

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 832 of 2022

Ratna @ Ratnakar Malik ***Petitioner***
Mr. Satya Narayan Mishra-4, Advocate

-versus-

Jasoda Behera ***Opp. Parties***
Mr. Subrat Kumar Nayak, Advocate

CORAM:
JUSTICE K.R. MOHAPATRA

ORDER
16.11.2022

Order No.

03. 1. This matter is taken up through Hybrid mode.
2. Petitioner in this CMP seeks to assail the order dated 1st August, 2022 (Annexure-5) passed in CS No.364 of 2019, whereby learned Civil Judge (Junior Division), Bhadrak, allowed an application filed by the Plaintiff/Opposite Party under Order XXVI Rule 9 CPC.
3. Mr. Mishra, learned counsel for the Petitioner submits that the suit in CS No.127 of 2019 has been filed by the Plaintiff/Opposite Party for declaration of right, title and interest over the suit property and for permanent injunction against the Petitioner/Defendant, who has already filed written statement. Before commencement of trial in the suit, the Plaintiff filed an application under Order XXVI Rule 9 CPC for deputation of a Survey knowing Commissioner to find out the existence of the land, nature of its usage and as to whether the suit land situates within the enclosure of the Plaintiff as well as to answer certain

further questions. Learned trial Court relying upon the decision in the case of ***Bhabesh Kumar Das Vs. Mohan Das Agrawal***, reported in 2015 (Supp.II) OLR 984, allowed the application. Hence, this CMP has been filed.

3.1 It is his submission that burden lies on the Plaintiff to prove her case. Since she has not yet entered the witness box to lead evidence, appointment of a Survey knowing Commissioner at this stage will certainly amount to procuring of evidence on behalf of the Opposite Party, which is not the object and intent of the provision. He placed reliance on a decision of this Court in the case of ***Santosh Kumar Parida Vs. Narayan Chandra Dash***, reported in 2020 (II) ILR-CUT-629, in which it is held as under:-

“5.1 Thus, from the reading of the provision it is manifest that if a matter in dispute in a suit needs any clarification or further explanation, the Court may consider issuance of a commission for that purpose. The language employed in the provision makes it abundantly clear that the Court exercises its judicial discretion while making order for issuance of a commission. But, it must be kept in mind that all matters in dispute in a suit cannot be elucidated through issuance of a commission. Thus, the party seeking issuance of a Commission must establish a prima facie case to invoke the provision. He cannot use the Court to collect evidence on his behalf in the guise of invoking the power of the court under the provision, unless the occasion so arises. Thus, the party to the suit seeking issuance of a commission must, at the first instance, make an endeavour to lead evidence to prove his case on the issue involved. Only when the evidence or material on record is insufficient or needs clarification or the parties are unable to lead evidence on any particular matter in dispute or it becomes expedient to make a local investigation by a Commission to lead further evidence in the matter, to pass an effective decree, then the Court has the power to exercise its discretion under the provision and issue such a

commission for any purpose mentioned in the provision itself.”

Thus, he submits that since no endeavour has yet been made by the Petitioner to lead evidence in support of his case, learned trial Court should not have directed for deputation of Survey knowing Commissioner.

4. Mr. Nayak, learned counsel for the Opposite Party objecting to the same contends that the Court has the discretion to depute a Survey knowing Commissioner at any stage of the suit. As a boundary dispute is involved in the suit, a Survey knowing Commissioner should be deputed at the threshold so that the party to the suit will enter the witness box with a preparation to meet with the report of the Survey knowing Commissioner. He, therefore, submits that there is no infirmity in the impugned order.

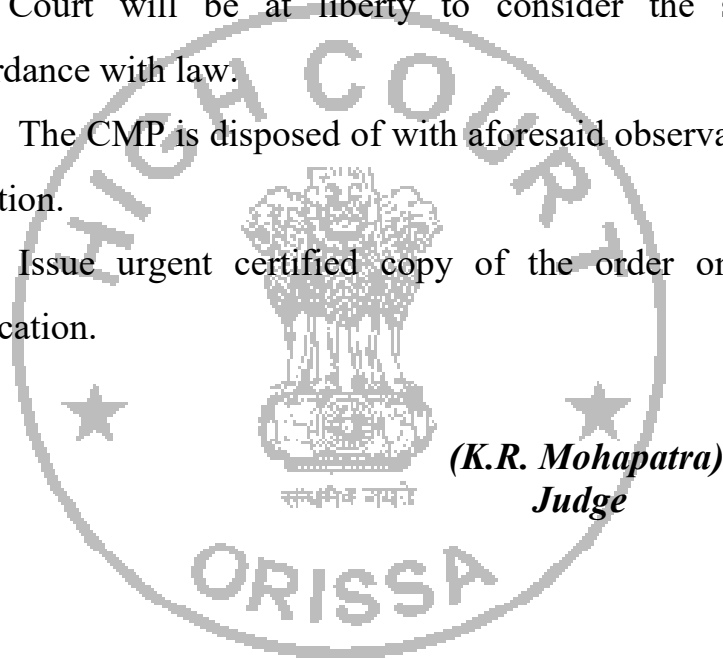
5. Considering the submissions made by learned counsel for the parties, this Court is of the considered opinion that in ***Santosh Kumar Parida (supra)*** has already laid down the principle as to how an application under Order XXVI Rule 9 CPC is to be dealt with. Thus, it is clear that the parties seeking issuance of Commission must establish a *prima facie*, case for invocation of such provision. The Court cannot be used to collect evidence on behalf of a party. The discretionary power of the Court under the provision should not be exercised unless occasion so arises. In the instant case, there appears no impediment for the Opposite Party to lead evidence for which he wants deputation of Survey Knowing Commissioner. Since no endeavour has yet been made in that regard and possession over the suit land is seriously disputed,

appointment of Survey knowing Commissioner before commencement of trial will certainly amount to procure evidence on behalf of a party. This material aspect was lost sight of while passing the impugned order.

6. Accordingly, the impugned order is set aside. It is directed that parties shall lead evidence in the matter and after closure of evidence, if at all it is required for deputation of a Survey knowing Commissioner, either of the parties may file a petition seeking relief to that effect and in that event learned trial Court will be at liberty to consider the same in accordance with law.

7. The CMP is disposed of with aforesaid observation and direction.

Issue urgent certified copy of the order on proper application.



s.s.satapathy