

IN THE HIGH COURT OF ORISSA AT CUTTACK

FAO No.78 of 2021

Kusuma Manjari Rana

....

Appellant

-versus-

Sanjukta Swain & Anr.

....

Respondents

**CORAM:
JUSTICE BIRAJA PRASANNA SATAPATHY**

**ORDER
16.03.2022**

Order No

05. 1. This matter is taken up through Hybrid Mode.

2. Heard Mr. Pradeep Kumar Ray, learned counsel for the Appellant and Mr. Manoranjan Mishra, learned counsel for the Respondent No.1.

3. This appeal has been filed by the Appellant challenging the order dated 19.02.2021 passed by the learned 1st Addl. District Judge, Cuttack in rejecting an application filed by the Appellant under order 39 Rule 1 and 2 of the CPC in I.A. No.01 of 2020 arising out of RFA No.37 of 2020.

4. It was submitted by Mr. Ray, learned counsel for the Appellant that challenging the judgment and decree passed by the learned Trial Court in Civil Suit No.553 of 2017, the

Appellant has filed RFA No.37 of 2020 and the matter is pending before the learned 1st Addl. District Judge, Cuttack.

5. In the said Appeal, the Appellant filed I.A. No.01 of 2020 under order No.39 of Rule 1 & 2 of the CPC inter alia with the prayer to restrain the present Respondent No.1 from causing nuisance over the dispute property described in Schedule A of the said Petition.

6. Learned Appellate Court after hearing the Parties and vide order dated 19.02.2021 rejected the said Petition of the Appellant, which is impugned here in this Appeal. After going through the order passed by the learned Appellate Court, I found that while rejecting the said Petition, learned Appellate Court had taken a view that unless a Commission is deputed to visit the spot and probe into the matter, the scenario would not be clear.

7. But instead of taking step for deputing a Commissioner, learned Appellate Court rejected the Petition vide order dated 19.02.2021.

8. On being directed by this court, the Appellant in shape of an affidavit brought to the notice of this Court regarding filing of I.A. No.2 of 2021 under Order 26 Rule 9 of the CPC in the aforesaid RFA No.39 of 2020. In the said application, a prayer has been made by the Appellant to depute a Commissioner in order to ascertain the conduct of the Respondent No.1.

9. In the said I.A. No.2 of 2021, objection has also been filed by the Respondent No.1 and the said I.A. is pending consideration before the learned Appellate Court.

10. Per contra Mr. Mishra, learned counsel appearing for the Respondent No.1 submitted that Respondent No.1 has also filed I.A. No.3 of 2022 in the above said Appeal under Order 39 Rule 1 & 2 of the CPC with a prayer to restrain the present Appellant from committing nuisance over the disputed plot described in Schedule A of the Petition.

11. Having heard learned counsel for the Parties, I am of the considered opinion that the dispute in between the Appellant and Respondent No.1 is with regard to causing of nuisance by either of the Parties.

12. Therefore, in my considered view learned Appellate Court prior to passing of the impugned order dated 19.02.2021 should have deputed a Commissioner to ascertain the truth as to which of the parties are causing nuisance over the suit schedule property.

13. In view of the observation made by the learned Appellate Court in its order dtd. 19.02.2021, a Commissioner is required to be deputed to ascertain the conduct of both Appellant and Respondent with regard to causing of nuisance.

14. Therefore, while interfering with the order dtd. 19.02.2021, I direct the learned Appellate court to take up both I.A. No.2 of 2021 filed by the Appellant under Order 26

Rule 9 of the CPC and I.A. No.3 of 22 filed by the Respondent no.1 under Order 39 Rule 1 and 2 of CPC analogously and after receipt of the report, pass a fresh order in I.A. No.01 of 2020 in accordance with law. It is observed that this Court has not expressed any opinion on merits of the case. Since allegation of nuisance is alleged by both the Parties, I direct the Appellate Court to make all endeavour to dispose of both the Petitions as expeditiously as possible, preferably within a period of one month from the date of receipt of the order and further pass a fresh Order in I.A. No.01/2020 within a period of one month from the date of disposed of the Petitions.

15. With the aforesaid observation and direction, the Appeal is disposed of.

(Biraja Prasanna Satapathy)
Judge

Sneha