

THE HON'BLE SRI JUSTICE S. RAVI KUMAR
CIVIL MISCELLANIOUS APPEAL No.909 of 2014

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Date:19.01.2015

Between:

Kondamudi Raghavamma

..... Appellant.

AND

Ikkurthu Krishna Murthy

....Respondent/appellant/defendant.

The Court made the following :

THE HON'BLE SRI JUSTICE S. RAVI KUMAR
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JUDGMENT:

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This appeal is preferred against judgment & decree dated 30-06-2014 in A.S.No.34/2013 on the file of X Additional District Judge, Gurazala whereunder judgment & decree dated 30-11-2012 in O.S.No.151/2009 was set aside and the matter was remanded back to the trial Court directing the trial Court to frame additional issues and to conduct trial for those issues after giving opportunity to both parties and dispose of the suit afresh.

2. The appellant herein is plaintiff in O.S.No.151/2009 and the respondent herein is defendant. The said suit was filed for relief of declaration and injunction in respect of suit property. Parties are hereinafter referred to as plaintiff and defendant for convenience and better understanding.

3. As per the plaint averments, plaintiff is daughter of Thummalacheruvu Satyanarayana. Her father, after the death of his first wife i.e., plaintiff's mother married one Hanumayamma. The said Hanumayamma also died on 15-08-2009 intestate and the plaintiff being class-I heir, she is entitled to succeed to the property of Satyanarayana, who died in the year 1990 and that the defendant is no way concerned with the family of T. Satyanarayana and has no right in the schedule property, but he with a malafide intention has been making attempts to trespass into the schedule property and trying to interference with peaceful possession and enjoyment, therefore, plaintiff is compelled to file the suit for declaration and injunction. Defendant resisted the suit contending that plaintiff herein received a sum of Rs.40,000/- from late Hanumayamma and relinquished her share in the plaint schedule property and executed a relinquishment agreement dated 10-04-1990 and that the said Hanumayamma enjoyed the plaint schedule property with exclusive rights and she bequeathed the schedule property in favour of defendant through a Will dated 23-01-2009 and that the legatees under the Will are in possession and enjoyment of the schedule property as

such, the plaintiff is not entitled for the reliefs.

4. On these contentions, trial Court, on a consideration of oral and documentary evidence, decreed the suit in favour of plaintiff. Aggrieved by which, defendant preferred appeal and the appellate Court, on a reappraisal of the material, observed that trial Court erred in not framing certain issues and felt that a retrial is necessary in respect of those issues and for that purpose, remitted back the matter to the trial Court for a reconsideration. Aggrieved by the said order of the appellate Court, present appeal is preferred by invoking Order 43 Rule 1 (u) of CPC.

5. Heard both sides.

6. Advocate for appellant mainly contended that the first appellate Court is vested with the power of remand as per Rules 23 & 23-A of Order XLI, only if the facts fall within the ambit of these Rules, a remand can be ordered, but the facts of the present case do not fall within the ambit of these Rules, therefore, the order of the appellate Court remanding the matter to the trial Court is not legal.

He submitted that the defendant resisted the claim of plaintiff mainly on two grounds; first being that plaintiff relinquished her share in pursuance of a relinquish agreement and secondly, late Hanumayamma executed a Will bequeathing the suit property in favour of defendant and in view of the Will, the claim of plaintiff is not tenable. He submitted that

trial Court gave findings on these two issues against the defendant, but the appellate Court remitted back the matter directing the trial Court to frame certain additional issues, which are only incidental in nature. He submitted that sending back matter to the trial Court would amount to reopening of the suit and giving opportunity again to the defendant, which was not availed during trial. He submitted that though defendant contended that there was an agreement in writing relinquishing plaintiff's right in the schedule property, no such document is produced before the trial Court and for that reason, the trial Court discarded the plea of defendant, but the appellate Court by remitting back the suit to the trial Court, reopened this aspect by giving opportunity to the defendant to produce the document though there was no such request from the defendant by filing any petition to receive that document as additional evidence. He further submitted that the Will pleaded by defendant is not accepted by the trial Court, but the appellate Court by directing the trial Court to frame an additional issue as to the presence of other beneficiaries under the Will would also amount to reopening of the case. He submitted that when the Will is not accepted, the question of bringing the other beneficiaries on record would not arise. He submitted that if the Will is accepted, there may be some meaning in directing the trial Court to frame an issue as to the presence of other beneficiaries for deciding the matter in pursuance of the Will, but the appellate Court has remanded the case, without any valid grounds, therefore, the order of

the appellate Court has to be set aside.

7. On the other hand, Advocate for defendant supported the order of the appellate Court and contended that the suit for declaration is not at all maintainable and when the defendant pleaded that Hanumayamma was in possession of property for more than 20 years, the plea of adverse possession was not considered by the trial Court, therefore, the appellate Court rightly remitted back the matter to decide that aspect and no prejudice will be caused on account of remand, because plaintiff will also have an opportunity to rebut the evidence. He further submitted that trial Court put the entire burden on the defendant and when the plaintiff came to Court seeking declaration without putting the burden on the plaintiff, putting the burden on defendant is not at all correct. He submitted that to avoid multiplicity of proceedings, the appellate Court rightly remitted back the matter to the trial Court and there are no grounds to interference with the appellate Court order dated 30-06-2014.

8. Now the point that would arise for my consideration in this appeal is whether the judgments of the Courts below are legal, proper and correct?

9. **Point:-** As already referred above, the main suit is filed for declaration of title and injunction over the suit schedule

property. There is no dispute with regard to relationship between the parties and their relationship with the deceased Satyanarayana & Hanumayamma. There is also no dispute with regard to identity of the suit property.

As already referred above, claim of plaintiff is mainly resisted on two grounds; firstly, that plaintiff relinquished her right through an agreement dated 10-04-1990 and secondly, suit schedule property was bequeathed to defendant through a Will dated 23-01-2009. The appellate Court, while dealing with these aspects, observed that issue relating to adverse possession and issue relating to non-joinder of necessary parties have not been framed by the trial Court though there was a specific plea in the written statement. According to defendant, late Hanumayamma perfected her title over the suit property by enjoying it continuously over a period of 20 years. When the trial Court framed an issue putting the burden on plaintiff whether she is entitled for the relief of declaration and injunction, the objection of the defendant with regard to plea of adverse possession of Hanumayamma has to be dealt under that issue. So as rightly pointed out by Advocate for plaintiff, there is no necessity of framing a separate issue for the plea of adverse possession, particularly when the defendant himself contended that plaintiff has relinquished her share on 10-04-1990.

If really, late Hanumayamma perfected her title by adverse possession, there is no necessity for plaintiff to execute any document to relinquish her share, so the very plea of

relinquishment contradicts the plea of adverse possession, therefore, the trial Court first considered the plea with regard to execution of relinquishment agreement. When the defendant has not produced any document as pleaded by him with regard to relinquishment, the learned Trial Judge negated the plea of relinquishment by holding that defendant failed to prove the alleged agreement dated 10-04-1990, but the appellate Court, by remitting back the matter, allowed the defendant to reopen that issue and permitted the defendant to adduce evidence in respect of that document, which in fact such document is not before the Court. As rightly objected by the Advocate for plaintiff when a specific document is pleaded oral evidence in respect of that document cannot be allowed, without producing that document, therefore, the appellate Court was wrong in directing the trial Court to conduct trial on this issue.

10. The other ground on which the appellate Court directed the trial Court to frame issue is in respect of presence of other beneficiaries under the Will. While dealing with the Will, the trial Court clearly held that the defendant failed to prove the Will by examining one of the attesting witness to prove execution of the Will. As rightly pointed out by the Advocate for plaintiff, if the Will is accepted, then the question of presence of other beneficiaries may be necessary to avoid multiplicity of proceedings. But when the trial Court held that the Will is not proved by complying the provisions of Section 68 of Indian Evidence Act, the

objection of the defendant with regard to presence of other beneficiaries cannot be sustained, but the appellate Court, by remitting back the matter to the Court below, has again reopened the case and gave an opportunity to the defendant to prove this document, which defendant has not availed during trial.

11. As per Order XLI Rule 23-A of CPC, the appellate Court can remand the matter only when it felt a retrial is necessary. As seen from the impugned judgment, the appellate Court has not felt that a retrial is necessary, but the only purpose of remand is to frame two additional issues and conduct trial on those two issues. Here when the trial Court framed issues, the defendant is well aware of the fact that the trial Court has not framed issues with regard to the non-joinder of necessary parties and issue relating to adverse possession. When the defendant has not objected with the issues framed by the trial Court, it has to be treated that he waived his right with regard to framing of issues. From a reading of Order XLI Rules 23 & Rule 23-A of CPC, the power of remand to be exercised by the lower appellate Court must be in conformity with the provisions of these two rules and only if the case falls under any of these two provisions, then only the Court can remit back the matter. Admittedly, the appeal is not on a decision of preliminary issue. So Rule 23 has no application at all.

So far as Rule 23-A is concerned, as already referred above, the appellate Court did not give any finding to the effect that

a retrial is necessary. Here the entire evidence is before the appellate Court with regard to plea of relinquishment and plea of Will and the appellate Court can as well appreciate the evidence of both parties with reference to these issues and the other two issues proposed by appellate Court namely; adverse possession and plea of necessary parties because they are only a consequential for the main two issues. Therefore, on a scrutiny of the material, I am of the view that the appellate Court committed error in remitting back the suit for a reconsideration, which virtually amount to reopening the case afresh, therefore, the order of the appellate Court remanding the suit for a reconsideration is set aside and the appeal is remitted back to the lower appellate Court, directing the appellate Court to restore the appeal to its original number and determine the appeal with the material available on record and decide the same without being influenced by any of the observations made supra.

The issue with regard to adverse possession is already inbuilt in issue No.1 and the additional issue with regard to plea of necessary parties inbuilt in issue No.3 and therefore, they are inbuilt in issue Nos.1 & 3 and no separate trial is necessary and keeping this in mind appellate Court shall decide the appeal.

12. Accordingly, the appeal is allowed by setting aside the impugned order dated 30-06-2013 in A.S.No.34/2013 on the file of X Additional District Judge, Gurazala and the appellate Court shall restore the appeal and decide the same as

indicated in Paragraph No.11. Both parties shall bear their own costs.

13. As a sequel, miscellaneous petitions, if any, pending in this appeal, shall stand dismissed.

JUSTICE S. RAVI KUMAR

Date:19.01.2015

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