

Basamma and ors. Vs. Peerappa

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Court : Karnataka

Decided On : Jan-08-1981

Reported in : AIR1982Kant9; ILR1981KAR1230; 1981(1)KarLJ286

Judge : K.S. Puitaswamy, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 95, 95(1), 95(2), 100 and 101

Appeal No. : Second Appeal No. 395 of 1975

Appellant : Basamma and ors.

Respondent : Peerappa

Advocate for Def. : J.S. Gunjal, Adv.

Advocate for Pet/Ap. : Manohar Rao Jagirdar, Adv.

Judgement :

1. This appeal is by the defendants and is directed against the judgment and decree dated 21-11-1974 of the Additional Civil Judge, Gulbarga in R. A. No.106 of 1973 affirming the judgment and decree dated 20-10-1973 of the Muntisiff, Chittapur in O. S. No. 54 of 1969.

2. Agricultural lands bearing Sy. Nos. 1 and 2 measuring 2 acres 4 guntas and 6 acres 14 guntas respectively of Margol village, Chittapur Taluk, Gulbarga District,

which were originally owned by one Baswantappa the husband of defendant No. 1, are in possession of the respondent/plaintiff, at any rate from 1955, if not earlier, After the death of Baswantappa sometime in 1957, there have been a number of disputes between defendant No. 1 and the plaintiff concerning the said lands.

3. On 25-11-1968 defendant No. 1 instituted O. S. No. 102 of 1968 in the Court of the Munsiff, Chittapur, against the plaintiff and four others for a permanent injunction to restrain them from interfering with her alleged possession of the said lands. On an application made by defendant No.1 in the said suit. the learned Munsiff on the same day granted an ex parte temporary injunction on these terms:

'25-11-1969.

Admit on Reg. No. 1 and issue summons to defendants for settlement of issues returnable by 29-11-1968.

Heard the advocate, perused the documents and also the affidavits of parties and bar witnesses. In the circumstances of the case I pass a conditional order. issue ad interim injunction as prayed for subject to the condition that they should not cut and remove the crops until further orders of the Court. The former should also undertake to do so and issue show cause notices to defendants by 29-11-1968.

Sd/-

Munsiff.'

Not unnaturally this order itself, led to a series of interlocutory orders. Ultimately, on 31-5-1969 defendant No. 1 withdrew the said suit and to same was dismissed as withdrawn Exhibit P-12).

4. While the said suit was pending, the case of the plaintiff is that defendant No. 1 along with defendants 2 and 3 trespassed on the said land that were in his lawful possession on Which he had grown various crops, removed the crops, committed various acts of waste and damage on the said lands under the cover of or in defiance of the interim orders made thereto and have rendered themselves for damage. On these and other allegations, the plaintiff instituted O. S. No.54 of 1969

on 17-7-1969 in the Court of the Munsiff, Chittapur, for recovery of a sum of Rs. 3000 as damages from defendants 1 to 3 who had committed acts of waste and damage and defendant No. 4 who had stood as surety in O. S. No. 102 of 1968 instituted by defendant No.1 against him. In his plaint, the plaintiff while alluding to the sale in his favour by Baswantappa, his possession and the various proceedings and in particular to the proceedings in O. S. No. 102 of 1968 that the acts of trespass, waste damage Committed by defendants 1 to 3 to the crops and other properties was of the value of Rs. 4000/- and claimed that he entitled to recover the same from the defendants. However he restricted his claim in the suit to a sum of Rs. 3000/- Only. The particular of the claim, the factual and the legal basis on which the same is founded is set out by the plaintiff in Para 11 of his plaint in these words.

'From the above facts it is clear that the plaintiff was in lawful possession and enjoyment of the two suits lands as full and absolute owner and that he had sown and grown the various crops referred to above in the two suit lands and defendant No.1 without any right whatsoever had filed a false suit on false representations and false documents and obtained an ex parte injunction order from the Court and got into wrongful possession of suit lands and thereafter she and her man defendant 2 and 3 removed the various standing crops and other materials by disobeying the court order to which they, were not legally entitled and caused other damages to the plaintiff. The removal of' standing crops and other materials from the suit-land and thier acts of burning hut, tamarind tree were all wrongful. Therefore all defendants are bound to compensate the plaintiff for their wrongful gain they have made to themselves and wrongful loss and damage they have caused to the plaintiff . The defendant No 4 is liable to the extent of Rs. 1,000/- as per his security board. The details of the crops and other materials removed and damage caused to the plaintiff property by the defendants and their value are as follows:-

1. Sugarcane in about 1/2 Rs 1500-00 acre 15 qtls.
2. Fodder, 6 cart loads Rs. 200-00
3. Paddy & Paddy hay, 3 cartloads (Paddy 4 khandis) 250-00
4. Value for hurt burnt 50-00
5. Value of the wood removed from cattle shed and damagecaused. 1100-00
6. Tamarind fruits removed 200-00
7. Tamarind tree burnt

and damaged. 100-00 8. Spanners, hammers etc. of oil Engine, removed. 100-009. Damage caused to the oil engine 100-00 10. Jawar crop, 6 bags 350-0011. Wheat crop 2 bags 200-0012. Grain crop, one and half bag 150-0013. Karad crop, 5 bags. 200-00 14. Manure, 30 cart loads 500-00 Total Rs. 4000-00 The defendants who were bound to amount for the income wrongfully received by them and compensate the plaintiff for the damage caused by their various Wrongful acts referred to above, have refused to account for and compensate the plaintiff Hence plaintiff had to file this suit'.

5. Defendants 1, 3 and 4 filed a joint written statement denying the claim made by the plaintiff. Defendant No. 2 adopted the written statement filed by defendant 1, 3 and 4. The defendants alleged that the plaintiff was not in possession of the lands and on the other hand defendant No. 1 was in lawful possession of the lands and that she and other defendants had not trespassed and committed acts of waste and damage on the lands. They also claimed that the value of the crops was as set out in para 11 of their written statement and not in para 11 of the plaint.

6. On the above pleadings, the learned Munsiff framed the following seven issues:

(1) Whether the plaintiff proves that he was in lawful possession of the suit land and had grown sugarcane, paddy and other crops therein as alleged in para 4 of the plaint for the year 1968-69?

(2) Whether he further proves that defendant No. 1 cut and removed the sugarcane, paddy and other crops from the suit lands with the help of her men defendants Nos. 2 and 3 against the Court's directions as alleged ?

(3) Whether he further proves that defendants Nos. 1 to 3 removed 6 cart loads of fodder, 3 cart loads of paddy hay, wood, corrugated iron sheets, fruits of tamarind tree, hammer and spanners of his oil engine and damaged oil engine, burnt his hut and part of the tamarind tree etc. and caused damage of about Rs. 3,000/- as alleged in para 4 of his plaint ?

(4). Whether the plaintiff proves that defendants 1 to 3 removed manure from the suit lands? If so what is its value?

(5) Whether defendant No. 4 is liable to the extent of Rs. 1,000/- as per his security bond ?

(6) To what damage the plaintiff is entitled to?

(7) What order?

On a consideration of the evidence placed by the parties in support of their respective case learned Munsiff by his judgment dated 20-10-1973 answered all the material issues in favour of the plaintiff and decreed the plaintiff's suit for Rs. 2,5001/- as against defendants 1 to 3 and for Rs. 1,000/- against defendant No. 4, that being the amount for which he had stood as surety in O. S. No. 102 of 1968. Against the said judgment and decree of the learned Munsiff, the defendants filed R. A. No. 106 of 1973 before the learned Civil Judge, who by his -judgment dated 21-11-1974 has dismissed the same. Before the first appellate Court as also before this Court, the plaintiff had not filed an appeal or cross-objections against that part of the decree that rejected his claim.

7. Sri Manobar Rao Jagirdar, learned counsel for the appellants has contended that the suit filed by the respondent/plaintiff was for recovery of damages on the ground that defendant No. 1 had obtained a temporary injunction on insufficient ground without a probable or reasonable cause and in the absence of a plea of malice and proof thereof, the suit itself was not maintainable, but the Courts below in decreeing an incompetent suit, have committed an error of law. In support of his contention Sri Jagirdar strongly relied on a Division Bench ruling of the Calcutta High court in Bhupendra Nath Chatterjee v. Smt. Trinayani Devi AIR 1944 Cal 2S9,

8. Sri. J. S. Gunjal, learned counsel for the respondent, while supporting the judgments of the Courts below, urged that the suit for damages was based on trespass, acts of waste and damages committed by do defendants and the ratio in Bhupendranath Nath Chatterjee's case had no application.

9. On the nature of the claim aside by the plaintiff the legal basis on which the same is founded, I have earlier set out the same in some detail. In their length written statement, the defendants have not even pleaded that the plaintiff's suit as

founded for recovering damages was not maintainable on the ground now urged before this court. Evidently for this reason, the learned munsiff did not frame any issue on the maintainability of the suit, the parties proceeded with the trial and placed the evidence. Notwithstanding the above, the defendants only at the stage of arguments contended that the plaintiff's suit in the absence of a plea of malice and proof, was not maintainable relying on the ruling of the Calcutta High court in *Mohini Mohan v. Surendra Narain Singh*, AIR 1915 Cal 173, and the ruling of the Privy Council in *Albart Bonnan v. Imperial Tobacco Co.* AIR 1929 FC 222. However the learned Munsiff noticing the said contention and the aforesaid rulings, has held that the suit itself was not for damages for malicious prosecution but was an action founded on trespass and therefore, maintainable.

10. In their first appeal before the learned civil judge, the defendants expressly formulated a ground on the above contention urged by them and rejected by the learned Munsiff and urged as is now being urged by them before this court (vide Para 3 of the appeal memo). But, at the hearing of their appeal, the defendants do not appear to have pressed that ground before the learned civil judge. Before the learned civil judge, the defendants appear to have challenged the judgment and decree of the learned munsiff only on two grounds that are formulated by

him in para 7 of his judgment, that have nothing to do with ground No. 3 urged in Their appeal memo. On an examination of The contentions urged before him, the learned Civil Judge has rejected both the grounds and has affirmed the judgment and decree of the learned Munsiff. Sri G. S. Kittur an experienced Civil Judge, who is now a District Judge has also maintained. the notes of. arguments addressed by counsel in the appeal file. From the notes made by the learned Civil Judge, it is clear that the defendants did not press 'ground No. 3 urged in their appeal memo, did not cite the authorities that had been cited before the learned Munsiff or before this Court. Sri. Jagirdar maintained that the learned counsel who had appeared for the defendants had urged ground No. 3 before the learned Civil Judge and the same has not been noticed and dealt with by him. In their appeal memo before this Court, the defendants do not state that ground No. 3 of their appeal memo was urged by them before the learned Civil Judge, but he had failed to notice. and deal with the same. In my view, Sri Kittur would not have failed to notice and deal with

ground No. 3, if the same had been urged before him.

11. What follows from the above is, that the defendants had not specifically urged their plea or the ground that is now being urged by them before this Court in their defence and urged the same at the stage of arguments before the learned Munsiff who, however, examined the same and rejected it, the correctness of which was challenged in their appeal memo before the first appellate Court but, was not urged as a ground at the hearing of the appeal. In my view, the contention urged for the defendants is . not ,one of those that touches the jurisdiction of the' court or a pure question of law that are on admitted facts which should be permitted to be urged for the first time in this appeal before this Court. On this ground alone, this Court will be justified in declining to examine the same and reject it without expressing one view or the other. But, I do not propose to do so and proceed to examine the same.

12. It Section 95 of the Code provides for award of compensation, to the defendant, where a plaintiff has obtained an arrest, an attachment or a temporary injunction by filing an application to the Court that has made the order The remedy provided under under section 95 is a special remedy. The amount that can be awarded by the Court cannot exceed Rs.1000/- or the pecuniary jurisdiction of the court itself , whichever is higher. In such an application the defendant has only to establish the ingredients referred to in that section and no more. Sub-section (2) of S. 95 bars a person who makes an application from instituting a suit for the same -purpose. But, a person who does not make an application under S. 95(1) can also institute a suit for damages for the same purpose. In such a suit, the action is founded on what is called as abuse of the process of the Court or malicious prosecution, in which the plaintiff has to allege and prove that the abuse of the process of the Court was also malicious. But, in an action for trespass, waste or damage, may be under the cover of an order of temporary injunction, that is not the position. In an action for trespass, the plaintiff is neither required to allege malice nor prove the same and he has only to allege and prove that he was in possession of the immovable property and the defendant his disturbed his possession (vide Chapters 4 and 8 of Ramaswamy Iyer's Law of Torts, 7th Edition). Bearing these principles in mind, it is now useful. to examine the nature of

the suit instituted by the plaintiff.

13. Earlier, I have set out the substance of the case of the plaintiff. The plaintiff's suit is not based on the abuse of the process of the Court, but is based on the trespass committed by defendants 1 to 3 and the damage done by them to his properties. In claiming damages, the plaintiff has undoubtedly referred to the previous proceedings as also the interim injunction granted by the Court in O. S. No. 102 of Mg. But, from that it is wrong to hold that the plaintiff has brought his action for damages on the ground -that defendant No. 1 had abused the process of the Court and obtained a temporary injunction on insufficient grounds, without reasonable and probable cause.. On the other hand, his case is that though the temporary injunction obtained by defendant No. 1 did not enable her to enter upon the lands, she and other defendants wrongfully entered the lands, removed the crops, caused acts of waste and damage to his properties for which he has claimed damages. Evidently, for this reason, the defendants did not join issue with the plaintiff and urged that in the absence of a plea as to malice, the suit was not maintainable, though of course they urged that as a ground at the hearing of the case. In my view, the plaintiff's suit not being one for abuse of the process of the Court or malicious prosecution, but is one for trespass committed by the defendants and the damage caused ' by them to his properties, he was neither required to allege malice nor -prove the same and the suit filed by him was undoubtedly maintainable.

14. In Bhupendra Nath Chatterjee's case : AIR1944 Cal289 , on which Sri Jagirdar placed great reliance, the facts, in brief, were these: One Smt. Trinayani Devi having purchased the tenancy rights from one Elokeshi Dasi was in occupation of certain lands , that belonged to Bhupendra Nath and others. When Trinayani Devi was about to construct a building in pursuance of the sanction obtained by her from the Municipality, Bhupendra Nath and others instituted T. S. No. 749 of 1934 against Trinayani Devi for, a declaration that she had no right to erect a permanent structure on the land and for a perpetual injunction restraining her from proceeding with the work of construction. In that suit, the defendants also obtained a temporary injunction restraining the plaintiff from raising any structure on the disputed property. Later the said suit was dismissed which was affirmed in appeals

by the District Judge and also by the High Court. In the first appeal also there was an injunction restraining the plaintiff from proceeding with the construction. On the termination of the said proceedings, the plaintiff instituted a suit for recovery of a sum of Rs. 710/- claiming damages caused to her by the temporary injunction granted in the suit and also in the appeal which was resisted by the defendants inter alia on the ground that the suit instituted by them was not actuated by malice and there were reasonable and proper grounds upon which the order, of temporary injunction was made by the Court, and therefore the suit filed by the plaintiff for recovery of damages on the ground of abuse of the process of the Court was not maintainable. After contest, the trial Court decreed the said suit for a sum of Rs. 2201/- which was affirmed in appeal. In the second appeal, the defendants reiterated their said contention. On that question, the Division Bench speaking through Mukherjea, J. examined the English and Indian Law and all the previous decisions of the Calcutta High Court and reiterated the well accepted principles in such cases. On facts, the Court found that the plaintiff's suit was a suit founded on the abuse of the process of the Court in which she was required to allege and prove malice and in that view they were inclined to dismiss the suit. But, on a request made by the plaintiff, the said suit was permitted to be converted into an application under S. 95(1) of the Code and the same was ordered to be tried by the trial Court. In Bhupendral Nath Chatterjee's case or other cases that were relied upon by the defendants before the trial Court the High Court of Calcutta or the Privy Council have not enunciated any new principle but have only restated the principles noticed by me earlier. A careful reading of the ruling of the Division Bench in Bhupendra Nath Chatterjee's case would show that the nature of the suit filed by the plaintiff is such that it does not really require an allegation of malice or proof to succeed as is contended, by Sri Jagirdar. For these reasons, I reject the contention of Sri: Jagirdar.

15. Sri jagirdar who argued this case and the other R. S. A. No. 1057 of 1974 between the plaintiff and defendant No. 1 and her children with thoroughness, objectivity and fairness, did not rightly dispute the correctness of the findings of the Courts below on other issues, they being on questions of fact. As the only contention urged by Sri jagirdar fails, this second appeal is liable to be dismissed.

16. A reading of the judgments of the Courts below reveals that a gruesome story was enacted against an helpless Harijan in a small village called Margol. But, thanks to the rule of law that prevails in our country and an independent judiciary the wrong committed to the helpless Harijan has been remedied in some measure though not in full measure. With anguish and pain, I must state that the action of defendants Nos. 1 to 3 besides being tortious, was highhanded, illegal and in normal circumstances it is a fit case in which this Court should dismiss this appeal with exemplary costs and even initiate contempt proceedings against defendant No. 1 for disobeying the temporary injunction issued by the learned Munsiff in her suit. But, such an action is not called for, as defendant No. 1, a widow does not appear to be a free agent but is egged by others to fight this litigation. In this view I decline to award exemplary costs or initiate contempt proceedings against defendant No. 1.

17. In the result, I dismiss this second appeal with costs.

18. Appeal dismissed.