 2 of C.P.C., this Court is of the view that once there is specific allegation of certain construction beyond permissible limit, it becomes incumbent on the part of the person bringing such allegation to first lead evidence to the effect at least to give a prima facie picture on the same and calling upon the response from other side and unless such stage is over, there is no room for application U/o.39 rule 7 of C.P.C.

In the circumstance, this Court finds, there was wrong filing of the application U/o.39 rule 7 of C.P.C. which was premature. In the process, this Court while declining to interfere in the impugned order, however looking to the complaint made in the application U/o.39 Rule 1 & 2 of C.P.C., this Court observes, if the Petitioners are so advised, they may first bring evidence in the application U/o.39 Rule 1 & 2 of C.P.C. to support their allegation and creating a situation for counter evidence. It is only after such exercise is over, in the event the trial court feels, there is material through affidavit versus affidavit and point needs to be determined is not clear, it may send a Commission for appropriate report in exercise of power U/o.39 Rule 7 of C.P.C.

4. The C.M.P. stands disposed of with the above direction, but without interfering with the impugned order.

**(Biswanath Rath)**  
**Judge**