A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No.770 of 2026
CNR No. ODHC010332742026

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

Sk. Tayeb Hossain @ Sk. Tayab Hossain .... ***Petitioner (s)***

-versus-

Sk. Jahed Hossain & Anr. .... ***Opposite Party (s)***

Advocates appeared in this case through Hybrid Arrangement Mode**:**

For Petitioner (s) : *Mr. Prasanta Kumar Satapathy, P. Panda, B.K. Das, S. Pati, Advs.*

For Opp. Party (s) : *Mr. Arpita Mohapatra, Mr. Saumendra Padhy, Mr. D. K. Naik, Ms. Bhagyalaxmi Das, Advs. for O.Ps.1 & 2*

CORAM:
HON'BLE DR. JUSTICE SANJEEB K PANIGRAHI

DATE OF HEARING: -25.08.2026
DATE OF JUDGMENT: -30.10.2026

Dr. Sanjeeb K Panigrahi, J.

1. In filing the present Civil Miscellaneous Petition (CMP), the Petitioner, being the Plaintiff in C.S. No. 613 of 2025 pending before the learned Senior Civil Judge, Jagatsinghpur, has challenged the impugned order dated 22.04.2026 passed by the learned District Judge, Jagatsinghpur, in F.A.O. No. 9 of 2026, whereby his application under Order XXXIX

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Rule 7 CPC for appointment of an Amin Commissioner for local inspection of the suit property was rejected.

2. Apart from the above, the Petitioner has also sought for a direction from this Court to the learned Appellate Court to allow his application under Order XXXIX Rule 7 CPC for deputing a Survey Knowing Commissioner to conduct a field inspection of the suit property and submit a report before the learned Appellate Court.

I. FACTUAL MATRIX:

3. The Petitioner, being the Plaintiff, filed C.S. No. 613 of 2025 before the learned Senior Civil Judge, Jagatsinghpur, seeking partition of the joint family properties comprising Khata No. 32, Plot Nos. 489, 490 and 499, Khata No. 47, Plot Nos. 286 and 287, and Khata No. 262/20, Plot Nos. 491, 492 and 498, situated in Mouza Bishunupur under Tirtol Tahasil.

4. In the said suit, the Petitioner also filed I.A. No. 305 of 2025 under Order XXXIX Rules 1 and 2 CPC seeking temporary injunction. In the said application, the Petitioner alleged that the Opposite Parties had forcibly demolished a latrine and attempted to raise pucca construction over the entire frontage of Plot No. 499, measuring Ac. 0.17, under Khata No. 32 in Mouza Bishunupur. Apprehending obstruction of access to the remaining portion of the property, the Petitioner sought an interim injunction restraining further construction. The learned Trial Court, vide order dated 12.12.2025, passed an ad-interim order directing the parties to maintain status quo over the suit land and restraining further construction. The Petitioner alleged that the Opposite Parties

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nevertheless proceeded with the construction by producing a forged certified copy of the order. Subsequently, after hearing both parties, the learned Trial Court, vide order dated 10.03.2026, allowed I.A. No. 305 of 2025 and directed the parties to maintain status quo over the suit land.

5. Challenging the said order, the Opposite Parties filed F.A.O. No. 9 of 2026 before the learned District Judge, Jagatsinghpur. In the said appeal, the Opposite Parties contended that they had already raised a partially constructed building over the suit land upto roof level and sought permission to complete the construction by casting the roof, subject to an undertaking. Keeping in view the nature of the dispute involved in the appeal and to ascertain the actual physical condition of the suit land, the present Petitioner filed an application under Order XXXIX Rule 7 CPC for deputation of an Amin Commissioner to inspect the scheduled property and submit a report. The Petitioner also suggested questionnaires for the proposed enquiry in the schedule of the application.

6. The Opposite Parties filed an objection contending that the application for local inspection at the appellate stage was not maintainable and had been filed with the intention of collecting evidence. In this context, the Petitioner submitted that an appeal under Order XLIII Rule 1(r) CPC is in the nature of a first appeal and that a factual enquiry may be necessary for effective adjudication of the dispute. The Opposite Parties had challenged the injunction order dated 10.03.2026 passed in I.A. No.

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305 of 2025 arising out of C.S. No. 613 of 2025, whereby the learned Trial Court had directed the parties to maintain status quo over Plot No. 499, Khata No. 32, measuring Ac. 0.17, kisam Bagayat, situated in Mouza Bishunupur. The Petitioner claimed a one-fifth share in the said joint family property.

7. According to the Petitioner, the suit land is joint family property and the Plaintiff's branch is entitled to a one-fifth share therein. The said property has not been partitioned by metes and bounds and no specific allotment or identification of the respective shares has been made between the co-sharers. As per the dimensions furnished by the Petitioner, the length of Plot No. 499 is 180 kadi on the northern side and 190 kadi on the southern side, while its breadth is 95 kadi on the eastern and western sides. The land is recorded as kisam Bagayat.

8. The eastern side of the plot is adjacent to the village road and the frontage adjoining the road measures approximately 50 feet (95 kadi). The Petitioner relied upon the sketch map attached to the plaint to explain the dimensions and location of the property. It was alleged that the Opposite Parties had forcibly occupied a substantial portion of the land and obstructed its frontage by raising construction. According to the Petitioner, the construction extended over approximately 50 kadi of the frontage, leaving only about 35 kadi as passage to approach the rear portion of the plot.

9. The Petitioner further alleged that Plot No. 499 was initially vacant and that the Opposite Parties commenced construction thereon which was

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opposed by the Petitioner, resulting in a dispute and apprehension of breach of peace. Consequently, a proceeding under Section 163 of the Bharatiya Nagarik Suraksha Sanhita, 2023, bearing Criminal Misc. Case No. 160 of 2025, was initiated before the learned Executive Magistrate, Tirtol, on 14.11.2025. On the same date, the learned Executive Magistrate restrained the parties from raising construction over the suit land. In the said proceeding, a field enquiry was conducted and a report was submitted on 20.11.2025.

10. The field enquiry report dated 20.11.2025 recorded that a septic tank measuring 13 feet in length and 11 feet in breadth, covering an area of 143 sq. ft., was under construction over Plot No. 499. It further recorded that another house structure, having a base area of approximately 693.25 sq. ft., had been constructed up to the plinth level and that the construction had been stopped.

11. The learned Executive Magistrate, vide order dated 07.12.2025, permitted construction of the latrine and bathroom near the septic tank while restraining further construction of any other structure over Plot No. 499. The Petitioner also relied upon the report dated 02.12.2025 submitted by the ASI, Krushnanandapur Police Station, which recorded service of notice restraining construction and referred to the construction of the septic tank.

12. The learned Trial Court, vide order dated 12.12.2025, passed an ad-interim order directing the parties to maintain status quo over Plot No. 499, measuring Ac. 0.17 under Khata No. 32 and restraining further

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construction till appearance and filing of show cause. The said interim order was thereafter continued from time to time and the application for temporary injunction was finally disposed of on 10.03.2026. The Petitioner alleged that the Opposite Parties had produced a forged order of the learned Trial Court before the Krushnanandapur Police Station on 27.12.2025, purporting to show that the status quo order had been vacated. Upon the matter being brought to its notice, the learned Trial Court called for a police report and, vide order dated 15.01.2026, recorded its observation regarding the production of a forged order sheet before the police to obtain undue advantage for continuing construction. The learned Trial Court accordingly directed the police to take action in accordance with law.

13. The Petitioner submitted that the reports submitted in the proceeding before the learned Executive Magistrate indicated that the house construction had reached only the plinth level and that further construction had been restrained. However, in Ground H of the memorandum of appeal, the Opposite Parties asserted that the building had already reached roof level and that only casting of the roof remained. According to the Petitioner, this assertion raised a serious question as to whether further construction had been undertaken during the subsistence of the restraint orders. The Petitioner, therefore, contended that deputation of a Survey Knowing Commissioner was necessary to ascertain the nature, extent and stage of construction. It was further contended that any construction undertaken in violation of

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the subsisting orders could not confer an advantage upon the Opposite Parties.

14. The Opposite Parties claimed rights over the property on the basis of a sale deed dated 07.11.2009. The Petitioner disputed their entitlement to raise permanent construction over any specifically identified portion of the property, contending that the joint family land had not been partitioned by metes and bounds. According to the Petitioner, in the absence of partition and separate allotment, the Opposite Parties could not claim exclusive rights over a particular portion of the joint property for raising a permanent structure.

15. The Petitioner further alleged that the Opposite Parties were attempting to obstruct substantially the entire frontage of Plot No. 499 by raising construction before partition. It was contended that such construction would cause serious prejudice and hardship to the Petitioner and the other co-sharers by restricting access to and use of the remaining portion of the joint property.

16. In view of the aforesaid factual position, the Petitioner contended that the nature and extent of construction, the area occupied by the structures and the alleged obstruction of the frontage required inspection by a Survey Knowing Commissioner. He further stated that such inspection was necessary to ascertain the physical condition of the property for assisting the learned Appellate Court in adjudicating the dispute. It was further submitted that the Petitioner was unable to undertake an independent inspection or measurement through a

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private Amin due to the alleged obstruction by the Opposite Parties. The Petitioner relied upon the earlier enquiry reports indicating construction up to the plinth level and contrasted them with the assertion made by the Opposite Parties in the appeal that the building had reached roof level, without specifying the extent of such construction.

17. The learned Appellate Court, while passing the impugned order dated 22.04.2026, observed that the suit land was recorded as kisam Bagayat and was open and accessible to the parties. The application for local inspection was accordingly rejected. The Petitioner contended that the learned Appellate Court had failed to consider that the dispute concerned the alleged unauthorised construction and obstruction of the frontage of the property, rather than merely its identification or accessibility. Hence, the present CMP.

II. SUBMISSIONS OF THE PETITIONER:

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

(i) The Petitioner submitted that the learned Appellate Court had considered the application for deputation of an Amin Commissioner for field inspection and submission of a report in a mechanical manner, without appreciating the allegations of illegal construction carried out by the Opposite Parties over the suit land. The principal issue involved in the matter was that the Opposite Parties had allegedly raised construction during the

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subsistence of the interim orders passed by the learned Executive Magistrate and the learned Trial Court, exceeding their claimed share and obstructing the frontage of the suit land. However, the learned Appellate Court had merely observed that the suit land was recorded as kisam Bagayat and was an open space accessible to the parties, without considering the allegations concerning the construction thereon. The questions appended to the application had not been taken into consideration, nor had the contentions raised therein been adequately dealt with by the learned Appellate Court. Therefore, the impugned order was not sustainable in law and was liable to be set aside.

(ii) It was further submitted that the Petitioner, being the Plaintiff in the suit and the Respondent in F.A.O. No. 9 of 2026, had sought appointment of an Amin Commissioner under Order XXXIX Rule 7 CPC for local inspection of the disputed property. The dispute between the parties pertained to alleged unauthorised construction over the suit land, and the proposed inspection was necessary to ascertain the actual physical condition of the property, particularly the nature and stage of construction.

(iii) The Petitioner also asserted that the Opposite Parties had blocked a substantial portion of the frontage of the suit land, thereby causing prejudice to the Petitioner and the other co-sharers. The field enquiry report dated 20.11.2025 disclosed the construction of a septic tank measuring 13 feet in length and 11 feet in breadth,

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covering an area of 143 sq. ft., and also referred to a house structure constructed up to the plinth level. Despite the continuation of the interim orders restraining further construction, the Opposite Parties had subsequently claimed in their memorandum of appeal that the house had reached roof level. According to the Petitioner, this raised a serious question regarding violation of the interim orders. Hence, a Civil Court Commissioner was required to conduct a field inspection and submit a report regarding the nature, extent and stage of construction, the area occupied by the structures and the availability of passage for the other family members to approach the rear portion of the property.

(iv) Accordingly, the Petitioner prayed for setting aside the impugned order and for a direction to the learned Appellate Court to depute a Civil Court Commissioner under Order XXXIX Rule 7 CPC. In support of his submissions, the Petitioner placed reliance upon the decisions in ***Kangali Khatei & Ors. Vrs. Alekh Khatei & Ors.***[1]***, Paradip Port Trust represented through its Secretary & Anr. Vrs. Sankhanad Behera & Ors.***[2]***, Abdul Naim Khan & Anr. Vrs. Sk. Kefaittullah & Ors.***[3] ***and Pramod Chandra Senapati Vrs. Sanatan Jena & Ors.***[4]

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[1] **2021 OLR Vol.1 Page 78**
[2] **2016 SCC OnLine Orissa 753**
[3] **2013 Supplementary OLR Page 253**
[4] **2015 CLT Vol.119 Page 1127**

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III. SUBMISSIONS OF THE OPPOSITE PARTIES:

19. Per contra, learned counsel for the Opposite Parties submitted that the application filed by the Petitioner under Order XXXIX Rule 7 CPC was merely an attempt to collect evidence. The Petitioner had never sought appointment of a Commissioner before the learned Trial Court and had filed the application only at the appellate stage. The questionnaire appended to the application itself demonstrated that the Petitioner sought determination of the stage and extent of construction, legality of construction, alleged encroachment and obstruction. These were disputed questions of fact which were required to be decided upon appreciation of evidence during trial.

20. It was further submitted that the Petitioner had himself described the suit property, furnished its boundaries and measurements, filed a sketch map and specified the frontage in his pleadings. The learned Appellate Court had, therefore, correctly refused appointment of an Amin Commissioner, particularly when the appeal was directed against an order of temporary injunction. The Appellate Court was required to examine the correctness of the order under appeal and not permit fresh collection of evidence. Appointment of a Commissioner at this stage would defeat the purpose of the trial.

21. The Opposite Parties further asserted that the allegations regarding violation of the injunction order, extent of construction, obstruction of frontage and alleged encroachment were seriously disputed questions

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of fact requiring adjudication during trial. Such issues could not be determined merely through the report of a Commissioner.

22. It was also submitted that the Petitioner had suppressed material facts, including the complete genealogy of the family, the rights of Hadisun Bibi and Juma Bibi, the registered sale deed and the mutation standing in favour of Opposite Party No. 2. According to the Opposite Parties, these were material circumstances relevant to the rights claimed over the disputed property.

23. The Opposite Parties further submitted that the Petitioner's own documents contradicted his allegations regarding the commencement of construction. The police reports relied upon by the Petitioner themselves disclosed the existence of a residential structure over the suit land. Therefore, the allegation that construction had commenced only after initiation of the proceedings was disputed by the materials relied upon by the Petitioner himself.

24. It was further asserted that the Opposite Parties had acted bona fide and, instead of violating the injunction order, had preferred F.A.O. No. 9 of 2026 before the learned Appellate Court. They had also furnished an undertaking that, if any construction was ultimately found to have been raised beyond the land purchased by them, they would remove the same without claiming any equity.

25. In support of their submissions, the Opposite Parties relied upon the decisions in ***Santilata Nayak & Ors. v. Nilamani Behera & Ors. C.M.P. No. 1859 of 2016***, and ***Gurunath Manohar Pavaskar v. Nagesh***

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Siddappa Navalgund[5]. Reliance was placed on the former decision to contend that an application under Order XXXIX Rule 7 CPC ought not to be entertained where the proposed inspection would amount to collection of evidence concerning matters requiring adjudication during trial. The latter decision was relied upon with reference to the discretion of the Trial Court to appoint a Commissioner for measurement and identification of disputed land where such necessity arises.

26. The Opposite Parties, accordingly, submitted that the jurisdiction under Order XXXIX Rule 7 CPC could not be exercised to enable a party to collect evidence on matters constituting the substantive controversy in the suit, which were required to be established through pleadings and evidence during trial. Permitting such an exercise at the appellate stage would effectively allow the Petitioner to secure evidence outside the regular trial process and thereby frustrate the procedure of adjudication. Accordingly, the Opposite Parties prayed for dismissal of the present CMP.

IV. FINDING OF THE LEARNED DISTRICT JUDGE, JAGATSINGHPUR:

27. The learned District Judge, Jagatsinghpur, vide the impugned order dated 22.04.2026 passed in F.A.O. No. 9 of 2026, rejected the application filed by the Petitioner under Order XXXIX Rule 7 CPC for appointment of an Amin Commissioner. The learned Appellate Court observed that the suit land was recorded as kisam Bagayat and was accessible to the

[5] (2007) 13 SCC 565

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parties, and that its physical condition could be established through evidence adduced by witnesses. It further observed that the application appeared to have been filed for collection of evidence at the appellate stage, whereas the Appellate Court was required to examine the legality and propriety of the injunction order on the basis of the materials available before the learned Trial Court. Finding that no exceptional circumstances had been shown necessitating local inspection at the appellate stage, the learned Appellate Court rejected the application as not maintainable at that stage and devoid of merit.

V. COURT'S REASONING AND ANALYSIS:

28. Heard learned counsel for the parties and perused the materials available on record.

29. The dispute concerns a parcel of land measuring Ac. 0.17, recorded as kisam Bagayat, situated in Mouza Bishunupur, which forms part of the joint family property sought to be partitioned in C.S. No. 613 of 2025. The controversy, which initially arose before the learned Executive Magistrate, Tirtol, subsequently travelled to the learned Trial Court and thereafter to the learned District Judge in F.A.O. No. 9 of 2026. The question presently arising for consideration is very narrow. The Opposite Parties, who are the appellants before the learned Appellate Court, have asserted that the building raised over the disputed property has reached up to roof level and have sought permission to complete the construction by casting the roof. The Petitioner, on the other hand, maintains that the construction could not lawfully have

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progressed beyond the plinth level in view of the restraint orders passed by the competent authorities and the learned Trial Court. In these circumstances, the issue requiring consideration is whether the learned Appellate Court was justified in rejecting the application for appointment of a commissioner to ascertain the existing physical condition of the property.

30. Order XXXIX Rule 7(1) CPC empowers the Court, upon an application by a party to the suit and on such terms as it thinks fit, to direct the detention, preservation or inspection of any property which is the subject matter of the suit or concerning which any question may arise therein. For these purposes, the Court may authorise a person to enter upon the land or building in the possession of another party and to make such observations as may be necessary or expedient for obtaining full information or evidence. The provision thus enables the Court to ascertain and preserve the physical condition of the property where the circumstances of the dispute warrant such assistance. The power is discretionary and must be exercised judicially, having regard to the nature of the controversy, the purpose of the proposed inspection and its necessity for proper adjudication. It is neither an automatic entitlement available on the mere asking of a party nor a power which can be declined without consideration of the circumstances necessitating its exercise.

31. The purpose of inspection under Order XXXIX Rule 7 CPC must also be distinguished from that of a commission for local investigation

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under Order XXVI Rule 9 CPC. While the latter provision enables the Court to elucidate matters in dispute through local investigation, the former expressly contemplates inspection and preservation of the property which forms the subject matter of the proceedings. The two provisions may overlap in their practical application, but their purposes and statutory requirements are not identical. In a suit for partition, where the respective shares of the parties have not yet been determined and allotted by metes and bounds, the physical condition of the joint property assumes particular significance. Any substantial alteration in its condition during the pendency of the proceedings may affect the interests of the co-sharers and the efficacy of the relief ultimately granted. The Court must, therefore, remain mindful of the necessity to protect the subject matter of the litigation without prejudging the competing claims of ownership or possession.

32. This Court is also conscious of the fact that the jurisdiction under Article 227 of the Constitution of India is supervisory and not appellate. In ***Waryam Singh v. Amarnath***[6] the Supreme Court has held that the power of superintendence under Article 227 of the Constitution of India is to be exercised sparingly and only in appropriate cases to keep subordinate Courts within the bounds of their authority, and not merely to correct errors. The principles governing the exercise of such jurisdiction were subsequently reiterated in ***Shalini Shyam Shetty v.***

[6] AIR 1954 SC 215

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Rajendra Shankar Patil[7] wherein the Supreme Court held that supervisory jurisdiction under Article 227 cannot be exercised merely to correct errors of law or fact, or because another view is possible. The power is to be exercised sparingly and only in circumstances warranting supervisory interference.

33. Similarly, in ***Garment Craft v. Prakash Chand Goel***[8]***,*** the Supreme Court reiterated the limited scope of supervisory jurisdiction under Article 227 of the Constitution of India. It was observed as follows:

> *"15. … 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. [Celina Coelho Pereira v. Ulhas Mahabaleshwar Kholkar, (2010) 1 SCC 217 : (2010) 1 SCC (Civ) 69] The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, 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."*

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[7] (2010) 8 SCC 329

[8] (2022) 4 SCC 181

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The aforesaid decision makes it clear that supervisory jurisdiction is corrective in nature and must be exercised sparingly, particularly where there is grave dereliction of duty, flagrant abuse or violation of fundamental principles of law or justice. The present case must, therefore, be examined within these established limits.

34. Section 107(2) CPC provides that, subject to the conditions and limitations prescribed, an Appellate Court shall have the same powers and perform, as nearly as may be, the same duties as are conferred and imposed upon Courts of original jurisdiction. Order XLIII Rule 2 CPC further makes the rules of Order XLI applicable, so far as may be, to appeals from orders. The mere fact that the proceedings have reached the appellate stage does not, therefore, by itself extinguish the power to direct an appropriate inspection of the property.

35. In ***Pasupuleti Venkateswarlu v. Motor & General Traders***[9]**,** the Supreme Court recognised that subsequent developments having a material bearing on the relief sought may be taken into consideration even during the pendency of appellate proceedings, subject to fairness to the parties. The Supreme Court observed that the Court may "*take cautious cognisance of events and developments subsequent to the institution of the proceeding*", provided that the rules of fairness to both parties are scrupulously observed. The principle underlying the aforesaid decision is that judicial relief must remain responsive to material changes in circumstances without disregarding the applicable procedural

[9] (1975) 1 SCC 770

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safeguards. In the present case, the assertion that the construction had reached roof level and the accompanying prayer for permission to complete it were matters requiring consideration in the context of the relief sought before the learned Appellate Court.

36. The principle governing appellate interference with discretionary orders of temporary injunction was explained in ***Wander Ltd. v. Antox India (P) Ltd***[10] wherein the Supreme Court observed:

> *"14. …An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion."*

The aforesaid principle restrains an Appellate Court from substituting its own discretion merely because another view is possible, unless the discretion exercised by the Court below is shown to be arbitrary, capricious, perverse or contrary to settled principles of law. This restraint, however, must be distinguished from the power of the Appellate Court to consider material subsequent developments, as

[10] 1990 Supp SCC 727

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recognised in ***Pasupuleti Venkateswarlu (supra)***, where such consideration is necessary for determining the relief sought before it. In the present case, the Opposite Parties did not merely challenge the correctness of the injunction order dated 10.03.2026. In Ground H of their memorandum of appeal, they asserted that the construction had reached roof level and sought permission to complete it by casting the roof, while offering an undertaking in support of that prayer. The learned Appellate Court was, therefore, confronted not only with the question whether the learned Trial Court had properly exercised its discretion, but also with a prayer concerning the continuation of construction over the disputed property. In considering such a prayer, the existing physical condition of the property could assume material significance. The restraint applicable to appellate interference with an interlocutory order cannot be understood as an absolute prohibition against considering relevant subsequent circumstances in accordance with law.

37. The Appellate Court is ordinarily not justified in substituting its discretion merely because another view is possible, unless the discretion exercised by the Court below is shown to be arbitrary, capricious, perverse or contrary to settled principles. This restraint, however, must be distinguished from the power of the Appellate Court to consider a material subsequent development where such consideration is necessary for determining the relief sought before it. In the present case, the Opposite Parties did not merely challenge the

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correctness of the injunction order dated 10.03.2026. In Ground H of their memorandum of appeal, they asserted that the construction had reached roof level and sought permission to complete it by casting the roof, while offering an undertaking in support of that prayer. The learned Appellate Court was, therefore, confronted not only with the question whether the learned Trial Court had properly exercised its discretion, but also with a prayer concerning the continuation of construction over the disputed property. In considering such a prayer, the existing physical condition of the property could assume material significance. The restraint applicable to appellate interference with an interlocutory order cannot be understood as an absolute prohibition against considering relevant subsequent circumstances in accordance with law.

38. The principal objection advanced by the Opposite Parties is that the application under Order XXXIX Rule 7 CPC was intended to collect evidence concerning disputed questions which ought to be decided during trial. The distinction underlying this objection is material. A Commissioner cannot be appointed merely to enable a party to discover or collect evidence which that party is otherwise required to establish. Nor can the Commissioner be authorised to determine questions of title, possession, encroachment or legality of construction which fall within the province of the Court.

39. A Commissioner cannot be appointed merely to enable a party to collect evidence which that party is otherwise required to establish. In

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Gurunath Manohar Pavaskar (supra), the Supreme Court emphasised that the burden of establishing title cannot be displaced by reliance upon a Commissioner's report and that substantive relief affecting proprietary rights cannot be granted without adjudicating the relevant questions of title. The Supreme Court also observed, in paragraph 14, that the Trial Court could appoint a Commissioner for measurement of the suit land while reconsidering the matter. The decision, therefore, does not prohibit local investigation in an appropriate case, but underscores the distinction between ascertaining the physical features of the property and adjudicating the substantive rights of the parties. In the present case, the proposed inspection is confined to the existing nature and extent of construction and is not intended to determine title, possession or the respective shares of the parties.

40. The question, therefore, is whether the proposed inspection in the present case is intended merely to collect evidence for the Petitioner or whether it would serve a legitimate purpose in assisting the learned Appellate Court. Whether the sale deed dated 07.11.2009 confers any particular right upon the Opposite Parties, what shares belong to the respective branches of the family, what rights Hadisun Bibi and Juma Bibi possessed and what legal consequences arise from the mutation in favour of Opposite Party No. 2 are matters which concern the substantive controversy in the partition suit. These questions must be determined upon appreciation of the pleadings and evidence in accordance with law. A Commissioner cannot be entrusted with their

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determination. However, the existence of structures upon Plot No. 499, their dimensions, the extent to which construction has progressed and the portion of the frontage adjoining the village road which remains unobstructed are matters relating to the physical condition of the property. These features are capable of being objectively observed and recorded through a local inspection. An investigation confined to such physical particulars would not, by itself, determine the respective rights of the parties or the legality of any construction. The distinction is significant because the Court must ensure that the proposed inspection serves the limited purpose for which it is warranted and does not become a substitute for evidence during trial.

41. In ***Haryana Waqf Board v. Shanti Sarup***[11], the Supreme Court considered a dispute concerning alleged encroachment upon land, wherein an application for appointment of a Local Commissioner under Order XXVI Rule 9 CPC had been rejected by the Trial Court. The Supreme Court observed that, having regard to the nature of the dispute concerning demarcation of the suit land, the application for local investigation had been wrongly rejected. It further held that the High Court ought to have considered whether appointment of a Local Commissioner was necessary in view of the nature of the dispute and the facts of the case. Although the decision arose under Order XXVI Rule 9 CPC, it reinforces the principle that the necessity for local investigation must be examined with reference to the particular

[11] (2008) 8 SCC 671.

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controversy requiring adjudication. In the present case, the application under Order XXXIX Rule 7 CPC was intended to ascertain the existing physical condition of the property, particularly the nature and extent of construction. The learned Appellate Court was, therefore, required to examine whether such an inspection would assist in deciding the relief sought before it, rather than rejecting the application merely on the general ground that it amounted to collection of evidence.

42. There is a further consideration arising from the nature of the disputed construction. Unlike a document whose contents ordinarily remain ascertainable from the record, the physical condition of a building may undergo alteration during the pendency of litigation. Where the stage and extent of construction are themselves disputed, a subsequent inspection may assist the Court in recording the condition existing at the time of such inspection. It may not conclusively establish the condition of the property on an earlier date, nor can it independently determine whether any construction was undertaken in violation of an injunction. Those questions would require consideration of the relevant orders and other evidence. Nevertheless, a contemporaneous record of the existing structures may be of assistance to the learned Appellate Court in considering the prayer for permission to complete construction. The Petitioner has also asserted that he is unable to undertake an independent measurement of the property because of obstruction by the Opposite Parties. Whether that assertion is ultimately established is a separate matter. Its relevance to the necessity

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for an impartial inspection, however, could not be disregarded without examination.

43. The sequence of events appearing from the record further explains the circumstances in which the application for local inspection was filed. On 14.11.2025, proceedings under Section 163 BNSS were initiated before the learned Executive Magistrate, Tirtol, and restrictions were imposed upon construction over the disputed land. The field enquiry report dated 20.11.2025 referred to a septic tank measuring approximately 143 sq. ft. and a house structure having a base area of approximately 693.25 sq. ft., which had reached the plinth level. The report dated 02.12.2025 referred to the service of notice restraining construction. By order dated 07.12.2025, the learned Executive Magistrate permitted construction of the latrine and bathroom while restraining further construction of other structures. Thereafter, on 12.12.2025, the learned Trial Court directed the parties to maintain status quo over Plot No. 499. The learned Trial Court, by order dated 15.01.2026, also recorded observations concerning the alleged production of a forged order sheet before the police and directed appropriate action in accordance with law. Subsequently, on 10.03.2026, the application for temporary injunction was allowed. Against this background, the Opposite Parties asserted in their memorandum of appeal that the house had reached roof level and sought permission to complete its construction. The difference between the stage of construction referred to in the earlier reports and that

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asserted in the appeal constituted a material circumstance requiring consideration. While these materials do not, by themselves, conclusively establish when the construction progressed or whether any particular order was violated, they disclose a factual controversy concerning the condition of the property which was relevant to the application for local inspection.

44. The allegation that construction continued during the subsistence of restraint orders also requires careful treatment. In ***Satyabrata Biswas v. Kalyan Kumar Kisku***[12], the Supreme Court considered the legal consequences of acts undertaken in violation of an order directing maintenance of status quo. It was observed that any act done in the teeth of the order of status quo is clearly illegal. The decision reiterates that a party cannot be permitted to derive an advantage from conduct undertaken in disregard of a subsisting judicial order.

45. The principle that a party cannot be permitted to derive an advantage from deliberate disobedience of judicial orders also finds support in ***Surjit Singh v. Harbans Singh***[13], and ***Delhi Development Authority v. Skipper Construction Co. (P) Ltd.***[14] These decisions underscore the importance of preserving the authority of judicial orders and preventing a party from benefiting from conduct undertaken in defiance thereof. However, the present proceedings do not require this Court to determine whether the Opposite Parties actually violated any

[12] (1994) 2 SCC 266.
[13] (1995) 6 SCC 50.
[14] (1996) 4 SCC 622.

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particular order or whether the construction was raised in breach of such restraint. Those questions must be examined by the competent Court upon consideration of the relevant materials and in accordance with law. The immediate question is whether the existing physical condition of the disputed property should be ascertained before the learned Appellate Court considers the prayer for completion of construction. An inspection directed for that limited purpose would not amount to a finding of disobedience or confer any advantage upon either party.

46. The undertaking furnished by the Opposite Parties before the learned Appellate Court also deserves consideration. According to the Opposite Parties, they had undertaken to remove any construction ultimately found to extend beyond the land purchased by them, without claiming equity. Such an undertaking may be relevant while considering the relief sought, but it does not, by itself, resolve the controversy concerning the existing nature and extent of construction. Nor can the mere furnishing of an undertaking dispense with the necessity of examining the physical circumstances where those circumstances materially bear upon the proposed relief. The police reports relied upon by the Opposite Parties, which refer to the existence of a residential structure, likewise do not conclusively resolve the dispute concerning the subsequent stage and extent of construction. These matters required the learned Appellate Court to consider whether an impartial inspection, confined to recording the physical

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features of the property, would assist in determining the application before it.

47. The reasoning adopted by the learned District Judge in rejecting the application rests principally upon three considerations. First, the suit land was recorded as kisam Bagayat and was considered open and accessible to the parties. Secondly, the physical condition of the property could be established through witnesses, making the proposed inspection an exercise in collection of evidence. Thirdly, no exceptional circumstances had been shown necessitating local inspection at the appellate stage. These considerations must be examined in the context of the nature of the dispute and the purpose for which inspection was sought.

48. The classification of the land as Bagayat does not, by itself, determine whether structures exist upon it or establish their present dimensions and condition. Equally, the possibility of adducing oral evidence does not necessarily render local inspection unnecessary in every case. The relevant consideration is whether, having regard to the controversy and the relief sought, an impartial examination of the physical condition of the property would materially assist the Court. The observation regarding the absence of exceptional circumstances must also be understood in its proper context. The discretion under Order XXXIX Rule 7 CPC is not to be exercised routinely, and the necessity for inspection must be established on the facts of each case. However, the fact that the application has been filed at the appellate stage does not,

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by itself, constitute an absolute bar to its consideration. The power available to an Appellate Court under Section 107(2) CPC remains subject to the applicable procedural limitations and must be exercised for a legitimate purpose. In the present case, the assertion made in the memorandum of appeal regarding the stage of construction, coupled with the prayer for permission to complete it, constituted a circumstance requiring specific examination while deciding whether inspection was necessary.

49. Upon consideration of the impugned order, this Court finds that the learned Appellate Court did not sufficiently examine the material circumstances upon which the application for local inspection was founded. The questionnaire appended to the application sought ascertainment of the nature, area and stage of construction and the availability of vacant land. Ground H of the memorandum of appeal referred to the building having reached roof level and contained a prayer for its completion. The earlier enquiry reports and the orders restraining construction were also material to understanding the controversy. The learned Appellate Court was required to consider whether, in view of these circumstances, a limited inspection would assist in determining the relief sought in the appeal. Instead, the application was rejected principally on the ground that the land was recorded as Bagayat, that witnesses could establish its condition and that inspection at the appellate stage would amount to collection of evidence. The impugned order does not adequately explain why an

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inspection confined to recording the existing physical condition of the property would be unnecessary despite the specific controversy concerning the stage and extent of construction. The omission assumes significance because these were the very circumstances upon which the necessity for inspection was founded.

50. The procedural provisions of the Code must be applied in a manner consistent with their purpose. In ***Sushil Kumar Sen v. State of Bihar***[15], and ***State of Punjab v. Shamlal Murari***[16], the Supreme Court emphasised that procedural law is intended to facilitate the administration of justice rather than obstruct it. This principle does not permit the Court to disregard statutory requirements or dispense with safeguards designed to protect the rights of the parties. It nevertheless requires that procedural discretion be exercised with due regard to the object of the provision and the circumstances of the dispute. Where the Code permits inspection of property and the existing physical condition of that property has a material bearing upon an interlocutory relief sought before the Court, the application must receive consideration on its merits. A refusal founded upon a general apprehension of collection of evidence, without examining whether the inspection can be appropriately confined, would fail to give adequate effect to the purpose of the provision.

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[15] (1975) 1 SCC 774.
[16] (1976) 1 SCC 719.

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51. The objection that the Petitioner had not sought appointment of a Commissioner before the learned Trial Court does not, by itself, justify rejection of the application. The Petitioner sought inspection during the pendency of F.A.O. No. 9 of 2026, in which the Opposite Parties had asserted that the construction had reached roof level and sought permission to complete it. The necessity for inspecting the existing condition of the property was, therefore, sought to be justified with reference to the circumstances arising in the appeal. Whether the inspection should ultimately be permitted remained a matter of judicial discretion, but the absence of an earlier application before the learned Trial Court was not conclusive of that question. Further, the assertion appearing in the written submissions of the Opposite Parties that the learned Trial Court had already rejected such an application is not borne out by the procedural history placed before this Court. The application presently under consideration was filed before the learned Appellate Court and rejected by the order dated 22.04.2026.

52. The allegation of suppression of material facts, including the genealogy of the parties, the rights of Hadisun Bibi and Juma Bibi, the registered sale deed and the mutation standing in favour of Opposite Party No. 2, concerns matters which may have a bearing upon the substantive claims in the partition suit. Those questions are distinct from the limited issue of ascertaining the existing physical condition of Plot No. 499. The appointment of a Commissioner for recording the nature and dimensions of structures upon the property would neither determine

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the validity of the sale deed nor adjudicate the respective shares of the parties. The allegations of suppression and the competing claims concerning title must, therefore, remain open for determination in the appropriate proceedings.

53. The decisions relied upon by the Petitioner, namely, ***Kangali Khatei*** (supra)**,** ***Paradip Port Trust v. Sankhanad Behera & Ors.*** (supra), ***Abdul Naim Khan*** (supra)**,** and ***Pramod Chandra Senapati*** (supra), were cited in support of the prayer for local inspection. The principles concerning the discretionary nature of inspection under Order XXXIX Rule 7 CPC and the need to prevent its misuse for collection of evidence have already been considered above. Applying the governing principles to the facts of the present case, this Court is of the considered view that the learned Appellate Court failed to give adequate consideration to the material circumstances bearing upon the necessity for a limited inspection. The impugned order, therefore, cannot be sustained. This conclusion is confined to the propriety of rejecting the application for local inspection and does not extend to the merits of the pending partition suit or the appeal against the injunction order.

54. It is, however, necessary to ensure that the scope of the proposed commission remains strictly confined. The Commissioner shall ascertain and report only the existing physical features of the property, including the nature, dimensions, location and stage of construction of the structures standing upon Plot No. 499, the extent of the frontage occupied by such structures and the availability of access to the

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remaining portion of the land. The Commissioner shall not express any opinion regarding title, possession, the respective shares of the parties, the validity of the sale deed or mutation, the legality of the construction or any alleged violation of judicial orders. Nor shall the Commissioner be required to determine conclusively the date or period during which any construction was undertaken. The report shall remain subject to objections by the parties and its evidentiary value shall be considered by the learned Appellate Court in accordance with the applicable provisions of law. Such a limited exercise would enable the learned Appellate Court to ascertain the existing physical condition of the property without permitting the commission to assume the function of adjudicating the substantive controversy between the parties.

VI. CONCLUSION:

55. For the reasons discussed above, this Court is of the considered view that the impugned order dated 22.04.2026 passed by the learned District Judge, Jagatsinghpur, in F.A.O. No. 9 of 2026 cannot be sustained in law and is accordingly set aside. The application filed by the Petitioner under Order XXXIX Rule 7 CPC stands **allowed**, subject to the following directions:

a. The learned District Judge, Jagatsinghpur, shall appoint a Survey Knowing Civil Court Commissioner within two weeks from the date of receipt of a copy of this judgment.

b. The Commissioner shall conduct a local inspection of Plot No. 499, Khata No. 32, Mouza Bishunupur, after giving prior notice

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to both parties and affording them an opportunity to remain present during the inspection.

c. The Commissioner shall ascertain and report upon:

    i. The existence and nature of the structures standing over the suit property, including any septic tank, latrine, bathroom or residential building;

    ii. The dimensions and covered area of each structure;

    iii. The existing stage of construction of each structure;

    iv. The location of the structures in relation to the eastern frontage adjoining the village road and the extent of frontage remaining unobstructed; and

    v. The portion of the suit property remaining vacant and the availability of access to its rear portion.

d. The Commissioner shall prepare a sketch map indicating the existing physical features of the property with reference to the relevant village map and, wherever practicable, accompany the report with dated photographs of the structures and surrounding area.

e. The Commissioner shall confine the inspection to ascertainment of the existing physical condition of the property and shall not express any opinion regarding the title or shares of the parties, the legality of the construction, the validity of the sale deed or mutation, or any alleged violation of judicial orders.

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f. The Commissioner shall submit the report before the learned District Judge within four weeks from the date of appointment. The expenses of the commission shall initially be borne by the Petitioner, subject to further orders of the learned Appellate Court.

g. Upon receipt of the Commissioner's report, the learned District Judge shall afford both parties an opportunity to file objections, if any, and thereafter proceed to hear and dispose of F.A.O. No. 9 of 2026, including the prayer for permission to complete construction, as expeditiously as possible, in accordance with law.

56. It is made clear that the observations made herein are confined to the question of appointment of a Commissioner under Order XXXIX Rule 7 CPC. This Court has not expressed any opinion on the merits of the pending partition suit, the respective rights and shares of the parties, the legality of the construction or the allegation of violation of any judicial order. All such questions are left open for determination by the competent Court in accordance with law.

57. Accordingly, the present Civil Miscellaneous Petition stands allowed to the extent indicated above. There shall be no order as to costs.

58. Interim order, if any, passed earlier by this Court stands vacated.

(Dr. Sanjeeb K Panigrahi)
Judge

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

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