

Court No. - 19

Case :- SECOND APPEAL No. - 139 of 2023

Appellant :- Ram Nath And Another

Respondent :- Lalta Prasad And 3 Others

Counsel for Appellant :- Prem Chandra Chauhan, Kashi Ram

Counsel for Respondent :- Girish Chandra Verma, Vinay Kumar Verma

Along with

Case :- SECOND APPEAL No. - 143 of 2023

Appellant :- Ram Nath And Another

Respondent :- Lalta Prasad And 3 Others

Counsel for Appellant :- Prem Chandra Chauhan, Kashi Ram

Counsel for Respondent :- Girish Chandra Verma

Hon'ble Jaspreet Singh, J.

1. Heard Sri P.C. Chauhan, learned counsel for the appellants and Sri Vinay Kumar Verma, learned counsel for the respondents.

2. In order to put the controversy in a perspective, certain brief facts giving rise to the instant two appeals are being noticed hereinafter:-

3. The appellants who are the plaintiffs in Suit No. 269 of 2000 filed before the Civil Judge, Junior Division, Mahmoodabad, District Sitapur had instituted a suit seeking a decree of permanent injunction, seeking to restrain the defendants from creating any interference in the use and occupation of a passage which has been shown in the site-plan by the letters A, B, C and D.

4. It was the case of the plaintiffs that they are having their house which has been shown in the site plan with boundaries as mentioned in para 1 of the plaint. On the eastern side, the passage has been shown and it is urged that the plaintiffs have been utilizing the same and had the right of access to their residence. This is the only way which is accessible to the plaintiff, apart from the fact that it was also utilized for bringing in heavy goods including grains by piling them on a tractor-trolley and in case if the said passage is obstructed then the plaintiffs would suffer irreparable injury and they would lose the access to the road nor they will be able to get their heavy

goods/grains etc. on any vehicle upto their residence.

5. The suit came to be contested by the defendants who denied the aforesaid facts and stated that initially the property in question was part of Plot Nos. 356 and 357 which was the bhumidhari and farming fields of the defendant. After the Consolidation Operations in the village, the said plots were given a new number 264 and it was reserved for Abadi. It was also stated that the said area which has been depicted as a passage by the plaintiff was part of the sehan of the defendants and they had been utilizing the same for the beneficial use of their house.

6. Later, the plaint came to be amended and it was further pleaded by the plaintiff that there is a Nali (small drain) which is running from west to east direction from the house of the plaintiff and the same was being utilized by the plaintiffs as well as other persons residing therein including Mahavir who has a house in the neighbourhood for draining out the dirty water.

7. It was stated that on 08.12.2003, the defendant started blocking the said drain by putting in garbage which was causing nuisance and accordingly the plaintiff sought a fresh relief in the nature of mandatory injunction commanding the respondents to unblock the said drain for free flow of dirty water.

8. This was also disputed by the defendants and it is in the aforesaid backdrop that the Trial Court on 22.01.2004 framed six issues. The main issues upon which the suit was contested:-

(i) Whether the plaintiff is entitle to use the passage?

(ii) Whether the defendants had blocked the disputed Nali and they were liable to be directed to remove/unblock the same?

9. After leading of evidence, the Trial Court noted that in so far as the right to use the passage is concerned, it found that the plaintiffs had an alternate way of four feet corridor which could be used by the plaintiff for ingress and egress. The Trial Court also relied upon the statement made by the plaintiff-witnesses and his cross-examination that the alleged Rasta/passagage for which the plaintiff had filed the suit was part of the defendant's sehan.

10. It is in this view that the Trial Court turned down the plea of the plaintiff seeking a decree in the nature of injunction against the obstruction of the passage, however, the Trial Court

considering the case of the plaintiff on the issue of drain found that since it was utilized for draining out the dirty water which had been blocked by the defendant, consequently, it partly allowed the suit directing the defendant to remove the garbage and to unblock the drain, however, the relief for obstruction on Rasta was turned down by means of judgment and decree dated 24.11.2017.

11. Being aggrieved against the aforesaid judgment and decree, two appeals came to be filed. The appeal filed by the plaintiffs whereby their part-relief for passage was rejected was numbered as Civil Appeal No. 5 of 2018 whereas the other appeal filed by the defendants who are the respondents herein filed appeal no. 90 of 2017 being aggrieved against the judgment and finding of the Trial Court regarding unblocking the drain.

12. Both the appeals were considered and heard together by the Additional District Judge, Court No. 4 (Special Judge/EC Act, Sitapur) and thereafter by means of judgment and decree dated 21.08.2023, the Lower Appellate Court dismissed the appeal of the plaintiff bearing No. 5 of 2018 and allowed the Civil Appeal bearing No. 90 of 2017 filed by the defendants. The consequence was that the suit of the plaintiff came to be dismissed in its entirety.

13. Being aggrieved, the plaintiffs have approached this Court in exercise of powers under Section 100 C.P.C. and the instant appeal bearing No. 139 of 2023 has been filed by the plaintiff whereby the appeal of the plaintiffs bearing No. 5 of 2018 was dismissed and the connected appeal bearing No. 143 of 2023 has been filed by the plaintiffs against the judgment and decree passed in Appeal No. 90 of 2017 whereby the defendant's first appeal was allowed. In view of the aforesaid background, both the appeals have been heard and decided together.

14. The contention of learned counsel for the appellant is that both the courts committed an error in failing to notice that the disputed property had been in the use and occupation of the plaintiffs and the defendants did not have a right either to obstruct the right of passage or to block the drain which was utilized for draining out the dirty water.

15. In the aforesaid circumstances, it is urged that both the courts did not even take a look and consider the evidence including the Commissioner's report which clearly indicated that the alleged corridor was merely a narrow passage of not more than four feet which was not conducive nor feasible through which the plaintiff could have access to his house for

getting in heavy goods, grains etc.

16. It is also stated that findings returned by the Lower Appellate Court dismissing the appeal of the plaintiffs and allowing the appeal of the defendants was also erroneous, inasmuch as, the right to flow of dirty water in the drain was essential for proper living including sanitation, therefore, this aspect has not been considered resulting in sheer miscarriage of justice.

17. Sri Verma, learned counsel for the respondents/defendants has submitted that it was specifically pleaded that the initial property belonged to the defendants and after the Consolidation Operations, it was reserved as Abadi. The disputed Rasta as alleged by the plaintiffs was nothing but the sehan of the defendants and in so far as the Nali is concerned, the same had already been blocked prior to the date of the institution of the suit and moreover even as the record would indicate that the plaintiff amended the plaint and introduced the cause of action specifically mentioning 08.12.2003 as the date when the defendants are alleged to have blocked the said Nali.

18. The Trial Court, though, decreed the suit for the unblocking of the Nali but failed to consider that as per the pleadings of the plaintiffs himself, this cause of action accrued in the year 2003 whereas the suit was of the year 2000. Moreover, a commission was execute to note the spot position which was done on 17.12.2000 and it was found that the Nali had already been blocked.

19. This was clear evidence to notice that the cause of action for the Nali did not subsist on the date of the institution of the suit and was introduced by way of an amendment and that too after three years. In the aforesaid circumstances and taking a wholesome view of the facts and circumstances as available including the Commissioner's report, the Lower Appellate Court dismissed the appeal of the plaintiff and allowed the appeal of the defendants which is based on proper appreciation of evidence and being a finding of fact is not assailable in exercise of powers under Section 100 C.P.C., accordingly, the appeals deserve to be dismissed.

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

21. The record would indicate that this Court by means of order dated 22.11.2023 had directed the plaintiff to file the legible copy of the map which was filed by the plaintiff along with the plaint in suit, map which was part of the Commissioner's report

as well as the map filed by the defendants.

22. In furtherance thereof, a supplementary affidavit has been filed which is taken on record and from the perusal thereof it is noticed that the plaintiff has only filed the map which was part of the Commissioner's report and the alleged map said to have been filed by the defendants is not a true and correct copy, inasmuch as, it is disputed by the defendants and he has produced a different map which he submits was part of the record of the Trial Court.

23. Be that as it may, having heard the learned counsel for the parties and from the perusal of the material on record, considering the submissions made, this Court finds that the plaintiffs in his plaint had given the boundaries of the disputed as under:-

"His house indicating that in the north there was the sehan of the plaintiffs, thereafter the house of Mahavir and thereafter the house of plaintiff no. 2, Ahata of plaintiff no. 1 and then the Ahata of Ram Naresh. On the southern side, he has indicated the sehan of the defendants and house of Ram Ram Charan, on the east, a concrete Rasta has been shown and on the west, a Rasta has been shown and on the weste, house of the defendants has been shown."

24. It was also pleaded that the plaintiff has been utilizing the said passage shown by letters A, B, C and D for bringing in his cattle, tractor upon which he used to get his grains and there was a Nali from which the dirty water flows.

25. It is this which is in dispute, however, upon leading of evidence, the plaintiff-witness no. 2 in his cross-examination stated that the disputed passage which has been shown by letters A,B,C and D was part of defendant's sehan. In so far as the Nali is concerned, this has also come on record that the same had already been blocked prior to institution of the suit.

26. The Commissioner's report which is dated 17.12.2000 and subject to the evidence led by both the parties, it was found that even on 17.12.2000, the said Nali had already been blocked. The plaint came to be amended and a fresh relief was claimed after more than three years. The plaintiff after amendment had specifically incorporated the date as 08.12.2003 when the defendants have alleged to have blocked the said drain.

27. Another aspect which needs to be considered is the fact that on the western side of the house of the plaintiffs, there is a way/Rasta available. This Rasta has not been shown rather the only contention was that the passage was the only way through which the plaintiffs could access their house and by blocking

the same, they were compelled to use the corridor which was merely four feet. The findings returned by the two courts on the aforesaid issue that the plaintiff had an alternate route available to them and since the plaintiffs-witness himself admitted that the disputed passage was the part of the sehan of the defendants. In the aforesaid circumstances, the relief of permanent injunction against the true owner was refused.

28. This has also been taken note of by the Lower Appellate Court who also found that it was not the case of the plaintiffs that the said passage was a public way and had it been so then the plaintiffs ought to have instituted a suit under Order 1 Rule 8 C.P.C. in a representative capacity.

29. Be that as it may, the issue regarding the Rasta which could not be established by the plaintiffs to be in use and having failed to disclose that on the western side of the house of the plaintiffs, they also had a Rasta, accordingly, the findings returned by the two courts on the issue of Rasta are concurrent findings based on the evidence and it could not be shown that the reliance placed by the two courts on the admission elicited from the cross-examination of P.W. 2 was incorrect, hence, these findings of fact are binding on this Court under Section 100 C.P.C. as no perversity has been established.

30. In so far as the drain is concerned, the same already stood blocked prior to the institution of the suit and moreover the relief in respect thereto in the nature of mandatory injunction came to be introduced after the amendment despite the fact being in the notice of the plaintiffs since long. These are pure findings of fact based on evidence which this Court is loath to interfere in exercise of powers under Section 100 C.P.C., accordingly, this Court does not find that there is any substantial question of law involved in the instant two appeals, accordingly, the appeals are ***dismissed*** at the admission stage itself, The judgment and decree passed by the Lower Appellate Court dated 21.08.2023 passed in Civil Appeal Nos. 90 of 2017 and 5 of 2018 is affirmed. Costs are made easy. The records, if any, shall be returned forthwith.

Order Date :- 8.12.2023

Asheesh