

(2023) 01 OHC CK 0120
In the Orissa High Court
Case No : CMP No. 1394 Of 2022

Shakuntala Jena

APPELLANT

Vs

Sikhya O Anusandhan Private Limited, Bhubaneswar And
Others

RESPONDENT

Date of Decision : 24-01-2023

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 145

Code of Civil Procedure, 1908 — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 3

Citation : (2023) 01 OHC CK 0120

Hon'ble Judges : K.R. Mohapatra, J

Bench : Single Bench

Advocate : Sudhansu Sekhar Jena,

Final Decision : Disposed Of

Judgement

K.R. Mohapatra, J

1. This matter is taken up through Hybrid mode.
2. Order dated 13th October, 2022 (Annexure-2 series) passed in IA No.1 of 2022 (arising out of CS No.2319 of 2022) is under challenge in this CMP, whereby learned Civil Judge (Senior Division), Bhubaneswar rejected an application filed under Order XXXIX Rule 3 CPC filed by the Petitioner.
3. It is submitted by Mr. Jena, learned counsel that the Petitioner has filed the suit for declaration of right, title, interest and permanent injunction. Along with the plaint, the Petitioner also filed an application under Order XXXIX Rules 1 and 2 CPC in IA No.1 of 2022. Since the opposite parties created disturbance and tried to evict the Petitioner from the suit land forcibly, she filed an application under Order XXXIX rule 3 CPC to dispense with service of notice on the Opposite Parties and to take up IA No.1 of 2022 to pass an ex-parte ad interim order of injunction. However, during pendency of the suit, the Opposite Party No.3 and his henchmen forcibly evicted the Petitioner from the suit land. It is his submission

that possession of the Plaintiff/Petitioner has been declared in a proceeding

under Section 145 Cr.P.C. Relying upon the decision in the case of Bhinka and others vs Charan Singh , reported in AIR 1959 SC 960, he submitted that life of the said order is co-terminus with the passing of the decree by the Civil Court. He refers to the case law, wherein and the judgment, wherein at para-16, wherein the Hon'ble Supreme Court held as under:-

"16. This leads us to the consideration of the legal effect of the order made by the Magistrate under Section 145 of the Code of Criminal Procedure. Under Section 145(6) of the Code, a Magistrate is authorized to issue an order declaring a party to be entitled to possession of a land until evicted therefrom in due course of law. The Magistrate does not purport to decide a party's title or right to possession of the land but expressly reserves that question to be decided in due course of law. The foundation of his jurisdiction is on apprehension of the breach of the peace, and, with that object, he makes a temporary order irrespective of the rights of the parties, which will have to be agitated and disposed of in the manner provided by law. The life of the said order is co-terminus with the passing of a decree by a civil court and the moment a civil court makes an order of eviction, it displaces the order of the criminal court. The Privy Council in Dinomoni Chowdhurani v. Brojo Mohini Chowdhurani [(1901) LR 29 IA 24, 33] tersely states the effect of orders under Section 145 of the Code of Criminal Procedure thus:

"These orders are merely police orders made to prevent breaches of the peace. They decide no question of title..."

We, therefore, hold that a provisional order of a Magistrate in regard to possession irrespective of the rights of the parties cannot enable a person to resist the suit under Section 180 of the Act."

Thus, the Petitioner is deemed to be in possession over the suit property unless and until she is evicted by due process of law or a decree of eviction is passed. However, learned trial Court without appreciating the same, rejected the said application and directed to take out notice on Defendants/Opposite Parties. In the meantime, Opposite Party Nos. 1, 2 and 4 have already entered appearance through their counsel, but the Opposite Party No.3, namely, Orissa Construction of Techno Engineering Corporative Society Private Limited, which is the main contesting party has neither appeared nor filed his show cause. As such, hearing on petition under Order XXXIX Rules 1 and 2 CPC is delayed. Since the Petitioner is out of the property being evicted illegally, the petition under Order XXXIX Rules 1 and 2 CPC should have been entertained and some interim order be passed protecting his possession over the property. Learned trial Court, without considering the same, passed the impugned order, which is not sustainable in law.

4. Considering the submission of learned counsel for the Petitioner that the impugned order was passed on 13th October, 2022 and in the meantime more than three months have already elapsed, this Court is of the considered opinion

that the purpose for which the application under Order XXXIX Rule 3 CPC was filed is no more available. If the Opposite party No.3 is the main contesting party, the Petitioner may take out notice by special messenger. It appears that the Petitioner without resorting to the same, has filed the CMP. In view of the discussion made above, I am not inclined to entertain the CMP.

5. Accordingly, CMP is disposed of with an observation that the Petitioner may workout his remedy by filing appropriate application before learned trial Court to serve notice on the Opposite Parties through alternate mode, if the notice on them has not yet been served.

Issue urgent certified copy of the order on proper application.

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