

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 1002 OF 2022

Madhab Chandra Sahoo

....

Petitioner

Mr. Dayanidhi Mohanty, Advocate

-versus-

Bichitrananda Das and another

....

Opp. Parties

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

22.11.2022

Order No.

01. 1. This matter is taken up through hybrid mode.
2. Order dated 12th September, 2022 (Annexure-4) passed by learned 4th Additional Civil Judge (Senior Division), Cuttack in Civil Suit No.933 of 2015 is under challenge in this CMP, whereby an application filed by the Defendant No.2-Petitioner under Order XXVI Rule 9 C.P.C. has been rejected.
3. Mr. Mohanty, learned counsel for the Petitioner submits that the civil suit has been filed by the Opposite Party No.1 for declaration of right, title and interest and for permanent injunction. Taking advantage of absence of Defendant No.2, the Plaintiff has raised a compound wall encroaching upon the land of Defendant No.2. In order to ascertain the physical possession of both the parties over Plot No.3017/5197 to an extent of Ac.0.06 decimals under Khata No.772/308 recorded in the name of Plaintiff and Plot No.3017/7017 to an extent of Ac.0.06 decimals under Khata No.772/2503 recorded in the name of the Defendant No.2, the Petitioner as well as Defendant No.1 filed separate applications under Order XXVI Rule 9 C.P.C.. It is his submission that unless the possession of the parties is ascertained by deputing a Survey Knowing Commissioner, the real controversy between the parties cannot be adjudicated upon

effectively. Learned trial Court most erroneously held that the document available on record clearly describes the land of the Plaintiff and Defendant No.2. It is also observed by learned trial Court that notice issued by Defendant No.1 under the SARFAESI Act does not cover the land of the Plaintiff. As such, learned trial Court came to a conclusion that no Survey Knowing Commissioner is required to be deputed to ascertain the possession of the parties. He, however, submits that the possession of the parties over the land in question is a vital aspect to be ascertained in the instant suit. Hence, learned trial Court has committed error of both fact and law in rejecting the application for deputation a Survey Knowing Commissioner

4. Taking into consideration the submission made by learned counsel for the Petitioner and on perusal of the record, it is apparent that the Defendant No.2-Petitioner has not yet led any evidence in the matter. Law is well settled that the party seeking deputation of a Survey Knowing Commissioner must make an endeavour at the first instance to establish his case by leading evidence. Since the Petitioner has not made any endeavour in that regard as yet, learned trial Court has committed no error in rejecting the application under Order XXVI Rule 9 C.P.C. for deputation of a Survey Knowing Commissioner.

5. In view of the above, I find no infirmity in the impugned order under Annexure-4.

6. Accordingly, this CMP being devoid of any merit stands dismissed.

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

(K.R. Mohapatra)
Judge