

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 630 OF 2022

Sulekha Chandra Beura

.....

Petitioner

Mr. Niranjana Lenka, Advocate

-versus-

Alekha Chandra Beura

....

Opp. Party

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

22.07.2022

Order No.

1. This matter is taken up through Hybrid mode.
2. Order dated 10th May, 2022 (Annexure-9) passed by Additional Senior Civil Judge, Kendrapara in CS No.105 of 2013, whereby he allowed an application filed by Plaintiff/Opposite Party under Order XXVI Rule 9 CPC.
3. Mr. Lenka, learned counsel for the Petitioner submits that the Plaintiff/Opposite party has already led evidence in the suit. However, learned Additional Civil Judge, without recording the finding that the evidence adduced by the Plaintiff is not sufficient to elucidate matter in controversy in the matter, mechanically allowed the application filed under Order XXVI Rule 9 CPC. Report of the Survey knowing Commissioner will create confusion in adjudication of the suit. Law is well-settled in the case of ***Santosh Kumar Parida –vNarayan Chandra Dash & others***, reported in 2020 (II) ILR CUT 629, to the effect that the party before resorting to Order XXVI Rule 9 C.P.C. must make an endeavour at the first instance to lead

evidence in support of his case and only when he is incapable to lead any evidence or the Court feels that a survey knowing commissioner should be appointed in the facts and circumstances of the case to elucidate the matter in dispute, then it may consider the appointment of a survey knowing commissioner. In the instant case, no such contingency has arisen. In the regard, he also placed reliance on order dated 22nd April, 2021 passed in CMP No.44 of 2021. Hence, the impugned order is not sustainable in the eye of law, as it amounts to procuring evidence on behalf of the Plaintiff. Hence, he prays for setting aside of the impugned order.

4. Taking into consideration the submission made by learned counsel for the Petitioner, this Court is of the considered opinion that a Survey knowing Commissioner can be deputed by the trial Court at any stage of the suit to elucidate the matter in controversy. The discretion conferred upon the trial Court can be crippled / cabined or curtailed by limiting the power to exercise the discretion at a particular stage of the suit. In the instant case, as submitted by Mr. Lenka, learned counsel for the Petitioner, the Plaintiff has already adduced evidence in the suit. At this stage, an application under Order XXVI Rule 9 CPC has been filed by the Plaintiff.

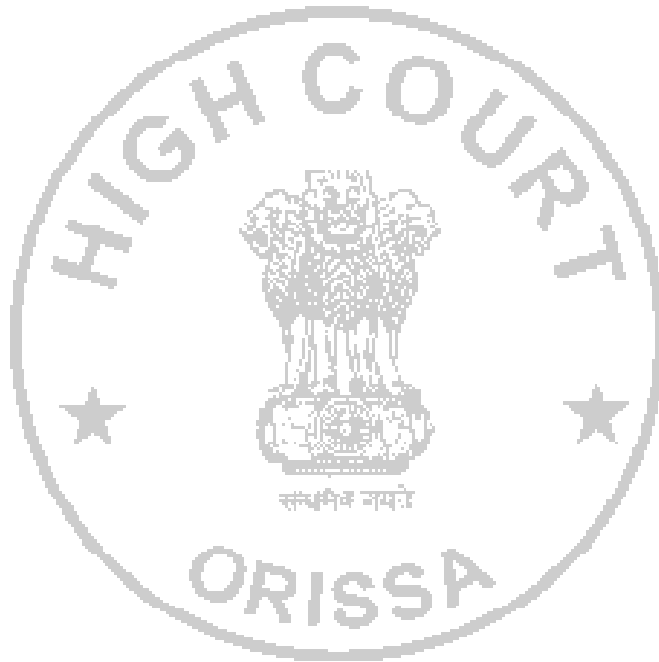
5. I do not find any infirmity in the impugned order, inasmuch as, learned trial Court has the jurisdiction to exercise such discretion after recording the evidence from the side of the Plaintiff. Report submitted by the Survey knowing Commissioner is a mere piece of evidence and shall be taken

into consideration along with other materials on record. As such, the impugned order warrants no interference.

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

(K.R. Mohapatra)

Judge



s.s.satapathy