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Court : Rajasthan

Decided On : Aug-20-1987

Reported in : 1987WLN(UC)449

Judge : Inder Sen Israni, J.

Appeal No. : S.B. Civil Revision Petition No. 822 of 1985

Appellant : Kesso Ram and ors.

Respondent : Rameshwar and ors.

Advocate for Pet/Ap. : Shri. G.K. Garg

Disposition : Petition dismissed

Judgement :

Inder Sen Israni, J.

1. This is a revision petition under Section 115 CPC against the judgment and order dated 17-9-1985 passed by the learned District Judge, Jhunjhunu in Civil Misc. Appeal No. 51/85 whereby he dismissed the Misc. Appeal against the order dated 10-7-1985 passed by the Munsif and Judicial Magistrate, Jhunjhunu under Order 39, Rules 1 and 2, CPC

2. The petitioner filed a civil suit for issue of perpetual injunction in the court of Munsif and Judicial Magistrate, Jhunjhunu, wherein it was contended that there existed a way from village Hansari to village Dhanoori through Khasra Nos. 92, 91, 84, 72 and 69. This way also leads to Khasra No. 29 of petitioner Kesuram. Learned trial court appointed a Commissioner to inspect the site, who filed his report on 19-11-1984 and after considering the report and other documents on record, the application for temporary injunction filed by the petitioners was dismissed. Against this, an appeal was filed, which was also dismissed after hearing both the parties.

3. The contention of Shri G.K. Garg, learned Counsel for the petitioners is that even though both the courts below have come to a finding that prima-facie the case does exist in favour of the plaintiff-petitioner but it has been held that since there is an alternative way, therefore, the grounds of irreparable injury and balance of convenience do not exist in favour of the petitioners. On this account the application for temporary injunction and the appeal filed by the petitioners were dismissed. Learned Counsel contends that the alternative way is only 1.5' in width, whereas the way mentioned by the plaintiffs in the plaint is 8 to 10' in width, wherefrom a cart can also reach to the field of the petitioner. Therefore, it is contended that this alternative way should not have been considered as the petitioners cannot take the cart to their field from that way. It is also contended by the learned Counsel that both the courts below have wrongly interpreted the report of the Commissioner and have held that the dotted lines of both the ways is of same width and therefore, both the ways are also expected to be of the same width. It is, therefore, contended that the trial court has wrongly exercised its jurisdiction by not granting temporary injunction to which the petitioners were entitled. Reliance has been placed on *Hastimal v. Bachchraj* (1952 RLW 191), in which it was observed that the right of way includes the right of way for carts etc. also, In *Anandi Lal v. Mohan Lal* (1985 RLR 106) it was observed by this Court that the learned trial court vacated the temporary injunction on the basis of documents, which was not a part of record of the case, therefore, this consideration of extraneous circumstances was a jurisdictional error and the order of the lower court was set-aside in revision. Reliance has also been placed on *Narsingh Ram v. Udharam* (1985 WLN(UC) 552), in which it was observed by this

Court that interim relief be not refused if fair question is triable in the case.

4. Learned Counsel for the non-petitioners Shri Sajjan Singh on the other hand has contended that two courts below have come to a finding that irreparable injury and balance of convenience do not exist in favour of the petitioners and, therefore, this Court should be slow in interfering with a concurrent finding of both the courts. It is also pointed out that one Tejaram brother of petitioner Kesooram had earlier filed the proceedings in the court of Assistant Collector, Jhunjhunu regarding declaration about the same way and also prayed for issue of temporary injunction, which had been refused. It is also contended that in the report of the Commissioner it has been clearly mentioned that the alleged way does not exist at several places. It is stated in the report that the existence of way can be seen in Khasra Nos. 91 and 69 but not in other Khasra Numbers as mentioned in the plaint by the petitioners. Reliance has been placed on *Hindustan Aeronautics v Ajit Prasad* : (1972)ILLJ170SC , in which it was observed by the Apex Court that the High Court should not interfere even if the order is right or wrong or in accordance with law or not unless the lower courts have exercised their jurisdiction illegally or with material irregularity. In *M.L. Sethi v R.P. Kapoor* : [1973]1SCR697 , it was observed by the Apex Court that revisional powers of the High Court under Section 115 CPC are limited. The erroneous decision on a question of law reached by the subordinate court which has no relation to the question of jurisdiction of that court, cannot be corrected by the High Court under Section 115 CPC.

5. I have gone through the orders of both the courts below as also the report of the Commissioner and certain maps produced by the parties. I am of the opinion that both the learned lower courts have taken into consideration all relevant documents and thereafter reached to a particular conclusion on the basis of the same. Both the courts below have held that since there is an alternative way, which is smaller one, for the petitioner No. 1, the balance of convenience and irreparable loss does not exist in favour of the petitioners. I find no error in the order of the first appellate court.

6. In the result, the revision petition is dismissed with no order as to costs.

