
(2011) 01 MAD CK 0195

In the Madras High Court

Case No : C.M.S.A. No. 40 of 1998 and C.M.P. No. 19700 of 1998

Puttu Kempaiah

APPELLANT

Vs

Manjula and Others

RESPONDENT

Date of Decision : 07-01-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 97, Order 41 Rule 23, Order 41 Rule 23A, Order 41 Rule 27

Citation : (2011) 1 LW 668

Hon'ble Judges : R.S. Ramanathan, J

Bench : Single Bench

Advocate : V. Nicholas, for the Appellant; P.K. Rajagopal, for Respondent 1 to 3, for the Respondent

Final Decision : Allowed

Judgement

R.S. Ramanathan, J.—This civil miscellaneous second appeal is filed against the order of remand made in R.E.A. No. 14 of 1996 on the file

of the Subordinate Judge, Hosur.

2. The suit in O.S. No. 166 of 1979 was filed by the Appellant herein for delivery of possession of the property and the suit was decreed and in

execution of the decree, the decree-holder/Appellant filed E.P. No. 36 of 1993 and he found that Respondents 3 to 5 were obstructing the taking

of delivery and therefore, the Appellant filed E.A. No. 16 of 1994 under Order XXI Rule 97 of the CPC to remove the obstruction and that was

allowed by the court below. Thereafter, Respondents 3 to 5 herein filed C.M.A. No. 14 of 1996 against the said order and that appeal was

allowed by the first appellate court and remanded the case to the court below and against the same, the present appeal is filed by the decree

holder.

3. The civil miscellaneous second appeal was admitted and notice of motion was ordered. In the grounds of appeal, the decree holder raised two

substantial questions of law and they are as follows:

a) When the lower appellate court didnot come to a conclusion that the decision of the trial court is erroneous on facts or on law and therefore

liable to be reversed,whether the lower appellate court is correct in remanding the petition to the trial court for fresh enquiry.

b) When Respondents 3 to 5 produced documents which have been marked asExs.R1 to R6 but failed to produce the alleged Will and thus

sufficient opportunity has been given to them by the Trial Court, whether the lower appellate court is correct in remitting the petition so as to give

them an opportunity to fill up the lacuna by producing the said alleged Will.

4. According to me, the two substantial questions of law raised by the Appellant can be framed as substantial questions of law in this appeal.

5. It is submitted by the learned Counsel for the Appellant that Respondents 3 to 5 obstructed to the delivery of property on the basis of an alleged

Will dated15.8.1976 executed by Chikona alias Kembiah. Though the Will was dated 15.8.1976, it is the specific case of Respondents 3 to 5 that

they came to know of the Will later in point of time and only on 10.12.1992, they came to know about the Will and thereafter, they realised their

right and obstructed to the possession of the property by the Appellant and to remove their obstruction, the Appellant filed the application. It is

further submitted by the learned Counsel for the Appellant that even though Respondents 3 to 5 claim right under the Will, they have-not produced

the Will before the court below nor let in evidence to prove the Will by examining the attesting witnesses and till the decree holder filed the petition

under Order XXI Rule 97 of the Code of Civil Procedure, the Will was not brought to light by Respondents 3 to 5 and considering all these

aspects, the Trial Court allowed the application filed by the Appellant. He further submitted that Respondents 3 to 5 are not strangers to other

Respondents and the decree holder has purchased the property from one Mallamma who was the legally wedded wife of Chikona alias Kembiah,

under a registered sale deed dated 24.8.1978 after the death of Chikona alias Kembiah,and the first Respondent claims to be the second wife

of Chikona alias Kembiah which fact was disputed by the decree holder in the suit itself and Respondents 3 to 5 claim to be the children of the first

Respondent and therefore, they are also aware of the decree passed against Respondents 1 and 2 and having kept quiet all these years without

probating the Will, for the first time, when delivery was about to be taken by the Appellant, they started obstructing the same and therefore, the

petition was filed by the Appellant for removing the obstruction and the lower appellate court, without taking into consideration the fact that the

Will was not produced and no request was made by Respondents 3 to 5 to file the Will and to lead evidence, allowed the appeal and remanded the

case to the Trial Court with a view to give one more opportunity to Respondents 3 to 5 and the order of the lower appellate court in remanding the

matter is against Order XLI Rule 23A of the CPC and therefore, the order is liable to be set aside.

6. On the other hand, the learned Counsel for Respondents 3 to 5 submitted that the lower appellate court has rightly remanded the matter to the

Trial Court with a view to give one more opportunity to Respondents 3 to 5 to prove the Will and no prejudice would be caused to the Appellant

by the order of remand and therefore, the order of the lower appellate court can be sustained.

7. Heard the counsel for both sides.

8. It is seen from the order of the lower appellate court that the lower appellate court has remanded the matter only for the purpose of giving one

more opportunity to Respondents 3 to 5 to prove their case. It is observed by the lower appellate court that the Trial Court failed to consider

whether the first Respondent was the legally wedded wife of the deceased Chikona alias Kembiah and whether Respondents 3 to 5 are entitled to

any share in the property and whether Respondents 3 to 5 are bound by the decree passed in O.S. No. 166 of 1979 and no opportunity was

given to Respondents 3 to 5 to prove their case and on that ground, the lower appellate court allowed the appeal and remanded the matter to the

Trial Court.

9. According to me, the lower appellate court erred in remanding the matter without any regard to the provisions under Order XLI Rule 23 and

23A. Order XLI Rule 23 says that 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. As per the Madras Amendment, the appellate court is also entitled to remand the case if it considers necessary in the interest of justice. As per Order XLI Rule 23A, where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23. Therefore, to invoke Order XLI Rule 23 and Rule 23A, the first condition to be satisfied is that the appellate court must reverse the judgment and consider that a re-trial is necessary in the interest of justice and on being satisfied with the same, the appellate court can remand the case to the Trial Court.

10 In this case, as stated supra, Respondents 3 to 5 claim their right on the basis of the Will and admittedly they have not filed the Will before the Trial Court in order to adduce any evidence to prove the Will. Even in the grounds of appeal, they have not raised any ground for letting additional evidence by invoking Order XLI Rule 27 of the CPC and even before the lower appellate court, they have not produced the alleged Will under which they claim their right.

11. Further, it is seen from the order of the Trial Court that Respondents 3 to 5 were given opportunity to lead evidence and they have not examined any witness and they have marked only 6 Exhibits as Exs. R1 to R6 and therefore, it cannot be stated that no opportunity was given to Respondents 3 to 5 to lead evidence. Having marked six documents, nothing would have prevented the Respondents to produce the Will and prove the same through attesting witnesses. Therefore, in the absence of any application filed by Respondents 3 to 5 seeking leave of the court to adduce additional evidence, it is not open to the lower appellate court to reverse the finding of the Trial Court and remand the matter by observing that it is not known whether Respondents 3 to 5 were given opportunity before the Trial Court to prove the Will. In the absence of any grounds raised in the memorandum of appeal regarding the denial of their right to file the Will and to lead evidence, the lower appellate court should not

have presumed that they were not given opportunity to produce the Will and prove the same.

12. According to me, the observation of the lower appellate court that there is no material available before it as to whether Respondents 3 to 5

voluntarily informed the court that they have no evidence or the Trial Court presumed that they have no oral or documentary evidence is a special

pleading on behalf of the Respondents. When Respondents 3 to 5 have specifically pleaded in the counter that they are claiming right under the

Will, it cannot be presumed that they were prevented from proving the Will by letting in evidence and even assuming that they were prevented from

letting in evidence to prove the Will as observed by the lower appellate court, in the absence of any application filed by them before the lower

appellate court to mark the Will and to lead evidence, the lower appellate court ought not have remanded the matter to the Trial Court.

13. Further, the lower appellate court did not give any finding regarding the Will when the Trial Court has given a specific finding that the Will set

up by Respondents 3 to 5 cannot be believed stating that the Will was not probated immediately after the death of the testator. Therefore, in the

absence of any finding given by the lower appellate court for reversing the judgment of the Trial Court, the lower appellate court ought not have

remanded the matter to the Trial Court only with a view to give one more opportunity to Respondents 3 to 5 to prove the Will and the finding of

the lower appellate court is against the provisions of Order XLI Rule 23 and therefore, both the substantial questions of law raised by Appellant are

answered in favour of the Appellant.

In the result, the civil miscellaneous second appeal is allowed. The order passed by the lower appellate court is set aside and the lower appellate

court is directed to dispose of the appeal on merits within a period of eight weeks from the date of receipt of this order. No costs. The connected

miscellaneous petition is closed.