

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

Civil Miscellaneous Appeal No.1032 of 2014

JUDGMENT:

1) This Civil Miscellaneous Appeal is preferred by the appellant/defendant aggrieved by the decree and judgment dt. 01.09.2014 in A.S.No.47 of 2005 on the file of Senior Civil Judge, Tadepalligudem, whereby the learned Judge remanded the suit to the trial Court for fresh disposal with a direction to appoint a fresh advocate commissioner to demarcate the property of both parties and to find out the alleged encroachment, if any.

2) The factual matrix is that the respondents/plaintiffs filed O.S.No.191 of 1999 on the file of Principal Junior Civil Judge, Tadepalligudem, against the defendant, seeking reliefs of vacant possession of Ac.0.03 cents in Item No.4 of plaint schedule property after ejecting the defendant, and for permanent injunction restraining the defendant and his men from interfering with their peaceful possession and enjoyment in respect of plaint schedule property. The defendant contested the suit. After full fledged trial, the trial Court, having found that the plaintiffs failed to prove the alleged encroachment, dismissed the suit. Aggrieved, the plaintiffs filed A.S.No.47 of 2005 on the file of Senior Civil Judge, Tadepalligudem. The appellate Court, having been dissatisfied that the commissioner's report was not specific whether there was an encroachment made by

the defendant or not, remanded the suit to the trial Court for a fresh disposal after appointing a fresh advocate commissioner.

Hence, the defendant/appellant preferred the instant C.M.A.

3) Pending disposal of CMA, respondent No.2/plaintiff No.2 died and his L.Rs were brought on record as respondent Nos. 3 to 8, as per Order dt. 25.07.2016 in CMA MP No.325 of 2015.

4) Heard Sri T. Durga Prasada Rao, learned counsel for the appellant and Sri S. Subba Reddy, learned counsel for the respondents.

5) The main plank of argument of learned counsel for appellant is that if the appellate court found that the commissioner's report was lopsided and wanted to scrap the same, it should have done it by itself without remanding the matter to the trial Court for disposal of the suit afresh. He further argued that the remand is a drastic order, which the Court should sparingly pass only when the conditions mentioned either in Order 41 Rule 23 CPC or Order 41 Rule 23-A CPC were satisfied, which is not the case in the present instant, and therefore, Order of the appellate court in remanding the matter for fresh disposal of the suit is quite unwarranted and against the principles of law. He further argued that without finding fault with the judgment of the trial Court, the appellate court has, by virtue of the remand order, set aside the said judgment. The learned counsel cited number of citations on the aspect when the appellate Court can remand the matter to the trial

Court. He, thus, prayed to allow appeal and set aside the Order of the lower appellate court.

6) Sri S. Subba Reddy, learned counsel for respondents, fairly admitted that the appellate's Court remand order fell foul of Order 41 Rule 23 CPC and 23-A CPC and prayed to give a suitable direction to the lower appellate Court.

7) In the light of the above rival arguments, the point that arises for determination is:

“Whether the Judgment of the lower appellate court in remanding the suit to the trial Court for fresh disposal is legally sustainable?”

8) **POINT:** Order 41 CPC specified two instances when the appellate Court can remand the matter to the trial Court. Those instances are covered under Order 23 CPC or Order 23-A CPC, which are thus:

“Order 23: REMAND OF CASE BY APPELLATE COURT : where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand”.

“ Order 23-A: 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 re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23”).

9) Now from a perusal of the impugned judgment, the appellate court remanded the matter on the main observation that advocate commissioner did not demarcate the property of plaintiffs and defendant and came to the wrong conclusion. On this observation, it directed the trial Court to dispose off the suit afresh by appointing afresh commissioner to demarcate the property of both parties and note the alleged encroachment, if any. Hence, the question is whether the order of remand is legally justified?

10a) It is evident that the appellate court has not disposed off the suit on preliminary issue and therefore, Order 41 Rule 23 CPC has no application.

b) Coming to Order 41 Rule 23-A CPC, in order to remand a matter under this provision, two conditions have to be satisfied; (1) the trial Court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a re-trial is considered necessary (Vide judgment in *P. Purushottam Reddy and another v. Pratap Steels Limited (AIR 2002 SC 771)*). The second condition is not satisfied in the instant case since the lower appellate court has not given any reasons why re-trial was necessary and therefore there was

no occasion for the appellate court to remand the matter under Order 41 Rule 23-A CPC also. If the lower Appellate Court wanted that a fresh advocate commissioner should be appointed, that exercise should have been done by the appellate Court itself and dispose of the appeal. Therefore, the Judgment of the lower appellate Court is legally not sustainable.

11) In the result, this Civil Miscellaneous Appeal is allowed and the Judgment dt.01.09.2014 in A.S.No.47 of 2005 on the file of Senior Civil Judge, Tadepalligudem, is set aside. The lower appellate Court, if consider necessary, shall appoint a fresh advocate commissioner and after obtaining the report, dispose off the appeal on merits within three months from the date of receipt of a copy of this Order.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

U. DURGA PRASAD RAO, J

Date: 18.01.2017

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