

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Miscellaneous Appeal No.608 of 2016

JUDGMENT:

The unsuccessful respondents 2 and 3 (defendants 2 and 3) preferred this CMA, under Order XLIII Rule 1 of the Code of Civil Procedure, 1908, ('the Code', for short) assailing the decree and judgment, dated 30.06.2016, of the learned XII Additional District Judge at Vikarabad, Ranga Reddy District, passed in AS.No.146 of 2012. The learned Additional District Judge while allowing the said first appeal set aside the decree and judgment, dated 30.06.2010, of the learned Senior Civil Judge, Vikarabad, passed in OS.no.187 of 2006 and remitted the said suit to the trial Court for disposal afresh after answering all the issues as well as the issues which were omitted to be answered by it.

2. I have heard the submissions of Sri G. Tirupati Reddy, learned counsel for the appellants-defendants 2 and 3, Sri K. Lakshmi Manohar, learned counsel for the respondents 1 and 2-plainiffs, and Sri K.V.V. Charya, learned counsel for the 3rd respdnt-1st defendant. I have perused the material record.

3. The parties shall hereinafter be referred to as the plaintiffs and the defendants as arraigned in the suit, for convenience and clarity.

4. The essential facts, which lead to the filing of this civil miscellaneous appeal by the defendants 2 and 3, in brief, are as follows:

The plaintiffs brought the suit for partition of the plaint schedule properties, by metes and bounds, into four equal shares and for allotment of possession of one such separated share each to the plaintiffs. The 1st defendant, who is the mother of the plaintiffs, remained ex parte. Defendants 2 and 3 filed a written statement resisting the suit. After full fledged trial, the trial court dismissed the suit. Aggrieved thereof, the plaintiffs preferred the

first appeal before the court of the learned XII Additional District Judge, Vikarabad. The first appellate Court allowed the said first appeal and, while setting aside the decree and judgment of the trial Court remanded the suit to the trial court for disposal afresh, as directed in its judgment. Aggrieved thereof the defendants 2 and 3 preferred this CMA.

5. As per settled law and as laid down in the decision in Jegannathan v. Raju Singamani and another¹, an appeal under Order XLIII Rule 1 (u) from an order of remand under Order XLI, Rule 23-A is maintainable. However, the said appeal under Order XLIII Rule 1 (u) can only be heard on grounds a second appeal may be heard under Section 100 of the Code. The settled position of law as laid down in the decision in Narayanan v. Kumaran² was echoed in the decision cited supra as follows: *“What has been held by this Court in Narayanan (2 supra) is that an appeal under Order 43 Rule 1 (u) should be heard only on the ground enumerated in section 100 of the Code. In other words, the constraints of Section 100 continue to be attached to an appeal under Order 43 Rule 1(u). The appeal under Order 43 Rule 1(u) can only be heard on the grounds a second appeal is heard under Section 100.”*

6. In this setting of facts and law, the point for determination in this civil miscellaneous appeal is – ‘whether the first appellate court is justified in setting aside the decree and judgment of the trial Court and remitting the matter to the trial court with a direction to decide the suit afresh subject to the directions in its judgment in the first appeal suit?.

7. The learned counsel for the defendants 2 and 3 would contend that the following substantial questions of law are involved in this appeal:

- (a) Whether the judgment and decree of lower appellate Court are in accordance with Order LXI Rule 31 of the Code?

¹ (2012) 5 Supreme Court Cases 540

² (2004)4 SCC 26

- (b) Whether the first appellate Court was justified in considering the Interlocutory applications filed by the 1st defendant for permission to file her written statement and lead additional evidence at the stage of first appeal, when admittedly she failed to make any claims before the trial Court having remained *ex parte* in the suit?
- (c) Whether the first appellate Court was justified in allowing the appeal and setting aside the decree and judgment of the trial Court and in remanding the matter with a direction to the trial Court to allow the 1st defendant to file a written statement and lead evidence when she did not avail that opportunity having intentionally remained *ex parte* in the proceedings before the trial Court?
- (d) Whether the first appellate Court is justified in giving an opportunity to the first defendant to file written statement and lead evidence, in the light of the facts that the first the appeal was preferred by the plaintiffs and not by the 1st defendant and that the first defendant who remained *ex parte* in the trial Court, did not prefer any appeal?

8. Learned counsel for the appellants/ defendants 2 and 3 while reiterating that the questions raised in this civil miscellaneous appeal are substantial questions of law contended as follows: -

Admittedly the plaintiffs claiming themselves to be the daughters of the 1st defendant and late Ramulu filed the suit for partition of the plaint schedule properties stating that the same belonged to late Ramulu and that they are entitled to a 1/4th share in plaint 'A' & 'B' schedule properties, which are landed properties and a house property respectively and *inter alia* alleged that the 2nd defendant is not a member of the joint family of late Ramulu and that the 3rd defendant is the illegitimate son of late Ramulu in view of the illegal contact he maintained with the 2nd defendant and that the plaintiffs 1 and 2, the 1st defendant and the 3rd defendant are entitled to a 1/4th share each in the plaint schedule properties. Defendants 2 and 3 admittedly resisted the suit by stating in their written statement that the 1st defendant, who is the first wife of Ramulu, was divorced by late Ramulu in the year 1965 and that she left the village after such divorce and resided with her parents at Tandur and that the plaintiffs are not the daughters of late Ramulu and that after divorcing the

1st wife, the 1st defendant herein, Ramulu married the 2nd defendant and that thereafter Ramulu lived with the defendants 2 and 3 and that after his death his property devolved upon the defendants 2 and 3 and that they became the pattadars and possessors of the property and that therefore the plaintiffs 1 and 2, who are falsely claiming to be the daughters of late Ramulu, are not entitled to any share in the properties. Admittedly, the 1st defendant remained *ex parte*. The plaintiffs, who are claiming to be the daughters of late Ramulu through the 1st defendant, did not examine her to substantiate their case that they are the daughters of late Ramulu and the 1st defendant. Therefore, on the failure on the part of the plaintiffs to establish that they are the daughters of late Ramulu, the trial court rightly held that the plaintiffs are not entitled to seek partition. The 1st defendant, who remained *ex parte* in the suit, did not support the case of her daughters, the plaintiffs. However, taking advantage of the fact that the plaintiffs filed the first appeal, she had filed two applications before the first appellate Court to permit her to file her written statement and lead evidence in the suit by pleading for the first time before the 1st appellate Court that she was earlier having disputes with her daughters, that is, the plaintiffs, and that she was with the defendants 2 and 3 and that the defendants 2 and 3 promised to take care of her defence also by engaging an advocate but they did not do so and they played fraud on her. The 1st appellate Court ought to have seen that the 1st defendant who remained *ex parte* in the suit and who did not prefer an appeal by stating that she is aggrieved of the decree and judgment of the trial Court is not entitled to seek any reliefs in the first appeal filed by the plaintiffs. Therefore, the 1st appellate Court committed a grave error in allowing the appeal and remitting the suit to the trial Court with directions to the trial Court to permit the 1st defendant to file written statement and lead evidence and then give an opportunity to both the parties to lead further evidence. The first appellate Court should have seen that the 1st defendant who intentionally remained *ex*

parte in the suit and who did not assail the decree and judgment of the trial Court by preferring an appeal, is not entitled to any reliefs under facts and in law. Therefore, the impugned remand order is unsustainable. Hence, the remand order is liable to be set aside with a direction to the 1st appellate Court to hear and dispose of the appeal on merits.

9. Per contra, learned counsel for the 1st defendant while supporting the impugned judgment of the 1st appellate Court, *inter alia*, contended as follows:

- 'The trial Court while not accepting the case of the plaintiffs recorded a categorical finding against the defendants 2 and 3 that they failed to establish their defence that there was a divorce between late Ramulu and 1st defendant. In that view of the matter, the first appellate Court was right in holding that the trial Court ought to have examined the question as to whether the 1st defendant, who is the wife of late Ramulu, is entitled to a share in the properties of late Ramulu and that the trial Court was in error in not examining the said issue and in simply dismissing the suit of the plaintiffs without examining the question as to whether the 1st defendant would be entitled to any relief in the suit for partition. The first appellate Court was right in considering the requests of the 1st defendant, as in a suit for partition every party is deemed to be a plaintiff and as the first appeal suit is a continuation of the suit. Therefore, the Court below was right in holding that the trial Court omitted to decide certain issues and in remitting the matter to the trial Court for fresh disposal in accordance with law. The contention of the defendants 2 and 3 that the divorce between late Ramulu and 1st defendant has taken place several decades prior to the suit and therefore it is impossible to establish such divorce cannot be countenanced. When the 1st defendant admittedly is the legally wedded wife of late Ramulu and when it is the case of the defendants 2 and 3 that there is a divorce between Ramulu and 1st defendant and that later Ramulu married the 2nd defendant, the legal burden is upon them to prove the said defence. However, the said defence is not established is noticeable from

the findings of the trial Court. Since the 1st defendant *bona fide* believed the defendants 2 and 3 and their words that they will take care of her defence in the suit by engaging an advocate and look after her interest also, she did not enter appearance in the suit. But they played fraud on her taking advantage of her illiteracy and the confidence reposed by her upon them. They did so with an intention to knock away the property by denying the rights of the 1st defendant. Therefore, the court below was justified in giving the 1st defendant an opportunity to file her written statement and contest the suit and in remanding the suit to the trial Court after setting aside the decree and judgment of the trial Court.'

10. The learned counsel for the plaintiffs would contend as follows: - 'At the earlier point of time, the 1st defendant, who is the mother of the plaintiffs, was sailing with the defendants 2 and 3. She being under the undue influence of the defendants 2 and 3 was not prepared at that time to support the plaintiffs. Hence, the plaintiffs could not examine her. The specific case of the plaintiffs and the 1st defendant is that there is no divorce between the 1st defendant and Ramulu. The specific case of the plaintiffs is that they are the daughters of late Ramulu and the 1st defendant. The trial Court committed grave error in ignoring the oral evidence of PWs1 to 5, who deposed that the plaintiffs are the children of late Ramulu through the 1st defendant, and also the exhibit A6, *bona fide* certificate of the 2nd plaintiff issued by the Headmistress concerned of the School wherein it is stated that Ramulu is her father. The trial Court was in error in dismissing the suit for non examination of the 1st defendant, who is by then opposed to the interests of her own daughters, and also the Headmistress who issued exhibit A6 *bona fide* school certificate. The trial failed to see that the said *bona fide* certificate issued by the school authorities is a public document and it required no further proof. The first appellate Court rightly allowed the first appeal preferred by the plaintiffs and correctly remitted the suit to the trial Court for fresh disposal.

By such an order of remand no prejudice is caused to the defendants 2 and 3 as their defence that Ramulu divorced his 1st wife, the 1st defendant, is disbelieved by the trial Court and as the plaintiffs are not denying the entitlement of the 3rd defendant to a share as he is the illegitimate son of Ramulu through the 2nd defendant.'

11. I have bestowed my attention to the facts and given earnest consideration to the submissions. From the facts and submissions, the following aspects emerge for consideration: - 'One Ramulu is the husband of the 1st defendant. The plaintiffs claiming to be the daughters of the said couple brought the suit for partition of the properties of late Ramulu. They, *inter alia*, contended in their plaint that Ramulu developed illicit intimacy with the 2nd defendant and the 2nd defendant gave birth to the 3rd defendant out of such illegal contact and that, therefore, the 3rd defendant is the illegitimate son of their father, Ramulu, and that their father died 25 years back. The plaintiffs also contended that since the 2nd defendant is not the legally wedded wife of late Ramulu and as she is only a mistress, she is not a member of the joint family and that, therefore, the plaintiffs 1 and 2 who are the daughters of late Ramulu and the 1st defendant, who is his wife, and the 3rd defendant, who is his illegitimate son, are entitled to a 1/4th share each in the plaint schedule properties. The 1st defendant remained ex parte. The defendants 2 and 3 filed a written statement stating, *inter alia*, that late Ramulu divorced the 1st defendant, his first wife, in the year 1965 and that at that time she left the village and went away and lived with her parents at their house at Tandur and that the plaintiffs are not daughters of late Ramulu and that after giving divorce to the first wife, late Ramulu married the 2nd defendant and that he lived with the 2nd defendant till his death and that after his death defendants 2 and 3 became pattadars and possessors of the properties left behind by late Ramulu. After full-fledged trial the trial Court dismissed the suit of the plaintiffs, *inter alia*, holding that the plaintiffs failed to establish that they are

the daughters of late Ramulu. The trial Court also observed that non examination of the 1st defendant, who is the mother of the plaintiffs, and also the Headmistress, who issued exhibit A6, *bona fide* school certificate of the 2nd plaintiff, is fatal to the plaintiffs' case. The trial court further held that the defendants 2 and 3 also failed to establish that the 1st defendant was divorced by her husband, late Ramulu. However, while dismissing the suit of the plaintiffs for partition, the trial court did not consider the issue as to whether or not the 1st defendant, who is admittedly the legally wedded wife of late Ramulu, is entitled to a share in the plaint schedule properties. The trial Court ought to have considered the said aspect in the light of its finding that the defendants 2 and 3 failed to establish their pleaded defence that late Ramulu divorced 1st defendant and then married the 2nd defendant.' Be that as it may.

11.1 In the first appeal filed by the plaintiffs, the 1st defendant, who remained *ex parte* in the trial Court, filed an interlocutory application under Section 107 read with Section 151 of the Code requesting to grant leave to her to file written statement and lead evidence in the suit by condoning her omission in filing the written statement before the trial Court. She also filed another application to receive additional evidence and sought permission to lead evidence in the suit. The 1st appellate court heard the said applications along with the appeal suit. The 1st appellate court considered her said requests having regard to the peculiar facts of the case, particularly in the light of the finding of the trial Court that the defendants 2 and 3 failed to establish that there was a divorce between late Ramulu and the 1st defendant and the further fact that the trial Court having recorded such a finding failed to examine the entitlement of the 1st defendant to a share in the plaint schedule properties. The 1st appellate court initially noted that the trial court dismissed the suit holding that the plaintiffs failed to examine the 1st defendant, who is their mother, and prove that they are daughters of late Ramulu and that the trial Court also *inter alia* recorded a finding that the defendants 2 and 3 also could

not establish that the 1st defendant is the divorced wife of late Ramulu. Then the 1st appellate Court went on to hold that the trial Court did not consider the question as to whether or not the 1st defendant, who is the wife of late Ramulu, is entitled to a share in the plaint schedule properties despite its finding that the defendants 2 and 3 failed to establish that late Ramulu divorced the 1st defendant and the settled legal position that in a partition suit every party defendant is also a plaintiff. For the said reasons and also for the reason that the 1st defendant, who remained *ex parte* in the suit, is permitted to file written statement and lead evidence, the 1st appellate Court allowed the first appeal of the plaintiffs and remitted the suit to the trial Court for fresh disposal.

12. In this context it is also necessary to refer to Rule 33 of Order XLI, which reads as under:

33 . Power of Court of Appeal— The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

From a reading of Rule 33 it is clear that the appellate Court has power to pass any decree or order as the case may be provided the parties are before the trial Court and as well as the appellate Court and the questions arise out of trial Court's judgment.

13. Before parting, it is necessary to state that the learned counsel for the defendants 2 and 3 contended that the Court below ought to have disposed of the first appeal of the plaintiffs on merits as the right of first appeal being a valuable right such right could not be taken away in a casual manner by disposing of the appeal in limine without going into and considering all the

points that arise for determination in the first appeal. In support of the said contention reliance was placed on the decision in Union of India v. K.V. Lakshman and others³. In the case on hand, defendants 2 and 3 are not the appellants. The plaintiffs are the appellants. The court below, without disposing of the appeal in limine ordered notices to the defendants-respondents in the appeal and all the respondents in the appeal entered appearance. After hearing both the sides, the Court below passed the judgment impugned in this civil miscellaneous appeal after adverting to the facts and the findings of the trial Court and also the failure on the part of the trial Court to consider the entitlement of the 1st defendant to a share in the properties of her husband in the light of the fact that a finding was recorded that the contesting defendants 2 and 3 failed to prove that there is a divorce between the 1st defendant and her husband Pamulu. Therefore, the decision is not helpful to the defendants 2 and 3, appellants herein.

14. On the above analysis, this Court finds that the 1st appellate Court is justified in setting aside the decree and judgment of the trial Court and remitting the suit to the trial court with a direction to decide the suit afresh subject to the directions in its judgment in the first appeal suit. Accordingly this Court holds that there is no substance in the questions that are raised as substantial questions of law in this civil miscellaneous appeal and that the contentions of the defendants 2 and 3 need no countenance being devoid of merit. The point and questions are answered accordingly against the defendants 2 and 3, the appellants herein.

15. In the result, the Civil Miscellaneous Appeal is dismissed confirming the decree and judgment in AS.No.146 of 2012 on the file of the learned XII Additional District Judge at Vikarabad, Ranga Reddy District, in all respects. Considering the fact that the suit is of the year 2006, the trial Court is directed

³ 2016(5) ALD 38 (SC)

to dispose of the suit as expeditiously as possible and preferably within a period of three (03) months from the date of receipt of a copy of this judgment.

Miscellaneous petitions, if any, pending in this appeal shall stand closed.

There shall be no order as to costs.

27th January, 2017
Vjl

M. SEETHARAMA MURTI, J

