

RSA-2804-1995 (O&M)

-2-

restraining the defendants from dispossessing the plaintiffs/respondents No.1 to 3 from the land measuring 27 kanals and 09 marlas included in the khasra number as detailed in the head note of the plaint.

After considering the respective claims, the Trial Court dismissed the suit based upon the report of the Local Commissioner, under which it had come that the appellants/defendants No.1 to 3 had not encroached upon the passage comprised in Khasra No.1322. Rather, there was some encroachment upon the land of passage comprised in the aforesaid khasra number; by the plaintiffs themselves.

Aggrieved against the same, the plaintiffs/respondents No.1 to 3 filed an appeal before the lower Appellate Court. The said appeal has been allowed vide judgment and decree dated 25.09.1995 and the suit has been decreed. Hence, the present appeal has been filed by defendants challenging the said judgment and decree passed by the lower Appellate Court.

Arguing the case, learned counsel for the appellants has submitted that the Court below has totally misread the evidence on file, as well as, the legal aspects. The appellants had nothing to do with the land measuring 27 kanals and 09 marlas which was owned by the plaintiffs. The dispute was, essentially, regarding the passage comprised in Khasra No.1322. None of the Court below has found that the appellants had made any encroachment upon the land of passage comprised in Khasra No.1322. Rather, the report submitted by the Local Commissioner establishes the encroachment by the plaintiffs themselves. Hence, the lower Appellate Court has gone totally wrong in law in passing the judgment and decree in favour of the plaintiffs/respondents No.1 to 3, and thereby,

RSA-2804-1995 (O&M)

-3-

legalizing the encroachment made by the plaintiffs/respondents No.1 to 3 on the land of passage, by default. Learned counsel has further submitted that neither the appellants have encroached upon the land of passage comprised in Khasra No.1322 nor do they have any intention of doing so. Rather, the appellants undertake not to encroach upon any land of passage comprised in Khasra No.1322. Hence, the judgment and decree passed by the lower Appellate Court deserves to be set aside.

On the other hand, learned counsel for respondents No.1 to 3/plaintiffs has submitted that the lower Appellate Court has rightly recorded that merely the encroachment by the plaintiffs on the passage, if any, would not give a right to the defendants/appellants; as well, to encroach upon the land of passage. Therefore, there is nothing illegal, if the Court below has passed the judgment and decree of injunction against the present appellants. Hence, the appeal deserves to be dismissed.

Learned counsel for respondent No.7 has submitted that, undisputedly, there is a passage comprised in Khasra No.1322. That passage has to be kept intact. None of the parties is entitled to encroach upon the land of the passage. Hence, the appellants have rightly been enjoined by the Court below.

Having heard learned counsel for the parties and having gone through the case file, this Court finds that essentially the case was for permanent injunction restraining the appellants from blocking the passage comprised in Khasra No.1322 or encroaching upon the same. However, the evidence led on the file does not show that the appellants have encroached upon any portion of the Khasra No.1322. Even the lower Appellate Court has not recorded a finding qua

any encroachment by the appellants upon the land of passage comprised in Khasra No.1322. So far as the attempt to blockage of passage by the appellants is concerned, there is absolutely no evidence on file to show that the appellants ever blocked the passage even temporarily; as claimed by the plaintiffs. On mere unsubstantiated suspicion, the party cannot be subjected to the Court decree, particularly, when such a decree has the effect of justifying the illegality of the decree holder. The lower Appellate Court has passed the judgment and decree on mere apprehension expressed by the plaintiffs that in the given case, the appellants/defendants No.1 to 3 could have encroached upon the land of passage. However, this kind of unsubstantiated assumptions cannot be made basis of a Court decree injunctioning another party. Even for a prohibitory or preventive decree there has to be a reasonable apprehension of breach of law. In the present case, there is not even an iota of evidence to suggest that the appellants ever did any positive act giving rise to the reasonable apprehension of their creating any blockage of use of passage. Even during the course of the present hearing, learned counsel for the appellants has submitted that the appellants neither ever encroached upon the passage nor do they have any intention to encroach upon or block the same.

On the contrary, the record shows that material has come against the plaintiffs that they have encroached upon some portion of the land of passage. Therefore, it appears that the suit was filed by the plaintiffs to justify their own encroachment upon the land of passage, if the report of the Local Commissioner is taken to be correct. However, this Court is not opining upon the report of the Local Commissioner in these proceedings because that report does not show any

RSA-2804-1995 (O&M)

-5-

encroachment by the persons against whom the decree was sought. So far as the alleged encroachment by the plaintiffs, as shown in the report, is concerned, any person or any person using the passage or the owner of the passage may have their remedies to get that vacated, however, in these proceedings that fact has to be taken as not so relevant.

In view of the above, finding the judgment and decree passed by the lower Appellate Court to be based upon totally unsubstantiated assumption and lack of even reasonable apprehension, the same are set aside and the present appeal is allowed. The suit filed by the plaintiffs is ordered to be dismissed. Decree sheet be prepared accordingly.

(RAJBIR SEHRAWAT)
JUDGE

19.04.2023
adhikari

Whether speaking/reasoned	Yes/No
Whether Reportable	Yes/No