

HON'BLE SRI JUSTICE S. RAVI KUMAR

CIVIL MISCELLANEOUS APPEAL No.1253 of 2008

JUDGMENT:

This appeal is preferred against order dated 04.08.2008 in A.S.No.2 of 2002 on the file of Senior Civil Judge, Adoni.

2. Appellant herein is plaintiff in O.S.No.214 of 1998 on the file of Junior Civil Judge, Pattikonda, and the said suit is filed for injunction in respect of plaint schedule land. Trial Court on a consideration of evidence of PWs.1 to 3 and documents Exs.A.1 to A.9 on behalf of plaintiff and the evidence of DWs.1 to 4 on behalf of defendant besides Court documents Exs.C.1 and C.2, decreed the suit in favour of plaintiff and granted permanent injunction restraining defendant from cutting the bund between the land of plaintiff and defendant, which is shown as AB in the plaint plan. Aggrieved by the decree of trial Court, defendant preferred appeal and the first appellate Court by setting aside the judgment and decree of trial Court, remanded the case to trial Court for fresh disposal in accordance with law by giving opportunity to both parties to adduce evidence, if any. Questioning the said order of first appellate Court, plaintiff preferred the present appeal.

3. Heard both sides.

4. Advocate for appellant submitted that first appellate Court without appreciating the evidence on record and

observing that the trial Court's judgment is not intelligible still suffers from irregularities, which requires fresh decision and on that ground remitted back the case for fresh disposal. He further submitted for exercising power under Order XLI Rule 23 or 23-A C.P.C., the first appellate Court has to satisfy that the matter requires fresh consideration in respect of particular issues, but here in this case, the first appellate Court without recording any reasons remitted back the case to trial Court, therefore, the order of the first appellate Court is not in accordance with law as per the procedure contemplated under Order XLI C.P.C. He further submitted that as the first appellate Court has not appreciated the evidence afresh and not followed the procedure under Order XLI Rules 23 or 23-A C.P.C., the judgment of first appellate Court is liable to be set aside.

5. Advocate for respondent-defendant submitted that after filing of appeal, defendant and another person, who is on northern side, constructed bunds and nothing survives in the appeal and that appeal has to be dismissed.

6. Now the point that would arise for my consideration in this appeal is:

Whether the order dated 04.08.2008 in A.S.No.2 of 2002 on the file of Senior Civil Judge, Adoni, is legal, proper and correct?

POINT :

7. Admittedly, the suit is filed for the relief of permanent injunction to restrain defendant from cutting the bund, which is shown as AB in the plaint plan and the trial Court on a consideration of oral and documentary evidence, particularly the evidence of Advocate Commissioner and his report and plan, granted decree in favour of plaintiff. First appellate Court without appraising any evidence that was available on record, simply remitted back the matter by giving opportunity to parties to lead evidence as defendant filed petition under Order XLI Rule 27 C.P.C. to adduce further evidence. It appears, defendant has produced some photographs showing the inundation of water, resulting loss to his lands and crops and by seeing these photographs, first appellate Court remitted back the case. As rightly pointed out by advocate for appellant, first appellate Court can only remand the case when it is satisfied that there exist grounds mentioned in Order XLI Rule 23 or 23-A C.P.C. by recording reasons, but here first appellate Court only to enable defendant to adduce evidence remitted back the matter without recording on what issue such evidence is required. Further, when additional evidence is filed under Order XLI Rule 27 C.P.C., first appellate Court has two options, *firstly*, appellate Court itself can receive that evidence and appreciate the same and record a finding in respect of add evidence on entire issues, or *secondly*, it can ask the trial Court to receive the documents and record evidence

and send the same to the appellate Court with its finding and without availing these two options, first appellate Court simply remanded the case by setting aside the decree that is passed on appreciation of evidence.

8. For these reasons, I am of the view that first appellate Court has committed error in not following the procedure contemplated under Order XLI Rule 23 or 23-A C.P.C. so also procedure contemplated under Order XLI Rule 27 C.P.C.

9. In the light of above observation, appeal is allowed and the impugned order dated 04.08.2008 in A.S.No.2 of 2002 is set aside and first appellate Court is directed to decide the appeal afresh.

10. Miscellaneous petitions pending, if any, shall stand closed. No costs.

S. RAVI KUMAR, J

9th August 2016.

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