

IN THE HIGH COURT OF ORISSA AT CUTTACK

Second Appeal No.225 of 1994

In the matter of appeal under Section 100 of the Code of Civil Procedure assailing the judgment and decree dated 06.07.1994 and 22.09.1994 respectively passed by the learned District Judge, Dhenkanal-Angul in T.A. No.15 of 1986 confirming the judgment and decree dated 22.03.1986 and 05.04.1986 respectively passed by the learned Additional Sub-Ordinate Judge, Dhenkanal-Angul in T.S. No.22/30 of 1983/83.

Manmoth Kumar Sahoo (Since Dead) by his LRs and Another ***Appellants***

-versus-

Adar Bewa (Since Deleted) & Others ***Respondents***

**Appeared in this case by Hybrid Arrangement
(Virtual/Physical Mode):**

For Appellants - ***Mr.P.K. Singh***
(Advocate)

For Respondents -

CORAM:

MR. JUSTICE D.DASH

Date of Hearing :02.09.2022 : Date of Judgment:25.11.2022

D.Dash,J. The Appellants, in this Appeal under Section 100 of the Code of Civil Procedure, 19008 (for short, 'the Code'), have assailed the judgment and decree dated 06.07.1994 and 22.09.1994 respectively passed by the learned District Judge, Dhenkanal-Angul in T.A. No.15 of 1986.

By the same, the First Appellate Court has dismissed the Appeal filed by the original Appellant No.1 and the other Appellant

as the unsuccessful Plaintiffs under section 96 of Code wherein they had challenged the judgment and decree dated 22.03.1986 and 05.04.1986 respectively passed by the learned Additional Sub-Ordinate Judge, Dhenkanal-Angul in T.S. No.22/30 of 1983/83.

It be stated there that the original Appellant No.1, having died during pendency of this Appeal, his legal representatives are now on record and pursuing this Appeal with the other Appellant, who was Plaintiff No.2 before the Trial Court. Similarly, the original Respondent No.1 having died during pendency of this Appeal, in presence of her legal representatives, her name has been expunged. It be also stated here that before the Trial court, one Bhagabata Sahu and Jharia Bewa were the Defendants. During the First Appeal, Bhagabata Sahu having died, his legal representatives had been substituted and Respondent No.1 was one out of them. The Respondent No.11, who was the Defendant No.2, having died, her legal representative has come on record as Respondent No.11(a). The Respondent No.12, in the present Appeal, was the Defendant No.3 in the suit.

The suit having been dismissed, the unsuccessful Plaintiffs although had carried the First Appeal, no fruitful result has yielded for them. So, this Second Appeal has come to be filed.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Trial Court.

3. Plaintiffs' Case:-

The land under Plot Nos.2901 & 2902 belonged to the Plaintiffs and they have their residential house over it. The

Defendants are the owners and recorded tenants of the land under Plot Nos.2890 & 2900, which is adjacent to the north of the land of the Plaintiffs. They have their residential house over it. The National Highway runs adjacent to those plots from north to south. The Plaintiffs and Defendants have their pucca building adjacent to the National Highways and kuchha rooms to the back of those plots. They have also their vacant homestead land beyond the kuchha room which they use as their backward (bari). It is stated that there is one narrow lane of 2½ feet breadth in between the above plots of the parties running up to the National Highway to the extreme end of the plots of the parties; over which the parties are having their competing claim. On that score, the suit bearing T.S. No.17 of 1980 was then sub-judice in the Court of the learned Munsif, Dhenkanal. The cause of action for filing the suit is that on 14.05.1983, the Defendants demolished their husking-floor, which was on the opposite side of the kitchen of the Plaintiffs after the lane and that kitchen of the Plaintiffs is to the adjacent south of the said lane to the back of the pucca building. The Defendants then started construction of a septic tank latrine without the approved plan of Municipality, which was being objected to by the Plaintiffs. The Defendants then carried out the construction despite the restrain from the Municipal Authority and it is said that half of the roof of that latrine has covered more than half of the disputed lane. As a result, the rain water of the roof of the latrine would be falling on the thatched roof of the Plaintiffs' kitchen. It is also stated that the footsteps of the latrine, having been constructed over a portion of the disputed lane, the same causes hindrance to the user of the lane. The construction of the latrine is said to be objectionable. So, the suit was ultimately

been filed praying for a mandatory injunction against the Defendants for demolition of said latrine.

4. The Defendant Nos.1 & 2, while traversing the plaintiff averments in their written statement, have stated that in the year 1979, the Plaintiffs have forcibly opened a door towards the lane and constructed drain adjacent to their wall which gave rise to the dispute and the suit has been filed which is pending. They have pleaded that in April, 1982, the Municipal Authority was moved for approval of the plan for construction of septic latrine. As no response was received, they proceeded with the construction and completed the same, well before 14.05.1983. They have also pleaded that the Plaintiffs have stopped the scavengers to pass in the lane to clean their service latrine for which they had to construct because of insistence from the side of the said Municipal Authority after stoppage of the practice of engagement of scavengers for the purpose. They also state that the septic tank latrine has been constructed strictly in accordance with the rule and no inconvenience is caused to the family members of the Plaintiffs. It is also stated that the Defendants have constructed a small drain adjacent to their house well on the lane itself and the excess water from that septic tank passes through that, which connects the main drain.

5. The Trial Court, on the above rival pleadings, framed as many as four issues. The answer to the issue, i.e., issue no.2 as to the construction of the latrine, upon examination of the evidence and their evaluation has been returned against the Plaintiffs.

The First Appellate Court, being moved by the unsuccessful Plaintiffs, has affirmed the findings of the Trial Court and accordingly, has been confirmed. Hence, the Second Appeal.

6. Learned counsel for the Appellants submitted that the Courts below have not taken into account the overwhelming evidence as to the discomfort and inconvenience created by the construction of the latrine by the Defendants. He further submitted that on the face of the evidence that by such act of discharge of foul water from the septic tank, the Courts below ought to have issued the mandatory injunction as prayed for. According to him, by simply concluding that there is no evidence as to the local standard of foul smell prevailing in the locality so as to materially affect the physical comforts of the Plaintiffs and their family members, the Courts below ought not to have refused to grant the decree. He, therefore, submitted for admission of this Appeal to answer the above as the substantial questions of law.

7. None appeared on behalf of the Respondents despite notice. Keeping in view the submissions made, I have carefully read the judgments and decrees passed by the Courts below.

8. The core issue, in the suit, is whether the said construction of the latrine by the Defendants is injurious to the Plaintiffs and is causing inconvenience. The Trial Court, on the said issue, as it appears has undertaken an elaborate examination of evidence let in by the parties and the finding has been rendered against the Plaintiffs. That finding of fact based on evidence having been questioned in the First Appeal, the First Appellate Court has held the said finding of the Trial Court to be based on proper

appreciation of evidence and said conclusion of the First Appellate Court is found to be based on proper appreciation of evidence and facts as well as the legal position.

The position of law is well settled that the concurrent finding of fact rendered by the Courts below does not warrant interference in the Second Appeal unless it is found to have been so arrived at upon perverse appreciation of evidence. Merely because a different view can be taken on the evidence on record, the Second Appellate Court is not authorized to disturb the said finding without coming to a definite conclusion that the finding is the outcome of perverse appreciation of evidence, either side trekking or overlooking the admissible and acceptable evidence on record or reading something which is extraneous to the evidence on record.

In the given case, the Trial Court having given the finding against the Plaintiffs, the First Appellate Court appears to have undertaken the exercise of re-appreciation of the said evidence independently at its level and accordingly, has arrived at the same finding and then finally has found no justification and reason to arrive at a finding contrary to that. This Court finds no such glaring infirmity therein so as to overturn the concurrent finding of fact on that core issue. In course of hearing, nothing is placed from the side of the Appellants that any such material evidence have been bypassed by the Courts below, which if would have been taken into account in their proper perspective, the conclusion would have been to the contrary or that such findings are based on inadmissible or unavailable evidence on record to conclude that, if the Courts below would have followed the right path, the finding might have been otherwise in favour of the Plaintiffs so as to decree their suit.

This Court, thus being not in a position to find out any such perversity in the concurrent finding of fact as returned by the Courts below, the submission of the learned counsel for the Appellants cannot be countenanced with.

9. For all these aforesaid, the submission of the learned counsel for the Appellants that the Appeal merits admission to answer any substantial question of law stands repelled.

10. In the result, the Appeals is dismissed. There shall, however, be no order as to cost.



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