

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 699 of 2022

Tanmaya Das

.....

Petitioner

Mr. Bibekananda Bhuyan, Advocate

-versus-

Pradeep Kumar Nayak and another

....

Opp. Parties

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

Order No.

30.08.2022

1. This matter is taken up through Hybrid mode.
2. Order dated 15th July, 2022 (Annexure-4) passed by learned 1st Additional District Judge, Khordha in RFA No.27 of 2019 is under challenge in this CMP, whereby an application under Order XXVI Rule 9 CPC filed by the Appellant/Petitioner is rejected.
3. Mr. Bhuyan, learned counsel for the Petitioner submits that CS No.19 of 2014 was filed by the Opposite Parties for demarcation of boundary, confirmation of possession and in the alternative for recovery of possession of the suit land, if found dispossessed during pendency of the suit. The suit was decreed in favour of the Plaintiffs/Opposite Parties. Assailing the judgment and decree, the Defendant/Petitioner preferred RFA No.27 of 2019, which is pending in the Court of 1st Additional District Judge, Khordha. During pendency of the appeal, the Appellant/Petitioner filed an application under Order XXVI Rule 9 CPC for deputation of Survey knowing Commissioner to demarcate the suit land. Said application being rejected vide order under Annexure-4, this CMP has been filed assailing the same.

4. Mr. Bhuyan, learned counsel for the Petitioner submits that admittedly the Petitioner and the Opposite Parties are adjacent land owners. There is a dispute with regard to boundary of the suit land. Hence, demarcation is essential for just adjudication of the dispute between the parties. In fact, before filing of the suit, the Defendant/Petitioner had filed Demarcation Cases bearing Nos. 1431 of 2012 and 3 of 2013 and the land was demarcated by the Tahasil Amin of Khordha. The said Amin has been examined as DW-4 on behalf of the Petitioner. Plaintiffs had also demarcated the land by a private Amin, who was examined as PW-3. Learned trial Court, while adjudicating the matter, did not at all take into consideration the report submitted by DW-4 and evidence adduced by him and passed the judgment and decree, which is challenged in the Appeal.

5. The Commissioner is required to be deputed to elucidate the matter in controversy between the parties. Since the dispute is with regard to boundary of the suit land, a Commissioner is to be deputed for just adjudication of the controversy. In support of his case, he relied upon the provision of Section 45 of the Evidence Act, 1872. It is his submission that the report, if any, to be submitted by the Commissioner will be considered along with other materials available on record at the time of adjudication of the appeal. Thus, the Plaintiffs-Opposite Parties will not be prejudiced in any manner, if Survey knowing Commissioner is deputed. He also relied upon the decision of the Hon'ble Supreme Court in the case of **Rahul S. Shah Vs. Jinendra Kumar Gandhi and others**, reported in (2021) 6 SCC 418 and submitted that the Hon'ble Court has suggested for amendment of provision of Order XXVI Rule 9 CPC for deputation of

“xx xx xx

(h) In order XXVI, in Rule-9, for the existing Proviso, the following provisions will be substituted, namely:-

Provided that in case where the possession is not in dispute and not a question of fact for adjudication before the Court, the Court may appoint Commissioner to assess the accurate description and status of the property:

Provided further that, where the State Government has made Rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.”

Therefore, submits that when two contradictory documents are available on record, the Commissioner's report should be. The court would render proper assistance for just a decision on the controversy. He, therefore, prays for setting aside the order of direct deputation of Survey knowing Commissioner to allocate the land in question.

Upon hearing learned counsel for the Petitioner, al of record, it appears that Plaintiffs have de in question by a private Amin. Said private A

the Plaintiffs during pendency of the suit was rejected on the basis of objection raised by the present Petitioner/Defendant.

7. It is contended by Mr. Bhuyan, learned counsel for the Petitioner that learned trial Court while adjudicating the suit, did not at all take into consideration the report of DW-4, which is essential for just adjudication of the dispute. If that be so, such an argument can be advanced before learned Appellate Court, who can take care of the same. Deputation of a Survey knowing Commissioner is required when the identity of the land in question is questioned. In the instant case, two demarcation reports of PW-3 and DW-4 are available on record, which can be taken into consideration to identify the boundary of the suit land. In the facts and circumstances of the case, deputation of a Survey knowing Commissioner at the appellate stage is not required.

8. Accordingly, I do not find any infirmity in the impugned order and thus, the CMP being devoid of any merit stands dismissed.

Urgent Certified copy of the order shall be supplied as per rule.

s.s.satapathy

(K.R. Mohapatra)
Judge