

*** The Hon'ble Sri Justice C.V.Nagarjuna Reddy**

+ Civil Miscellaneous Appeal No.1058 of 2014

% Dated 06.02.2015

Between:

Kesava Reddy

...Appellant

and

A.Visupaksha Reddy (died) and 7 others

...Respondents

! Counsel for the Appellant: Mr.M.Radha Krishna

**^ Counsel for respondent Nos.2 to 6: Mr.K.Sita
Ram**

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? Cases cited:

2010 (2) ALD 86 (SC)

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Counsel for respondent Nos.2 to 6: Mr.K.Sita Ram

The Court made the following:

Judgment:

This Civil Miscellaneous Appeal arises out of the judgment and decree, dated 25-08-2014, in AS.No.60 of 2012, on the file of the Court of the learned II Additional District Judge, Kurnool at Adoni, whereby he has remanded the case to the Court of the Junior Civil Judge, Aluru, for considering the additional documentary evidence filed by respondent Nos.2 to 6, who are the appellants before it, and to answer the issues afresh.

I have heard Mr.M.Radha Krishna, learned Counsel for the appellant, and Mr.K.Sitaram, learned Counsel for respondent Nos.2 to 6.

One Virupaksha Reddy filed OS.No.170 of 2006 for declaration of his title to the plaint schedule property and also for permanent injunction restraining the petitioner and respondent Nos.7 and 8 herein from interfering with his peaceful possession and enjoyment of the plaint schedule property. After filing the suit, the sole plaintiff died. Respondent Nos.2 to 6, who have come on record as his legal representatives, have pursued the suit. By judgment and decree, dated 23-04-2012, the trial Court has dismissed the suit. Feeling aggrieved by the said judgment and decree, respondent Nos.2 to 6 have filed AS.No.60 of 2012. In the appeal, respondent Nos.2 to 6 have filed certain additional documents viz., certified copy of registered sale deed bearing document No.1826/69, certified copy of the judgment and decree in AS.No.17 of 2005, certified copy of 1-B register, statement of subdivision and the Adangal for the fasli 1421. The lower appellate Court marked these documents as Exs.A.6 to A.10 respectively. It has also framed three points and after discussing those points, it has felt that in the absence of Ex.A.6, the lower Court was justified in rejecting the relief of declaration of title and that the said document cannot be

examined by the appellate Court without giving a fair opportunity to both parties to adduce evidence in respect thereof. It has further observed that if the appeal is allowed based on Ex.A.6, it will deny the defendants the opportunity to question the said document. The lower appellate Court has, therefore, remitted the matter to the trial Court for considering the additional documentary evidence filed by the appellants before him and deciding the suit afresh after giving a fair opportunity to both the parties. Feeling aggrieved by the said judgment, the first defendant has filed this Civil Miscellaneous Appeal.

The learned Counsel for the appellant has submitted that the lower appellate Court has committed a grave procedural illegality in remanding the case for fresh disposal by the trial Court. In support of his submission, he has placed reliance on Rule 28 of Order XLI of the Code of Civil Procedure, 1908 (CPC) and also on the judgment of the Supreme Court in **H.V.Vedevyasachar vs. Shivashankara and another**^[1].

The learned Counsel for respondent Nos.2 to 6 sought to support the procedure followed by the

lower appellate Court.

I have carefully considered the respective submissions of the learned Counsel for the parties.

Order XLI CPC deals with Appeals from original decrees. Under this Order, the appellate Court is conferred with the power to remand the appeals in three different situations. First, under Rule 23, where an appeal is preferred against a decree, based upon a preliminary point, and in case that decree is reversed in appeal, the appellate Court may, by order, remand the case for disposal on merits. Second, under Rule 23-A, where an appeal is preferred against a decree, based on issues other than the preliminary point, and in case that decree is reversed in appeal and a re-trial is considered necessary, the appellate Court will have the same powers as it has under Rule 23. Third, under Rule 25 also, the appellate Court may remand the case after framing certain additional issues.

However, where additional evidence is produced for the first time before the appellate Court, as in the instant case, Rules 27 and 28 of Order XLI CPC govern the situation. Under Rule 27 (1), the parties to appeal shall not be entitled to

produce additional evidence, whether oral or documentary, in the appellate Court except under the circumstances envisaged under sub-clauses (a), (aa) and (b) thereof. Under sub-rule (2) of Rule 27, whenever additional evidence is allowed to be produced by an appellate Court, the Court shall record the reasons for its admission. Rule 28 prescribed the procedure for taking additional evidence. Under this Rule, wherever additional evidence is allowed to be produced, the appellate Court may either record such evidence by itself or direct the Court, from whose decree the appeal is preferred, or any other sub-ordinate Court to take such evidence and forward the same to it.

In Para 4 of the judgment of the lower appellate Court, it has observed that during the course of the arguments, the Counsel for the appellants/plaintiffs filed the certified copies of Sale Deed No.1826/69, judgment and decree in AS.No.17/05, 1-B register, statement of sub-division and the adangal for the fasli 1421 and that they were marked as Exs.A.6 to A.10.

The learned Counsel for the parties are unable to state as to whether any order, recording the reasons for admitting those documents, was

passed in terms of sub-Rule (2) of Rule 27 by the lower appellate Court. In the face of the unequivocal language in sub-rule (2) of Rule 27, no additional evidence can be allowed and admitted unless the Court records reasons therefor.

Be that as it may, even if the lower appellate Court has felt that the additional evidence produced by respondent Nos.2 to 6 is relevant for the purpose of proper and effectual adjudication of the appeal, it is left with two options under Rule 28. Either it has to record the evidence by itself or direct the Court, from whose decree the appeal is preferred, or any other subordinate Court to take such evidence and forward the same to it. It, therefore, necessarily means that in either case, the lower appellate Court itself has to dispose of the appeal on merits after recording of further evidence. It has no jurisdiction to remit the case to the trial Court for adjudication of the suit afresh on the ground of taking on record the additional evidence. This position is well crystallized by the judgment of the Supreme Court in **H.V.Vedavyasachar** (cited supra). Dealing with a similar situation, the Supreme Court held as under:

9. However, so far as the second contention raised by the learned Counsel for the appellant is concerned, in our

opinion, the same has substance. When an application for adducing additional evidence is allowed, the appellate Court has two options open to it. It may record the evidence itself or it may direct the trial Court to do so. Order XLI Rule 28 of the CPC reads as under:

‘28. Mode of taking additional evidence-

Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.’

10. For the aforementioned purpose, in our considered opinion, the High Court could not have directed the trial Court to dispose of the suit after taking evidence. Such an order of remand could be only in terms of Order XLI Rule 23, Order XLI Rule 23A or Order XLI Rule 25 of the Code. None of the said provisions have any application in the instant case.

11. This Court in *Shanti Devi and others v. Daropti Devi and others* (2006) 13 SCC 775, has held as under:

“But the same by itself could not be a ground for remitting the entire suit to the learned trial Judge upon setting aside the decree of the learned trial Court. The power of remand vests in the appellate Court either in terms of Order 41 Rules 23 and 23A or Order 41 Rule 25 of the Code of Civil

Procedure. Issue 4 was held to have been wrongly framed. Onus of proof was also wrongly placed and only in that view of the matter, the High Court thought it fit to remit it to the learned trial Judge to determine a question of fact, which according to it was essential upon reframing the issue.”

As the lower appellate Court has committed a serious procedural illegality in remitting the case to the trial Court, the judgment and decree under appeal cannot be sustained and the same is, accordingly, set aside.

The Civil Miscellaneous Appeal is allowed. The lower appellate Court is directed to decide as to whether it will itself record the evidence or direct the trial Court to record the evidence and forward the same to it. After recording of the evidence either by itself or by the trial court, the lower appellate Court shall dispose of the appeal on merits. This process shall be completed within three months from the date of receipt of this order.

As a sequel to disposal of the Civil Miscellaneous Appeal, CMAMP.No.1764 of 2014, filed by the appellant for interim relief, is disposed of as infructuous.

(C.V.Nagarjuna Reddy, J)

Dt: 6th February, 2015

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[\[1\]](#) 2010 (2) ALD 86 (SC)