

**IN THE HIGH COURT OF ORISSA AT CUTTACK**

**CMP NO. 1256 OF 2023**

(An application under Article 227 of the Constitution  
of India)

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***Fakir Mohan Lenka*** ..... ***Petitioner***

*-versus-*

***Block Development Officer and*** ..... ***Opp. Parties***  
***Successor-in-Office, Salipur Block and***  
***others***

*Advocates appeared:*

*For Petitioner* : Mr. Abinash Routray, Advocate

*For Opp. Parties* : Mr. Swayambhu Mishra,  
Additional Standing Counsel

**CORAM:**  
**JUSTICE K.R. MOHAPATRA** ★

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**Heard and disposed of on 03.01.2024**  
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**JUDGMENT**

1. This matter is taken up through hybrid mode.
2. Order dated 11<sup>th</sup> July, 2023 (Annexure-6) passed by learned Additional District Judge, Salipur in RFA No.97 of 2011 is under challenge in this CMP, whereby an application filed by the Plaintiff No.1-Petitioner under Order XXVI Rule 9 C.P.C. has been rejected.
3. Mr. Routray, learned counsel for the Petitioner submits that the suit has been filed for permanent and prohibitory injunction. The Plaintiffs are the recorded tenants of Plot

Nos.1389 and 1390. A pucca road was constructed adjacent to the land of the Petitioner over Plot No.1396 encroaching upon his land. Hence, the suit was filed for the aforesaid relief. The suit being dismissed, the Petitioner preferred the appeal, which is pending in the Court of learned Additional District Judge, Salipur in RFA No. 97 of 2011. During pendency of the suit, the Plaintiffs have adduced evidence in support of their case. They also examined a private Amin to show that there is an encroachment over the suit plot by the Government in constructing a road. The said report was disbelieved on the ground that it was not signed by the local people and boundary tenants. In order to ascertain that there is an encroachment over the suit property, an application under Order XXVI Rule 9 C.P.C. was filed before learned Appellate Court and the impugned order under Annexure-6 has been passed. It is his submission that an application under Order XXVI Rule 9 C.P.C. is maintainable at the appellate stage in view of the ratio decided in the case of ***Bishnu Charan Sahu –v- Paramananda Sahu and others***, reported in 1994 (I) OLR 205, wherein at paragraph-6 it is held as under:

*“6. A survey-knowing commissioner is deputed for local investigation for the purpose of elucidating the question as to whether the disputed land appertains to a particular survey plot or plots. His report is evidence in the case and forms part of the record. Such evidence is usually collected during trial of a suit In a given case if such evidence was essential but has not been led during trial of the suit, and it is sought to be led in appeal, it would be by way of additional evidence. As to when either party to an appeal is entitled to produce additional evidence, the relevant provision is Order 41, Rule 27 of the Code.*

*Under Clause 1(b) of the said rule the appellate Court has power to allow additional evidence not only if it requires such evidence to enable it to pronounce judgment but also for any other 'substantial cause'. An appellate Court may be able to pronounce judgment on the materials already on record but may still consider additional evidence necessary in the interest of justice to pronounce a satisfactory judgment. In such a case paramount consideration being ends of justice, admission of additional evidence is for meeting a 'substantial cause'. Further more if additional evidence sought to be introduced in appeal has a direct bearing on the main issue involved in the case, a party should normally be permitted to adduce additional evidence unless he is guilty of laches. If an appellate Court felt that the evidence of survey-knowing commissioner after local investigation, or opinion of a handwriting expert after comparison, is required in the interest of justice, there can be no legal impediment for appellate Court to permit admission of additional evidence and ultimately utilize the same for final disposal of the appeal. But in such a case the appellate Court has in compliance of Rule 28, to retain the appeal and either to take such evidence itself or direct the trial Court or even any other subordinate Court to take such evidence and send it to the appellate Court who can utilise the same while finally disposing of the appeal.*

3.1 He also relied upon the decision of this Court in the case of ***Nakula Sahu –v- Suresh Chandra Beherdolai***, reported in **2016 (I) OLR 624**, which also reiterates the aforesaid ratio. Learned Appellate Court rejected the petition only on the ground that a Survey Knowing Commissioner should not be deputed to collect the evidence for a party and discretion of the Court can be exercised only when it finds difficulty in passing an effective decree on the available evidence. It is also erroneously held by learned Appellate Court that no such

material was placed before the Court. Hence, prayer of the Petitioner to depute a Survey Knowing Commissioner was not entertained. It is his submission that a Survey Knowing Commissioner can only clarify the dispute between the parties, which is essentially a boundary dispute. This aspect was completely brush aside by learned Appellate Court while adjudicating the matter. Hence, he prays for setting aside the impugned order under Annexure-6 and to direct learned Appellate Court to depute a Survey Knowing Commissioner to answer the questionnaire as per the Schedule in the petition under Order XXVI Rule 9 C.P.C.

4. Mr. Mishra, learned Additional Standing Counsel vehemently objects to the same. It is his submission that the land was measured by the Tahasil Amin in presence of the Plaintiff No.1-Petitioner and the report has been exhibited as Ext.B-I. The Plaintiffs have also examined a private Amin on their behalf, but he did not support their case as observed by learned trial Court in the judgment passed in the suit. In order to patch of the lacunae in their case, such an application has been architected by the Plaintiffs. Hence, learned Appellate Court has rightly observed that process of the Court cannot be used to procure evidence for a party.

4.1 Mr. Mishra, learned Additional Standing Counsel draws attention of this Court to the following observation made by learned trial Court in the judgment passed in the suit.

*“D.W.2 is the sarpanch of the locality. During his cross examination he has stated that on 13.5.2002, the plaintiffs' plot No. 1389 and 1390 were measured in his presence. Subsequently, Tahasil*

*Amin had measured on 21.12.2008 during pendency of the case and the report of the Tahasil Amin is marked as Ext.B-I. During both these measurement he was present. He has stated that the demarcation is made on 13.5.2002 and measurement made on 21.12.2008 gave the same result and as per the measurement by Tahasil Amin the concrete work has been done over the Govt. road plot and no encroachment has been made.”*

He, therefore, submits that when the witness examined on behalf of the Plaintiffs did not support their case, deputation of a Survey Knowing Commissioner at this stage will be a travesty of law and will certainly prejudice the Defendants. Hence, he prays for dismissal of CMP.

5. Considering the rival contentions of the parties and on perusal of the record, it appears that the Petitioner filed petition under Order XXVI Rule 9 C.P.C. with the following questionnaire.

**SCHEDULE**

**Points to be answered by the Civil Court Commissioner**

1. *Whether the Settlement/Consolidation Authorities prepared the Map of Hal Plot Nos. 1394, 1395, 1389 and 1390 correctly as per the entitlement of the owners of the said land ?*
2. *Whether the length of Hal Plot No.1394 from East to West has been enhanced to 150 Kadi from 120 Kadi ?*
3. *Whether there is existence of "Bhagabata Ghara" over Plot No. 1395 which is just adjacent to the village road ?*
4. *Whether any portion of the land of the Plaintiffs in Plot No.1389 and 1390 have been included in Village road?*

6. There is nothing on record to suggest that the Plaintiffs could not have adduced evidence before learned trial Court on those issues/subject matter. Mr. Routray, learned counsel for the Petitioner, however, submits that evidence has been adduced on the aforesaid subject matter before learned trial Court, but it was erroneously disbelieved/ignored by learned trial Court. If that be so, learned Appellate Court can re-appreciate the evidence available on record at the time of adjudication of the appeal. Further, the land was measured by the Tahasil Amin in presence of the parties. The report has also been exhibited as Ext.B-I. The Plaintiffs have also examined a private Amin and report along with map and field book etc. has been exhibited as Exts. 7, 8, 9 and 10. When ample materials are available on record to identify the land and to answer the questionnaire, as quoted above, there is no necessity to further depute a Survey Knowing Commissioner to answer the same. Wrong appreciation of the materials on record by learned trial Court cannot be a ground to depute a Survey Knowing Commissioner at the appellate stage.

7. In that view of the matter, this Court is of the considered opinion that learned Appellate Court has committed no error in rejecting the petition under Order XXVI Rule 9 C.P.C. Hence, the CMP being devoid of any merit stands dismissed.

Urgent certified copy of this judgment be granted on proper application.

**(K.R. Mohapatra)**  
**Judge**

*bks*