

**THE HON'BLE SRI JUSTICE S. RAVI KUMAR**

**SECOND APPEAL No.424 of 2006**

**Date:12.06.2015**

**Between:**

Sakipalli Manikyam

...Appellant.

AND

Palakollu Chellayya and another.

...Respondents.

The Court made the following:

**THE HON'BLE SRI JUSTICE S. RAVI KUMAR**

**SECOND APPEAL No.424 of 2006**

**JUDGMENT:**

This appeal is preferred against judgment dated 14-09-2005 in A.S.No.246/2003 on the file of Additional Senior Civil Judge, Srikakulam whereunder judgment dated 28-03-2000 in O.S.No.319/1996 on the file of Principal Junior Civil Judge, Srikakulam is reversed.

2. Appellant herein is plaintiff and respondents herein are defendants in the above referred O.S.No.319/1996 and they are hereinafter referred to as plaintiff and defendants as

arrayed in the suit.

3. Brief facts leadings to filing of this appeal are as fallows:-

Plaintiff filed the above suit for a declaration of her title to 'ABCD' site shown in the plaint plan and for eviction of defendants. Plaintiff also sought for mandatory injunction for removal of 'AC'-wall for opening 'X'-Doorway and opening of 'Z'-sluice as shown in the plan. According to plaintiff, plaint schedule property with building and adjoining site was originally belonged to one Korapapu Dalayya, father of plaintiff, who enjoyed the same till his death in May 1996, he was paying property house tax to the municipality and he executed a registered Will on

07-10-1992 bequeathing the plaint schedule property in favour of plaintiff with absolute rights and as per the Will, plaintiff got the plaint schedule property, after the death of her father and she has been in peaceful possession and enjoyment till 10 days prior to the filing of the suit, defendants encroached 'ABCD' site unlawfully and forcibly without any manner who are having houses and house sites to the South of plaint schedule property, defendants are brothers and they have no right whatsoever in the plaint schedule property and therefore, they are liable to be evicted and the plaintiff is entitled for the relief as prayed for.

4. Defendants resisted the claim of the plaintiff and according to them, even according to the boundaries

mentioned in the Will, this plaint schedule property does not belong to plaintiff's father and that the defendants are in possession and enjoyment in their own right and that the plaintiff is not entitled for the reliefs claimed and that the suit is not maintainable. On these allegations, trial Court framed three issues and examined four witnesses and marked two documents on behalf of plaintiff and examined three witnesses and marked one document on behalf of defendants and on a over all consideration of oral and documentary evidence decreed the suit as prayed for. Having aggrieved with the decree of the trial Court, defendants preferred appeal to the District Court, which was subsequently made over to Additional Senior Civil Judge Srikakulam and the appellate Court, on a consideration of material available on record, allowed the appeal by setting aside the decree and judgment of the trial Court. Aggrieved by the same, plaintiff preferred present appeal.

5. The following are the substantial questions of law raised in the grounds of appeal:-

*“Whether Lower Appellate Court is correct in reversing the well considered Judgment and decree of the trial Court when the plaintiff established her title by Ex.A1 coupled with oral testimony of P.Ws.3 and 4 and commissioner's report?*

*Whether the Lower Appellate Court is correct when construing the recitals in document of title Ex.A1 regarding defendants nor any work Memo. To measure the defendants vacant site with the area of the Plaintiff's site?*

*Whether the Lower Appellate Court is right in ignoring the fact that the defendants failed to discharge the burden of proof shifted on them to prove 'A, B, C, D' is their site when the Plaintiff proved her title to the entire house 'M, N, O, D'?*

*Whether the Lower Appellate Court is right in relying upon the oral evidence of D.Ws regarding the user of vacant site for cattle tying, hayricks and raising Tulasivanam when there is pleading to that effect in their Written Statement?"*

6. This Court admitted the appeal treating the above grounds as substantial questions of law.

7. Heard arguments.

8. Advocate for appellant mainly contended that a bare perusal of the appellate Court judgment would show that the same is not in accordance with provisions of Order 41 Rule 31 CPC and therefore, this is a fit case to remit back the case to the appellate Court for a reconsideration.

9. Now the point that would arise for my consideration in this second appeal is whether there is any substantial question of law to be considered by this Court?

10. **Point:-** As already referred above, the suit is filed for declaration, eviction and mandatory injunction and the claim is based on a Will executed by plaintiff's father. Trial Court dismissed the suit on the ground that plaintiff failed to prove her claim over the suit schedule property, but the appellate Court reversed findings of the trial Court on the ground that the lower Court erroneously granted decree in favour of the plaintiff. The main contention of the Advocate for appellant is that first appellate Court being a fact finding Court as to reappraise the evidence with reference to the points that are

framed in the appeal and then decide those points, but the appellate Court, without following procedure and without appraising oral and documentary evidence, reversed a well reasoned Judgment of the trial Court, therefore, the case has to be remitted back to the first appellate Court for reconsideration. He has drawn my attention to the provisions of Order 41 CPC particularly Rules 30 & 31, which mandate the appellate Court to frame points for determination and reappraise oral and documentary evidence and then give decision on the points and then reasons for such decision. As rightly pointed out by Advocate for appellant the appellate Court has not framed any points for consideration. It has not even referred to the issues that were framed by the trial Court and the findings of the trial Court on such issues. What the appellate Court has done is it extracted the evidence on plaintiff's side witnesses and without touching the defendants side evidence straight away allowed the appeal which in my view is absolutely incorrect. As first appellate Court has not followed the procedure for hearing of the appeal and rendering Judgment in accordance with Order 41 CPC, I feel that the request of the appellant counsel has to be considered. As request for remand is considered, I am not going into the merits and demerits of the case, because any findings by this Court may embarrass the lower appellate Court.

11. For these reasons, appeal is allowed and the judgment

dated 14-09-2005 in A.S.No.246/2003 on the file of Additional Senior Civil Judge, Srikakulam is set aside and the matter is remitted back to the appellate Court with a direction to restore the appeal and decide the same within a period of six months from the date of receipt of copy of this judgment and record. Registry to send back record immediately without any delay. No costs.

12. As a sequel, miscellaneous petitions, if any, pending in this appeal, shall stand disposed of.

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***JUSTICE S. RAVI KUMAR***

**Date:12.06.2015**

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