

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP NO. 1326 OF 2019

Narottam Mohapatra **Petitioner**

Mr. Prasant Kumar Satapathy, Advocate

-versus-

Raghunath Barik and another **Opp. Parties**

Mr. G.K. Nanda, Advocate

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

06.12.2022

Order No.

3. 1. This matter is taken up through hybrid mode.
2. This CMP has been filed assailing the order dated 16th August, 2019 (Annexure-8) passed by learned Senior Civil Judge, Nilgiri in C.S. No. 1 of 2014, whereby an application filed by the Defendant No.2-Petitioner under Order XXVI Rule 9 C.P.C. has been rejected.
3. Mr. Satapathy, learned counsel submits that the Petitioner had earlier filed an application under Order XXVI Rule 9 C.P.C. before commencement of the trial for appointment of survey knowing commissioner to answer certain questions. Said application was rejected vide order dated 21st August, 2018. Assailing the same, the Petitioner preferred CMP No. 119 of 2019, which was disposed of on 13th February, 2019 with the following order:

“Challenge is made to the order 21.8.2018, passed by the learned Civil Judge (Senior Division), Nilgiri, in C.S. No.1 of 2014-I, whereby and whereunder, learned trial court rejected the application of the plaintiff to depute a Survey Knowing Commissioner filed under Order-26, Rule-9 CPC.

It appears that hearing in the matter has already commenced.

In view of the above, the petition is disposed of with an observation that if the trial court comes to a conclusion that it is not possible to come to a definite conclusion on the available material on record, then it may appoint a Survey Knowing Commissioner without being influenced by the previous order.”

4. Hence, during examination of the witnesses on behalf of Defendant No.2-Petitioner, an application Order XXVI Rule 9 C.P.C. was filed in terms of the direction of this Court in CMP No. 119 of 2019. But, learned trial Court relying upon the case laws in the case of ***Y.B. Patil and others –v- Y.L. Patil***, reported in AIR 1977 (SC) 392 and the case of ***Ramakanta Das –v- Gita Devi Choudhury***, Vol. 33 (1991) O.J.D. (Civil) 354 rejected such application holding that principles of *res judicata* applies to subsequent stages of the same proceeding. He further submits that in view of the observation of this Court in CMP No.119 of 2019 quoted (supra), learned trial Court ought to have considered the application under Order XXVI Rule 9 C.P.C. afresh without being influenced by the previous order rejecting the application under Order XXVI Rule 9 C.P.C. Learned trial Court did not, at all, delve into the merit of the petition under Order XXVI Rule 9 C.P.C. and rejected the same. Hence, the impugned order is not sustainable.

5. Mr. Nanda, learned counsel for the Opposite Parties submits that in the petition under Order XXVI Rule 9 C.P.C., the Petitioner had not referred to the order passed in CMP No.119 of 2019. As such, learned trial Court has rightly rejected the petition under Order XXVI Rule 9 C.P.C. holding that principles of *res judicata* applies to subsequent stages of the same proceeding. In absence of the order passed in CMP No.119 of 2019, there was no

material before learned trial Court to consider as to whether there is any change in circumstance to entertain the petition under Order XXVI Rule 9 C.P.C.. As such, learned trial Court has committed no error in rejecting the application under Order XXVI Rule 9 C.P.C..

6. Considering the submissions made by learned counsel for the parties and on perusal of the order passed in CMP No.119 of 2019, it is apparent that this Court while disposing of the CMP No.119 of 2019 has categorically held that if learned trial Court feels that it is not possible to come to a definite conclusion on the available material on record, then it may appoint a urvey knowing commissioner. Since the evidence from the side of Defendant No.2-Petitioner has not yet been completed, such a situation as stated in the order passed in CMP No.119 of 2019 has not yet arisen. In view of the order passed in CMP No.119 of 2019, an application under Order XXVI Rule 9 C.P.C. can only be considered after closure of the evidence from both the sides, if required.

7. In view of the above, this Court without interfering with the impugned order disposes of this CMP with a direction that in the event an application under Order XXVI Rule 9 C.P.C. is filed after closure of the evidence from both the sides in the suit, the said application shall be adjudicated on its own merit, giving opportunity of hearing to the parties concerned.

8. Since the suit is of the year, 2014, learned trial Court shall also make an endeavour for early disposal of the suit. Parties are directed to cooperate with learned trial Court for the same.

8. The interim order dated 5th February, 2020 passed in I.A. No. 1398 of 2019 stands vacated.

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

(K.R. Mohapatra)
Judge

bks

