

(2008) 12 OHC CK 0092
In the Orissa High Court

Smt. Aratibala Dash and Another

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 05-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (2009) 107 CLT 34 : (2009) 1 OLR 29

Hon'ble Judges : B.S. Chauhan, C.J;B.N. Mahapatra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.S. Chauhan, C.J.—This case has chequered history and only for getting an interim injunction there had been rounds after rounds of litigations though the trial of the suit has not yet commenced.

2. The Appellants filed Civil Suit No. 72 of 2004 before the Learned Civil Judge (Sr. Division) 2nd Court, Cuttack for a declaration of their right of user over the suit property as their approach road from their house to National Highway No. 5 and for permanent injunction restraining the Defendants/ Respondents from interfering in their right to use over the suit property. Along with the suit an application under Order 39, Rules 1 and 2 CPC was filed for grant of temporary injunction restraining the Defendants/Respondents from obstructing the passage and the said application was dismissed vide Order Dated 8.6.2004 with a finding that the Plaintiffs-Appellants do not have a prima facie case for grant of temporary injunction.

3. The said order was challenged by the Plaintiffs-Appellants by filing FAO No. 87 of 2004 before the Learned District Judge, Cuttack along with CMA No. 89 of 2004 i.e. application for interim relief. Vide Order Dated 2.7.2004, the Appellate Court directed the parties to maintain status quo over the suit property till the disposal of the appeal. However, the said appeal was decided vide Order Dated 30.8.2004 directing the Civil Court to decide the case afresh. After the order of

remand passed by the first Appellate Court, the Trial Court appointed a Pleader Commissioner who submitted a report in favour of the Appellants-Plaintiffs observing that no other road having access to the said land was available. However, the application was dismissed by the Trial Court vide Order Dated 26.9.2005.

4. The Appellants/Plaintiffs being aggrieved filed FAO No. 224 of 2005 before the Learned District Judge, Cuttack which was also dismissed vide Order Dated 3.2.2006 with a finding that no injunction could be granted since they failed to establish prima facie case and further that the Respondents were setting up their government offices in accordance with law after having the allotment of the plot in dispute.

Being aggrieved of the Order Dated 3.2.2006, the Appellants -Plaintiffs filed Writ Petition No. 8331 of 2006 which has been dismissed vide Judgment and Order Dated 22.7.2008. Hence this appeal.

5. The three Courts have recorded the findings of fact that no case of grant of interim relief was made out in favour of the Appellants-Plaintiffs. There was alternative passage from the Appellants-Plaintiffs' plot towards the south side for their use. The Learned Single Judge has summoned the map from the office of the Sub-Registrar, Jagatpur and examined the issue himself and affirmed the finding of facts recorded by the Courts below.

Before us the same issues have been agitated and emphasis has been placed on the report submitted by the Pleader-Commissioner which has been considered by all the three Courts below.

6. It is settled legal proposition that if the Courts below have recorded the finding of fact, the question of re-appreciation of evidence by the third Court does not arise unless it is found to be totally perverse. The higher Court does not sit as a regular Court of appeal. It's function is to ensure that law is being properly administered. Such a Court cannot embark upon a fruitless task of determining the issues by re-appreciating the evidence. The Court would not ordinarily interfere with the concurrent findings on pure questions of fact and review the evidence for the third time unless there are exceptional circumstances justifying the departure from the normal practice. The position may undoubtedly be different if the inference is one of law from facts admitted and proved or where the finding of fact is materially affected by violation of any rule of law or procedure. (Vide Srinivas Ram Kumar Vs. Mahabir Prasad and Others, ; Tulsidas Khimji Vs. Their Workmen, ; and Pentakota Satyanarayana and Others Vs. Pentakota Seetharatnam and Others,).

7. Where the Court below considered the material facts and did not take into consideration any inadmissible evidence etc., the interference is not required by Court on third instance. (vide Madhavan Nair v. Bhaskar Pillai (2005) 10 SCC 553.)

8. In Babu Ram, Ashok Kumar and Another Vs. Antarim Zila Parishad, , the Full Bench of Allahabad High Court has observed as under:

A Court of appeal would not interfere with the exercise of discretion by the Court below. If the discretion has been exercised in good faith, after giving due weight to relevant matters and without being swayed by irrelevant matters. If two views are possible on the question, then also the Court of appeal would not interfere even though it may exercise discretion differently, were the case to come initially before it. The exercise of discretion should manifestly be wrong.

In the instant case we are the fourth Court. It is not the case of the Appellants that the Courts below have decided the case in violation of any statutory rules or in violation of principles of natural justice. The main submission advanced is that the Pleader's Commission report should not have been ignored.

9. In view of the fact that the Learned Single Judge has summoned the map from the office of the Sub-Registrar, Jagatpur and examined the case himself and recorded the finding of facts that there is alternative passage for their approach to the public road, the facts do not warrant any interference.

10. In view of the above, we do not see any cogent reason to interfere with the matter. The appeal lacks merit and is accordingly dismissed.

B.N. Mahapatra, J.

11. I agree.