
(2011) 11 KAR CK 0088
In the Karnataka High Court
Case No : M.S.A. No. 52 of 2010

Smt. Zulekabi and Others

APPELLANT

Vs

Sri Ahmed Shariff Sab

RESPONDENT

Date of Decision : 09-11-2011

Acts Referred:

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

Citation : (2011) 11 KAR CK 0088

Hon'ble Judges : Jawad Rahim, J

Bench : Single Bench

Advocate : T. Sheshagiri Rao and Sri Sunil S. Rao, for the Appellant; H.K. Thimmegowda, for the Respondent

Final Decision : Allowed

Judgement

Jawad Rahim

1. Miscellaneous second appeal is by the defendants in O.S. No. 26/1997.
2. Heard.
3. The contextual facts are the respondent/plaintiff tiled a suit in O.S. No. 26/1997 for partition of the properties described in the schedule to the petition for allotting unto him share. The appellants were defendants in the party array. The suit was resisted by them. After detailed enquiry in it, the plaintiffs tendered evidence as PWs 1 to 4 and relied on 12 documents. The appellants also tendered evidence on their behalf through DWs 1 and 2 and relied on 29 documents. The learned trial Judge considering the evidence held that it supports no ground in the plaint to grant decree to divide the properties in the schedule and thus dismissed the suit. Assailing it, they were in R.A.No. 164/2006.
4. The learned appellate Judge, accepting certain grounds only against the impugned judgment of the trial Court, has set it aside the judgment and decree and remanded the case with certain directions. The order impugned though is

setting aside the judgment and decree of the trial Court dismissing the suit but has directed the trial Court to reconsider only certain issues. The appellants/defendants have questioned the remand as being not in terms of Rule 23, 23A of Order XLI of the CPC. In support thereof; it is averred that trial Court had dismissed the suit after a specific finding that the plaintiffs had failed to establish genetic relationship with Ibrahim Sab. The finding of the trial Court is based on material evidence and therefore, the appellate Court should have reassessed the material evidence to decide as to whether it supports the order or it supports petitioners. Instead of doing so, the learned appellate Judge accepted the request of the plaintiffs to permit them to lead additional evidence and only on that ground directs the trial Court to reconsider the issue. Further grounds are that permission to lead evidence cannot be granted for mere asking, The circumstances narrated under Rule 27 of Order XLI must be shown to exist and appellate Court should be of the opinion that additional evidence is necessary for deciding the dispute effectively or finally. In other words, the core contention is the appellate court must be of the opinion that the additional evidence is necessary and then only, it should be permitted. The circumstances under which it could be granted must be established by the party seeking such a relief. The appellate Court has, while passing the impugned order, failed to record its finding as to whether the evidence on record supports the finding of the trial Court or not. The first appellate Court being final Court on facts could not have refused to exercise jurisdiction conferred on it to re-assess the evidence on record. Besides, the order of remand is unsustainable as it deprives opportunity to the defendants.

5. The learned counsel for the respondent/plaintiff has supported the impugned judgment contending an opportunity is available to the defendants to counter the evidence which ultimately would be placed.

6. Having heard both sides, I am satisfied that the impugned order does not reveal that the appellate Court has examined the grounds in appeal with reference to material on record. The learned appellate Judge has taken note of the request made by the plaintiff to lead additional evidence as a basis for remand. As urged request for additional evidence is to overcome the finding of the trial Court regarding paucity of evidence establishing the genetic relationship between the parties and the common ancestors.

7. Be that as it may. The impugned order, as rightly urged, does not show that the learned appellate Judge has re-appraised the evidence on record to reach conclusion that the impugned judgment of the trial Court needs to be set aside for retrial. In fitness of things, it is desirable that the appellate Court shall reconsider the appeal on merit and take a decision. While reassessing the evidence, it will be up to the appellate Court to decide whether the additional evidence is necessary or not.

8. Therefore, the respondent is permitted to urge all such grounds which may accrue to his benefit during rehearing of the appeal.

9. The appeal is therefore allowed. The judgment and decree passed in R.A.No. 164/2006 is set aside. The appellate Court is directed to hear the appeal on merit after giving opportunity to both sides, within the outer limits of three months from the date of receipt of the copy of this order. Both the parties are directed to maintain status quo till then.