A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No.387 of 2026
CNR No.- ODHC010151842026

(In the matter of an application under Article 227 of the Constitution of India, 1950)

M/s Jinardi Biri Factory, West Bengal & Anr. .... ***Petitioner(s)***

-versus-

M/s Danish Enterprises, Sambalpur & others .... ***Opposite Party (s)***

Advocates appeared in the case through Hybrid Mode**:**

For Petitioner(s) : *Mohammed Mustaq Ansari, Adv.*

For Opposite Party (s) : *None appears*

CORAM:
HON'BLE DR. JUSTICE SANJEEB K PANIGRAHI

DATE OF HEARING:-01.09.2026
DATE OF JUDGMENT: -30.10.2026

Dr. Sanjeeb K Panigrahi, J.

1. The petitioners have filed the present Civil Misc Petition assailing the legality and propriety of the order dated 06.01.2026 passed by the learned Civil Judge (Sr Div) (Commercial Court), Sambalpur, in C.S. No. 31 of 2025, whereby their application under Order XXVI Rule 9 and Order XXXIX Rule 7 CPC, read with Section 151 CPC and Section 135(2) of the Trade Marks Act, 1999, for appointment of a Local Commissioner

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was rejected. The application sought inspection of the defendants' premises and godowns and seizure of the alleged infringing goods and connected business records. The petitioners seek setting aside of the impugned order and consequential directions for appointment of a Local Commissioner to undertake the measures sought in their application.

I. FACTUAL MATRIX OF THE CASE:

2. The brief facts of the case are as follows:

(i) The present CMP arises out of Civil Suit No. 31 of 2025 pending before the Civil Judge (Senior Division) (Commercial Court), Sambalpur. The suit was instituted on 25.09.2025 by M/s Jinardi Biri Factory and M/s Jamil Enterprises against M/s Danish Enterprises and three others.

(ii) M/s Jinardi Biri Factory, represented by its proprietor Abdul Kadir, is engaged in manufacturing and marketing biri and other tobacco products, while M/s Jamil Enterprises, represented by Sayed Mukhtar Ahmed, is described in the plaint as its authorised distributor-cum-licensee for Odisha.

(iii) The plaint states that the first plaintiff has used the mark "SHIBA BIRI 480" since 1995 and obtained registration of the mark in 2021. The dispute concerns the use and marketing of biri products under marks described in the record as "SHIBA BIRI 480", "SHIBA BIRI 488" and "NEW SHIBA BIRI 488", along with the trade dress and packaging associated with those products. The plaintiffs allege that the defendants' marks and packaging are similar to those used for their product and are likely to cause confusion in the market. The defendants, in their

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objection to the application for temporary injunction, disputed the alleged similarity and maintained that the prefix "New", the numeral "488" and other features distinguished their products. They also questioned the scope of the plaintiffs' registration and referred to pending label applications before the Registrar of Trade Marks.

(iv) The plaint traces the dispute to a decline in the second plaintiff's sales from the middle of 2024 and to information allegedly obtained in 2025 concerning the defendants' products. Before filing the suit, the second plaintiff approached the first defendant and also made representations to the police and the Commercial Tax and GST authorities.

(v) The plaint refers to the interception of a vehicle carrying the disputed products on 21.08.2025, the institution of ICC Case No. 21 of 2025 before the SDJM, Sambalpur, and an order dated 03.09.2025 directing registration and investigation of the complaint.

(vi) In the commercial suit, the plaintiffs seek permanent and mandatory injunctions, reliefs for alleged infringement and passing off, delivery of the disputed goods, rendition of accounts, damages of ₹25 lakh and other consequential reliefs. Along with the suit, the plaintiffs filed I.A. No. 1 of 2025 under Order XXXIX Rules 1 and 2 CPC. By order dated 10.11.2025, the Commercial Court allowed the application in part.

(vii) For the duration of the suit, it restrained the defendants and persons acting through them from dealing in goods bearing the marks "SHIBA BIRI 480", "SHIBA BIRI 488", "NEW SHIBA BIRI 488", or any mark identical or deceptively similar to the plaintiffs' registered word mark "SHIBA BIRI 480". The defendants were also directed to maintain

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accounts of the stock and sales of the disputed goods and to produce them when required. At that stage, the Court declined to grant separate protection in respect of copyright because no certificate or other proof of copyright registration had been produced.

(viii) On 01.12.2025, the plaintiffs filed an application under Order XXXIX Rule 2-A CPC alleging breach of the interim injunction. The defendants denied the allegation and, in turn, applied under Order XXXIX Rule 4 CPC for vacation, variation or clarification of the injunction. By order dated 02.01.2026, the Commercial Court rejected the plaintiffs' application under Order XXXIX Rule 2-A. By a separate order dated 05.01.2026, the Court also rejected the defendants' application under Order XXXIX Rule 4, holding that no change in circumstances or undue hardship warranting alteration of the injunction had been shown.

(ix) At the time of instituting the suit, the plaintiffs had also applied under Order XXVI Rule 9 and Order XXXIX Rule 7 CPC, read with Section 151 CPC and Section 135(2) of the Trade Marks Act, 1999, for appointment of a Local Commissioner. The application sought inspection of the defendants' premises and godowns, including premises identified by the plaintiffs within and outside Sambalpur; seizure of the disputed goods, packaging material and business records; authority to open locks and obtain police assistance if required; videography and photography of the exercise; permission for a representative of the plaintiffs to accompany the Commissioner; and delivery of the seized goods to the plaintiffs subject to an undertaking. The application was treated as ancillary to the suit and was not separately registered as an

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interlocutory application. The order dated 06.01.2026 records that the defendants neither filed a written objection nor advanced an oral objection to it.

(x) By the said order dated 06.01.2026, the Commercial Court declined to appoint a Local Commissioner. The present CMP challenges that order and seeks its setting aside and the appointment of a Local Commissioner.

II. SUBMISSIONS ON BEHALF OF THE PETITIONER:

3. Learned counsel for the Petitioner earnestly made the following submissions in support of his contentions:

(i) Learned counsel for the Petitioners submits that the order dated 06.01.2026 warrants interference because the learned Commercial Court did not consider the nature and purpose of the application for appointment of a Local Commissioner.

(ii) It is submitted that the underlying suit seeks not only an injunction against the use of the disputed marks but also delivery of the alleged infringing goods, rendition of accounts and damages. The goods, packaging materials, stock records and accounts relevant to these reliefs are stated to be located at premises under the control of the Defendants and cannot ordinarily be inspected or preserved by the Petitioners themselves.

(iii) It is submitted that, while deciding I.A. No. 1 of 2025 on 10.11.2025, the Commercial Court had already found a prima facie case in favour of the Plaintiffs and restrained the Defendants from dealing in goods bearing

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the marks "SHIBA BIRI 480", "SHIBA BIRI 488", "NEW SHIBA BIRI 488", or any other identical or deceptively similar mark. The Defendants were also directed to preserve accounts of their stock and sales.

(iv) According to the petitioners, their application filed along with the suit stated that they had learnt from the trade and market that substantial quantities of the disputed goods were stocked at the defendants' premises and godowns. They apprehended removal of those goods and tampering with the connected records upon service of notice of the injunction application.

(v) Learned counsel further submits that the Commercial Court conflated the application for appointment of a Commissioner with the earlier proceeding under Order XXXIX Rule 2-A CPC. The application under Rule 2-A concerned an allegation of past disobedience of the injunction and the imposition of penal consequences, whereas the application for a commission sought inspection, preservation and documentation of material situated at the Defendants' premises. The failure to establish wilful disobedience by the standard applicable to proceedings under Rule 2-A, it is argued, could not by itself determine whether a local inspection was required.

(vi) The CMP petition also records that the order rejecting the Rule 2-A application has been challenged in FAO No. 2 of 2026 before the District Judge, Sambalpur.

(vii) It is contended that the application had been made under Order XXVI Rule 9 and Order XXXIX Rule 7 CPC, read with Section 75 and Section 151 CPC and Section 135(2) of the Trade Marks Act, 1999. These

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provisions, according to the Petitioners, empower the Court to direct a local investigation where it would elucidate a matter in dispute and to order the inspection, detention or preservation of the subject matter of the suit.

(viii) The Commissioner was proposed to be authorised to inspect the identified premises, prepare an inventory, take custody of the disputed goods and relevant records, photograph and videograph the exercise and obtain police assistance where required. It is submitted that these directions were sought to preserve the subject matter and place an objective account of the existing position before the Court.

(ix) Learned counsel disputes the finding that the proposed commission would amount to collection of evidence on behalf of the Petitioners. He submits that the object of the application was to obtain evidence which, because of its location and nature, could be ascertained only through an inspection at the spot.

(x) It is contended that appointment of a Commissioner would neither establish infringement by itself nor relieve the Plaintiffs of their obligation to prove their case at trial. The Commissioner's report and the materials collected during the exercise would remain subject to the scrutiny of the Court and to such objections as may be raised by the parties.

(xi) Reliance is placed on ***Bijaylal Mohanta and Another v. Khiramani Mohanta and Others***,[1] for the proposition that a commission may be issued to obtain evidence which, by its peculiar nature, can be obtained

[1] 2015 (I) OLR 718

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only at the spot and to elucidate a matter that cannot otherwise be satisfactorily resolved. Learned counsel also relies on ***Savitri Devi and Others v. Prasanna Kumari Devi @ Dibya @ Pramodini (Dead) and Others,***[2] to distinguish an inspection under Order XXXIX Rule 7 CPC from a local investigation under Order XXVI Rule 9 CPC and to submit that an inspection should not be refused merely by characterising it as an attempt to collect evidence.

(xii) It is further submitted that the subsisting injunction and the proposed commission serve different purposes. The injunction regulates the Defendants' future conduct, whereas the commission was sought to ascertain, document and preserve the goods and records allegedly already in existence. The impugned order therefore could not rest solely on the view that the Petitioners' interests stood sufficiently protected by the injunction. Learned counsel also points out that, as recorded in the impugned order, the Defendants had neither filed a written objection nor advanced an oral objection to the application for appointment of a Commissioner.

(xiii) On these grounds, learned counsel prays that the order dated 06.01.2026 be set aside and that appropriate directions be issued for appointment of a Local Commissioner to undertake the inspection and other measures sought in the application, subject to such safeguards as this Court may consider necessary.

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[2] 1992 (II) OLR 14

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III. SUBMISSIONS ON BEHALF OF THE OPPOSITE PARTIES:

4. Despite service of notice, none appeared on behalf of the Opposite Parties when the matter was taken up by this Court. By orders dated 14.08.2026 and 21.08.2026, further opportunities were granted to them to enter appearance. When they remained unrepresented on 27.08.2026, this Court directed that the proceeding would continue ***ex parte***.

5. No counter-affidavit, written note of submissions or oral argument has been placed before this Court on their behalf. Consequently, no submission has been advanced by the Opposite Parties specifically in support of the order impugned in the present CMP.

6. The position is similar in respect of the application for appointment of a Local Commissioner before the Commercial Court. The impugned order dated 06.01.2026 expressly records that the Defendants neither filed a written objection nor advanced any oral objection to that application.

7. The reasons for declining the commission were recorded by the Commercial Court upon its independent scrutiny of the application and cannot be attributed to the Defendants as their contentions.

8. However, for the sake of completeness of rival arguments, the record discloses that the Defendants had contested the Plaintiffs' application for temporary injunction and had subsequently applied under Order XXXIX Rule 4 CPC for vacation, variation or clarification of the injunction dated 10.11.2025. In those connected proceedings, they maintained that the marks used for their products were distinct from the Plaintiffs' mark by reason of the prefix, numerals and other visual and structural features. They also questioned the scope of the Plaintiffs'

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registration, referring particularly to the status of the label application under Class 34, and denied that their products were likely to cause confusion or deception among consumers. They sought permission to continue their business without infringing any legally protected right of the Plaintiffs.

9. The Defendants had also opposed the Plaintiffs' application under Order XXXIX Rule 2-A CPC. They denied having violated the interim injunction and contended that the allegations of disobedience were vague and unsupported by legally admissible evidence. These positions were taken in relation to the grant, modification and alleged breach of the interim injunction. They were not presented as objections to the application for appointment of a Local Commissioner and do not constitute submissions made by the Opposite Parties in the present proceeding.

IV. THE OBSERVATION OF THE COMMERCIAL COURT:

10. The question before the learned Civil Judge (Senior Division) (Commercial Court), Sambalpur, was whether the circumstances of Civil Suit No. 31 of 2025 warranted appointment of a Local Commissioner to inspect the Defendants' premises and seize the goods bearing the disputed trademarks, together with the related business records. The Court was required to consider whether the apprehended removal or disposal of those goods justified the proposed commission and whether such assistance was necessary for effective adjudication of the dispute.

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11. In examining the application, the Commercial Court considered the Plaintiffs' assertion that the Defendants held a substantial stock of the disputed goods and might remove or dispose of it after receiving notice of the injunction application and the order passed thereon. It noted the scope of the relief sought, including inspection and seizure, opening of locks where necessary, police assistance, seizure of account books, photography and videography, and delivery of the seized goods to the Plaintiffs against an undertaking.

12. The Court also took into account the subsisting interim injunction and the earlier rejection of the Plaintiffs' application alleging its violation. Although the Defendants had neither filed a written objection nor advanced an oral objection, the Court observed that the application nevertheless required scrutiny in accordance with law and the circumstances of the case.

13. On the factual basis for the proposed commission, the Commercial Court found that no material had been placed on record to substantiate the assertion concerning the existence of a substantial stock or the apprehension of its removal or disposal. It further noted that the earlier application alleging breach of the interim injunction had been rejected for want of evidence establishing such breach. In these circumstances, it characterised the apprehension regarding removal or disposal of the disputed goods as speculative.

14. The Commercial Court next considered the protection already available under the interim injunction. It observed that the injunction restrained the Defendants from using the disputed trademark and sufficiently

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protected the Plaintiffs' interests. The Court accordingly did not regard the apprehension expressed in the application, without supporting material, as establishing a need for the additional measures sought through a commission.

15. As to the scope of the power under Order XXVI Rule 9 CPC, the Commercial Court observed that a Local Commissioner could not be appointed as a matter of course and that such appointment was warranted when the Court itself required assistance for effective adjudication. It further stated that a Commissioner could not be appointed to collect evidence on behalf of a party and that the power was to be exercised only in exceptional circumstances. Applying that approach, it found that no compelling circumstance, such as imminent destruction of evidence or continued violation of the injunction, had been demonstrated.

16. On these findings, the Commercial Court concluded that the necessity for appointment of a Local Commissioner had not been established. It therefore rejected the application by order dated 6 January 2026, which is impugned in the present CMP.

V. THIS COURT'S REASONING AND ANALYSIS:

17. Heard learned counsel for the Petitioners and perused the documents placed before this Court. Despite opportunities afforded, none appeared on behalf of the opposite parties, and the matter has accordingly been considered in their absence.

18. The question requiring determination is whether the order dated 06.01.2026 passed by the learned Civil Judge (Sr Division), Commercial

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Court, Sambalpur, refusing appointment of a Local Commissioner in Civil Suit No. 31 of 2025, warrants interference under Article 227 of the Constitution.

19. The order under challenge is interlocutory in nature. Section 8 of the Commercial Courts Act, 2015 expressly bars a civil revision application or petition against an interlocutory order of a Commercial Court and provides that, subject to Section 13, any such challenge shall be raised only in an appeal against the decree. Neither an order refusing a commission under Order XXVI Rule 9 nor an order declining inspection under Order XXXIX Rule 7 CPC falls within the appealable orders enumerated in Order XLIII Rule 1 CPC.

20. The legislative scheme thus restricts piecemeal statutory challenges to interlocutory orders, reserving objections to non-appealable orders for consideration in an appeal against the decree. This approach accords with the object of expeditious resolution of commercial disputes noticed by the Supreme Court in ***Jaycee Housing (P) Ltd. v. Registrar (General), Orissa High Court***.[3] That object must inform the consideration of the present challenge, without excluding the constitutional jurisdiction of this Court. The relevant excerpt is produced hereinbelow:

> *"That thereafter, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 was passed by the Parliament, which has been subsequently re-named as Commercial Courts Act, 2015.*
>
> *The statements of Objects and Reasons of the said Act, inter alia, provides as under:*

[3] (2023) 1 SCC 549

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"The proposal to provide for speedy disposal of high value commercial disputes has been under consideration of the Government for quite some time. The high value commercial disputes involve complex facts and question of law. Therefore, there is a need to provide for an independent mechanism for their early resolution. Early resolution of commercial disputes shall create a positive image to the investor world about the independent and responsive Indian legal system."

21. In ***Radhey Shyam v. Chhabi Nath,***[4] the Supreme Court distinguished the supervisory jurisdiction under Article 227 from the writ jurisdiction under Article 226 and clarified that curtailment of statutory revisional jurisdiction does not enlarge the power of superintendence. The relevant excerpt is produced hereinbelow:

"26. The Bench in Surya Dev Rai also observed in para 25 of its judgment that distinction between Articles 226 and 227 stood almost obliterated. In para 24 of the said judgment distinction in the two articles has been noted. In view thereof, observation that scope of Article 226 and 227 was obliterated was not correct as rightly observed by the referring Bench in Para 32 quoted above. We make it clear that though despite the curtailment of revisional jurisdiction under Section 115 CPC by Act 46 of 1999, jurisdiction of the High Court under Article 227 remains unaffected, it has been wrongly assumed in certain quarters that the said jurisdiction has been expanded. Scope of Article 227 has been explained in several decisions including Waryam Singh and another vs. Amarnath and another, Ouseph Mathai vs. M. Abdul Khadir, Shalini Shyam Shetty vs. Rajendra Shankar Patil and Sameer Suresh Gupta vs. Rahul Kumar Agarwal[14]. In Shalini Shyam Shetty, this Court observed:

[4] (2015) 5 SCC 423

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"64. However, this Court unfortunately discerns that of late there is a growing trend amongst several High Courts to entertain writ petition in cases of pure property disputes. Disputes relating to partition suits, matters relating to execution of a decree, in cases of dispute between landlord and tenant and also in a case of money decree and in various other cases where disputed questions of property are involved, writ courts are entertaining such disputes. In some cases the High Courts, in a routine manner, entertain petitions under Article 227 over such disputes and such petitions are treated as writ petitions.

65. We would like to make it clear that in view of the law referred to above in cases of property rights and in disputes between private individuals writ court should not interfere unless there is any infraction of statute or it can be shown that a private individual is acting in collusion with a statutory authority.

66. We may also observe that in some High Courts there is a tendency of entertaining petitions under Article 227 of the Constitution by terming them as writ petitions. This is sought to be justified on an erroneous appreciation of the ratio in Surya Dev and in view of the recent amendment to Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999. It is urged that as a result of the amendment, scope of Section 115 CPC has been curtailed. In our view, even if the scope of Section 115 CPC is curtailed that has not resulted in expanding the High Court's power of superintendence. It is too well known to be reiterated that in exercising its jurisdiction, High Court must follow the regime of law.

67. As a result of frequent interference by the Hon'ble High Court either under Article 226 or 227 of the Constitution with pending civil and at times criminal cases, the disposal of cases by the civil and criminal courts gets further impeded and thus causing serious problems in the administration of justice. This Court hopes and trusts that in exercising its power either under Article 226 or 227, the

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Hon'ble High Court will follow the time honoured principles discussed above. Those principles have been formulated by this Court for ends of justice and the High Courts as the highest courts of justice within their jurisdiction will adhere to them strictly."

27. Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. We are also in agreement with the view of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226.

28. We may also deal with the submission made on behalf of the respondent that the view in Surya Dev Rai stands approved by larger Benches in Shail, Mahendra Saree Emporium and Salem Advocate Bar Assn and on that ground correctness of the said view cannot be gone into by this Bench. In Shail, though reference has been made to Surya Dev Rai, the same is only for the purpose of scope of power under Article 227 as is clear from para 3 of the said judgment. There is no discussion on the issue of maintainability of a petition under Article 226. In Mahendra Saree Emporium, reference to Surya Dev Rai is made in para 9 of the judgment only for the proposition that no subordinate legislation can whittle down the jurisdiction conferred by the Constitution. Similarly, in Salem Bar Assn. in para 40, reference to Surya Dev Rai is for the same purpose. We are, thus, unable to accept the submission of learned counsel for the respondent.

29. Accordingly, we answer the question referred as follows:
(i) Judicial orders of civil court are not amenable to writ jurisdiction under Article 226 of the Constitution;
(ii) Jurisdiction under Article 227 is distinct from jurisdiction from jurisdiction under Article 226."

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22. Likewise, in ***Shalini Shyam Shetty v. Rajendra Shankar Patil***,[5] the Supreme Court explained that, although Article 227 cannot be curtailed by statute, it cannot be invoked merely to correct ordinary errors of fact or law or substitute another possible view. The present petition must consequently be examined within the limits of supervisory jurisdiction.

> "49. *On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:*
>
> …
>
> *(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.*
> *(i) High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in the case of L. Chandra Kumar vs. Union of India & others, reported in (1997) 3 SCC 261 and therefore abridgement by a Constitutional amendment is also very doubtful.*
> *(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227."*

[5] (2010) 8 SCC 329

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23. Those limits were reiterated in ***Garment Craft v. Prakash Chand Goel***,[6] where it was elucidated that the High Court does not act as a court of first appeal to reappreciate the material or replace the subordinate court's factual conclusions with its own. Interference is warranted where the order discloses a grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The relevant para is produced hereinbelow:

> *"15. Having heard the counsel for the parties, we are clearly of the view that the impugned order is contrary to law and cannot be sustained for several reasons, but primarily for deviation from the limited jurisdiction exercised by the High Court under Article 227 of the Constitution of India. The High Court exercising supervisory jurisdiction does not act as a court of first appeal to reappreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion, for that of the inferior court or tribunal.1 The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, 1Celina Coelho Pereira (Ms) and Others v. Ulhas Mahabaleshwar Kholkar and Others, (2010) 1 SCC violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It is axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice."*

[6] (2022) 4 SCC 181

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24. Therein, the Supreme Court also clarified that supervisory jurisdiction is not exercised to correct every factual error or legal flaw where the ultimate conclusion remains supportable. The inquiry, therefore, is whether the refusal of the application suffers from an infirmity of that character, rather than whether this Court might independently have considered some form of inspection appropriate.

25. Now, the application must nevertheless be considered under the provisions actually invoked. Order XXVI Rule 9 CPC permits local investigation where the Court considers it requisite or proper to elucidate a matter in dispute or ascertain, among other matters, *mesne* profits or damages.

26. Order XXXIX Rule 7 CPC separately authorises detention, preservation or inspection of relevant property and entry into premises for those purposes. Section 135(2)(b) of the Trade Marks Act, 1999 expressly contemplates interlocutory orders preserving infringing goods, documents and other evidence related to the subject matter of the suit. The Commercial Court was therefore required to examine the purpose and factual basis of the proposed measures under these provisions. The application could not be disposed of solely by invoking a general proposition that a Commissioner cannot collect evidence for a party.

27. The distinction is illustrated by ***Committee of Management, Anjuman Intezamia Masajid, Varanasi v. Rakhi Singh.***[7] While considering a scientific investigation under Order XXVI Rule 10A CPC, the Supreme Court explained that a Commissioner's report and the evidence taken

[7] 2023 SCC OnLine SC 980

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by the Commissioner form part of the record, subject to objections, examination of the Commissioner and scrutiny during trial. The report does not, by itself, constitute a substantive determination of the disputed rights. The Court also recognised the trial court's discretion to direct an investigation, subject to appropriate safeguards. Although that case concerned a scientific survey, its explanation of the evidentiary function of a commission is relevant here. The circumstance that an investigation produces evidence cannot, by itself, render the exercise impermissible.

28. The observation concerning collection of evidence in the impugned order must accordingly be qualified. Where inspection or preservation falls within the applicable statutory provisions, the Court must examine whether the proposed exercise would serve a legitimate adjudicatory or preservative purpose and whether the material justifies its scope. At the same time, the existence of the statutory power does not make its exercise automatic. The applicant must disclose a sufficient basis for the particular intervention requested, and the Court must consider its likely effect upon the possession, property and business operations of the affected party.

29. In the present case, the application sought substantially more than inspection and preparation of a report. It contemplated seizure of goods, packaging and business records, breaking open locks where necessary, police assistance, photography and videography, participation of the petitioners' representative and delivery of seized goods to the petitioners upon an undertaking. It also extended to

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additional premises identified by the petitioners. The petitioners were not required to establish the exact quantity of goods beforehand or await actual destruction of evidence. Nevertheless, measures of the breadth sought required sufficiently specific particulars or material enabling the Court to assess their necessity and extent. The petitioners' inability to enter the opposite parties' premises privately could not, standing alone, justify the entire range of relief claimed.

30. The Commercial Court recorded a distinct finding that the assertion concerning substantial stocks of the disputed goods and the apprehension of their removal were unsupported by material. That finding addressed the factual foundation of the application. The prima facie assessment underlying the injunction dated 10.11.2025 did not necessarily establish the existence or location of the stocks referred to in the commission application.

31. Similarly, material concerning resemblance between the rival marks or packaging did not, without further consideration, establish the necessity of entering premises and seizing goods and records. The deficiency identified by the Commercial Court was therefore not merely the absence of precise stock figures, but the absence of sufficient material supporting the particular intervention requested. No basis has been demonstrated for treating that assessment as perverse within the limits of Article 227.

32. The subsisting injunction was also relevant, though its existence could not furnish a complete answer to the application. Restraining future conduct and preserving material for adjudication serve different

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purposes. An injunction against use of the disputed marks does not necessarily remove the need for a preservation order. In the present case, however, the order dated 10.11.2025 additionally required the opposite parties to maintain and preserve complete accounts of stock and sales and produce them when directed.

33. That direction did not preserve the goods themselves, but afforded protection relevant to the petitioners' concern regarding ascertainment of damages or profits. The Commercial Court was entitled to consider that protection while examining whether additional measures had been justified. The injunction did not automatically confer an entitlement to a commission with the powers sought.

34. The reliance upon rejection of the application under Order XXXIX Rule 2A CPC requires a further clarification. In ***Food Corporation of India v. Sukh Deo Prasad,***[8] , the Supreme Court emphasised that exercise of the punitive power under that provision requires clear establishment of the obligation imposed by the injunction and its breach. An application seeking inspection or preservation raises a different question:

> *"The power exercised by a court under order 39, Rule 2A of the Code is punitive in nature, akin to the power to punish for civil contempt under the Contempt of Courts Act, 1971. The person who complains of disobedience or breach has to clearly make out beyond any doubt that there was an injunction or order directing the person against whom the application is made, to do or desist from doing some specific thing or act and that there was disobedience or breach of such order. While considering an application under order 39 Rule 2A, the court cannot construe the order in regard to which disobedience/breach is alleged, as*

[8] (2009) 5 SCC 665

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creating an obligation to do something which is not mentioned in the `order', on surmises suspicions and inferences. The power under Rule 2A should be exercised with great caution and responsibility…."

35. Failure to establish disobedience from the photographs and videos relied upon does not establish that no disputed goods exist or exclude otherwise justified protective relief. Moreover, the commission application had been filed at the institution of the suit and did not originate merely from the subsequent allegation of breach. Rejection of the Rule 2A application by order dated 02.01.2026 could therefore not, merely by reason of that rejection, operate as a legal bar to consideration of the commission application. The correctness of that separate order does not arise for determination in the present CMP.

36. These qualifications do not, however, require the impugned order to be set aside. Apart from its observations concerning collection of evidence and rejection of the application under Order XXXIX Rule 2A CPC, the Commercial Court separately recorded that the assertion concerning substantial stocks of the disputed goods and the apprehension of their removal were unsupported by material. The significance of that finding lies in the extensive measures sought, including entry into premises, seizure of goods and business records, breaking open locks and police assistance. The deficiency was not the failure to establish the precise quantity of stock, prove an actual breach of the injunction or demonstrate that destruction of evidence had already occurred. It was the absence of sufficient supporting material for the circumstances

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relied upon to justify those measures. Although the statutory powers of inspection and preservation ought to have been expressly considered, the omission to discuss them separately does not, in the circumstances of this case, displace that independently recorded factual assessment.

37. The petitioners have not demonstrated that the Commercial Court overlooked material bearing upon the necessity of the measures sought or reached a conclusion contrary to the record. In the absence of such an infirmity, interference would amount to substituting this Court's assessment of the sufficiency of the material for that of the Commercial Court, contrary to the principle in ***Garment Craft*** (supra). The possibility that a more limited inspection might have been considered does not, by itself, establish a jurisdictional error or patent perversity warranting interference under Article 227. The conclusion is confined to the application as framed and the material placed in its support; it does not endorse a general prohibition against inspection or preservation of evidence in an intellectual-property dispute.

38. Nor does the absence of an objection to the application, or the opposite parties' non-appearance before this Court, compel its acceptance. In ***Balraj Taneja v. Sunil Madan,***[9] the Supreme Court held that a court cannot mechanically grant relief merely because the defendant has failed to file a written statement; it must independently satisfy itself that the facts justify the relief claimed. The relevant excerpt is produced hereinbelow:

[9] (1999) 8 SCC 396

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> *"29. As pointed out earlier, the Court has not to act blindly upon the admission of a fact made by the defendant in his Written Statement nor the Court should proceed to pass judgment blindly merely because a Written Statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the Court. In a case, specially where a Written Statement has not been filed by the defendant, the Court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of Court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the Court can conveniently pass a judgment against the defendant who has not filed the Written Statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression 'the Court may, in its discretion, require any such fact to be proved' used in sub-rule (2) of Rule 5 of Order 8, or the expression 'may make such order in relation to the suit as it thinks fit' used in Rule 10 of Order 8."*

39. Although that abovementioned judgment arose under Order VIII Rule 10 CPC, the underlying requirement of judicial satisfaction applies here as well. The absence of opposition does not dispense with scrutiny of the necessity and permissible extent of an order authorising entry, seizure and police assistance. The present petition has accordingly been examined on its merits notwithstanding the opposite parties' absence.

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40. The refusal of the present application does not determine the petitioners' substantive claims or foreclose protective relief upon a materially different factual basis. In ***Arjun Singh v. Mohindra Kumar,***[10] the Supreme Court distinguished different classes of interlocutory orders and explained that protective orders may be reconsidered upon new facts or situations subsequently emerging, while repetitive applications on an unchanged basis may be rejected. The relevant paragraph is produced hereinbelow:

> *"13. It is needless to point out that interlocutory orders are of various kinds; some like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the court usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly, capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principle of res judicata does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been disposed of the Court would be justified in rejecting the same as an abuse of the process of Court. There are other orders which are also interlocutory, but would fall into a different category. The difference from the ones just now referred to lies in the fact that they are not directed to maintaining the status quo, or to preserve the property pending the final adjudication; but are designed to ensure the just, smooth, orderly and expeditious disposal of the suit. They are*

[10] AIR 1964 SC 993

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interlocutory in the sense that they do not decide any matter in issue arising in the suit, not put an end to the litigation."

41. Accordingly, if subsequent material or materially changed circumstances furnish specific grounds for inspection or preservation at identified premises, it shall be open to the petitioners to seek suitably confined directions before the Commercial Court. This liberty does not authorise repetition of the same application on an unchanged factual basis.

42. Any such application shall be considered independently under the applicable provisions, including Section 135(2) of the Trade Marks Act and Order XXXIX Rule 7 CPC, with Order XXVI Rule 9 CPC applied where appropriate. The inquiry shall concern the connection of the material sought to the dispute, the necessity and extent of the proposed intervention, and appropriate safeguards concerning entry, records and custody of goods. The application shall not be rejected upon an understanding that preservation of evidence is categorically impermissible or that failure to establish disobedience necessarily excludes protective relief.

VI. CONCLUSION:

43. For the foregoing reasons, no interference with the order dated 06.01.2026 is warranted in exercise of jurisdiction under Article 227 of the Constitution.

44. The Civil Misc Petition is **dismissed**, subject to the clarifications recorded above.

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45. Nothing stated herein shall be construed as a final expression on the parties' competing rights in the disputed marks or packaging, or on the claims for infringement, passing off, damages, accounts or delivery-up. Those questions remain open for adjudication in Civil Suit No. 31 of 2025.

46. There shall be no order as to costs.

47. Interim order, if any, passed earlier stands vacated.

(Dr. Sanjeeb K Panigrahi)
Judge

Orissa High Court, Cuttack,
Dated the 30th October, 2026

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