

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL MISCELLANEOUS APPEAL No. 34 OF 2015

JUDGMENT:

This appeal under Order XLIII Rule 1 (u) of CPC is filed by the appellant-plaintiff challenging the order of remand dated 12-08-2014 passed by learned XI Additional District and Sessions Judge, Tenali (for short, 'the Court below'), in A.S.No. 327 of 2012 on the grounds that the Court below, though considered the evidence, without any specific purpose remanded the matter so as to enable the respondents-defendants to establish their claim obviously for different reasons; that when the evidence on record is sufficient, the Court below ought not to have remanded the suit to the trial Court and the Court below would have decided the appeal on merits and that the reason assigned by the Court below does not attract Order XLI Rule 23-f or Rule 23-A of CPC.

2. At the hearing, learned counsel for the appellant while reiterating the contentions would draw the attention of this Court to the evidence on record *i.e.* depositions of P.Ws.1 to 4 and D.Ws.1 and 2 and placed reliance on ***Vidya Sagar Cole (died) and others Vs. J.Balaji Singh and another***¹.

3. Whereas learned counsel for the respondents supported the order in all respects.

4. As seen from the material on record, the appellant filed suit O.S.No. 169 of 2005 on the file of the Court of Principal Senior Civil Judge, Tenali (for short, 'the trial Court'), against the respondents for recovery of possession of Ac. 0.03 cents out of Ac. 0.04 cents and put her in possession of the same. The trial Court by decree and judgment dated 23-07-2012 decreed the suit directing the

¹ 2013 (6) ALD 519

respondents to vacate and deliver vacant possession of the subject site. Aggrieved by the same, respondent No. 1 preferred the abovementioned appeal. The Court below by the impugned judgment remanded the matter to the trial Court for proper adjudication. Feeling aggrieved, the present revision is filed.

5. When the suit is filed for recovery of possession and put the appellant in possession of the property, it is for her to prove her title to the property and encroachment of Ac. 0.03 cents out of Ac. 0.04 cents by the respondents without any lawful right. The appellant produced voluminous oral and documentary evidence to substantiate her claim. In addition to that, commissioner was appointed by the trial Court and Ex.C1 report and Ex.C2 plan were marked through him. Unless the report of the commissioner is set aside based on any objections filed by any of the parties thereto, the report is to be taken into consideration as part of record of the trial Court. If, for any reason, the Court below finds that there is any lacuna in the report and inspection of the property by the commissioner is required again for elucidation of facts, the Court below may issue such direction to the same commissioner, re-entrust the warrant or appoint any other commissioner afresh, for the limited purpose, *suo motu*. Instead of resorting to such procedure, the Court below remanded the matter to the trial Court.

6. In similar circumstances in ***Vidya Sagar Cole*** (1st *supra*), this Court considered the scope of Order XLI Rules 23 and 23-A of CPC with the approval of the earlier judgment in ***K.Sriramulu Vs. K.V. Radhakrishna Murthy***² and held that an order of remand made without coming to a conclusion that the decision of the trial Court is wrong and that it is necessary to reverse or set aside the decree, is illegal; that the appellate Court has to consider the evidence on

² 1985 (2) ALT 534

record and then has to arrive at a conclusion whether the finding recorded by the trial Court cannot be supported by evidence on record; and that in considering whether the remand is necessary or not, the conduct of the parties has to be considered i.e., whether they had sufficient opportunity to adduce evidence at the trial Court or not. It also held that there is a clear danger that in such cases a remand order may in effect be an invitation to perjury; that the provisions of Order 41 Rule 23 of CPC are not intended to circumvent the provisions of Order 41 Rule 27 of CPC; and that by merely using the formula "in the interest of justice", an otherwise unjustifiable remand cannot be clothed with an air of legality. In the present facts of the case, the Court below did not record any finding as to the reasons for necessity to set aside the decree and judgment of the trial Court but afforded an opportunity to the parties to adduce further evidence circumventing the law and such direction is impermissible under law and therefore the judgment of the Court below is liable to be set aside.

7. The civil miscellaneous appeal is allowed setting aside the decree and judgment dated 12-08-2014 passed in A.S.No 327 of 2012 on the file of the Court below and the Court below is directed to decide the appeal afresh considering the material available on record and if the Court below finds any difficulty to decide the appeal effectively, it may re-entrust the warrant to the same commissioner or appoint any other commissioner for limited purpose and decide the appeal in accordance with law keeping in mind the observations made hereinbefore. Pending miscellaneous petitions, if any, shall stand closed in consequence. No costs.

Date: 13-11-2018.

JSK

M.SATYANARAYANA MURTHY, J.