

(2003) 06 OHC CK 0074
In the Orissa High Court
Case No : Second Appeal No. 171 of 1989

Durga Charan Naik and Another	Vs	APPELLANT
Kasinath Nayak (died) by his L. Rs. and Another		RESPONDENT

Date of Decision : 26-06-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10

Citation : AIR 2004 Ori 70

Hon'ble Judges : P.K. Tripathy, J

Bench : Single Bench

Advocate : B.B. Rath, R.C. Rath, S.K. Panda and M.K. Mohanty, for the Appellant; Jagannath Das, G.B. Das and Sujata Das, for the Respondent

Judgement

P.K. Tripathy, J.—For the reasons indicated below, the Second Appeal is bound to fail and consequently dismissed.

2. The following substantial question of law was formulated on 1-8-1989 when the Second Appeal was admitted.

"The only substantial question of law which arises for consideration in this Second Appeal is, whether the learned Courts below were correct in recording their findings solely on the basis of the report of the Civil Court Commissioner without taking into consideration the other evidence available on records."

3. It be noted at this Juncture that in the appeal memo appellants have raised three other substantial questions of law challenging to the acceptability of the report of the Civil Court Commissioner but such grounds were not accepted by this Court to be relevant substantial questions to be considered at the time of hearing of the appeal.

4. Judgment and decree passed by the Munsif, Bhubaneswar (Civil Judge, Junior Division) on 11th May, 1984 in O. S. No. 49 of 1976 by way of dismissing the suit was confirmed by learned Addl. District Judge, Bhubaneswar as per the impugned judgment passed in 13-1-1989 in Title Appeal No. 1/9/29 of 1989.

Therefore, plaintiffs are the appellants.

5. The original plaintiff Budhi Nayak filed the suit for declaration of his right, title and interest in respect of the suit property and for eviction of the defendants and to grant relief of recovery of possession in his favour besides issue of mandatory injunction against the defendants to remove the construction illegally raised by them. During pendency of the appeal in the lower appellate Court the original plaintiff having died, as per the order of the appellate Court passed on 16-1-1986, the present appellants were substituted as his legal representatives being respectively the son and the widow of said Budhi Nayak.

6. The disputed property is a stripe of land measuring an area of Ac. 0.05 decimals having the size of 20 feet x 61/2 feet. That disputed area situates between the lands belonging to the defendants vide plot Nos. 1580 and 4752, and the land belonging to the plaintiffs vide Plot No. 1579. According to the plaintiffs, the disputed property is a part and parcel of plot No. 1579 belonging to them and there was a green fence demarcating the boundary of said plot from plot Nos. 1580 and 4752 belonging to the defendants. According to the plaintiffs, on 31-12-1975 defendants forcibly encroached upon the disputed portion and constructed a compound wall and some other constructions without paying any heed to the protest raised by the original plaintiff and his family members. Accordingly the plaintiffs claim for the aforesaid reliefs. Defendants in their written statement, inter alia, claim that they have not constructed stone boundary wall on the disputed area and that, such construction was made by the plaintiffs and further that the disputed area appertains to plot No. 1580 and 4752 belonging to them.

7. On the basis of such pleadings of the parties, trial Court framed the following four issues.

(i) Whether the plaintiff has got title over the suit land?

(ii) is there any cause of action?

(iii) is the suit bad for non-joinder of necessary parties?

(iv) To what relief. If any, is the plaintiff entitled?

As stated at the bar, and rightly so, issue No. (i) is the issue which is to determine if the plaintiffs are entitled to the reliefs claimed. In support of their respective cases when plaintiffs examined three witnesses including the original plaintiff as P. W. No. 1, defendants also examined three witnesses including defendant No. 1 as D. W. No. 1. Several documents were relied upon by the parties and the relevant documents shall be noted at the time of consideration of the contention of the parties. Fact remains that an Amin Commissioner made a measurement and at the behest of the trial Court such documents were marked Exts. I to VII. Out of the same. Ext. IV is the Field Book, Ext. V is the local inquiry report, Ext. VI is the case Map and Ext. VII is the report of the Amin Commissioner.

8. Before dealing with the case another contention of the parties may be noted here. It is stated at the Bar and is also available on record that the aforesaid original suit was first disposed of on 31-7-1978. Learned Munsif decreed the suit granting the prayer for possession and mandatory injunction in favour of the plaintiff. Against that, the lower Appellate Court entertained an appeal from the side of the defendants and remanded the matter to the Court below with a direction to depute a Civil Court Survey Knowing Commissioner, to get the land demarcated and to decide the case accordingly. As noted above, the Amin Commissioner made the measurement and reported that the land appertains to plot Nos. 1580 and 4752 belonging to the defendants. On assessment of the oral and documentary evidence adduced by the parties and the report of the Civil Court Commissioner learned Munsif passed the Impugned Judgment dismissing the suit of the plaintiff and the lower Appellate Court vide the impugned judgment has also dismissed the appeal after assessment of such evidence on record.

9. In course of hearing, Mr. Rath, learned counsel for the plaintiffs-appellants argues that survey was not properly conducted by the Civil Court Commissioner and the evidence of D. W. Nos. 1 and 3 is contrary to the plea advanced by them and therefore the plaintiffs suit should have been decreed. He also argues that the evidence of P. W. No. 3, the Tahsil Court Amin and his report marked Ext. 2 sufficiently rebuts to the report of the Civil Court Commissioner and the Courts below did not properly considered that aspect. In that context, Mr. Rath also relies on the case of Kantaru Sahu and Others Vs. Dharma Sahu and Another, In the case of Kantaru Sahu (supra) this Court has propounded that if the Survey Knowing Commissioner is deputed by the Court and such Commissioner submits a report, then such report is acceptable as evidence in view of the provision in Order 26, Rule 10(2), C. P. C. but Court is to assess the evidenciary value of such report and not bound to act according to that report. That position of law is not disputed by the respondents.

10. Keeping in view the nature of the dispute evidence led by the parties, findings recorded by the Courts below and the above raised contentions of the appellants, this Court carefully peruses the evidence on record and finds that for good reason the Courts below have not accepted the evidence of P. W. No. 3 and Exts. 1 and 2 in proof of plaintiffs' claim of title over the disputed area. The trial Court has specifically recorded that in the report Ext. 2 P. W. No. 3 (Tahsil Court Amin) has not stated that defendants have made encroachment on the area belonging to the plaintiffs. The trial Court also found that report to be not acceptable on the grounds that there was no proof that the demarcation was conducted by P. W. No. 3 with due notice to the defendants, the demarcation was conducted by P.W. No. 3 by making measurement from no fixed point and the plaintiffs or P. W. No. 3 have failed to produce the Field Measurement Book to indicate the manner in which measurement was made by P. W. No. 3. On the other hand, report of the Civil Court Survey Knowing Commissioner was found to be not suffering from any such defects, and therefore such report was accepted

in which the Civil Court Commissioner after taking note of different areas indicated as disputed area by the plaintiffs and the defendants, measured systematically and gave his opinion that the disputed area belongs to the plots owned by the defendants. Not only that, trial Court also referred to the evidence of the parties examined from their respective sides and found that it is not in dispute on record that there was any old house which was existing on the disputed area and after demolition of the same the existing construction has been made by the defendants, In that context, the trial Court did not accept the evidence from the side of the plaintiffs that plaintiffs (original plaintiff] father had constructed and demolished that house on the ground that such a plea is not stated in the plaint. On a scrutiny of the report of the Civil Court Commissioner, this Court finds no defect or lacuna so as to find fault with the Courts below for accepting that report.

11. From the argument of the appellants, this Court finds that they want to build up a case in their favour on the basis of some minor contradictions in the evidence adduced from the side of the defendants. In a dispute of present nature plaintiff is to succeed on the basis of positive evidence on record if that supports his case and not on the basis of weakness of the evidence adduced by the opponent unless such weak evidence of the opponent supports the cause of the plaintiffs. Contradictions, which have been pointed out, on perusal are not amounting to admission of title and possession of the plaintiff over the case land, but such contradictions are found to be minor contradictions relating to the manner of possession over the case land as claimed by the defendants. Therefore, such contradictions ipso facto do not prove title of the plaintiffs over the disputed area or factum of forcible dispossession made by the defendants.

12. It, therefore, emerges from the perusal of the pleadings and evidence of the parties and the findings recorded by the Courts below that the Courts below have not committed any illegality in deciding Issue No. (i) against the plaintiffs to dismiss their suit. Hence, the Second Appeal is dismissed. Keeping in view the facts and circumstances, parties are directed to bear their respective cost of litigation all throughout.