

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 738 of 2022

Vishnu Deo Roy

.....

Petitioner

Mr. Rajesh Kumar Mahapatra, Advocate

-versus-

Rajesh Kumar Tiwari

....

Opp. Party

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

Order No.

30.08.2022

1. This matter is taken up through Hybrid mode.
2. Petitioner in this CMP seeks to assail the common order dated 28th July, 2022 (Annexure-1) passed by learned Senior Civil Judge, Jharsuguda in CMA No.17 of 2017, whereby three applications filed under Order XI Rule 1 CPC, Order XVI Rule 1 read with Section 151 CPC and Order XVIII Rule 2 CPC were rejected.
3. Mr. Mahapatra, learned counsel for the Petitioner submits that judgment and decree passed in TS No. 57/102/04 of 1996-1998-2004 travelled up to Hon'ble Supreme Court and in all the forums the decree holder came out successful. Subsequently, Execution Case No.5 of 2007 has been filed. The Petitioner being the JDr, on his appearance, filed an application under Section 47 CPC, which has been registered as CMA No.17 of 2017. During pendency of the said petition, the Petitioner filed an application under Order XI Rule 1 CPC on 11th April, 2018 praying inter alia to grant leave to the JDr to serve interrogatories on DHrs/Opposite Parties, as the JDRs alleged that the decree put to

execution has been obtained by practicing fraud. Another petition under Order 16 Rule 1 read with Section 151 CPC was filed to call for the case record in Nazul Case No.4 of 2002, Nazul OGLS Case No.3 of 2007, OGLS Case No.208 of 2009 and OGLS Case No.209 of 2009 from the Court of Tahasildar, Jharsuguda and written statement filed by the DHrs in TS No.57/102/04 of 1996-1998-2004 from the Court of Civil Judge (Junior Division), Jharsuguda. He also filed third application under Order XXVI Rule 1 read with Order XVIII Rule 2 CPC inter alia praying therein to appoint Commissioner to examine the Petitioner on the grounds stated therein. All the applications were dismissed by a common order under Annexure-1. Assailing the same, this CMP has been filed.

4. In course of hearing, Mr. Mahapatra, learned counsel for the Petitioner submitted that although it is borne out of record that the plea taken in the petitions under Order XI Rule 1 CPC and Order XVI Rule 1 CPC had already been raised and answered in the suit itself and also in the subsequent proceedings, but at the same time, the decree being obtained by practicing fraud the petitions filed by the Petitioner under Order XI Rule 1 as well as Order XVI Rule 1 read with Section 151 CPC ought to have been considered favourably. He further submitted that the Petitioner had also filed an application under Order XXVI Rule 1 and Order XVIII Rule 2 CPC to examine the JDr on commission. All these applications were not considered in its proper perspective and learned executing Court dismissed the same by passing the common order, which is impugned herein. Hence, he prays for setting aside the impugned order under Annexure-1 and to remit

the matter back to the executing Court for consideration of all the applications afresh in accordance with law.

5. Upon hearing learned counsel for the Petitioner and on perusal of record, it appears that the Petitioner had an opportunity to raise the issue with regard to fraud and in fact he had raised it before the Courts, which have already been answered. Thus, the submission of interrogatories to the DHr to reply the issue with regard to fraud is no more available to be raised at the stage of execution of the decree. So far as calling for records of different case records are concerned, it appears that the same has already been taken care of in the decree put to execution. Further, it appears that the Petitioner seeks to call for those records to establish that the DHr is not the owner of the property put to execution. The said issue is not available to be raised in an execution proceeding by a party to the suit. Moreover, the Petitioner being a tenant has filed the petition under Section 47 CPC (CMA No.17 of 2017) as well as in the aforesaid three petitions, effectively assails the right, title and interest of the landlord (DHr.), which is not permissible under Section 116 of the Evidence Act.

6. So far as examination of the Petitioner on commission is concerned, no case is made out to that effect, inasmuch as Petitioner has not explained as to why he is not in a position to appear before the Court and lead evidence. Executing Court considering the matter in detail, came to the conclusion that appointment of Commission to examine the JDh is not required in the facts and circumstances of the case. It further appears that

composite orders passed in the aforesaid three petitions, has been challenged in one CMP, i.e., the present one.

7. In view of the above, I find no infirmity in the impugned order. Accordingly, the CMP being devoid of any merit, stands dismissed.

8. Learned Senior Civil Judge, Jharsuguda shall do well to proceed with the execution case and see that the matter is disposed of at an early date. Parties are directed to co-operate with learned executing Court for early disposal of the execution case.

(K.R. Mohapatra)
Judge



s.s.satapathy