



IN THE HIGH COURT OF ORISSA AT CUTTACK

AFR

CMP No.200 of 2024

Ramakrushna Nayak **Petitioner**
Mr. S.K. Mishra, Senior Advocate along with
Mr. J. Pradhan, Advocate

-Versus-

Manoj Kumar Behera and **Opposite**
another **Parties**
Mr. S.K. Dash, Advocate

CORAM:
JUSTICE R.K. PATTANAİK

DATE OF JUDGMENT:23.05.2025

1. Instant petition is filed by the petitioner assailing the impugned decision by order dated 20th February, 2024 as at Annexure-8 of learned Civil Judge, Junior Division, Nimapara in I.A. No.101 of 2023 arising out of the suit in C.S. No.162 of 2023 for having appointed a Pleader Commissioner in terms of Order 39 Rule 7 CPC at the behest of the opposite parties on the grounds inter alia that such a decision is not sustainable in law, hence, therefore,



the same is liable to be interfered with and set aside.

2. The petitioner is the plaintiff in the suit instituted seeking a relief permanent injunction against the opposite parties in respect of the suit schedule property and not to interfere in his possession over the same along with the proforma defendants. The suit land is morefully described in the plaint as at Annexure-1. By pleading that the opposite parties do not have any right title, interest and possession over the suit schedule property, it has been claimed by the petitioner in Annexure-1 that he is being threatened by them, who are contemplating to raise illegal construction there over on the strength of a void gift deed and mutation RoR issued in favour of the Secretary Salanga ME School. It is further pleaded that the school in question is no more there but in view of the mutation RoR, the opposite parties are creating disturbance over and in respect of the suit land, which is in possession of the petitioner and his family and is being used for cultivation. In the said suit, opposite party No.1, namely, defendant No.1 filed WS and claimed that defendant No.2 for himself and as guardian and



next friend of the minors of the family voluntarily executed the gift deed in favour of the school and delivered possession of the suit land and, hence, denied the claim of the petitioner and also challenged his authority to challenge the deed. According to opposite party No.1, defendant No.2 established the school and remained as its Headmaster and in order to receive recognition and for construction of school building with a play ground, he executed the gift deed in favour of the school. The further pleading is that the registered gift deed was executed on 30th November, 1996 and it was acted upon and hence, binding to the petitioner and that apart, the suit land was muted in the name of the Secretary of the school in respect of Khata No.379/8 and the same is within the knowledge of the other side and public at large and also alleged that the petitioner does not have any personal interest but by suppressing the real facts and in order to harass the opposite parties, instituted the suit.

3. In the suit, the petitioner filed the I.A. for a direction to the opposite parties not to take up any construction over the suit land till disposal of the



suit and therein, an objection was received from the opposite parties. In the said I.A., the opposite parties moved the application under Order 39 Rule 7 CPC to depute a Pleader Commissioner to inspect and report the topography of the suit land. According to the opposite parties, as per the revenue records, the school is situated over the suit plot and after verification, the State Government has sanctioned fund for further construction of its building and in so far as, the petitioner is concerned, he is not in possession of the same. Since, the claim of the petitioner on the basis of the pleading that there is no such school standing over the land in question, the opposite parties, therefore, requested the learned court below to depute a Pleader Commissioner for inspection before considering the I.A. for any such order restraining them from making construction as has been pleaded by the petitioner. While considering such a request, learned Civil Judge, Junior Division, Nimapara in I.A. No.101 of 2023 filed under Order 39 Rules 1 and 2 CPC allowed inspection to be held by a Commission and to report back revealing whether any school building is situated over the suit plot or



it is a paddy field. The said decision of learned court below has been questioned by the petitioner on the ground that any such attempt with appointment of the Pleader Commissioner would amount to collection of evidence through the process of the Court for and on behalf of the opposite parties and the same is impermissible under law.

4. A copy of the gift deed dated 30th November, 1996 is at Annexure-7 series. The deed is a registered one executed by defendant No.2 in favour of the Secretary of the school. On the basis of the registered gift deed, the suit plot was recorded in the name of the school represented by its secretary with the issuance of the mutation RoR. The question is, whether, learned court below was justified in deputing a Pleader Commissioner for inspection of the suit land in terms of Order 39 Rule 7 CPC?

5. Heard Mr. Mishra, learned Senior Advocate assisted by Mr. Pradhan, learned counsel appearing for the petitioner and Mr. Dash, learned counsel for the opposite parties.



6. Mr. Mishra, learned Senior Advocate for the petitioner submits that learned court below fell into serious error in appointing a Pleader Commissioner to inspect the suit plot to ascertain, whether, the school building stands over the same or it is used for paddy cultivation, as any such inspection is nothing but collection of evidence from the side of the opposite parties. On the other hand, Mr. Dash, learned counsel for the opposite parties justifies the impugned order at Annexure-8 and contends that the real dispute is over the suit land, whether, to be in occupation of the petitioner or the opposite parties, who claim to have a school building over the same and denied by the other side alleging it to be used for cultivation, hence, for considering disposal of the I.A. since filed by the petitioner to restrain any such construction over the plot, it was absolutely desirable for inspection and rightly, therefore, the Pleader Commissioner was appointed for the said purpose.

7. The following decisions, such as **Amiya Bhusan Tripathy Vrs. Ahammad Ali 1986 (II) OLR 330; Subal Kumar Dey Vrs. Purna Chandra Giri and others AIR 1989 Ori 214;**



Krushna Behera and others Vrs. Gitarani Nandi 1990 (I) OLR 247; Dr. Subas Chandra Rath Vrs. Dr. Sinandan Mohanty 2004 (I) OLR 58; Pramod Chandra Senapati Vrs. Sanatan Jena and others 2015 (I) ILR-CUT-1043; and Paradip Port Trust and another Vrs. Sankhanad Behera and others 2017 (I) CLR 567 have been cited at the Bar. The contention from the side of the opposite parties is that for the limited purpose and to the extent as has been proposed, the appointment and deputation of the Pleader Commissioner and allowed by learned court below is essential to consider the disposal of the I.A. filed under Order 39 Rules 1 and 2 CPC but seriously opposed by the petitioner with a plea that it would tantamount to collecting evidence.

8. In fact, Order 39 Rule 7 CPC empowers a Court to make appropriate orders for detention, preservation or inspection of property, which is the subject matter of a suit or as to which any question arises therein and for the specific purposes indicated may authorize any person to enter upon or into any land or building in possession of any other party to the suit with such other consequential



directions issued in that behalf. In other words, the above provision authorizes the Court to issue a Commission for inspection, preservation etc. in respect of any property which is the subject matter of the suit. The contention of Mr. Mishra, learned Senior Advocate for the petitioner is that the gift deed executed by defendant No. 2 is seriously questioned by the petitioner, legality or otherwise of the same, is still to be debated, deliberated and adjudicated upon in the suit and since the opposite parties are contemplating to raise construction over the suit land in view of such a deed and mutation RoR, the same is to be prevented. The further contention is that if a school building stands over the suit plot, evidence could be led, hence, to ascertain the same, a Commission cannot be appointed, since any such exercise would amount to accumulation of evidence to favour the opposite parties. It is reiterated by Mr. Mishra, learned Senior Advocate that inspection in terms Order 39 Rule 7 CPC is not for a purpose to facilitate collection of evidence for any of the parties to the suit and hence, learned court below was not right to appoint a Pleader Commissioner. Mr. Dash, learned



counsel for the opposite parties challenged the claim of the petitioner with regard to registered gift deed as invalid and at the same time, would contend that the Commission is needed to go for an inspection before considering the I.A. and the request for injunction.

9. In Amiya Bhusan Tripathy (supra), this Court concluded that a Commissioner may be appointed even by an ex-parte order but for a limited purpose and the report received as a result is not to be treated as a evidence and in the facts and circumstances of the case held that any such report is not to be taken as a piece of evidence under Order 26 Rule 10 CPC. In **Subal Kumar Dey** (supra), it is held by this Court that even when a dispute relates to the situation of the disputed land, nature of construction made and effect of such construction in juxtaposition to the rival claim, a local inspection by a Pleader Commissioner under Order 39 Rule 7 CPC would give a clear picture to the Court for considering the question of temporary injunction pending before it and the same does not amount to collection of evidence. Similarly, in **Krushna Behera** (supra), it is held that local



inspection to be needed. In **Dr. Subas Chandra Rath** (supra), the application for a Commission deputed under Order 39 Rule 7 CPC was rejected but instead a Survey Knowing Commissioner was appointed and therein, since duty of the plaintiff was to prove as to the extent of construction made and whether, any such construction to be in violation of the order of injunction concluded that the Survey Knowing Commissioner cannot make such an enquiry regarding the dates of construction. While dealing with a similar matter, this Court in **Pramod Chandra Senapati** (supra) concluded and confirmed the appointment of a Pleader Commissioner under Order 39 Rule 7 CPC considering the dispute between the parties over possession of the property beyond the record of right but for a limited purpose for investigation and preservation of the trees stood over the suit land but got uprooted during cyclone. In **Paradip Port Trust** (supra), while considering the scope and ambit of Order 39 Rule 7 CPC, this Court confirmed the order with the appointment of a Pleader Commissioner as the dispute related to existence of a structure over the suit land and as the



same needed local inspection of the land in question and its adjoining area to have a clear picture for the court to consider the application for temporary injunction pending orders.

10. The application under Order 39 Rule 7 CPC is not filed in the suit either before or after receiving evidence from the respective parties but in the I.A. filed by the petitioner therein to restrain the opposite parties from taking up any construction over the suit land pending disposal of the suit instituted by him. The execution of the gift deed by defendant No.2 is the bone of contention challenged by the petitioner claiming it to be illegal and not binding to him without any right, title and interest being conveyed to the opposite parties. The dispute as such is to be examined in the suit. There is no declaration challenging the registered gift deed on any such ground pleaded by the petitioner revealed from Annexure-1 as the relief is for injunction simplicitor. The claim of the opposite parties is entirely based on the alleged gift deed followed by the mutation RoR with the plea that it was executed by defendant No.2, who established the school and was also its Headmaster and upon



such gift, the suit land is in possession of the school ever since then and even prior thereto.

11. The inspection of a Commission as per Order 39 Rule 7 CPC is obviously for a limited purpose either for detention or preservation or inspection of a suit property. A report of the Pleader Commissioner received by the Court is often utilized in reaching at a particular decision. Such a report may still be said to have evidentiary value unlike the one received from the Survey Knowing Commissioner in view of Order 26 Rule 10 CPC. Although, such a provision is absent in Order 39 CPC but it has to be accepted by a Court and even relied upon by one of the parties to the suit. In strict sense, a report of Pleader Commissioner may not be evidence similar to the provision under Order 26 CPC but in a given circumstance, it is treated so, though, for a limited purpose. In the case at hand, the petitioner claims the suit property used as a paddy land but it is challenged by the opposite parties by pleading that it is being used for the school. In the suit, the respective parties are fully divided over the nature of the suit land. The petitioner would definitely be leading evidence to



show that notwithstanding the gift deed executed by defendant No.2, which is illegal, the suit plot is in their possession. Likewise, the opposite parties shall have the opportunity to adduce evidence to the contrary with all such materials regarding the establishment of the school and construction of a building of the same over the suit land etc.

12. At this juncture, the consideration before the Court would be, whether, the Pleader Commissioner appointed by learned Court below was a correct approach in view of the rival claims advanced. It is alleged by the petitioner that the opposite parties should not be allowed to take up construction over the suit property. The dispute lies regarding the use and utility of the suit land either for cultivation purpose or having a school over the same. Since, it is denied by the petitioner claiming that there is no school building over the suit land and the opposite parties contradict the same, for a limited purpose, to ascertain its existence or otherwise, the Court is of the considered view that appointment of the Pleader Commissioner is the right way to deal with the situation. The report of the Commissioner under Order 39 Rule 7 CPC may



not be treated as evidence in the suit but to tackle the issue at hand, while considering an application for injunction moved by the petitioner, such an exercise by learned Court below cannot be said to be wrong or erroneous. Considering the citations referred to and discussed herein before, recording the submissions of Mr. Mishra, learned Senior Advocate for the petitioner and Mr. Dash, learned counsel for the opposite parties and as a decision is required to be taken whether the suit land is used by the school and the same is functioning from there as opposed by the petitioner, the appointment and deputation of the Pleader Commissioner as directed by learned court below with a decision in that regard since not found to be a flawed one, the inescapable conclusion is that the impugned order at Annexure-8 calls for no interference. It is at the cost of repetition observed that the report of the Pleader Commissioner is, though, necessary to take a decision, while dealing with the I.A. filed by the petitioner under Order 39 Rules 1 and 2 CPC and for opposing construction over the suit land by the opposite parties but is to be utilized for the limited purpose as proposed and not beyond.



13. Accordingly, it is ordered.

14. In the result, the petition stands dismissed, however, in the circumstances, there is no order as to the costs.

(R.K. Pattanaik)
Judge

Rojina