

Tummalla Atchiah

Vs

Venka Narasingarao

Civil Appeal No. 1647 of 1968

(N. L. Untwalia, P. S. Kailasam JJ)

24.01.1978

JUDGMENT

UNTWALIA, J. -

1. This is an appeal by the defendant by certificate. It arises out of a suit filed by the plaintiff/respondent for cancellation or setting aside of the registered assignment deed dated October 31, 1957 executed by the latter in favour of the former purporting to transfer the decree in O.S. No. 88 of 1949 on the file of Court of Subordinate Judge, Kakinada, for recovery of the possession of the scheduled properties measuring about 20 to 25 acres of land and for future mesne profits.
2. The trial Court decreed the suit in part and granted a decree for cancellation of the assignment deed aforesaid on the plaintiff's paying Rupees 13,000 to the defendant. Under the decree defendant was required to deliver possession of the suit properties to the plaintiff on the payment of the said sum of Rs. 13,000.
3. The defendant filed an appeal in the High Court and a cross objection was filed by the plaintiff. In the cross-objection the grounds taken were in regard to two matters only, namely, costs and mesne profits. No ground was taken in the cross-objection attacking the decree of the trial Court in regard to the payment of Rupees 13,000 and defendant's liability to deliver possession of the suit properties only on such payment being made. The High Court has, however, varied that portion of the decree of the trial Court by exercising its power under Order 41, Rule 33 of the Code of Civil Procedure. The High Court does not seem to be right when it says in its judgment that the cross-objection was confined to costs only. After having said so the High Court has granted decree for mesne profits also in exercise of its power under the same provision of law, that is, Order 41, Rule 33, C. P.C. The defendant's appeal was dismissed by the High Court but subject to this finding that a sum of Rs. 7600 only had been paid by the defendant to the plaintiff. The High Court has found that the said amount of Rs. 7,600 was not paid as a part of the consideration of the deed of assignment but under a different and collateral agreement executed by the defendant in favour of the plaintiff for a sum of Rs. 20,000. There were many other complications of facts involved in this litigation. It is not necessary for us to give any details of them.
4. Having heard learned Counsel for the parties and having given our due consideration to the points involved in this appeal, we have thought it proper to dispose of this appeal by a short order. No detailed or reasoned judgment by us, on the facts of this case, is called for.
5. We are of the view that the High Court was clearly wrong in taking recourse to Order 41, Rule 33, C.P.C. in interfering with the decree of the trial Court in relation to payment of Rs. 13,000. The

cases relied upon by the High Court are clearly distinguishable. The plaintiff was a party to the appeal. He had filed a cross-objection but did not attack the decree of the trial Court making him liable to return Rs. 13,000 before he could take back possession from the defendant. Without a specific ground in the cross-objection and without payment of court-fees on the said amount he was not entitled to get any relief by the Court, under Order 41, Rule 33, C.P.C.

6. Having appreciated the entire facts and circumstances of the case we are not inclined to accept the argument put forward on behalf of the appellant before us that a decree for cancellation of the assignment deed dated October 31, 1957 ought not to have been passed. We are of the view that the courts below were right in passing such a decree. The High Court has also committed an error in directing ascertainment of mesne profits as payable by the defendant/appellant from the date of the suit. Since the decree of the trial Court had directed him to deliver possession only on payment of Rs. 13,000 by the plaintiff the defendant could not be made liable for any mesne profits before the payment of the said amount by the plaintiff.

7. We accordingly allow this appeal in part and modify the decree of the High Court to the extent indicated below :

7A. The decree for cancellation of the assignment deed dated October 31, 1957 stands and the condition imposed by the trial court in its decree is also affirmed by us, that is to say, the defendant would be liable to deliver possession on payment of Rs. 13,000 to him by the plaintiff. If he does not deliver possession even after the payment of the said amount he will be liable to mesne profits from the date of such payment. A dispute was raised before us by learned Counsel for the parties as to whether possession had already been given up and delivered by the defendant. It was asserted on behalf of the appellant that he is no longer in possession of the suit properties had given up and delivered possession long time back through the process of the Court. On the other hand learned Counsel for the respondent states before us that possession was not given up by the appellant and he is still in possession. On the payment of a sum of Rs. 13,000 by the plaintiff or if the said sum has already been paid a proceeding for determination of mesne profits, if necessary may be started and in that proceeding this disputed question of fact of possession will have to be gone into and determined by the first court, whereupon a decree for mesne profits may be passed or may not be passed, as the case may be. The decree for mesne profits granted by the High Court is, accordingly also modified. In the circumstances we make no order as to costs.

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