

(2016) 01 OHC CK 0029

ORISSA HIGH COURT

Case No: W.P.(C) No. 14726 of 2006

Madhusudan Sahu

APPELLANT

Vs

Banamali Khadiratna

RESPONDENT

Date of Decision: Jan. 18, 2016

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 26 Rule 9, Order 41 Rule 27
- Constitution of India, 1950 - Article 227

Hon'ble Judges: Dr. Akshaya Kumar Rath, J.

Bench: Single Bench

Advocate: Siddharth Mishra, Advocate, for the Appellant; Debasis Pattnaik, Advocate, for the Respondent

Final Decision: Dismissed

Judgement

Dr. Akshaya Kumar Rath, J.

1. By this petition under Article 227 of the Constitution of India, challenge is made to the order dated 28.10.2006 passed by the learned Additional District Judge, Deogarh in R.F.A. No. 2 of 2005, whereby and whereunder, the application filed by the appellant under Order 26, Rule 9 C.P.C. for appointment of a Survey Knowing Commissioner has been rejected.

2. The petitioner as plaintiff instituted C.S. No. 26 of 2002 in the court of the learned Civil Judge (Sr. Division), Deogarh for declaration of right, title and interest and delivery of possession of the suit land impleading the opposite party as defendant. The suit was dismissed. Challenging the judgment and decree passed by the learned trial court, the petitioner filed R.F.A. No. 2 of 2005 in the court of the learned Additional District Judge, Deogarh. During pendency of the appeal, the petitioner filed an application under Order 26, Rule 9 C.P.C. for appointment of a Survey Knowing Commissioner. It is stated that pursuant to the order of the Tahasildar, Deograh in Identification Case No. 189 of 2002, the R.I., Kantapali measured and

demarcated the land. Thereafter suit was filed basing on the report of the R.I., Kantapali, Ext. 5. The R.I. was examined as P.W.4. The defendant-respondent in his written statement has neither denied nor disputed the contents of the demarcation of the suit land. But then no issue was framed with regard to the correctness of the identification of the suit land for which the plaintiff could not file an application under Order 26, Rule 9 C.P.C. The learned trial court disbelieved the testimony of P.W.4 and dismissed the suit. The respondent filed objection to the same. By order dated 28.10.2006, the learned appellate court rejected the application holding, inter alia, that judgment of the lower court reveals that the identification report of P.W.4 was challenged by defendant. P.W.4 was subjected to extensive cross-examination. Further, the appellant intended to reagitate the matter in the appeal.

3. Heard Mr. S. Mishra on behalf of Mr. Ramakanta Mohapatra, learned Senior Advocate for the petitioner and Mr. D. Pattnaik on behalf of Mr. D.K. Mishra, learned Advocate for the opposite party.

4. The scope of the appellate court to appoint a Survey Knowing Commissioner has been succinctly stated in the case of Nakula Sahu Vrs. Suresh Chandra Beherdolai and others, 16(1) ILR, Cut 102 in paragraphs 7, 8 and 9 of the said report, which is quoted below:-

"7. Sub-Section 2 of Section 107 provides that the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein. The words "as nearby as may be" occurring in the said sub-rule imply that the appellate Court shall be vested with the powers which are vested on the Courts of original side so far as may be necessary for the interest of justice. (Judhistir Subudhi Vrs. Balaji Financial Fund and another, , 1987 (I) OLR 589).

8. Dealing with the powers of appellate Court to appoint Survey Knowing Commissioner, a Division Bench of this Court in the case of Bishnu Charan Sahu Vrs. Paramananda Sahu and others, , 1994 (I) OLR-205, in paragraph-6 of the report held as follows:-

"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 utilise 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."

9. In Mahendranath Parida Vrs. Purnananda Parida and others, , AIR 1988 ORISSA 248, 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."

5. On the anvil of the decision cited (supra), case of the petitioner may be examined.

6. The assertion of the plaintiff is that he filed an application before the Tahasildar, Deogarh for identification of the suit land. Pursuant to the direction of the Tahasildar, Deogarh, R.I., Kantapali demarcated the case land in presence of the villagers and prepared a trace map on 4.9.2002. The R.I. was examined as P.W.4. He was subjected to extensive cross-examination by the defendant. Once the land has been measured by the competent R.I., who has also been examined as a witness on behalf of the plaintiff, this Court is of the view that application for appointment of Survey Knowing Commissioner is a ruse.

7. There being no illegality or perversity in the order dated 28.10.2006 passed by the learned Additional District Judge, Deogarh in R.F.A. No. 2 of 2005, this Court is not inclined to interfere with the same. Accordingly, the petition is dismissed.