

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No.799 of 2022

Mamata Das

..... Petitioner

Mr. Kousik Ananda Guru, Advocate

-versus-

Prahallad Kumar Ruparel and others

.... Opp. Parties

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

17.10.2022

Order No.

2.
 1. This matter is taken up through hybrid mode.
 2. Petitioner in this CMP seeks to assail the order dated 14th July, 2022 (Annexure-6) passed by learned Senior Civil Judge, Sambalpur in CS No.243 of 2019, whereby an application filed under Order XXVI Rule 9 CPC has been rejected.
 3. Mr. Guru, learned counsel for the Petitioner submits that the Petitioner as Plaintiff has filed the aforesaid suit for specific performance of contract and to direct the Defendants/Opposite Party Nos.1 and 2 to execute the sale deed in his favour. It is submitted that there exists a commercial building over Schedule-‘A’ property, which is constructed deviating the approved plan of the Sambalpur Development Authority. The deviations made are thoroughly described in Schedule-‘B’ of the plaint. Before commencement of hearing, the Plaintiff/ Petitioner filed an application under Order XXVI Rule 9 CPC praying to depute an Engineer to verify as to whether there is any deviation in construction of the said building or not.

Learned trial Court observing that there is no material on record with regard to deviation in construction, rejected the petition. Hence, this CMP has been filed.

3.1 Mr. Guru learned counsel placed reliance on the case law in the case of **Rahul S. Shah Vs. Jinendra Kumar Gandhi and others**, reported in AIR 2021 SC 2161, in para 37 of which, Hon'ble Supreme Court held as under:-

“37. It also becomes necessary for the Trial Court to determine what is the status of the property and when the possession is not disputed, who and in what part of the suit property is in possession other than the defendant. Thus, the Court may also take recourse to the following actions:

a) Issue commission under Order XXVI Rule 9 of CPC.

A determination through commission, upon the institution of a suit shall provide requisite assistance to the court to assess and evaluate to take necessary steps such as joining all affected parties as necessary parties to the suit. Before settlement of issues, the Court may appoint a Commissioner for the purpose of carrying out local investigation recording exact description and demarcation of the property including the nature and occupation of the property. In addition to this, the Court may also appoint a Receiver under Order XL Rule 1 to secure the status of the property during the pendency of the suit or while passing a decree.

b) Issue public notice specifying the suit property and inviting claims, if any, that any person who is in possession of the suit property or claims possession of the suit property or has any right, title or interest in the said property specifically stating that if the objections are not raised at this stage, no party shall be allowed to raise any objection in respect of any claim he/she may have subsequently.

c) Affix such notice on the said property.

d) Issue such notice specifying suit number etc. and the Court in which it is pending including details of the suit property and have the same published on the official website of the Court.”

It is submitted by Mr. Guru, learned counsel that since the possession over the Schedule-‘A’ property by Defendant Nos.3 and 4/Opposite Parties, is not disputed, a Commission is to be

issued to ascertain the deviation, if any in construction of the commercial building. This aspect was lost sight of by learned trial Court while adjudicating the petition under Order XXVI Rule 9 CPC. Hence, the impugned order is not sustainable.

4. Considering the submission made by Mr. Guru, learned counsel for the Petitioner and on perusal of case record as well as case law cited, this Court is of the considered opinion that the Petitioner has specifically stated the deviation in Schedule- 'B' of the plaint. Thus, onus is on him to lead cogent evidence to prove the same, if at all required. Further, at para-37 of the case law supra Hon'ble Supreme Court held that when the status of the property and position is not disputed the Court may issue a Commission under Order XXVI Rule 9 CPC to ascertain as to in which part of the suit property a party is in possession. The same is not the situation in the present case. It is apparent from the case record that hearing of the suit has not yet commenced and the Petitioner has not led any evidence in support of his case. Thus, appointment of a Survey knowing Commissioner at this stage will certainly amount to procuring evidence on behalf of the Petitioner, which is not permissible in law. Hence, I do not find any infirmity in the impugned order.

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

(K.R. Mohapatra)
Judge