

Sankar Kumar and anr. Vs. Mohanlal Sharma

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Court : Orissa

Decided On : Jan-08-1998

Reported in : AIR1998Ori117

Judge : P.K. Misra, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 26, Rule 10; [Specific Relief Act, 1963](#) - Sections 39

Appeal No. : Second Appeal No. 260 of 1985

Appellant : Sankar Kumar and anr.

Respondent : Mohanlal Sharma

Advocate for Def. : S.K. Dey, ;Y. Mohanty, ;S.K. Ghose, ;B.B. Ray and ;S.S. Sukla, Advs.

Advocate for Pet/Ap. : A.K. Mahakud and ;D.K. Dash, Advs.

Disposition : Appeal allowed

Judgement :

P.K. Misra, J.

1. Defendants are the appellants against a reversing decision.

2. The plaintiff-respondent filed a suit for mandatory injunction to remove the extended projection of the roof of the defendants' house on the ground that the said roof of the house is projecting and extending over the land belonging to the plaintiff, as a result of which the rain water is falling over the kitchen garden of the plaintiff and thus causing extensive loss and damages. The defendants in the written statement while denying the plaintiff's allegations claim that the roof is projecting over the vacant side belonging to the defendants themselves.

3. The trial Court dismissed the suit on the finding that the plaintiff failed to prove that the disputed land belongs to the plaintiff. The Appellate court reversed the finding of the trial Court and decreed the suit by holding that the disputed land belongs to the plaintiff.

4. During the pendency of the suit, a Civil Court Commissioner had been deputed. Though the Civil Court Commissioner had reported that the water from the house of the defendants was falling on the plaintiff's land, the trial Court had not placed any reliance upon the said report of the Civil Court Commissioner on the ground that the Civil Court Commissioner had not prepared any field map nor has referred to any record-of-right at the time of survey. The lower appellate Court while considering the aforesaid aspect, simply accepted the report of the Civil Court Commissioner merely on the ground that earlier the said report had been accepted. A perusal of the trial Court record indicates that the trial Court while accepting the Commissioner's report had observed that the effect of the report shall be considered along with the other evidence on record. Law is well settled that merely because a report of the Commissioner is accepted during the trial, such report is not binding on the trial Court at the time of final decision of the suit. Acceptance of a Commissioner's report at that stage only means that the report is considered to be a part of the record and is to be considered along with the other evidence on record at the time of final hearing. The trial Court had given cogent reason for not relying upon the report of the Commissioner. The lower appellate Court without referring to the reasonings given by the trial Court has simply placed reliance on the Commissioner's report, merely on the ground that on earlier occasion the said report had been accepted. As such, the erroneous approach of the lower appellate Court has definitely vitiated the judgment.

5. The lower appellate Court has also drawn adverse inference against the defendants as no witnesses including the defendants were examined in support of their claim that the disputed land belongs to them. In such a suit where the plaintiff was claiming a mandatory injunction on the basis that the disputed land belongs to him, the onus was definitely on the plaintiff to prove his own case. Law is well settled that merely because the defendants fail to prove their case, the plaintiff's suit is not to be decreed and the plaintiff has to stand or fall on the basis of strength of his own case. The lower appellate Court has relied upon a decision reported in (1970) 36 Cut LT 1211 (Paramananda Sahu v. Babu Sahu) wherein adverse inference had been drawn against a party because the party was not examined as a witness. The facts and circumstances of that case were entirely different where the question of adoption was in dispute and the Court drew adverse inference against defendant No. 1, who though denied about the adoption in written statement, was not examined. In the facts and circumstances of the present case, there was no justification for the lower appellate Court to draw an adverse inference and come to a conclusion that the plaintiff had right merely because the defendants were not examined.

6. In the present case, the main question to be decided is as to whether the land where the water from the house of the defendants is falling belongs to the plaintiff or to the defendants. Since the report of the Commissioner on the matter has not been accepted, it is necessary that such aspect has to be redetermined by deputing another Commissioner for the purpose. It is, therefore, necessary that the matter should be remanded to the trial Court and the trial Court should depute a survey knowing Commissioner to report as to whether the disputed land where the water from the roof of the defendants' house is falling belongs to the plaintiff or to the defendants. Such Commissioner should be deputed at the cost of the plaintiff and both parties shall be given adequate opportunity to adduce further evidence in support of their respective cases.

7. Accordingly, the appeal is allowed and the suit is remanded to the trial Court for fresh disposal. The plaintiff should be called upon to deposit the cost for appointing a survey knowing Commissioner within a period of two months from the date of receipt of this order and, thereafter, the suit should be disposed of as

expeditiously as possible preferably within a period of six months. There will be no order as to costs of this appeal.

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