

CASE NO.:
Appeal (civil) 831 of 2002

PETITIONER:
Sri Thimmaiah

RESPONDENT:
Shabira and Ors

DATE OF JUDGMENT: 06/02/2008

BENCH:
Dr. ARIJIT PASAYAT & P. SATHASIVAM

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 831 OF 2002

Dr. ARIJIT PASAYAT, J.

1. Heard learned counsel for the parties.
2. Challenge in this appeal is to the judgment of a learned Single Judge of the Karnataka High court allowing the First Appeal filed by the respondents under Section 96 of the Code of Civil Procedure, 1908 (in short the 'CPC').
3. The factual background needs to be noted in brief:

The appeal before the High Court was by the plaintiffs who are respondents in the present appeal.

The plaintiffs 1 and 2 are the wife and husband. According to the plaintiffs, the 1st plaintiff purchased site no.43 in survey No.37 of Avalahalli Village, Bangalore South Taluk, measuring East to West 45' and North to South 30' and bounded on East by 5th Main Road, on the West by Site No.46, on the North by Site No.42 and on the South by Site No.44. According to them, the 2nd defendant (respondent No.3 herein) sold the property as power of attorney holder of one Narayana Rao in favour of the 1st plaintiff under a registered sale deed dated 7.6.1984. At the time of purchase, a temporary structure was there on the property and with an intention to construct a new building, they pulled down the temporary structure. When the plaintiffs started demolishing the said structure, the 1st defendant (appellant herein) made an attempt to interfere with the peaceful possession and enjoyment of the property and that under the guise of purchasing of a site No.42, the 1st defendant also made an attempt to encroach on the plaintiffs property. Therefore, the plaintiffs filed a suit for judgment and decree for permanent injunction to restrain the defendants from interfering with the peaceful possession and enjoyment of the property.

The 1st defendant filed the written statement contending that he has purchased the property from one Nagaraja who is the 3rd defendant and that the 1st defendant is in possession of site No.42 which is measuring 45' x 60'. Therefore, he requested to dismiss the suit of the plaintiffs.

The 2nd defendant has supported the case of the plaintiffs. The 3rd defendant has not filed any written statement. According to the 1st defendant the 3rd defendant is the owner of the property. Based on the above pleadings the trial Court framed the following issues:-

- (i) Whether the plaintiff is in lawful possession of the plaint schedule property on the date of filing the suit?
- (ii) Whether the illegal interference is proved?
- (iii) Whether the plaintiff is entitled to permanent injunction as prayed?"

The 2nd plaintiff has been examined as PW-1. The 2nd defendant-vendor of the 1st plaintiff has been examined as PW-2 and got marked Ex.P-1 to P-14. On behalf of the defendants, the 1st defendant has been examined as DW-1. After appreciating the oral and documentary evidence the trial Court dismissed the suit of the plaintiffs. Against the said judgment and decree, the First Appeal is filed by the plaintiffs.

It is to be noted that the High Court formulated the following point for determination in appeal:

"Whether the 1st plaintiff proved that the 2nd defendant had the power to alienate site No.43 in her favour, and if so, is she entitled for a decree in her favour?"

The High Court allowed the appeal holding that plaintiff No.1 had proved her case in respect of Site No.43 in view of Exs. P-1 and P-2. Adverse inference was drawn because the defendant No.1 failed to produce the power of Attorney executed by Narayana Rao in favour of 3rd defendant.

4. In support of the appeal, though many points were urged, the primary stand was that in a suit for permanent injunction, the foundational fact which had to be established was possession. In the instant case, the trial Court while answering Issue Nos.1 and 3 categorically held that the plaintiffs had failed to prove their possession. There is no finding recorded by the High Court regarding possession and even while formulating the point for determination the question of possession was not considered.

5. Per contra, learned counsel for the respondents submitted that the parties proceeded on the basis of title and since the trial Court recorded findings regarding possession which are contrary to the materials on record, the High Court has rightly allowed the appeal.

5. Undisputedly, the suit was one for permanent injunction and in such a suit the plaintiff has to establish that he is in possession in order to be entitled to a decree for permanent injunction. The general proposition is well settled that a plaintiff not in possession is not entitled to the relief without claiming recovery of possession. Before an injunction can be granted it has to be shown that the plaintiff was in possession.

6. In the instant case, Issues Nos. 1 and 3 which were framed on 1.10.1988 clearly refer to this vital aspect. The trial Court while answering the aforesaid issues held in the negative. Unfortunately, the High Court did not consider the effect of these findings and even did not record any finding regarding possession. Therefore, as rightly contended by learned counsel for the appellant, the High Court could not

have allowed the appeal. As noted above, even while formulating the point for determination, the High Court did not formulate the question relating to possession.

7. In the aforesaid circumstances, we set aside the impugned judgment of the High Court and remit the matter to the High Court to formulate a definite point relating to possession and then analyse the evidence on record with reference to that question and decide the appeal.

8. Since the matter is pending since long, the High Court is requested to dispose of the appeal as early as practicable preferably by the end of August, 2008.

9. The appeal is allowed to the aforesaid extent without any order as to costs.

JUDIS