
(2024) 05 OHC CK 0085

Orissa High Court

Case No: CMP No. 418 Of 2024

Dhuleswar Sethi And
Others

APPELLANT

Vs

Sankarsan Dalai And
Others

RESPONDENT

Date of Decision: May 6, 2024

Acts Referred:

- Code of Civil Procedure, 1908 - Order 26 Rule 9

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

Bench: Single Bench

Advocate: Amiya Kumar Mohanty

Final Decision: Disposed Of

Judgement

K.R. Mohapatra, JÂ

1. This matter is taken up through hybrid mode.

2. Order dated 5th April, 2024 (Annexure-6) passed in C.S. No.629 of 2023-I is under challenge in this CMP, whereby learned Senior Civil Judge, 1st

Court, Cuttack allowed an application filed by the Plaintiffs-Opposite Parties under Order XXVI Rule 9 C.P.C. for deputing a Survey Knowing

Commissioner for identification of the suit property.

3. Mr. Mohanty, learned counsel for the Petitioners submits that the suit land is a gali rasta. A suit has been filed by the Plaintiffs-Opposite Parties for

easement right. Overwhelming evidence is available on record to identify the suit property. In spite of the same, an application under Order XXVI

Rule 9 C.P.C. was filed in the midst of trial. Although a detailed objection was filed by the Defendants-Petitioners to the Petition under Order XXVI

Rule 9 C.P.C., but without discussing the same, the impugned order under Annexure-6 has been passed relying upon the principles in *Rahul S. Shah*

â€"v- *Jinendra Kumar Gandhi*, reported in 2021 (I) OLR SC 1058. Learned trial Court has also not discussed the applicability of the ratio decided in

Rahul S. Shah (supra) to the instant case. He, therefore, prays for setting aside the impugned order under Annexure-6 and to remit the matter to

learned trial Court for fresh consideration of the petition under Order XXVI Rule 9 C.P.C. keeping in mind the objection raised by the Defendants-

Petitioners.

4. Taking note of the submission made by learned counsel for the Petitioners and on perusal of the case record including the impugned order under

Annexure-6, this Court finds that a detailed objection was filed to the petition under Order XXVI Rule 9 C.P.C., which has been annexed as

Annexure-5 to the CMP. But, while discussing the matter, learned trial Court has not taken into consideration the objection filed by the Defendants-

Petitioners to the petition under Order XXVI Rule 9 C.P.C. Only taking into consideration the case of the Plaintiffs-Opposite Parties, the impugned

order under Annexure-6 has been passed. In that view of the matter, this Court feels that petition filed by the Plaintiffs-Opposite Parties under Order

XXVI Rule 9 C.P.C. requires fresh consideration.

5. Accordingly, the impugned order under Annexure-6 is set aside and the matter is remitted to learned Civil Judge (Senior Division), 1st Court,

Cuttack for fresh adjudication of the petition under Order XXVI Rule 9 C.P.C., giving opportunity of hearing to the parties concerned and discussing

the rival claims of the parties.

6. It is made clear that this Court has not expressed any opinion on the merits of the case of either of the parties.

7. The CMP is accordingly disposed of.

8. Since the CMP is disposed of without issuing notice to the Opposite Parties, they are at liberty to seek for variation of this order, if they feel

aggrieved.

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

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