

Neutral Citation No. - 2023:AHC-LKO:75554

Court No. - 19

Case :- SECOND APPEAL No. - 203 of 1991

Appellant :- Mohd.Kamil And Others

Respondent :- Smt.Rashida

Counsel for Appellant :- Avadhesh Kumar

Counsel for Respondent :- S.K.Srivastava,A.A. Khan,Abdul Zaheer,Akhtar
Abbas,Arshad Naim,Mohd. Ali,Pankaj Kumar Pandey,R.P. Shukla,S.P. Shukla

Hon'ble Jaspreet Singh,J.

1. Heard Shri Avadhesh Kumar, learned counsel for the appellants.

None has put in appearance on behalf of the respondent despite the fact that the case is listed under the heading "**These Cases Shall Not Be Adjourned**".

2. The appeal is of the year 1991 and accordingly, the Court has heard learned counsel for the appellant in absence of learned counsel for the respondent.

3. The instant second appeal has been filed by the defendant assailing the concurrent judgment and decree dated 22.01.1991 passed by the Additional Civil Judge, Sitapur in Appeal No.105/1990 and by the same judgment, the respondent's appeal bearing No.107/1990 was also dismissed as a result the entire suit of the plaintiff for permanent injunction was as decreed by the First Additional Munsif, Sitapur by means of the judgment and decree dated 16.08.1990 was affirmed.

4. The instant second appeal was admitted on 06.05.2005 on the following substantial question of law, which read as under:-

"1 Whether the right of flowing of Nali claimed by the plaintiff-responder could have been decreed if it has not been transferred along with the land transferred.

2. Whether something can be said about the Chabutra which is also an easementary right or not."

5. In order to appreciate the controversy involved in the suit, certain brief facts are being noticed first hereinafter.

6. Originally, the plaintiff Smt. Rashida had filed a suit seeking a decree of injunction restraining the defendant from creating any interfering in the use and occupation of the Chabutra (platform) shown in the site-plan on the eastern side of the house of the plaintiff and also from restraining the defendant from blocking the Nali (small drain) from which the dirty water from the house of the plaintiff flowed.

7. The suit came to be contested by the defendant stating that they had their rights and there was no Nali which belonged to the plaintiff. Moreover, even the Chabutra did not belong to the plaintiff and the plaintiff is not entitled to a decree of injunction and the suit is liable to be dismissed.

8. Upon exchange of pleadings, the trial Court framed five issues. However, the main issues upon which the suit was contested was (i) whether the alleged disputed land shown in the map annexed with the plaint was purchased by the plaintiff from the defendant by sale-deed dated 17.02.1977 and (ii) whether the alleged land is the only approach available to the plaintiff to have excess to his house.

9. The trial Court while dealing with the Issues No.1 and 2 after noticing the sale-deed which was brought on record, it held that the defendant had sold only land measuring 25 ft x 44 ft. and about 5 ft. of land from the main door of the plaintiff has also been indicated in the sale-deed. Moreover, on the eastern side, there is mention of Chabutra but this

apparently indicates that the said Chabutra was not sold to the plaintiff. Thus, it was found that the plaintiff did not have a right over the Chabutra.

10. The trial Court while dealing with the Issue No.2 noticed that the plaintiff had access to her home while passing through Chabutra and also Nali that goes upto the road and other than that the plaintiff did not have any other way.

11. In the aforesaid backdrop, the trial Court partly allowed the suit by means of the judgment and decree dated 16.08.1990 and restrained the defendant from blocking the Nali for the discharge of waste water from the house of the plaintiff till it met the road and also the defendant was restrained from creating any interference in the right of use of way of the plaintiff from Chabutra. The map prepared by the Commissioner was also made part of the decree.

12. The plaintiff being aggrieved preferred an regular Civil Appeal No.107/1990 whereby the suit of the plaintiff was partly decreed. The defendant also filed an appeal bearing No.105/1990 and both the appeals were heard together and decided by the judgment and decree dated 22.01.1991, as a result, the plaintiff's appeal bearing No.107/1990 was allowed and the suit as a whole was decreed while the appeal filed by the defendant bearing No.105/1990 was dismissed. It is being aggrieved against the same, the defendant filed the instant second appeal.

13. As it has been noticed that the appeal was admitted on the two substantial questions of law, the submission of the learned counsel for the appellant while supporting the substantial questions of law is that once it

was apparent from the sale-deed that the Nali was outside the boundaries and the area which was sold, the same could not be utilized by the plaintiff. Even the Chabutra was not within the area of boundaries sold. Thus, it also could not be treated to be a land of the plaintiff. Hence, both the trial Court as well as the Appellate Court has committed an error in decreeing the suit of the plaintiff.

14. Having heard learned counsel for the appellant and from a perusal of the material on record, it is not disputed that the defendant executed a sale-deed in favour of the plaintiff. It is also not disputed that the boundaries does not include the Nali or the Chabutra, however, it is relevant to notice that Nali even though may not be inside the house of the plaintiff, but from the record as well as evidence it was established that this was only Nali which was drawing out the dirty water from the house of the plaintiff and this met with the other Nali upto the main road. Apparently, it becomes the easementary right which was appurtenant and connected with the dominant heritage i.e. the house belonging to the plaintiff and for its beneficial enjoyment too. There was no bar for the plaintiff to institute the suit for injunction restraining the defendant from blocking the same. Insofar as the Chabutra is concerned, it has also been recorded by the two Courts that the only way for the plaintiff to access her house was while passing through the Chabutra.

15. For the aforesaid reasons, in absence of any alternate or other way, the plaintiff also acquired the rights of way and for the said reasons, both the trial Court and the Appellate Court upheld the rights of the plaintiff. The findings recorded by the trial Court and the appellate Court are pure

findings of fact and it cannot be said that there is any perversity which may persuade this Court to interfere in the second appeal.

16. Having considered the aforesaid, this Court is of the clear opinion that the instant appeal is devoid of merit and consequently it is dismissed. The judgment and decree passed by the lower Appellate Court dated 22.01.1991 passed in Civil Appeal No.107/1990 is affirmed and the dismissal of the Appeal bearing No.105/1990 is also affirmed.

17. In the facts and circumstances, there shall be no order as to costs.

18. The record of the trial Court be remitted forthwith.

Order Date :- 17.11.2023

Rakesh/-