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Court : Patna

Decided On : May-11-2012

Appellant : Jasamati Devi and ors

Respondent : Sheo Murat Dubey and ors

Judgement :

IN THE HIGH COURT OF JUDICATURE AT PATNA Second Appeal No.455 of
2008 Jasamati Devi & Ors Versus Sheo Murat Dubey & Ors

11. 1-2012 Heard Mr. Arbind Nath Pandey, the learned counsel appearing for the appellants in support of this appeal. The defendants are the appellants in this appeal against the judgment of reversal. The title suit has been filed by the plaintiffs for removal of encroachment from the suit land. It is the case of the plaintiffs that there had been partition and separation between the descendants of the two co-sharers, namely, Dwarika Dubey and Mathura Dubey before the cadastral survey and C.S.Plot No. 246 was allotted to the share of the branch of Dwarika Debey and in C.S. Plot No. 247, Chhotu Dubey was allotted share from north and Guput Dubey was allotted land from south. It is the case of the plaintiffs that in the said plot no. 247 there was a Rasta left in between the land of shares of Chhotu Dubey from south and Guput Dubey from north for connecting plot no. 246 to plot no.178 on which there was existing main road. Later on, after the death of Chhotu Dubey his above said share in plot no.247 was given to Guput Dubey after compromise of the dispute with the branch of Dwarika Dubey and in lieu of the

same three decimals in plot no.251 from the south, adjacent to C.S.No. 246 was given to the branch of Dwarika Dubey. It is further case of the plaintiffs however that the Rasta existing in plot no. 247, although not shown in the recent survey with a separate plot number, remained in existence, but in the year 1966 the 2 defendants created an obstruction by raising a wall in the said Rasta in the year 1966 at the point where the said Rasta joins the public road in C.S.No. 178 corresponding to R.S.No.

157. The plaintiffs filed Case No. 146 of 1966-67 before the D.C.L.R. for removal of the said encroachment in which order was passed on 9- 7-1983 for removal of encroachment from R.S.plot no.

157. It is the assertion of the plaintiffs that they have acquired right of easement over the said Rasta or going to the public road in R.S.Plot no. 157 from there own C.S.Plot no.

246. The defendants resisted the claim of the plaintiffs by asserting that no Rasta ever existed in plot no. 247 and, in fact, the defendants have left some land in between the two parts of their house which is their own land used by them exclusively. It is the case of the defendants that there was earlier some land left in between plot nos. 246 and 247 which was used by the plaintiffs as Rasta, but later on the plaintiffs assimilated the said land in their own plot and constructed their house and have malafidely started claiming existence of Rasta over the land of the defendants. The trial court, after hearing the parties and considering their evidence on record, has come to the conclusion that the plaintiffs have already got alternative Rasta for coming out of their own plot and going to the public road and on that basis the trial court concluded that the plaintiffs were not entitled to the relief based upon the right of easement. The appellate court, however, reappreciated the evidence of the rival parties and has come to the finding that the 3 plaintiffs have been asserting their right of user of the disputed land as Rasta from the year 1966 itself and therefore even if the plaintiffs have been using other land as alternative Rasta will, by itself, be not sufficient to deny them the right of easement. By referring to the documentary evidence at Ext. 3 series the appellate court has come to the finding that the disputed land was being used as Rasta by

the plaintiffs from much before the filing of the suit and this is the only permanent Rasta available to the plaintiffs for coming to the public road at R.S.Plot no.

157. On the basis of these main findings the appeal was allowed and the judgment of the trial court was reversed. The learned counsel appearing on behalf of the appellants has submitted that the appellate court below has misconstrued the evidence on record and has wrongly held that the disputed land was being used by the plaintiffs as Rasta before filing of the suit. It has been urged that the findings recorded by the appellate court are contrary to the evidence on record and in ignorance of the material evidence. The learned counsel has also contended that the principle laid down in the Apex Court judgment, reported in 2005(1) P.L.J.R. (S.C.) 188 has also not been followed correctly by the appellate court. After perusing the judgments of the courts below and considering the submissions on behalf of the appellants, it appears that the main dispute hinges around the finding as to whether the disputed land was being used by the plaintiffs as permanent Rasta for going to the public road, as asserted by them 4 much before the filing of the suit. From the impugned judgment of the appellate court, it appears that on the basis of consideration of the documentary evidence as Ext.3 series, the conclusion has been arrived at that the disputed land had been claimed as Rasta by the plaintiffs as far back as in the year 1966. It also appears that reliance has been placed upon Ext.3/b and Ext.3/d by the appellate court stating that the D.C.L.R., after spot inspection, had found the nature of the disputed land as Rasta, but as it was on private land, the order of removal of encroachment could be passed only with regard to public road in plot no.157. The appellate court has also discussed the principle of law laid down by the Apex Court and has found that those principles are applicable in cases where the person, claiming the right of easement over the land as Rasta, has alternative Rasta. However, the appellate court below has rightly not applied the said principles to the facts of the present case in view of its finding that the Rasta being used by the plaintiffs at present is by way of an alternative, out of compulsion, and therefore the same cannot be considered to be alternative Rasta in its true sense. The defendants have led oral evidence mainly on the point of existence of another Rasta, which fact is apparent from the judgment of the trial court, but in view of the documentary evidence on record, which have been considered by the appellate court to come to the finding

that the disputed land was being used by the plaintiffs as Rasta till before the dispute arose in the year 1966, consideration of oral evidence with regard to use of another land as Rasta by the plaintiffs is not very much material. Moreover, it is well-settled that reappreciation of the evidence by the Court is not open in second appellate jurisdiction unless the findings are shown to be perverse. The findings recorded by the appellate court below are based upon appreciation of material evidence on record, and there is no perversity in the same. The dispute between the parties is concluded by the findings of fact by the appellate court below. There is no substantial question of law arising in this appeal for consideration, which is, accordingly, dismissed. (V. Nath, J.)

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