

(1980) 12 OHC CK 0007

In the Orissa High Court

Case No : Second Appeals No's. 297 of 1976 and 13 of 1977

Bhagirathi Saha and Others

APPELLANT

Vs

Anantanarayan Das Choudhury and etc.

RESPONDENT

Date of Decision : 19-12-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 4
Orissa Municipal Rules, 1953 — Rule 534E
Specific Relief Act, 1963 — Section 38

Citation : AIR 1981 Ori 58 : (1981) 51 CLT 126 : (1981) 51 CLT 125

Hon'ble Judges : N.K. Das, J

Bench : Single Bench

Advocate : R.K. Mohapatra and S.C. Basa, for the Appellant; S.K. Dey and Y.K. Mohanty, for the Respondent

Final Decision : Allowed

Judgement

N.K. Das, J.—Plaintiff and defendants are owners of two adjoining pucca buildings facing a main road in the town of Puri. Plaintiff brought the suit for injunction restraining the defendants from making any construction on the top of their ground-floor adjoining the window of the plaintiff on his first-floor within fortyfive-degree angle from the sill of the window.

Plaintiffs case is that he purchased a double-storeyed building in 1943 by a registered sale deed and is in possession of the same since the time of purchase. Construction of the building was completed in the year 1938. In the first-floor he has one window on the northern wall of the western room, marked "X" in the sketch-map appended to the plaint. The defendants threatened to make construction over their ground-floor near the aforesaid window in a manner so as to block the flow of light and air to the room of the plaintiff through the said window. They further threatened to obstruct the plaintiff in his convenient and peaceful enjoyment of his house. The plaintiff filed Title Suit No. 234/57 in the Court of the Munsif, Puri against the present defendant No. 1, his deceased

brother Bholanath and late Suraimal Saha (predecessor of defendants 2 series). That suit was decreed and the defendants carried Title Appeal No. 37/59 of 1961/60 which was allowed in the year 1962. Plaintiff then preferred Second Appeal No. 243 of 1962 in this Court, but a memo of compromise (Ext. 6) was filed on 13-12-63 in the Second Appeal and accordingly the Second Appeal was disposed of on 1-5-64 in terms of the compromise. As per the terms of the decree in the Second Appeal (Ext. 2), the defendant undertook not to make any construction in violation of the Orissa Municipal Rules and also to provide open space in between the existing building of the plaintiff and the building which was to be constructed by the defendants. It is contended that the defendants had given undertaking admitting the easementary right of the plaintiff for free flow of light and air to his house through the window in question. According to the Municipal Rules, the defendants should not make any construction on their first-floor without observing the minimum rule of 45 degree angle from the sill of the window of the plaintiff, but the defendants are carrying on construction in a manner so as to prevent the flow of light and air through the said window.

2. In the written statement, the defendants have pleaded that the compromise was not according to law and cannot therefore be given effect to. The Municipal Rules do not provide for leaving open space in the first-floor. Even conceding that the Rules apply, then plinth area of the terrace is to be taken into consideration to find out the space required to be left on either side. The defendants have left open space of more than three feet width in between the wall of the plaintiff and that of their own where the window in question exists. The plaintiff is getting sufficient light and air to his room in question from other directions and the diminution of light and air, as alleged by the plaintiff, is to be ignored. The defendants further contend that they have not violated any terms of the compromise entered into in the Second Appeal. The rule of 45 degree angle can have no application to the present case.

3. The trial court held that the compromise entered into in the Second Appeal was not according to Order 23, Rule 3 of the CPC and as such the decree in the Second Appeal is not valid. The plaintiff had acquired prescriptive right of easement to light and air through the window in question. As the right has matured, the plaintiff is entitled to get sufficient light and air through the said window. The defendants have to leave at least 10 feet space from the window in question and they are not entitled to make the construction as per the plan (Ext. A) submitted by them. The prayer for prohibitory injunction made by the plaintiff was decreed restraining the defendants from making any construction within 45 degree angle and for pulling down the construction already made by them on the first floor of their building facing the window of the plaintiff.

The First Appellate Court has held that though the compromise decree in the Second Appeal was not according to law, yet the defendants are bound by the undertaking given by them in the High Court. The plaintiff has not perfected his prescriptive right of easement to light and air. The direction was that the

defendants have to leave a space of five feet from the sill of the window of the plaintiff making the construction over the first-floor. The First Appellate Court has modified the decree of the trial court as stated above.

4. The plaintiff has filed Second Appeal No. 297/76 challenging the decree of the First Appellate Court and the defendants have filed Second Appeal No. 13/77 challenging the decision of the First Appellate Court directing to leave a space of five feet from the sill of the window of the plaintiff.

5. The first question is whether the defendants are bound by the undertaking given by them in the earlier Second Appeal. Ext. 6 is the said undertaking. It is stated therein that the defendants would not make any construction in violation of the Orissa Municipal Rules and would provide open space in between the existing building of the plaintiff and the building, if any, to be constructed by the defendants. It is immaterial to go into the question whether the decree passed on this undertaking is valid according to the provisions of Order 23, Rule 3 C. P. C. read with the Orissa Amendment which says that both the parties should sign the compromise petition. There was no compromise petition, but on the undertaking of the counsel for both sides, the Second Appeal was disposed of. In any case, the defendants are bound by the undertaking given on their behalf by their authorised counsel. In *Deonandan Ojha v. Ramdayal Ojha* AIR 1971 Pat 102, it has been held that the best evidence about what happened before Court is what is recorded by the Judge in the order. Its correctness is not open to challenge by the parties. It can only be changed if the Judge himself says that he incorrectly recorded the order or if both the parties agree that what is recorded by the Court is not correct. The Patna High Court relied on *Bank of Bihar Ltd. Vs. Mahabir Lal and Others*, . It has further been held that every undertaking by a party is not given before the Court in writing. Counsel gives undertaking and the Court accepts that undertaking and proceeds on that undertaking and passes orders. It is as good as an undertaking given by a party himself in writing and is binding on him. In that view of the matter, I hold that the defendants are bound by the undertaking given in Ext, 6.

6. The defendants submitted the plan Ext. A leaving a space of three feet from the sill of the window of the plaintiff. This plan has been approved by the Municipality. There is evidence on record to show that some officers of the Municipality went for local enquiry and after that the plan was approved. It is contended by the defendants that once the plan has been approved by the concerned authorities of the Municipality according to the provisions of the Municipal Rules, it will be deemed that the construction is according to rules. The defendants rely on a decision of this Court in *S. Ziaullah v. Khatija Bibi* (1974) 1 CWR 88, in which it has been held that there can be no denial that the construction of the first-floor is definitely an addition to the building. Considering the provisions of Section 273 of the Orissa Municipal Act read with Rules 534-B (i), 534-C (ii), 534-D (2), 532 (1)" and 534-E (2) (a) of the Orissa Municipal Rules, it will appear that all the aforesaid provisions taken together will lead to

the conclusion that a person can be allowed by the municipal authorities to construct the first-floor on the existing ground-floor on the very walls without leaving any space as required in the construction of the ground-floor and if space is to be left out on the first-floor as required under the Rules, one has to put walls on the first-floor not on the walls of the ground-floor but away from it and in that case the walls of the ground-floor could not ordinarily carry the weight. It is contended on behalf of the plaintiff that this Court did not take into consideration the provisions of Sub-rule (9) of Rule 532 of the Orissa Municipal Rules, but considered only Sub-rule(1). Sub-rule (9) of Rule 532 provides that no addition to a building shall be allowed unless the addition is such as would be permissible if the whole building was reconstructed from the plinth with the open space required under the bye-laws applicable to the site of the building at the time of proposed addition. There is no dispute about the fact that construction of the first floor is an addition to the building. It is therefore contended on behalf of the defendants that the air space below the minimum should not be diminished at the time of construction of the first-floor. The defendants have referred to the evidence of the plaintiff and contend that there are several windows in that house and there will be no diminution of air and light to the house of the plaintiff.

7. The question that arises for consideration is whether in the facts and circumstances of the case the plaintiff is entitled to the relief of mandatory injunction as prayed for by him. By the time the aforesaid S. Ziaullah case was disposed of, the Full Bench decision of this Court was not in the field. *Krushna Kishore Bal Vs. Sankarsan Samal and Others*, was a case in which the plaintiffs prayed for mandatory injunction against the defendant who was making construction close to their house. The Full Bench held that:

"Even in a case where a person has acquired a right of easement to light and air an action for damages or injunction is not maintainable unless the injury complained of is material.

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The position would be no better in the case of the plaintiffs who have acquired no right of easement but complained of injury on account of the violation of the municipal plan and the rules. Plaintiffs are, therefore, to establish not merely injury to their right to light, air and privacy but material injury."

The Full Bench further held that mere violation of the municipal plan or rules would not furnish the plaintiffs with a cause of action. Plaintiffs must prove that defendant's construction in violation of the plan and the rules resulted in an invasion of their right to light, air and privacy causing material injury to them. If the plaintiffs establish such a case, defendant has an obligation in favour of the plaintiffs. As these questions were not considered by the Courts below, the Court remanded the suit framing issues to the effect if the construction by the defendant caused an injury to the right of the plaintiffs to light, air and privacy; if the injury was material, if pecuniary compensation would afford adequate relief

in respect of the injury; and if the plaintiffs were entitled to perpetual and mandatory injunctions. The suit was remanded for fresh disposal after recording evidence.

8. According to the dictum of the Full Bench as stated above, the plaintiff has to establish the material injury irrespective of the question whether he has perfected his prescriptive right to light and air and if he establishes material injury, then he will be entitled to perpetual injunction as prayed for. No doubt defendants have given undertaking for making construction on the first-floor of their building according to the provisions of the Municipal Rules. It is contended by the plaintiff that the defendants have not obeyed the Municipal Rules. The Full Bench has set the question at rest that even if the defendants make construction in violation of the Municipal Rules, the plaintiff has to establish the material injury by such violation, so as to enable him to be entitled to the relief of injunction.

9. As the aforesaid questions have not been considered in this case, it is necessary in the interest of justice that issues are to be framed and the case has to be disposed of according to the principles laid down by the Full Bench. The contents of the plaint clearly establish that plaintiff has claimed his right to light and air and on that ground he has prayed for injunction. In view of these circumstances and in the interest of justice, it is necessary that the following issues are to be framed :--

(a) Has the construction by the defendant caused an injury to the plaintiff's right to light and air?

(b) Is the injury, if any, material ?

(c) Whether pecuniary compensation would afford adequate relief in respect of the injury ?

(d) Is the plaintiff entitled to perpetual and mandatory injunction, as prayed for?

10. In the result, both the appeals are allowed. The judgment and decrees of the Courts below are set aside and the suit is remanded to the Trial Court. The Trial Court would now proceed to try the issues mentioned above, after giving full opportunity to the parties to lead evidence, besides the evidence already on record and dispose of the case according to law as indicated above. In the circumstances of the case, parties to bear their own costs.