

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 770 of 2022

Annapurna Panda

..... Petitioner

Ms. Deepali Mahapatra, Advocate

-versus-

Annapurna Panda and anther

.... Opp. Parties

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

12.09.2022

Order No.

1. This matter is taken up through Hybrid mode.
2. Miss Mahapatra, learned counsel submits that there is inadvertent error regarding description of status of the parties. Hence, she prays for correcting the same in Court.
3. Prayer is allowed.
4. Petitioner in this CMP seeks to assail the order dated 13th July, 2022 passed in CS No.41 of 2008, whereby learned Civil Judge (Senior Division), Bhadrak refused to entertain an application under Order XXVI Rule 9 CPC filed by the Petitioner/Defendant No.1.
5. Miss Mahapatra, learned counsel for the Petitioner submits that CS No.41 of 2018 has been filed for the following reliefs:-

- “a) Let the tube well installed by the defendants and construction above the suit land be removed by an appropriate decree by way of mandatory injunction;*
- b) Let the defendants be restrained permanently from entering upon or making any nuisance over the suit land by a decree of perpetual injunction;*
- c) Let cost of the suit be decreed in favour of plaintiff;*
- d) Let any other relief that would deem just and proper be decreed in favour of plaintiff.”*

In order to establish her case, Defendant No.1 after closure of evidence by the parties, filed an application under Order XXVI Rule 9 CPC. Learned trial Court observing that Defendant No.1 could have examined a private Amin for measurement of the land and that the suit land being open to all there is no difficulty for Petitioner/Defendant No.1 to measure the land, rejected the application. It is her submission that prayer made in the suit essentially relates to location of the tube-well over the land. Relying upon decisions of this Court in the case of ***Kamala Jena and another Vs. Smt. Sabitri Devi***, reported in (2017) Supp.II OLR 124; ***Benudhar Mohapatra and others Vs. Collector-cum-District Magistrate, Nayagarh and others***, reported in (2017) I OLR 1031 and ***Govinda Nahak and others Vs. Juria Gouda and others***, reported in (2017) II OLR 581, Miss Mahapatra submits that since identity of the land and its demarcation are prime consideration in the suit, it is proper on the part of learned trial Court to depute a Survey knowing Commissioner, whose report could be taken into consideration along with other materials on record at the time of adjudication of the suit. This material aspect was not taken into consideration by learned trial Court while passing the impugned order under Annexure-5. She therefore prays for setting aside the impugned order and direct for appointing Survey knowing Commission for measurement of the land vis-à-vis location/position of the tube-well in question.

6. Taking into consideration the submission of learned counsel for the Petitioner and on perusal of record, it appears that the Plaintiff in order to establish his case, has examined a private Amin and exhibited the report. It also appears that the land in question is a road. Thus, Defendant No.1 has no difficulty to

measure the land by a private Amin and submit the report, which could have been considered along with other materials available in the suit. Without resorting to the same, Defendant No.1 files an application under Order XXVI Rule 9 CPC to depute a Survey knowing Commissioner. This Court in the case of ***Santosh Kumar Parida –v Narayan Chandra Dash & others***, reported in 2020 (II) ILR CUT 629, held 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. Of course, there can be no dispute with regard to the ratio decided by this Court in the case laws cited by learned counsel for the Petitioner, but the same will apply depending upon fact and circumstances of each case.

7. In that view of the matter, when the parties seeking deputation of Survey knowing Commissioner is incapable of entering upon the land and measure, it can pray for deputation of such Commissioner. In the instant case, land in question is a road, which is open to all. There is no material on record to show that the Petitioner has any difficulty in entering upon the land to measure it. In absence of any material to that effect, petition for deputation of Survey knowing Commission should not be entertained, which would amount to procuring evidence by the Court on behalf of a party. Thus, I find no infirmity in the impugned order.

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

9. At this stage, Miss Mahapatra, learned counsel for the Petitioner submits that liberty should be given to Defendant No.1 to adduce evidence through a private Amin. In view of such submission, this Court, without expressing any opinion on the merits of such submission, observes that if such an application is filed the same shall be considered on its own merit giving opportunity of hearing to the parties concerned.

(K.R. Mohapatra)
Judge

