

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 807 OF 2022

Brundaban Sahoo

....

Petitioner

Mr. Rajjeet Roy, Advocate

-versus-

***Orissa Construction and Techno
Engineering Cooperative Society Ltd.,
Bhubaneswar***

....

Opp. Party

**CORAM:
JUSTICE K.R. MOHAPATRA**

**ORDER
17.11.2022**

Order No.

5. 1. This matter is taken up through hybrid mode.
2. This CMP has been filed assailing the order dated 8th August, 2022 (Annexure-1) passed in I.A. No.1 of 2018 (arising out of C.S. No.2163 of 2018), whereby learned Civil Judge (Junior Division), Bhubaneswar allowed an application under Order XXXIX Rule 7 C.P.C. filed by the Defendant-Opposite Party.
3. Mr. Roy, learned counsel for the Petitioner submits that C.S. No.2163 of 2018 has been filed by the Petitioner for permanent injunction to restrain the Defendant from entering upon the suit land creating disturbance in his possession. Along with a plaint, the Petitioner filed I.A. No.1 of 2018 under Order XXXIX Rules 1 and 2 C.P.C. The Defendant on its appearance filed objection to the petition for interim injunction without filing any written statement in the suit. The Plaintiff at Paragraph-10 of the plaint has stated as under:

“10. That the plaintiff has constructed 4 nos. of shop room over extreme eastern side of the suit schedule

land and he left over certain portion of land measuring 8' X 50' from the eastern side with teen fencing for the use of open space. The plaintiff is possessing the suit schedule land without any hindrance from any corner. His possession is openly, continuously with the knowledge of the whole world."

The Plaintiff has also given the boundary of the property in the schedule of suit property.

4. The Defendant filed objection to the petition for interim injunction stating as under:

"2. XXX XXX XXX

Be it clarified that in between the eastern side compound wall raised by the plaintiff/petitioner over the extreme eastern end of his purchased land as well as the road running at the eastern direction, there is a gap about 500 sq.ft. and over the said land the petitioner has no manner of right whatsoever and on that score the said outside land beyond the eastern side compound wall cannot be treated as suit land by any imagination."

5. Along with the show cause reply, the Defendant filed an application under Order XXXIX Rule 7 C.P.C. for deputation of a Pleader Commission to ascertain as to whether there is any gap between the eastern side boundary wall of the Plaintiff-Petitioner and the road running at the eastern direction and whether there is any construction existing beyond the eastern side boundary wall of the Plaintiff-Petitioner. Learned Civil Judge without taking into consideration the scope and ambit of Order XXXIX Rule 7 C.P.C. mechanically allowed the said petition. Hence, this CMP has been filed.

6. It is submitted by Mr. Roy, learned counsel for the Petitioner that when the Defendant has filed show cause reply with definite pleading, burden is on him to establish the same. There is no material on record to show that the Defendant is

prevented from submitting material in support of his case. The provision under Order XXXIX Rule 7 C.P.C. makes it clear that it should be used sparingly and an application should not be entertained on mere asking for it. In support of his contention, Mr. Roy, learned counsel for the Petitioner relied upon a decision in the case of **Kangali Khatei and others –v- Alekh Katei and others**, reported in 2021 (I) ILR-CTC-463, in which this Court has held as under:

“6. Thus, the fundamental principles, amongst other, to be kept in mind while exercising discretion under Order XXXIX Rule 7, C.P.C. are:-

(i) The discretion under the rule must be exercised sparingly and in exceptional circumstances and not in a routine manner on mere asking for it;

(ii) The party seeking assistance of the Court under the provision must establish that he is incapable of having the knowledge of the subject-matter of dispute in view of the nature of the suit property or is prevented from it without any sufficient cause, and

(iii) The discretion is required to be exercised for just adjudication in the facts and circumstances of the case.”

7. Learned trial Court has not made any endeavour to ascertain as to whether the Defendant is reasonably prevented from producing materials to establish its case. The Opposite Party has not made any endeavour in that regard. On a plain reading of the impugned order under Annexure-1, it appears that learned trial Court has not assigned any reason to allow the petition. Hence, he prays for setting aside the impugned order under Annexure-1.

8. Although, notice on the Opposite Party is held to be sufficient vide order dated 3rd November, 2022, but none appears on its behalf.

9. Considering the submission made by learned counsel for the Petitioner and on perusal of the record, it appears that the dispute involved as to whether, there is a gap of 500 ft. in between the land of the Petitioner and the eastern side road. Since the Defendant has categorically taken a stand in his objection to the petition under Order XXXIX Rules 1 and 2 C.P.C. to the effect that there is no gap, onus is on him to establish the same. It appears that the Defendant has not made any endeavour in that regard. There is also no material on record to come to a conclusion that the Defendant is prevented or incapable of having knowledge and produce materials in support of his case. In that view of the matter, this Court is constrained to observe that learned trial Court has exercised the discretion under Order XXXIX Rule 7 C.P.C. on mere asking for it, which is not the scope and intent of Order XXXIX Rule 7 C.P.C.

10. In view of the above, this Court sets aside the impugned order under Annexure-1 and directs learned trial Court to decide I.A. No.1 of 2018 at an early date in accordance with law.

Urgent certified copy of this order be granted on proper application.

(K.R. Mohapatra)
Judge

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