

IN THE HIGH COURT OF JUDICATURE AT PATNA
Second Appeal No.317 of 2013

- =====
1. DURGA DAS @ DURGA DAS MANDHYANI
 2. Harpal Das @ Harpal Das Mandhyani Son of Late Basa Mal
 3. Ashok Madhyani
 4. Pari Rani @ Parwati Devi
 5. Devi Rani
 6. Maya Rani
 7. Pushpa Rani @ Pushpa Devi
 8. Madhu Rani
 9. Chanda Rani @ Mrs. K. Ruprela Daughters of Late Basa Mal
 10. Smt. Kaushlya Devi wife of Late Mangat Ram
 11. Sunil Kumar Malkani @ Sunil Malkani
 12. Vikash Kumar Malkani @ Vikash Sons of Late Mangat Ram All resident of Mohalla- Amlatola, Katihar, P.O., P.S. & District- Katihar

.... Appellants.

Versus

1. ABDUL SUHAN
2. Abdul Hannan Sons of Late Abdul Ghani Firdaushi
3. Asrafi Jahan Begum, d/o Late Abdul Ghani Firdaushi
4. Abdul Katim Firdausi
5. Md. Nurul Hassan Firdaushi Sons of Late Chaudhary Abdul Latif
6. Nurul Islam
7. Munna
8. Guddu
9. Pappu Son of Late Anwarul Haque
10. Ruhi
11. Beli Daughters of Late Anwarul Haque
12. Bibi Sajda Khatoon, W/o Khalilur Rahman
13. Sahabuddin S/o Late Chaudhary Qutabuddin Firdaushi
14. Bibi Rahmati Khatoon W/o Md. Hassan D/o Late Chaudhary Qutubuddin
15. Tazuddin S/o Late Chaudhary Salimuddin
16. Mansoor Alam
17. Barik Alam
18. Khalid Alam Sons of Late Ghauhar Ali
19. Mahbood Alam son of Late Ghauhar Ali
20. Gulam Haider
21. Gulam Sarwer
22. Gulam Kuiser
23. Gulam Manaur
24. Gulam Sawar
25. Gulam Nawaz
26. Gulam Sarfaraj
27. Gulam Neraj
28. Gulam Siraj sons of Late Chaudhary Md. Salauddin
29. Bibi Sabera Khatoon widow of Late Chaudhary Md. Salauddin
30. Fatima Khatoon widow of Late Chaudhary Mustaque Ahmad
31. Ashfaq Ahmad
32. Afaq Ahmad

33. Farooque Ahmad
34. Mumtaz Ahmad Son of Late Chaudhary Mustaque Ahmad
35. Mahmooda Khatoon
36. Munria Sultana Daughters of Late Chaudhary Mustaque Ahmad All
resident of Mohalla- Saifganj, P.O., P.s. & District- Katihar

.... Respondents.

=====

Appearance :

For the Appellant/s : Mr. Diwakar Sinha

For the Respondent/s : Mr.

=====

CORAM: HONOURABLE MR. JUSTICE V. NATH
ORAL JUDGMENT

9 25-01-2016

Heard the learned counsel for the appellants.

The plaintiffs are the appellants in this appeal against the judgment and decree of reversal.

The suit was filed by the plaintiffs for declaration that the defendants have encroached over an area of 33 decimals of land in R.S.Plot No. 1982 towards north belonging to the plaintiff and they are only entitled to an area of 1.56 acres of land in R.S.Plot No.1982 from south. The relief has been sought to evict the defendants from the suit land and for recovery of possession.

The undisputed facts are that the Plot No.1982 area 1.93 acres of land originally belonged to Kaniz Fatima who sold 58 decimals out of the said area to Shravan Kumar by registered sale deed dated 04.12.1969 from northern side. The plaintiffs also claimed to have purchased 20 decimals of land out of the aforesaid area of Plot No.1982 towards north of the land purchased by Shravan Kumar. The plaintiffs have further claimed



to have purchased 58 decimals of land from Shravan Kumar by registered sale deed dated 26.10.1970. The defendants filed T.S.No.28/1970 claiming 1.56 acres of land in Plot No.1982 on the basis of their purchase from Bibi Kaniz Fatima by registered sale deed dated 02.07.1956 and in that suit the plaintiffs were also impleaded as defendants. The said suit was decreed and the decree was put to execution in Execution Case No. 189/1973 wherein the delivery of possession to the decree holders (defendants in the present suit) was affected on 22.04.1983 after demolishing pucca boundary wall , fencing etc of the judgment-debtor (plaintiffs in the present suit).

The case of the plaintiffs in the present suit, in short, is that the defendants encroached over 3 decimals land of the plaintiff on 20.05.1983 by constructing a wall and thereby the plaintiffs have been left with only 4 decimals land out of Plot No.1982. It is also the case of the plaintiff that in Demarcation Case No.06/1983 before Sub Divisional Officer, the land of Plot No.1982 was measured by the Amin wherein the defendants were found in possession of 33 decimals of land in excess of their 1.56 acres of land in Plot No.1982. The relief, accordingly, as aforementioned have been sought against the defendants.

The defendants in their written statement have



contested the allegations and claim of the plaintiffs and have come out with specific case that immediately after the delivery of possession in Execution Case No. 189/1973 they had constructed a boundary wall in presence of the Najir. The defendants have specifically stated that they are in possession of only 1.56 acres land in R.S.Plot No.1982 and besides that they are in possession of 12 decimals land of R.S.Plot No. 1975 which has been amalgamated with the land of R.S.Plot No.1982. The defendants have also denied the knowledge of the demarcation case or measurement made in that demarcation case.

The trial court returned the findings on the issues arising in the suit in favour of the plaintiffs and granted the decree as prayed. In appeal, however, the appellate court below on reappraisal of evidence has reversed the findings of the trial court, allowed the appeal and dismissed the suit by the impugned judgment and decree.

The learned counsel appearing for the appellant has submitted that the appellate court below has committed error in law in not considering the material evidence adduced on behalf of the plaintiffs. It has also been submitted that the reasonings assigned by the trial court has not been considered by the appellate court below and therefore the impugned judgment is

vulnerable in view of the provision of Order 41 Rule 31 C.P.C. It has also been submitted that as the suit was for removal of encroachment it was incumbent upon the appellate court below to have appointed the survey knowing pleader commissioner to identify the encroachment and in not doing so the appellate court below has committed material irregularity in dismissing the suit of the plaintiff. No other submission has been made on behalf of the appellants.

After perusal of judgments of both the courts below and considering the submissions, it is manifest that the suit has been filed alleging encroachment of 33 decimals of land of the plaintiffs in Plot No.1982 by the defendants and seeking the relief for removal of the said encroachment. However, the plaintiffs have admitted in the plaint that there had earlier been a suit between the plaintiffs and the defendants wherein the defendants were allowed the relief of declaration of title over 1.56 acres of land in Plot No.1982 alongwith the relief for recovery of possession. The fact has also been admitted that the said decree was put to execution in Execution Case No.189/1973 and the defendants were put in possession over 1.56 acres of land in Plot No.1982 as decreed after dispossessing the plaintiffs from the part of the land which was in wrongful possession of the plaintiffs. The

plaintiffs, however, have alleged that on 20.05.1983 the defendants have encroached over 33 decimals of land of the plaintiffs in the suit Plot No.1982. In view of the denial by the defendants of the allegations of the encroachment and their specific case that they are in possession of only 1.56 acres of land in Plot No. 1982 after erection of boundary wall around their land on the date of delivery of possession itself, it was for the plaintiff to establish the fact of alleged encroachment by leading cogent evidence. However, the plaintiff no.2 in his deposition as P.W. 10 has supported the case of the defendants that the boundary wall was erected after the delivery of possession to the defendants and the entire land of the defendants is within the said boundary wall. The plaintiff no.2 has further accepted in his deposition that on 20.05.1983, he had filed an application before the executing court below alleging that more land was handed over in possession to the defendants in course of delivery of possession upon which Miscellaneous Case No.74/1989 was initiated but ultimately dismissed for default. The appellate court has found on the basis of records that in his petition filed on 20.05.1983 before the executing court below alleging delivery of possession of excess land, it was claimed by the plaintiffs that only 7 decimals of land had been given in excess to the defendant. In the present suit the

plaintiffs have alleged the encroachment by the defendants on 20.05.1983 itself but have claimed encroachment of 33 decimals of land. The appellate court below has also found that the plaintiff no.2 in his deposition as P.W. 10 has failed to substantiate the alleged encroachment and has expressed doubt over the version of the plaintiffs regarding excess land in possession of the defendant after taking into notice the varying and conflicting stand of the plaintiffs. It has also been taken into consideration by the appellate court below that the plaintiffs did not take any step for local inspection of the suit land by a survey knowing pleader commissioner in support of their allegation regarding damage of the boundary wall by the defendants. The appellate court below after scrutiny of evidence on record has also come to the finding that the measurement as claimed to have been done in the demarcation proceeding was in fact done in absence of the defendants. In the backdrop of these facts, this Court does not find that the appellate court below has acted unreasonably or with perversity in coming to the conclusion that there is no material on record to establish the alleged encroachment by the defendants or the possession of the defendants over excess land than their 1.56 acres of land in Plot No.1982. During the course of submission on behalf of the appellants, no material evidence has been pointed out

which has been ignored by the appellate court below and in fact the submission on behalf of the appellants has mainly centered around reappreciation of evidence to come to a different conclusion in order to overturn the findings of fact by the appellate court below which are based upon the appreciation of evidence on record. The possibility of another view on the same set of evidence cannot be a substantial question of law to be considered at the second appellate stage.

Ex consequenti, this Court does not find any substantial question of law arising for consideration in this appeal, which is, accordingly dismissed.

(V. Nath, J)

Nitesh/-

U			
---	--	--	--