

IN THE HIGH COURT OF ORISSA AT CUTTACK
CMP No. 1103 OF 2022

Tillotama Parida and others *Petitioners*
Mr. Prasanta Kumar Mohanty, Advocate
-versus-
Sarabindhu Parida and others *Opp. Parties*

CORAM:
JUSTICE K.R. MOHAPATRA

ORDER
18.11.2022

Order No.

01. 1. This matter is taken up through hybrid mode.
2. The Petitioners in this CMP seek to assail the order dated 13th September, 2022 (Annexure-4) passed in C.S. No.08 of 2016, whereby learned Additional Senior Civil Judge, Baripada rejected an application filed by them under Order XXVI Rule 9 C.P.C. The Petitioners also assail the order dated 29th October, 2022 (Annexure-7), whereby an application to recall the order dated 13th September, 2022 filed by them has been rejected.
3. Mr. Mohanty, learned counsel submits that Defendant Nos.8, 9, 13(a) to 13(d), 14 and 15 are the Petitioners in this CMP. The suit has been filed for partition. Defendant No.1 supports the case of the Plaintiffs. The Petitioners filed their written statement stating that final decree in T.S. No.21 of 1961 has already been passed by partitioning the suit property by metes and bounds. D.W.1 (Defendant No.1) deposed that “*there is no separate boundary around each house of the shareholder. The entire land we all co-sharer residing without*

boundary.” Thus, in order to ascertain the position of the land and as to whether there has been a boundary in the residential house of the co-sharer, a Survey Knowing Commissioner has to be deputed.

4. Earlier the Petitioners had approached this Court in CMP No.797 of 2019, which was disposed of on 27th August, 2019 with the following direction:

“In view of the same, the petition is disposed of with an observation that after conclusion of evidence, if it is not possible on the part of the learned trial court to come to a definite finding, then it may appoint a civil court commissioner without being influenced by the previous order. Learned Addl. Civil Judge (Senior Division), Baripada shall conclude the hearing of the suit within a period of three months from the date of production of a certified copy of the order.”

5. Learned trial Court refused to entertain the application on the ground that this Court while disposing of CMP No.797 of 2019 has left the matter to the discretion of the Court to depute a Survey Knowing Commissioner, if it is so required. Such a ground to reject the petition under Order XXVI Rule 9 C.P.C. is not sustainable, as the Court was required to adjudicate the petition under Order XXVI Rule 9 C.P.C. on its own merit and examined as to whether, in fact, a Survey Knowing Commissioner is required to be deputed or not. Unless a Survey Knowing Commissioner is deputed, there will be ambiguity to the rival contentions of the parties with regard to partition of the suit property. Hence, a Survey Knowing Commissioner should have been directed to be deputed by learned trial Court. Learned trial Court has rejected the application without assigning sufficient reasons. Hence, the

impugned orders under Annexures-4 and 7 are liable to be set aside.

5. Upon hearing learned counsel for the Petitioners and on perusal of the case record, it appears that Defendant No.1 has led evidence in support of his plea, made out in his written statement. Since the Plaintiffs claim partition, burden is on them to prove that the suit property is partible. Likewise, since the Petitioners claim that the suit property has already been partitioned pursuant to the final decree passed in T.S. No.21 of 1961, onus is on them to prove the same. There is nothing on record to arrive at a conclusion that the Petitioners are either obstructed or incapable of producing materials on record in support of their claim. There is also no material on record to come to a conclusion that a Survey Knowing Commissioner is required to be deputed to elucidate any matter in disputes. Further, it appears that the evidence from both the side is closed and the matter is posted for argument. As observed by this Court in CMP No.797 of 2019, learned trial Court did not find any reason to depute a Survey Knowing Commissioner in exercising of its discretion. Thus, I find no infirmity in the impugned orders under Annexures-4 and 7.

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