

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 1038 of 2022

P.Biswanath Prusty and others

Petitioners

Mr. Mruganka Mauli Patnaik, Advocate

-versus-

State of Odisha and another

.... Opp. Parties

Mr. Ajodhya Ranjan Dash,
Additional Government Advocate

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

**ORDER
26.10.2022**

Order No.

1. This matter is taken up through hybrid mode.
2. Order dated 19th September, 2022 (Annexure-3) passed by learned 5th Additional District Judge, Bhubaneswar in RFA No.8 of 2005 is under challenge in this CMP, whereby an application filed by the Petitioners under Order XLI Rule 27 read with Section 151 CPC has been rejected.
3. Mr. Patnaik, learned counsel for the Petitioners submits that CS No.174 of 1985-I was filed in the Court of learned Civil Judge (Junior Division,) Bhubaneswar for declaration of right, title and interest of the Plaintiffs over the suit land and for permanent injunction. The suit being dismissed, the Plaintiffs filed RFA No.8 of 2005, which is pending in the Court of learned 5th Additional District Judge, Bhubaneswar for adjudication. During course of argument, Petitioners filed an application under Order XLI Rule 27 CPC to adduce additional evidence with regard to OPP Case No.135 of 1998 initiated against them. Learned Appellate Court on a flimsy ground that no such pleading was made in the plaint and that the fact was

known to the Plaintiffs at the time of filing of the suit, rejected the petition. Hence, this CMP has been filed.

3.1 It is submitted by learned counsel for the Petitioners that at para-8 of the plaint, Plaintiffs have specifically stated about the OPP Case. Thus, the observation to the effect that there is no pleading with regard to the OPP Case is not sustainable. Although the Plaintiffs were aware of the OPP Case, but the documents were not with them which could only be traced out from a box during pendency of the appeal. These material aspects were not considered by the learned Appellate Court while adjudicating the appeal. Hence, the impugned order is not sustainable and is liable to be set aside.

4. Upon hearing learned counsel for the Petitioners and on perusal of case record, it appears that Plaintiffs had knowledge of OPP Case during pendency of the suit. Learned Appellate Court in the impugned order has also observed that OPP Case was initiated in the year 1998. There is no material on record to show that endeavour was being made by the Plaintiffs during pendency of the suit to trace out the case record and adduce evidence to that effect. The box from which the documents was allegedly traced out during pendency of the appeal, was available in the house of the Plaintiffs, as submitted by learned counsel for the Petitioners. Hence, it is apparent that the Plaintiffs have not exercised due diligence during pendency of the suit to trace out the documents and lead evidence on the same. It is also not clear from the materials on record as to how the documents would be necessary for just adjudication of the appeal.

5. In view of the above, learned Appellate Court has committed no error in dismissing the petition under Order XLI Rule 27 read with Section 151 CPC. Accordingly, the CMP being devoid of any merit, stands dismissed.

(K.R. Mohapatra)
Judge

s.s.satapathy

