

IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.77 of 2014

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1. Anima Ghosh widow of late Pradeep Kumar Ghosh Resident Of Mohalla-
Kishanganj Line, P.S And District- Kishanganj
2. Pranab Kumar Ghosh
3. Prabal Kumar Ghosh Both sons of late Pradeep kuamr Ghosh

.... Appellants

Versus

1. Ashish Kumar Ghosh
2. Salil Kumar Ghosh
3. Sujit Kumar Ghosh All Sons Of Late Pankaj Kumar Ghosh All R/O Line
Mohalla, Kishanganj, P.S And District- Kishanganj., Respondent No. 1, At Present
Resides At D.V.C Road, Near Yarpur Kalibari Old Jakkanpur, P.S- Jakkanpur,
District- Patna. Respondent No. 2, At Present Resides At New Town, Near Firce
Bridge, P.S+ P.O- Islampur, District- Uttar Dinajpur (West Bengal), Respondent
No. 3 At Present Working As Hostel Superintendent, Eastern Railway, Dhanbad.

.... Respondents

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Appearance :

For the Appellant/s : Mr. Shashi Shekhar Sharma

For the Respondent/s : Mr. null

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CORAM: HONOURABLE MR. JUSTICE V. NATH

ORAL JUDGMENT

Date: 07-09-2016

Heard Mr. Chitragupt Prasad, learned counsel
appearing for the appellants and Mr. D.K.Sinha, learned senior
counsel appearing for the respondents.

The appellant in the present appeal is the
plaintiff in the suit and has preferred this appeal against the judgment
and decree affirming the order of rejection of plaint.

The matrix of facts discloses that earlier there
was a suit between the parties being T.S.No.14/1990 for partition.
This suit was disposed of in terms of compromise by order dated



16.01.1991. It is not in dispute that subsequently the plaintiff of that suit (T.S.No.14/1990) filed a petition under Section 94 C.P.C in the said suit itself praying for restraining the respondents from making any construction over the land allotted to him. By order dated 10.04.2001 (quoted extensively by the appellate court below in the impugned judgment), the said petition was rejected by the learned court. Thereafter the plaintiff filed the present suit praying for declaration that the terms and conditions of preliminary decree passed in T.S.No.14/1990 are mandatory and binding on the parties and further for relief of grant of injunction restraining the defendants from making any construction over the passage in terrace at the roof of the first floor as well as to remove the construction which has been made by the defendant- Ashish Kumar Ghosh.

The trial court after hearing the parties and considering the facts and circumstances of the case by order dated 10.03.2003 rejected the plaint under the provisions of Order 7 Rule 11(a) and (d) as well as Section 47 and 11 C.P.C. The plaintiff thereafter filed the appeal. By the impugned judgment and decree the appellate court below has dismissed the appeal.

Mr. Chitragupt Prasad, learned counsel for the appellants has submitted that both the courts below have erred in law in holding that the suit filed by the present plaintiff was barred by res



judicata in view of the previous order dated 10.04.2001 passed in T.S.No.14/1990. It has been contended that the plaintiff has a right to maintain the suit and even though the order dated 10.04.2001 was passed against the plaintiff but still the plaintiff can maintain the suit without questioning the legality and validity of the said order. It has also been submitted by the learned counsel that in the averments of the plaint the plaintiff has questioned the legal validity of the said order dated 10.04.2001. It has, therefore, been propounded that both the courts below have wrongly passed the order rejecting the plaint of the plaintiff-appellant. The learned counsel for the appellants, however, during the course of submission, has accepted that no relief was prayed against the order dated 10.04.2001 but has maintained that the plaintiff was not required to pray for any relief against the said order as the said order was passed by a court having no jurisdiction being functionis officio.

Mr. Sinha, learned senior counsel for the respondents, however, has pointed out that the plaintiff has not made any averment in the plaint questioning the legal validity of the order dated 10.04.2001 except making a reference of the same in paragraph mentioning the cause of action for the suit. It has been canvassed that the plaintiff-appellant had filed the earlier T.S.No.14/1990 which was disposed of in terms of the compromise by a compromise decree, and



again it was the plaintiff-appellant himself who filed the petition on 10.04.2001 in the said suit for seeking injunction against the defendant-Ashish Kumar Ghosh from making any construction over the first floor. It has been pointed out that the said order was not challenged by the plaintiff-appellant and even in the suit which has been filed by the plaintiff-appellant the legal validity of the said order has not been questioned. It has, therefore, been propounded that both the courts below have rightly come to the conclusion that the suit is barred by the principles of res judicata and has rightly rejected the plaint.

After considering the submissions and perusal of the impugned judgments of both the courts below, it is manifest that the earlier suit filed by the plaintiff i.e. T.S.No.14/1990 was disposed of in terms of compromise. Thereafter the plaintiff filed a petition in the T.S.No.14/1990 itself purporting to be under Section 94 C.P.C. seeking relief of injunction restraining the defendant-Ashish Kumar Ghosh from making any construction over the first floor. The learned court below passed the order dated 10.04.2001 rejecting the said petition filed by the plaintiff after recording the finding that the plaintiff was not allotted any share on the first floor of the suit house. The present suit, thereafter, was filed by the plaintiff where the legality and propriety of the said order was not questioned. It is also

not in dispute that the legality and propriety of the order dated 10.04.2001 has not been challenged by the plaintiff before a superior forum. The law is well settled that any order or decree between the parties would be binding upon the parties unless the same is reversed in accordance with law. The finding by both the courts below in this regard after taking notice of the order dated 10.04.2001 does not appear to be vitiated in any manner. The submission on behalf of the appellants that the order dated 10.04.2001 was passed by a court which had no jurisdiction to pass the said order cannot now be countenanced as it was the plaintiff-appellant who had invited the court to pass the order and once after the order had been passed by the court against him, he cannot now turn back and question the jurisdiction of the said court. In any view of the matter, however, as the said order has not been challenged by the plaintiff in the present suit, the courts below have not committed any error in rejecting the plaint.

For the aforesaid reasons and discussions, this Court does not find any substantial question of law arising for consideration in this appeal, which is, accordingly, dismissed.

(V. Nath, J)

Nitesh/-

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