

(2019) 02 OHC CK 0052
In the Orissa High Court
Case No : C.M.P. No.163 Of 2019

Institute Of Management And Agricultural Extension (IMAGE), APPELLANT
Represented Through Its Director, Bhubaneswar

Vs

Sri Pulin Bihari Moharana And Another RESPONDENT

Date of Decision : 19-02-2019

Acts Referred:

Constitution Of India, 1950 — Article 227
Code Of Civil Procedure, 1908 — Order 26 Rule 9

Citation : (2019) 02 OHC CK 0052

Hon'ble Judges : Dr. A. K. Rath, J

Bench : Single Bench

Advocate : Pradipta Kumar Mohanty, P.K. Pasayat, P. Mohanty,

Final Decision : Dismissed

Judgement

Dr. A.K.Rath, J

1. This petition challenges the order dated 16.04.2018, passed by the learned Civil Judge (Junior Division), Bhubaneswar, in C.S. No.263 of 2010,

whereby and whereunder, the trial court allowed the application of the plaintiff under Order-26 Rule-9 CPC for appointment of a Survey Knowing

Commissioner.

2. Since the dispute lies in a very narrow compass, facts need not be recounted in details. Suffice it to say that plaintiff- opposite party no.1 instituted

the suit for permanent injunction impleading the petitioner and opposite party no.2 as defendants. The defendant entered appearance and filed written

statement denying the assertion made in the plaint. While matter stood thus, the plaintiff filed an application under Order-26 Rule-9 CPC for

appointment of a Survey Knowing Commissioner. It was stated that the order of

status quo was passed in I.A. No.320 of 2010. The defendants have encroached upon a portion of the suit land. The defendant objected the petition. The trial court allowed the same.

3. Mr. Pradipta Kumar Mohanty, learned Senior Counsel for the petitioner submits that hearing of the case has not yet began. The defendants have not encroached upon any portion of the plaintiff's land. After the evidence is closed, if it is not possible on the part of the trial court to come to a definite conclusion on the available material on record, then it may appoint a Survey Knowing Commissioner.

4. In Bhabesh Kumar Das Vs. Mohan Das Agrawal, 2015 (II) CLR 603, this Court held :

“In the case of Prasanta Kumar Jena Vs. Choudhury Purna Ch. Das Adhikari, 99 (2005) CLT 720, the learned Single Judge of this Court held that an application under Order 26 Rule 9 C.P.C. can be considered only after closure of the evidence when the court finds difficult to pass an effective decree on the existing evidence. Relying on the said decision, learned Single Judge of this Court set aside the order of appointment of Survey Knowing Commissioner for measurement and demarcation of the land passed by the learned trial court. The same was challenged before this Court in the case of Ram Prasad Mishra Vs.

Dinabandhu Patri and another. The Bench speaking through Mr. V. Gopala Gowda, C.J. (as he then was) held that the learned Single Judge has interfered with the order passed by the learned trial court in appointing the Survey Knowing Commissioner ignoring the decision of this Court in the case of Mahendranath Parida Vs. Purnananda Pardia and others, AIR 1988 ORISSA 248. Thus, the decision in the case of Prasanta Kumar Jena (supra) has been impliedly overruled by

the Division Bench of this Court.

In Mahendranath Parida (supra), this Court held that when the controversy is as to identification, location or measurement of the land or premise or object, local investigation should be done at an early stage so that the parties can be aware of the report of the Commissioner and can go to trial prepared.

In Ramakant Naik and others Vs. Bhanja Dalabehera, 2015 AIR CC 1724 (ORI), this Court held that issuance of a Commission for local investigation is the discretion of the Court. While considering the prayer for appointment of Commission, the Court must apply its mind to the facts and circumstances of the case and

pass order. No straight jacket formula can be laid down. Before issuance of Commission, the Court must be satisfied that there is prima facie case in favour of the

applicant. On a reading of Order 26 Rule 9 C.P.C., it is manifest that the stage of appointment of Survey Knowing Commissioner has not been prescribed. When the legislature in its wisdom has not prescribed the stage of appointment of Survey Knowing Commissioner, the power of the Court to appoint the Survey Knowing Commissioner cannot be cabined, cribbed or confined.

5. The ratio in Bhabesh Kumar Das (supra), proprio vigour applies to the facts of the case.

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6. The report of the Survey Knowing Commissioner forms a part of the record. Person aggrieved by the same may file objection to the same and summon the Commissioner for cross-examination.

7. The impugned order does not suffer any illegality or infirmity, warranting interference by this Court under Article 227 of the Constitution. The petition is dismissed. No costs.

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