

IN THE HIGH COURT OF ORISSA AT CUTTACK
CMP No. 560 OF 2022

Agasti Sahu *Petitioner*
Mr. Abhilash Mishra, Advocate
-versus-
Sabitri Biswal and others *Opp. Parties*

CORAM:
JUSTICE K.R. MOHAPATRA

ORDER
29.08.2022

Order No.

I.A. No. 774 of 2022

3. 1. This matter is taken up through hybrid mode.
 2. This is an application for amendment.
 3. Mr. Mishra, learned counsel for the Petitioner submits
 that he does not want to press this I.A.
 4. Accordingly, the I.A. is dismissed as not pressed.

(K.R. Mohapatra)
Judge

CMP No. 560 OF 2022

4. 1. This matter is taken up through hybrid mode.
 2. Although this matter is listed for orders, Mr. Mishra,
 learned counsel for the Petitioner prays for taking up the matter
 on merit for final disposal.
 3. The Petitioner in this CMP seeks to assail the order dated
 13th April, 2022 (Annexure-6) passed by learned Civil Judge
 (Junior Division), Rampur in Civil Suit No.88/45 of 1994/14,
 whereby he rejected an application to strike off the evidence of
 one Kuna Pradhan, examined on behalf of the Plaintiff on the

ground of non-compliance of the provision under Order XVIII Rule 3A C.P.C.

4. Mr. Mishra, learned counsel for the Petitioner submits that one Jeheru Majhi is the Plaintiff in the suit. After his death, an application for substitution was filed. The Defendant did not raise any objection to the same and it was allowed vide order dated 6th December, 2021. On 23rd March, 2022, the substituted Plaintiff without examining himself filed evidence in affidavit of one Kuna Pradhan under Order XVIII Rule 4 C.P.C. Learned trial Court without following the procedure laid down in Order XVIII Rule 3A C.P.C. allowed said Kuna Pradhan to be examined on behalf of the Plaintiff. Subsequently, the Defendant filed an application to strike off the evidence of said witness on the ground that the procedure laid down under Order XVIII Rule 3A C.P.C. was not followed. But learned trial Court misconstruing the said provision of law, dismissed the application. Hence, this CMP has been filed.

5. Mr. Mishra, learned counsel for the Petitioner draws attention of the Court to Order XVIII Rule 3A C.P.C., which reads as under:

“3-A. Party to appear before other witnesses.- Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage.”

Hence, he submitted that the Plaintiff is required to be examined himself before any other witness on his behalf is examined. In the instant case, no leave of the Court was sought for to examine one Kuna Pradhan as an independent witness,

who is not a party to the suit. As such, the evidence of said Kuna Pradhan should be struck off from the record and the plaintiff may be directed to examine himself ahead of any other witness to be examined on his behalf.

6. Upon hearing learned counsel for the Petitioner and on perusal of the provisions under Order XVIII Rule 3A C.P.C., it is manifest that said provision is directory in nature and not mandatory. In the instant case, the evidence in affidavit of one Kuna Pradhan was filed on 23rd March, 2022 under Order XVIII Rule 4 C.P.C. The Defendant did not raise any objection to the same at the relevant time. On the other hand, the Defendant sought for an adjournment to cross-examine the witness. On the adjourned date, he refused to cross-examine the said witness. Accordingly, examination of said Kuna Pradhan was closed. Subsequent to that, an application, as aforesaid, was filed to strike off the evidence of Kuna Pradhan. While adjudicating the matter, learned trial Court relied upon the decision in the case of *Maguni Dei –v- Gouranga Sahu and others*, reported in AIR 1978 Ori 228, wherein this Court held that the provision of Order XVIII Rule 3A C.P.C. is directory in nature and that in proper cases, the Court has got power to examine a party at a later stage even where he has not obtained the Court's previous permission as provided in the said rule. In the case of *Swami Hari Harananda Giri –v- Yogoda Satsangh Society of India and others*, reported in AIR 1991 Ori 75, this Court has also reiterated the said principles. In the instant case, learned trial Court has examined one Kuna Pradhan as a witness on behalf of the Plaintiff before examination of the Plaintiff. By recording

evidence of the witness, learned trial Court has impliedly granted leave to the Plaintiff to examine said Kuna Pradhan even if he is not a party to the case. In the instant case, it appears from the record that the substituted Plaintiff was sick on the date of hearing. Hence, the evidence of said Kuna Pradhan was filed and he was examined. The Defendant did not raise any objection to the same at the relevant time. He had also prayed for an adjournment to cross-examine the witness. Since the provision of Order XVIII Rule 3 C.P.C. is directory in nature and no exception can be taken for examination of Kuna Pradhan as a witness before examination of the substituted Plaintiff, this Court is not inclined to interfere with the impugned order under Annexure-6.

7. Accordingly, the CMP being devoid of any merit stands dismissed.

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

(K.R. Mohapatra)
Judge

ms