

(1999) 12 PAT CK 0089

Patna High Court

Case No: Appeal from the Appellate Decree No. 327 of 1995

Smt. Sugga Devi

APPELLANT

Vs

Pramod Choudhary

RESPONDENT

Date of Decision: Dec. 15, 1999

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 11

Citation: (2000) 1 PLJR 847

Hon'ble Judges: P.K. Deb, J

Bench: Single Bench

Advocate: Abdul Mannan Khan, Sadique Ahmad and Binay Kumar, for the Appellant;
Brajesh Sharma and Syed Masood Manzar Ahsan, for the Respondent

Final Decision: Allowed

Judgement

P.K. Deb, J.

This appeal has been preferred against the judgment and decree dated 29.9.1995 passed by the 2nd Additional District Judge, Khagaria, in Title Appeal no. 19 of 1994 whereby and whereunder the judgment and decree passed by the Additional Munsif, Khagaria, in Title Suit no. 17 of 1992 has been reversed. The plaintiff-appellant filed the suit with the allegation that the boundary wall of the purchased land of the plaintiff wherein her residence is situated had been demolished by the defendant, who are next door neighbours and came in possession by right of purchase subsequent to that of the plaintiff and constructed a Chhajja and opened up a window causing encroachment over the lands of the plaintiff and also created construction in possession of the plaintiff over her residence in her purchased land. The defendant contested the suit denying all the allegations of the plaintiff. During the proceeding of the suit before the trial court survey knowing pleader commissioner was appointed to find out the encroachment as alleged, if any, but the pleaders commissioner submitted a report not in accordance with the direction of the writ issued to him and as such, the report of the

pleader commissioner was rejected. Then the suit proceeded on the basis of oral evidence and also documents filed by both the parties. On consideration of the evidence on record, the trial court found that the plaintiff's land has been encroached by construction of Chhajja and by opening up of a window towards the plaintiff's land and ordered for removal of the encroachment. Against that order an appeal was preferred. The appellate court also on consideration of the trial court judgment, without independently going through the evidence adduced by the parties, came to the finding that the allegations of encroachment is very negligible as the same is 15" in width and 64" in length and on the basis of a single Bench judgment of this Court, the encroachment being a trivial in nature he had reversed the judgment of the original court. Hence, this Second Appeal.

2. At the admission stage under Order 41 Rule 11 of the CPC notice has been issued to the respondents and they appeared also and the matter has been heard in presence of the counsel for both the parties. Although the evidence of the parties adduced in the trial court had not been independently considered by the appellate court but it appears from the judgment that the encroachment, as alleged, from the side of the plaintiff could be established but then the question comes in as to how much of encroachment is there. The same can be found out only after a proper survey being made either by survey knowing pleader commissioner or through proper surveyor and if a proper survey being made and it is found that there is encroachment then the plaintiff can be granted a decree for recovery of the encroached portion by removal of obstruction, if any. Learned counsel for the respondent has also raised no objection for proper survey. In such sort of small encroachment cases survey of the land is a must. When the report of the survey knowing pleader commissioner was rejected then it ought to have been sent for the second time to do the survey properly and submit a report as per the specific direction being given in the writ itself. But that has not been done in the trial court nor the same has been considered by the appellate court. In that way, the judgment of the appellate court is hereby set aside and the matter is sent back to the appellate court for writing a fresh judgment on the materials on record after having proper survey of the land and its accessories as contained in Schedule-1(A) of the plaint. The survey should be ordered after hearing the counsel for the parties by settling the point and direction to be made in the writ for the survey and after survey report is received any objection is raised from the parties, learned appellate court shall proceed in accordance with law to dispose of the appeal. While considering the survey report learned appellate court shall also consider the oral evidence being adduced by both the parties on the point of dispute. Thus, the second appeal is hereby allowed by remanding the case to the appellate court after setting aside the appellate judgment with the direction and observation as made above. In the facts and circumstances; no order as to costs.