

IN THE HIGH COURT OF ORISSA AT CUTTACK

S.A. No.297 of 2000

In the matter of an Appeal under Section 100 of the Code of Civil Procedure assailing the judgment dated 26.08.2000 passed by the learned 1st Additional District Judge, Berhampur in Title Appeal No.42/96 (42/95-GDC) setting aside the judgment and decree dated 22.08.1995 and 06.09.1995 respectively passed by the learned Civil Judge, Junior Division, Berhampur in Title Suit No.29 of 1994.

Shyamaghana Nayak

....

Appellant

-versus-

Smt.Sangeeta Mohapatra

....

Respondent

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

For Appellant

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Mr. M. Mishra, Sr. Advocate
B. Mishra, P.K. Das, B. Mishra,
(Advocate)

For Respondent

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Mr. L. Samantaray, Advocate.

CORAM:

MR. JUSTICE D.DASH

Date of Hearing : 20.11.2022 : Date of Judgment: 23.12.2022

D.Dash,J. The Appellant, by filing this Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), has assailed the judgment and decree passed by the learned 1st Additional District Judge, Berhampur in Title Suit No.42/96 (42/95-GDC).

By the same, the Appeal filed by the Respondent in challenging the Judgment and decree passed by the learned Civil Judge, Junior Division, Berhampur in Title Suit No.29/94 under section 96 of the Code has been allowed.

The Trial Court having dismissed the suit filed by the Respondent as the Plaintiff; in the First Appeal, the suit has been decreed directing the Appellant (Defendant) not to open the passage of the well for drawing water and to close the wall which was broken by the Appellant (Defendant) at the time of construction of the septic latrine.

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 Suit.

3. The Plaintiff's case is that one Kokila Nayak was the common ancestor of the Defendant's family and he is the maternal grandfather of the Plaintiff. In a partition which took place in the year 1947 amongst Kokila and his three sons, their houses were divided. In the said division, the suit house fell to the share of Ramachandra Nayak whereas two other houses remained under the possession of Kokila with his two sons namely Bhima and Shyamaghana. Said Shyamaghana is the Defendant in the present suit who was then a minor. The eastern and western side of the

house was allotted to Kokila which was later on divided between Bhima and Shyamaghana (Defendant). It is said that the Defendant got the eastern adjoining house. These three houses were having no septic latrines and those were provided with service latrines on their backside. The suit house is the mid one. It is further stated that there is no link between the said three houses. There is a well, half of which situates on the land of the Defendant and the other half comes on the land in the share of Ramachandra. So the said well is in joint possession of both.

4. In course of time, Ramachandra adopted Rabichandra who is the natural son of Defendant as his adopted son. Then for the purpose of convenience, partition was affected between Ramachandra and Rabichandra. Ramachandra while enjoying his share, sold the suit house to the Plaintiff to clear up his loan dues. It is alleged that said Rabichandra with the assistance of his natural father and the Defendant tried to interfere with the peaceful possession of the well and the house purchased by the Plaintiff and created disturbance and finally on 17.02.1994, the Defendant closed the broken wall thereby depriving the Plaintiff of using the water from the well.

5. The Defendant in his written statement has stated that, there is only one open latrine in the backside of the house for use of the Defendant and

his family members. There was a passage on the wall to allow the Defendant and his family members to approach the latrine. The suit house which belongs to Ramachandra is some feet away from the said latrine and there is also a gate. So it is said that neither Ramachandra nor the Plaintiff has got right over the wall or the well which exclusively belong to the Defendant.

6. On the above rival pleadings, the Trial Court having framed five issues has answered those two crucial issues that is issue no.2 and 3 upon examination of evidence and their analysis in the backdrop of their rival pleadings. The Trial Court's answer to those two issues are against the Plaintiff holding that the Plaintiff has failed to prove as having the right over the wall and the well in further holding that the Defendant has got the right of passage to go the Kacha latrine situated on the back side of the house of the Plaintiff. With such answer, the suit was dismissed.

7. The First Appellate Court being approached by the unsuccessful Plaintiff has over turned, the above findings of the Trial Court. On re-appreciation of evidence, it has held that the situation warrants excise of easementary right jointly by both sides on the wall which the Defendant has deliberately closed to the disadvantage of the Plaintiff. In arriving at such conclusion; on discussion of evidence, it has held that there is a well

in the middle of the wall that demarcates the boundaries of Ramachandra and the Defendant which has been closed by the Defendant with a view to cause inconvenience to the Plaintiff. The suit was accordingly decreed by the First Appellate Court over setting aside the order of dismissal, as had been passed by the Trial Court. Hence the present Second Appeal is at the instance of the aggrieved Defendant. The Appeal has been admitted to answer the following substantial question of law;

- (i) Whether the Lower Appellate Court is justified in decreeing the suit when the Plaintiff has not examined as witness.

8. Learned counsel for the Appellant submitted that here in the case, when the Plaintiff herself has not come to the witness box in order to prove the plaint averments in support of the reliefs claimed, the Courts below have erred in not drawing adverse inference against her on the basis of the principles containing Illustration (g) of 114 of the Evidence Act, 1872. He further submitted that the Trial Court upon detail discussion of evidence on record in the backdrop of the rival case presented in the respective pleadings since had arrived at a conclusion against the case of the Plaintiff, the First Appellate Court has been unreasonable in setting the same at naught.

9. Learned counsel for the Respondent, on the other hand, has submitted that merely because the Plaintiff has not examined herself as

witness, it is not the universal rule that for the same, adverse inference is bound to be drawn against her case. He submitted that if the Plaintiff through admissible evidence has proved her case which is acceptable, as it has been in the present suit, the non-examination of the Plaintiff has no adverse impact on the case of the Plaintiff. According to him, an adverse inference for non-examination of a party can be drawn against his case if he could have only proved his case and no other evidence can be the substitute but when there is overwhelming evidence on record in support of case of that party, non-examination of that party would not permit the Court to draw adverse inference. According to him in the present suit non-examination of the Plaintiff is not at all fatal.

10. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below I have also gone through the plaint and written statement and have perused the evidence both oral and documentary.

11. It is seen that in the present suit, the Plaintiff is a housewife and on her behalf, her husband has been examined as P.W.1 besides the other witness P.W.2. From the side of the Plaintiffs, documents Ext.1 to 6 have been proved. The husband of the Plaintiff has stated to have been looking after the case on behalf of his wife, the plaintiff. The point for

determination in the present case is as to if the Plaintiff has got any right over the well as well as the wall which are situated in between the suit house and the house of the Defendant. The Defendant himself having come to the witness box as D.W.1 has stated that the intervening wall between his house and that of the Plaintiff's maternal grandfather, Ramachandra was constructed by their father Kokila. He states to have dug the well on his own land. The certified copy of the partition deed between Ramachandra and his son Rabichandra has been proved in the case as Ext.3 which shows the existence of the wall and half of the well to have fallen in the share of Ramachandra. It is also admitted that Rabichandra was given a house elsewhere. Therefore, half of the wall and the well standing in between the houses of the Defendant and Ramachandra fell to the common share of the Defendant as well as the Plaintiff's vendor in the partition which had taken place in the year 1947 which has been admitted in evidence and marked Ext.1. For all these, the claim of the Defendant that he dug the well on his own land falls flat which thus was not required to be refuted by the Plaintiff herself and therefore, her coming to the witness box is of no fatal consequence. The husband of the Plaintiff (P.W.1) has stated that the wall situated in between the suit house and that of the Defendant is under joint possession

of both and the well situated in between the house of Bhima and the Plaintiff is their joint well. Ramachandra's daughter has been examined as P.W.2. She has stated about her father to have been allotted with the middle house and the eastern wall of the Defendant's house is the western of the suit house and that the western side house was allotted to Bhima. It was further stated by her that in between the wall and house of Ramachandra and the Defendant, there is a well which is used by both and that well is divided by being packed in the middle so that both sides can use the same to their convenience which she states to have been closed by the Defendant thus preventing the Plaintiff to draw water from the well.

12. With the above evidence on record which clearly show that there is a well in the middle of the wall that demarcate the boundaries of Ramachandra and Defendant and the Defendant has closed the same which under the circumstance is bound to cause inconvenience to the Plaintiffs, I am of the considered view, that the non-examination of the Plaintiff is not of any fatal consequence to her case which has been otherwise established through evidence as piloted by the Plaintiff and placed by the Defendants from their side. In view of the evidence of the husband of the Plaintiff (P.W.1) and the daughter of Ramachandra

(P.W.2); had the Plaintiff been even examined, she would just have reiterated the same. The evidence of these two witnesses examined from the side of the Plaintiffs in support of all those facts pleaded in the plaint of which they have the knowledge on their own when is in no way found to be unacceptable, for non-examination of the Plaintiff in the suit, it does not call for drawal of adverse inference as against the Plaintiff's case.

13. The First Appellate Court, as it appears having rightly taken into account, the evidence of Plaintiff's witnesses and even taking cue from the evidence of Defendant's witnesses is absolutely right in decreeing the suit by rectifying the error committed by the Trial Court. The substantial question of law is accordingly answered leading to the dismissal of this Appeal.

14. In the result, the Appeal stands dismissed. No order as to cost.

**(D. Dash),
Judge.**