
(1995) 11 KAR CK 0078
In the Karnataka High Court
Case No : C.R.P. No. 2678 of 1995

Chinnappa

APPELLANT

Vs

Srinivasa Reddy

RESPONDENT

Date of Decision : 03-11-1995

Acts Referred:

Specific Relief Act, 1963 — Section 36, 37, 38, 39

Citation : (1996) ILR (Kar) 932 : (1996) 1 KarLJ 114

Hon'ble Judges : Hari Nath Tilhari, J

Bench : Single Bench

Advocate : C.B. Srinivasan and Byareddy, for the Appellant; H.P. Mudlappa, for the Respondent

Final Decision : Allowed

Judgement

Hari Nath Tilhari, J.

1.This Revision Petition has been listed along with the application for vacation of exparte interim order of stay. But, to avoid further delay in the matter of disposal of the Revision I have called upon both the Counsel for the parties to argue the case on merits, Before I further proceed, I may mention that this Revision arises out of the judgment and order dated 15.7.1995 delivered by the Principal Civil Judge (K.G. Lakshmipathi), Bangalore, in Miscellaneous Appeal No. 39/95 (K. Chinnappa v. C. Srinivasa Reddy) dismissing the plaintiff's appeal challenging the order of mandatory injunction granted by the Munsiff, Anekal, on 25.3.1995 in favour of the defendant (opposite party) in O.S.No. 193/93.

2. The brief facts of the case in nut-shell are to the effect that the plaintiff filed the suit for permanent injunction restraining the defendant from interfering and committing trespass on the land alleged to be belonging to the plaintiff, situated in Hebbagodi village in Bangalore District. During the pendency of the suit the defendant/opposite party moved an application purporting to be under Order 39 Rules 1 and 2 read with Section 151 C.P.C. praying for grant of temporary

mandatory injunction directing the plaintiff to remove the fencings that had been placed by the plaintiff, which according to the defendant created obstruction in his way. As appears from, the judgment and order of the Trial Court, plaintiff has asserted that the fencing was more than 20 years old and that the same was not put during the pendency of the suit, while it is the case of the defendant that they were put during the pendency of the suit. The Munsiff did not decide this question at all. The learned Munsiff directed removal of the fencing simply on the ground that the fencing exists towards the Northern side of the defendant's house and that removal of that barbed fencing is necessary for better access to the defendant and as such he passed the order on I.A.III as under:-

"I.A.III is allowed. The plaintiff is hereby directed to remove the fence wire and stone pillars put-up in front of house of defendant as shown in Ex.P-13 to 15 failing which the defendant is at liberty to remove the same".

Having felt aggrieved from this order of the Trial Court, the plaintiff preferred Miscellaneous Appeal under Order 43 Rule 1 C.P.C. to the Learned Civil Judge, Bangalore. The Learned Principal Civil Judge has dismissed the appeal by holding in paragraph 15 of the judgment in which Appellate Court made reference to the Case Law which had been relied upon by the respondent in support of his contention, that the Trial Court was justified in granting the temporary injunction of mandatory nature and thereafter opined that in fit cases the Courts are empowered to issue mandatory injunctions to remove obstructions. It further observed that in the present case the plaintiff has obstructed free movement of the defendant on the northern side of his property which the plaintiff was not entitled to and therefore the obstruction caused to the defendant are to be removed and therefore the Trial Court was justified in issuing mandatory injunction. It further observed that this is not a fit case for interference with the discretionary order passed by the Trial Court and consequently the appeal has to be rejected. With these observations the lower Appellate Court dismissed the appeal filed by the plaintiff. Having felt aggrieved from the judgment of the Appellate Court (Principal Civil Judge), the plaintiff has come up in Revision u/s 115 of C.P.C.

3. I have heard Sri C.B. Srinivasan, learned Counsel for the Revision petitioner, assisted by Sri Byareddy, an Advocate of this Court, and the learned Counsel for the respondent Sri H.P. Mudlappa at length.

4. It has been contended by the Counsel for the Revision petitioner that the learned Trial Judge acted without jurisdiction in passing the mandatory injunction order. He further submitted that a decree in the nature of perpetual mandatory injunction could not be granted except in a suit filed by a party; that mandatory injunction could be granted only by way of a decree passed in a suit after trial and it could not be granted in the suit filed by the plaintiff where it was a suit for preventive injunction, and particularly at the instance of the defendant. The learned Counsel further submitted that without conceding it may be argued that if fencing had been raised by plaintiff under the garb of temporary injunction

order, then the defendant could have moved an application for removal of the fencing and until it is alleged and proved that fencing had been put during the pendency of the suit under the garb of temporary injunction, the direction to remove the same could not be granted except in a suit separately and properly filed because, according to the plaintiff's case, the fencing is old one and had been in existence for more than 20 years. As such, the learned Counsel submitted that the order of the Trial Court granting temporary injunction is in excess of jurisdiction and in any case it is an illegal exercise of jurisdiction. The learned Counsel further submitted that Section 151 CPC is not meant to circumvent such remedy provided under law in such a situation, namely filing of suit for mandatory injunction.

5. The contentions made by the learned Counsel for the Revision petitioner have been hotly contested by Sri Mudlappa, learned Counsel for the respondent. He placed before me the original order passed by the Trial Court as well as the Appellate Court and submitted that both the Courts have held that it is a fit case in which mandatory injunction should be granted as the fencing put by the plaintiff is creating obstruction in the free passage of the defendant from the northern side. He further submitted that u/s 115 C.P.C. the concurrent findings need not and could not be interfered with nor the order which has been passed in exercise of discretionary power conferred by the Code calls for interference.

6. Except the aforementioned arguments, no other contention has been raised by either side. I have applied my mind to the contentions made by the learned Counsel for the respective parties. There is no doubt, as urged by the Counsel for the respondent, that the jurisdiction of this Court u/s 115 C.P.C. is confined to the questions of jurisdiction, namely, exercise of jurisdiction not vested with or to cases where there has been illegal refusal to exercise the jurisdiction vested or where there is a case of the Court below acting illegally or with material irregularity and in such circumstances this Court may interfere with the order impugned, provided further that the order if allowed to stand, is likely to cause substantial injury to the party aggrieved. Keeping these basic principles of law u/s 115 C.P.C., I proceed to examine the matter.

7. The power to grant injunction is subject to the provisions of law as contained in the Specific Relief Act and the C.P.C. Material Sections are Sections 36, 37, 38 and 39 of Specific Relief Act. These Sections are quoted hereunder in extenso and they read as under:-

"36. Preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual.

37.(1) Temporary injunctions are such as are to continue until a specified time or until the further order of the Court, and they may be granted at any stage of a suit, and are regulated by the Code of Civil Procedure, 1908.

(2) A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined

from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

38(1) Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) When any such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II.

(3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of property, the Court may grant a perpetual injunction in the following cases, namely:-

"(a) Where the defendant is trustee of the property for the plaintiff;

(b) Where there exists no standard for ascertaining the actual damage caused, or likely to be caused by the invasion;

(c) Where the invasion is such that compensation in money would not afford adequate relief;

(d) Where the injunction is necessary to prevent a multiplicity of judicial proceedings.

39. When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts".

A reading of Section 36 of the Specific Relief Act very clearly shows that the granting of preventive relief of injunction, whether temporary or, perpetual, is no doubt at the discretion of the Court concerned but that discretion is controlled by the subsequent provisions. Section 37(1) of the Specific Relief Act provides that temporary injunctions are such as are granted to continue until a specified time or until further orders of the Court and are regulated by the provisions of C.P.C. A reading of Sub-section (2) of Section 37 reveals that perpetual injunction can be granted only by a decree made at the hearing of the suit upon the merits and by a perpetual injunction, where it is preventive injunction, the defendant is permanently prohibited from doing an act, the commission of which is contrary to the rights of the plaintiff. The defendant is also restrained from asserting any right which is contrary to the right of the plaintiff. Perpetual injunction is to be granted by the decree in order to enforce or compel the performance of certain act whereby the party is directed either to do something in positive or is prevented from committing the breach complained of. The life of temporary injunction order is limited in its scope during the pendency of the suit and it is really in the nature of helping the Court in attaining the main object of its final determination. But, where a permanent injunction is granted, then the law requires that it can only be granted by the Court after deciding the matter on

merits and by passing a decree in a suit.

8. What is stated above being the scope of temporary and permanent injunctions, the direction to the plaintiff in the present case to remove certain fencing standing on the land could not have been granted by a mandatory injunction at the instance of the defendant in the suit filed by the plaintiff and especially in a case where the plaintiff's case is that the fencing had been standing since 20 years. Section 39 of Specific Relief Act very clearly provides that when to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts, it means, a person who claims a perpetual mandatory injunction in the nature of removal of certain fencing had to plead and establish his right on one hand and the obligation cast on the other side to do certain thing and the Court has to determine the existence of such obligation and that could be done only at the hearing on the merits of the suit. So, decree for mandatory injunction could be granted in a suit filed for that purpose by the person claiming decree for mandatory injunction. It may be that during the pendency of that case, if there is assertion of a right or commission of an act which is contrary to the rights of the claimant of mandatory injunction, the Court may issue an order restraining from doing that act during the pendency of the suit. But, the relief of mandatory injunction cannot be granted to a person without filing a suit for decree for mandatory injunction that without alleging, asserting and proving the right and the obligation emanating therefrom, a person cannot be allowed to have short-circuit.

9. Order 39 Rule (1) C.P.C indicates the cases in which temporary injunction can be granted. A reading of Rule 1 of Order 39 C.P.C reveals that temporary injunctions may be granted where the property in dispute is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree or in cases where the defendant threatens or intends to remove or dispose of his property with a view of defrauding his creditors or when the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute. A perusal of Rule 2 of Order 39 C.P.C reveals that injunction can be issued to restrain the defendant from committing breach of contract or injury complained of or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

10. In the present case, the defendant alleges that the plaintiff has placed fencing to the northern side of his property under the garb of injunction order and the plaintiff's case is that the fencing is old one. Simply on the ground that the fencing has covered the free passage, the defendant cannot get mandatory injunction in the suit filed by the plaintiff, nor the Court is entitled to issue an order of such nature. Such a case really requires a decree to be passed only in a regular suit on trial. The parties may, no doubt, be directed to maintain status

quo in such a suit. Order 39 will not come to the rescue of the defendant to move such an application and the Court, in my opinion, will have no jurisdiction to grant such a mandatory injunction as it has been granted in the present case.

11. Section 151 C.P.C no doubt declares that inherent powers vest in the Court. Inherent powers are not conferred on the Court by Section 15 C.P.C but Section 151 C.P.C is declaratory of the powers inherent in the Courts to pass orders in the interest of justice and to avoid the abuse of process of the Court. But the substantive relief which a person wants to claim, such as mandatory injunction u/s 39 of Specific Relief Act, asserting the rights vested in the person who claims mandatory injunction and corresponding obligation on the defendant of that case or the opposite party, and the Court if after trial finds that the rights and obligations or breach is established, is entitled to grant mandatory injunction. Thus considered, in my opinion, firstly, the Trial Court had no jurisdiction to grant mandatory injunction in favour of the defendant directing the plaintiff to remove the existing fencing. Secondly, it can find whether fencing has been put under the garb of temporary injunction obtained and if that had been done, then it can be said that u/s 151 C.P.C the Court can order removal thereof. Otherwise, if it comes to the conclusion that really the fencing had not been put under the garb of temporary injunction obtained during the pendency of the suit, then the application had to be thrown out. The Court, while granting the order, impugned has acted illegally also in not determining this material question and Without deciding the material question exercising the jurisdiction vested in it. Thus, the Trial Court committed jurisdiction error.

12. No doubt, discretionary powers are there in the Court but in matters where the Court has exceeded its jurisdiction or fails to exercise the jurisdiction vested in it; there is no question of discretion. I feel sorry to mention neither the Trial Court nor the lower appellate Court have applied their mind to the relevant provisions of Specific Relief Act in this regard as also to the provisions of C.P.C. Discretion is meant to be exercised judicially and not capriciously. Thus considered, in my opinion, when the lower Appellate Court dismissed the appeal without application of its mind, it failed to exercise the jurisdiction vested in it by dismissing the appeal by simply taking the view that it is a discretionary order and not to be interfered with. Thus considered, I am of the opinion and I hold that the Trial Court acted in excess of the jurisdiction vested when it issued mandatory injunction for removal of the fencing on an application under Order 39 Rules 1 and 2 read with Section 151 C.P.C at the instance of the defendant in a suit filed by the plaintiff for a decree for permanent injunction.

13. The lower Appellate Court failed to exercise its jurisdiction by not applying its mind to the question as to whether jurisdiction vested in the Trial Court to issue mandatory injunction in favour of the defendant in the suit filed by the plaintiff. It was the duty of the lower Appellate Court to have applied its mind it had to deal with the power to grant perpetual or temporary, preventive or mandatory injunction and under what conditions they could have been granted, because,

conditions have been prescribed for granting certain order -preventive or temporary - and the Court has no power to grant that order if the case does not come within the four corners of the conditions prescribed. Thus considered, the orders of the Trial Court and the Appellate Court suffer from jurisdictional error. I find support for my view from the law laid down by this Court in Veerabhadrapa Vs. Mayappa,

14. It is always open to the defendant to take proper course of law and avail necessary remedy if he proves his allegation that the Revision petitioner has done something which obstructs his rights.

15. I have not made any observations on the merits of the case at all. I only held that the impugned orders are without jurisdiction or there is illegal exercise of jurisdiction which has the effect of causing injury to the other party.

16. Accordingly, the Revision Petition is allowed and the impugned orders are set aside. Costs are made easy.