

(2008) 02 KAR CK 0051

In the Karnataka High Court

Case No : Regular Second Appeal No. 402 of 2001

B. Chandravathi Shetty and W/o Muddanna Shetty (since dead by L.Rs., Smt. Hemalatha Shetty, Mr. Devidas Shetty and Mr. Ajith Shetty) and B. Prafulla Shetty and W/o S. Raghu Shetty

APPELLANT

Vs

B. Seetharama Shetty and B. Vishwanth Shetty

RESPONDENT

Date of Decision : 21-02-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 105 (2)

Citation : (2008) 2 KCCR 1029

Hon'ble Judges : V. Jagannathan, J

Bench : Single Bench

Advocate : S. Shanker Shetty, for the Appellant; Padubidri Raghavandra Rao, for the Respondent

Final Decision : Dismissed

Judgement

V. Jagannathan, J.—This second appeal involves short but important questions of law apart from the ones framed by this Court while admitting the appeal. The first question is whether the lower appellate court could have disregarded the directions given to it by this Court while remanding the matter on the ground that the said directions are nullity or non-existent in the eye of law and secondly, whether a court of co-ordinate jurisdiction can go beyond the earlier final decision of its predecessor before remand. These and other related questions call for an answer in this second appeal.

2. The facts giving rise to this judgment, briefly stated, are to the effect that the appellants herein, who were the plaintiffs before the trial court in O.S. No. 292/1983, filed the suit in question for permanent injunction against the defendant, who happens to be the brother of the two appellants, and it was the case of the appellants that the items mentioned in suit Schedule "A" belonged to them following their father Loku Shetty executing a well dated 24.7.1974 and the

appellants, consequent to the bequest made in their favour, took possession of the suit items. As the defendant interfered with the possession and enjoyment of the suit schedule properties, the appellants were constrained to institute the suit as aforesaid for the relief of permanent injunction.

3. Defendant Seetharama Shetty contested the said suit contending that he has been in possession of 65 cents in S. No. 42/6, 51 cents in S. No. 42/4, 6 cents in S. No. 50/9B, 31 cents in S. No. 30/10 and 7 cents in S. No. 27C/2B and the entire item No. 3 of Schedule "A" properties and the rest of the Schedule "A" were in possession of his brother Vishwanath Shetty. Further, he also claimed the said suit items S. Nos. 42/6 and 42/4 on the basis of a common order passed by the Land Tribunal in his name and also in the name of his father Loku Shetty. He also denied execution of the will by his father and bequeath of the suit item "A" in favour of the appellants.

4. The said pleadings of the parties in essence led the trial court to frame trial issues which required the appellants to prove that they were in lawful possession of the suit properties and that they are entitled to permanent injunction. After considering the evidence placed by the respective sides, the trial court came to the conclusion that the appellants had failed to prove that they were in possession of the suit properties and secondly, the appellants were also not able to establish execution of the will by Loku Shetty. As a result of the said conclusion reached, the suit of the appellants was dismissed.

5. Aggrieved by the dismissal of the suit, the appellants preferred an appeal before the higher appellate court in R.A. No. 21/1987. The judgment and decree of the trial court was set aside and the appellants were granted the relief of permanent Injunction sought for by them against defendant Seetharama Shetty. The decision of the lower appellate court gave rise to Regular Second Appeal No. 564/1969 being preferred by the defendant and a learned judge of this Court, by his judgment dated 9.9.1997, disposed of the second appeal by remanding it to the lower appellate court with the following directions:

17. However, in view of the divergent findings rendered by the courts below, I feel that opportunity should be given to the parties herein to prove the genuineness and validity of the Will. For such disposal, the other son Vishwanatha Shetty also in a necessary party. The plaintiffs must implead the other son also as a party to the proceeding before the first appellate court. If the first appellate court, after further enquiry, comes to the conclusion that the Will is genuine, then the suit of the plaintiffs may be decreed as prayed for. But, however, if it is found that the Will is not genuine, then the first appellate court is directed to pass a decree for partition declaring that in all the properties, the parties are entitled to 1/4th share each and the preliminary decree for partition shall follow.

18. Subject to the above direction, the second appeal is allowed and the matter is remitted back to the first appellate court for disposal in the light of the

observational above made. The parties are directed to appear before the first appellate court on 12.11.1997.

6. After remand as aforesaid, the lower appellate court took up the matter and framed two issues which are:

- i) Whether the plaintiffs/appellants prove that Loku Shetty executed the Will dated 24.7.1974 and that the said Will is true and valid?
- ii) Whether the plaintiffs/appellants further prove that they are put in possession in the year 1978?

Both the parties were given opportunity to adduce evidence in roe pact of the two issues framed as above and P.W.3 was cross-examined and D.W.3 was also examined. After considering the entire material on record, the learned judge of the lower appellate court concurred with the findings recorded by the trial court at the first instance and also took the view that the appellants herein had failed to establish execution of the will Ex.P-18 and, therefore, they are not entitled to the relief of permanent injunction and following the directions given by this Court while remanding the matter, the lower appellate court held that all the parties are entitled to 1/4th share each in the suit properties and accordingly, the appeal, insofar as the prayer for permanent injunction is concerned, came to be dismissed by confirming the order of the trial court. But, at the same time, the appellants as well as respondents-1 and 2 were held to be entitled to 1/4th share each in the suit "A" schedule properties by metes and bounds and also issued direction for drawing up of the preliminary decree.

7. Aggrieved by the dismissal of the appeal insofar as the prayer for permanent injunction is concerned and also Aggrieved by the lower appellate court upholding that the appellants as well as the respondents are entitled to 1/4th share in suit "A" schedule property, this second appeal has been preferred.

8. I have heard the submissions made by the learned Counsel Shri Shaker Shetty for the appellants and the learned senior Counsel Shri Padubidri Raghvendra Rao for the respondents. I have also carefully perused the entire material placed on record.

9. The first contention put forward lay the learned Counsel for the appellants is that the lower appellate court could not have granted the decree for partition when the suit filed by the appellants was only for grant of the relief of per mark at injunction. In other words, without there being any pleadings, issues and evidence placed leading to partition, the lower appellate court had no jurisdiction to pass the decree for partition notwithstanding the fact that this Court, while remanding the matter, had given certain directions to the lower appellate court. Therefore, it is contended that the decree passed by the lower appellate court is a decree in nullity and without Jurisdiction, the lower appellate court ought not to have followed the directions given by this Court while remanding the matter because, the order passed by this Court while remanding the matter and the

directions given therein are also without jurisdiction and non-existent in the eye of law, Therefore, the lower appellate court ought not to have followed the directions given to it by this Court while remanding the case earlier.

10. It is further contended by the learned Counsel for the appellants that this Court also could not have passed the order as was done in the instant case and could not have given directions to the lower appellate court to partition the suit "A" schedule property among the parties if the will was not proved, Therefore, the entire proceedings subsequent to such a direction being given by this Court while remanding the matter becomes void and, as such, the judgment and decree passed by the lower appellate court cannot be sustained in law.

11. As far as the merits of the case concerning execution of the will Ex.F-18 are concerned, it is the submission of the learned Counsel for the appellants that the lower appellate court committed serious error in taking the view that there are suspicious circumstances surrounding the execution of the will and there was no such scope for the lower appellate court to draw such an inference particularly when the Appellants having produced the will Ex.P-18, also examined the attestors to the said will. As far as the lower appellate court's finding that the defendant was not given any property and that every thing was given to the appellants is concerned, the said view is erroneous because, a look at the schedule to the will Ex.P-18 and also to the bequest made in the will make it clear that Loku Shetty did bequeath certain items in favour of his sons also apart from giving suit "A" schedule properties to his daughters i.e., the appellants herein. Therefore, having regard to the evidence on record and second respondent Vashwanatha Shetty taking up inconsistent contrary stand, as could be seen from his affidavit filed before the lower appellate court, the learned judge of the lower appellate court could not have held that the appellants have failed to prove execution of the will Ex.P-18. Since the conclusions reached by the lower appellate court are not based on the evidence on record, but being contrary to the evidence placed, the persons findings of the lower appellate court can be interfered with by this Court in second appeal having regard to the scope of Section 100 of the C.P.C.

12. As far as the non-questioning of the order passed by this Court while remanding the matter on 9.9.1997 is concerned, it is submitted that the said order is not an appealable order having regard to the various provisions of the C.P.C. and, therefore, it is permissible for the appellants even now to question the said directions given at an earlier stage while the matter was remanded. In other words, even in a collateral proceedings, the question can be raised as to an order or decree passed previously being without Jurisdiction or non-existent in the eye of law. The last submission made by the learned Counsel for the appellants is that an application has been filed for leading additional evidence for the purpose of getting the signatures of the attestors to the will being marked and, therefore, it is necessary to permit the appellants to lead additional evidence with regard to the will Ex.P-18.

13. In support of the above submissions, the learned Counsel for the appellants placed reliance on the decisions reported in Madhukar and Others Vs. Sangram and Others,

14. Sri Padubidri Raghavendra Rao, learned senior Counsel for the respondents, in contrast to the contentions put forward by the appellants counsel, argued that the directions given by this court while remanding the matter on 9.9.1997 had become final and the appellants, if aggrieved by the said directions, ought to have preferred an appeal against the said order. But, no such appeal was filed and consequently, having regard to Section 105(2) of the C.P.C., the appellants are now precluded from questioning the correctness of the order passed by this Court while remanding the matter. It was submitted in this connection that this Court did not frame any issues, but on the other hand, directed the lower appellate court to frame the issues revolving execution of the will Ex.P-18 by Loku Shetty and afterwards, by giving both sides opportunity to lead evidence with regard to the issues framed, to dispose of the matter by allowing the appeal filed by the appellants if the will Ex.F-48 was proved and, if not, to allot to each one of the parties their share in the suit schedule properties. Therefore, this Court, while remanding the matter, had not exceeded its jurisdiction and as the appellants did not prefer any appeal against the said order of remand, it is not now open to them to contend before this Court once again during the course of the same proceedings that the earlier order passed has to be ignored by this Court.

15. It was then submitted by the learned senior Counsel for the respondents that as far as the lower appellate court is concerned, following the directions given by this Court, there was no other alternative left to the learned judge of the lower appellate court than to follow the directions. As such, the lower appellate court has rightly followed the directions given to it and hence, no fault can be found with the order passed by the lower appellate court. In this context, it was also argued by the learned senior Counsel that if the lower appellate court had not obeyed the orders of this Court, which is a superior court, then, there will be no sanctity at all for the orders passed by the higher courts and the said act on the part of the learned judge of the lower appellate court would also attract contempt proceedings for not following the directions given by the superior court.

16. As far as the relief granted by the lower appellate court is concerned, the submission made by the learned senior Counsel is that the prayer in the suit filed by the appellants also indicates that apart from the prayer of permanent injunction being sought, there was also a general prayer for grant of such other reliefs and, therefore, the courts will have to take into consideration that the real object of the courts of law is to order justice to the parties and, as such, the lower appellate court had the power to mould the relief. Therefore, no fault can be found even with regard to the relief granted by the lower appellate court pursuant to the directions given by this Court. Even otherwise, it was submitted that the parties were fully aware of the nature of the controversy between them

and having understood the bone of contention that was in existence between them, the evidence was also let in by both sides and both the courts below have referred to the said evidence and, therefore, it is impermissible for the appellants to contend at this stage that there were no pleadings nor any issues framed in regard to execution of the will Ex.P-18.

17. As far as the will Ex.P-18 is concerned, the learned senior Counsel, by referring to the entire evidence on record as well as to the reasons given by both the courts below, submitted that there are several suspicious circumstances which cumulatively load to the inference that the will Ex.P-18 is not a genuine will executed by Loku Shetty. In support of the said submission, the learned senior Counsel referred to the evidence to submit that a plain look at the signatures found in Ex.P-18 will leave no one in doubt as to the difference in the signatures of Loku Shetty in each page of the will and overwriting to very clear. Apart from this, though the appellants have examined the attestors before the court below, the signatures of the attestors have not been marked and so also the signatures of Loku Shetty in the will has not been marked through the said witnesses. All these circumstances, coupled with the fact that the will also mentions about the desire of Loku Shetty to effect partition of the suit properties among his children, it is difficult to accept the appellants' case that Loku Shetty had bequeathed all the items in suit "A" schedule properties in their favour, these circumstances taken together have led both the courts below not to accept the will Ex.P-18 as a genuine will or for that matter, the said will being above suspicion. Therefore, the view taken by the lower appellate court cannot be termed as perverse.

18. The next submission made by the learned senior Counsel for the respondents is that, as this Court is sitting in second appeal over the judgment of the lower appellate court, no interference is called for in respect of concurrent finding of facts even if the said finding on facts is erroneous. As for as the order of remand being not an appealable order is concerned, the learned senior Counsel repelled the argument advanced in this regard by the appellants' counsel by referring to Order 41, Rule 23-A of the C.P.C. to submit that the order of remand that was passed falls within the ambit of Rule 23-A of Order 41 and an appeal, therefore, is permissible against the said order under Order 43 Rule 1(u). And such, the appellants having not taken any steps to question the order passed earlier while remanding the matter, it is not now open to the appellants to contend that the earlier order passed is incorrect or that it is without jurisdiction.

19. As far as the application filed for leading additional evidence is concerned, the learned senior Counsel submitted that, no such permission can be granted for the purpose of enabling the appellants to fill in any lacuna in their case.

20. In support of the above submissions, the learned senior counsel for the respondents placed reliance on the decisions reported in Hindalco Industries Ltd. Vs. Union of India (UOI) and Others,

21. Having heard the contentions put forward as above by the learned Counsel for the parties and also having regard to the important questions of law which have arisen in this case and has been referred to by me in the very opening paragraph of this judgment and also having regard to the substantial questions of law framed by this Court while admitting this appeal, the following points arise for consideration:

i) Whether a court of coordinate jurisdiction can go beyond the final decision of its predecessor?

ii) Whether the lower appellate court could have disregarded the directions given to it by this Court while remanding the matter on the ground that the said directions/order is a nullity or non-existent in the eye of law?

iii) Whether the order passed by this Court while remanding the case can be said to be an appealable order or not?

iv)(a) Whether the first appellate court is right in recording a finding in holding that late Loku Shetty has executed the will in auspicious circumstances though the suit property is bequeathed in favour of the plaintiffs, defendants and six grand-children as per the will?

(b) Whether the first appellate court was right in recording a finding holding that the will not proved ignoring the substantive material evidence on record?

Point No. (i)

22. The first contention of the learned Counsel for the appellants is that this Court issued the directions as it has done while remanding the matter on 9.9.1997 and the said directions being without jurisdiction, therefore, non-existent in the eye of law and hence, this Court can now go into that very aspect in this appeal. As far as this contention is concerned, it has to be said straightaway that the order passed while remanding the matter earlier and the directions given therein have become final in the sense, the appellants have not questioned the said directions given. In the instant case, it is clear from the order of remand that a court of coordinate jurisdiction had directed the lower appellate court to enquire into the genuineness of the will and if the court came to the conclusion that the will is genuine, then the suit of the plaintiffs be decreed and if it not found to be a genuine will, then, the first appellate court was directed to pass a decree for partition declaring all the parties being entitled to 1/4th share. It is with this specific direction, this Court had remanded the matter and, in the course of its order, it had also observed that the will, prima facie, does not appear to be a will without any cloud attached to it. Having made the said observations and also in view of the divergent findings rendered by the courts below, this Court was of the view that both the parties should be given opportunity to prove the genuineness and validity of the will and for the said purpose, the other son Vishwanatha Shetty is also a necessary party.

23. The appellants have not questioned the above said findings of this Court

while remanding the case. In such a situation, whether one again it is open for this Court of coordinate jurisdiction to go beyond the earlier order is to be answered. The decisions cited by the learned senior Counsel for the respondents throw light on this aspect. In the case of Dilip Kumar Roy and others Vs. Panchkari Sinha and others, , it has been observed thus:

If the appellate court remands a case to the lower court, none of the matters finally disposed of by the order of remand can be reopened, when the case comes back from the lower court; but if at the time of remand no final decision is given on a point, though some observations only are made in respect of it, it is open to a court of co-ordinate jurisdiction, when finally determining the case, to come to its own conclusion in it, and even in a case decided by the High Court, if a Judge of appeal decides certain points and remands the case, his decision is binding on his successor before whom the case comes up again from the judgment after remand, because such a court is a court of coordinate jurisdiction and, therefore, he cannot go beyond the earlier final decision of his predecessor before remand.

24. A Division Bench of the Patna High Court, in the case of Sunder Ahir and Others Vs. Mt. Phuljharia and Another, , has dealt with the question relating to power of the appellate to go behind its earlier finding and has, in the process, referred to the guiding principles. The said principles are as under:

(1) that if a bench of the High Court remands a case to the lower court under its inherent powers, the matters finally disposed of by the order of remand cannot, any of them, be reopened, when the case comes back from the lower court, but, if at the time of remand, no final decision is given on a point, though some observations only are made in respect of it, it is open to another bench, a court of co-ordinate jurisdiction, when finally determining the case, to come to its own conclusions on it; and

(2) that even in a case, decided by the first court of appeal other than a case, decided by the High Court, if a judge on appeal decides certain points and remands the case, his decision is binding on his successor, before whom the case comes up again on appeal from the judgment after remand, because such a court is a court of co-ordinate jurisdiction, and, therefore, he cannot go behind the earlier final decision of his predecessor before remand.

His test, to ascertain if a particular finding given by the judge on appeal is a final decision or no, is to find out, if, by the order of remand, the judge on appeal, has remanded the suit for determination of all the points at issue, or, it has determined some points in controversy, and remanded the suit for determination of the remaining points, which may include the question of maintainability of the plaintiffs' suit itself, in which case the decree of the first court has to be act aside, and the suit remitted to the court below for a fresh decision of the case according to law.

Where the first appellate court finally decided all the questions in favour of the

plaintiffs, and on those findings it was established that the plaintiffs had subsisting title and that the suit was not time-barred but in its opinion plaintiff's suit for partition without relief for recovery of possession was not maintainable and therefore to give the plaintiff an opportunity to pay necessary court-fee remanded the case.

25. In the case of Smt. Lalbati Kuer Vs. Satchitanand Verma and Others, , a Division Bench of the Patna High Court has observed that if the High Court, in second appeal, remands a case to the tower court, the matter finally disposed of by the order of remand cannot be reopened when the case comes back from the lower court on the principle of constructive res judicata.

26. In the light of the aforesaid position in law, I am of the opinion that this Court cannot go beyond the final decision taken by a Bench of co-ordinate jurisdiction while remanding the case and, as such, the first contention put forward by the learned Counsel for the appellants has to fail.

Point No. (ii)

27. The learned Counsel for the appellants, placing reliance on a decision of the Supreme Court in the case of Kiran Singh and Others Vs. Chaman Paswan and Others, , contended that where the decree passed is without jurisdiction and hence a nullity, the same can be questioned in other proceeding and even in a collateral proceeding and, therefore, the lower appellate court could not have followed the directions given by this Court, while remanding the matter. As far as this contention is concerned,, it has to be mentioned at the outset that the lower appellate court is an Inferior court to this court and, therefore, the question of the lower appellate court not following the directions given by a superior court will and cannot arise, having regard to the hierarchy of courts in our judicial system.

28. In the case of Smt. Ramabai and Others Vs. Harbilas and Others, , it has been held that under the order of remand passed by the appellate court, the trial court has limited jurisdiction depending upon the terms of remand order and it can decide the suit only in view of the direction issued by the appellate and it is well settled that the court to which the case is remanded has to comply with the order of remand and acting contrary to the order of remand is contrary to law and further, the order of remand had to be followed in its true spirit.

29. The Apex Court, in the case of Commissioner, Karnataka Housing Board v. C. Muddaiah reported in (2007) 7 SCC 689, held that where the order passed by a Single Judge of High Court in earlier writ petition, directing the appellant-Board to reassign seniority of respondent-employee and pay him consequential benefits, had attained finality, the Board cannot disobey the said order on the ground that no direction in respect thereof could have been passed. Having said thus on the facts of the case, the Apex Court also made the following observations:

Once a direction is issued to a competent court, it has to be obeyed and implemented without any reservation. If an order passed by a court of law is not complied with or is ignored, there will be an end of the rule of Law. If a party against whom such order is made has grievance, the only remedy available to him is to challenge the order by taking appropriate proceedings known to law. But it cannot be made ineffective by not complying with the directions on a specious plea that no such directions could have been issued by the court. Upholding of such argument would result in chaos and confusion and would seriously affect and impair administration of justice.

30. Keeping in view the above proposition of law laid down by the Apex Court and other High Courts, in the instant case, the lower appellate court could not have disobeyed the directions given to it by this Court when the matter was remanded by an earlier order dated 9.9.1997. Any such action on the part of the lower appellate court would have led to serious consequences. As such, I am unable to agree with the contentions put forward by the learned Counsel for the appellants that the lower appellate court ought to have ignored the directions given to this Court while remanding the matter on the ground that the said directions are without jurisdiction or for that matter, a nullity and non-existent in the eye of law.

Point No. (iii)

31. The next contention of the appellants' counsel to be considered at this juncture is as to the nature of the order passed by this Court on 9.9.1997 while remanding the case to the lower appellate court. Referring to Section 105(2) of the C.P.C., it is contended by the appellants' counsel that the said provision 105(2) comes into play only in respect of an order against which an appeal lies and, in the instant case, the order passed by this Court earlier while remanding the matter does not fall within any one of the orders from which appeal lies under Order 43 of the C.P.C. In this connection, the learned Counsel for the appellants referred to Order 43, Rule 1(u) and also to Order 41, Rules 23 to 25 to submit that the order passed earlier by this Court is not an appealable order.

32. Per contra, the learned senior Counsel for the respondents, by referring to the very same provisions of the C.P.C. i.e., Order 43 Rule 1(u), argued that the order passed by this Court on an earlier occasion while remanding the case falls within the ambit of Rule 23A of Order 41 and, as such, appeal lies against the said order. And merit in the submission made by the learned senior Counsel for the respondents. Having gone through the relevant provisions referred to by both the counsel for the parties, I am of the view that Rule 23A of Order 41 is attracted to the case on hand in respect of the order passed by this Court while remanding the case.

33. Rule 23A of Order 41 of the C.P.C. reads thus:

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.

34. Having regard to the above said provision, it becomes clear that this Court, while remanding the case to the lower appellate court, had allowed the appeal filed by the first respondent herein and remitted the matter back to the first appellate court for disposal. In other words, the effect of the said order passed by this Court is that, the decree passed by the lower appellate court was reversed in appeal and further directions were given to dispose of the matter in the light of the observations made in the order of remand. Thus, the appeal was disposed of otherwise than on a preliminary point. As such, the provision of Rule 23A of Order 41 is applicable and consequently, the order passed pursuant to the said Rule 23A becomes an appealable order as could be seen from Order 43, Rule 1(u) of the C.P.C.

35. Once the order passed becomes an appealable order, the provision of Section 105(2) of the C.P.C. comes into operation. The said provision provides as under:

(2) Notwithstanding anything contained in Sub-section (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

36. It is, therefore, clear from a plain reading of the provision as contained in Section 105(2) of the C.P.C. that a party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness, in this connection, it is also pertinent to refer to two decisions of the Apex Court.

37. In the case of *Nain Singh Vs. Koonwarjee and Others*, it has been held by the Apex Court that where the order of remand is appealable under Order 43 and if the order is not appealed against, its correctness is no more open to examination in view of Section 105(2) of the C.P.C., and the court went on to hold that a review of the remand order in exercise of the inherent powers is erroneous.

38. In another decision in the case of *Sita Ram Goel Vs. Sukhnandi Dayal and Another*, the Apex Court held that under Order 43 Rule 1(u) of the C.P.C., an appeal lies against an order remanding the case where an appeal would lie from the decree of the appellate court and from the fact that the respondent had filed a second appeal which was the subject of attack before the Apex Court against the decision in an appeal of the District Court in the same proceedings, it was clear that the respondent should have filed an appeal against the order of remand. Having observed thus, the court went on to hold that the consequence of an omission to file an appeal against the order of remand, under such circumstances, is indicated in Section 105(2) of the C.P.C.

39. In the instant case, the order of remand has now been held to be an appealable order and, therefore, appellants having failed to question the same,

they cannot be permitted to question the validity of the order by virtue of the bar u/s 105(2) of the C.P.C. At the same time, it has to be kept in view that the bar contained in Section 105(2) does not apply to the jurisdiction of the Supreme Court under Article 136. This is the observation of the Supreme Court in the case of Krishna Pillai Rajasekharan Nair v. Padmanabha Pillai reported in AIR 2004 SC 1206. The relevant paragraphs of the aforesaid decision are required to be reproduced are paragrapha-23 and 24 and they read thus:

23. It was submitted that the earlier order of remand dated 10.2.1981 made by the High Court whereby the High Court had held that the suit filed by the plaintiff ought to have contained a prayer for redemption of the mortgage property and even if it did not contain such a prayer, it ought to be construed as a suit for redemption and the limitation for filing the suit should be calculated accordingly, has achieved a finality in view of not having been appealed against and, therefore, it is not any more open for the plaintiff to contend now that his suit was not a suit for redemption but only for declaration of title, partition and possession. We cannot agree.

24. Sub-section (2) of Section 103 of the Civil Procedure Code, 1908 provides that where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness. The provision is not without exceptions and limitation. First is, when the order of remand is illegal, and more so, if it is without jurisdiction (See AIR 1981 707 (SC)). The High Court had in exercise of second appellate jurisdiction illegally reversed the exercise findings of fact and ordered remand, It was held that in an appeal to Supreme Court from the final order of the High Court after remand, challenge even to the first order of the High Court making remand, and, all the proceedings taken thereafter as a result of the illegal order of remand was available to be laid. When the matter reaches a forum, superior to one which had made the order of remand earlier it can go into the question of legality or validity of the order of remand. The bar enacted by Section 105(2) applies up to the level of that forum which had remanded the matter earlier. Secondly, Section 105(2) has no applicability to the jurisdiction exercisable by this Court by reference to Article 136 of the Constitution. This is for the reason that no appeal lies to this Court against an order of remand; an appeal under Article 136 of the Constitution is only by special leave granted by this Court. It is settled law that Section 105(2) has no applicability to the Privy Council and to the Supreme Court. (Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, . In the present appeal preferred against the judgment and decree passed by the High Court in the proceedings held pursuant to the earlier order of remand dated 10.2.1981 the correctness of the order of remand can be examined and gone into by this Court.

40. In the light of the aforesaid position in law, in the case on hand, as the order of remand is an appealable order, the Appellants having failed to question the same, therefore, axe barred from raising any contention before this Court as to

its correctness because of Section 105(2) of the C.P.C. and also the appellants having failed to invoke the jurisdiction of the Supreme Court under Article 136 of the Constitution, the doors were closed once and for all for the appellants to question the correctness of the order passed by this Court while remanding the matter on 9.9.1997.

41. Having thus considered the above important questions of law that have arisen in the light of the contentions urged before this Court, I now proceed to deal with the substantial questions of law framed by this Court at the time of admission.

42. Point No. (a) & (b):

Two questions raked for consideration related to the finding of the lower appellate court with regard to the execution of the Will Ex.P-18 by Loku Shetty. This court now in second appeal, is required to examine as to whether the first appellate court was right in recording the finding that Loku Shetty executed Will under auspicious circumstances and secondly, to examine as to whether the lower appellate court had committed any error in recording a finding that the Will executed under Ex.P-18 is not the genuine Will of the said Loku Shetty and while doing so, whether the lower appellate court had ignored the substantial material placed on record. Before I answer the above questions of law framed by this Court, it is necessary to keep in view the scope of this Court while dealing with the second appeal u/s 100 of the CPC. In a very recent case, reported in the case of Gurdev Kaur and Others Vs. Kaki and Others, , the Apex Court dealt in a great detail, with regard to the principles to be borne in mind by the second appellate court having regard to Section 100 of the CPC and also examined the position which existed prior to the 1976 amendment to the CPC. In the course of this decisions the Apex Court also refers to several earlier decisions touching on the point and noted the law laid down by it in the earlier decisions. The said observations of the Apex Court in the above case are to be found at paragraphs 53 to 57 which read thus:

53. In *Thiagarajan v Sri Venugopalaswamy B. Koil* this Court has held that the High Court in its jurisdiction u/s 100 CPC was not justified in interfering with the findings of fact. The court observed that to say the least the approach of the High Court was not proper. It is the obligation of the courts of law to further the clear intent of the legislature and not frustrate it by excluding the same. This Court in a catena of decisions held that where findings of fact by the lower appellate court are based on evidence, the High Court in second appeal cannot substitute its own findings on reappreciation of evidence merely on the ground that another view was possible.

54. In the same case, this Court observed that in a case where SLP was filed against a judgment of the High Court interfering with findings of fact of the lower appellate court. This Court observed that to say the least the approach of the High Court was not proper. It is the obligation of the courts of law to further the

clear intendment of the legislature and not frustrate it by excluding the same. This Court further observed that the High Court in second appeal cannot substitute its own findings on appreciation of evidence merely on the ground that another view was possible.

55. This Court again reminded the High Court in *Cammr., HRCE v. P. shanmugama* that the High Court has no jurisdiction in second appeal to interfere with the finding of facts.

56. Again, this Court in *State of Kerala v. Mohd. Kunhi* has reiterated the same principle that the High court is not justified in interfering with the concurrent findings of fact This Court observed that, in doing so, the High court has gone beyond the scope of Section 100 of the Code of Civil Procedure.

57. Again, in *Madhavan Nair v. Bhaskar Pillai* this Court observed that the High court was not justified in interfering with the concurrent findings of fact. This Court observed that it is well settled that even if the first appellate court commits an error in recording a finding of fact, that itself will not be a ground for the High Court to upset the same.

43. Finally after analysing the case laws laid down by the Privy Council and by the Apex Court prior to 1976 and after the said period, the conclusion reached is to be found at para 69 which reads as under:

69. The analysis is of cases decided by the Privy Council and this Court prior to 1976 clearly indicated the scope of interference u/s 100 CPC by this Court Even prior to amendment, the consistent position has been that the courts should not interfere with the concurrent findings of facts.

44. In another case reported in the case of *Parsini (dead) thorough LRs. Vs. Atma Ram and others*, , the Apex Court has observed that it is not permissible u/s 100 of the CPC while dealing with second appeal to reverse the finding of fact recorded by the trial court and appellate court. In the case of *Taherakhatoon (D) by Lrs. Vs. Salambin Mohammad*, , it was held that where the first appellate court had recorded a finding that the agreement of sale was not a genuine document and one of the reasons given by it was found to be factually incorrect, yet, the Apex Court held that the said finding, however, being based on other relevant material on record, the High Court is not entitled to interfere with the said finding. In the case of *Dnyanoba Bhaurao Shemade Vs. Maroti Bhaurao Marnor*, , the Apex Court observed that whether the finding of fact reached by courts below is against the weight of evidence or not, is the question which will remain in realm of appreciation of evidence and does not project any question of law, much less, any substantial question of law and therefore, the decision of the Delhi High Court in second appeal on reappreciation of evidence was act aside.

45. In another decision reported in the case of *Kulwant Kaur and Others Vs. Gurdial Singh Mann (dead) by Lrs. and Others etc.*, dealing with the scope of Section 100 of CPC, the Apex Court observed that the question whether the

lower court finding is perverse, would come within the ambit of substantial question of law, but however, there must be a clear finding in the judgment of the High Court as to perversity, in order to show compliance with provisions of Section 100. In the case of Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., , it was held by the Apex Court that "substantial" in context means, having substance, essential, real, of sound worth, important or considerable and the question of law must be debatable, one which has not been settled earlier by statute or binding precedent and must have a material bearing on the outcome of the case and also observed that in respect of finding of fact, the first appellate court apart from being the final court of facts, held, the first appellate court is also a final court of law in that its decision on a question of law to no longer assailable before the High Court, unless such question is a substantial question of law.

46. In yet another recent decision reported in the cane of Hero Vinoth v. Seshammal 2006 AIR SCW 2833, the Apex Court after referring to several of its earlier decisions on the principles u/s 100 of CPC, summarised the law at para 24 in the said decision which reads as under:

The principles relating to Section 100 summarised as follows: (i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law. (ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law. (iii) The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognised exceptions are where (a) the Courts below have ignored material evidence or acted on no evidence: (b) the Courts have drawn wrong inferences from proved facts by applying the law erroneously or (c) the courts have wrongly cast the burden of proof. When refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

47. Keeping in view the above decision in law, I now proceed to answer the second substantial question of law raised by this Court at IV(a) and (b). In the instant case, the lower appellate court had recorded a finding that the Will Ex.P-18 does not appear to be a genuine Will executed by Loku Shetty because of several suspicious circumstances surrounding the said Will. After having analysed the evidence on record let in by the parties, the lower appellate court found as many as 10 circumstances which gave the impression that the Will Ex.F-18 is not the genuine Will of Loku Shetty. Of these circumstances, some of the important ones according to the lower appellate court are the following:

- i) The signature of PWs. 2 and 3 the attestors to the Will has not been marked in the evidence on Ex.P-18.
- ii) PWs. 2 and 3 have not identified the signature of Loku Shetty on Ex.P-18.
- iii) The difference in the signature of Loku Shetty in each page of Will Ex.F-18 and there being no similarity in the signature of the testator in Ex.P-18
- iv) There is a reference in the Will Ex.P-18 that the partition will have to be effected, but no such partition took place and on the other hand a lion share of the properties were found bequeathed to the appellants. The main factor is that PW1 does not bring to light, the execution of the Will Ex.P-18 by her father until the filing of the suit and she does not reveal about the Will to the defendant Seetharama Shetty, even though she was in good terms with the said defendant and she came to know of the Will three years prior to the death of her father. Another circumstance is that the defendant Seetharama Shetty and his brother Vishwanatha Shetty were residing in a portion of plaintiff "A" schedule property viz., Hosamane House, but no reasons are assigned by PW1 as to why Loku Shetty preferred the plaintiffs and allotted them plaintiff "A" schedule properties to the exclusion of the defendants. The lower appellate court also found that the plaintiff did not produce RTC extracts till the year 1981-82 and this indicates that the Will Ex.P-18 was not acted upon.

48. Apart from the above circumstances which the lower appellate court found emerging from the evidence on record, it also made an observation that even the trial court had discussed this aspect of the matter and has referred to several circumstances which in the opinion of the trial court gave rise to look at the Will Ex.P-18 with suspicion. The trial court also found several circumstances some of which have also been referred to by the lower appellate court and in addition, the trial court also noticed that the documents produced by the appellants viz., tax paid receipts in proof of payment of electricity charges, receipt for permission to transport rice were all insufficient to prove the possession of the suit "A" schedule properties by the plaintiff and it also noticed that both the appellants herein were not residing along with the deceased, but one of the appellants was at Madras and the other one was at Mangalore and it was only the first respondent Seethamma Shetty who was residing with his father till the death of Loku Shetty. The courts below found that Loku Shetty was not keeping good

health and was suffering from B.P. and other diseases and also taken treatment at Fr. Mutter's Hospital and Ex.D-19 is the document in proof of this. It was also found by both the courts below that FWs.2 and 3 did not say in their evidence that Loku Shetty signed Ex.F-18 of admitting its contents. Another circumstance noticed by the courts below is that the signature in Ex.P-18 of Loku Shetty reveals overwriting, whereas the signature in the plan attached to Ex.P-1 the copy of the registered Will does not show any such tremor in the handwriting of Loku Shetty. The two attestors were also found to be very closely acquainted with Raghu Shetty the husband of the second plaintiff.

49. Another circumstance noted by the court below is that Loku Shetty had some leasehold property and had claimed occupancy rights. But there is no reference in the Will Ex.P-18 in regard to these properties.

50. Thus, both the courts below were of the view that several circumstances surrounding the Will gave rise to view the Will with suspicion and as such, the courts below recorded identical findings to the effect that the appellants have failed to prove the genuineness of the Will Ex.P-18 and in view of the suspicious circumstances surrounding the Will, the appellants have failed to establish their possession of the suit schedule properties.

51. It is, thus, clear from the above findings of the courts below and in particular, the first appellate court that there has been a concurrent finding of fact concerning the Will Ex.P-18. Having regard to the law laid down by the Apex Court in the aforementioned decisions, it is impermissible for this Court in the second appeal to interfere with the concurrent finding of facts. Applying the law laid down by the Apex Court in *Hero Vinoth's case supra*, I do not find that the case falls within any one of the three tests laid down in para 24(iii). In other words, it is not a case where it can be said that the courts below have ignored material evidence or acted on no evidence and it cannot be said that the courts have wrongly cast the burden of proof and it is also not a case where it can be said that the evidence taken on a whole is not capable of supporting the above findings of the courts below. Therefore, having regard to the proposition of law laid down by the Apex Court and particularly in the light of the decision in *Madhava Nair's case*, in *Gurudev Kaur's case*, wherein the Apex Court has held that the High Court will not be justified in interfering with the concurrent finding of fact even if the first appellate court commits an error in recording a finding of fact, that itself will not be a ground for the High Court to upset the same.

52. In the light of the above analysis, I am of the view that both the substantial questions of law raised by this court at IV(a) and (b) while admitting this appeal, will have to be answered in favour of the finding recorded by the first appellate court.

53. I now turn to yet another contention put forward by the learned Counsel Sri Shakar Shetty for the appellants and that is concerning the grant of relief which was not prayed for. It is the submission of the appellants' counsel that in a suit

for injunction, the lower appellate court could not have granted the relief of partition. I have already referred to the circumstances, under which the lower appellate court had passed the decree granting partition, particularly having regard to the directions issued by this Court while remanding the case on 9.9.1997. Apart from the above factor, even looked from the angle of the stand taken by the parties before the courts, below and the observations of the trial court as well as the lower appellate court, it cannot be said that the parties were unaware of the real controversy between them. No doubt, learned Counsel for the appellant has referred to several decisions of the Apex Court and also of this Court to contend that without a foundation being laid in the plaint, a relief which was not prayed cannot be granted.

54. In the decision reported in *G. Venkataramaiah and G. Narayanaswamy Vs. C. Kempaiah* (since dead by L.Rs. Narayanamma, K. Chinnappa, Avalappa and Nandakumar), this Court has held that the trial court suo-moto on its own without there being pleadings, issues and evidence, cannot grant the relief. In another decision reported in 1967(1) Mysore Law Journal 71, this Court has held that the scope of a suit is determined by the pleadings in the case. Any amount of evidence cannot fill up the lacuna in the pleadings. If the case is not pleaded, the same cannot be permitted. The decision in the case of *Bondar Singh and Ors. v. Nihal Singh and Ors.* ILR 2003 Kar 2253 lays down the principles that in the absence of pleadings and written statement on an issue, no evidence can be looked into. In another decision reported in the case of *Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar*, it has been laid down that the decision of a case cannot be based on the ground outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint the Court is not entitled to grant the relief not asked for.

55. At the same time, the Apex Court has also held in several decisions that the court has got the power to mould the relief. In *Hindalco Industries Ltd. Vs. Union of India (UOI) and Others*, , the Apex Court dealing with Order 2 Rule 2 CPC, has observed that court/tribunal can mould the ancillary relief having regard to germane and relevant circumstances and the discretion should be exercised by the court/tribunal with circumspection in a just, reasonable and non-arbitrary manner and consistent with justice, equity and good conscience. The Division Bench of Andhra Pradesh High Court in the case of *Vishram Arjun v. Irukulla shankaraiah and Anr.* AIR 1957 A.P. 784 dealing with Order 7 Rule 7 has observed thus:

No doubt as a general rule, no plaintiff is entitled to a relief for which there is no foundation in the plaint. But when on the pleadings & the issues and the evidence adduced, the relief is clear, this general rule does not apply because it is the duty of the court to grant relief as the circumstances of the case would warrant even though it may not be asked for.

The primary duty of the courts after all is to do justice. Rules of procedure are intended only to advance the cause of justice rather than to impede the same. All

that the court is to guard against is that no prejudice has been done to or no surprise has been sprung upon the other party. When the suit was fought by the parties deliberately and substantially upon the issues as framed by the trial judge, there is nothing against law in determining their rights on the footing.

56. In another decision, dealing with Order 7 Rule 7 Punjab and Haryana High Court in the case of Karam Dass and Others Vs. Som Parkash, has held thus:

No doubt, as a general rule no plaintiff is entitled to a relief for which there is no foundation in the plaint but when on the pleadings and the issues and the evidence adduced the relief is clear, this general rule does not apply because it is the duty of the court to grant relief as the circumstances of the case would warrant even though it may not be asked for. The primary duty of courts, after all, is to do justice. Rules of procedure are intended only to advance the cause of justice rather than to impede the same.

57. A Division Bench of this Court in the case of Patil Exhibitors (P) Ltd. v. The Corporation of the City of Bangalore AIR 1986 Kar 194 has laid down the following proposition of law concerning Order 7 Rule 7 of CPC:

It is true that a party, cannot generally, seek to sustain a prayer on a ground other than, and totally distinct from, the one specifically raised and urged. Relief, it is true, must be founded on the specific case pleaded. But, as is said, quite often the legitimate consideration of substance are allowed to prevail over the limitation of mere form. If a relief, either interlocutory or final, is consistent with and flows from the very case of the opposite side or what must be held necessarily consistent with it, and does not take the opposite side by surprise then court can mould the relief accordingly.

58. In the case of Gangaram Ramachandra v. Butrusao AIR (39) 1952 Nagpur 202, it was held by the court that a suit for exclusive possession of 16 annas can be turned into a suit for partition and possession of such share as may be determined to belong to the plaintiff if the defendants contend, or it is found that the plaintiff is not entitled to the whole hut only to a part. In the case of S. Shivanathan (deceased) by L.Rs. v. S.G. Narayana 1998 (4) K.L.J. 514, this Court while dealing with Order 7 Rule 7 has observed that though a particular relief not prayed for, the court can grant such relief as the party is entitled to, on facts established on the evidence on record even if such facts are established by the party opposite. In yet another decision of thin court, reported in the case of Demanagouda and Anr. v. Smt. Ranaurwa and Ors. ILR 1999 Kar 222, it has been held that in a suit for declaration and injunction, the court will be justified in granting the relief of possession and such power is there to the courts notwithstanding the absence of pleadings.

59. It has also been held that in a suit for declaration and injunction, the Court will be justified in granting relief of possession and as such powers is vested in the courts notwithstanding the absence of pleadings.

60. In the light of the aforesaid decisions referred to by both the Counsel for the partial, in the instant case, it has to be said that the first reason for the lower Appellate Court to allot each of the partial 1/4th share in the suit properties is because of the direction given by this Court while remanding the matter earlier by its order dated 9.9.1997. As already referred to by me while dealing with this aspect of the matter, the lower Appellate Court had no other alternative than to allot 1/4th share to each of the parties following its findings that the will Ex.P18 was not proved by the appellants as the genuine will of Lokushetty. Secondly, a perusal of the judgment of the trial Court also reveals that though there was no specific issue framed with regard to the execution of the will Ex.P18, yet the trial Court thought it fit to consider the said aspect in order to ascertain as to who is in exclusive possession of plaint "A" property particularly when the defendants are disputed the will Ex.P18 and also having taken the contention that the defendants were in actual possession of the part of plaint A property. In fact, para-7 of the trial Court's order, we find the following observations:

7. This is a suit for hare injunction. There is no issue regarding the due execution of Ex.P18 will. The Court may consider the due execution of Ex.P18 Just to ascertain the exclusive possession of the plaint "A" schedule properties by the plaintiffs incidentally.

61. I have referred to this portion of the order of the trial Court only to raise a point that though the parties had not pleaded with regard to the properties being allotted to each one of them, yet, when they went into trial, the question as to who is in possession of the suit properties was considered in detail by the trial Court and also by the lower Appellate Court. As such it cannot be said that the parties were unaware of the real controversy between them. The trial Court dismissed the suit of the appellants which led to the appellants preferring the appeal before the lower Appellate Court in R.A. No. 21/89 and the judgment of the trial Court was reversed there being giving to Second Appeal 564/89 being preferred by the defendants before the trial Court and in the course of the arguments before this Court, it was contended by the parties particularly by the defendants in the said R.S.A. that the vital dispute between the parties had not been properly projected and not framing an over the issue relating to the validity of the will therefore would render the entire proceedings invalid. This Court in the light of the said contention put forward, observed at page-15 of its order, that there is a specific pleadings in the plaint, regarding the will and there is also a specific denial in the written statement and likewise there was also specific plea regarding the appellants taking possession in pursuant to the will and the same being denied by the defendants and therefore this Court thought it fit to make the observations that the lower Appellate Court ought to have framed issues to the validity of the will and as to whether the plaintiffs were in possession in the year 1978 and therefore ultimately this Court remanded the same by allowing the second appeal filed by the defendants and gave a direction as mentioned earlier in the course of this judgment.

62. After remand, both the parties went before the lower Appellate Court and led evidence on the issues framed by the lower Appellate Court and therefore, under these circumstances it has to be held that both the parties were fully aware of the entire controversy upon which the success or failure of the suit of the plaintiffs rested and this Court had specifically directed the lower Appellate Court, on its finding on the genuineness of the will and depending upon the said finding to decree the suit of the appellants for permanent injunction or to allot each one of the parties 1/4th share if the will was not proved to be genuine.

63. Therefore in the peculiar facts and circumstances of this case, no fault can be found with the judgment and decree passed by the lower Appellate Court in so far as declaring that the appellants as well as the respondents are entitled to 1/4th share each in the suit "A" schedule property. Ultimately it is to be borne in view that the primary duty of the Court is to do justice and unless it is shown that the parties have been prejudiced, it cannot be said that the lower Appellate Court committed any error in granting the relief in accordance with the direction given by this Court while remanding the case earlier. Therefore when the parties went before the lower Appellate Court, consequent to the direction given by this Court and contesting the matter by placing evidence in support of the issues framed after remand, it is not permissible now to contend that the lower Appellate Court could not have granted the relief, which was not found in the pleadings of the parties when they went to trial before the trial Court.

64. Another contention put forward by the learned Counsel for the appellants is that as the first Appellate Court had decided the controversy between the parties with regard to the genuineness of the will Ex.P18, this Court will have to treat the present appeal as the first appeal and therefore the appellants tend be permitted to adduce additional evidence in order to get the signature of the attestors marked in Ex.P18. As far as this submission is concerned, in ray view, this Court is sitting in appeal over the judgment and decree passed by the first Appellate Court, it cannot be permitted to canvas that the present appeal will have to be heard as First Appeal. The decision referred to by the learned Counsel for the appellants in Kiran Singh and Others Vs. Chaman Paswan and Others, . In support of his contention, if does not help to advance this case. But on the other hand, a close look at the facts involved in the said case will go to show that the said decision rather helps the arguments advanced to the contrary by the learned Counsel for the respondents.

65. In the aforesaid decision, the Apex Court considered the matter, which involved construction of Section 11 of the Suite Valuation Act. The suit preferred by the appellants for recovery of possession from the defendant was dismissed giving raise to an appeal being preferred before the District Court and the said Court also dismissed the appeal. Thereafter, the plaintiffs took up the matter in second appeal to the High Court and for the first time, an objection was raised with regard to the valuation in the plaint and after the valuation was correctly assessed and additional Court fee was also paid, an objection was raked to the

effect that following the suit valuation, the appeal from the decree of the trial Court would not lie to the District Court but to the High Court and therefore the High Court should hear the second appeal as the first appeal. The Apex Court declined to accept the said arguments put forward and held that no prejudice would be caused to the appellants, The Court also observed that courts cannot recognise that as prejudice which flows from the action of the very party who complains about it. As far as the second appeal being heard as first appeal is concerned, in the very same decision, the Apex Court also observed that there is no provision in the C.P.C. which authorised a Court of second appeal to go into the question of fact of which lower Appellate Court has recorded the findings and to reverse them.

66. In the instant case, the lower Appellate Court heard the matter after affording both sides opportunity to place their evidence and rendered its decision on the merits of the case after considering the entire evidence in the light of the direction given by this Court while remanding the matter and as such no prejudice can be said to have been caused to the appellants merely because the matter was disposed of by the lower Appellate Court after remand by this Court.

67. The last of the contentions urged by the learned Counsel for the appellants is with regard to the opportunity to place additional evidence. An application has been filed, to the said effect and it is contended that the signatures of the attestors were not get marked in Ex.P18 and therefore for the said purpose, additional evidence become necessary.

67. As far as this contention put forward is concerned) I have considered the averments made in the affidavit accompanying the application and also the objection filed by the respondents. It has to be mentioned, that the appellants lower every opportunity to place such evidence as they thought it fit in support of their case before the lower Appellate Court after the matter was remanded. Though FW-2 was examined by the appellants and DW-1 was also examined, the appellants did not choose the said opportunity to get the signatures marked in Ex.P18. Whether it is permissible at this length of time to permit them to do so is the question. The answer is to be found in one of the decisions referred to by the appellants' Counsel himself. In the case of Kali Charan v. Suraj Bati and Ors. AIR 1941 Oudh 89, it was held that when the plaintiff gave the evidence and if that evidence according to the plaintiff was found to be in sufficient evidence, she cannot be allowed to any second appeal to produce fresh evidence and the relevant observations are as under:

When in the trial Court the pleading and the issues cover the question regarding proof of execution of a document required by law to be attested and the plaintiff has given evidence though insufficient to prove to execution, the plaintiff cannot be allowed to second appeal to adduce fresh evidence as regards the execution and he cannot thus be allowed to patch up the weak parts of his case and fill up the omissions: (Talluri) Peda Manikyam Vs. Vantabattina Periaadu and Others, and AIR 1931 143 (Privy Council) Rel. On.

69. The decision in ILR 2003 KAR 4637 referred to by the appellants' Counsel is not applicable to the case on hand. In as much as in the said case, the controversy was surrounding the date of death and mutation entry was found to be relevant and therefore the additional evidence was held to be permissible but that is not the situation in the case on hand for the reasons already mentioned above. Hence, the last of the contentions urged to the appellants' Counsel also does not merit consideration.

70. Before I conclude, it has to be mentioned that though the learned Counsel for the appellants has referred to many other decisions apart from the one which I have referred in the course of this judgment, the said decisions are not applicable having regard to the peculiar facts and circumstances of the case on hand and does not help the case of the appellants any further.

70. In the result, I pass the following:

ORDER.

Appeal is dismissed. No costs.