

HIGH COURT OF UTTARAKHAND AT NAINITAL

Second Appeal No.75 of 2013

Jagdeep Kumar Agarwal and others Appellants

Versus

Smt. Asha Negi and others Respondents

Present:-

Mr. K.H. Gupta, Rafat Munir Ali and Ms. Irum Zeba,
Advocates for the appellants.

Mr. T.A. Khan, Sr. Advocate assisted by Mr. Mohd. Shafy,
Advocate for the respondents.

Hon'ble Rakesh Thapliyal, J.

The instant second appeal has been preferred by the plaintiffs/appellants against the judgment and decree passed by the learned Additional District Judge, Kotdwar, Garhwal, dated 22.04.2013/25.04.2013 in Civil Appeal No.4 of 2010, Smt. Asha Negi and another vs. Jagdeep Kumar Aggarwal and others.

2. Brief facts of the case are that a suit was filed by the appellants bearing O.S. No.45 of 2005 praying for demolition of a wall raised by the defendants marked as 'X' in the plaint map as well as for restraining the defendants and their agents from creating any hindrance on the plaintiffs in using the common path. In the suit, written statement was filed by the defendants by submitting that the path in question is not a common passage and the plaintiffs have no right to use the same.

3. After exchange of pleadings, the trial court framed Nine issues and decide all issues in favour of the plaintiffs/ appellants except Issue No.8 which relates to an unregistered agreement dated 26.06.2001 and decreed the suit on 20.10.2010.

4. Being aggrieved with the judgment and decree passed by the trial court, Civil Appeal No.04 of 2010 was filed by the defendants which was allowed by the 1st Appellate Court and the judgment and decree passed by the trial court was set aside.

5. Now, being aggrieved with the judgment and decree passed by the 1st Appellate Court dated 22.04.2013, the instant second appeal has been preferred which was admitted on 22.03.2014 with the following substantial question of law:-

“Whether the lower appellate court has reversed the findings of the trial court as to the right of plaintiffs to use 10 feet passage on a totally wrong appreciation of evidence.”

6. Mr. K.H. Gupta, learned counsel for the appellants argued that one Jagesh executed a registered sale deed in favour of the plaintiffs on 26.06.2001,

wherein, there is a reference of common passage which was obstructed by the defendant by raising a wall. Consequently, plaintiffs/appellants instituted a suit for demolition of wall as well as to restrain the defendant and his agent from creating any obstacle and hindrance in the way of plaintiff in using the common passage. He submits that brother of Jagesh, namely Kailash also executed a sale deed in favour of the defendants on 15.07.1998 wherein also there is reference of the same common passage with further rider that the defendant will neither encroach nor raise any construction on the said common passage. He submits that despite the fact that there is reference of common passage in both the sale deeds, the defendants raised a wall in order to restrain the plaintiffs from using this common passage. He submits that the trial court rightly decreed the suit and while decreeing the suit, all the issues as framed by the trial court were decided in favour of plaintiffs except one which relates to an unregistered agreement. He argued that the first appellate court on wrong premise allowed the appeal based on the statement of Kailash who, in fact, supports the case of the plaintiffs in his written statement though orally he supports the defendants and the first appellate court committed

manifest illegality while allowing the appeal on the basis of contradictory stand of Kailash.

7. On the other side, Mr. T.A. Khan, Sr. Advocate who appears for the defendants-respondents submits that, in fact, the first appellate court allowed the appeal on the basis of the settlement dated 31.07.1993 arrived at the time of land distribution, and a site plan was also prepared, wherein, the share of all were determined. He submits that after settlement both Jagesh and Kailash sold their respective share. The site plan is also part of record which is at page 60 and by showing this site plan, Mr. Khan, Sr. Advocate submits that, in fact, the disputed common passage as shown in the plaint is part of the land which was given to Kailash on settlement who executed the sale deed in the year 1998 in favour of the defendants. Mr. Khan, learned senior counsel further pointed out that the alleged common passage which is shown in the plaint is, in fact, the internal passage of four persons including defendant to whom Kailash sold his property. He submits that so far as Jagesh is concerned, there is already a separate passage for him as per site plan, therefore, the suit filed by the plaintiff showing the passage as a common passage marked as 'X' is completely

misconceived since the alleged common passage as shown in the plaint is nothing but the internal common passage of Kailash who executed four sale deeds in favour of four persons and the passage as shown in the sale deed is only for using it as a common passage to four persons to whom Kailash sold his land which he got by virtue of settlement arrived in 1993.

8. In response to this, Mr. K.H. Gupta, Advocate submits that the first appellate court while allowing the appeal completely overlooked the documentary evidence which is the primary piece of evidence which cannot be overlooked and the sale deed of the defendants shows that the path as shown in the plaint is, in fact, is common passage and the defendants have no right to construct any wall over this common passage.

9. After hearing the arguments of learned counsel for both the parties and after gone through with the judgment passed by the trial court as well as the first appellate court and the family settlement of 09.08.1993 including the site plan which is at page 60 of the paper book, there is no doubt that in the sale deed of plaintiff and the defendant there is reference of a common passage, but this fact is also undisputed that Jagesh and

Kailash, who are real brother sold their respective share which they got by way of family settlement of 1993. This is also undisputed fact that Kailash executed the sale deed in the year 1998 though Jagesh executed the sale deed in the year 2001. So far as the common passage is concerned it appears that Jagesh in connivance with his brother Kailash shown in the sale deed passage as a common passage which, in fact, falls on the land owned by Kailash. After settlement of 1993, both Jagesh and Kailash got their exclusive share and after getting their respective share, both of them have absolute right to transfer their respective share. The path as shown in the plaint, no doubt, falls in the land which was sold out by Kailash to the defendants, but showing the path as a common passage which falls in the area of Kailash cannot be accepted. The trial court though decreed the suit, but it appears that the trial court completely overlooked this important aspect of the matter and without applying his judicial mind decreed the suit by deciding all the issues as framed in favour of the plaintiffs. So far as the judgment and decree passed by the first appellate court is concerned, this Court is of the view that the first appellate court rightly decreed the appeal and as such the

substantial question of law as framed is decided in favour against the appellant/plaintiff.

10. Accordingly, instant second appeal is dismissed being devoid of merit.

11. Let lower court record is remitted back to the concerned court.

(Rakesh Thapliyal, J.)
23.12.2025

Ravi