SUPREME COURT OF INDIA

Basayya I. Mathad

Vs.

Rudrayya S. Mathad & ors.

C.A.No.1349 of 2001

(Arijit Pasayat and P. Sathasivam JJ.)

24.01.2008

JUDGMENT

P. Sathasivam, J.

1. This appeal is directed against the judgment and order dated 16.03.1999 of the High Court of Karnataka at Bangalore in Regular Second Appeal No. 131 of 1999 in and by which the learned single Judge dismissed the second appeal at the stage of admission.

2. Brief Facts:

> "The appellant and Shri Shivayya (since deceased) and two others were brothers. Their father owned many properties apart from being tenant of suit lands. Their father died in the year 1952. According to the appellant, he alone was cultivating the suit lands as tenant excluding all the brothers. The properties were divided among the brothers. The suit property continued to be in the exclusive possession of the appellant as the same was a tenanted land. Under Section 44 of the Karnataka Land Reforms Act, 1974 (hereinafter referred to as the Act) all the lands held by or in possession of tenants stood transferred to and vested in the Government. Under Section 45 of the Act, tenants were given an option to be registered as occupants of the vested lands. It is the claim of the appellant that in view of the provisions of the Act, the suit lands, which were in his possession as on 01.03.1974, stood vested in the Government. He applied for registration of the occupancy rights in respect of the suit lands. The respondents herein claiming to be the tenant for a part of the land sought registration of occupancy rights. The Land Tribunal, after holding enquiry as required under the provisions of the Act, allowed the application of the appellant and rejected the application of the respondents. Aggrieved by the same, the respondents filed an appeal before the Land Reforms Appellate Authority which was also rejected. The Appellate Authority found that the appellant herein cultivated the suit lands and other brothers have never cultivated the same. Thereafter, the plaintiff, Shivayya (since

deceased), filed a suit for partition and separate possession of his share from the suit lands. On the basis of the evidence on record, the trial Court dismissed the suit filed by the plaintiff. The plaintiff preferred an appeal before the appellate Court which also confirmed the decree and dismissed the appeal on 29.11.1996. The plaintiff preferred a second appeal before the High Court being R.S.A. No. 105 of 1997. The High Court, by order dated 10.12.1997, allowed the second appeal and remanded the matter to the first appellate Court to decide the same in the light of the finding and conclusion arrived at by it. The first appellate Court, relying upon the opinion of the High Court, held that the suit land was granted for the benefit of the entire family and the plaintiff is entitled to claim his share and allowed the appeal on 14.12.1998. Questioning the judgment and decree of the first appellate Court, the appellant preferred R.S.A. No. 131 of 1999 before the High Court. The learned single Judge, basing reliance on his opinion in the earlier second appeal i.e. R.S.A. No. 105 of 1997, which is binding and final, dismissed the second appeal in limine. Aggrieved by the judgment and decree of the High Court, the appellant filed the present appeal before this Court."

3. Heard Mr. Shankar Divate, learned counsel appearing for the appellant and Mr. S.N. Bhat, learned counsel appearing for the respondents, perused the entire annexure and other relevant materials filed before this Court.

4. Before considering the impugned judgment of the High Court, it is useful to refer the notice issued by this Court on 15.12.1999 when S.L.P.(c) No. 13747/1999 came up for hearing. The order passed, while issuing notice to the respondents, reads as under:Issue notice to show cause why the earlier judgment of the High Court dated 10.12.1997, giving the finding that the property shall be treated as a family property, should not be set aside on the ground that interference on question of fact was not permissible under Section 100 CPC. Status quo as of possession on the spot shall be maintained. From the above order, it is clear that the respondents were put on notice to the effect that while hearing this special leave petition the correctness of the earlier finding in the judgment of the High Court dated 10.12.1997 in R.S.A. No. 105 of 1997 would be gone into by this Court. In view of the same, though the decision in R.S.A. No. 105 of 1997 has not been challenged in this Court, in view of the reasons which we refer hereunder this Court is justified in considering the same.

5. As observed in the notice issued by this Court on 15.12.1999, let us first consider whether the learned Judge of the High Court is justified in interfering with the factual aspect and concurrent findings of both the Courts below and ultimate order of remand is warranted. We carefully analyzed the order of the High Court dated 10.12.1997 passed in R.S.A. No. 105 of 1997. The said second appeal came to be filed by the plaintiff-appellant against the dismissal of a suit and the learned Judge after referring the unreported decision of the Division Bench of the same Court in R.F.A. No. 189 of 1996 dated 9.8.1996 directed the contesting respondent for production of an order of the grant passed by the Authority and on going through the same arrived at a conclusion that the findings of the Courts below were contrary to the grant and set aside the same. In paragraph 3 of his order, the learned Judge concluded,

The Court shall treat this property also as a family property particle among the members of the family. By observing so, remanded the matter to the first appellate Court with a direction to dispose of the same in accordance with law in the light of the decision referred to in paragraph 2 as well as his finding in paragraph 3.

6. Learned counsel appearing for the appellant vehemently contended that the order of the learned Judge dated 10.12.1997 allowing the second appeal without framing the substantial question of law in terms of Section 100 C.P.C. cannot be sustained. He also submitted that forgetting that the learned Judge was hearing a second appeal filed against the concurrent findings of both the Courts below, received a copy of the order of grant passed by the authority, entertained the same and basing reliance on it, set aside the judgment and decree of both the Courts below and remanded the matter to the first appellate Court for fresh consideration. Learned counsel commented that the course adopted by the learned Judge is unknown to law and is not justified in reversing the concurrent finding of the Courts below by merely perusing a document which was entertained without following the recourse provided under Order XLI Rule 27 C.P.C., the High Court committed an error in accepting the document and upsetting factual findings arrived at by the Courts below. It is the argument of the learned counsel for the appellant that because of the erroneous conclusion by the High Court, the lower appellate Court has no other option except to follow the same and allowed Regular Appeal No. 9 of 1994 and decreed the suit of the plaintiff in O.S. No. 517 of 1989.

7. Mr. S.N. Bhat, learned counsel appearing for the respondents, submitted that inasmuch as no appeal had been filed against the decision of the High Court in R.S.A. No. 105 of 1997, the correctness or otherwise of the said order cannot be canvassed in this appeal. It is true that against the order of remand in R.S.A. No. 105 of 1997, the appellant has not filed appeal before this Court. However, after remand, the first appellate Court, based on the direction of the High Court, allowed the appeal and decreed the suit which was challenged by way of second appeal being R.S.A. No. 131 of 1999 before the High Court. As stated earlier, the High Court, by judgment and order dated 16.3.1999, dismissed the second appeal in limine which is the subject-matter of the present appeal.

8. On going through the entire materials, we are of the view that this Court is justified in considering the earlier order of the High Court dated 10.12.1997 in R.S.A. No. 105 of 1997 for the following reasons:

> "(i) It is not in dispute that the parties in the earlier proceeding, namely, R.S.A. No. 105 of 1997 and in the impugned proceeding - R.S.A. No. 131 of 1999 are one and the same. Interestingly, the very same learned Judge had passed both the orders. The appellant had placed judgment of the High Court rendered in R.S.A. No. 105 of 1997 as Annexure-P2 which is available on page 35 of the paper-book. A perusal of the same shows that after reproducing unreported decision, namely, R.F.A. No. 189 of 1996 dated 09.08.1996 (Jarappa Poojari and Others vs. Smt. Ramakku and Others), the learned Judge called the respondent for production of the order of grant passed by

the authority and after perusing the same arrived at a finding that the suit property also be treated as a family property and particle among the members of the family. By arriving at such a conclusion, he set aside the orders of both the Courts below. It is not in dispute that the learned Judge heard and disposed of the second appeal filed under Section 100 CPC which reads as under:-

Second appeal.-

(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

9. The above provision was amended and incorporated by amending Act 104 of 1976 which came into effect from 01.02.1977. The learned Judge disposed of the second appeal being R.S.A. No. 105 of 1997 on 10.12.1997 well after the amendment to Section 100. It is clear from the above provision that only if the High Court is satisfied that the case involves a substantial question of law, after formulating questions and hearing those questions so formulated dispose of the same based on the materials placed before it. This Court, in a series of decisions, has held that allowing a second appeal without framing substantial question of law is clearly contrary to the mandate of Section 100 CPC vide:

"(a) *Gian Dass vs. Gram Panchayat, Village Sunner Kalan and Others*[1]

(b) *Joseph Severance and Others vs. Benny Mathew and Others*[2]

(c) *Sasikumar and Others vs. Kunnath Chellappan Nair and Others*[3]

(d) Chadat Singh vs. Bahadur Ram and Others[4]

(e) *Kanhaiyalal and Others vs. Anupkumar and Others*[5]
(f) Civil Appeal No. 2836 of 2001 - Town Planning *Municipal Council vs. Rajappa & Anr. dated 08.01.2007* (Dr. Justice Arijit Pasayat and Justice P. Sathasivam) In view of the settled legal position and of the fact that the High Court has not adhered to the same, failed to formulate substantial question of law thereby committed an error in allowing the second appeal. On this ground, the judgment and order of the learned Judge in R.S.A. No. 105 of 1997 is liable to be set aside. Apart from the above infirmity, the High Court has committed an error in interfering on a question of fact which was not permissible under Section 100 CPC vide *P. Chandrasekharan and Others vs. S. Kanakarajan and Others*[6] It is relevant to point out that it is impermissible for a High Court to arrive at a decision that the suit property forms part of family property partible among the members of the family without adverting to acceptable materials placed before it in terms of the procedure and in accordance with law. On this ground also, the decision of the High Court is liable to be interfered with. iv) The third infirmity is that though the parties to the proceeding can produce a document as additional evidence even in Appellate Court, undoubtedly, they have to adhere and satisfy the mandates provided under Order XLI Rule 27. For clarity, we hereby reproduce the same. 27. Production of additional evidence in Appellate Court.-

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or (a) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

10. It is clear that parties to the lies are not entitled to produce additional evidence as of course or routine but must satisfy the conditions stated in sub-clauses (a) & (aa). Admittedly, such recourse has not been resorted to neither by the party concerned nor adhered those principles by the High Court. Paragraph 3 of his order shows that the learned Judge verified

the document produced on his direction without complying the mandate as provided under Rule 27 of Order XLI. Hence, we are of the view that the finding of the learned Judge based on a document produced at the time of argument de hors to Rule 27 referred above cannot be sustained in the eye of law. In such circumstances, his ultimate conclusion treating the suit property as a family property particle among the members of the family is also liable to be set aside. In fact, sub-clause (2) of Rule 27 mandates that wherever additional evidence is allowed to be produced by an Appellate Court, it shall record the reason for its admission. It is needless to mention that the High Court neither followed those conditions for production of additional evidence nor recorded the reason for basing reliance on the same.

11. It is relevant to point out that in the ultimate paragraph (para 4), the learned Judge, after remitting the matter to the first Appellate Court directed to dispose of the matter in accordance with law in the light of the decision mentioned (supra) and my finding rendered above. Based on the said positive direction, the first Appellate Court has no other option and, by judgment dated 14.12.1998, allowed Regular Appeal No. 9 of 1994 and granted preliminary decree for partition.

12. Though Mr. S.N. Bhat, learned counsel for the respondents reiterated his earlier stand that the decision in R.S.A. 105 of 1997 cannot be gone into in the absence of appeal against the same, in the light of our above-mentioned discussion, reasons thereon coupled with the infirmities pointed above and the earlier decision is not in terms of Section 100 as well as Order XLI Rule 27 CPC, we are unable to accept the said objection and pass the following order:-

> "1. The finding of the high court in rash no. 105 of 1997 dated 10.12.1997 treating the suit property also as family property particle among the members of the family is set aside.
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> 2. Since the lower appellate court i.e. civil judge, senior division, goal allowed the regular appeal no. 9 of 1994 on 14.12.1998 based on the finding and positive direction of the high court dated 10.12.1997 in rsa no. 105 of 1997, his ultimate decision allowing the appeal and granting preliminary decree is also set aside.
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> 3. In view of our conclusion in sub-pares 1 & 2, the impugned order of the high court dated 16.03.1999 in r.s.a. no. 131 of 1999 is set aside.
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> 4. The civil judge, senior division, goal is directed to restore regular appeal no. 9 of 1994 on his file and dispose of the same afresh uninfluenced by any of the observation made by us.
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> 5. Both parties are at liberty to file appropriate petition, if they so desire, for production of any material as additional evidence subject to satisfying the conditions prescribed in rule 27 of order xli cpc.

6. It is made clear that we have not expressed anything on the merits of the claim of either party. Our above conclusion mainly relates to the illegality or irregularity in the order of the high court in allowing the second appeal (rsa no. 105 of 1997)

7. Taking note of the fact that suit for partition was instituted even in the year 1989 and yet to reach its finality, we request the civil judge, goal to dispose of the appeal, as directed above and in accordance with law within a period of six months from the date of receipt of copy of this judgment."

13. The civil appeal is allowed on the above terms. No costs.

Cases Referred

[1]*(2006) 6 SCC 271*
[2] *(2005) 7 SCC 667*
[3]*(2005) 12 SCC 588*
[4]*(2004) 6 SCC 359*
[5]*(2003) 1 SCC 430*
[6] *(2007) 5 SCC 669*