HIGH COURT OF ANDHRA PRADESH :: AMARAVATI

+CIVIL MISCELLANEOUS APPEAL Nos.472, 473, 474, 483, 484 and 485 of 2022

CMA No.472 of 2022 :

Between:

#1. Kanneganti Kamalakar @ Kamalakara Rao
S/o. Kotaiah Chowdry, Hindu, aged 78 years,
Presently residing at USA represented by his
GPA holder Mr. Mandava Siddhartha S/o. Vinaykumar
Hindu, aged 27 years, employee,
Residing at Delhi

... Appellant

And

$ 1. 1. Nishtala Subramanya Satya Venkata Kameswara Sanyasi Rao, S/o. late Narasimha Murty wrongly Described as Venkatarama Subramanya Sharma, Hindu, aged about 47 years, business, Resident of Ingilapalli Village, Dttirajeru Mandal, Vizianagaram District and another.

... Respondents

JUDGMENT PRONOUNCED ON **18.10.2023**

THE HON'BLE DR.JUSTICE K. MANMADHA RAO

1. Whether Reporters of Local newspapers may be allowed to see the Judgments? - Yes -

2. Whether the copies of judgment may be marked to Law Reporters/Journals - Yes -

3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? - Yes -

DR.JUSTICE K. MANMADHA RAO

THE HON'BLE DR.JUSTICE K. MANMADHA RAO

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Respondents

! Counsel for the Appellant

Counsel for Respondents:

<Gist :

>Head note:

Sri M. Kesava Rao

Sri K. Devi Prasanna Kumar

?Cases referred :

1. (2021) 11 SCC 277

2. 2008(1) ALD 712

3. (2022) 7 SCC 247

4. (2015) 17 SCC 713

5. AIR 1981 (SC) 1400

THE HON'BLE DR.JUSTICE K. MANMADHA RAO

C.M.A Nos.472, 473, 474, 483, 484 and 485 of 2022

COMMON JUDGMENT :

As the issue involved in these appeals is one and the same, these matters are taken up together for disposal by this Common Judgment.

2. The facts in these appeals are similar and identical, therefore C.M.A.No.472 of 2022 is taken as lead case, and the facts therein are referred to for convenience.

3. The impugned A.S.No.09 of 2021 was filed by the unsuccessful 1st defendant against the decree and judgment in O.S No.21 of 019 dated 5.5.2020 on the file of the Senior Civil Judge, Vizianagaram (for short "the trial Court").

4. For the sake of convenience, the parties in this appeal will be referred to as arrayed before the trial Court.

5. The 1st respondent/plaintiff filed the suit before the trial Court for permanent injunction restraining the defendants and their men from ever interfering with the exclusive possession and enjoyment of the plaintiff over the plaint schedule property in any manner whatsoever and for costs. The plaintiff is the absolute owner of the property situated at Vizianagaram. Originally, the South Eastern Railway Employees Co-operative Building Society, Vizianagaram, acquired land in an extent of Ac.8.76 cents by way of purchase from several original Owners by paying necessary sale

consideration and taken over possession of the same and the said Society got approved the proposal for layout and the plaint schedule two plots are part-and-parcel of the said layout. After approval of layout, the said Society through its President, sold out the plaint schedule plots to the plaintiff and handed over possession of the plaint schedule plots and ever since the plaintiff, being the bona fide purchaser, has been in possession and enjoyment of the plaint schedule plots with all absolute rights, title, interest and possession. In the village Adangal of Dharmapuri at column Nos. 12 and 13 show that the land in S.No.64 in an extent of Ac.4.90 and Ac.3.90 cents are house plots. The plaintiff purchased the plaint schedule property together another plot No.59 adjacent layout laid down by the above Society. Further, the defendants without having any manner of right or title trying to encroach into the plaint schedule property and also trying to create some spurious documents in collusion with each other and third parties, which are not at all binding on the plaintiff.

6. While so, on 11.09.2015, the defendants, taking advantage of absence of the plaintiff in Vizianagaram, tried to interfere with the plaint schedule property, but because of protest and intervention of local mediators, the defendants could not interfere with the plaint schedule property and left the place by

proclaiming that they would again come and interfere with the plaint schedule property, Hence the suit.

7). The 1st defendant filed written statement denying all the material allegations in the plaint and contended that an extent of Ac.3.90 cents is a part in S.No.64/2 of Dharmapuri village, which was originally purchased by one Bulusu Lakshmi Devamma under registered sale deed dated 09.05.1927 from one Namburu Venkata Raja Rajaji and his son, ever since she is in possession and enjoyment of the same and after her death, her two daughters viz., Nishtala Annapoornamma and Gorthi Sureedamma have succeeded to her estate, who enjoyed the said property and got cultivated through tenant Ryots. Thereafter, since disputes arose between the two sisters and tenant Ryots, Annapoornamma and Sureedamma have filed suit in O.S.No.72 of 1977 on the file of Sub Court, Vizianagaram, for declaration of title and recovery of possession, which was subsequently decreed declaring that both the sisters are the absolute Owners over Ac.3.90 cents of land in S.No.64/2.

8. While so, both Annapoornamma and Sureedamma died without issues. Since Sureedamma predeceased to Annapoornamma, she executed a Will on 18.07.2000 in favour of the 1" defendant bequeathing the property of Ac.3.90 and subsequently the Testator/Annapoornamma died on 16.09.2001,

thereby, the Will acted upon and the 1" Defendant became the absolute owner of the said Ac.3.90 cents of property. Since, even prior to the decree in the above said suit, there was a house built in Ac.3.90 cents and as such the said property remained uncultivated and left as barren land and shrubs and bushes have grown up in the said property, and hence, the plaintiff cannot claim the said property by way of Will and hence the defendant is the absolute Owner of the said extent and hence the suit is not maintainable and prayed to dismiss the suit.

9. Basing on the above pleadings, the trial Court framed the following issues for trial:

1. Whether the plaintiff is entitled for the relief of permanent injunction as prayed for?
2. To what relief?

10. During the course of trial, on behalf of the plaintiff, PWs.1 and 2 were examined and Ex.A1 to Ex.A12 were marked. No one was examined and no documents were marked on behalf of the defendants. Upon considering the oral and documentary evidence, the trial Court decreed the suit. Aggrieved by the same, the 1st defendant preferred the present impugned Appeal Suit in A.S N.09 of 2021 before the Principal District Court, Vizianagaram (for short “the first appellate Court”) contending that the decree

and judgment of the trial Court is contrary to law, weight of evidence and probabilities of the case.

11. After careful examination of the entire material available on record and on considering the submissions made by both the counsels the first appellate Court has allowed the appeal by setting aside the decree and judgment passed by the trial Court and the matter was remanded back to the trial Court for fresh disposal in accordance with law within four months from the date of receipt of the judgment after giving opportunity to the appellant/defendant subject to payment of Rs.5,000/- by the appellant/defendant to the 1st respondent/plaintiff on or before 7.1.2022, failing which the appeal stands dismissed. Hence, the appeal came to be filed.

12. The pleadings which are cited by the appellant in CMA No.472 of 2022, the same are adopted by other appellants in other CMAs i.e., CMA Nos.473, 474, 483, 484 and 485 of 2022.

13. During pendency of the above CMAs, this Court, while condoning the delay and while issuing notice before admission, granted interim stay as prayed for vide order dated 29.12.2022 & 30.12.2022 in all the appeals.

14. Heard Sri M. Kesava Rao, learned counsel appearing for the appellant(s) and Sri K. Devi Prasana Kumar, learned counsel appearing for the respondents.

15. During hearing, learned counsel for the appellant(s) while reiterating the averments made in the appeals, contended that the judgment and decree of the lower appellate Court are contrary to law and weight of evidence and cannot be sustainable under eye of law. Further, the lower appellate Court ought to have appreciated that the appellant therein did not seek for remand of the appeal but sought for allowing the appeal by setting aside the decree. He further submits that the lower appellate court had erred and failed to see that the appellant did not filed any petition in the appeal with regard to the further adjudication of the evidence under the provisions of CPC and also did not even call for the record of the trial Court to examine whether the trial Court has really afforded the defendant to cross examine the witnesses of the plaintiff and also adduce evidence on his behalf. He further submits that the lower appellate Court allowed the appeal by setting aside the decree and judgment of the trial Court and ordered for fresh disposal which virtually amounts *de novo* trial. If there is any lapse or fault on the part of the 1st defendant before the trial Court, he did not avail the opportunity of adducing evidence before the

first appellate Court and without pointing out any infirmity in the judgment of the trial Court, the matter cannot be remitted back to the trial Court. He further submits that the 1st defendant prayed for remand only to cover his latches, which cannot be permitted.

16. To support his contentions, learned counsel for the appellant(s) has placed reliance on the judgment of Hon'ble Supreme Court reported in **Shivakumar and others versus Sharanabasppa and others**[1], wherein it was held that :

> *. A conjoint reading of Rules 23, 23A and 24 of Order XLI brings forth the scope as also contours of the powers of remand that when the available evidence is sufficient to dispose of the matter, the proper course for an Appellate Court is to follow the mandate of Rule 24 of Order XLI CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a re-trial is considered necessary that the Appellate Court shall adopt the course of remanding the case. It remains trite that order of remand is not to be passed in a routine manner because an unwarranted order of remand merely elongates the life of the litigation without serving the cause of justice. An order of remand only on the ground that the points touching the appreciation of evidence were not dealt with by the Trial Court may not be considered proper in a given case because the First Appellate Court itself is possessed of jurisdiction to enter into facts and appreciate the evidence. There could, of course, be several eventualities which may justify an order of remand or where remand would be rather necessary depending on the facts and the given set of circumstances of a case.*

17. In another case reported in **Sri Rama Agencies, Mahabubnagar v. Machani & Machani Agro Chemicals, Kurnool District**[2], wherein the High Court of Judicature, Andhra Pradesh at Hyderabad held that:

> *"…the respondent did not file any application under Rule 27 of Order XLIII of C.P.C., before the Appellate Court, nor did he complain, that his efforts to adduce any other evidence was scuttled by the trial Court. However, the lower Appellate Court, even while trying to sustain the conclusions arrived at by the*

[1] (2021) 11 Supreme Court Cases 277
[2] 2008(1) ALD 712

trial Court, had come forward with the suggestions, as to what the respondent herein ought to have done. If the respondent had pursued a particular line before the trial Court, it was not for the Appellate Court to assess as to how far it was appropriate."

18. Learned counsel for the appellant(s) while relying on the above decision, submits that the lower appellate Court committed error by granting the relief of remanding the matter to the trial Court, though the respondent herein and appellant therein did not seek the relief of remand.

19. *Per contra*, learned counsel for the respondents filed their counters in all the appeals and denied all the allegations made in the appeals. Learned counsel argued that as per judgment of the first appellate court, the 1st respondent herein paid the costs to the appellant herein. He further contended that the trial Court judgment was delivered during the Covid period and the 1st respondent herein being set ex parte he was denied opportunity to adduce his evidence or to cross examine PW.1 and PW.2. Hence the first appellate Court, considered and an opportunity has to be given to this respondent, by remitting back the suit to the trial Court for fresh disposal after giving opportunity to the 1st defendant to adduce evidence and imposed costs on this respondent. He further submitted that the first appellate Court is right in remanding the matter to the trial Court as the evidence is insufficient to decide the issue.

20. Learned counsel for the respondents has placed reliance on the judgment of Hon'ble Supreme Court reported **Laltaprasad Balashankar Pande vs Ramsajivan Balashankar Pande**[3] , wherein it was held that :

> *"..Admissibility of an additional evidence under Order XLI Rule 27 of 'the Code' does not depend upon the relevancy of the issue on hand, or whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause that is whether such additional evidence has a direct bearing on pronouncement of judgment"*

21. He has also relied upon a decision of Hon'ble Supreme Court reported in **A. Andisamy Chettiar versus A. Subburaj Chettiar**[4], wherein it was held that :

> *From the opening words of sub-rule (1) of Rule 27, quoted above, it is clear that the parties are not entitled to produce additional evidence whether oral or documentary in the appellate court, but for the three situations mentioned above. The parties are not allowed to fill the lacunae at the appellate stage. It is against the spirit of the Code to allow a party to adduce additional evidence without fulfillment of either of the three conditions mentioned in Rule 27. In the case at hand, no application was moved before the trial court seeking scientific examination of the document (Ex.A-4), nor can it be said that the plaintiff with due diligence could not have moved such an application to get proved the documents relied upon by him. Now it is to be seen whether the third condition, i.e. one contained in clause (b) of sub-rule (1) of Rule 27 is fulfilled or not.*
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> -
>
> *"13. Though the general rule is that ordinarily the appellate court should not travel outside the record of the lower court and additional evidence, whether oral or documentary is not admitted but Section 107 CPC, which carves out an exception to the general rule, enables an appellate court to take additional evidence or to require such evidence to be taken subject to such conditions and limitations as may be prescribed. These conditions are prescribed under Order 41 Rule 27 CPC. Nevertheless, the additional evidence can be admitted only when the circumstances as stipulated in the said Rule are found to exist....."*
> *In N. Kamalam (dead) and another v. Ayyasamy and another[3], this Court, interpreting Rule 27 of Order XLI of the Code, has observed in para 19 as under: -*

[3] (2022) 7 SCC 247
[4] (2015) 17 SCC 713

"……. the provisions of Order 41 Rule 27 have not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the court of appeal – it does not authorize any lacunae or gaps in the evidence to be filled up. The authority and jurisdiction as conferred on to the appellate court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way." In Union of India v. Ibrahim Uddin and another[4], this Court has held as under: -

"49. An application under Order 41 Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find out whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced……" Learned counsel for the appellant argued before us that the High Court, in revision, at an interim stage of appeal pending before the lower appellate court, should not have interfered in the matter of requirement of additional evidence.

We have considered the argument advanced on behalf of the appellant and also perused the law laid down by this Court as to the exercise of revisional power under Section 115 of the Code in such matters. In Mahavir Singh and others v. Naresh Chandra and another[5], explaining the scope of revision in the matters of acceptance of additional evidence by the lower appellate court interpreting expression "or for any other substantial cause" in Rule 27 of Order XLI, this Court has held as under: -

"The words "or for any other substantial cause" must be read with the word "requires", which is set out at the commencement of the provision, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this rule would apply as noticed by the Privy Council in Kessowji Issur v. G.I.P. Rly. [ILR (1907-08) 31 Bom 381]. It is under these circumstances such a power could be exercised. Therefore, when the first appellate court did not find the necessity to allow the application, we fail to understand as to how the High Court could, in exercise of its power under Section 115 CPC, have interfered with such an order, particularly when the whole appeal is not before the Court. It is only in the circumstances when the appellate court requires such evidence to pronounce the judgment the necessity to adduce additional evidence would arise and not in any other circumstances. When the first appellate court passed the order on the application filed under Order 41 Rule 27 CPC, the whole appeal was before it and if the first appellate court is satisfied that additional evidence was not required, we fail to understand as to how the High Court could interfere with such an order under Section 115 CPC." In Gurdev Singh and others v. Mehnga Ram and another[6], this Court, on similar issue, has expressed the view as under: -

"We have heard learned counsel for the parties. The grievance of the appellants before us is that in an appeal filed by them before the learned Additional District Judge, Ferozepur, in an application under Order XLI, Rule 27(b), Code of Civil Procedure (CPC) the learned Additional District Judge at the final hearing of the appeal wrongly felt that additional evidence was required to be produced as requested by the appellants by way of examination of a handwriting expert. The High Court in the impugned order exercising jurisdiction under Section 115 CPC took the view that the order of the appellate court could not be sustained. In our view the approach of the High Court in

revision at that interim stage when the appeal was pending for final hearing before the learned Additional District Judge was not justified and the High Court should not have interfered with the order which was within the jurisdiction of the appellate court. The reason is obvious. The appellate court hearing the matter finally could exercise jurisdiction one way or the other under Order XLI, Rule 27 specially clause (b). If the order was wrong on merits, it would always be open for the respondent to challenge the same in accordance with law if an occasion arises to carry the matter in second appeal after an appellate decree is passed. But at this interim stage, the High Court should not have felt itself convinced that the order was without jurisdiction. Only on this short question, without expressing any opinion on the merits of the controversy involved and on the legality of the contentions advanced by both the learned counsel for the parties regarding additional evidence, we allow this appeal, set aside the order of the High Court." In view of the law laid down by this Court, as discussed above, regarding exercise of revisional powers in the matter of allowing the application for additional evidence, when appeal is pending before the lower appellate court, the impugned order passed by the High Court cannot be upheld and the same is set aside. However, to do complete justice between the parties, we think it just and proper to direct the first appellate court to decide the application for additional evidence afresh in the light of observations made by this Court regarding principles on which such an application can be allowed or rejected. We order accordingly. We further clarify that we have not expressed any opinion as to the merits of the case. Accordingly, the appeal is disposed of.

22. Learned counsel for the respondents further submits that as per interim stay passed in these appeals, this respondent is unable to proceed further with the suit. If the orders of this court dated 30.12.2022 are not vacated, this respondent will be put to irreparable loss and hardship. Hence, prayed to dismiss the appeals while vacating the interim stay orders passed by this Court.

23. In reply, learned counsel for the appellant(s) argued that the lower appellate Court, simply perused the grounds of appeal and without application of mind has passed the judgment and decree and the lower appellate Court failed to see the provisions of the CPC over ride for remanding the matter to the trial Court on imposition of costs.

24. On perusing the entire material available on record, this Court observed that, the plaintiff purchased the plaint schedule property under Ex.A1 from his vendor and ever since date of purchase, he has been in possession and enjoyment of the said property. Admittedly, the plaint schedule property is a vacant land and in view of that, the plaintiff is presumed to be in constructive possession of that vacant site by virtue of the title passed to him from his vendor under Ex.A1.

25. On the other hand, the 1st defendant though contested the matter, by raising several pleas and allegedly claimed title over the plaint schedule property at first failed to cross examine PW.1 and secondly he did not choose to cross examine PW.2 and also failed to adduce any evidence.

26. In the present case, from the factual matrix of the case, it is clear that both parties are very much disputing the title of each other over the schedule property. It is the contention of the appellant that the trial Court did not give opportunity to let in evidence and passed judgment during the pandemic period and further even if counsel for the 1st defendant refused to receive before the trial Court, for the acts and lapses of an Advocate, the innocent party cannot be made a victim and urged the Court to remand the matter to the trial

Court for fresh disposal after giving opportunity to the appellant to adduce evidence and to cross examine the plaintiff's witnesses. The act of non-cross-examination and refusing to take notice is on the part of the learned counsel for the appellant/1st defendant, for which act, the party cannot be made a victim.

27. In a case of **Rafiq and another vs. Munshilal and another**[5], wherein the Apex court held that "*an innocent party cannot be suffered to injustice merely because his chosen Advocate defaulted..*"

28. Under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the case, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in

[5] AIR 1981 (SC) 1400

the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his case nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job.

29. A practice has grown up in the High Court amongst the lawyers that they remain absent when they do not like a particular Bench. May be he is better informed on this matter. Ignorance in this behalf is our bliss. Even if I do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute? What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If I reject this petition, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. May be that the learned advocate absented himself deliberately or intentionally. I have no material for ascertaining that aspect of the matter. I say nothing more on

that aspect of the matter. However, I cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. In view of the above, the party is not responsible because he has done whatever was possible and was in his power to do, the costs should be recovered from the advocate who absented himself.

30. It is the contention of the 1st respondent/ plaintiff that if there is any lapse or fault on the part of the counsel for the appellant/1st defendant before the trial Court, the appellant did not avail the opportunity of adducing evidence before the first appellate Court, and without pointing out any infirmity in the judgment of the trial court, the matter cannot be remitted back to the trial Court. It is also the contention of the 1st respondent/plaintiff that the appellant/1st defendant prayed for remand only to cover his latches, which cannot be permitted.

31. It is pertinent to mention here that as per Amendment Act 104/1976 w.e.f. 01.02.1977,Order XL1 Rule 23-A confers powers on the appellate Court to remand whole suit for trial.

32. Learned counsel for the appellant/1st defendant submitted that the 1st defendant is claiming the title over the schedule property by strongly objecting the alleged title of the plaintiff, the trial Court should have given opportunity to the

appellant to establish his case since the restraint order by way of injunction can be granted only on establishing the actual interference or threat of interference. However, learned counsel for the 1st respondent/plaintiff submitted that the appellant/1st defendant did not ask for remanding the suit either for fresh disposal after giving opportunity to the appellant or for conducting de nova trial. He further submitted that if really the defendant is deprived of his right to adduce evidence before the trial Court, he ought to have made an attempt to adduce evidence before the appellate Court by filing a petition under Order XL1 Rule 27 CPC and as such cannot ask for setting aside the judgment of the trial Court.

33. Upon perusing the entire material available on record, it is observed that, whatever be the reasons, the defendant did not cross examine the plaintiff's witnesses and did not adduce any evidence on his behalf, hence without any hesitation, it can be said that the appellant had no opportunity to submit his case by adducing his side evidence also by cross examining the plaintiff's witnesses. Moreover, when the appellant/1st defendant was really denied opportunity by the trail Court, he could have file a petition under Order XL1 Rule 27 of CPC for adducing evidence before the first appellate Court as rightly

contended by the 1st respondent/plaintiff, and merely only on that ground, the urge of the appellant cannot be brush aside.

34. In view of the foregoing discussion, this Court found no illegality or perversity in the orders passed by the first appellate Court warrants no interference. Finding no merit in all the instant Civil Miscellaneous Appeals and as devoid of merits, the same are liable to be dismissed.

35. Accordingly, all the Civil Miscellaneous Appeals are dismissed. There shall be no order as to costs.

36. It is made clear the interim orders granted by this Court in all the appeals are hereby vacated.

37. As a sequel, miscellaneous applications pending, if any, shall also stand closed.

DR.JUSTICE K. MANMADHA RAO

Date: 18 -10-2023.

Note : L.R copy to be marked.

(b/o)Gvl

HE HON'BLE DR. JUSTICE K. MANMADHA RAO

C.M.A Nos.472, 473, 474, 483, 484 and 485 of 2022

Date : 18 .10.2023

Gvl