

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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Civil Miscellaneous Appeal No.473 of 2015
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JUDGMENT:

This appeal under Order XLIII Rule 1 of the Code of Civil Procedure, 1908 ('the Code' for short) by the unsuccessful petitioner/plaintiff is directed against the order dated 21.04.2015 of the learned Judge, Family Court-cum-VII Additional District Judge, Eluru of West Godavari District passed in IA.No.163 of 2014 in AS.No.18 of 2014.

2. I have heard the submissions of the learned counsel for the appellant/plaintiff ('the plaintiff', for brevity) and the learned counsel for the respondents/defendants ('the defendants', for brevity). I have perused the material record.

3. The basic facts necessary for consideration are as follows: -

The plaintiff had brought the suit - OS.No.197 of 2011 on the file of the Court of the learned I Additional Junior Civil Judge, Eluru (trial Court) for a perpetual injunction restraining the defendants, their men and followers from interfering with the plaintiff's possession and enjoyment of the plaint schedule property. That suit was resisted by the defendants. On merits and after full fledged trial, the trial Court had dismissed the suit of the plaintiff. Therefore, the plaintiff had preferred the first appeal suit in AS.No.18 of 2014 before the Court below. In the said appeal, the plaintiff had also filed IA.No.163 of 2014 under Order 39 Rule 1 and Section 151 of the Code for a temporary injunction restraining the defendants from interfering with the plaintiff's peaceful possession and enjoyment pending disposal of the said appeal. That application was dismissed by the Court below. Therefore, the plaintiff had preferred this appeal.

4. The learned counsel for the plaintiff had submitted as follows: -

The trial Court had dismissed the suit only on the ground of res judicata. Aggrieved of the judgment of the trial Court, the plaintiff had preferred the first appeal suit. In fact a finding was recorded by the trial Court that the plaintiff was in possession and enjoyment of the suit schedule property. The Court below ought to have seen that for granting a temporary injunction the plaintiff has to prove only his possession over the schedule property on the date of filing of the application for injunction. Since the trial Court had recorded a finding qua possession in the judgment in the suit, the appellate Court ought to have granted an injunction as prayed for pending final disposal of the first appeal. The Court below ought to have seen that the 1st defendant who gave evidence as DW1 in the suit had testified that he did not file any suit seeking recovery of possession of the plaint schedule property after the earlier litigation had attained finality and that he had further admitted that there is no documentary evidence in proof of compromise entered into between the plaintiff and the defendants. The evidence of DW1 does not prove any such compromise as his examination in chief is silent on the said aspect and as he had stated that he is not having any documentary proof to show that he had obtained possession of the suit schedule property and that the plaintiff had brought the instant suit-OS.No.197 of 2011 to extract more money from the defendants. The Court below ought to have seen that the plaintiff being in possession of the immovable property viz., the suit schedule property can maintain a suit for perpetual injunction even against the rightful owner and that the original owner as per our jurisprudence is not entitled to take possession from the plaintiff by using force. The Court below ought to have seen that in the suit, the plaintiff had exhibited exhibits A4 to A11, the copies of no.3 adangals, to prove his possession over the plaint schedule land and that the compromise alleged by the defendants was not proved. Therefore, the Court below ought to have granted a temporary injunction in favour of the plaintiff pending final disposal of the first appeal.

5. On the other hand, the learned counsel for the defendants had supported the order of the Court below and had stated that the order

impugned is a well reasoned order and does not call for any interference and that the dismissal of the earlier suit and the findings in the said suit operate as estoppel by record and therefore, the plaintiff is debarred from raising any contentions contrary to the findings in the former suit, which have become final and binding on the parties and hence, there is no merit in the appeal and the appeal is liable to be dismissed.

6. Now the point for determination is:

Whether the plaintiff had made out valid and sufficient grounds and had satisfied the cardinal principles for granting a temporary injunction restraining the defendants from interfering with the plaintiff's peaceful possession and enjoyment of the plaint schedule property pending final disposal of the first appeal on the file of the Court below?

7. **POINT:**

7.1 The facts leading to the filing of this appeal and the contentions of both the sides are already stated supra, in detail. Admittedly the plaintiff had originally brought the suit-OS.No.177 of 1982 for specific performance of an agreement to sell dated 05.08.1979 on the file of the learned Senior Civil Judge, Eluru against the defendants. The said suit was dismissed by the trial Court on merits and after full fledged trial by a judgment dated 18.01.1993. The first appeal suit in AS.No.204 of 1994 preferred by the plaintiff against the defendants and others was dismissed by this Court by a judgment dated 22.10.2010. The case of the plaintiff herein is that under the agreement to sell the possession was delivered to him and that though his suit for specific performance was dismissed, he was and is continuing in possession of the property and that, therefore, the defendants cannot take forceful possession of the plaint schedule property from him as he is in settled possession and that, therefore, he is entitled to a temporary injunction. In the earlier litigation this Court had held as follows: - ***'The aforesaid evidence on behalf of the plaintiff, therefore, fails to establish his plaint allegations that he had the entire sale consideration with him on the date of Ex.A1 and the delivery of possession as well as delivery of title deeds, as claimed by him, is***

clearly not established by his own evidence.’ *‘It is, therefore, probable that for claiming one-upmanship or upper hand over the elder brother i.e. the second defendant, the plaintiff’s father may have engineered the devise of obtaining Ex.A1 in favour of plaintiff from the first defendant by obtaining her signature during the long number of years of management of the first defendant’s property. Ex.A1, therefore, does not inspire confidence and I am not satisfied that the plaintiff has established genuineness of Ex.A1 and failed to establish the plaintiff allegations especially with regard to delivery of title deeds and possession.’* This Court while dismissing the appeal of the plaintiff filed against the dismissal of the suit for specific performance had recorded a finding *inter alia* that the plaintiff was of 19 years of age as on the date of suit agreement and is a grand son of the 1st defendant. The defendants have filed cross objections in the first appeal filed by the plaintiff before the Court below assailing the finding of the trial Court that the plaintiff is in possession of the property. Nonetheless, the fact remains that the trial Court while dismissing the suit of the plaintiff for perpetual injunction had recorded a categorical finding that the findings in the former litigation on the issue of possession operate as *res judicata*. No-doubt, the said finding is now under challenge in the first appeal pending before the Court below. Be that as it may. In the trial Court, the plaintiff had obtained an *ex parte* status quo order. However, subsequently, the application for temporary injunction was dismissed by the trial Court. Against the same the plaintiff had filed CMA.No.25 of 2011 on the file of the Court of the II Additional District Judge, Eluru; and, the said CMA was dismissed on 09.12.2011. The plaintiff had then preferred a revision in CRP.672 of 2012 on the file of this Court. The said CRP was also dismissed on 16.03.2012. Therefore, right from the dismissal of the temporary injunction application by the trial Court till date, there is no order of injunction in favour of the plaintiff. Therefore, in the orders impugned, the Court below had observed as follows: - ***‘Since in the earlier litigation as also in the present suit, the trial Court has refused to grant injunction in favour of the petitioner, this Court also is not inclined to grant temporary injunction to the petitioner’.*** As rightly observed by the

Court below, there was no order of injunction in favour of the plaintiff after the dismissal of the injunction application by the trial Court and at any time subsequent thereto. The only emphasis of the learned counsel for the plaintiff is that in the written statement, the defendants had pleaded a compromise and that pursuant to the compromise the property was delivered by the plaintiff to the defendants on 20.11.2010 and that the said plea of delivery of possession is a false plea and that the trial Court had disbelieved the said defence of the defendants and had held that the plaintiff is in possession of the suit schedule property but had dismissed the suit on the ground of *res judicata* in view of the findings in the former litigation. Thus, laying emphasis on the finding of the trial Court that the defendants could not prove the alleged delivery of possession by the plaintiff to the defendants on 20.11.2010 and on the further finding of the trial Court that the plaintiff is in possession, it is forcefully contended by the learned counsel for the plaintiff that the plaintiff is entitled to a temporary injunction during the pendency of the first appeal and that inspite of the findings in the former suit against the plaintiff, the plaintiff cannot be evicted except by following the procedure established by law and that the defendants are not entitled to take forceful possession from him though they are the rightful owners of the property. As the finding in regard to *res judicata* is under challenge in the first appeal, the finding that the plaintiff is in possession of the property is also similarly under challenge in the first appeal. Further, the defendants have filed cross objections challenging the finding that was recorded by the trial Court against them in regard to possession. Even assuming for a moment that the compromise is not true as contended by the plaintiff, his contention cannot be countenanced *prima facie* at this stage as the finding of the trial Court that he is in possession is assailed in the first appeal pending before the Court below and the defendants have also filed cross objections assailing the said finding of the trial Court and are placing strong reliance on the findings of this Court in AS.No.204 of 1994, which are extracted supra to the effect that the plaintiff had failed to establish in his suit for specific performance the plaintiff allegations therein with regard to delivery of title deeds and possession. The plaintiff in his affidavit filed in support of the petition before the Court below

had stated that he is in possession and enjoyment of the plaint schedule property and that during the pendency of the application filed under Section 5 of the Limitation Act he had raised 1010 variety of paddy in the petition schedule land and that the defendants are trying to highhandedly dispossess him and that, therefore, he is advised to file the application for temporary injunction in the first appeal. Per contra, in the counter affidavit filed on behalf of the defendants they had got stated that they had started agricultural operations for rabi crop on 25.11.2010 and had got ploughed the land by A. Venkatrao by investing Rs.4,800/- and had produced a receipt in that regard and had further pleaded that they had purchased seed variety 1010 from one Manchem Dhananjeya resident of Bhimadole and that he had also given a receipt in that regard and that later the defendants had applied manures to the crop in the schedule land by purchasing manures from Ravi Raja Traders, Bhimadole. The defendants had also produced the receipts related to the purchases of seeds and manures.

7.2 I have given earnest consideration to the facts and the submissions and the chronology of events narrated supra. After giving a detailed and thoughtful consideration to the submissions, this Court finds that the plaintiff could not make out a *prima facie* case. At the stage of considering the merits of this appeal against an interim order passed by the Court below, this Court need not deeply examine the issue of *res judicata* and record any findings which will have a bearing on the points that may arise for determination in the first appeal suit pending before the Court below, which is the last court of fact. It is for the Court below to deal with the first appeal on all aspects comprehensively being the last court of fact.

7.3 Be that as it may. It is apt to note that the learned counsel for the appellant had placed reliance on the decision in **Rame Gowda (dead) by LRs v. M.Varadappa Naidu (dead) by LRs** ^[1] wherein the facts and findings are as follows: - 'The plaintiff had filed a suit alleging his title as also his possession over the disputed piece of land. The trial Court had found that the plaintiff had failed to prove his title but, he had succeeded in proving his

possession over the suit property. Hence, the trial Court had held that he was entitled to protect his possession till dispossessed there from by due process of law. Therefore, the trial Court had issued an injunction in his favour. The defendant's appeal was dismissed by the High Court. He had therefore, brought an appeal before the Supreme Court. The Supreme Court while dismissing the appeal and while holding that possessory title is good against all the world but the rightful owner had held as follows: - **'It is thus clear that so far as the Indian law is concerned, the person in peaceful possession is entitled to retain his possession and in order to protect such possession he may even use reasonable force to keep out a trespasser. A rightful owner who has been wrongfully dispossessed of land may retake possession if he can do so peacefully and without the use of unreasonable force. If the trespasser is in settled possession of the property belonging to the rightful owner, the rightful owner shall have to take recourse to law; he cannot take the law in his own hands and evict the trespasser or interfere with his possession. The law will come to the aid of a person in peaceful and settled possession by injuncting even a rightful owner from using force or taking the law in his own hands, and also by restoring him in possession even from the rightful owner (of course subject to the law of limitation), if the latter has dispossessed the prior possessor by use of force.'** In the well considered view of this Court, the ratio in the cited decision is not helpful at this interlocutory stage to the plaintiff as the issue of *res judicata*, which was answered by the trial Court against the plaintiff falls for determination on merits in the first appeal which is pending before the Court below and as the relief of temporary injunction being an equitable relief, cannot be granted in favour of the plaintiff, whose suit for specific performance was dismissed and the judgment in the said suit had attained finality.

7.4 Viewed thus, this Court finds that there is no merit in the appeal and the appeal is liable to be dismissed.

8. In the result, the Civil Miscellaneous Appeal is dismissed. There shall be no order as to costs. The suit is of the year 2011 and the first appeal is of

the year 2014 and hence, this Court deems it appropriate to direct the Court of first appeal to dispose of the first appeal as expeditiously as possible and preferably within two (02) months from the date of the receipt of a copy of this judgment.

Miscellaneous petitions, if any, pending in this appeal shall stand closed.

M. SEETHARAMA MURTI, J

14th September, 2015
Vjl

[\[1\]](#) (2004) 1 SCC 769