
(1987) 08 OHC CK 0021
In the Orissa High Court
Case No : Misc. Appeal No. 39 of 1985

Basudev Gouda

APPELLANT

Vs

Narsingha Patra

RESPONDENT

Date of Decision : 06-08-1987

Acts Referred:

Citation : AIR 1988 Ori 278

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : S.S. Basu, S.S. Rao and G.S. Das, for the Appellant; R.V. Ramdas, H.C. Nayak and B.K. Panda, for the Respondent

Final Decision : Allowed

Judgement

S.C. Mohapatra, J.—This is an appeal by the defendant against the order of remand passed by the appellate court in exercise of the power under Order 41, Rule 23-A, C.P.C.

2. In the suit for injunction, a commissioner was deputed for finding out whether there is encroachment on the plaintiff's land on which it is alleged by the plaintiff that the defendant has started construction of the house. The trial court dismissed the suit. On appeal by the plaintiff the appellate Court found that the writ to the Commissioner has not been properly complied with. Accordingly, it set aside the decree and directed to hear the suit afresh after deputing another Commissioner for measurement.

3. Mr. S. S. Rao, the learned counsel for the appellant, submitted that the order is vitiated on account of the fact that the report of the Commissioner is not the only evidence in this case and there are other materials on record from which the appeal could have been decided by the appellate Court.

Mr. R K. Panda, the learned counsel for the respondent, submitted that the result of the entire suit depends upon the Commissioner's report and for the said purpose a Commissioner was deputed by the trial Court. Accordingly, the

appellate Court is justified in remitting back the entire suit.

4. After hearing both the parties, I am satisfied that the appellate Court was not justified in remitting back the entire suit. After amendment of the C.P.C., remand of a suit by the appellate Court is authorised on three grounds :

(1) The preliminary issue on which the suit has been decided fails (Order 41, Rule 23, C.P.C.);

(2) One important issue has to be decided for proper decision of the dispute (Order 41, Rule 25, C.P.C.); and

(3) Interest of justice requires the entire suit to be tried again.

5. I have expressed in a decision reported in AIR 1986 Oris 207 Rushi v. Madan Behera:

"".....The appellate Court is required first to make the endeavour to answer the disputed findings and where in spite of such findings it would not be in a position to come to a conclusion either way, it would remand the suit for fresh trial....."

Following the said decision, it has been held in a decision reported in (1986) 2 OLR 54 Nishi Swain v. Bikala Charan Swain :

"I may make it clear that Order 41, Rule 23-A, C.P.C., should be sparingly used since the public policy is that a litigation is to be concluded finally as early as possible. Where, however, remand is felt necessary after judicial consideration and Rule 25 is considered not to be adequate, appellate court may consider the question of open remand under Rule 23-A"

In the present case, the appellate court has not examined the matter in this light.

6. The appellate Court is directed to hear the appeal afresh and in case it is felt that the appeal can only be disposed of by a fresh Commissioner being appointed, it shall keep the appeal pending and after framing an issue, it shall remit that issue for a finding of the trial court after considering the report of the Commissioner appointed afresh. In case there are other materials as claimed by the appellant, the appellate Court shall decide the appeal.

7. In the result, the appeal is allowed. Both parties are directed to appear on 1st Sept., 1987, before the appellate court on which date the appellate Court shall fix a date of hearing of the appeal. There shall be no order as to costs in this appeal.