

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

* * * *

Civil Miscellaneous Appeal No.1141 of 2006

Between

Mohd. Ibrahim (died) per LRs
Smt. Raheemunissa Begum and another

..Appellants

And

Mohd. Abdul Hannan (died) per LRs
Sardar Begum and others

.. Respondents

JUDGMENT PRONOUNCED ON

: 22.08.2017



THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO :

1. Whether Reporters of Local newspapers : YES
may be allowed to see the Judgments?
2. Whether the copies of judgment may be : YES
Marked to Law Reporters/Journals?
3. Whether Their Ladyship/Lordship wish to : YES
see the fair copy of the Judgment?

* THE HON'BLE SRI JUSTICE A. RAMALINGESWARA RAO

+ Civil Miscellaneous Appeal No.1141 of 2006

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Smt. Raheemunissa Begum and another

..Appellants

Vs.

\$ Mohd. Abdul Hannan (died) per LRs
Sardar Begum and others

... Respondents

!Counsel for the Appellants : Sri B. Vijaysen Reddy

^ Counsel for Respondents : Sri K. Mahipathi Rao

< Gist :

> Head Note :

? Cases referred:

1. 1999 (4) ALD 41
2. 2005 (1) ALD 410
3. 2014 (2) ALD 739
4. (2002) 2 SCC 686



HON'BLE SRI JUSTICE A. RAMALINGESWARA RAO

Civil Miscellaneous Appeal No.1141 of 2006

Judgment:

Heard learned counsel for the appellants and learned counsel for the respondents.

This Civil Miscellaneous Appeal is preferred by the defendants in O.S.No.226 of 1985 on the file of the District Munsif, Mahaboobnagar. The said suit was originally filed by one Mohd. Abdul Hannan, who died during the pendency of the appeal and was pursued by the legal representatives, for declaration of title and for perpetual injunction in respect of an extent of 0.23 gts., in Survey No.9 and Ac.0.33 gts., in Survey No.10 of Mahaboobnagar village and taluk, Mahaboobnagar district. The suit was dismissed by judgment and decree dated 30.12.1996 and when the plaintiff filed an appeal in A.S.No.78 of 1998 before the learned II Additional District Judge, Mahaboobnagar, the same was allowed by judgment and decree dated 06.12.2006 by setting aside the judgment and decree in O.S.No.226 of 1985 and remanding the matter to the lower Court for fresh disposal. Challenging the same, the present Civil Miscellaneous Appeal was filed.

The trial Court framed the following issues for trial:

1. Whether the plaintiff is the owner and is in exclusive possession of the suit schedule lands and entitled to the relief of declaration and permanent injunction as prayed for?
2. Whether the vendor of the plaintiff by name Md. Ismail has got alienable right in the suit schedule lands?
3. Whether the father of defendant is the original purchaser of the suit land through registered sale deed dated 03.03.1953 from its original owner M.A. Wahid, S/o Md. Ismail and patta was mutated in his name?
4. To what relief?

The trial Court also framed the following additional issue:

1. Whether the vendor of the plaintiff has perfected the title by virtue of adverse possession in respect of suit lands before the alienation in favour of plaintiff?

All the issues were decided against the plaintiff and the suit was dismissed. Before the lower appellate Court an application for additional evidence was filed under Order 41 Rule 27 CPC in I.A.No.57 of 2006 and the same was allowed by condoning the delay in receiving the additional documents. The lower appellate Court held that the appellants explained the circumstances in which they could not produce the relevant documents during the trial stage and it was therefore necessary for the trial Court to consider the same. The lower appellate Court also held that the trial Court erred in not properly considering Exs.A44 to A47 which are important documents. It also observed that the evidence of PW.2, who stated that he was continuing in possession of the suit schedule land continuously without interruption for more than the statutory period and acquired by adverse possession, was not properly considered by the trial Court. Accordingly, it set aside the judgment and decree of the trial Court and remanded the matter to the trial Court.

Learned counsel for the appellants submitted that the reasons assigned by the lower appellate Court for remanding the matter are not proper and he relied on the decisions reported in *Midakanti Nagabhushana Reddy v. Midakanti Yellaiah*¹, *Kummari Jangaiah (died) per LR v. Somavarapu Savithri*² and *Sannapu Reddy Venkata Reddy v. Jillela Bhupal Reddy*³.

¹ 1999 (4) ALD 41

² 2005 (1) ALD 410

³ 2014 (2) ALD 739

Midakanti Nagabhushana Reddy's case (supra) did not arise out of a case for remand and hence the same is not applicable to the facts of the present case. It was a case of failure of the appellate Court to frame appropriate points for determination and recording its decision thereon.

Similarly, the case in Kummari Jangaiah (supra) was a case of consideration of various issues decided by the trial Court under a single point by the appellate Court. It also appears from the said judgment that the appellate Court has not set aside the judgment and decree of the trial Court, but remanded the matter to the trial Court by stating that the reasons assigned by the trial Court were not sound. In those circumstances, the order of remand was set aside and the lower appellate Court was directed to hear the appeal afresh.

Sannapu Reddy Venkata Reddy's case (supra) arise when the trial Court rejected the documents by giving due reasons and in the appeal when the lower appellate Court remanded the case to the trial Court on the ground that there was no discussion on exhibited documents, this Court by relying on a decision reported in P. Purushottam Reddy v. Pratap Steels Limited⁴ observed that the order of remand does not fall under any provisions of Rules 23, 23-A and 25 of Order 41 CPC. In those circumstances only the order of remand was set aside.

The remand by the appellate Court is governed by the provisions of Order 41 Rules 23, 23-A and 25 of CPC.

Rule 23 of Order 41 CPC deals with a case of remand by the appellate Court, when the suit was decided on a preliminary point, whereas, Rule 23-A of Order 41 CPC deals with the suits which were

⁴ (2002) 2 SCC 686

disposed of other than on a preliminary point. Rule 25 of Order 41 states that if the Court from whose decree the appeal was preferred omitted to frame or try any issue, or to determine any question of fact, which appears to the appellate Court essential to the right decision of the suit upon the merits, the appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred. The Rule says that in such cases the appellate Court shall direct the lower Court to take the additional evidence required. Such restriction is not placed in Rule 23-A. Hence, it is necessary to reproduce Rule 23-A and Rule 25 of Order 41 CPC for better appreciation.

“23A. Remand in other cases.- Where the court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a retrial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.”

“25. Where Appellate Court may frame issues and refer them for trial to court whose decree appealed from.- Where the court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the court from whose decree the appeal is preferred and in such case shall direct such court to take the additional evidence required; and such court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons there for within such time as may be fixed by the Appellate Court or extended by it from time to time.”

Since, in the present case, the appellate Court did not frame any issue and referred the matter to the trial court, the case falls under Rule 23-A.

Rule 23-A was inserted by Act 104 of 1976 pursuant to the Fourteenth Report of the Law Commission. A reading of the above Rule makes it clear that the satisfaction of the appellate Court for retrial is important.

The facts in P. Purushottam Reddy's case (supra) are that a contract for sale of immovable property was entered into between the parties on 31.10.1987. The contract was subject to obtaining requisite exemption or permission under the Urban Land (Ceiling and Regulation) Act, 1976. It was stipulated that it should be obtained by 30.06.1988. Since it was not obtained by that time, a letter was written on 01.12.1988 by the vendor informing that the agreement to sell stands cancelled and part of the advance money was returned agreeing to pay the balance advance money by the end of December 1988. After exchange of legal notices, a suit for specific performance was filed on 29.06.1989. The trial Court decreed the suit on 12.03.1992 and against the same, an appeal was preferred before the High Court on 19.08.1999. The High Court allowed the appeal and set aside the judgment and decree of the trial Court and remanded the case for holding additional trial on three additional issues framed by the High Court and thereafter to decide the case afresh. Against the said order, the vendor preferred an appeal. It was noticed by the Supreme Court that the High Court remanded the case by exercising its inherent powers. The Supreme Court said that inherent powers can be availed of *ex debito justitiae* only in the absence of express provisions in the Code. It was observed that the appellate Court should be circumspect in ordering the remand when the case is not covered either by Rule 23 or Rule 23A or Rule 25 of the CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore must be avoided. Since the High Court framed three points, it was held that neither Rule 23 nor Rule 23-A of Order 41 applied and only Rule 25 is applicable. Then the Supreme Court examined the three points framed by the High Court and held that the questions could have been gone into by the High Court and a finding could have been recorded on

the available material in as much as the High Court, being the court of first appeal, all the questions of fact and law arising in the case were open before it for consideration and decision. The Supreme Court also observed that if the parties went to trial with full knowledge about an issue, had ample opportunity to adduce evidence thereon and fully availed themselves of the opportunity, the absence of an issue is not a ground for remand. In view of the same, the Supreme Court allowed the appeal and the order of remand by the High Court was set aside.

In the instant case, the lower appellate Court remanded the case with the following observations:

“11.....During the pendency of the appeal before this Court an application for additional evidence under Order 41 Rule 27 of C.P.C. has filed by the appellant which remained undisposed off, and stated by my learned predecessor it can be called with A.S. The said petition was not disposed off, the appellant was not given sufficient opportunity by the lower court to produce the document in the trial court. I hold the petition I.A.No.57 of 2006 is allowed and the delay is condoned in receiving additional documents. The application for adduce evidence appear to the matter of considerable importance and should not have been kept in the file. The appellant have defended the suit *inter alia* on the ground that the plaintiff has got title. In their application the appellants have explained the circumstances in which they could not produce the relevant documents during trial stage and it was therefore necessary for the court to have considered the same proceedings to finally dispose off the appeal not having done so the judgment was set aside. In my view the case required reconsideration.

12. The learned counsel for the appellant has also placed before the court several documents which is material piece of evidence and circumstances I feel it is just and necessary to consider the documents. The lower court has not appreciated the documentary evidence in proper and perspective manner, because Ex.A.44 to A.47 are important documents for this case. It is to be those documents has to be further considered and further the lower court came to conclusion vendors of the plaintiff has no alienable rights in respect of the suit lands, but additional documents if considered the point can be decided fairly. Therefore, I feel these documents have to be considered even by lower court. After seeing the document of the lower court the lower court has not appreciated the documents Exs.A.32, A.43, A.44 to A.46A, 47-A and also evidence of the plaintiffs witnesses properly. Further the vendors of the plaintiff are entitled to alienate the suit schedule property in the capacity of legal heir of his father. Therefore an opportunity should be given to both the parties to lead further evidence and by considering the additional documents filed before this court. That the trial court failed to notice that the plaintiff was in possession and enjoyment over the suit lands on the strength of his own right in the

capacity of owner by paying land revenue to Government either cultivating personally or through tenant. In support of it, the plaintiff filed C.C. of Pahanies Exs.A2 to A11 and A35 to A41 as well as land revenue receipts, Exs.A12 to A25 and Ex.A33, A34 evidencing the payment of land revenue by PW.2 who is vendor of the plaintiff. Therefore, I remanded the matter for reconsidered these point in the suit. Further on behalf of the defendants side DW.1 has admitted the possession of father of PW.2 in respect of the suit schedule lands. According to this witnesses the suit lands were obtained as lease along with and after expiry of the lease the father of PW.2 delivered back possession to his father. The DW.No.1 in his cross-examination has clearly admitted that "I have not filed any document showing the redelivery of possession of the lands in Sy.No.3, 9 and 10 by Mohd. Ismail and sons company after the period of lease is over". From the said evidence it is clear that the vendor of plaintiff PW.2 continued possession over the suit land continuously without interruption for more than statutory period and acquired by adverse possession. All these aspects the lower court has not considered properly and the documents filed before this court also has to be considered by the lower court. Therefore, I feel it is just and necessary to allow the appeal by setting aside the judgment of the lower court by allowing the appeal. The lower court shall give fresh decision on issues according to law. The learned counsel for the appellant filed I.A.No.57 of 2006 to receive documents as additional evidence the same is allowed and these documents shall be marked by lower court, as bunch of documents were filed, all these documents to be marked as per law subject to proof and relevance. Therefore the matter is remanded to lower court for fresh disposal according to law and all the documents are certified copies of sale deeds, and after giving an opportunity to both the parties."

In view of the same, I am of the opinion that the case falls under Rule 23-A of Order 41 CPC and the order of the lower appellate Court can be held to be valid.

Accordingly, the Civil Miscellaneous Appeal is dismissed by upholding the order of remand of the lower appellate Court dated 06.12.2006. There shall be no order as to costs.

As sequel thereto, the miscellaneous petitions, if any, pending in this Civil Miscellaneous Appeal shall stand closed.

A. RAMALINGESWARA RAO, J

Date: 22nd August 2017
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