
(1980) 04 OHC CK 0016
In the Orissa High Court
Case No : Second Appeal No. 104 of 1977

Krushna Chandra Prusty

APPELLANT

Vs

Muralial Moda

RESPONDENT

Date of Decision : 18-04-1980

Acts Referred:

Citation : (1981) 51 CLT 277

Hon'ble Judges : R.N. Misra, J

Bench : Single Bench

Advocate : R. Ch. Mohanty, for the Appellant; S.K. Dey, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, J.—Plaintiff who is in appeal against the affirming decree of the Additional Subordinate Judge of Cuttack instituted a suit on 12.5.1971 alleging that his shop building stood to the north of the Defendant's abutting the main road in Choudhury Bazar area of Cuttack town. When the Defendant threatened to make his building double storied, Plaintiff was apprehensive that construction of the same would obstruct free flow of air and light through, the windows and openings on the southern wall of the Plaintiff's double storied building and, therefore, he filed Tide Suit No. 177 of 1970 asking for permanent injunction. That suit was compromised on 18-12-970, on the following terms:

(i) Defendant would in no way obstruct the windows on the double storied southern wall through which Plaintiff received light and air.

(ii) Similarly as and when Defendant raises a double storied construction close to the existing kitchen and latrine of the Plaintiff, he would not open any window on the northern wall.

(iii) As and when Defendant intends to raise any double storied construction on the southern side of the Plaintiff's house, he would do so in accordance with the Municipal laws and would not open any door or window towards Plaintiff's side.

The said compromise decree became final. Plaintiff has alleged that notwithstanding such decree which binds the Defendant, he has proceeded to raise a double storied construction without the requisite municipal permission in breach of the decree. Plaintiff thereupon levied an execution case to get the structure demolished and asked for appropriate punishment to be given to the Defendant for violation of the binding decree. No relief, however was available in the, execution case and the Plaintiff, therefore, filed the suit asking for mandatory injunction requiring the Defendant to demolish the construction and for a direction that he should case the drains opened towards the Plaintiffs house and for other ancillary reliefs. He alleged that the construction had effected light and air to the Plaintiff's double storied house It was further alleged that the Defendant had fixed up a water tap and its water was flowing into the Plaintiff's side and amount to a nuisance. Defendant's drains had damaged the Plaintiff's shop building and as the building was an old one, Plaintiff became apprehensive of a total collapse.

2. The Defendant entered contest denying the plaint averments and pleaded that the suit was not maintainable in the absence of Municipality. He further pleaded that the compromise entered into the earlier litigation was not" enforceable for want of consideration. He denied that his construction was in violation of Municipal laws. He denied that the Plaintiff's right to light and air had been diminished and affected in any manner and he also denied that any nuisance had been caused to the Plaintiff on account of drain water or the fixing of the water tap.

3. In the suit Plaintiff examined three witnesses in all including himself as P.W. 1. P.W. 2 had been appointed as pleader commissioner in the earlier suit. His report was proved as Ext, 5. P.W. 3 was the pleader-commissioner in the execution case. His report was mar ked as Ext. 6. On the side of the Defendant two witnesses were examined.

4. The learned Munsif decreed the suit in part and by permanent injunction restrained the Defendant from opening any drain towards the Plaintiff's premises. Other reliefs were not granted. The Plaintiff, therefore, appealed.

The learned Appellate Judge made a local inspection and recorded a memorandum. After hearing parties he affirmed the decree of the Trial Court and dismissed the appeal. Plaintiff has therefore, come to this Court in second appeal.

5. In this Court Plaintiff's counsel pressed that there should be a local inspection. On 4-2-1980, I did not agree to visit the spot but after hearing both sides I called upon the learned District Judge at Cuttack to visit the spot and record a memorandum of local inspection with reference to four aspects, viz:

(i) he distance of the new construction of the Defendant from the Plaintiff's building and the height at which the windows on the Plaintiff's building on the wall facing to the Defendant's building are located. Whether the new construction has affected in any perceptible manner the Defendant's access to

light and air?

(ii) The distance between the Plaintiff's wall and the Defendant's wall and whether there is any open space till the skyline in between and if there be, the extent of the same.

(iii) Is there any wash basin fitted on the Defendant's side in such a manner as draining water into the Plaintiff's premises?

(iv) Is Defendant's new construction made in such a way that it leads to falling of rain water into or on the Plaintiff's building?

The learned District Judge visited the spot in presence of parties and submitted his report which has been made a part of the record and has been utilised by counsel for parties.

There is no dispute that the four questions which have been mooted for consideration of the learned District Judge at the time of local inspection are the pertinent aspects for consideration. The learned District Judge has found:

...will be seen that the corridor is an enclosed space and the water from the roof of the new construction of the Defendant and the wash basin opens towards the corridor. The water of the wash basin has been channelised to pass through the rain water pipe of the first floor on the eastern direction and the water from the new construction has been channelised to pass to the roads side by (sic) pipe. There is no roof over this 3 feet space, till the sky level. In view of this open space, the light that the Plaintiff was getting in his rooms may have been curtailed to some extent but it cannot be said that the rooms have become absolutely dingy and dark. On account of this closed space, the flow of free air may perhaps be obstructed.

From the memorandum prepared by the learned Appellate Court during hearing of the appeal it appears that there was 11 feet open space which has in the meantime been - reduced obviously on account further construction. Plaintiff had been maintaining throughout that the Defendant had not obtained requisite permission from the Municipality for the construction undertaken by him on the roof of his existing house. Defendant had not attempted to silence this stand of the Plaintiff by producing Municipal permission. There is no serious opposition on Defendant's side that the construction required, permission under the Municipal laws. The fact that the Defendant had raised construction without Municipal sanction certainly amounts to a breach of the compromise decree. Ordinarily the Defendant should have made himself liable to be suitably dealt with for such high handed action as also the construction raised in violation of the decree could have been ordered to be pulled down. The learned District Judge has, however, reported that there is a still gap of 3 feet between the two constructions and adequate light is received through the openings though the total light which the Plaintiffs double storied house had been receiving has been reduced. The learned District Judge has also indicated that flow of air has been reduced. These

certainly afford a cause of action to the Plaintiff. In view of the fact that the houses are located in one of the very busy localities and ordinarily in that area wide space is not available between the houses. I am prepared to take a liberal view and I am of the opinion that direction to pull down the structure raised by Defendant might work out in a harsh and Inequitable way against Defendant. I am however inclined to take the view that the Defendant having committed a breach of the decree and obtained e benefit contrary to his obligation should now be bound down by a perpetual injunction from not further interfering with the Plaintiff's house in any manner. He shall not be entitled to have any opening in his northern wall in view of the categorical term in the compromise decree. This term is available to be enforced. From the report of the learned District Judge it is not very clear whether there is any opening on the northern wall of the Defendant. No fault can be found with the report as the learned District Judge had not been asked to indicate, his observation on the question. Defendant must, however be bound by the term of the decree and he would not be permitted to have any opening on the northern wall in his double storied construction.

So far as the tap and basin are concerned, from the report of the learned District Judge it appears that it is really not a nuisance. Mr. Mohanty contended that the Defendant was in the habitat shifting the location do not think any importance should be attached to this contention but the Defendant can be called upon to fix his basin in such a way that no water therefrom would go to the Plaintiff's house or premises.

6. I would accordingly modify the decrees in the Courts below and grant the following further reliefs to the Plaintiff, viz., Defendant is hereby perpetually restrained from raising any further construction towards the Plaintiff's side which would reduce the distance between his and the Plaintiff's wall below three feet. He shall also not raise any further construction which would affect the passage of "light and air to the Plaintiff's double storied house. The Defendant is restrained by a perpetual injunction from having any opening in the northern wall in the first floor. He is also directed to fix the tap and basin in such a manner in the corridor that its water does not flow into the house of the Plaintiff. Plaintiff shall be en titled to costs of this litigation. Hearing fee in this Court is fixed at rupees fifty.