

Sreenivasan Vs. Thilakan

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Court : Kerala

Decided On : Jun-24-2003

Reported in : AIR2003Ker350; 2003(2)KLT958

Judge : K.A. Mohamed Shafi, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 107; [Specific Relief Act, 1963](#) - Sections 34 and 38

Appeal No. : C.M.A. No. 113 of 2002

Appellant : Sreenivasan

Respondent : Thilakan

Advocate for Def. : K.V. Sadananda Prabhu and; R. Remji, Advs.

Advocate for Pet/Ap. : N.P. Samuel, Adv.

Disposition : Appeal allowed

Judgement :

K.A. Mohamed Shafi, J.

1. This C.M.A. is filed by the respondent-plaintiff in A.S. 124/94 on the file of the Subordinate Judge's Court, Irinjalakuda challenging the judgment dated 21.12.2001.

2. O.S. 107/94 was filed by the appellant plaintiff before the Munsiffs Court, Irinjalakuda seeking permanent prohibitory injunction against the defendant respondent herein in respect of the plaint A and B schedule properties. The trial court decreed the suit restraining the respondent from trespassing upon plaint A and B schedule properties and from constructing any pathway in plaint B schedule property. The respondent challenged the decree and judgment passed by the trial court before the Subordinate Judge's Court, Irinjalakuda in A.S. 124/94. The lower appellate court allowed the appeal, set aside the decree and judgment passed by the trial court and remanded the suit to the trial court for fresh consideration in accordance with law in the light of the observations made in the judgment.

3. This C.M.A. is preferred by the plaintiff-respondent in the appeal challenging the remand order passed by the lower appellate court.

4. The respondent-defendant has preferred memorandum of cross objection challenging the remand order contending that the lower appellate court should have disposed of the appeal on merits on the available evidence adduced by the parties.

5. The appellant's case is that plaint A schedule property belongs to him on absolute right and plaint B schedule property of an extent of 4.625 cents on the north eastern side of plaint A schedule property was originally Government land possessed and enjoyed by him and his predecessor-in-interest since long time. According to him, he obtained assignment of plaint B schedule property from the Government as per Ext.A2 purchase certificate issued by the Tahsildar after complying with all the requirements under the Land Assignment Act and the Rules framed thereunder and conducting a proper enquiry. Neither the respondent nor anybody else had raised any objection at the time of enquiry nor they have preferred any appeal against the assignment as per Ext.A2. It is also contended by the appellant that though the respondent claimed right of way through plaint B schedule property, no such pathway is in existence and he tried to trespass upon the plaint schedule properties and cut off a way through plaint B schedule property by demolishing the water channel and that fact is evident from the Commissioner's reports Exts.C1 and C2. According to him, in Ext.C1 report the Commissioner has

noted that plaint A and B schedule properties constituted a compact area with boundaries on all the four sides of the properties and there was no pathway through plaint B schedule property and in the subsequent report Ext.C2 the Commissioner has found that the fence was demolished. The appellant has also contended that the respondent has got a pathway to the Panchayath road through his brother's property. Therefore, he contended that the decree and judgment passed by the trial court decreeing the suit in favour of the appellant is perfectly, just and proper and that the judgment passed by the lower appellate court remanding the matter to the trial court is illegal and improper.

6. The defendant-respondent has contended that the respondent had pleaded prescriptive right of easement through the plaint schedule properties and both the appellant and the respondent had adduced evidence before the trial court in support of their rival contentions. He also submitted that though the trial court entered findings against him without proper appreciation of the evidence, the lower appellate court found that a pathway existed on the western side of the property leading to the Panchayat road situated on the southern side.

7. The lower appellate court has found that the respondent herein has been using the pathway existed in plaint B schedule property for a very long time and since he is claiming easementary right of way by prescription, the finding of the trial court that he has no necessity to use that pathway through plaint B schedule property for ingress and egress to the Panchayat road is not sustainable. The lower appellate court has also found that the right of the respondent herein to get protection against invasion of his right to use the pathway in plaint B schedule property has to be protected. After entering the above findings the lower appellate court found that since the respondent herein has not prayed for a declaration of his right of way through the plaint schedule properties the suit has to be remanded to the trial court for fresh decision regarding the right of way of the respondent through plaint B schedule property. Accordingly the lower appellate court set aside the judgment and decree passed by the trial court and remanded the suit for fresh disposal after giving liberty to the respondent to carry out amendment seeking declaration of his right in accordance with law and giving opportunity to both sides to adduce evidence.

8. The counsel for the respondent vehemently argued that since the respondent has claimed only prescriptive easementary right of way through plaint B schedule property, there is absolutely no necessity for him to seek a declaration of right of way through the plaint schedule properties and therefore the remand order passed by the lower appellate court after finding that he is entitled to an easementary right of way through plaint B schedule property is unnecessary, unwarranted and illegal.

9. Both appellant and the respondent attack the judgment passed by the lower appellate court remanding the suit to the trial court for fresh disposal after setting aside the decree and judgment passed by the trial court. In this case both sides have adduced evidence in support of their rival contentions in the suit. It is clear from the judgments passed by the trial court as well as the lower appellate court that while the trial court found that the respondent has no right of way through plaint B schedule property and the appellant is in possession and enjoyment of plaint A and B schedule properties and as such he is entitled to the permanent prohibitory injunction against the respondent restraining him from trespassing upon the plaint schedule properties and constructing a pathway through plaint B schedule property, the lower appellate court found that the respondent is entitled to a right of way through plaint B schedule property.

10. In this case both sides have no contention that they did not get sufficient opportunity to adduce entire evidence before the trial court. On the other hand their case is that they have adduced sufficient evidence necessary to establish their rival contentions. Even though a remand under Order 41, Rule 23 of C.P.C. is within the discretion of the appellate court, that discretion has to be exercised on sound and reasonable premises and guided by judicial principles and the remand order should not be arbitrary or without sufficient cause. The mere fact that the evidence on record is not sufficient to enter a definite finding on the point in issue, is not sufficient to enable the appellate court to remand the matter. A remand should not be made to enable the party to fill up the lacuna in his case. These principles are laid down by a Division Bench of the Madras High Court in the decision in Ramakrishna v. Rangayya (AIR 1954 Madras 783).

11. In the decision reported in 1969 KLJ 754 (M. Keshava Kamath v. C. Abdul Sukoor) this Court has observed as follows:

'I, therefore, think that merely because the trial court had wrongly declined to reopen the case and hear the arguments it does not follow that the decree should have been set aside and the suit remanded for fresh disposal. This would only lead to further expense and delay. On the other hand, the appellate court should have heard the arguments in extenso and disposed of the case. Failure to do so was, in my opinion, wrong. Even where the judgment of the lower court involves misconception, misreading of evidence, or ignoring important evidence bearing on the question to be decided or is otherwise contrary to law, a remand 'for writing a more satisfactory judgment' should not be made.'

12. In the decision reported in AIR 1986 Orissa 207 (Rushi v. Madan Behera) a single Judge of the Orissa High Court has observed as follows:

'I may not be understood to express that the appellate court has no power to remand on the facts of this case. It should have first assessed the evidence and dealt with the finding and then given the reason why it would not be in a position to give a finding. In that case only an order of remand may be justified. Otherwise, remand may amount to misuse of the power vested in the Court. Merely because a power is vested, the appellate court is not to exercise it as it desires.'

13. In the decision reported in AIR 1988 SC 2123 (K. Krishna Reddy v. Spl. Dy. Collector, Land Acqn. Unit II) the Supreme Court has observed as follows:

'The appellate power of remand, at any rate ought not to be exercised lightly. It shall not be resorted to unless the award is wholly unintelligible. It shall not be exercised unless there is total lack of evidence. If remand is imperative, and if the claim for enhanced compensation is tenable, it would be proper for the appellate court to do modest best to mitigate hardships.'

14. In the decision reported in AIR 1989 Madras 18 (Srinivasagam v. Kuttiah) the Madras High Court has observed as follows:

'It should be noted further that before remanding the case, Order 41, Rule 23 itself contemplates that the appellate court should reverse or set aside the decree. Reading the rules together this provision will not apply to a case where the trial court has considered the entire evidence but in the opinion of the appellate court a different view ought to be taken of the evidence and the appellate court is in a position to come to a finding on the evidence on record. In such a case, it is the duty of the appellate court to consider the matter as it stands and give its own finding in reversal of the finding of the trial court. But that would not justify a remand.'

15. It is clear from the dicta laid down in the above decisions by this Court, the other High Courts and the Supreme Court that the discretionary jurisdiction vested in the appellate court to remand the matter to the trial court cannot be exercised in cases where the appellate court can decide the issue considering the evidence on record. It is also clear that remand cannot be made due to the reason that the findings arrived at by the trial court are erroneous or due to misreading the evidence or due to the failure to apply the correct law on the point or for writing a better or more satisfactory judgment or to fill up the lacuna in the case.

16. From the impugned judgment it is clear that the lower appellate court found that the right of the respondent herein to get protection against invasion of his right to use the pathway in plaint B schedule property has to be protected. But the lower appellate court finding that an opportunity to seek declaration of the right of the respondent over plaint B schedule property for removal of all doubts as submitted by the counsel for the respondent should be given, set aside the decree and judgment passed by the trial court and remanded the matter to the trial court for fresh consideration in accordance with law in the light of the observations made in the judgment passed by that court.

17. It is well settled and the lower appellate court also found that in a suit for injunction a counter claim by way of declaration to protect the prescriptive easementary right of way in defence of the suit is unnecessary. In spite of that finding the lower appellate court set aside the decree and judgment passed by the trial court and remanded the suit to the trial court enabling the respondent to seek

a declaration of the easementary right of way through plaint B schedule property.

18. In the decision reported in 1999(1) KLT 298 = 1999(1) KLJ 254 (Unnikrishnan v. Ponnu Ammal) a single Judge of this Court has observed as follows:

'I may say with respect, that the fact that the title to the easement is not complete until the right is brought in question in some suit and it is recognised, does not necessarily lead to the conclusion that in a suit to prevent interruption of the enjoyment of the right, the plaintiff must also seek a relief by way of declaration of the right of prescriptive easement. Would it not be sufficient if in the suit he has filed, whether it be for mandatory injunction or for a prohibitory injunction, the plaintiff first establishes that he has acquired a right by prescription so as to be in a position to invite the Court to grant him the decree for injunction sought for by him? It appears to me that it is one thing to say that the right must be recognised by the Court before it became enforceable and quite another thing to say that a formal declaration of such right by Court is necessary to entitle him to relief.

xxx xxx xxx The single question in these cases is whether the obstruction complained of is a nuisance. Once such nuisance is established, the owner of the dominant tenement would be entitled to the relief of injunction in terms of the Specific Relief Act and Section 35 of the Easements Act. There is no warrant for reading into Section 38 of the Specific Relief Act or Section 35 of the Easements Act, a requirement that in a suit by the dominant owner he must also seek the relief of a declaration of his right by prescription.

14. Thus on a consideration of the relevant aspects I am not in a position to accept the contention that a suit for injunction to protect an easement by prescription or to prevent an obstruction to an easement by prescription is not maintainable unless there is also a prayer for declaration of the right.'

19. Therefore, it is clear that in the above suit filed by the appellant seeking prohibitory injunction in respect of the plaint A and B schedule properties wherein the respondent has set up a prescriptive right of easement of way through the plaint schedule properties, remand of the matter to seek declaration of the easementary right of way over and above establishing the easementary right of

way through the plaint schedule properties to the satisfaction of the Court, is illegal and unsustainable. Therefore, the order of remand of the suit passed by the lower appellate court to the trial court for fresh disposal in accordance with law for the sole ground of seeking declaration of the easementary right of way through the plaint schedule properties cannot be sustained.

20. In a suit seeking mandatory or prohibitory injunction asserting easementary right or in defence of the suit for injunction setting up an easementary right, the burden is heavy upon the person who has set up the easementary right over his opponent's properties. Therefore specific plea regarding easementary right and establishment of that plea of easementary right by positive evidence before the Court are necessary for the respondent to succeed in defending the above suit filed by the appellant. Of course, as against the finding entered by the trial court that the respondent failed to establish the easementary right pleaded by him, the lower appellate court has entered contrary findings.

21. In view of the fact that I have found that the order of remand passed by the lower appellate court to the trial court for fresh disposal after setting aside the decree and judgment passed by the trial court, is not sustainable and both the appellant and the respondent have submitted before this Court that they are satisfied with a finding of the lower appellate court with regard to their rival claims made in the suit on the evidence adduced by them and available on record, the lower appellate court has to consider the appeal afresh on merits and to pass appropriate judgment.

22. Therefore, the appeal as well as the cross objection are allowed. All the findings entered by the lower appellate court in the impugned judgment are set aside and the appeal is remanded to the lower appellate court for fresh disposal in accordance with law after giving opportunity to both sides to be heard, uninfluenced by any of the observations made in the impugned judgment. It is made clear that I have not made any pronouncement with regard to the merits in this case.

Parties will appear before the lower appellate court on 28.7.2003.

