

IN THE HIGH COURT OF ORISSA AT CUTTACK
W.P.(C) No.20834 of 2011

Sudhakar Mohanty & Ors.

....

Petitioner

Mr.S.N.Mohapatra,
Advocate

-versus-

Rabi Narayan Jena & Ors.

....

Opposite Party(s)

Mr.S.K.Mishra,
Advocate

CORAM:
JUSTICE BISWANATH RATH

ORDER
29.03.2022

Order No.

06.

1. Heard submission of the Parties.
2. Writ Petition involved a challenge to consider an application under Order 26 rule 9 read with Order 41 rule 27 of C.P.C. involving in the pendency of First Appeal in R.F.A. No. 38 of 2008, though there is wrong indication of the number of the case in filing Annexure-2. Challenging the impugned order at Annexure-4 in allowing the application under Order 26 rule 9 read with Order 41 rule 27 of C.P.C., Mr.Mohapatra, learned counsel for the petitioner brought to the notice of this Court that once in the pendency of civil suit, an attempt is made by way of an application under Order 26 rule 9 of C.P.C. and such application even though rejected, however allowed the petitioner therein to have the help of Private Amin Report, the petitioner is

estopped from bringing such application for consideration of the Appellate Authority. It is in the above premises and further there is no consideration of the previous attempt of the petitioner appropriately by the Appellate Authority. Mr.Mohapatra, learned counsel for the petitioner requested this Court for interfering in the impugned order and setting aside the same.

3. Mr.Mishra, learned counsel appearing for the contesting opposite party, in his objection submitted earlier attempt of the petitioner particularly in the pendency of the suit cannot stated on the way of the petitioner as presently the consideration is in First Appeal. However referring to the provision at Section 105 C.P.C. and also Section 151 of C.P.C. contended the appellant is entitled to raise question, if any, raised in filing of appeal may be even at any stage of hearing of appeal. It is in the premises and for the observation of the lower Appellate Court in allowing such application. Mr.Mishra, attempted to justify such order.

4. Considering the rival contention of the parties and going through the application under Order 26 rule 9 read with Order 41 rule 27 of C.P.C. appearing at Annexure-2 page-41 of the brief, this Court finds the application is filed with pleading and question as follows:-

“1. That, the appellants as plaintiffs have filed the original suit claiming that A0.01d out of their C.S. Plot No-236 of 667 has been amalgamated in M.S. Plot no.824 and Mutation Plot No.824 of 1240.

2. That, the defendants/ respondents case is that disputed A0.01d in part of their C.S. Plot no.231 in order to ascertain the dispute the plaintiffs filed a petition U/O-26 RULE-9 C.P.C. in the Court below and the Court below rejected the petition on 09.05.2001 with the observation that same can be done by a private Amin.

3. That, accordingly the plaintiff examined PW-4 proved the report and relay map filed by him so also defendants examined DW-2 and proved the report and relay map the

Court below did not accept any of the Commissioner report and without appointment of Survey knowing Commissioner dismissed the suit.

4. That, without preparation of relay map by Survey knowing commissioner the dispute cannot be adjudicated between the parties.

5. That, the report and map of Survey knowing the Commissioner is highly required for this Court for proper adjudication of the dispute.”

Reading through the above, this Court finds there is no scope at all under Order 41 rule 27 of C.P.C. In the above background even assuming that petitioner made an approach under Order 26 rule 9, reading through the pleadings in the application at Annexure-2, taking note hereinabove, this Court finds the petitioners have a clear pleading involving their previous attempt Under Order 26 rule 9 in the suit got rejected but there is allowing with the help of Private Amin report.

5. Looking to the disclosure in Para-3 & 4 and question framed, this Court finds for the rejection of such application by the trial Court, nothing prevented the appellants to raise question involving the above aspect in filing the appeal. Even assuming the appellants have not raised any such question, the appellants could take leave of the Court and raise such questions for determination by the Appellate Court. But in the circumstance, an application under Order 26 rule 9 is entertainable. In the process this Court finds there is illegal acceptance of application under Order 26 rule 9 of C.P.C. by the lower Appellate Court. As a result this Court interfering the impugned order at Annexure-4 sets aside the same.

6. Writ Petition succeeds.

(Biswanath Rath)
Judge