

**Nandareddy Vs. Sarojamma**

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**SooperKanoon Citation :** [sooperkanoon.com/1195017](http://sooperkanoon.com/1195017)

**Court :** Karnataka

**Decided On :** Aug-01-2016

**Judge :** A.N.Venugopala Gowda

**Appeal No. :** MSA 5/2016

**Appellant :** Nandareddy

**Respondent :** Sarojamma

**Judgement :**

1 IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE 1<sup>ST</sup> DAY OF AUGUST, 2016 B E F O R E THE HONBLE MR. JUSTICE A.N. VENUGOPALA GOWDA MISCELLANEOUS SECOND APPEAL NO.5/2016 (RO) BETWEEN: NANDAREDDY S/O. GURUMURTHY REDDY, RESIDING AT DODDASHIVARA VILLAGE, KASABA HOBLI, MALUR TALUK, KOLAR - 563 130. ... APPELLANT (BY M/s. A.G. SHIVANNA & ASSOCIATES, ADVS.) AND: SAROJAMMA W/O. RATHNAPPA, AGE MAJOR, RESIDING AT DODDASHIVARA VILLAGE, KASABA HOBLI, MALUR TALUK - 563 130. ... RESPONDENT (BY SRI A.MADHUSUDHANA RAO, ADV.) THIS MSA IS FILED UNDER O.43 RULE 1(u) OF CPC., AGAINST THE

JUDGMENT

AND DECREE DATED 14.10.2015 2 PASSED IN R.A NO.120/2011 (OLD RA NO.20/2008) ON THE FILE OF THE SENIOR CIVIL JUDGE AND JMFC, MALUR,

## ALLOWING THE APPEAL AND SETTING ASIDE THE

### JUDGMENT

AND DECREE DATED 18.12.2007 PASSED IN O.S.NO.72/2001 ON THE FILE OF THE PRL. CIVIL JUDGE (JR.DN.), MALUR, REMANDING THE MATTER TO THE TRIAL COURT TO APPOINT THE COMMISSIONER IN ACCORDANCE WITH LAW AND TO DISPOSE THIS MATTER EXPEDITIOUSLY AS EARLY AS POSSIBLE IN ACCORDANCE WITH LAW. THIS APPEAL COMING ON FOR ADMISSION THIS DAY, THE COURT DELIVERED THE FOLLOWING:

### JUDGMENT

Challenge in this appeal is to the Judgment and Decree of Senior Civil Judge, Malur allowing R.A.No.120/2011.

2. The appeal before the lower Appellate Court was by the defendant, who is the respondent in the present appeal. The appellant filed the suit to pass a decree of permanent injunction against the respondent and restrain her from interfering with his possession and enjoyment of the suit schedule property. Subsequently, the plaintiff was amended and the decree of declaration was also sought. Written statement was filed and the suit was contested. 6 issues and an additional issue were raised. 3 During trial, the plaintiff got himself examined as PW-1 and marked Exhibits P1 to P5 and the defendant got herself examined as DW-1 and examined 2 witnesses as DWs 2 and 3 and marked Exhibits D1 to D8. At the stage of arguments, a Memo was filed by the plaintiff, not pressing the relief of declaration. The prayer in that regard was deleted. After appreciating the oral and documentary evidence, Trial court decreed the suit with costs and defendant was restrained by a decree of permanent injunction from interfering in any manner with the plaintiff's peaceful possession and enjoyment of the suit schedule property.

3. Feeling aggrieved, defendant filed R.A.No.120/2011, under S.96 of CPC, in the Court of Senior Civil Judge, Malur. Therein, I.A. Nos.4, 5, 7 to 9 were filed. Applications were contested by filing statement of objections. I.As. were taken up along with the main appeal and the following points were raised for consideration;

4 (1) Whether trial court has failed to appreciate the oral and documentary evidence in a proper perspective manner and interference of this appellate court is

necessary?. (2) Whether appellant/defendant is entitled to produce the documents as additional evidence as prayed in IA IV, V, VI to IX?. (3) Whether appellant/defendant proves that the appointment of commissioner is necessary?. (4) What order?.

4. The lower Appellate Court below despite reminding itself, that in a suit for bare injunction, basically the Court is required to look into the fact as to who is in possession of the suit property as on the date of the suit and whether there was an illegal interference and whether the plaintiff is entitled to the discretionary relief of injunction has allowed the appeal and I.A. Nos.4, 5 and 7 to 9. Additional evidence sought to be produced was allowed. An application filed for appointment of Court Commissioner was also allowed and the Trial court was directed to take assistance of the Court Commissioner. It has held, that it is very much necessary to remand the case to the Trial Court to give an opportunity to the 5 defendant to lead additional evidence on additional documents and also to obtain report from the Court Commissioner. It has further held, that the Trial Court has to necessarily re-appreciate the oral and documentary evidence, after giving an opportunity to both the parties to adduce additional evidence. The Judgment and Decree passed in the suit was set aside and the case was remanded to the Trial Court. This appeal is directed against the said judgment of remand.

5. In support of this appeal, though many points were urged by the learned advocate for the appellant, the main issue urged for consideration is, that the suit being limited for passing a decree of permanent injunction and the fundamental fact required to be established being the possession and unlawful interference with the plaintiffs lawful possession of the suit schedule property, and in the instant case the Trial Court having answered the relevant issues in favour of the plaintiff, lower Appellate Court has committed error and illegality in allowing the applications 6 filed by the defendant i.e., during the pendency of the appeal and has committed wrong in setting aside the well reasoned judgment passed by the Trial Court. Learned counsel submitted that there is a misdirection adopted by the Court below in the matter of passing of the impugned Judgment and the same being contrary to S.107 of CPC is unsustainable. Reliance was placed on the decision in the case of M.H.MAHABALESHWAR Vs. THE JOINT REGISTRAR OF

6. Per contra, learned advocate for the respondent submitted that the parties having proceeded on the basis of title and as the declaratory relief was sought and there being perfunctory findings entered by the Trial Court and as certain material evidence, despite exercise of due diligence could not be produced before the Trial Court, applications were filed for receiving the additional evidence and for appointment of Court Commissioner. He submitted that in the facts and 7 circumstances of the case, lower Appellate Court having found merit in the applications filed, is justified in passing the Judgment of remand. Learned counsel further submitted that pursuant to impugned Judgment, evidence has been recorded by the Trial Court and hence, there is no justification to entertain this appeal and grant any relief.

7. Considered the rival contentions and perused the record. Point for consideration is whether the lower appellate court is justified in allowing the appeal and remanding the case to the Trial Court, to grant opportunity to both the parties to adduce additional evidence, re-appreciate the oral and documentary evidence and decide the suit?. 8. Undisputedly, the suit filed is one for permanent injunction, as the prayer for grant of decree of declaration was deleted. The suit being for passing a decree of permanent injunction, the plaintiff has to establish that he is in lawful possession and peaceful enjoyment of the suit schedule property and that the same 8 was sought to be illegally interfered with by the defendant. Burden of proving the said issues is on the plaintiff. Unless the plaintiff proves the said issues, he is not entitled for a decree of permanent injunction, as it is well settled proposition of law, that the plaintiff, not in possession of the suit property is not entitled to such relief, without claiming recovery of possession. Thus, it is incumbent for the plaintiff to prove, in order to obtain a decree of permanent injunction, that he is in lawful possession and peaceful enjoyment of the suit schedule property and the same was attempted to be illegally interfered with by the defendant.

9. Trial Court has raised the relevant issues and answered the same in favour of the plaintiff. The finding of fact entered into by the Trial Court having been assailed by the defendant by contending the same to be erroneous and illegal, lower

Appellate Court, in exercise of the power conferred on it under S.107 of CPC is entitled to re- appreciate the evidence, both oral and documentary. 9 Lower appellate court has the power to decide the appeal both on questions of fact and law. Sufficient guidelines are available to the lower Appellate Court, under Order XLI of CPC in the matter of consideration and deciding the appeal.

10. In the present case, lower Appellate Court raised point Nos.1 to 4 for consideration and by misdirecting itself has passed the impugned judgment. I.As. filed for grant of permission to produce additional evidence has not been properly examined by keeping in view the mandatory provision under Order XLI Rule 27 of CPC and the principles of law laid down in paras 36 to 48 by the Apex Court in the case of UNION OF INDIA Vs. IBRAHIM UDDIN, (2012) 8 SCC148 Even if additional evidence sought to be produced is permitted, then the lower Appellate Court should keep in view the provision made in Rule 28 of Order XLI of CPC.

11. Only for the sake of appointment of Court Commissioner, Judgment and Decree of the Trial Court, 10 should not be set aside. First Appellate Court, if satisfied, can exercise the power of the Trial Court, in the matter of appointment of Court Commissioner. The First Appellate Court possesses the wider power and hence, if the ingredients are made out, in appropriate case, can exercise the power and appoint the Court Commissioner for conducting local inspection and submission of report. Unless the requisite ingredients are made out, such powers cannot be exercised. Without assigning the cogent reasons, Appellate Court cannot and should not exercise the power under Order XXVI Rules 9, 10 and / or Order XLI Rule 27 of CPC. The exercise of such power should be for valid reasons i.e., upon the fulfillment of the conditions precedent, which are not forthcoming in the present case. However, suit being one for passing a decree of permanent injunction and the burden of proof being on the plaintiff, appointment of Court Commissioner, whether would amount to collection of evidence has not been kept in view. The impugned Judgment is arbitrary, capricious and perverse. 11 12. The impugned Judgment, when tested in the light of the relevant statutory provision and settled position of law, is not sound and calls for interference. In the result, the appeal is allowed and the impugned Judgment and Decree is set aside. R.A.No.120/2011 is restored for consideration and decision afresh. Both the

parties are directed to appear in the Court of Senior Civil Judge, Malur, on 20th August, 2016 and receive further orders. Lower Appellate Court shall keep in view the observation made supra and decide the appeal and the I.As. with expedition and within a period of three months from the next hearing date. All contentions of both the parties are left open for consideration and decision. No costs. Sd/-  
JUDGE sac\*

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