

HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

CIVIL MISCELLANEOUS APPEAL No.1104 OF 2010

JUDGMENT:

Heard learned counsel for the appellant and learned counsel for the respondent.

This Appeal is preferred by the plaintiff challenging the order of remand passed by the learned Judge, Family Court-cum-Additional District and Sessions Judge, Vizianagaram in A.S.No.1 of 2009, dated 20.09.2010.

The appellant herein filed O.S.No.46 of 2000 on the file of the Senior Civil Judge, Vizianagaram, for declaration that the plaintiff was the absolute owner of the plaint schedule lands and for recovery of the same. Before the trial Court, the plaintiff besides examining herself as P.W.1, examined P.Ws.2 and 3 and marked Exs.A.1 to A.8. The defendant examined D.Ws.1 to 5, apart from marking Exs.B.1 to B.3.

The trial Court based on the pleadings framed the following issues.

1. Whether the plaintiff's marriage with Nagaraju is subsisting by the date of the death of Nagaraju?
2. Whether the Will is propounded by the plaintiff said to have been executed by Nagaraju is true, valid and binding?
3. Whether the plaintiff is entitled to the declaration as prayed for?
4. Whether D-1 is entitled to the protection U/s.53-A of the Transfer of Property Act?
5. Whether the plaintiff is entitled to the consequential possession of the schedule property?
6. To what relief?

While holding these issues in favour of the plaintiff, decreed the suit by Judgment and decree dated 23.10.2008. Against the said Judgment and decree, the second defendant preferred an Appeal before the learned Judge, Family Court-cum-Additional District and Sessions Judge at

Vizianagaram, in A.S.No.1 of 2009. The lower appellate Court framed the following points for consideration.

1. Whether the plaintiff's marriage with Nagaraju is subsisting by the date of death of Nagaraju, her husband?
2. Whether the Will is propounded by the plaintiff said to have been executed by Nagaraju is true, valid and binding?
3. Whether D.1 is entitled to the protection U/s 53-A of the Transfer of Property Act?
4. Whether the plaintiff is entitled to the declaration and consequential possession of the schedule property?
5. To what relief?

The lower appellate Court recorded a finding in favour of the plaintiff with regard to Point No.1, but while considering Point Nos.3 and 4 elaborately, observed as follows:

"But on a perusal of their evidence it appears, that having knowledge about the possession and enjoyment of the defendants over the suit schedule property they supported the case of the defendants. The village elders and the persons who hold crucial posts in the village are the proper persons to speak about the continuous holding possession and enjoyment of the Item No.1 of the plaint schedule property, but unfortunately, none of them were examined. It is the specific case of the second defendant that from the last forty years, he has been in possession and enjoyment of the plaint schedule property. Therefore, the relevant revenue records and cultivation accounts may be available to prove the same but unfortunately he could not summon any of them in order to examine the persons connected thereto. It is the case of the second defendant that they perfected title by adverse possession having obtained the same under agreement of sale. But no reliable document is placed other than Exs.B.1 to B.3. Had the father of second respondent really purchased the land under Ex.B.1 in the year 1966 itself, he must have exercised his rights as a owner of the property, if his possession was hostile to the real owner of the property. Merely because land revenue was not collected from the second defendant, in the circumstances, may not be a ground to disentitle the second defendant that he was not in possession and enjoyment of the property. The relevant revenue accounts may speak about the possession and enjoyment of the plaint schedule property by the respective

parties. Therefore, the observations made by the Court below that as the second defendant has not filed tax receipts and Pattadar Passbooks, he failed to prove his continuous possession and enjoyment over the suit schedule property, cannot be accepted. Since the relevant revenue records are available with the village officers concerned, if an opportunity is given to the second defendant to put forth his case in those lines, in the circumstances of the case, I am of the view that it would meet the ends of justice. Having regard to all these facts and circumstances and in view of the observations referred to supra, I am of the considered view that it is a fit case to be remanded to the Court below for fresh consideration after giving an opportunity to both sides to let in their evidence, if any, and to dispose of the same within six months."

Similarly, while considering Point No.2, the lower appellate Court remanded the matter to the trial Court for fresh disposal according to law, and observed as follows:

"The evidence of P.W.1 goes to show that her husband Nagaraju executed Ex.A.1, Will, bequeathing all his properties and it is an unregistered Will. P.Ws.2 and 3 are the attestors of Ex.A.1, Will, stated that Ex.A.1 was executed at the house of the scribe and they attested the document. It is the consistent case of the defendants that the executant of the Will has no right to execute a Will in favour of the plaintiff since the property was already sold by his mother about forty years ago and they are entitled to protection under Section 53-A of the Transfer of Property Act. It is further contention of the plaintiff that by virtue of inheritance also she got the property from her husband Nagaraju. In view of the contentions of both sides and made observations under Point No.3, it appears there are contrary with suspicious circumstances clouded with regard to the execution of the Will. Thus, in view of said observations made by me under point No.3, at this stage, I feel it is not just and proper to give any finding with the insufficient material facts available on both sides raised by them in respect of the contentions raised by them and hence the suit is liable to be remanded for fresh disposal according to law."

It is well settled that the power of remand cannot be exercised to fill up the lacuna in the evidence or to give one more opportunity to the parties. The reasons assigned by the lower appellate Court for remanding

the matter to the trial Court are not in consonance of the provisions of the Code of Civil Procedure as contained in Order XLI. In view of this, this Court has no hesitation to set aside the Judgment and decree in A.S.No.1 of 2009, dated 20.09.2010, and accordingly, the same is set aside.

The Civil Miscellaneous Appeal is accordingly allowed. Consequently, the matter is remanded to the learned Judge, Family Court-cum-Additional District and Sessions Judge, Vizianagaram, to restore A.S.No.1 of 2009 and dispose of the same in accordance with law after hearing both the parties on the basis of the evidence available on record, within a period of six months from the date of receipt of a copy of this order.

Consequently, miscellaneous petitions pending, if any, shall stand closed.

18.08.2017
pln



A.RAMALINGESWARA RAO, J