

Bhaskar Chandra Roy Vs. Indrajit Roy

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Court : Kolkata

Decided On : Jun-19-2000

Reported in : (2000)3CALLT465(HC)

Judge : Bhaskar Bhattacharya, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Section 115 - Order 39, Rules 1 and 2

Appeal No. : Civil Revisional Jurisdiction C.O. No. 1685 of 2000

Appellant : Bhaskar Chandra Roy

Respondent : indrajit Roy

Advocate for Def. : Mr. Bikash Ranjan Bhattacharjee, ;Mr. S.K. Ghosh and ;Mr. R. Bhattacharjee, Adv.

Advocate for Pet/Ap. : Mr. Samapti Chatterjee and ;Ms. Chaitali Mukhopadhyay, Adv.

Judgement :

B. Bhattacharya, J.

1. This Revisional application is at the Instance of a plaintiff In a suit for declaration and injunction and is directed against Order dated March. 3, 2000 passed by the

Additional District Judge, 5th Court, Allpore in Misc. Appeal No. 294 of 1999 thereby setting aside the Order No. 34 dated June 5, 1999 passed by the Civil Judge (Junior Division), 2nd Court in Title Suit No. 358 of 1998.

2. The dispute involved in this application is over 4ft. passage lying by the side of the property owned by the parties. Initially the property belongs to the common vendor of the parties. The said vendor transferred 3 cotthas of land to the Opposite party herein. In the said deed it was mentioned that the disputed passage can be used by the vendor only for the purpose of easement and right of passage. There was, however, a stipulation in the deed that the vendor in future will not transfer this 4ft. passage to any subsequent purchaser.

3. The petitioner herein purchased 2 cottahs of land situated by the side of the land of the Opp. party from the said vendor and in the said deed the disputed 4ft. passage was shown as private passage of the present petitioner although in the previous deed executed in favour of the Opp.party, the vendor only reserved his right of passage and easement right through that passage.

4. The present petitioner now wants to bring water connection through the said 4ft. wide passage to his residence. The Opp.party has filed a separate suit for declaration that he has got absolute right over 4ft. passage as vendor has illegally transferred the same to the present petitioner. In the suit filed by the Opp.party he prayed for injunction restraining the presence petitioner from entering into the said passage; whereas in the suit filed by the present petitioner he prayed for injunction restraining the Opp.party from creating any disturbance in the matter of using the same as common passage for ingress and egress and from bringing water connection through that passage.

5. Both the applications were heard together and the learned trial Judge by Order No. 34 dated June 5, 1999 rejected the application of the Opp. party and allowed the prayer of the present petitioner.

6. Being dissatisfied, the Opp.party preferred an appeal only against the order by which injunction was granted in favour of the present petitioner.

7. By the order impugned herein, the learned first appellate Court below has set-aside the order passed by the learned trial Judge.
8. Being dissatisfied, the petitioner has come up in revision.
9. After hearing Ms. Chatterjee learned Advocate appearing on behalf of the petitioner and Mr. Bhattacharjee learned Advocate appearing on behalf of the Opp. party and after going through the materials on record, I find that so far right of passage is concerned, the petitioner has definitely a strong prima facie case to go for trial. More over, against rejection of the application for Injunction in the suit filed by the Opp. party, Opp.party did not prefer any appeal. Therefore, only question is whether during the pendency of the suit, the present petitioner should be permitted to take water connection through the disputed 4ft. passage. The learned first appellate Court below was of the view that in the absence of any local inspection no effective order can be passed.
10. Mr. Bhattacharjee learned Advocate' appearing on behalf of the Opp.party has submitted that the main water connection is going through the C.M.C. road by the site of the house of the present petitioner and as such, there is no necessity of bringing water pipelines through the disputed passage.
11. Ms. Chatterjee learned Advocate appearing on behalf of the petitioner has disputed the aforesaid contentions and has contended that the main water pipelines is passing through 12ft. wide common passage on the western side of the house of the Opp.party.
12. In view of such fact. In my opinion, the dispute can be resolved by appointing an Advocate Commissioner only for the purpose of ascertaining where C.M.C. water pipelines are passing through the 12ft, wide common passage on the western side of the house of the Opp.party or not. If it appears that the C.M.C. water pipeline is not passing through the C.M.C. road by the said house of the petitioner but is passing through western side of the house of the Opp.party, In such a case In my opinion, the petitioner should be entitled to bring water connection through 4ft. wide disputed passage as the petitioner has made out a strong prima facie case as regards right of passage over the said disputed

passage.

13. Under the aforesaid circumstances. I set-aside the order Impugned and direct the learned trial Judge to appoint an Advocate Commissioner for the purpose of ascertaining whether C.M.C. water line is passing through the 12ft. wide common passage as shown in the map annexed to the plaint of the petitioner or through the C.M.C. road which is lying on the western side of the house of the petitioner. The learned trial Judge is directed to dispose of the injunction application in accordance with such report. I have already indicated that if the water pipeline goes through 12ft. wide common passage, then the application filed by the petitioner should be allowed and the petitioner should be permitted to draw water line through 4ft wide passage otherwise the petitioner should be satisfied by bringing water pipeline direct from the C.M.C. road, in the event it is found that water pipeline passes to that road.

14. With the above observations, the Revisional application is disposed of.

The learned trial Judge is directed to Immediately appoint an Advocate Commissioner with specific direction to file report on such Inspection within a fortnight from the date of issue of writ and the learned trial Judge will dispose of the injunction application within three weeks after submissions of the report.

Xerox certified copy of this order, If applied for, will be delivered within a week from application.

15. Application disposed of