

(1979) 02 MP CK 0002

Madhya Pradesh High Court

Case No: Revision No. 657 of 1976

Patram and others

APPELLANT

Vs

Rameshwar Dayal

RESPONDENT

Date of Decision: Feb. 8, 1979

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 151

Citation: (1979) JLJ 622

Hon'ble Judges: J.P. Bajpai, J

Bench: Single Bench

Advocate: Mishra, for the Appellant; Katare, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

J.P. Bajpai, J.

This order shall govern the disposal of civil Revision No. 669 of 1976, also, the point involved in which is also the same and the parties too are common.

2. The facts giving rise to both these revisions are that the applicants instituted a suit against the non applicant for cancellation of a sale deed on the allegation that the same was executed for the collateral purpose of securing the payment of loan and was not a real sale-deed intended to be acted upon as such. It was also alleged that the same was got executed or the document was not for the purposes of effecting the sale any was only by way of security. During the pendency of the suit, the defendant non-applicant moved an application under Order 29 Rules 1 & 2 read with section 151 of the CPC for grant of temporary injunction on the allegation that since the defendant is in cultivating possession of the suit land from the date of purchase, the plaintiff be restrained from interfering with his possession.

3. The case of the plaintiff was that they had never parted with the possession of the suit land in pursuance of sale and they had been in possession of the same as before because the execution of the deed was a nominal one and was never acted upon. The entries in the Khasra also right from 1971 onwards up to the date of the suit, continuously disclose the possession of the plaintiffs. The defendant did not take any action to get his name mutated immediately after purchase which would have been in the normal course a natural conduct of a purchaser had the transaction been a real transaction of the sale. For the first time, steps were taken in the year of the suit for getting the Dame mutated.

4. The trial Court however, by applying the principles of Order 39 rules 1/2 CPC for grant of temporary injunction, i.e. balance of convenience irreparable injury and *prima facie*teness of the case, passed an order restraining the plaintiffs from interfering with the possession of the defendant. The present applicant plaintiff, however, preferred an appeal before the lower appellate Court. On behalf of the non applicant, an objection was raised about the maintainability of appeal by contending that since the trial Court had specially made a mention of section 151 of the CPC while granting the temporary injunction, the same amounted to an Order u/s 151 CPC and as such was not appealable under Order 43 despite the fact that the same was issued in the nature of a temporary injunction by applying the principles of Order 39. rules 1 & 2 C.P.C. The objection prevailed upon the lower appellate Court and the appeal of the applicant-plaintiff was dismissed as not tenable. The lower appellate Court accordingly did not consider the case on merits. The applicants have now preferred revisions (No. C.R. 657/76 and No 669/76).

5. Before this Court it was urged that since the vital circumstances of inaction on the part of the defendant for more than four years after the date of purchase for not getting his name recorded, the Khasra entries disclosing the possession of the plaintiff as usual continuously even after the date of purchase for years together the price of the land being ten times more in value than that of Rs. 400/- as shown in the sale-deed, were completely overlooked and the mere say of the defendant was accepted to hold that he was in actual physical possession of the suit land, and, therefore, the order made by the trial Court be set aside or the appeal be remanded to the lower appellate Court for deciding the same on merits. The contention was that possession of the applicants being shown in the annual village papers was sufficient for holding *prima facie* case in favour of the applicants for deciding the question of temporary injunction.

6. After hearing both the counsel and on going through the orders impugned this Court is of the opinion that it would not be proper and necessary to express any opinion on the merits of the case of the respective parties in this respect and the case deserves to be remanded to the lower appellate Court because the appeal before the said Court had not been at all decided on merits and had been rejected on the preliminary ground that the same was not tenable. This view taken by the

lower appellate Court is absolutely illegal for the reasons stated hereinafter and since due to the same the lower Court failed to exercise its jurisdiction which it had, the order impinged calls for interference in revision.

7. It is true that the trial Court did mention section 151 while granting the temporary injunction but it is also equally true that the trial Court, as is, evident from the perusal of the order impugned did apply all the principles of Order 29 rule 1/2 C P. C. considered the case in the light of the irreparable injury *prima facie* of the case and balance of convenience and was of the opinion that in order to maintain status quo regarding the suit land, an injunction was necessary. Under these circumstances even if the trial Court passed order of temporary injunction by relying not on the provisions of section 151 of the CPC to act upon in the circumstances which, according to it might not have been fully covered by the provisions of Rules 1/2 of the Order 39 C. P. C. the Order impugned does not lose its nature of being one of temporary injunction granted in accordance with the provisions of Order 39.

8. From the facts and circumstances of the case stated above, it is apparent that the trial Court used its inherent powers to expand the remedy in order to do justice to cover a case not within the exact words of the procedural section but definitely within the purpose of the same. Whenever inherent powers are invoked to do so, the Court, in effect, simply uses the inherent powers to act and it is deemed that the order ultimately made would still be one under the relevant provisions and, therefore, the consequence is that such an order being under the aforesaid procedural provision will remain appealable. The principle underlying is that when in the interest of justice, it is felt that one side should be given a remedy, though the same does not fall within the exact word of any procedural provisions, the other side should also be allowed the right of appeal that would have existed had the procedural section really covered the same and was not required to have been applied by means of a fiction. In the present case therefore, the fact that the Court preferred to act by relying on the provisions of section 151 C P: C, will not make the order non-appealable because the order will have to be treated as having been passed under Rule 1/2 of Order 39 of the Code of Civil procedure.

9. In this context it would be relevant to refer to the observations made in the case of AIR 1943 172 (Nagpur) by placing reliance on the observations made by the Division Bench of this Court in the case of AIR 1938 326 (Nagpur) which support this approach.

10. This Court, is therefore, of the opinion that the lower appellate Court erred in law in not exercising its jurisdiction which it had by not dealing with the case on merits by holding that the appeal was not tenable. The orders made by the lower appellate Court are accordingly set aside and both the Miscellaneous appeals are remanded back for disposal afresh. Parties are directed to appear before the lower appellate Court on 12-2-1979. The lower appellate Court shall proceed to dispose of the appeal on merits expeditiously.

11. Both the revisions are partly allowed. In the facts and circumstances of the case, parties will bear their own costs of this revision.