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**(1997) 09 KAR CK 0027**  
**In the Karnataka High Court**  
**Case No : Regular Second Appeal No. 591/89**

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| Rangaiah              | Vs | APPELLANT  |
| Pattanaika and Others |    | RESPONDENT |

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**Date of Decision :** 09-09-1997

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, 100, 103

**Citation :** (1998) ILR (Kar) 916

**Hon'ble Judges :** T.N. Vallinayagam, J

**Bench :** Single Bench

**Final Decision :** Allowed

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## Judgement

T.N. Vallinayagam, J.

The unfortunate plaintiff is the appellant. The suit for declaration of the title of the plaintiff over a land measuring 20 guntas in Sy.No. 104/3 at Madanahalli village and for injunction against the defendant was decreed by the Trial Court, only in respect of 12 guntas and injunction also restricted only in respect of 12 guntas. The plaintiff therefore appealed and the First Appellate Court unfortunately not only dismissed the appeal, but also dismissed the suit itself, even in the absence of an appeal by the defendant. Certainly aggrieved by such odd procedure adopted by the First Appellate Court, the plaintiff is before this Court, in this second appeal.

2. The questions of law were raised concerning the dismissal of the suit by the First Appellate Court and non consideration of the evidence by the First Appellate Court.

3. The plaintiff claimed the property on the basis of his possession and the Katha entry the plaintiff has raised four coconut trees, six young coconut plants, two mango trees and one neem tree. The trees are about 9 to 10 years old and the whole, property has been fenced all around. The defendant who is the owner of the property East of the plaintiff has been trying to remove the fence on the

Eastern side for the purpose of encroaching upon the plaintiff's land.

4. The defendant contended that he is the grand son of Thimmakka the original proposition through her daughter Rangamma. While plaintiff is a grand son through her Son Sannappa. In the Genealogical tree, appended to the written statement Rangamma is shown as unmarried, but yet it is not explained as to how the defendant and his brothers were born to her, either through a marriage or through any other co-habitation (however, this may not be relevant for deciding the claim of the plaintiff). In the written statement, with reference to the particular suit property it was contended that 20 guntas were enjoyed by the defendant an Eastern half and the Plaintiff the other Western half. The disturbance of the fence and putting a new fence around 10 guntas was admitted but the complaint was that the plaintiff was trying to interfere with those 10 guntas. The plaintiffs right to 10 guntas was denied. Alternatively, a plea of adverse possession was put up.

5. The Trial Court holding that the defendant has proved his possession only to 8 guntas granted decree for the balance of 12 guntas in favour of the plaintiff. But the Appellate Court on appeal by the plaintiff, holding that revenue documents are not documents of title not only dismissed the appeal, but also dismissed the suit, notwithstanding the fact, that the defendant has not preferred an appeal nor filed any cross objections.

6. Before dealing with the merits of the second appeal, The disposal of the first Appeal by the First Appellate Court deserve condemnation. When there is no appeal by the defendant, question of grant of the decree in respect of 12 guntas, the Appellate Court has no power to dismiss the suit, Order 41 Rule 22 speaks about the objection the respondent may raise as if he had preferred separate appeal. This is how Order 41 Rule 22 reads:

"Upon hearing respondent may object to decree as if he had preferred separate Appeal :- Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the court below in respect of any issue ought to have been in his favour."

In this case, no cross-objection has been made. In that event the Appellant Court has no power to dismiss the suit. It can either agree with the appellant-plaintiff and give the plaintiff more than what the Trial Court has given. But certainly, it cannot deprive the plaintiff the benefit of the decree granted to him by the Trial Court. The Appellate Court has thoroughly misunderstood the provision of law and it is certainly unfortunate that the plaintiff has been made victim of such ignorance of law by the Appellate Court.

7. It is necessary to place on record the power of the High Court in second appeal vis-a-vis the power of the First Appellate Court. The power of the High Court to deal with the second appeal is made extensive by the amendment by Act 104/76. Section 103 reads as follows:-

"Section 103. Power of High Court to determine issue of fact:- In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,-

a) which has not been determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, or

b) Which has been wrongly determined by such court or courts by reason of a decision on such question of law as is referred to in Section 100."

Therefore the power of the High Court is different from that of the first Appellate Court. In this case, the First Appellate Court though fit to assume the power u/s 103 which is improper.

8. On merits, this is one of cases wherein the case should have been decreed on the basis of the written statement alone. Paragraph (3) of the written statement is not only an answer to the plaintiff's claim but also an admission. Para (3) reads as follows:-

"when the land was phoded according to the respective possession, the eastern 4-19 was phoded as S.No. 104/1 and in the name of Sannappa father of the plaintiff. To the west of this S.No. 104/2 3-34 in the name of Rangamma mother of defendant. With respect of the 0-20, though both parties were enjoying 0-10 each, the defendant eastern half, the plaintiff father western half, since it becomes a fragment to divide the same, the whole of it was phoded as S.No. 104/3 and in the name of the father of plaintiff as he was the elderly person. Nonetheless, the parties enjoyed as usual their respective half in S.No. 104/3."

The fact of allotment of 20 guntas in favour of the plaintiff's father is admitted. But what is claimed is that the defendant was enjoying 10 guntas. That is why, the defendant has chosen to put forth the plea of adverse possession. The plea of adverse possession has been rightly found by the courts below as not sustainable. Reliance was placed on Ex.D1 wherein the entry in favour of the plaintiff has been made only for 12 guntas. In any event, the defendant's claim to 8 guntas, even under Ex.D1 must be traced to some title. In the absence of any title found in favour of the defendant, his alleged possession of 8 guntas cannot be construed as legal. This is the result of the reading of the written statement and non-appreciation of the same, by the courts below. Therefore, it must be construed that the defendant admitted the claim of the plaintiff in respect of 20 guntas and on his failure to prove any right to possession over 8 guntas, the plaintiff must be given decree for 20 guntas.

In this view, the judgment and decree of the Appellate Court are set aside, the decree of the Trial Court is modified, the suit is decreed with costs, and the second appeal is allowed. No costs.