



HIGH COURT OF ANDHRA PRADESH
MONDAY ,THE TENTH DAY OF JUNE
TWO THOUSAND AND NINETEEN

PRSENT

THE HONOURABLE SRI JUSTICE D.V.S.S.SOMAYAJULU
CIVIL MISCELLANEOUS APPEAL NO: 1359 OF 2018

Between:

1. Palla Aruna W/o. Palla Satyanarayana,
Hindu, Aged about 56 years, Occ House Wife, R/o D.No.14-16-3.
Ramajogipeta,
Maharanipeta Post Visakhapatnam

...PETITIONER(S)

AND:

1. Botta Seethamma(Died) Visakhapatnam
2. Botta Sanyasi Rao S/o. Late Chandrayya, Retired Port Employee. Hindu,
Aged about 56 years Rio.Ramajogipeta. Maharanipeta.Post.
Visakhapatnam District--530002

...RESPONDENTS

Counsel for the Petitioner(s): M RADHAKRISHNA

Counsel for the Respondents: P RAJASEKHAR

The Court made the following: ORDER



2019:APHC:16555

IN THE HIGH COURT OF ANDHRA PRADESH AT AMARAVATI

MONDAY, THE TENTH DAY OF JUNE
TWO THOUSAND AND NINETEEN

PRESENT

THE HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

CMA NO: 1359 OF 2018



Appeal under Order 43 Rule 1 [u] of CPC aggrieved by the Judgment and Decree dt: 18/7/2018 in A.S. No.225/2008, on the file of Special Sessions Judge for S.C. and S.T cases-cum-XI Additional District and Session Judge. Visakhapatnam, in setting aside decree and judgment dated 23/06/2008, in O.S. No 40/1997 on the file of the Junior Civil Judge, Bheemunipatnam.

Between:

Palla Aruna, W/o. Palla Satyanarayana, R/o. D.No.14-16-3. Ramajogipeta, Maharanieta Post Visakhapatnam

...APPELLANT/RESPONDENT/PLAINTIFF

AND

1. Botta Seetharna(Died),
2. Botta Sanyasi Rao, S/o. Late Chandrayya, Retired Port Employee.
R/o.Ramajogipeta. Maharanieta Post, Visakhapatnam District--530002

...RESPONDENTS/ APPELLANT/ DEFENDANTS

IA NO: 1 OF 2018

Petition under Section 151 CPC praying that in the circumstances stated in the affidavit filed in support of the petition, the High Court may be pleased to grant stay of all further proceedings in pursuance of Decree and Judgment passed in A S.No.225/2008 dt.18-07-2018 on the file of the Special Sessions Judge for S.C.and S.T Cases-cum-XI Additional District and Session Judge, Visakhapatnam District otherwise the petitioner will be put to great hardship.

Counsel for the Appellant :SRI. M. RADHAKRISHNA

Counsel for the Respondent No.2: SRI P. RAJASEKHAR

The Court made the following: ORDER

**HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU****C.M.A.No.1359 of 2018****ORDER:**

This Civil Miscellaneous Appeal is filed questioning the order, dated 18.07.2018, passed in A.S.No.225 of 2008 by the learned XI Additional District & Sessions Judge, Visakhapatnam. By the impugned judgment the appeal was allowed setting aside the decree and judgment dated 23.06.2008 in O.S.No.40 of 1997 passed by the learned Junior Civil Judge, Bheemunipatnam and the matter was remanded to the 1st Court to receive the additional evidence filed by both the appellant and the defendants.

This Court has heard Sri M. Radha Krishna, learned counsel for the appellant and Sri P. Raja Sekhar, learned counsel for the respondent.

Learned counsel for the appellant relied upon number of judgments of the Hon'ble Supreme Court of India reported in **Uttaradi Mutt v Raghavendra Swamy Mutt**¹; **H.P. Vedavyasachar v Shivashankara And Another**² and **Shanti Devi v Daropti Devi and Others**³ and the judgment of a learned single Judge of this Court reported in **Kesava Reddy v A. Virupaksha Reddy and Others**⁴.

¹ (2018) 10 SCC 484

² (2009) 8 SCC 231

³ (2006) 13 SCC 775

⁴ (2016) 1 ALD 564



Learned counsel for the appellant argued that the lower Court committed a fundamental error in remanding the matter to the lower Court. It is his contention that the procedure prescribed under Order 41 Rule 27 of CPC has not been followed at all. Learned counsel submits that after the Court was convinced that the additional evidence is to be received the procedure prescribed under Order 41 Rule 28 and 29 of CPC has to be followed and that the Appellate Court has a discretion either to receive the evidence by itself or to direct the lower Court to receive the evidence and send back the finding. It is his contention that allowing the Appeal is not called for in the circumstances.

In reply to this learned counsel for the respondent argued that there is no error committed by the Court below and that once the Court came to the conclusion that additional evidence is necessary, the Court had the option of sending the matter back to the lower Court. Learned counsel relied upon the judgment of the Supreme Court in **The Corporation of Madras & Another v M. Parthasarathy and Others**⁵ and argued that the Court has the power under Order 41 Rule 23-A of CPC to set aside the judgment and decree of the lower Court and that in view of this judgment the trial Court could frame additional issues and decide the suit afresh. Therefore,

⁵ (2018) 9 SCC 445



learned counsel contends that there is no error in the impugned order.

Learned counsel for the appellant essentially relied upon the grounds, which are raised by him in para-13 of the grounds of appeal.

Order 41 Rule 23 of CPC deals with remand of a case by the Appellate Court. If the original *lis* has been disposed of on a preliminary point and the Appellate Court has decided to reverse the said finding, the Appellate Court may direct the remand of the matter and may also direct what issue or issues should be tried by the Trial Court. Even otherwise, as per Order 41 Rule 23-A of CPC after the decree is reversed in appeal and a retrial is considered necessary the Appellate Court has the power to remand the case. Therefore, Order 41 Rule 23 and 23-A of CPC deal with a situation where the finding is reversed in appeal and the Appellate Court feels that there is a need for further evidence.

If, however, the Court is of the opinion that the available evidence is sufficient it can decide the case on its own and without remand and can decide the case finally.

If, however, the Appellate Court feels that the lower Court has omitted to frame any issue, failed to try any issue or determine a question of fact, which the Appellate Court deems essential, then the Appellate Court may frame issue/issues by itself and refer the same to the lower Court for a trial and for



taking additional evidence on such issue/s. The lower Court shall after recording the evidence on the specific issue/issues return the same to the Appellate Court. The Appellate Court shall then decide the appeal by itself after receiving the evidence under Order 41 Rule 26 of CPC.

Apart from all of these, Order 41 Rule 27 of CPC gives an option to the parties to the case to file an application for receipt of additional evidence.

In the present case both the parties have exercised this option – Both the appellant and the respondent herein have filed applications for receiving additional evidence. The said applications and the order passed thereon are not strictly the subject matter in challenge. By the impugned order the appeal itself was “allowed” and the decree of the trial Court was “reversed” - which is the essential question that is raised here.

After hearing both the learned counsel and after considering the law on the subject, this Court is of the opinion that the Court below has overlooked the provisions of Order 41 Rule 28 and 29 of CPC. Order 41 Rule 28 of CPC clearly states that where additional evidence is allowed to be produced the Appellate Court may (a) either take evidence directly or (b) direct the trial Court or any other subordinate Court to record the evidence and send it back to the Appellate Court. Rule 29 further clarifies by stating that the Appellate Court should specify the point to which the evidence is to be confined. In



fact, the Hon'ble Supreme Court of India in **The Corporation of Madras case** (5 supra) also held that the Appellate Court has an option of taking the evidence by itself or remitting the case to the trial Court for a limited trial on a particular issue. However, in that case as the Appellate Court did not give an opportunity to the opposite party to file any rebuttal evidence to counter the additional evidence the Hon'ble Supreme Court of India held prejudice was caused. Therefore, the Hon'ble Supreme Court of India remanded the matter under Order 41 Rule 23-A of CPC and ordered a trial.

In the present case, the lower Court felt that the applications filed by both the parties for receiving additional evidence should be allowed. The reasons given by the parties in filing the applications for additional evidence were accepted. Thereafter, the Appellate Court in the opinion of this Court, committed an error. It allowed the entire appeal and remanded the matter for receiving fresh evidence.

It had an option of (a) deciding to record the evidence by itself or (b) direct the lower Court to take such evidence and send back the findings to the Appellate Court. It did not do either of the above. In addition, the Appellate Court also failed to specify the point to which the evidence is to be confined.

In that view of the matter, this Court is of the opinion that the lower Court committed an error in setting aside the judgment and decree of the trial Court and holding that the



appeal is allowed. The judgment passed in this case is a judgment on merits. The Appellate Court was not exercising its power under Order 41 Rule 23 and 23-A of CPC. It was dealing with the situation falling under Order 41 Rule 27 of CPC. In that view of the matter, the case law cited by the learned counsel for the appellant is much more relevant and applicable to the facts of the case. A plain language interpretation of the provisions of Order 41 of CPC and the case law cited make it very clear that the first Appellate Court committed an error in this case. Hence, the impugned order is set aside and the following directions are issue to the Appellate court in this matter viz.,

- 1) The learned XI Additional District and Sessions Judge, Visakhapatnam, is directed to examine the matter afresh and decide whether additional evidence is to be recorded by itself or whether the matter should be sent to the trial Court for recording the additional evidence. If the 1st Appellate Court viz., XI Additional District and Sessions Judge, Visakhapatnam decides to send the matter to the trial Court for recording the evidence the Court has to strictly follow the procedure specified under Order 41 Rule 28 and 29 of the CPC.
- 2) After recording the evidence by itself or after recorded evidence is received from the trial Court, the lower Appellate Court shall dispose of the appeal on merits.



- 3) The entire process should be completed within a period of three months from the date of receipt of this order without further extension of time.

In view of the fact that the original suit is of the year 1997, the trial Court judgment is of the year 2008 and the Appellate Court's judgment is of the year 2018, the time frame is fixed and learned XI Additional District and Sessions Judge, Visakhapatnam is directed to strictly adhere to the time frame that is so fixed.

With the above directions, this Civil Miscellaneous Appeal is allowed, but in the circumstances, there shall be no order as to costs.

As a sequel, miscellaneous petitions pending, if any, shall stand closed.

SD/- P. RAMA KRISHNA
JOINT REGISTRAR

SECTION OFFICER

//TRUE COPY//

To,

One Fair Copy to Hon'ble Sri Justice D.V.S.S.Somayajulu
(for his lordship's kind perusal)

- 1 The Special Session Judge for S.C. and S.T cases-cum-XI Additional District and Session Judge, Visakhapatnam (along with case records, if any)
- 2 The Junior Civil Judge, Bheemunipatnam, Visakhapatnam District.
3. One CC to Sri M. Radhakrishna Advocate [OPUC]
4. One CC to Sri P. Rajasekhar Advocate [OPUC]
5. 9 LR Copies
6. The Under Secretary, Union of India, Ministry of Law, Justice and Company Affairs, New Delhi
7. The Secretary, Andhra Pradesh High Court Advocates Association, High Court Buildings, Vijayawada
8. Two CD Copies





HIGH COURT

DATED:10/06/2019

ORDER

CMA.No.1359 of 2018

ALLOWING THE CMA

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24/7/19