

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No.737 of 2022

Kanakalata Mahal

.....

Petitioner

Mr. Suvashish Pattanaik, Advocate

-versus-

Pankajini Das @ Mohanty and another

....

Opp. Parties

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

29.08.2022

Order No.

1. 1. This matter is taken up through Hybrid mode.
2. 2. Petitioner in this CMP seeks to assail the order dated 2nd August, 2022 passed by learned 2nd Additional Civil Judge (Senior Division), Bhubaneswar in IA No.1 of 2021 (arising out of CS No.39 of 2021), whereby an application under Order XXXIX Rule 7 CPC has been rejected.
3. 3. It is submitted by Mr. Pattaniak, learned counsel for the Petitioner that along with the plaint, the Petitioner has filed an IA in IA No.1 of 2021 and an application under Order XXXIX Rule 7 CPC was also filed by the Petitioner, which was dismissed vide order dated 23rd November, 2021. Assailing the same, the Petitioner had filed CMP No.702 of 2021, which was disposed of with the following order:-

“5. Taking into consideration the submission of learned counsel for the Petitioner and on perusal of the materials on record, it appears that the Petitioner has not made any attempt to measure the land through a private Amin. Further, there is no material on record to show that the Plaintiff-Petitioner is prevented to enter upon and measure the suit land. it is trite law that when the Plaintiff-Petitioner

is prevented from entering upon the suit land and to inspect the same, the Court may consider the deputation of a survey knowing commissioner under Order XXXIX Rule 7 C.P.C., if it is so required.”

In view of the observation made, as above, the Petitioner made two attempts to measure the land through a private Amin, but it is the submission of Mr. Pattanatik, learned counsel that the same was obstructed by the Defendants/Opposite Parties on both the occasions. Thus, finding no other alternative, Plaintiff/Petitioner filed another application under Order XXXIX Rule 7 CPC. The said application was rejected vide order dated 2nd August, 2022 (Annexure-6). Hence, this CMP has been filed.

4. It is further submitted that in para-12 of the petition under Order XXXIX Rule 7 CPC, the Petitioner has categorically stated that on two occasions, he made attempt to measure the land by a private Amin to ascertain the topography of the plot, which was obstructed by Defendants/Opposite Parties. Hence, finding no other alternative the Petitioner filed the application under Order XXXIX Rule 7 CPC. Learned trial Court, while considering the application, failed to apply the law on this point and erroneously held that deputing the Civil Court Commissioner to measure the land is not necessary, as it will not assist the Court to decide the original IA. Further, it will be nothing but collection of evidence. It is submitted by learned counsel for the Petitioner that such an observation is erroneous one and it appears that learned trial Court proceeded in a wrong notion that report of the Commissioner under Order XXXIX Rule 7 CPC will amount to collection of the evidence through Court. Hence, he prays for setting aside the impugned order.

5. Taking into consideration the submission of learned counsel for the Petitioner and on perusal of record, it appears that this Court in CMP No.702 has elaborately discussed the matter and rejected the same confirming dismissal of a similar nature of application. Along with other findings, this Court observed that Petitioner has not made any attempt to measure the land through a private Amin. Although at para-12 of the application under Order XXXIX Rule 7 CPC (Annexure-4) a plea has been taken that the Petitioner has made two attempts to measure the land by a private Amin, which was obstructed by the Defendants/Opposite Parties, but no details of the date of such attempts and name of private Amin was mentioned therein. It further appears that learned trial Court has taken the pain to discuss the matter in detail and pass the reasoned order under Annexure-6. In that view of the matter, I am not inclined to entertain the CMP.

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

(K.R. Mohapatra)
Judge