

10.1.2022
SL No.5
Court No.8
(gc)

SAT 86 of 2020

**Swapan Kumar Tribedi
Vs.
Tulasi Tribedi & Ors.**

(Via Video Conference)

Mr. Sandip Das,
Mr. Sajal Kanti Bhattacharyya,
Mr. Sarthak Burman,
...for the Appellant.
Mr. Jibon Ratan Chatterjee, Sr. Adv.,
Md. Hafiz Ali,
...for the Defendants/Respondents.

The affidavit of service filed in Court be kept with the record.

This second appeal has come for admission. The second appeal is arising out of a judgment and decree of affirmation by the learned Additional District Judge, Kandi, Murshidabad in Title Appeal No.18 of 2017 arising out of the judgment and decree passed by the learned Civil Judge (Junior Division), 2nd Court, Kandi, District-Murshidabad in Title Suit No.37 of 2001.

Mr. Sandip Das, learned Counsel appearing on behalf of the appellant has argued that both the Courts below have completely misconstrued the report filed by the learned Commissioner and disregarding the fact that although the report of the learned Commissioner may not have been tendered any evidence or exhibited but in terms of Order 26 Rule 10(2) of C.P.C., it forms part of the record and the evidence taken by him shall be the evidence in the suit. It is

submitted that the learned Trial Court although had noticed that the learned Commissioner had reported that the defendants encroached some portion of the property of the plaintiff, but while arriving at the conclusion, has disregarded the same and dismissed the suit filed by the plaintiff. The Appellate Court committed similar error and the findings arrived at by both the Courts with regard to the encroachment are perverse and, accordingly, the second appeal should be admitted.

On 9th March, 2001 while hearing the said matter, we directed the production of the plaint in Title Suit No.144 of 2005 and the report of Radhamadhab Ghosh dated 21st December, 2009 that was exhibited in the said proceeding. The reason being that the Title Suit No.144 of 2005 was instituted by the defendants in this proceeding against the plaintiff, it would appear from record that in Title Suit No.144 of 2005, the investigation was conducted by a survey passed lawyer, namely, Radhamadhab Ghosh unlike in the present case and his report dated 21st December, 2009 was marked as 'Exhibit-C' stating that the suit plot of the present defendants is bounded by boundary wall. The said report does not show whether the present respondents/defendants encroached the plaintiff's land as mentioned in 'Ka-1' schedule of the plaint.

On consideration of both the reports, both the Courts have opined that it would not appear from the report dated 12th January, 2011 the extent of the land of the plaintiff

alleged to have been encroached by the defendants. It is not correct that both the Courts have ignored the report filed by the Commissioner in the said proceeding. Both the Courts have taken note of Order 26 Rule 10(2) of C.P.C, although not specifically mentioned in both the judgments. The defendants have encroached some part of the property which has been categorically stated in both the judgments as consideration of the materials on record and the earlier Commissioner's report being 'Exhibit-C' that there has been no encroachment on the plaintiff's land by the defendants in the present suit. The concurrent findings on facts are not to be likely interfered with unless it appears to be perverse.

We are unable to accept the submission made on behalf of the appellant that both the Courts have committed error in arriving at the conclusion that there has been no encroachment on the plaintiff's land. In absence of any such perversity, we do not find any substantial questions of law raised in the appeal for which the second appeal needs to be admitted.

The second appeal, being SAT 86 of 2020, accordingly, stands dismissed.

However, there shall be no order as to costs.

All parties shall act on the server copies of this order duly downloaded from the official website of this Court.

(Kesang Doma Bhutia, J.)

(Soumen Sen, J.)