

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.34 of 2015

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Sarwan Kumar, Son of Late Kailash Singh, Resident of village-Gopichak,
P.S.-Sheikhpura, District-Sheikhpura at present Barbigha, Patel Nagar, P.S.-
Barbigha, District-Sheikhpura.

... .. Appellant/s

Versus

1. Amrendra Kumar, Son of Late Baidya Nath Prasad.
2. Baidya Nath Prasad, Son of Ram Swaroop Mahton.
3. Laxmi Devi, Wife of Baidya Nath Prasad Sinha.

All residents of Village-Patel Nagar, P.S.-Barbigha, District-Sheikhpura.

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Deepak Kumar Singh, Advocate
For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL JUDGMENT

Date : 04-08-2023

Heard the learned counsel for the appellant on the
point of admission.

2. The appellant has filed this second appeal under
Section 100 of the Code of Civil Procedure feeling aggrieved
and dissatisfied with the judgment and decree dated 22.12.2014
passed by the learned Additional District Judge, Sheikhpura in
MTA No.9 of 2013 whereby while dismissing the appeal, the
learned appellate court affirmed the judgment dated 22.02.2013
and decree dated 06.03.2023 passed by the learned Munsif,
Sheikhpura in Title Suit No.18/2010.

3. From the records, it appears the appellant was



plaintiff before the learned trial court and the appellant before the first appellate court.

4. The appellant and the respondent nos. 2 and 3 purchased a piece of land each on Plot No.439 and several other persons have also purchased the land in the said plot. The purchased land of the appellant is stated to be 75/32 decimals and the respondents' purchased land is 13 decimals. The case of the appellant is that the house of the respondents is situated in the northern boundary of the house of the appellant and both sides have entered into a written agreement dated 05.12.2002 that the appellant would leave 1 feet land in his north and the respondent no.1 would leave 15 inch land in his south and in that manner they would construct their houses. The open space of 27 inch between the houses of the appellant as well as the respondent no.1 would be used as alley for air and light and both sides agreed not to open any eaves (*chajja*). Though the appellant abided by the terms of agreement and erected his wall leaving 1 feet of the land, the respondents while constructing the first floor, projected 18 inch of their roof on 15 inch of their earlier left land and also 3 inch on the land of the appellant. This extension of 18 inch through projection of the roof on first floor is the bone of contention in between the appellant and the



respondents.

5. On the other hand, the respondents have denied the agreement dated 05.10.2002. The respondents have further submitted that when they started constructing their house, they left two and half feet open space towards south which was from north to south and further left 25 feet space from east to west open on their own land for air and light. Further case of the respondents is that the appellant taking undue advantage of his being in police force encroached upon the land of the respondents and started construction work and erected the wall on the said land.

6. The learned trial court framed nine issues and after consideration of evidence dismissed the suit of the appellant. The plaintiff-appellant moved before the learned first appellate court which recorded finding that the judgment and decree passed by the learned lower court were legal and valid and went on to dismiss the appeal of the plaintiff-appellant. The order of the learned appellate court has been assailed in this second appeal.

7. The learned counsel appearing on behalf of the appellant has vehemently contended that the learned trial court did not frame the issues properly based on the pleadings and the



learned appellate court did not take this fact into its consideration. Both the courts below did not consider that as the issues were not framed properly, the evidence was not read in proper perspective and, thus, a wrong finding was arrived at by the learned courts below.

8. The learned counsel further contended that the learned appellate court has not considered each and every issues while recording the judgment of affirmation. The learned counsel has further submitted that the learned appellate court was required to appreciate the evidence *vis-a-vis* the issues framed and a duty was cast upon the learned appellate court which it has failed to discharge. The learned counsel has further submitted that the learned appellate court in paragraph 31 has summarized its finding basically relying on the discussion made by the learned trial court on the documents and the oral evidence.

9. The learned counsel has further contended that though the learned appellate court recorded its finding about the learned trial court not complying the provisions of Order 26 Rule 10A and Order 26 Rule 14 (3) of the Code of Civil Procedure with regard to report of learned Survey Knowing Pleader Commissioner, which has been marked as Exhibit 3



series, yet it did not remand the case before the learned trial court for appointment of new Pleader Commissioner, as Exhibit 3 was disbelieved and not considered by it. In this condition, the only option open to the learned lower court, under the provisions of the Order 26 Rule 14 (3) of the Code of Civil Procedure, was to seek fresh report by appointing a new Survey Knowing Pleader Commissioner, which was not done by it. Even the learned appellate court recorded its finding that the report cannot be relied on due to non-compliance of provisions of Order 26 Rule 14 (3) of the Code of Civil Procedure. It did not remit the matter and neither did it resorted to provisions of Order 41 Rule 7 of the Code of Civil Procedure for bringing on record the scientific report of the Pleader Commissioner by way of additional evidence.

10. The learned counsel has further submitted that the learned appellate court has failed to comply the provisions of Order 41 Rule 31 of the Code of Civil Procedure and did not consider the evidence on record. Its finding are not supported by the reasons. The learned lower court did not consider the oral evidence and failed in its duty to appreciate the oral evidence. The learned counsel placed his reliance on the decision of the Hon'ble Supreme Court in the case of *H. Siddiqui v. A.*



Ramalingam reported in **(2011) 4 SCC 240** wherein it held in paragraph 21 as under :

“Order 41 Rule 31 CPC

21. The said provisions provide guidelines for the appellate court as to how the court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate court that the court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance with the said provisions if the appellate court's judgment is based on the independent assessment of the relevant evidence on all important aspects of the matter and the findings of the appellate court are well founded and quite convincing. It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for



consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions (Vide Sukhpal Singh v. Kalyan Singh [AIR 1963 SC 146] , Girijanandini Devi v. Bijendra Narain Choudhary [AIR 1967 SC 1124] , G. Amalorpavam v. R.C. Diocese of Madurai [(2006) 3 SCC 224] , Shiv Kumar Sharma v. Santosh Kumari [(2007) 8 SCC 600] and Gannmani Anasuya v. Parvatini Amarendra Chowdhary [(2007) 10 SCC 296 : AIR 2007 SC 2380])”.

11. I have considered the contentions and grounds taken by the learned counsel for the appellant to assail the order of learned appellate court on the ground that issues were not properly framed as per the pleadings, I think the same does not appear to be correct. The issues framed may be loosely worded but it cannot be said that they are not as per the pleadings or the issues have been improperly framed. The learned trial court has framed the following issues on the basis of the pleadings of the parties :-

1. क्या वाद पोषनीय है?
2. क्या वाद परिसीमा अधिनियम से प्रभावित हैं?
3. क्या वाद विशेष अनुतोष अधिनियम के धारा 34 से प्रभावित है?
4. क्या वादी निर्धारित न्याय शुल्क दाखिल किया है?
5. क्या वादी को वाद दायर करने का उचित कारण मौजूद है?



6. क्या प्रतिवादी सं० 1 दिनांक 5.10.02 के समझौते को माना है?

7. क्या विवादित जमीन जो नापी के अनुसार 18" उत्तर से दक्षिण और 25' पूरब से पश्चिम है वह प्रतिवादी के जमीन का भाग है वादी के जमीन का भाग हैं विवादित (वादग्रस्त जमीन 18" उत्तर से दक्षिण और 25' पूरब से पश्चिम जिसपर प्रतिवादी द्वारा निर्माण किया गया है क्या यह सही है। यह अवैध है, जिसे ध्वस्त किया जा सकता है।

8. क्या उत्तरवारी दिवाल जिस पर वादी का घर है, वह अपने खरीदगी जमीन पर बनाया है।

9. क्या वादी मांगे गये अनुतोष को पाने का हकदार है?

12. The learned counsel for the appellant has not been able to convince this Court that any of the issues were not required to be framed or were beyond the pleadings.

13. The learned appellate court took notice of all issues and formulated its own points for determination of the appeal. Thereafter, the learned appellate court considered the findings recorded by the learned trial court on the evidence for arriving at its findings and in doing so, it has also recorded its own reasons which reflects from paragraphs 14 to 30 of the impugned judgment. Paragraph 31 referred by the learned counsel has only summed up what has been discussed and considered by the learned appellate court. It is not a fact that the learned appellate court jumped to a conclusion without recording its own reasons.



14. Since the learned appellate court affirmed the judgment and decree of the learned lower court, I do not think it was required to discuss each and every issue with reference to findings or reiterate the reasons given by the learned trial court. The Hon'ble Supreme Court in the case of ***Malluru Mallappa v. Kuruvathappa*** reported in **(2020) 4 SCC 313** has discussed this issue in paragraph 18 which reads as under :

“18. It is clear from the above provisions and the decisions of this Court that the judgment of the first appellate court has to set out points for determination, record the decision thereon and give its own reasons. Even when the first appellate court affirms the judgment of the trial court, it is required to comply with the requirement of Order 41 Rule 31 and non-observance of this requirement leads to infirmity in the judgment of the first appellate court. No doubt, when the appellate court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by the trial court. Expression of a general agreement with the reasons given by the trial court would ordinarily suffice”.

15. Even submission of learned counsel for the appellant about need to refer the matter to the learned trial court for issuance of a new commission since it set aside the report of the Survey Knowing Pleader Commissioner by implication,



does not seem to be correct. If the provision is considered in its totality, the Order 26 deals with Commissions and Order 26 Rule 13 and Rule 14 are concerned with Commissions in the case of partition decree. Even the heading of the Code of Civil Procedure is quite explicit and the plain reading of the provisions substantiate this fact. It deals with the situation where the Court confirms or varies the report or reports, it shall pass a decree in accordance with same as confirmed or varied. But when the Court set aside the report or reports it shall either issue a new commission or make such other Order as it shall think fit. Thus, passing a decree based on report of the Survey Knowing Pleader Commissioner has been provided where the commission has been granted prior to preparation of decree in a partition suit and it is not true for all cases where a Pleader Commissioner has been appointed. So, the contention of the learned counsel for the appellant is without any substance. Moreover, when the learned appellate court has considered the other evidence, documentary as well as oral, I do not think much reliance could be placed on Exhibit 3 series. This document has been contradicted by another document, which is Exhibit H, the report of the Circle Amin, which specifically mentions that the total area of the appellant was only 2343



sq.kari whereas, his construction was on 2365 sq. kari. So, the house of the appellant exceeds his purchased land and this document was not opposed by the plaintiff-appellant.

16. From the discussions made hereinabove, it is apparent that the learned counsel for the appellant has tried to challenge the concurrent findings of two courts mostly on the facts of the case and the appreciation of evidence by the learned appellate court. The Hon'ble Supreme Court on a number of occasions has held that the High Court is not expected to re-appreciate the evidence just to replace the findings of the lower courts. Reliance could be placed in the case of ***Karnataka Board of Wakf Vs. Anjuman-E-Ismail***, reported in ***(1999) 6 SCC 343*** wherein it has been held by the Hon'ble Supreme Court that pure question of fact are not amenable to the jurisdiction of second appeal. If the learned court below arrived at a finding which does not suffer from any infirmity or perversity, this Court will not look into the matter to re-appreciate the evidence to take a contrary view.

17. Hence, in the light of the discussions made so far, the decision relied upon by the learned counsel for the appellant is of no help to his case.

18. Since the learned counsel for the appellant has



not been able to point out any perversity in the judgment of the learned appellate court and as the grounds raised by the learned counsel for the appellant as discussed hereinbefore do not make out a case for admission of this second appeal, I do not find that any substantial questions of law arises in the present matter.

19. Accordingly, the instant second appeal is dismissed at the stage of admission itself.

(Arun Kumar Jha, J)

V.K.Pandey/-

AFR/NAFR	A.F.R.
CAV DATE	N/A
Uploading Date	11.08.2023
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