
(1983) 08 KAR CK 0014
In the Karnataka High Court
Case No : Civil Referred Case No. 6 of 1981

Raja Hussain

APPELLANT

Vs

Gaviappa and Others

RESPONDENT

Date of Decision : 30-08-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 46 Rule 1, 113

Citation : AIR 1984 Kar 108 : (1984) 1 KarLJ 47

Hon'ble Judges : R.S. Mahendra, J;G.N. Sabhahit, J

Bench : Division Bench

Advocate : B.S. Raikote, for the Appellant; Muralidhar Rao, for the Respondent

Judgement

G.N. Sabhahit, J.—The factual antecedents, briefly stated, are:

One Gaviappa Hubli and Somappa Uttangi, as plaintiffs filed Original Suit No. 31/1/1966 before the Munsiff, Koppal, against one Raja Hussain and Viswanathasa, as defendants 1 and 2, for recovery of possession of 80 Square Yards of land out of 869 Square Yards in Plot No. 1696 situate, at Koppal. According to the plaintiff, this site was purchased by plaintiff 1 and deceased father of plaintiff 2 from its previous owner Viswanathasa, (defendant 2), for a sum of Rs. 3,000/-. Defendant 1 was alleged to be in wrongful possession of 80 square yards out of 869 square yards purchased by the plaintiffs. He had also constructed two huts on the site without their consent.

The suit was contested by defendant 1 Raja Hussain. He opposed the claim on several grounds. His contention was that the construction over the suit site exclusively belonged to him. He further contended that he had purchased the site from one Balakrishnasa about eighteen years back for a sum of Rs. 50/- He denied that he had committed trespass. He further contended that he had perfected his title by adverse possession.

The trial Court framed the necessary Issues and recorded evidence. The suit was decreed by the trial Court against defendant 1, it having held that the plaintiffs

entitled to recover possession of the suit sit@ from defendant 1. Aggrieved by the said judgment and decree, defendant It preferred Regular Appeal No. 46/4/1967 before the Civil Judge, Raichur. That appeal was allowed by the learned Civil Judge, by his judgment and decree dated 1-9-1970. He set aside the judgment and decree passed by the trial Court and dismissed the suit of the plaintiffs. Aggrieved by the said judgment and decree, plaintiffs came up in appeal in Regular Second Appeal -No. 172 of 1971 before this Court challenging the judgment and decree of the First Appellate Court. That appeal was registered as Regular Second Appeal No. 172 of 1971 and was along with Regular Second Appeals Nos.175 and 176 of 1971, which pertained to different areas, in the same plot and raised similar 12 questions of facts and law. This Court was pleased to hold on hearing that the First Appellate Court failed to decide the question of limitation and the question of adverse possession in accordance with law. In that view, this Court allowed the appeals and set aside the judgments and decrees of the Courts below and remitted the, matters back to the First Appellate Court for disposal in accordance with law.

When the matter went back before the learned Civil Judge, the learned Civil Judge, ultimately, discovered that plaintiff 1 Gaviappa had died on 19-7-1974 during the pendency of the Second Appeal before this court. Parties submitted a memo that since the second appeal was decided after he died without bringing his legal heirs on record, the matter should be referred to this Court for taking such steps as are deemed proper.

2. The learned counsel appearing for the parties signed the memo. Relying on the memo, the learned Civil Judge has made a reference to this Court by the above reference. He has referred the matter thus to this Court

"In the instant, case also appellant Gaviappa died on 19-7-1974 as per the affidavit of Somappa. But, howere, his LR's. were not brought on recovered till 13-9-1976 when his R. S. A. No. 172/1971 was heard and disposed of by the Hon"ble High Court " the matter was remanded to the lower Appellate Court. Hence, on the strength of the above decision, I have made this reference to the Hon"ble High Court for passing suitable orders in the matter"

3. The learned civil Judge relied on as unreported decision of this Court, (reported in Short Notes), in C. R. C. No. 5 of 1970 between Jinna-Dasaheb Imamsaheb Palegar and others and Appasaheb Alias Babaji Kallappa Kaddu, (since deceased, by his legal representatives), decided on 5-7-1978. Thus, the learned Civil Judge has not referred any statement of facts seeking the opinion of this Court, on a question of law.

4. The only section in the Civil P. C which speaks of reference by a subordinate Judge is Section 113, which reads :

"Reference to High Court.- Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit,

Provided that where the Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation, or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the, High Court to which that Court is subordinate or by the Supreme Court, the Court, shall state a case setting out its opinion and the reasons there for, and refer the same for the opinion of the High Court.

Explanation :- In this section, "Regulation" means any Regulation of the Bengal, Bombay or Madras Code or Regulation as defined in the General Clauses Act, 1897 or in the General Clauses Act of a State."

5. Thus, reading Section 113 of the Civil P. C., it becomes clear that there are two categories of. cases wherein a Subordinate Court may refer to the High Court for its opinion. The first part states subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court. it is discretionary. It is hemmed in by conditions and limitations as may boll prescribed and these conditions and restrictions are provided under Order 46, Rule 1 in Schedule 1 of the Code of Civil Procedure. The second part of the section refers to the reference that shall be made and it refers to the vires of any Act, ordinance, regulation or. any provision contained therein. We are, in the present case, concerned with the first part.

6. Order 46, Rule 1 of the Civil P. C., which governs the first part of Section 113 of the Civil P. C., reads :

"Reference of question to High Court : Where, before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained and refer such statement with its own opinion on the point for the decision of the High Court. "

7. Thus, reading Order 46, Rule 1 of the Civil P. C. in juxtaposition with Section 113 of the Civil P. C., it becomes clear that before a reference is made, if it is an appeal, it is a pre-requisite that the decree in the appeal is not subject to appeal. If the decree is subject to appeal, then, no reference is competent. Secondly, the Court which refers must state the facts of the case and the point on which it entertains doubt, after expressing its own opinion on the point. Thus, it becomes manifest that this Court. on a reference, is to exercise its jurisdiction as a consultative Court and nothing beyond. It cannot exercise its original or appellate jurisdiction. (Vide : Seth Premchand Satramdas Vs. The State of Bihar, and Delhi Financial Corporation v. Ram Parshad AIR 1977 Delhi 80.

8. In the instant case, the learned Civil Judge has no doubt stated that this Court

disposed of the second appeal without knowing that one of the appellants was no more at the time when it heard the arguments and delivered the judgment. May be so. That does not call for any opinion. The learned Civil Judge has also not sought for any opinion. He simply states for passing suitable order in the matter."

9. As stated above, on reference u/s 113 read with Order 46, Rule I of the Civil P. C., this Court is not seized of the entire proceeding. It can neither exercise its original jurisdiction nor appellate jurisdiction. The jurisdiction invoked on a reference is consultative jurisdiction. It cannot pass any orders on merits.

10. Further, obviously, if a decree is passed in the appeal by the learned Civil, Judge it is appealable. It was in an appeal that this Court remanded the matter on allowing the appeal. Therefore, under O. 46. R. 1 of the Code of Civil Procedure, no reference is competent. (vide: Punjab State Vs. Joginder Nath, and Chhotubhai Bhimbhai v. Bai Kashi AIR 1941 Bom 365).

11. Besides, this Court, by a Division Bench decision, consisting of Hon'ble, the Chief Justice Govinda. Bhat and Jagannatha Shetty, J., has ruled in the case, Hudugaranga Naika, v. Gowramma (1973) 2 Mys 369 : AIR 1974 Kant 34 that a reference on the ground that the Judge is unable to understand the, scope of the statutory provision and asking for opinion and guidance does not fall within the ambit of Section 113 of the CPC and is, therefore, incompetent.

12. The High Court of Bombay has deprecated the practice of some of the subordinate Judges to make reference pointing out that a direction given by the Superior Court is illegal and incompetent, in the cast L.S. Sherlekar Vs. D.L. Agarwal, of the judgment thus:

"Before parting with the case, we cannot but observe that the attitude adopted by the applicant Judge is wholly unwarranted. A reference under the provisions of Order 46. Civil P. C., is not to be made, because a Judge thinks that a certain direction by the District Judge or by the High Court is wrong. If any consequences of want of jurisdiction flow from some such illegal direction, a party may as well raise the point at the appellate stage or in an other proper proceeding before the Courts. A reference is to be made only when an important issue of law arises in the suit. This is something which has to do with the merits of the suit. It is wrong for any Judge to take up a contentious attitude and adopt the role of, a litigant. The net result of the applicant Judge's attitude has been to deprive the plaintiff of the fruit of his attachment order which could not be effectively executed because of this unwarranted reference."

We respectfully agree and endorse the view expressed by the Division, Bench of the Bombay High Court.

13. Thus, we are satisfied that the reference, made by the learned Civil Judge is quite incompetent and without more it has to be rejected.

14. It is no doubt true that the learned Civil Judge has referred to a decision of this Court in Civil Referred Case No. 5 of 1970 disposed of on 5-7-1978, between

Jinna dasaheb Imamsaheb Palegar and others and Appasaheb alias Babaji Kallappa Kaddu, (since deceased, by his legal representatives).

Therein, this Court has no occasion to consider whether a reference of the present type is competent or not. We were taken through that judgment and we find that the judgment assumes that it is a valid reference and proceeds to consider the merits. Hence, the learned Civil Judge was not justified in thinking that the judgment is a precedent for the proposition that when a direction is given by a Superior Court, it is competent for the subordinate Court to make a reference with regard to the legal character of that direction as illegal or void. We clarify that the said judgment is not an authority for such a proposition.

15. Our attention was also invited to a decision of the Calcutta High Court, referred by this Court in Civil Referred Case No. 5 of 1970, in the case, Abdul Aziz v. Lakshmi Chandra Mujumdar and Sons (AIR 1923 Cal 676). Therein, in an appeal instituted against the decree passed by the learned District Judge, after remand, their Lordships observed that even though the remand order was passed after the death of the, appellant, it was not a nullity and the Court did not lose jurisdiction to further allow the legal representatives of the deceased appellant to be brought on record. In the course of the judgment, there is an obiter "which states that the learned District Judge could have brought to the notice of the High Court that such an order was passed after the death of the appellant. That cannot be an authority to say that a reference would lie u/s 113 read with O. 46, R. 1 of the Civil P. C. in such a case.

16. In fact, the High Court, of Himachal Pradesh in a recent decision has referred to the Calcutta decision and has pointed out that in such a case, it is not as if the party is, not left without a remedy and that the aggrieved party can. always apply to the concerned Court to reconsider the order and make necessary amendments by applying for Review under O. 47, R. I of the Civil P. C. (vide Ghansara Singh V. Smt. Ajudhia ILR (1975) HP 742). There the remand order was against a dead person, The fact regarding death was not known to the appellants or to the respondents. Question arose whether that would be a sufficient cause for reviewing the judgment made. The Court held that it was a sufficient cause to review the order Under O. 47, R. 1 as well as under O. 47, R. 4 of the Civil P. C. It was a mistake or error apparent on the face of the record. That was sufficient reason to set aside the judgment.

17. Thus, the proper remedy for the aggrieved party in a situation like the present one, where in ignorance of fact this Court or an Appellate Court allows the appeal and makes a direction for remand, is to apply to the Court in review and it cannot be the subject matter of a reference by a Subordinate Judge reducing himself to the position of a contentious litigant in making such a reference.

18, In the circumstances, we are constrained to hold that the reference made by the Civil Judge, Kappal, is incompetent and, as such, it is rejected.

19. Reference rejected.