

Court No. - 19

Case :- SECOND APPEAL No. - 540 of 1987

Appellant :- Pragdin And Others

Respondent :- Kunjal

Counsel for Appellant :- H.S.Sahai,Hanumant Lal Yadav,K.L. Vishwakarma,Priti Saxena,Ratan Kant Sharma,Uma Shankar Sahai,Vidya Bhushan Pandey

Counsel for Respondent :- R.K.Sharma,Pulkit Misra

Hon'ble Jaspreet Singh,J.

1. Heard Shri Sharaswat Srivastava, learned counsel appearing under the authority of Shri U. S. Sahai, learned counsel for the appellants and Shri Pulkit Misra, learned counsel for the respondent.

2. The instant second appeal has been preferred by the defendants being aggrieved against the judgment and decree passed by the trial court dated 28.08.1982 passed in Suit No.201 of 1980 whereby the plaintiffs who had filed the suit for injunction was allowed. The regular civil appeal filed by the defendants bearing No.315 of 1982 has been dismissed by the Civil Judge, Sultanpur acting as the Appellate Court by means of judgment and decree dated 18.07.1987.

3. The defendants being aggrieved thereafter preferred the instant second appeal which was admitted on 21.10.1987 and the following questions of law were framed which are being reproduced hereinafter:-

"a) whether a judgment and decree, which is based upon incorrect appreciation of pleadings of the parties, is sustainable?

b)whether an appellate judgment which is very much influenced by an incorrect fact that the alternative passage has not been pleaded by the defendants(but in fact, it had been pleaded), is maintainable?

c) whether a judgment and the consequent decree is

sustainable, which has ignored the Commissioner's report and other evidence on the record?

d) whether the lower courts are justified in decreeing the suit as prayed, even when it was found as a fact and a finding had also been recorded that the plaintiff's contention was not correct and that part of the case was not proved?

e) whether a prescriptive easementary right of passage can be decreed without proving the ingredients of this right as envisaged by Section 15 of the Easement Act?

f) whether a right of passage can be decreed without giving any consideration to the ground, space for which the right of passage was claimed, the relation between the parties and other attending circumstances of the case?

g) whether the courts below are justified in decreeing the demolition of the entire structure without giving any consideration that only the demolition of part was required for the exercise of the claimed right of passage?

h) whether a person can sue for the benefit of the general public without complying with the provisions of Order 1 Rule 8 of the Code of Civil Procedure?

4. Before advertng to the rival submissions, this Court deems appropriate to briefly notice the facts giving rise to the instant appeal.

5. The original plaintiff, namely, Kunjal filed a suit for permanent injunction bearing Regular Suit No.201 of 1980 pleading therein that the house of the appellants has been shown in the site-plan annexed and forming part of the plaint in suit indicating that on the northern side that is a passage which has been shown by the letters X Y which runs in east west direction and the same has been in use of the plaintiff since the time of their forefathers for over hundred years. It was pleaded that this passage marked by letters X Y merges with the main road which runs in north south direction.

6. It was further pleaded that the said passage at the juncture it meets with the main road prior thereto the defendants attempted to raise a saria thereby blocking the passage which in turn would affect the right of the plaintiff to access the road

and since it has been under use of the plaintiff, accordingly blocking of the passage would cause irreparable injury to the plaintiff. In the aforesaid circumstances, the relief for injunction was sought.

7. The defendants filed their written statement wherein they denied the plaint allegations and further stated that the plaintiff has not given the correct picture in the site-plan and as such suit of the plaintiff was liable to be dismissed.

8. Upon the exchange of the pleadings, the trial court framed six issues and primarily the issue upon which the suit was contested were:- **(i)** Whether the plaintiff is entitled to use the said passage? **(ii)** Whether the plaintiff is entitled to get and remove the obstruction by the defendants?

9. After the parties had led evidence the trial court noticed that the plaintiff has the access to the main road only from the said passage marked by the letters X Y and in absence of any other alternate rout the plaintiff would suffer injury in case if he is prevented from using the said passage, accordingly the court by means of order dated 28.08.1982 decreed the suit. The defendants preferred a Regular Civil Appeal No.315 of 1982 which has also been dismissed by the lower appellate court confirming the judgment and decree passed by the trial court also on similar grounds that the plaintiff had acquired the right of easement and since there was no alternate way available with the plaintiff, he was entitled for the decree of injunction. The defendants in the aforesaid circumstances approached this Court by means of the instant second appeal on the questions of law as noticed above.

10. The Court has heard the learned counsel for the parties and also perused the material on record.

11. The contention of the learned counsel for the appellants is that the two courts have not appropriately appreciated the pleading of the parties and thus any finding given which is contrary to the pleadings is bad in the eyes of law

and such a judgments cannot be sustained. It has further been urged that whether the plaintiff had Prescriptive Easmentary Right over the passage in question and without filing the suit in terms of Order 1 Rule 8 CPC?; Whether the relief as prayed could have been granted and all these issues have not been appropriately considered by the trial court so also by the lower appellate court, hence the appeal deserves to be allowed.

12. Learned counsel for the respondent, on the other hand, submits that the plaintiff had specifically pleaded that he had right over the user of passage which was in existence since the time of his forefathers. The defendant did not have any right to create any obstruction and accordingly this has been considered by the two courts including by taking notice by the Advocate Commissioner's Report and in light thereof the two courts have returned findings of fact which are not assailable in second appeal, especially when there is no palpable error in the said finding which is based on the evidence led by the parties, in the aforesaid circumstances, the appeal deserves to be dismissed.

13. Noticing the aforesaid contentions in context with the record available, apparently it would indicate that the plaintiff has clearly pleaded that the passage marked by letters X Y which is on the northern side of the house of the plaintiff was being utilized since over hundred years and as such the defendants had no right to block such passage. At this juncture, it will be relevant to notice the site-plan and from the perusal thereof, it indicates that the main road is running on north south direction and the passage run from east to west direction and meets the main road. The house of the plaintiff and the defendants has been shown on the southern side of the passage whereas on the northern side is a well and house of Rajaram.

14. From the perusal of the said site-plan, it does not indicate that there is any other alternate passage available with the plaintiff. In the aforesaid backdrop, the defence of the defendants indicates that the plaintiff does not have any right

over the passage nor the same will be utilized by him. It is urged that the plaintiff in order to usurp the land has filed the suit which otherwise deserves dismissal.

15. In light of the questions of law as framed, as a proposition it is relevant to state that a judgment and decree which is based on incorrect fact may not be sustainable. However, it needs to be seen whether the two judgments under challenge suffers from such a vice. In this context the pleading as noticed above clearly indicates that the defendants in his written statement had not pleaded that the plaintiff had an alternate route which was being utilized by him for reaching up to the main road. At this stage, it would be relevant to notice the written statement of the defendants wherein he had pleaded that the plaintiff has not depicted the correct picture in the site-plan. He has also stated that the defendants and their ancestors have been living in the property in question which is part of their land and it was never a passage. It was also pleaded that since it was the land of the defendants, they have only attempted to raise a pakka sariya as the old sariya had fallen down being a dilapidated structure. It was also pleaded that the plaintiff was not in possession and for the aforesaid reason the suit was liable to be dismissed.

16. However, there is no clear averments that the appellant has any alternate route. No site-plan was filed by the defendants to indicate that what is the correct position, in case if the site-plan filed by the plaintiff is alleged to be incorrect. It is in the aforesaid backdrop that the parties led evidence and the trial court even noticed the two Commissioner's report and has given a finding that the plaintiff has right to access the main road from the passage X Y.

17. It is also provided in the judgment of the trial court that the defendants shall not obstruct the passage and in case if they had raised any construction thereon in shape of keeping a sariya, the same was required to be removed. The lower appellate court also has echoed the same sentiment while dismissing the defendants appeal.

18. This Court having considered the material on record finds that the finding recorded by the two courts is based on proper appreciation of evidence and this Court is not required to reappraise the evidence on record. The findings of fact have been recorded and they are based on material evidence available on record. It is not the case of the appellants that the finding recorded by the trial court as well as the lower appellate court is contrary to any material evidence on record or has been recorded without any evidence or the two courts have taken a view which no prudent person could arrive at. Considering the aforesaid facts and circumstances, also noticing that once the view has been taken by the two courts, the findings of fact are usually binding on this Court unless any perversity has been pointed out.

19. In view of the aforesaid, there does not appear any palpable error committed by the two courts while dismissing the defendants appeal. It will also be relevant to notice that plaintiff has already pleaded that the said passage was in his use for the last hundred years from the time of his forefathers. This averment of the plaintiff was supported by the evidence and it cannot be said that the said finding is bad. It is also to be noticed that since the house of the plaintiff which has been shown in the site-plan and is connected to be main road by the passage in question since the personal right of the plaintiff is affected hence he had filed the suit in his personal capacity. Only in case if the rights of large number of people was being affected, then the suit could have been filed in terms of Order 1 Rule 8 CPC in a representative capacity but looking into the nature of the dispute as borne out from the pleading. It clearly indicates that it was a personal right of the plaintiff-respondent which was being challenged by obstructing the passage and in the aforesaid circumstances, the suit filed for injunction by the plaintiff cannot be said to be bad.

20. In view of the aforesaid, this Court does not find that there is any merit in the appeal. Accordingly, the appeal is dismissed. The judgment and decree passed by the trial court dated 28.08.1982 in Suit No.201 of 1980 as well as

lower appellate court dated 18.07.1987 in Regular Civil Appeal No.315 of 1982 is affirmed. Costs are made easy. The record of the trial court be returned forthwith.

Order Date :- 6.12.2023

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