RAJASTHAN HIGH COURT

Sri Ram

Vs.

Radhey Shyam

Civil Second Appeal No. 323 of 1982
(Shiv Kumar Sharma, J.)

09.11.2005

ORDER

Shiv Kumar Sharma, J.

1. It is unfortunate that the present appeal which was filed in 1982 could not be decided expeditiously. Following substantial questions of law were framed at the time of admission of appeal:-

> (i) Whether the Courts below have misread and misconstrued Ex.A-3, Ex. A-4. Ex. A-5, Ex. A-10 and Ex. A-8 in holding that the present suit is not barred by *res judicata* ?
> (ii) Whether the finding of the Courts below holding that the existence of Gali is based on no evidence?
> (iii) Whether the Courts below have erroneously held that the opening of the spouts and shutters has rendered the alleged Nohra unusable and also affect the privacy of the plaintiffs' Nohra?

2. Contextual fact depict that the plaintiff-respondents (for short 'plaintiff') instituted civil suit for permanent injunction and possession in the Court of Munsif. The plaintiff stated that in the year 1962 when the defendant-appellant (for short 'defendant') constructed his house on the eastern side i.e. towards the Nohra of plaintiff he took out 6 spouts. At the time of construction, Kaccha House belonging to Lala Nai was also demolished and the Gali was taken in possession by putting tin sheets over it. Two new shutters were also put by the defendant towards the Nohra of the plaintiff. Site plan showing unauthorized occupation was annexed by the plaintiff with the plaint.

3. In the written statement the defendant denied the correctness of the site plan. Even the existence of alleged Nohra of the plaintiff was also denied. It was averred that the house of defendant was very old and renovated in 1962. Mories (spouts) ABCG shown in the site plan were in existence for more than 20 years and Mories E and H were constructed in the year 1962 in the presence of plaintiff's father. The land in question belong to temple and the spouts had been falling on that land for the last 50 years. The properties 2, 3 and 4 were not belonging to Lala Nai and the existence of Gali was also denied. The defendant further pleaded that the matter in dispute was already decided on September 21, 1944 (*Gabduram v. Triloki, Jagannath*), therefore, the suit was barred by *res judicata* under Section 11, Civil Procedure Code. The plaintiff was estopped from challenging the construction as no objection was raised at the time of construction. On the basis of the pleadings of parties seven issues were framed. The suit of the plaintiff was decreed vide judgment dated May 5, 1976. The first appeal against the said judgment came to be dismissed vide judgment and decree dated September 2, 1982. Hence the instant second appeal.

4. Having heard the rival submission and on scanning the impugned judgments and other material on record, I find that the controversy between the parties was resolved way back in 1944. Ancestors of the parties contested a suit *Gabduram v. Triloki, Jagannath* which attained finality on September 21, 1944. Section 11 of the Civil Procedure Code embodies the doctrine of *res judicata* which rests on the principle that one should not be vexed twice for same cause and that there should be finality of litigation. When a particular decision has become final and binding between the parties, it cannot be set at naught again by misreading and misconstruing documents. The basic principle of the rule of *res judicata* is that the cause of action for the second suit being merged in the judgement of the first, it does not any more survive. The principle of *res judicata* bars re-trial and decision once again of what is concluded. In view of the fact that controversy between the parties had already been resolved by judgment dated September 21, 1944. I hold that second suit instituted by the plaintiff was barred by the principle of *res judicata* and the Courts below have committed error in passing the decree in favor of the plaintiff.

5. The learned appellate Court committed serious error of law in holding that Gali existed. A perusal of document Ex. A-3 demonstrates that *Gali* was never existed. The Courts below had also committed error in not taking into consideration the documents Ex. A-1 to A-10. From the evidence of defendant four spouts ABCG were of more

than 20 years and other spouts EH were constructed in the year 1962, but the Courts below have wrongly held that all the spouts were constructed in 1962. Thus the finding on issue No. 1 of the Courts below is vitiated as existence of *Gali* was not established from the evidence on record.

6. For these reasons I allow the appeal and set aside the impugned decrees and judgments of the Courts below. There shall be no order as to costs.

Appeal allowed.