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SRI THIMMAIAH

v.

SHABIRA AND ORS.

(Civil Appeal No. 831 of 2002)

B

FEBRUARY 6, 2008

(DR. ARIJIT PASAYAT AND P. SATHASIVAM, JJ.)

*Code of Civil Procedure, 1908; S.96:*

C

*Suit for grant of permanent injunction – Filing of, by respondents against appellant to restrain him from interfering with peaceful possession of property – Dismissed by trial Court – Appeal allowed by High Court – On appeal, Held: Before an injunction is granted, plaintiff has to show that he was in possession of the property in question – Trial Court considered the vital issue of possession and held it in negative – High Court neither formulated the question nor recorded any finding regarding possession – Hence, matter remitted to High Court to formulate a question on possession to decide the appeal – Directions issued.*

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E

**Respondent No.1 purchased certain land with temporary structure thereon from respondent No.3 under a registered sale deed. When respondents (respondent No.1 and her husband-respondent No.2) started demolishing the structure, the appellant interfered with the peaceful possession and enjoyment of the property in question and also attempted to encroach over the property. Respondents filed a suit for grant of permanent injunction against the appellant. Trial Court framed three questions, viz., (i) as to whether respondent Nos. 1 and 2 were in lawful possession of the plaint schedule property on the date of filing the suit; (ii) as to whether the illegal interference was proved; and (iii) as to whether the plaintiff was entitled to permanent injunction as prayed. After appreciating the evidence, trial Court dismissed the suit.**

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Aggrieved, respondent Nos.1 and 2 filed appeal before the High Court, which was allowed by the High Court. Hence the present appeal.

Appellant contended that the trial Court categorically held that the plaintiffs had failed to prove their possession; and that 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.

Respondents submitted that since the trial Court recorded findings regarding possession which are contrary to the materials on record, the High Court has rightly allowed the appeal.

Partly allowing the appeal, the Court

**HELD: 1.1** 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. (Para – 5) [510-E]

**1.2** In the instant case, Issues Nos. 1 and 3 which were framed by the trial Court clearly refer to this vital aspect of possession of the property in question. The trial Court while answering these issues held in the negative. 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 the appellant, the High Court could not have allowed the appeal. Even while formulating the point for determination, the High Court did not formulate the question relating to possession. Hence, the matter is remitted 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. (Para – 6, 7) [510-F, G, H; 511-A]

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 831 of 2002.

From the Judgment and final Order dated 18.7.2001 of the High Court of Karnataka at Bangalore in R.F.A. No. 598/1998.

B Vikas Rojipura and E.C. Vidya Sagar for the Appellant.

S.N. Bhat, N.P.S. Panwar, D.P. Chaturvedi and Kiran Suri for the Respondents.

C The Judgment of the Court was delivered by

Dr. **ARIJIT PASAYAT**, J. 1. Heard learned counsel for the parties.

D 2. Challenge in this appeal is to the judgment of the 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:

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

F 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 5<sup>th</sup> 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 2<sup>nd</sup> defendant (respondent No.3 herein) sold the property as power of attorney holder of one Narayana Rao in favour of G 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 H 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 3<sup>rd</sup> 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 2<sup>nd</sup> defendant has supported the case of the plaintiffs. The 3<sup>rd</sup> defendant has not filed any written statement. According to the 1st defendant the 3<sup>rd</sup> 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 2<sup>nd</sup> plaintiff has been examined as PW-1. The 2<sup>nd</sup> 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 2<sup>nd</sup> defendant had the power to alienate site No.43 in her favour, and if so, is she entitled for a decree in her favour?"

A 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 3<sup>rd</sup> defendant.

B 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.

C 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.

D 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.

E 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.

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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. A

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. B

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

S.K.S.

Appeal partly allowed.