

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP NO. 681 of 2022

Pramila Nayak

....

Petitioner

Mr. Prasanna Kumar Rath, Advocate

-versus-

Malaya Kumar Swain

....

Opp. Party

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

09.11.2022

Order No.

3.
 1. This matter is taken up through hybrid mode.
 2. Petitioner in this CMP seeks to assail the order dated 23rd November, 2021 (Annexure-1) passed by learned Senior Civil Judge, Kamakhyanagar in IA No.50 of 2021 (arising out of CS No.85 of 2021), whereby an application under Order XXXIX Rule 7 CPC filed by the Petitioner, has been rejected.
 3. Mr. Rath, learned counsel for the Petitioner submits that CS No.85 of 2021 is filed by the Petitioner for declaration of her right, title, interest and for cancellation of the RSD executed in favour of the Opposite Party. Since the Defendant disturbed the peaceful possession of the Plaintiff/Petitioner over the suit land she filed an application under Order XXXIX Rules 1 and 2 CPC in IA No.50 of 2021. During pendency of the said IA, the Petitioner filed an application under Order XXXIX Rule 7 CPC praying inter alia to depute a Pleader Commissioner to verify the topography as well as existence of residential house over the suit property. It is his contention that the Petitioner is residing over the suit property by constructing her residential house over a portion of the suit property. The Opposite Party/Defendant

claiming that he had purchased the suit property, is trying to evict the Petitioner. Hence, the suit as well as the interim applications were filed. The Opposite Party raised an objection that the Petitioner is not residing over the suit property. In order to ascertain the factual position a Pleader Commission should be deputed in exercise of power under Order XXXIX Rule 7 CPC to facilitate adjudication of the interim application for injunction. However, learned trial Court, without considering the same, dismissed the petition holding that it will amount to procuring evidence on behalf of the Petitioner. He, therefore, prays for setting aside the impugned order under Annexure-1 and direct learned trial Court to depute a Pleader Commissioner to ascertain topography and possession over the suit land.

4. Upon hearing learned counsel for the petitioner and on perusal of the record, it appears that the Petitioner filed the petition under Order XXXIX Rule 7 CPC effectively assailing the case of the Defendant/Opposite Party in the suit itself. At para-10 of the petition, it has been categorically stated that recital of document of the Opposite Party is ambiguous and uncertain and beyond truth. Hence, an inspection is required to be made over the suit property with regard to existing structure thereon and the nature of occupation over the same. Since the petitioner claims that she is in possession over the suit property burden is on her to establish nature of her occupation. Similarly, the burden is on her to prove that she has her residential house over a portion of the suit property. Petitioner claims that she is in possession over the suit property. As such, there is no difficulty on the part of the Petitioner to inspect the property and submit material before the Court to establish her case in the

petition for injunction. Thus, allowing deputation of a Pleader Commissioner will certainly amount to procuring material(s) on behalf of the Plaintiff/Petitioner, which is not permissible in law. This Court also finds no impediment on the part of the Petitioner to produce material before the Court to establish her case. Hence, a petition under Order XXXIX Rule 7 CPC is not maintainable. Thus, I find no infirmity in the impugned order.

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

(K.R. Mohapatra)
Judge



s.s.satapathy