

(1995) 09 KAR CK 0039

In the Karnataka High Court

Case No : Civil Revision Petition No. 4009 of 1990

Gopalakrishna Holla and Others

APPELLANT

Vs

Narasimha Bhat, Since Deceased, by L. Rs. and Others

RESPONDENT

Date of Decision : 29-09-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Citation : (1995) 4 KarLJ 468

Hon'ble Judges : H. N. Narayan, J

Judgement

1. The order of the learned Munsiff setting aside the decree after its execution/satisfaction is in challenge in this revision. Brief facts of this case are as follows:

2. Petitioners herein had filed a suit in O.S. No. 56 of 1975 in the Court of the Additional Munsiff, Puttur, seeking the relief of declaration and possession. The 11th defendant claimed tenancy rights in the suit lands under the provisions of the Karnataka Land Reforms Act, 1961 ("the Act" for short). The issue of tenancy was referred to the Land Tribunal, Puttur, for its decision and further trial of the suit was stayed, pending decision of the Tribunal. The Tribunal granted occupancy rights to the 1st respondent i.e., 11th defendant in respect of only one survey number, but rejected his claim in respect of two other survey numbers. The plaintiffs and the 11th defendant preferred appeals before the Karnataka Land Reforms Appellate Authority. After its abolition, the appeals stood transferred to the High Court and they were registered as Civil Petitions. As the decision of the Tribunal was not received by the Civil Court, the said suit was adjourned from 2-1-1982 to 30-6-1982. However, the order of the Tribunal was received by the Court in the month of February, 1982. The mischief appears to have occurred thereafter. The plaintiffs-petitioners had filed an application to advance the case from 30-6-1982 to 25-2-1982 without notice to the 11th defendant or his Counsel. It may be noticed here that 11th defendant was the only contesting defendant in the suit. An application I.A. 5 under Order 6, Rule 17, C.P.C. for amendment of the plaint was filed by the plaintiffs. Without serving notice to the 11th defendant or his Counsel, the said application was posted for

hearing on 18-3-1982, on which day, the amendment application was allowed. The suit was posted thereafter to 31-3-1982 and 16-4-1982. On 7-4-1982, plaintiffs had filed another application to advance/prepone the case from 16-4-1982 to 7-4-1982. The case was advanced to 7-4-1982 without notice to the other side. On the same day, two witnesses were examined and some documents were marked by the plaintiffs and the case was closed on their side. Since the defendants were absent, the Trial Court reserved the case for judgment to the next day and passed an ex parte decree. The judgment and decree was not challenged. Thereafter, the decree was put into execution in E.P. No. 143 of 1982 and possession of the suit property was taken by the decree-holders on 15-2-1983. It is thereafter that defendant 11 came to know of the fraud played on him. Aggrieved by the said order, he has filed a Miscellaneous Petition under the provisions of Order 9, Rule 13, C.P.C. to set aside the decree. The said petition was opposed by the plaintiffs-decree-holders. However, on consideration of evidence of the petitioner therein, the Trial Court has set aside the ex parte judgment and decree passed by that Court. Hence, the plaintiffs-decree holders have filed this revision questioning the order of the Court below. It is their contention that they have already taken possession of the land in question and there is no enforceable decree for the Court to set aside and therefore, questioned the maintainability of the petition under Order 9, Rule 13, C.P.C. It is further submitted that the affected party could have claimed the relief under Section 34 of the Specific Relief Act.

3. Rebutting these contentions, the learned Counsel for the respondents submits that an ex parte decree is snatched behind his back and the Trial Court has rightly set aside the decree.

4. Hence, the scope and applicability of the provisions of Order 9, Rule 13, C.P.C. arise for consideration in this revision.

5. There is no dispute in this case that the issue of tenancy was referred to the Land Tribunal, Puttur, for its decision and the case was posted to 30-6-1982. There is also no dispute that in the mean time, plaintiffs have filed an application to advance the case from 30-6-1982 to 25-2-1982. The suit was preponed/advanced without notice to contesting defendant 11 or his Counsel. There is also no dispute that an application-I.A. 5 for amendment of the plaint was also filed by the plaintiffs without notice to the contesting defendant or his Counsel. There is also no dispute that the amendment application was allowed without hearing the other side. There is also no dispute that the trial of the suit was advanced again from 16-4-1982 to 7-4-1982 without notice to the other side. Some witnesses were examined on behalf of the plaintiffs on the very day and their evidence was closed. The judgment was rendered on the next day. There is also no dispute that the decree-holders have executed the decree and obtained possession of the suit property. Incidentally, it is noticed that one of the plaintiffs in the suit was working as a Bench Clerk in the Civil Court of that place. Though the status of the plaintiff as a Bench Clerk working in the Civil Court of that place

is not very material for the purpose of deciding the issue involved, the manner in which the Court proceeded to advance the case without notice to the other side and allowed the plaintiffs to have their say, clearly rises serious doubts regarding the bona fides for the persons concerned. Persons involved in the dispensation of justice must be above suspicion and their conduct must not give room for private or public grumbling. The learned Counsel for the respondents refrained from making imputations to the decree-holders, and the Presiding Officer who was responsible for passing such a decree. The learned Munsiff on consideration of these facts has rightly set aside the decree. What is required to be established in a petition under Order 9, Rule 13, C.P.C. is that the applicant has got sufficient cause to remain absent on the date when the matter was set down for hearing and therefore the cause shown by the petitioner is sufficient cause within the scope of Order 9, Rule 13, C.P.C. The 11th defendant has established before the Trial Court the circumstance under which he was prevented from appearing in the trial of the suit. Therefore, on facts the Trial Court is right in setting aside the decree.

6. The next important question for consideration is whether the petition of this nature filed under Order 9, Rule 13, C.P.C. is maintainable.

7. Mulla in his commentary on Code of Civil Procedure, 13th Edition, Volume I at Page 822 Note 21 has stated as follows:

"The fact that an ex parte decree has been satisfied does not preclude the defendant from applying to the Court for an order to set it aside under this rule".

An identical question came up before the High Court of Calcutta in Keshab Chandra Datta v Ballygunge Estate Pvt. Ltd, AIR 1972 Cal. 221. The Calcutta High Court has observed as follows:

"Even when an ex parte decree has been fully executed it is open to the Court to set aside the decree on proper grounds and if the ex parte decree is set aside on an application under Order 9, Rule 13 of the Principles of restitution laid down in Section 144 of the Code of Civil Procedure would be attracted. The fact that a conveyance has been executed by the Court would not disentitle the defendant from seeking its remedies under Order 9, Rule 13".

Similar question arose before the Bombay High Court in Zendooolal Nandlal v Kishorilal Mehtabhai, (1899) ILR 23 Bom. 716, wherein the Bombay High Court has held that the fact that an ex parte decree has been satisfied, does not disentitle a defendant from applying to the Court to set it aside under Section 108 of the Civil Procedure Code (Act XIV of 1882) which corresponds to Order 9, Rule 13 of the present Code. I am in respectful agreement with the view expressed by Calcutta and Bombay High Courts.

8. The Supreme Court of India in Binayak Swain v Ramesh Chandra Panigrahi and Another, AIR 1966 SC 948, has explained the doctrine of restitution in relation to an ex parte decree. The Supreme Court has said that the principle of

the doctrine of restitution is that on the reversal of a decree, the law imposes an obligation on the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost. This obligation arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has been done under the erroneous decree; and the Court in making restitution is bound to restore the parties so far as they can be restored to the same position they were in at the time when the Court by its erroneous action had displaced them from.

9. In the case before the Supreme Court, in execution of an ex parte decree passed in an appeal by the District Judge, the property of the judgment-debtor was sold and purchased by the decree-holder himself. The High Court subsequently set aside the ex parte decree and the suit was remanded for hearing and fresh disposal. The Supreme Court is of the view that on these facts the judgment-debtor under Section 144 of the Code is entitled to restitution of his properties which the decree-holder had purchased subject to equities to be adjusted in favour of the decree-holder. The Supreme Court has stated further that by passing of a subsequent decree upon a fresh disposal of the suit the execution sale held in the ex parte decree which the High Court has set aside was not validated.

10. In view of the position of law, the contention of the Counsel for the respondent that contesting defendant should have filed a suit under Section 34 of the Specific Relief Act has no force.

11. The next question for consideration is whether this Court in exercise of revisional powers under Section 115, C.P.C. can interfere with the impugned order. The powers of the High Court under Section 115, C.P.C. is stated by the Supreme Court in *Keshardeo Chamria v Radha Kissen Chamria and Others*, AIR 1953 SC 23, as follows:

"Section 115, Civil Procedure Code, applies to matters of jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it, and if a Subordinate Court had jurisdiction to make the order it has made and has not acted in breach of any provision of law or committed any error or procedure which is material and may have affected the ultimate decision, the High Court has no power to interfere, however profoundly it may differ from the conclusions of that Court on questions of fact or law".

Following the said decision, the Supreme Court in *M/s. D.L.F. Housing and Construction Co. (P) Ltd. v Sarup Singh and Others*, AIR 1971 SC 2324, at para 8 of the judgment has stated the law as follows:

"The position thus seems to be firmly established that while exercising the jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself..... The words "illegally" and with "material irregularity" as used in this clause do not cover

either errors of fact or of law; they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may, in our view, relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with. The High Court does not seem to have adverted to the limitation imposed on its power under Section 115 of the Code. Merely because the High Court would have felt inclined, had it dealt with the matter initially, to come to a different conclusion on the question of continuing stay of the reference proceedings pending decision of the appeal, could hardly justify interference on revision under Section 115 of the Code when there was no illegality or material irregularity committed by the learned Additional District Judge in his manner of dealing with the question. It seems to us that in this matter the High Court treated the revision virtually as if it was an appeal".

12. It is not shown before this Court that the Trial Court has committed any error either on facts or on law. Petitioners have failed to point out any material irregularity or illegality. It is not their case that the Court has no jurisdiction to pass such an order. Therefore, in my considered view there is no valid ground which calls for interference. The contentions raised in this revision, in my opinion, are bereft of merit. The revision therefore fails and is dismissed. However, without costs.