

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 473 OF 2022

Sahid Mohammad

....

Petitioner

Mr. Prasanta Kumar Satapathy, Advocate

-versus-

Islam Mohammad and others

....

Opp. Parties

Mr. Karunakar Gaya, Advocate

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

08.08.2022

Order No.

3. 1. This matter is taken up through hybrid mode.
2. The Petitioner in this CMP seek to assail the order dated 22nd April, 2022 (Annexure-1) passed by learned Senior Civil Judge (LR), Jagatsinghpur in I.A. No.240 of 2019 (arising out of C.S. No.349 of 2019) allowing an application under Order XXXIX Rule 7 C.P.C.
3. Mr. Satapathy, learned counsel submits that C.S. No.349 of 2019 has been filed for partition. Along with the plaint, the Plaintiff-Petitioner also filed an application under Order XXXIX Rules 1 and 2 C.P.C. in I.A. No.240 of 2019. The said application came to be disposed of on 27th July, 2021 under Annexure-1 directing the parties to maintain status quo over the suit land except Consolidation Khata No.35, Plot No.1077 taking into consideration the materials available on record as well as the report of Pleader Commissioner appointed under Order XXXIX Rule 7 C.P.C. Being aggrieved by the said order, the Plaintiff-Petitioner filed F.A.O. No.19 of 2021. Learned District Judge, Jagatsinghpur vide order dated 16th August, 2021 (Annexure-5) while disposing of the appeal has held as under:

“

Order

The appeal be and the same filed by the appellant is allowed in part affirming/confirming the ordering portion of the impugned order. But, discarding/expunging the words i.e. the report of the Amin Commissioner is accepted, indicated just above the ordering portion of the impugned order.

*So, it is clarified that, the whole order dated 27.07.2021 passed in IA No.240/2019 will be read excluding the words i.e. **‘the report of the Amin Commissioner is accepted’**. Accordingly, the appeal is disposed of finally.*

Send back the LCR to the learned Court below along with the copy of this judgment forthwith.”

4. Being aggrieved by exclusion of the words “the report of the Amin Commissioner is accepted”, the Plaintiff-Petitioner preferred CMP No.443 of 2021, which was disposed of on 15th September, 2021 with the following directions:

“7. Upon hearing learned counsel for the Petitioner and on perusal of the materials on record, it appears that the FAO No.19 of 2021, the Petitioner himself had prayed for expunging the finding with regard to acceptance of the report of Amin Commissioner, which has been accepted. Thus, I find no reason as to how the Petitioner is aggrieved by the impugned order. Further, the contention of Mr. Sahu, learned counsel for the Petitioner to the effect that there is no finding as to who has made the construction can only be found out after leading evidence in the matter, which cannot be adjudicated in a petition under Order XXXIX Rules 1 and 2 C.P.C.

8. In that view of the matter, I am not inclined to entertain the CMP. Accordingly, this CMP being devoid of any merit stands dismissed.”

5. Order passed by learned District Judge, Jagatsinghpur in F.A.O. No.19 of 2021 under Annexure-5 was also assailed before this Court by the Defendants-Opposite Parties in CMP No.784 of 2021, which was disposed of on 18th January, 2022 with the following directions:

“5. In view of the facts stated hereinabove, this Court is not inclined to interfere with the impugned order. However,

liberty is granted to the Petitioners to make a fresh application for appointment of a Survey Knowing Commissioner if they so like. In the event such an application is filed, the same shall be considered in accordance with law.

6. Since this matter is disposed of at the stage of admission in absence of the Opposite Parties, it is open for the Opposite Parties to seek for modification/variation of this order if they feel aggrieved by this order.

7. With the aforesaid observation the CMP stands disposed of.”

6. In view of the liberty granted, the Petitioner filed I.A. No. 281 of 2022 for modification of the aforesaid order, which was disposed of on 31st March, 2022 without any modification in the aforesaid order. However, pursuant to the direction of this Court dated 18th January, 2022 passed by this Court in CMP No.784 of 2021, the by the Opposite Parties filed a fresh application for appointment of a Commissioner under Order XXXIX Rule 7 C.P.C. in I.A. No.240 of 2019, which was considered and the impugned order dated 22nd April, 2022 has been passed by appointing a Survey Knowing Commissioner to ascertain the topography, location, length, breadth of the building constructed over Plot No.1077 to an extent of Ac.0.12 decimals under Khata No.35 under Satapura-Dhanipur Mouza.

7. Mr. Satapathy, learned counsel for the Petitioner submits that after disposal of I.A. No.240 of 2019, an application under Order XXXIX Rule 7 C.P.C. in the said I.A. is not maintainable. Such an objection although raised, learned trial Court without considering the same, allowed the application directing to depute a Survey Knowing Commissioner. A Survey Knowing Commissioner is appointed under Order XXVI Rule 9 C.P.C.. Order XXXIX Rule 7 C.P.C. comes into play when an interim

application under Order XXXIX Rules 1 and 2 is considered. The report of the Commissioner appointed under Order XXXIX Rule 7 C.P.C. is not an evidence, whereas the report of the Survey Knowing Commissioner under Order XXVI Rule 9 C.P.C. can be considered as a piece of evidence while adjudicating the suit. Learned trial Court failed to appreciate the difference between two distinct provisions under C.P.C. and appointed a Survey Knowing Commissioner in an application under Order XXXIX Rule 7 C.P.C., which is not permissible under law. He, therefore, prays for setting aside the impugned order.

8. Mr. Gaya, learned counsel for the Opposite Parties, on the other hand, vehemently objected to the same and submitted that in view of the factual position, as discussed above, the I.A. No.240 of 2019 can be treated to be pending and an application under Order XXXIX Rule 7 C.P.C. may be entertained. Considering the submissions made by learned counsel for the parties, this Court in CMP No.784 of 2021 has categorically directed that if the Petitioner makes a fresh application for appointment of a Survey Knowing Commissioner, the same may be considered in accordance with law. Thus, learned trial Court has committed no error in appointing a Survey Knowing Commissioner. In view of the above, the impugned order warrants no interference.

9. Taking into consideration the submissions made by learned counsel for the parties and the factual position, as stated above, it appears that the Opposite Party Nos.1 to 6 have misconstrued the petition under Order XXVI Rule 9 C.P.C. to be

a petition under Order XXXIX Rule 7 C.P.C.. The petition under Order XXXIX Rule 7 C.P.C can be entertained while adjudicating an application for temporary injunction and interlocutory orders. It is settled law that a petition under Order XXXIX Rule 7 C.P.C. cannot be considered as evidence during trial. By the time, this Court granted liberty to the Petitioner to file a fresh application for appointment of a Survey Knowing Commissioner, I.A. No. 240 of 2019 had already been disposed of. Thus, the application under Order XXXIX Rule 7 C.P.C. in the said disposed of petition could not have been entertained.

10. Further, this Court has granted liberty to the Petitioner to file an application for appointment for a Survey Knowing Commissioner. A Survey Knowing Commissioner is appointed under Order XXVI Rule 9 C.P.C. and the report submitted by the Commissioner can be considered as a piece of evidence during trial of the suit.

11. Upon hearing learned counsel for the parties, it is crystal clear that the Opposite Parties had filed an application under Order XXXIX Rule 7 C.P.C. in a disposed of I.A. No. 240 of 2019 pursuant to the direction made in CMP No.784 of 2021, which could not have been considered for appointment of a Survey Knowing Commissioner in a disposed of interim application filed under Order XXXIX Rules 1 and 2 C.P.C.

12. In view of the above, the impugned order is not sustainable in the eyes of law and the same is set aside.

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

(K.R. Mohapatra)
Judge