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(2002) 01 AP CK 0099

In the Andhra Pradesh High Court

Case No : C.M.A. No. 362 of 1990

K. Suryanarayana and Another — APPELLANT

Vs

P. Lakshmipathi Raju and Others — RESPONDENT

Date of Decision : 21-01-2002

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23

Citation : AIR 2002 AP 340

Hon'ble Judges : G. Yethirjulu, J

Bench : Single Bench

Advocate : P.V.R. Sharma, for the Appellant; Mahipal Reddy Mandala, for the Respondent

Final Decision : Allowed

Judgement

G. Yethirjulu, J.—This is a miscellaneous appeal preferred against the judgment of the Subordinate Judge, Bapatla dated 18-12-1989 in A.S.No.18 of 1984.

2. The appellants are the defendants 1 and 2 in O.S.No.551 of 1980 on the file of the Principal District Munsif Court, Bapatla. The suit was filed by the plaintiff for dissolution of partnership and settlement of accounts of the 1st defendant-firm and to pass a decree in his favour for such amount as he may become entitled to with interest against such defendants who become liable to pay the said amount. The Principal District Munsif Court in its judgment dated 07-5-1984 dismissed the said suit with costs by holding that there is no necessity to pass any order for dissolution of the firm as it was already dissolved on the date of disposing of the mill which is the sole property of the firm in favour of defendants 18 and 19.

3. Being aggrieved by the judgment and decree of the trial court, the plaintiff preferred an appeal covered by A.S.No.18 of 1984 on the file of the Subordinate Judge, Bapatla.

4. The averments of the plaint are briefly as follows:

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The plaintiff and defendants 2 to 7 constituted a firm known as "Sree Srinivasa Rice and Oil Mill, Karlapalem in 1972.The 2nd defendant is the managing partner of the said firm and was managing the mill. Subsequently some of the partners sold away their shares to others and in pursuance of that sale defendants 16 and 17 were inducted as partners into the said firm and on 15-11-1977 they entered into a partnership-deed on a general stamp. The 2nd defendant being the managing partner of the firm has to settle the accounts every year by the end of March and distribute the profits among the partners. The 2nd defendant did not manage the firm properly and several partners are not satisfied with the affairs of the firm. Despite repeated demands, the 2nd defendant did not render proper accounts and failed to settle the same. The mill of the firm was damaged in the 1977 cyclone. Therefore, the partners sold away the mill to defendants 18 and 19 and they in turn leased out the mill to defendants 20 and 21. The 2nd defendant who received the sale consideration was authorized to discharge the debts of the firm and to pay the balance to the partners, as it was not possible for the partners to carry on the business in partnership with the 2nd defendant, hence the suit.

5. The 2nd defendant, who is the main contestant, filed a written statement and the following are the averments in brief:

The averments of the plaint are denied. The plaintiff carried on the business of the firm and managed the affairs under his personal supervision by maintaining accounts with false entries. The plaintiff operated the bank accounts and borrowed loans on behalf of the firm without the knowledge and consent of other partners. The plaintiff misappropriated Rs.2,18,900/- of the firm as on 06-10-1977. The mill for which the partnership was constituted was not in a working condition as on 25-7-1979. His name was described as managing partner nominally. The plaintiff absconded from the mill without informing the other partners by leaving the account books and other papers at the mill premises. The partnership firm constituted on 01-04-1977 was not registered as required under the provisions of the Partnership Act. Hence the suit is liable to be dismissed with costs.

6. Defendant Nos.18 and 19, who purchased the mill of the partnership firm for Rs. 2,80,000/- under a contract of sale dated 25-7-1979 executed by all the partners, pleaded that they are not necessary parties to the suit and they have nothing to do with the profits and losses of the said firm.

7. Defendant Nos.6, 11 and 20 filed separate written statements. Defendant Nos.3, 9, 10, 12 and 15 filed a Memo adopting the written statement of the 6th defendant.

8. Defendant No.21 filed a Memo adopting the written statement of the 20th defendant. Defendants 1 and 16 filed a Memo adopting the written statement of the 2nd defendant.

9. On the basis of the pleadings, the trial court framed appropriate issues on

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different dates. The plaintiff in order to prove his case examined P.Ws.1 and 2 and marked Exs.A.1 to A.33. The defendants examined D.Ws. 1 to 4 and marked Exs.B.1 to B.95. Exs.X.1 to X.6 were marked through witnesses.

10. The trial court, on 07-5-1984, after considering the evidence adduced by both parties dismissed the suit with costs by holding that the suit filed by the plaintiff is within time, that the defendants 18 and 19 are not necessary parties for proper adjudication of the suit, that the plaintiff acted as a de facto managing partner of the firm, that since the business transactions of the firm came to an end on 29-7-1977, that as the running of the business of the mill is the essential condition for the dissolution of the partnership, that since the firm was already dissolved when the same was sold to defendants 18 and 19, it is not necessary to pass any order for dissolution of the firm and there is no necessity for the 2nd defendant to render any accounts to the plaintiff or other partners.

11. The plaintiff being aggrieved by the judgment and decree dated 07-5-1984 of the Principal District Munsiff Court, Bapatla, preferred A.S.No.18 of 1984 on the file of the Subordinate Court, Bapatla.

12. When the matter came up for hearing before the appellate court, the appellate court held that mere severance of relation of partnership does not amount to dissolution of the firm, that if Ex.B.47-contract of sale dated 25-7-1979 is a letter of consent or agreement for the dissolution of partnership, the plaintiff would not have mentioned in the notice that he files a suit for dissolution of partnership and for settlement of accounts. Therefore it cannot be inferred that closing of the business and selling of the mill to the third parties does not amount to dissolution of the partnership. The appellate court further observed as follows:

... So, the lower court considered that when the firm was tentatively dissolved, the other points will not come to an end, but when the point that the firm was not dissolved was upheld, the other issues have to be answered on the material available on record. ... the lower court decided the suit on point of law that the partnership was dissolved U/s. 40 as per Ex.B.47, but the appellate court decided that Sec. 40 have no application in the present case and the appellate court came to the conclusion that the partnership was not dissolved. In view of the above circumstances, this Court cannot answer the other issues, as the appellant has not let in any evidence in this court. So it is a fit case to be remanded to the lower court to answer issues 1 to 3 according to law.

13. While making the above observations, the appellate court allowed the appeal by setting aside the judgment and decree of the trial court for fresh disposal on issues 1 to 3.

14. The 1st defendant-firm represented by the 2nd defendant and the 2nd defendant in his individual capacity preferred this miscellaneous appeal challenging the order of the appellate court remanding the matter to the trial court for fresh disposal according to law.

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15. The point for consideration is whether the order of the Subordinate Judge, Bapatla in A.S.No.18 of 1984 is not valid under law and whether it is liable to be set aside?

16. It is an undisputed fact that the partnership firm was constituted for owning and running of the schedule rice and oil mill and to share the profits, if any, from out of the said business. It is also an undisputed fact that all the partners entered into an agreement of sale dated 25-7-1979 covered by Ex.B.47. It was signed by all the partners of the firm agreeing to sell the said property for consideration. The parties adduced oral evidence to prove their respective contentions and to disprove the contentions of the opposite parties. They filed the partnership deeds, sales-tax returns, copies of cheques, promissory notes with discharge endorsements, books of account relating to the transactions of business of the firm, copies of the pleadings of other related suits and other necessary documents. The appellate court observed that it couldn''t answer the other issues, as the appellant did not adduce any evidence before it. Therefore it is a fit case to be remanded to the lower court to answer issues 1 to 3.

17. The appellate court discussed only about the observations made by the trial court and did not weigh the evidence on its own merits. It did not list out the gaps that were to be filled in order to arrive at a conclusion in respect of the matters covered by the issues. The issues cover the oral and documentary evidence adduced by both parties and it may not be possible for both parties to adduce any further evidence touching upon the matters covered by the issues. The appellate court instead of marshaling the evidence and giving answers to the points in issue discussed the de-merits of the judgment of the trial court without making its own assessment after weighing the evidence adduced by both parties. In this connection it is essential to extract Order 41 Rule 23 C.P.C. and it reads as follows:

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, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject all just exceptions, be evidence during the trial after remand.

18. This Court in SARASWATHIDEVI & ORS. v. JUJJURU SATYANARAYANA RAJU1 while considering the scope of Order 41 Rule 23 C.P.C. observed as follows: ... The power under Order 41 Rule 23 is of wide amplitude and of discretionary nature, but the discretion should not be exercised arbitrarily, but with circumspect guided by sound and reasonable judicial principles capable of being corrected by the Court of Appeal. The order of remand should indicate sufficient and cogent reasons for remitting the matter for re-trial.

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19. In the case covered by the above decision, when the matter was remanded to the lower appellate court, instead of abiding by the remand order, committed illegality by making a further remand to the trial court for re-trial of the suit thereby enabling the respondents to fill in the lacuna to the detriment of the appellants which is likely to cause miscarriage of justice to the appellants. The High Court therefore set aside the order of remand made by the lower appellate court as illegal. In P.RAMA RAO v. P.VIMALAKUMARI2 the A.P. High Court observed as follows:

The power of remand under the amended Rule 23 of Order 41 applicable to Madras and Andhra Pradesh are wide enough to take in not only the cases, where the trial court had decided the cases on the preliminary point, but also the case where the trial court had decided all the issues after considering the entire evidence on record and when the appellate court in the interest of justice feels that a remand was just and proper, the conditions prescribed for the exercise of the power of remand under Rule 23 Order 41 C.P.C. are mandatory but not a mere formality. To arrive at a finding on the material on record that the judgment of the trial court is erroneous and is liable to be reversed or set-aside is a condition precedent for the appellate court to clutch at the jurisdiction to pass an order of remand under Order 41 Rule 23 C.P.C.

20. The above judgments indicate that the appellate court has sufficient power to remand the matter to the trial court for fresh disposal on merits, but it is possible only when the appellate court in the interest of justice feels that a remand was just and proper and the appellate court should arrive at a finding on the material available on record that the judgment of the trial court is erroneous and is liable to be reversed or set aside. This is a condition precedent for passing the order under Order 41 Rule 23 C.P.C. Except observing that the partnership firm was not dissolved, the appellate court did not assign any other reason stating as to how the interests of either of the parties would suffer, whether due to non-availability of sufficient oral or documentary evidence. The appellate court did not specify as to what are the specific gaps in the evidence adduced by both parties and how it is going to prejudice either of the parties. The mere observation of the appellate court that the trial court has to decide the matter on issues 1 to 3 is not sufficient to sustain the order of remand.

21. It took eleven years for this miscellaneous appeal to reach the stage of hearing and it is not known how much time it is likely to take for the trial court to enable the parties to make up their mind whether any further evidence has to be adduced or not. In my considered view, there is sufficient oral and documentary evidence to enable the appellate court to answer all the issues covered by the appeal. It is not the observation of the appellate court that the evidence on record is not sufficient. Unless there is a compelling reason to remit the matter to the trail court, it is not desirable to resort to exercise the power under Order 41 Rule 23 C.P.C., which is likely to cause complete damage to the interest of the parties. Hence the judgment and decree of the appellate court is liable to be set

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aside.

22. In the result, the appeal is allowed by setting aside the judgment and decree dated 18-12-1989 of the Subordinate Court, Bapatla passed in A.S.No.18 of 1984. The Subordinate Court, Bapatla is directed to restore the appeal A.S.No.18 of 1984 to its original file and dispose of the same on merits within a period of two months from the date of receipt of a copy of this judgment along with the record. No costs.

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