

Melagiriyappa and Another Vs. Tumulappa and Another

Melagiriyappa and Another Vs. Tumulappa and Another

SooperKanoon Citation : sooperkanoon.com/371932

Court : Karnataka

Decided On : Oct-18-1995

Reported in : AIR1996Kant150; 1995(5)KarLJ392

Judge : Hari Nath Tilhari, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 115 - Order 12, Rule 6 - Order 39, Rules 1 and 2 - Order 43, Rule 1; [Evidence Act, 1872](#) - Sections 17

Appeal No. : Civil Revn. Petn. No. 122 of 1994

Appellant : Melagiriyappa and Another

Respondent : Tumulappa and Another

Advocate for Def. : S.V. Rama Rao, Adv.

Advocate for Pet/Ap. : V.S. Gunjal, Adv.

Judgement :

ORDER

1. This is a Civil Revision under Section 115 of the Civil Procedure Code from the judgment and order dated 11-11-1993 passed in Misc. Appeal No. 44/93 (Thumalappa v. Melagiriyappa), whereby the first Appellate Court allowed the plaintiff appeal in the matter of an application under. Order 39 Rules 1 and 2, CPC which had been moved in suit No. 491/92 and set aside the order of the Trial

Court, whereby the Trial Court has refused to grant temporary injunction, the lower Appellate Court after having set aside in as Court's order, granted the order of temporary injunction in favour of the opposite parties.

2. The suit No. 491/92 was a suit for specific performance of contract to execute the sale deed in pursuance of the agreement dated 22-7-1989. According to the plaintiffs opposite party, the defendant had sold his 4 acres of land as admitted. Execution of the sale deed dt. 10-2-1950 and has handed over possession thereof at the time of executing the sale deed dt. 10-2-1950. Subsequently on 22-7-1989 the defendant agreed to transfer by sale, 2 acres of land from that very plot Sy. No. 99 of Thippaganahalli lying south of the Mud bund which was alleged to be forming the southern boundary of the land sold earlier in 1950. According to the plaintiffs case, the possession of the 2 acres of land lying to the south of 4 acres of land which had been subject matter of sale deed dated 10-2-1950, had been delivered, at the time when the agreement for sale was entered into by the defendants, to the plaintiffs after having received the sale consideration. The plaintiffs therefore claimed an order of temporary injunction restraining the defendants from interfering with the alleged possession of the plaintiff -- opposite party about the said 2 acres of land. The application for injunction was opposed and objections to the application had been filed by the defendant who is the revision petitioner in this Court. The defendant revisionist also filed an Affidavit in support of his objections. The defendant did admit the ownership and possession of the plaintiffs over 4 acres of land in Sy. No. 99 which had been admitted sold in favour of the plaintiffs by the defendants vide the sale deed dt. 10-2-1950. The defendant admitted the possession of the plaintiff over that land which was the subject matter of the above mentioned sale deed dt. 10-2-1950. But defendants categorically denied the entering into any such agreement as agreement dt 22-7-1989 as well as denying the execution of the agreement dt. 22-7-1989 in favour of the plaintiffs opposite party. The defendants-revisionist also denied the receipt of the sale consideration as well as the factum of delivery of possession of 2 acres of land which has been the subject matter of alleged agreement dt. 22-7-1989. The defendant-revisionist case has been that the agreement has been a forged document created with ulterior purpose of grabbing the said property. The defendants revisionists further took the plea that if temporary injunction is granted

it is likely to cause irreparable loss and injury to the defendants.

3. The learned Munsiff after having heard the Counsel for the parties and having looked into the records, opined that as regards the 2 acres of land in respect of which the agreement of sale deed-dt. 22-7-1989 is said to have been executed the plaintiff applicant did not acquire any title by virtue of that agreement and that the said agreement and its execution has been challenged by the defendants. It recorded the finding:

'Under these circumstances I am of the clear view that the plaintiff is not entitled for injunction at this stage and the plaintiff has failed to made out a prima facie case for grant of temporary injunction at this stage even on basis of the materials placed before this Court.'

The learned Munsiff further opined that apart from the fact that the plaintiff failed to establish the prima facie case for grant of temporary injunction, the balance of convenience was also not in favour of the plaintiff and it opined if injunction is granted defendants would be put to irreparable loss and injury. After having recorded these findings by its order dated 7-7-1993 rejected the application of the plaintiff opposite party for grant of injunction. Having felt aggrieved from the order dated 7-7-1993 the plaintiff preferred the Misc. Civil Appeal under Order 43, Rule 1 of the Code of Civil Procedure. The learned lower Appellate Court made a reference to paragraph 3 of the Written statement and observed finally at page 23 of under:

'The defendants have unequivocally told that these plaintiffs were in possession and enjoyment of a portion of Sy. No. 99, comprised within the boundaries shown in the sale deed dt. 10-2-1950. As already discussed, the boundaries mentioned in the sale deed and the suit schedule are one and the same. Even if the injunction is granted, the plaintiffs will not be able to stretch their legs beyond the boundaries mentioned in the sale deed dt. 10-2-1950. Therefore, the defendants will not loose anything whether the injunction is not granted, the defendants will encroach upon the boundaries mentioned in the sale deed dt. 10-2-1950 and they will cause loss to the plaintiffs. Hence, I hold that the plaintiffs will suffer irreparable injury, in case the injunction is not granted.'

The lower Appellate Court further observed : 'The suit land is an agricultural land and the plaintiffs who have prima facie proved their title and possession must be allowed to peacefully plough, sow, harrow and harvest etc., If their possession is interfered with, neither, they will be able to cultivate nor to protect their possession.' On this ground it held that balance of convenience was in favour of the plaintiffs.

4. A reading of the above quoted paragraphs firstly reveal that the lower Appellate Court has approached the case taking as if the injunction was being sought with respect to the land which has been the subject matter of the sale deed dated 10-2-1950 and it further took that the property of subject matter of agreement dated 22-7-1989 was also the same one and that plaintiffs possession has been admitted by defendants over that land. After recording these findings, the learned lower Appellate Court allowed the appeal and granted injunction. Having felt aggrieved from the order of the Appellate Court, the defendants revisionist has filed RevisionPetition under Section 115 of the C.P.C.

5. I have heard Sri. V. S. Gunjal assisted by Sri. V. V. Gunjal, learned Counsel for the petitioners and Sri. S. V. Rama Rao, appeared on behalf of the opposite party. Sri. Gunjal, the learned Counsel for the petitioners submitted before me [hat the lower Appellate Court has granted the injunction order in an illegal manner as it completely misread and confused the case as it took that the injunction was being sought with respect of the land -- subject matter of sale deed dated 10-2-1950 or it took that the land, subject matter of sale deed dated 10-2-1950 and of the agreement dated 22-7-1989 were same and they bear the same boundaries. And the Court therefore basing on that mis reading of the pleadings and further misread the allegations at para 3 of the written statement as an admission that the defendants have admitted the possession of the plaintiffs over the 2 acres of land which was the subject matter of agreement dated 22-7-1989. The learned counsel submitted that the Court below as such acted illegally in recording the findings of possession on the basis of misreading of the facts of the case and therefore it acted illegally and with material irregularity in exercising the jurisdiction. The learned Counsel for the petitioners submitted that there is no dispute so far as the sale deed dated 10-2-1950 is concerned. No doubt four acres land had been sold

thereunder and possession there of given and it was only 4 acres of land the boundaries of which are given in the sale deed. The land in dispute in the present case is not that land but it is a different land which is situated to the south of that land and in between the two there is a mud bund. The learned Counsel submitted that the learned Appellate Court really Committed procedural illegality in treating the two lands as the same and it illegally without any evidence held that the plaintiffs has been in possession of and has proved to have acquired the possession of the land in dispute under the agreement. He submitted that therefore the finding on the question of possession which has been recorded if at all with reference to the land in dispute is not only vitiated by error of law but it is the result of illegal exercise of jurisdiction emanating from misreading of the pleadings of the case and as such when the finding on the question of possession is vitiated by error of law and procedure as well as the granting of injunction on the basis of a wrong finding of facts as to the possession is nothing but a passing of an order in excess of jurisdiction as it is well settled principle of law that injunction order cannot be granted unless possession (sic) is proved. He pleaded that it is really a fit case for interference. He further submitted Revenue record entries which had been filed by the defendants and which are in favour of the defendants have also not been considered by the lower Appellant Court nor the contents of the Affidavit in the light of the Revenue record entries and as such the learned Counsel submitted that when the finding of fact has been arrived at after having ignored certain material evidence then this Court can be said to be said to be acting Illegally in exercise of jurisdiction and with material irregularity.

6. The contention made by the learned Counsel for the petitioners had been hotly contested by Sri. Rama Rao, learned Counsel for the respondents. Sri. Rama Rao submitted that jurisdiction of this Court under Section 115 is limited to question of jurisdiction pure and simple, in the sense if the order is passed beyond jurisdiction, it may be interfered with. If the order is the result of failure to exercise jurisdiction vested, it can be interfered with. If the order suffers from the Courts acting illegally and material irregularity of jurisdiction, it may be interfered with, provided the order results in causing material injustice and injury to the party. He submitted In the present case really all material has been considered, a finding has been arrived at and even if the finding with respect to prima facie case or possession or balance of

convenience might be wrong, that simple error will not entitle this Court to interfere with the findings recorded by the Appellate Court. He submitted that the revisional jurisdiction is not the same and its extent is not the same as that of a first appellate Court or of a second appellate Court. He submitted that the jurisdiction u/s. 115 of the Code is very limited, it may be part of the general appellate jurisdiction but that jurisdiction is limited to purely questions of jurisdiction or error of law touching jurisdiction or the Courts acting illegally and arbitrarily. Otherwise it is not to be exercised. He submitted this is a case of finding of fact, therefore there is no need for this Court to interfere.

7. I have applied my mind to the contentions made by the learned Counsels for the parties. There is no dispute so far as the basic proposition of law is concerned that the jurisdiction of this Court under Section 115 though may be the part of the general appellate jurisdiction of a superior Court, but it is limited and it is circumscribed by the limits prescribed by Section 115 which limits are as under:

a) that the order made by the subordinate Court comes within the forecast of expression case decided;

b) that the order sought to be challenged should not be appealable to this Court or to any Courts subordinate;

c) that the order impugned is shown to have been suffering from jurisdictional error or it may be a case of jurisdictional error in the sense that the Court below has acted illegally or with material irregularity in exercise of jurisdiction or there may be one more set of cases where the Court may recording an erroneous decision on a question of fact or law touching its jurisdiction usurps or refuses to exercise the jurisdiction and such cases may not be covered by clause (c), of Sec. 115 but be covered by either clause (a) and (b) of section 115.

8. The leading case on this subject is the case of *Chaube Jagdish Prasad v. Ganga Chaturvedi*, reported in : AIR 1959 SC492 and the other case of *Joy Chand Lal Babu v. Kamalaksha Chaudhury*, reported, jn . So there can be no dispute with the bare proposition of law that the scope of the jurisdiction of this Court is limited and is not akin to that of a first Appellate Court. It is only if a jurisdictional error is

there, the Court can interfere. But it is not always bound to interfere even if there is a jurisdictional error unless there is failure of justice or substantial injury caused.

9. The question before this Court as such had to be examined was whether the possession of 2 acres of land subject matter of agreement dt. 22-7-1989 had been delivered to the plaintiffs opposite party) and whether he was in possession or not. The plaintiffs no doubt as asserted that possession had been given to them pursuance of that agreement. This fact had been denied by the defendants. So the findings had to be recorded by the Court specifically whether the possession of 2 acres of land subject matter of agreement had been given to the plaintiff or not. Here the Court does not appear to have considered either the Revenue entries which have been produced nor it appears to have considered the Affidavits filed by the parties. Apart from that the lower Appellate Court has proceeded to consider as if it was considering the question of delivery of possession of 4 acres of land under sale deed dt. 10-2-1950, when really with respect to that 4 acres of land there has been no dispute between the parties and it was admitted case on that 4 acres of land to the north of Mud bund which has been sold by the defendants to the plaintiffs opposite party that is possession had been given. The dispute in the present case really was whether under agreement dated 22-7-1989, possession of other 2 acres land has been delivered. But the observation of the Court that I have quoted in the earlier part of this Judgment clearly reveals that the lower Appellate Court has taken the allegations at para 3 of the Written statement where the defendants had admitted delivery of the 4 acres of land under sale deed dated 10-2-1950 as if it has been an admission regarding 2 acres of land subject matter of the agreement dated 22-7-1989 though in the earlier part of the Judgment the Court has observed that plaintiffs admit unequivocally that within the above boundaries that is boundaries mentioned in the sale deed dt. 10-2-1950 the possession of 4 acres of land in Sy. No. 99 had been given and there is no dispute as mentioned earlier. The lower Appellate Court reached a conclusion as if the boundaries of both the lands --- subject matter of the sale deed dt. 10-2-1950 and the agreement dated 22-7-1989 are the same and on that basis it records the finding that, defendants will not lose anything if injunction is granted with respect to the land covered within the boundaries of the sale deed dated 10-2-1950. But defendants may suffer if plaintiffs interfere with that possession. This is really the

basically illegal approach. It was no body's case that defendants was interfering with the plaintiffs possession over the land, subject matter of sale deed dt. 10-2-1950 nor was as submitted by the opposite party, any injunction was sought for that land. The Court below taking the view as if the boundaries are same and opined and held that the plaintiffs have proved title and therefore the Court illegally held that title has been proved. But the question of possession having been handed over i.e. 2 acres which was the subject matter of agreement, appears to have been confused with that of the land -- subject matter of sale deed. The finding on the question of possession which has been recorded recorded after misreading and misunderstanding the pleadings are the result of the non application of the mind and if a finding is recorded without proper application of the mind to the pleadings and the facts of the case, definitely it can be said that the Court has not acted in accordance with the procedure prescribed and it has really acted illegally and with material irregularity. It is well established principle that a statement to be read as an admission of a party it must be definite, clear and specific and must specifically refer to and relate point or fact in dispute, otherwise it is not an admission nor can be treated to be the admission. See Chikkam Koteswara Rao v. Chikkam Subba Rao, : AIR 1971 SC1542 , Dolatsinghji Jaswantsinghji v. Khachar Mansur Rukhad, AIR 1936 PC' 150 (153 Col. 1) and Ajodhya Prasad Bhargava v. Bhawani Shankar Bhargava, : AIR1957 All1 (FB)). But here contents 'of para 3 of Written statement related to some thing which was not the subject matter of the suit but was subject mater of the sale deed of 1950 cannot at all the,treated or read to be an admission of delivery of possession of 2 acres of land which was subject matter of agreement dated 22-7-1989. So this is case of misreading of pleadings and as a result thereof Court below misdirected itself and acted illegally in passing the order.

10. Thus considered, in my opinion, the finding on question of possession or balance of convenience which has been recorded by the lower Appellate Court suffers from illegal exercise of jurisdiction as it run; contrary to the law relating to pleadings and admission also. A finding of fact which has been arrived at either ignoring the material evidence on record or without considering the material on record such as revenue record, material which admittedly had been filed by the parties as well as the finding of facts recorded on the basis of a misreading

defence pleading and threading it to be admission when it could not amount to an admission at all is an act amounting to nothing but acting illegally or in a manner not in accordance with the procedure prescribed by law.

11. Thus considered in my opinion, with the finding on the basic question of possession and delivery of actual possession of the land in dispute, namely, 2 acres of land - the subject matter of the agreement has been erroneously recorded and has been recorded in an illegal manner and on the basis there of the injunction order has been granted. Otherwise the Court could not have granted injunction order. As such, the decision of the lower Appellate Court deserves to be set aside. The proper course in such a case appears to me to allow the Revision, to set aside the order and to direct the lower Appellate Court to consider the appeal of the plaintiffs afresh.

12. Having thus considered, I allow the Revision, and set aside the order of the Appellate Court dated 11-11-1993 passed in Misc. Appeal No.44/93. The possession as on the date of filing of the appeal shall be maintained until the Appellate Court decides the case or pass any order'. The Lower Appellate Court will decide the appeal expeditiously after hearing the parties.

13. Revision allowed.