
(2013) 11 AP CK 0093
In the Andhra Pradesh High Court
Case No : CMA. No. 219 of 2013

Bayyarapu Narayana Raidu and Another	APPELLANT
Vs	
Smt. Pagadala Varalaxmi	RESPONDENT

Date of Decision : 12-11-2013

Acts Referred:

Citation : (2014) 2 ALD 176 : (2014) 4 ALT 808

Hon'ble Judges : M.S. Ramachandra Rao, J

Bench : Single Bench

Advocate : P. Vinayaka Swamy, for the Appellant; M. Papa Reddy, for the Respondent

Final Decision : Allowed

Judgement

M.S. Ramachandra Rao, J.—This appeal is filed under Order LVIII Rule 1(u) of CPC challenging the order dt. 16.11.2012 in AS. No. 120 of 2010 of the II Addl. District Judge, Warangal, setting aside the judgment and decree dt. 21.07.2010 in OS. No. 778 of 2006 of the Prl. Junior Civil Judge, Warangal, and remitting the matter back to the Trial Court for fresh disposal. The appellants are defendants in the above suit. The said suit was filed by the respondent/plaintiff for recovery of possession of the plaint schedule property from the defendants and for costs.

2. The plaintiff contended that she is the absolute owner and possessor of the plaint schedule property which she had purchased from Smt. K. Shyamalabai under a registered sale deed Ex.A.1/dt. 25.08.1981; that her vendor had purchased the said property from its original owner Modem Kanakaiah (for short, "Kanakiah") under a private sale deed Ex.A2/dt. 08.03.1973; that on account of employment of her husband and after his demise, she is staying with her daughters at Hyderabad; that the defendants who are residing towards the southern side of the plaint schedule property occupied it by erecting a shed and a compound wall and this was discovered when the plaintiff and her son-in-law went to Warangal on 22.02.2006; that when the defendants were questioned, the defendants claimed that 2nd defendant is the owner of the property. The

plaintiff alleged that taking advantage of her old age and her absence, the defendants illegally occupied the plaint schedule property and they are liable to be evicted.

3. The 2nd defendant filed a written statement which was adopted by 1st defendant. They denied the title and possession of the plaintiff and her vendor. They contended that that mother of 1st defendant purchased 500 sq.yds including the plaint schedule property from one I. Komalamma and I. Sakkamma under Ex.B.2 simple sale deed dt. 01.05.1970; that these individuals had previously purchased it from Kanakaiah on 02.09.1964 under Ex.B1; that 1st defendant had got 500 sq.yds including the plaint schedule property in a family partition in 1977; that he constructed a house in the said plot in 1992 and also a compound wall and residing therein; and that under Ex.B.6 registered Gift Settlement Deed dt. 13.11.2003 and Ex.B7 rectification deed, the 1st defendant had gifted the plaint schedule property of 228 1/4 sq.yds to his wife, the 2nd defendant out of love and affection. She also pleaded that she had perfect title and possession over the plaint schedule property from 1970 and therefore the suit of the plaintiff is barred by limitation and ought to be dismissed.

4. On the above pleadings, the Trial Court framed the following issues:

1. Whether the plaintiff got valid title to the schedule property?
2. Whether the plaintiff is entitled for recovery of possession as prayed for ?
3. To what relief ?

5. The plaintiff examined PWs.1 to 3 and marked Exs.A1. to A.5. The defendants examined DWs.1 and 2 and marked Exs.B.1 to B.13.

6. By judgment and decree dt. 21.07.2010, the Trial Court dismissed the suit with costs. It held that the plaintiff did not establish the title and possession of Kanakaiah from whom her predecessor in title Smt. K. Shyamalabai purchased the plaint schedule property under Ex.A.2 dt. 08.08.1973; that Ex.A.2 appears to be a created document and not genuine; it is inadmissible in evidence as it is unregistered; there is no evidence to show that plaintiff was in enjoyment of the plaint schedule property on the date of filing of the suit; that Ex.A.1 did not confer any title upon her; plaintiff had admitted that she did not know when the defendants occupied the plaint schedule property and she ought to have filed the suit within twelve years from the date of her dispossession. So the suit is barred by limitation. It also held although Exs.B.1 and B.2 are unregistered sale deeds, D.1 had paid stamp duty and penalty and they indicate the possession of mother of the 1st defendant and her vendors. It accepted the genuineness of these documents on the ground that they were executed more than thirty years back. It also held that it was incumbent on plaintiff to seek relief of declaration of title over the plaint schedule property and she could not have filed a suit only for recovery of possession.

7. Aggrieved thereby, the plaintiff filed AS. No. 120 of 2010 before the lower

appellate court.

8. By judgment and decree dt. 16.11.2012, the lower appellate court allowed the appeal, set aside the judgment and decree of the Trial Court and remanded the matter back to the trial court to consider the issue as to whether the plaintiff's suit is barred by limitation as she had not filed the suit within twelve years from the date of her dispossession. It however, held that in a suit for recovery of possession, it is not invariably necessary to seek declaration of title over the plaint schedule property when the defendants in the written statement deny the title of the plaintiff. It also held that since both plaintiff and defendants trace their title from Kanakaiah, it is not necessary for the plaintiff to establish the title and possession of Kanakaiah as on the date of Ex.A.2 and that the said finding of the Trial Court is contrary to record. Several factual errors committed by the Trial Court were also pointed out by the lower appellate court. It however observed in para. 27 of its judgment as under:

27. Under these circumstances, as I have pointed out earlier the approach of the trial court was not at all correct and there were no proper issues framed in this regard, and the trial court only framed two issues as to whether the plaintiff has got valid title and whether the plaintiff is entitled for recovery of possession. There is no issue with regard to the fact as to when the plaintiff has been dispossessed from the suit property and whether the suit is barred by limitation as per the Article 64 and 65 of Limitation Act. The approach of the trial court in the present case is not correct and it proceeded on the assumptions and presumptions without application of principle of law. Therefore, for these reasons I allow the appeal and remand the matter to the trial court to frame fresh issues and allow the parties to the limit extent as to when the plaintiff has been dispossessed and whether the plaintiff suit is within limitation or not with reference to Article 64 and 65 of Limitation Act.

9. Aggrieved thereby, this appeal has been filed.

10. The counsel for the appellants/defendants contended that the lower appellate court ought not to have remitted the matter back to the trial court as it had found several errors in the judgment of the trial court; that it could have itself framed the necessary issues, if it felt they should be decided, and ought to have decided them instead of remitting the matter back to the trial court since this would further delay the disposal of the suit.

11. The counsel for the respondent/plaintiff argued that the order of the lower appellate court was the proper order in the facts and circumstances of the case and it did not warrant any interference by this court.

12. In view of the above contentions, the point which arises for consideration is:

Whether in the facts and circumstances of the case, the order of remand by the lower appellate court to the trial court is sustainable or not ?

13. In Narayanan Vs. Kumaran and Others, the Supreme Court held that an

appeal under Order 43 Rule 1(u) of C.P.C. should be heard only on the grounds enumerated in Section 100 C.P.C. and that the appellant in such an appeal is not entitled to agitate questions of fact. It also held that in an appeal against an order of remand under this clause, the High Court can and should confine itself to such facts, conclusions and decisions which have a bearing on the order of remand and cannot canvass all the findings of fact arrived at by the lower appellate Court. Similar view has been taken in *Jegannathan Vs. Raju Sigamani and Another*,

14. This being the scope of this appeal, I will now consider whether it was appropriate for the lower appellate Court to have remitted the matter back to the trial Court, in the facts and circumstances of the case.

15. In my opinion, the trial court erred in holding that since plaintiff admitted that she did not know when the defendant allegedly occupied the plaint schedule property and that as she is seeking recovery of possession basing on title, she should have filed the suit within twelve years from the date of dispossession. The lower appellate court also in para 27 extracted supra also assumed this to be the legal position and that was why it remitted the matter back to the trial court to decide the issue as to when the plaintiff has been dispossessed from the plaint schedule property and whether the plaintiff's suit is barred by limitation under Article 64 or 65 of the Limitation Act, 1963.

16. Both the courts in my opinion, have committed a grave error in not noticing the change in law brought about by the Limitation Act, 1963 from the earlier Limitation Act, 1908. In *Md. Mohammad Ali (Dead) by Lrs. Vs. Sri Jagadish Kalita and Others*, the Apex Court pointed out:

By reason of the Limitation Act, 1963 the legal position as was obtaining under the old Act underwent a change. In a suit governed by Article 65 of the 1963 Limitation Act, the plaintiff will succeed if he proves his title and it would no longer be necessary for him to prove, unlike in a suit governed by Articles 142 and 144 of the Limitation Act, 1908, that he was in possession within 12 years preceding the filing of the suit. On the contrary, it would be for the defendant so to prove if he wants to defeat the plaintiff's claim to establish his title by adverse possession.

21. For the purpose of proving adverse possession/ouster, the defendant must also prove *animus possidendi*.

This has again been reiterated in *Saroop Singh Vs. Banto and Others*, at Pg. 4412. So under the 1908 Act, the plaintiff not only had to prove his title but also had to prove his possession within twelve years preceding the date of institution of the suit in order to recover possession of immovable property. But under the 1963 Act, there has been a change in law and in a suit attracting Article 64 and 65 of the said Act, the plaintiff has only to prove his title and it is for the defendant to prove acquisition of title by adverse possession.

17. It is also pertinent to note that the defendants have pleaded title to the plaint schedule property by placing reliance on Ex.B.1 and B.2, simple sale deeds dt. 02.09.1964 and 01.05.1970 under which the 1st defendant's mother acquired title to the plaint schedule property. In para. 9 of the written statement filed by 2nd defendant, it is stated "this defendant submits that the defendants have acquired the title over the property having perfect title and possession over the same since 1970 onwards". This does not amount to a plea of "adverse possession".

18. In fact, having pleaded title, it is not permissible for the defendants to plead adverse possession as both pleas are mutually inconsistent. In *Karnataka Board of Wakf Vs. Government of India and Others*, the Supreme Court declared:

A plaintiff filing a title suit should be very clear about the origin of title over the property. He must specifically plead it. (See *Narayanan Vs. Kumaran and Others*, In *P. Periasami v. P. Periathambi* (2004) 10 SCC 779 this Court ruled that:

Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property.

The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced.

19. When it is not necessary as per the provisions of the Limitation Act, 1963 for the plaintiff to show that she has filed the suit within twelve years from the date of his dispossession, it is not necessary to decide the issue when the plaintiff was dispossessed from the plaint schedule property. Therefore, in my opinion, the lower appellate court erred in remanding the matter to the trial court to frame and decide the issue "when the plaintiff was dispossessed from the plaint schedule property". When there is no plea of adverse possession raised by the defendants, there is also no need to decide the issue whether the suit is barred by limitation.

20. In view of the legal position, I am of the view that the lower appellate court ought not to have remanded the matter back to the trial court. It might as well have itself decided the appeal on merits as it has all the powers of a trial court to re-appreciate the evidence. The Supreme Court and our High Court have also deprecated the practice of remanding matters to the trial court when the lower appellate court itself could have dealt with and decided the issues.

21. In *Ashwinkumar K. Patel Vs. Upendra J. Patel and Others*, the Supreme Court held:

7. In our view, the High Court should not ordinarily remand a case under Order 41, Rule 23, C.P.C. to the lower Court merely because it considered that the reasoning of the lower Court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case

mentioned in the order of the trial Court and considered whether the order of the trial Court ought to be confirmed or reversed or modified. It could have easily considered the documents and affidavits and decided about the prima facie case on the material available. In matters involving agreements of 1980 (and 1996) on the one hand and an agreement of 1991 on the other, as in this case, such remand orders would lead to further delay and uncertainty. We are, therefore, of the view that the remand by the High Court was not necessary.

22. In *P. Purushottam Reddy and Another Vs. Pratap Steels Ltd.*, the Supreme Court held that an appellate Court should be circumspect in ordering a remand when the case is not covered by Rule 23 or Rule 23-A or Rule 25 of C.P.C. and that an unwarranted order of remand gives the litigation an undeserved lease of life and must therefore be avoided.

23. In *Municipal Corporation, Hyderabad Vs. Sunder Singh*, the Supreme Court, considered the scope of Order 41 Rule 23 of C.P.C. and declared:

15. Order 41 Rule 23 of the Code reads thus:

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 readmit 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 all just exceptions, be evidence during the trial after remand.

16. The amendment which is applicable for the State of Andhra Pradesh is same as that of the State of Madras, which reads as under:

(a) After the words "the decree is reversed in appeal", insert the words "or where the Appellate Court while reversing or setting aside the decree under appeal considers it necessary in the interest of justice to remand the case"; and

(b) delete the words "if it thinks fit", occurring after the words "the appellate court may".

17. Order 41 Rule 23 would be applicable when a decree has been passed on a preliminary issue. The appellate court must disagree with the findings of the trial court on the said issue. Only when a decree is to be reversed in appeal, the appellate court considers it necessary, remand the case in the interest of justice. It provides for an enabling provision. It confers a discretionary jurisdiction on the appellate court.

18. It is now well settled that before invoking the said provision, the conditions precedent laid down therein must be satisfied. It is further well settled that the court should loathe to exercise its power in terms of Order 41 Rule 23 of the CPC

and an order of remand should not be passed routinely. It is not to be exercised by the appellate court only because it finds it difficult to deal with the entire matter. If it does not agree with the decision of the trial court, it has to come with a proper finding of its own. The appellate court cannot shirk its duties.

24. In *Saraswathi Devi Vs. J. Satyanarayana Raju* 1985 (2) ALT 478, this Court held:

...The power under Order XLI Rule 23 of the CPC is of wide amplitude and of a discretionary nature, but the discretion should not be exercised arbitrarily but with circumspection guided by sound and reasonable judicial principles capable of being corrected by the Court of appeal. It should not be a substitute for laxity but be stemmed from the need to render substantial justice. The order of remand should indicate sufficient and cogent reasons for remitting the matter for re-trial. It is to be remembered that when re-trial is ordered, it amounts to allowing the party to fill in the lacuna crept at the trial with eyes wide open to the basis of the pleadings and issues raised and the trial concluded. So the parties have to bear the consequences thereof. The order of remand should not, generally speaking, be ordered when the defect in the proceedings has been made due to the negligence or default on the part of the defaulting party who will have the advantage of the remand. The mere fact that the evidence on record is not sufficient to enable a Court to come to a definite conclusion on an issue or point is not a ground to remit the matter. It is also to remember that the mere fact that the parties did not have an opportunity of producing all the evidence they needed before the trial Court, is not also a relevant circumstance unless the parties are taken by surprise. There is a danger that the order of remand of the court would cause lurking apprehension, may be unfounded, in the mind of the court below that there is something wrong in the judgment and it needed correction. However carefully the order may be worded, the danger of such an impression cannot easily be erased from the mind of the court below. The appellate court must therefore be circumspect in that regard. The appellate Court should consider whether the party succeeding in the trial Court would be met with undue hardship of further litigation and expense and also whether injustice would be done by the order of remand. Keeping those circumstances in view, though the power of remand is of wide discretionary one, it should be exercised sparingly and with circumspection ultimately the ends of justice.

(emphasis supplied)

25. For the above reasons, the appeal is allowed and the judgment and decree dt. 16.11.2012 of the lower appellate court setting aside the judgment and decree dt. 21.07.2010 of the trial court and remitting the matter back to the trial court is set aside; A.S. No. 120 of 2010 is restored to the file of the lower appellate court; and it shall decide the same in accordance with law within a period of two (2) months from the date of receipt of a copy of this order. No costs. Miscellaneous applications, pending if any, in this Appeal shall stand closed.