

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 373 of 2022

Alekha Mishra and another* *Petitioners

Mr. Mritunjay Banerjee, Advocate

-versus-

Purna Chandra Mishra and another* *Opp. Parties

Mr. M. P. Pattnaik, Advocate

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

15.07.2022

Order No.

2. 1. This matter is taken up through Hybrid mode.
2. 2. Petitioners in this CMP seek to assail the order dated 2nd April, 2022 passed by learned Senior Civil Judge Puri, whereby an application filed by the Plaintiffs/Petitioners under Order XXVI Rule 9 CPC in CS No.440 of 2021 has been rejected.
3. 3. Mr. Banerjee, learned counsel for the Petitioners submits that the suit is filed for demarcation and permanent injunction. Hence, there is no legal bar for appointment of a Survey knowing Commissioner at the pre-trial stage, more particularly when the Defendants-Opposite Parties do not have any objection to the same.
- 3.1 In support of his contention, he placed reliance on the following decisions:-
 - i) ***Mahendranath Parida Vs. Purnananda Parida and others***, reported in ***AIR 1988 Ori 248***;
 - ii) ***Agananada Nayak Vs. Narayan Mohapatra***, reported in ***1991 (II) OLR 563***;
 - iii) ***Tushar Kanta Panigrahi Vs. Udayanath Sahu***, reported in ***2011 (I) OLR 678***;

iv) *Akshaya Kumar Pattnaik Vs. Debi Prasad Tripathy*
(CMP No.285 of 2014 disposed on 22nd April, 2021);
and

v) *Suraj Nayak Vs. Pabitra Senapati* (CMP No.334 of
2020 disposed of on 22nd December, 2020)

3.2 He also submits that the Plaintiffs/Petitioners have already demarcated the land in question by a private Amin and the documents to that effect are available before the learned trial Court.

4. It is submission that appointment of a Survey knowing Commissioner in a suit for demarcation at pre-trial stage cannot be said to be for procuring evidence, but it will assist the Court to appreciate the evidence. He also submits that a joint petition has been filed before the learned trial Court for appointment of Survey Knowing Commissioner. Learned trial Court failed to appreciate that if a Commissioner is appointed it will reduce the burden of the Court and save judicial time to adjudicate the suit. He, therefore prays to set aside the impugned order and to direct the learned Senior Civil Judge, Puri to appoint Survey knowing Commissioner for just adjudication of the case.

5. Mr. Pattnaik, learned counsel for the Defendants/ Opposite Parties concedes to the submission of learned counsel for the Petitioners and submits that the CMP may be allowed by setting aside the impugned order.

6. Taking into consideration the submissions of learned counsel for the parties and on perusal of record, it appears that trial of the suit has not commenced. Mr. Banerjee, learned counsel for the Petitioners submitted that the land has already

been demarcated by a private Amin and documents to that effect is available on record before the learned trial Court. Since the land has already been demarcated and evidence is yet to be laid on the said demarcation, there is no necessity to depute a Survey knowing Commissioner at this stage. Law is well settled that a party may seek for deputation of Survey knowing Commissioner at any stage of the suit. That does not mean that the party seeking deputation of Survey knowing Commissioner should not make any endeavour to lead evidence for identification of the land in question. Had it been the case that a party is not in a position to demarcate the property then the Court would have considered the petition for appropriate relief. In the instant case, no such case has been made out by the Plaintiffs/Petitioners to seek for the aforesaid relief. This Court in the case of **Santosh Kumar Parida Vs. Narayan Chandra Dash and others**, reported in 2021 (I) CLR 342 and **Ramakanta Nayak Vs. Bhanja Dalabehera**, reported in (2015) Supp. II OLR 418 has already set out the principles for consideration of the application under Order XXVI Rule 9 CPC, which reads as under:-

“5.1 Thus, it is apparent that in a suit, the Court may issue a commission to any person for the purpose of ‘elucidating any matter in dispute’ and for all other purposes mentioned in the provision itself. According to Oxford dictionary, the word ‘elucidate’ means ‘to throw light or to make clear, to explain, to remove obscurity from and render intelligible or to illustrate’. According to Cambridge dictionary, it means ‘to explain something or make something clear’. According to Chambers dictionary, it means ‘to make lucid or clear or to throw light upon, to illustrate, making clear, explanatory’. Thus, from the reading of the provision it is manifest that if a matter in dispute in a suit needs any clarification or further explanation, the Court may consider issuance of a commission for that purpose. The language employed in

the provision makes it abundantly clear that the Court exercises its judicial discretion while making order for issuance of a commission. But, it must be kept in mind that all matters in dispute in a suit cannot be elucidated through issuance of a commission. Thus, the party seeking issuance of a Commission must establish a prima facie case to invoke the provision. He cannot use the Court to collect evidence on his behalf in the guise of invoking the power of the court under the provision, unless the occasion so arises. Thus, the party to the suit seeking issuance of a commission must, at the first instance, make an endeavour to lead evidence to prove his case on the issue involved. Only when the evidence or material on record is insufficient or needs clarification or the parties are unable to lead evidence on any particular matter in dispute or it becomes expedient to make a local investigation by a Commission to lead further evidence in the matter, to pass an effective decree, then the Court has the power to exercise its discretion under the provision and issue such a commission for any purpose mentioned in the provision itself.

6. The provision is silent about the stage at which such a commission should be issued. The power conferred under the provision can be exercised at any stage during pendency of the suit. In other words, the Court in its discretion may issue a commission at any stage of the suit, when it thinks necessary to do so for the purpose of elucidating any matter in dispute or for any other purposes prescribed in the Rule itself. There are divergent views with regard to the stage of a suit at which a Commission can be issued. There cannot be any straightjacket formula to prescribe any particular stage of the suit at which a Commission, if required, can be issued. It depends upon the facts and circumstances of each case. In the case of **Ramakanta Nayak Vs. Bhanja Dalabehera**, reported in (2015) Supp.II OLR 418, this Court held that issuance of a commission for local investigation is the discretion of the Court. While considering the prayer for issuance of a Commission, the Court must apply its mind to the facts and circumstances of the case and pass orders. Before issuance of a Commission, the Court must be satisfied that there is prima facie material in favour of the applicant for issuance of such a Commission. Again, in case of **Ramakanta Nayak (supra)**, it is held that when the Legislature in its wisdom has not prescribed the stage of appointment of Survey knowing Commissioner, the power of the Court to appoint the Survey knowing Commissioner cannot be cabined, cribbed or confined. Thus, the power of the Court to issue commission under the provision cannot be abridged or curtailed by prescribing a

particular stage of the suit for issuance of a Commission for a particular purpose”.

(emphasis supplied)

7. In the case of ***Mahendranath (supra)***, this Court held that ‘*when the controversy is as to identification, location or measurement of the land or premise or object, local investigation should be done at an early stage so that the parties are aware of the report of the Commissioner and go to trial prepared. The party against whom the report may have gone may choose to adduce evidence in rebuttal.*’ In the instant case, the Plaintiffs-Petitioners have already demarcated the land through private Amin and he has submitted his report, which is available in the record of the suit. Thus, no further deputation of Commissioner is necessary at the pre-trial stage of the suit, as no evidence either in support or rebuttal of the Amin report, has yet been adduced. There is also no quarrel over the law settled in rest of the decisions relied upon by the Petitioner. This Court in said cases has recorded findings depending upon the facts and circumstances of the said case.

8. In view of the discussion made above, this Court is of the considered opinion that learned trial Court has exercised its discretion judicially by refusing to entertain an application under Order XXVI Rule 9 C.P.C., in the facts and circumstances of the case. Consent of a party to allow an application does not bind the Court to pass an order in a particular manner as agreed upon by the parties. The Court, while passing an order must apply its mind to the facts and circumstances of the case as well as the law involved.

9. Thus, I do not find any infirmity in the impugned order. Accordingly, the CMP being devoid of any merit stands dismissed.

(K.R. Mohapatra)
Judge



s.s.satapathy