

Darbari Lal and ors. Vs. Madan Lal and ors.

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Court : Jammu and Kashmir

Decided On : Mar-15-2011

Judge : J. P. Singh, J.

Acts : [Transfer of Property Act, 1882](#) - Section 92 ; [Code Of Civil Procedure \(CPC\), 1908](#) - Sections 115, 115(1) ;

Appeal No. : C Rev No. 3 OF 2008.

Appellant : Darbari Lal and ors.

Respondent : Madan Lal and ors.

Advocate for Def. : Mr. D. C. Raina, Adv.

Advocate for Pet/Ap. : Mr. O.P.Sharma, Adv.

Judgement :

1. Mst. Barto Devi filed a Suit against Gouri, her brother, impleading Nikki and Kamla Devi as Proforma Defendants seeking declaration that land comprised in Khewat Nos. 1, 2 & 3 of Village Padal of Tehsil Hiranagar, was the joint property of the parties to the Suit and Gouri had no right to transfer it by any mode including Sale, Gift, Mortgage, Lease or Exchange etc. Alongwith the Suit, an application seeking interim directions against the defendant too was filed. Gouri contested the Suit pleading, inter alia, that land comprised in Khasra No. 198/7 min falling in Khewat No.2, was his self acquired property and Mst. Barto Devi had neither any right therein nor was she entitled to seek injunctive directions against him. Copy of

Decree dated 06.11.69 of the Civil Court of Munsiff, Hiranagar, evidencing Gouri to have acquired land comprised in Khasra No. 198/7min in terms of the Decree, was also placed on records.

2. Both Mst. Barto Devi and Mr. Gouri died during the pendency of the suit. They have been substituted by their legal representatives. Finding that the property in dispute was the joint property of the parties and there was a prima facie case in favour of the plaintiff, the trial Court passed an order restraining defendant- Gouri from raising construction on the Suit land till the final disposal of the Suit.

3. Finding no merit in the defendants Appeal against the order, the Appellate Court dismissed Gouris Appeal vide its Order of September 27, 2007.

4. Dealing with the defendant s plea regarding his exclusive ownership and possession over land measuring 14 Kanals 7 Marlas comprised in Khasra No. 198/7 min of Village Padal, it was found by the two Courts that in view of the provisions of Section 92 of the Transfer of Property Act, the defendant could not claim any superior right in the property. In applying the provisions of Section 92 of the Transfer of Property Act, the Courts proceeded on the premise that the Decree relied upon by the defendant was a Decree of Redemption of Mortgage which would not vest ownership right in defendant No.1 to claim absolute and exclusive right of enjoyment of land comprised in Khasra No.198/7 min. Questioning the orders of the trial Court and the Appellate Court on plaintiff s application under Order 39 of the Code of Civil Procedure, the petitioners-defendants have invoked the Revisional jurisdiction of this Court seeking setting aside of the orders and dismissal of respondents application in so far as it seeks restraint against the petitioners to raise construction on the land comprised in Khasra No. 198/7 min, during the pendency of the Suit.

5. Sri D.C.Raina, learned Senior Counsel appearing for the respondents, raised a preliminary objection about the maintainability of the petitioners Revision Petition urging that in view of the amended provisions of Section 115 of the Code of Civil Procedure, Svt. 1977, the petitioners Revision Petition was not maintainable as the High Court may not vary or reverse any order made in the course of a Suit or other proceedings, except where the order, if it had been made in favour of the

party applying for revision, would finally dispose of the Suit or other proceedings, which was not the situation in the present case, in that, even if the Revision had to be allowed, it would not finally dispose of the Suit.

6. Learned counsel further submitted that in view of the bar enacted by Section 115 of the Code prohibiting interference in the orders passed in the course of the Suit or other proceedings which do not result in final disposal of the suit or proceedings, exercise of power of superintendence too may be not warranted, for such a course would render the provisions of Section 115 of the Code nugatory.

7. On merits of the case, learned counsel would say that the Decree relied upon by the petitioners, the successors-in-interest of defendant No.1, being a Redemption Decree, the orders passed by the Courts below may not warrant interference additionally because the findings of the two Courts regarding existence of a prima facie case in favour of the respondents were concurrent.

8. O.P.Sharma, learned counsel for the petitioners, on the other hand submitted that both the Courts below had committed a grave error of law in understanding the Decree relied upon by the petitioners, and the error committed by them being glaring and apparent, on the face of the records, the exercise of revisional jurisdiction by the High Court was a compelling necessity to advance the cause of justice. Dealing with the respondents counsel s submission that the Revision was not maintainable, he submitted that there being no bar in Section 115 of the Code for entertaining Revision against the Appellate order against the trial Court s order under Order 39 of the Code, the petitioners Revision was maintainable; And even if, it were to be held that the Revision Petition may not lie against the orders passed under Order 39 of the Code of Civil Procedure, the present was a fit case, where the power of superintendence was required to be exercised by the High Court, in the interests of justice, to set right the wrong committed by the Courts below.

9. I have considered the submissions of learned counsel for the parties, perused the records and the provisions of Section 115 of the Code of Civil Procedure. I will first deal with the preliminary objection raised by the respondents learned counsel, as to the maintainability of the Revision Petition in view of the provisions of Section

115 of the Code of Civil Procedure.

10. To determine the issue, regard needs to be had to the provisions of Section 115 of the Code, which, for facility of reference is reproduced hereunder.

115 Revision

[(1)] The High Court may call for the record of any case which has been decided by any Court subordinate to the High Court and in which no appeal lies thereto, and if such subordinate Court appears.

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, or [(d) to have caused failure of justice], the High Court may make such order in the case as it thinks fit:

[Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision would have finally disposed of the suit or other proceedings.]

[(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto. [(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.] In terms of the provisions of Section 115(1), the High Court may call for the record of any case which has been decided by any Court subordinate to it to make such orders as it may think fit, if the subordinate Court appears:- (1) to have exercised a jurisdiction not vested in it by law; or

(2) to have failed to exercise a jurisdiction so vested, or (3) to have acted in the exercise of its jurisdiction illegally or with material irregularity, or (4) to have caused failure of justice.

11. The proviso appended to Sub-section 1 of Section 115, however, enacts a bar to the exercise of power contemplated by Section 115(1), when any order made or order deciding an issue, in the course of a Suit or other proceedings, which is sought to be varied or reversed, would not finally dispose of the Suit or other proceedings, if it had been made in favour of the party applying for Revision. The expression in the course of a Suit or other proceedings, appearing in the proviso contemplates such orders which a Court may pass for the progress of the Suit or other proceedings. As the plain language of the proviso and the intention of the legislature, in choosing the words employed in the expression, in the course of a Suit or other proceedings, so indicate, the Supplemental proceedings contemplating, inter alia, Grant of temporary injunction, Appointment of a Receiver or Making of such other interlocutory orders as may appear to the Court to be just and convenient, may not fall within the purview of the proviso. Section 115(2) of the Code of Civil Procedure contemplates yet another bar for exercise of the power of revision by the High Court in respect of those orders and decrees against which an Appeal lies either to the High Court or to the Court Subordinate thereto.

12. Perusal of the provisions of Section 115 as a whole, therefore, demonstrates that the legislatures intention that the Revisional jurisdiction may not be exercised by the High Court against those orders, which were appealable under the Code of Civil Procedure, either to the High Court or to any Court subordinate thereto and were passed in the course of a suit or other proceedings, barring, however, those orders, which, though passed during the pendency of the Suit were not so passed for the progress of the Suit or other proceedings, but in Ancillary or Supplemental proceedings, and were not appealable as such to the High Court. It, therefore, appears that the legislature, in its wisdom, has left the High Court free to exercise its Revisional jurisdiction against the orders passed by Courts subordinate to it, in exercise of their appellate jurisdiction. The orders passed by the Courts subordinate to it in exercise of their appellate jurisdiction, inter alia, against orders passed under Order 39 would, thus, be open to revision by the High Court under Section 115 of the Code of Civil Procedure. I am supported in taking this view by Mahadeo Savlaram Shelke and others vs. Pune Municipal Corporation and another reported as (1995) 3 Supreme Court Cases 33, where their lordships held as follows:-

3. Shri Rajinder Sacher, learned Senior Counsel for the appellants contended that under Section 115 CPC, High Court has power of revision where the appeal is not provided for either to it or subordinate court. Since the Joint Judge had exercised the appellate power, by operation of Section 115(2), the High Court was devoid of jurisdiction to exercise the Revisional power. When statutory prohibition was imposed by CPC which is a more expeditious and efficacious remedy, the exercise of jurisdiction by the High Court under Article 226 was not warranted. At this juncture it is necessary to point out that the High Court exercised its power under Article 227 and not either under Article 226 or under Section 115 CPC. Even otherwise the bar under Section 115(2) is to exercise Revisional power where the party is provided with right of appeal to the High Court or the subordinate court against the impugned order. It is not a bar to exercise Revisional power under Section 115(1) against appellate order..... The above view was reiterated in Kadiyala Rama Rao vs. Gutala Kahna Rao and others reported as (2000) 3 Supreme Court Cases 87, where it was held as follows:-

13. The learned advocate in support of the appeal further contended that in any event the revision petition as framed is not maintainable and the High Court should have rejected the same. We are, however, unable to lend concurrence therewith since the legislative change introduced in Section 115 is clear enough to indicate that an order passed by a Court subordinate to the High Court in its appellate jurisdiction, if it is not appealable, would be within the ambit of Section 115 of the Code and thus a Revisional application would be maintainable. A revision application against an order which is not appealable either before the subordinate court or the High Court would also be maintainable. In view of the above legal position, the petitioners' Revision against order dated 08.11.2000 of Munsiff, Hiranagar, which had merged in order dated 27.09.2007 of the learned Additional District Judge, Kathua, would, thus, be maintainable.

14. The Preliminary Objection raised by the learned Senior Counsel to the maintainability of the petitioners' Revision, therefore, fails and is, accordingly, rejected holding the petitioners' Revision maintainable. Petitioners' Revision Petition, having been held maintainable, learned Senior Counsel's argument in the alternative in respect of the exercise of Power of Superintendence, may not, thus,

arise for consideration. Coming to the merits of the issue demonstrated by learned counsel for the parties, reference needs to be made to the decree, which the Courts below have construed a Redemption Decree, whereas the petitioners-defendants, projecting their right of exclusive enjoyment of the property covered by Khasra No.198/7 min, claim it a Pre-emption Decree.

To appreciate the issue contents of the Decree passed on 6.11.69 in Civil Suit No.116 of 1969 need to be noticed. These are as follows:-

A compromise decree on the basis of the statements of the parties is passed as follows:-

The land has been sold for Rs.3000/-. Rs.900/- has been kept in trust for the mortgage amount. Out of the remaining amount of Rs.2100/-, Rs.900/- have been paid today to Uttam Chand defendant No.1. Remaining amount of Rs.1200/- would be paid by plaintiff-Gouri within 30 days to Uttam Chand-defendant or would be deposited in the Court. On deposit of the amount the decree for possession on the basis of right of prior purchase would stand passed in favour of the plaintiff and against defendant No.1. In case, the amount was not paid by the plaintiff to defendant, the suit would stand dismissed and Rs.900/- shall be paid back by the defendant to the plaintiff.

15. Another order passed by Deputy Commissioner (Collector), Kathua on 02.07.1981, a copy whereof has been placed on records, too needs to be noticed. It reads thus:-

IN THE COURT OF S.R.SHARMA IAS DY.COMMISSIONER KATHUA

File No. Date of institution Date of decision 14/Dewani 11.7.1979 2-7-1981 180

Gori S/O Sadhu r/o Padal v/s i) Milkhi Ram Tehsil Hiranagar ii) Behari Lal

SS/o Bhagat Ram r/o

Padal Tehsil Hiranagar.

(Applicant) (Non-applicants)

ORDER

Gori hereinafter called the applicant has made a prayer to this court to redeem the mortgage land measuring 14 kanals and 7 marlas in khasra no.198/7 of village Padal Tehsil Hiranagar under section 10 of the J&K; Agrarian Reforms Act 1976 in his favour. The parties were heard the record of the case was perused. The facts of the case reveal that one Prabhu who was the original owner of the subject land mortgaged the same to Behari for an amount of Rs.900/- on 14-4- 1964. At that time the mortgager was in physical possession of this said land, subsequently Prabhu sold the subject land to some other person for an amount of Rs.3000/-. Upon this Gori the applicant lodged against the sale in the court of law by filing a preemption suit. Ultimately the case was decided in favour of the applicant. He deposited Rs.3000/- and Rs.900/- respectively in the civil court for payment to the purchaser and the mortgagee. The amount is still lying deposited in the court of Munsiff Hiranagar. It seems clear that the applicant is entitled to redeem the subject land under section 10 of the J&K; Agrarian Reforms Act mainly on two grounds. Firstly the mortgagor was in physical possession of land at the time of mortgage. Secondly the mortgagee has enjoyed the fruit of the mortgaged land for more than 10 years which does not entitle him to claim any charge for improvements at this stage. The non-applicant Milkhi however stated that he is a petty farmer possessing a small scale of land and his eviction from the mortgaged land would cause hardship to him. This argument of the non-applicant is not sustainable under law. Accordingly I accept the plea of the applicant and order that the subject land be restored to him by Tehsildar Hiarnagar. An amount of Rs.900/- deposited in the court of Munsiff Hiranagar shall be released and paid to the non-applicant.

The file be consigned to record after due completion. Announced.

Sd/-

(S.R.Sharma) IAS)

Dy. Commissioner(Collector)

Kathua.

16. In view of the decree and the order quoted above, it is absolutely clear that the Courts below have committed an illegality apparent on the face of records in construing decree dated 6.11.69 of Munsiff Hiranagar as Redemption Decree when there was no occasion for them so to do in view of the clear and unambiguous terms of the decree explicitly indicating it a decree for possession on the basis of the Right of Prior Purchase. The Mortgage, in terms of Deputy Commissioner (Collector), Kathuas order dated 2.7.1981, having been declared to have extinguished in view of the provisions of the Jammu and Kashmir Agrarian Reforms Act, the petitioners had, prima facie, a better title to the land comprised in Khasra No.198/7 min, which plea of theirs has been misconstrued by the Courts below.

17. Both the Courts below have, therefore, overlooked the better title and admitted possession of the petitioners in respect of the land comprised in Khasra No.198/7 min while considering the existence or otherwise of a prima facie case in favour of the plaintiffs. In presence of the decree of the Civil Court and the orders passed by the Deputy Commissioner (Collector) holding the land free from mortgage, the respondents-plaintiffs could not be said to have made out a prima facie case for issuance of a restraint order against the petitioners in respect of land comprised in Khasra No.198/7 min, restraining them from raising construction thereon. The orders passed by the Courts below cannot, therefore, be sustained.

18. The injunctive directions issued by the learned Munsiff and upheld by the learned Additional District Judge, Kathua are, therefore, modified and it is provided that the injunctive directions, restraining the petitioners-defendants from raising construction on the suit land would not operate against the petitioners in so far as the land covered by Khasra No.198/7 min was concerned. The plaintiffs application under Order 39 CPC shall, accordingly, stand disposed of on the above terms. This Revision Petition, therefore, succeeded and is, accordingly, allowed.