

Court No. - 19

Case :- SECOND APPEAL No. - 24 of 1991

Appellant :- Kali Charan

Respondent :- Narain And Others

Counsel for Appellant :- Pramod Kumar,O.P.Lal,Pramod Kumar,S.K.Srivastava

Counsel for Respondent :-

S.N.Bhattacharya,K.K.Srivstava,Kamal Kumar Srivastava

Hon'ble Jaspreet Singh,J.

1. Heard Shri Pramod Kumar, learned counsel for the appellant.
2. None has put in appearance on behalf of the respondents. Consequently, the Court has proceeded to hear the learned counsel for the appellant in absence of the counsel for the respondents as the appeal is of the year 1991.
3. At the very outset, the counsel for the appellant submits that though the substitution application was allowed, however, he could not carry out the necessary amendment and though he has moved an application seeking the indulgence of the Court which is likely to be listed on 11.12.2023. Hence, either permission may be granted to carry out the amendment today itself or after the disposal of the application.
4. Noticing that the appeal is of the year 1991. Hence, the Court has permitted the counsel for the appellant to carry out the necessary amendment during course of the day and thereafter, the court has proceeded to hear the appeal on merits.
5. This is the plaintiff's second appeal being aggrieved against the judgment and decree passed by the trial court dated 15.10.1988 passed in Civil Suit No.110 of 1986 by 3rd Additional Munsif Unnao, whereby in a suit for permanent

injunction filed by the plaintiff, the trial court partly allowed the suit. Being aggrieved, the plaintiff filed a Regular Civil Appeal under Section 96 C.P.C. registered as Appeal No.72 of 1988 which has been dismissed by the lower appellate court prompting the appellant to approach this Court.

6. The record indicates that the instant second appeal was admitted by this Court by means of order dated 03.08.1993 on the following substantial question of law which reads as under:-

"Whether the judgement and decree in Suit No.114 of 1955 did operate as res judicata and is the finding of the two courts recorded by the court below is contrary and suffers from substantial error of law? if so its effect?"

7. Shri Pramod Kumar, learned counsel for the appellant has submitted that the original plaintiff, Shri Kali Charan had filed a suit for injunction and also for seeking possession of the disputed property against the defendants on 14.05.1986 registered as Regular Suit No.110 of 1986. It was pleaded that the plaintiff is the owner in possession of a house and it also has right of Sahen over the property. Some part of the land which belonged to the plaintiff has been encroached upon by the defendants, therefore, in the given situation the defendants be restrained from interfering in the possession of the plaintiff and also be directed to hand over the vacant and peaceful possession of the disputed property which has been shown in the site plan annexed and forming part of the claim in suit by letters ह 2, ह 3, ह 4, ह 5 and ह 6 as well as shown by letters A, A3, Z, Z1, Z2 in the Commissioner's report dated 28.05.1986. It was further prayed that the defendants be restrained from interfering in the peaceful possession of the house and Sahen of the plaintiff which has been shown by the letters व, ह, ल, र, य and shown by letters A2, C, D, E, E2, A in the Commissioner's map dated

28.05.1986.

8. It is urged that the suit came to be contested by the defendants, who stated that they are the owners of the property and they are utilizing the land in question as part of their Sahen and the said land did not belong to the plaintiff.

9. Upon the exchange of pleadings, the trial court framed six issues. However, the important issues upon which the suit was contested were :-

(i) whether as per the plaintiff stated in Para-2 of the plaint, is Sahen is on the eastern side and whether the disputed property is also being utilized as the Sahen of the plaintiff;

(ii) whether as per the contention of the plaintiff, the defendants have encroached upon some part of the Sahen land prior to the institution of suit;

(iii) whether as per the defendants, Sahen of the plaintiff is in the North Western direction.

10. After the parties led evidence, the trial court while considering Issue No. (i) held that the Sahen of the plaintiff was definitely on eastern side of his house. However, it confined the Sahen of the plaintiff up to the letters D and C as shown in the site plan. It also recorded a finding that the plaintiff could not prove that the defendants had encroached upon the land of the plaintiff prior to the institution of the suit and in view of thereof by means of judgement and decree dated 15.10.1988 it partly decreed the suit granting an injunction restraining the defendants from interfering in the peaceful possession of the plaintiff over the land shown by letters A3, A2, B, C, D, Z1 and Z as shown in the Commissioner's map dated 18.05.1986. The map prepared by the Commissioner was also made part of the

decree. The plaintiff being aggrieved against the part decree of the suit preferred a Regular Civil Appeal, however, the appellate court also by means of judgement and decree dated 24.10.1990 dismissed the appeal.

11. Shri Pramod Kumar, learned counsel for the appellant has vehemently urged that the predecessor of the plaintiff had earlier instituted a Suit bearing No.114 of 1955 in the court of Munsif, North, Unnao (Ghasite versus Shree Ram and others) and in the said suit which was decreed by means of judgement and decree dated 09.09.1959 the suit of Shri Ghasite, the predecessor of plaintiff seeking possession was decreed. It is urged that the instant suit for injunction filed by the present appellant was in respect of the same property which was the subject matter of a Regular Suit No.114 of 1955 and thus, the findings recorded in the earlier suit of 114 of 1955 would operate as *res judicata* and since it was held in the earlier suit that the plaintiff was the owner and his suit for possession was decreed then in the instant case, it was not open for the courts to have re-agitated the controversy and limit the rights of the plaintiff which already stood crystallized in terms of the earlier Suit No.114 of 1955.

12. It is further urged that the present defendants are none other but the successor of the original defendants in the earlier Suit No.114 of 1955 and accordingly, both the Courts have committed an error in ignoring that the findings of the earlier suit would operate as a *res judicata* and in light thereof the Court ought to have decreed the suit of the plaintiffs in its entirety but by confining it to a lesser area than the one identified in the earlier suit, the courts have committed an error resulting in sheer miscarriage of justice.

13. In order to appreciate the contention of the learned counsel

for the appellant and from perusal of the material on record, it would indicate that in the instant suit, the plaintiff has shown his disputed house by letters अ, ब, स, द and on the eastern side of the house, he has shown his Sahen which also has a well thereon. The house of the defendants is on the Southern side of the house of the plaintiff and even the Sahen of the defendants is on the eastern side of the house of the defendants. However, it is urged that the Sahen of the plaintiff extended till the road, however, the Courts have ignored the findings recorded in the earlier suit which has given rise to incorrect findings. The trial court and the lower appellate court have decreed the suit of the plaintiff in respect of his exclusive Sahen upto the letters D and C as shown in the map of the Commissioner which has been made part of the decree.

14. In this context, if the decision of the earlier Suit bearing No.114 of 1955 is seen, it would indicate that the plaintiffs have filed the copy of the judgement bearing paper No. 44/1 passed by the court of Munsif, North, Unnao in Regular Suit No.114 of 1955. The suit of the plaintiff was decreed in part and the Munsif, North, Unnao in its judgement dated 09.05.1959 ordered that the suit for possession was allowed over a piece of land lying upto Babul tree and in front of the Chabutra and Chhaper only as shown in the Commissioner's map. It is only this portion which was decreed against the defendant and the rest was dismissed.

15. Noticing the map which was referred to by the court in the earlier Suit No.114 of 1955, it would also indicate that the Sahen of the plaintiff was on the eastern side after the Chhapar and Chabutra and up to the Babul tree. What is significant to note is the well which is claimed by the plaintiff to be on his own land and part of his Sahen was never accepted by the court

in the earlier Suit bearing No.114 of 1955. In the map of the earlier suit of 55, a well has been shown much a head on the eastern side of the Babul tree. The disputed land in question in the earlier suit has been shown by letters G, H, I, F.

16. This is taken note of then the aforesaid factual situation would served that is apparently in contradiction to the site plan filed by the plaintiff wherein he has shown the well to be within the land belonging to the plaintiff as his Sahen. It is in the aforesaid backdrop that the two courts have noticed that even noticing the fact of the earlier Suit of 1955, the Sahen of the plaintiff was apparently on the eastern side of his house and the contention to the contrary made by the defendants was incorrect and thus, the trial court held that the Sahen of the plaintiff was definitely on the eastern side. However, since in the earlier suit of 1955, the well was not treated to be part of plaintiff's land, hence in the instant suit, the depiction of the well over the Sahen land of the plaintiff did not find favour with the two courts. In the earlier suit, the Sahen extended only upto the Babul tree, however, in the instant case, neither the plaintiff nor the Commissioner could locate the existence of the Babul tree which has been mentioned in the earlier suit of 1955. This assumes significance for the reason that the Sahen of the plaintiff in the earlier suit was treated to be only upto the Babul tree and the well was excluded. The same finding has been utilized by the two courts in the instant suit to hold that since the well is beyond the land which was held to be the plaintiff's Sahen in the earlier suit, hence in absence of any exact location and existence of the Babul tree, the two courts have partly decreed the suit upto letters C and D shown in the site plan as prepared by the Commissioner and which has also been made part of the decree.

17. In light of the aforesaid, the contention of the plaintiff that the finding of the earlier suit would operate as *res judicata* may be partly correct but in the instant case, the two courts have accepted the same and have decreed the suit partly. The plaintiff cannot claim any right more than what was crystalized in an earlier suit of 1955 and if so, then the burden was on the plaintiff to prove as to how he had the right over the disputed property ahead of the Babul tree and claiming the well to be in his own land when on the earlier suit this well was held to be on land of the plaintiff. However, no such clear evidence could be led by the plaintiff. In view of the above, it is incorrect on the part of the counsel for the appellant to state that the two courts have ignored the judgement in the earlier suit of 1955 and that the findings would operate as *res judicata*.

18. This Court finds that the two courts have definitely relied upon the earlier judgement of 1955 and has treated the Sahen of the plaintiff to be on the eastern side and since the well which is being claimed by the plaintiff as part of his Sahen land was not even considered and was found to be ahead of the Sahen of the plaintiff in the earlier suit of 1955 and not part of it and it has been relied by the two courts. Hence, the said findings are based on proper appreciation of evidence and it cannot be said that the two courts have ignored it. The plaintiff could not establish as to how his land could extend beyond what was crystalized in the earlier suit of 1955, hence the plaintiff also would be bound by the same findings which would operate upon the plaintiff too.

19. In view of the aforesaid, this Court after examining the matter on merits finds that there is no error in the judgement and decree passed by the trial court as well as the lower appellate court, for this Court to interfere in exercise of powers

under Section 100 C.P.C. This Court further finds that the two courts have rightly relied upon the decision in the earlier suit of 1955 and it is not as if the findings have not been accepted. There is no violation of the principle of *res judicata* rather in case, if the plaintiff is claiming more than what was settled in the earlier with him, then it was the duty of the plaintiff to have establish the same which has not been done, hence the plaintiff is also bound by the findings in the earlier suit of 1955.

20. Accordingly, the appeal is devoid of merits and is **dismissed**. The judgement and decree passed by the trial court dated 15.10.1988 in Suit No.110 of 1986 and the judgement and decree passed by the lower appellate court dated 24.10.1990 in Civil Appeal No.72 of 1988 are affirmed.

21. In the facts and circumstances, there shall be no order as to cost. The record of the trial court be returned forthwith.

Order Date :- 8.12.2023

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