

IN THE HIGH COURT OF ORISSA AT CUTTACK
CMP No.503 OF 2022

Harihar Mishra and another

Petitioners

Ms. Gayatri Das, Advocate

-versus-

Sumeet Mishra

.... ***Opp. Party***

CORAM:
JUSTICE K.R. MOHAPATRA

ORDER
28.06.2022

Order No.

3. 1. This matter is taken up through hybrid mode.
2. The Petitioners in this CMP seek to assail the order dated 31st March, 2022 (Annexure-1) and the order dated 6th May, 2022 (Annexure-2) passed by learned Civil Judge (Senior Division), Nayagarh in I.A. No.7 of 2022 and I.A. No.127 of 2021 respectively (arising out of C.S. No.304 of 2021).
3. Ms. Das, learned counsel for the Petitioners submits that by the order under Annexure-1, learned trial Court rejected an application under Order XXXIX Rule 7 C.P.C. holding that without complying with the provision under Rule 8(3) of Order XXXIX C.P.C., such an application is not maintainable. By the order under Annexure-2, learned trial Court rejected an application under Order XXXIX Rule 3 C.P.C. It is her submission that the suit has been filed for a decree of declaration that the gift deed dated 21st August, 2018 executed by one Brundabati Mishra in favour of Defendant No.1 is invalid and void, and not binding on the Plaintiffs and the Plaintiffs have right, title and interest over the suit property/house described in Schedule 'B' of the plaint. A further prayer for confirmation of possession and permanent injunction was also

made in the suit. Since there is every likelihood that the Defendant No.1 would alienate the property during pendency of the suit, an application under Order XXXIX Rules 1 and 2 C.P.C. (I.A. No.127 of 2021) was filed along with the plaint. Due to urgency in the matter, the Petitioners also filed an application under Order XXXIX Rule 3 C.P.C. to dispense with service of notice on the Defendant No.1-Opposite Party and to take up I.A. No.7 of 2022 for consideration of the prayer for ad-interim order of injunction. During pendency of the said I.A., the Petitioners also filed an application under Order XXXIX Rule 7 C.P.C. for deputation of a pleader commissioner to ascertain the topography and field position of the suit land. Learned Civil Judge rejected the application under Order XXXIX Rule 7 C.P.C. holding that an order under Order XXXIX Rule 7 C.P.C. can only be passed after compliance of Order XXXIX Rule 8(3) C.P.C. by serving notice on the Defendant No.1-Opposite Party. He also rejected the application under Order XXXIX Rule 3 C.P.C. observing that there is no urgency in the matter.

4. Ms. Das, learned counsel for the Petitioners in support of her case relied upon the case law in *Amiya Bhusan Tripathy-v-Ahammad Ali*, reported in 1986 (II) OLR 330. She also relying upon the decision in the case of *Kangali Khatei and others -v-Alekh Khatei and others*, reported in 2021 (I) ILR CTC 463, submits that since the Petitioners have complied with the requirements of Order under XXXIX Rule 7 C.P.C. in the instant case, learned Senior Civil Judge ought to have considered the application under Order XXXIX Rule 7 C.P.C favourably. In view of the above, learned trial Court has committed an error in rejecting the application. Hence, this CMP has been filed.

5. On perusal of the record, it appears that along with the petition under Order XXXIX Rule 7 C.P.C., the Petitioners also filed an application under Order XXXIX Rule 8(3) C.P.C. to hear application for deputation of pleader commissioner dispensing with service of notice on the Defendant No.1-Opposite Party. The grounds taken in the said petition are as under:-

“That in case, the Opposite Party is aware of the institution of the above suit and the petition for local inspection, the Opposite Party may either dispose of or change the nature and character of the suit property after destroying and labeling ground it as a result the entire propose of filing the above suit and I.A. will be defeated by the delay after sending notice to the Opposite Party.”

Rule 8(3) of Order XXXIX C.P.C. provides that before making an order under Rule 6 or Rule 7 under Order XXXIX C.P.C., the Court shall, except where it appears that the object of making such order would be defeated by the delay, direct notice thereof to be given to the Opposite Party. The ground taken by the Petitioners in the petition under Order XXXIX Rule 8(3) C.P.C., as stated above, does not make out a *prima facie* case to dispense with service of notice on the Defendant No.1 before hearing the petition under Order XXXIX Rule 7 C.P.C. Hence, I find no infirmity in the impugned order under Annexure-1.

6. So far as the petition under Order XXXIX Rule 3 C.P.C. is concerned, it appears that the order impugned under Annexure-2 was passed on 6th May, 2022 and in the meantime, more than one month has elapsed. On perusal of the petition under Order XXXIX Rule 3 C.P.C., it appears that the Petitioners have not made out any case for dispensing with service of notice on the Defendant No.1 before entertaining an application under Order XXXIX Rules 1 and 2 C.P.C.

8. On consideration of the materials on record, more particularly, on perusal of the order sheet of I.A. No.127 of 2021 (arising out of C.S. No.304 of 2021) annexed to the CMP as Annexure-4, it appears that the Petitioners have taken several adjournments starting from 21st December, 2021 for hearing of the petition under Order XXXIX Rule 3 C.P.C. From the conduct of the Petitioners, it appears that there is no urgency in the matter. Thus, learned trial Court has committed no illegality in refusing the prayer of the Petitioners under Order XXXIX Rule 3 C.P.C.

9. Ms. Das, learned counsel for the Petitioners, however, submits that although the Petitioners were present on 6th May, 2022, when the petition under Order XXXIX Rule 3 C.P.C. was taken up for hearing, they have been shown as absent. Objection to the same can be agitated before learned trial Court.

10. In that view of the matter, I am not inclined to interfere with the impugned orders under Annexures-1 and 2.

11. Accordingly, this CMP being devoid of any merit stands dismissed.

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

(K.R. Mohapatra)
Judge

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