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SooperKanoon Citation : sooperkanoon.com/911154

Court : Karnataka

Decided On : Jun-17-2010

Reported in : ILR2010KAR3864

Judge : A.N.Venugopala Gowda J.

Appeal No. : Miscellaneous Second Appeal No. 31/2009

Appellant : Kumar and Another

Respondent : Papanna and Others.

Judgement :

1. Plaintiffs are the appellants. They filed O.S.239/93 in the Court of Prl. Civil Judge (Jr. Dn.) at Devanahalli against the defendants - respondents, for partition and separate possession of the plaint schedule property. Defendants 2 and 3 filed the written statement and alleged that, the suit property is the self acquired property of their father - the 1st defendant, who has executed a will in favour of the 3rd defendant and therefore, the plaintiffs have no share in the suit property. In the written statement, there was also plea with regard to lack of pecuniary jurisdiction to try the suit and also with regard to sufficiency of the payment of court fee. During the pendency of the suit, first defendant - Ramagondanahalli Muniswamappa, having passed away, his daughters were brought on record as the legal representatives. They adopted the written statement filed by defendants 2 and 3. The learned Trial Judge initially raised 12 issues and thereafter, 2

additional issues. Issue Nos.8 and 9, pertaining to the sufficiency of court fee and the pecuniary jurisdiction to try the suit respectively, were ordered to be tried as preliminary issues. At that stage, the defendants filed a memo dated 14.02.2000 stating that, issue Nos.8 and 9 are not pressed. In view of the said memo, the learned Trial Judge deleted the said issues on 14.02.2000. The suit was posted for trial on the other issues. For the plaintiffs, PW-1 deposed and Exs.Pl to P5 were marked. For the defendants, DWs 1 and 2 deposed and Exs. Dl to D12 were marked. After appreciation of the evidence, learned Trial Judge answered all the issues (other than the deleted issues) and held that the plaintiffs are entitled for partition by metes and bounds and get possession of l/6th snare each, in respect of the first item of suit property and decreed the suit in part.

2. The said judgment and decree was questioned by the 3rd defendant, in R.A.76/06, in the Court of Civil Judge (Sr. Dn.), Devanahalli. I.A.II was filed under 0 41 R 27 CPC, with a prayer to permit the appellant to lead the evidence of one Gopalappa, an attestor to the will allegedly executed by 1st defendant. Said application having been opposed, the appeal and I.A.II, were together taken up for consideration. Learned first appellate Judge raised the following points for consideration:

i) Whether the appellant has established that, I.A.II filed under 0.41 Rule 27 of C.P.C is deserves to be allowed at this stage and he is entitled to give additional evidence?

ii) Whether the Trial Court erred in non- considering the absolute right of the appellant over the schedule property acquired under a registered Will dated 23.3.1992 executed by deceased respondent no.3?

iii) Whether the Trial Court erred in holding the respondent no.1 and 2 are having l/6th share each in suit item no.1 by metes and bounds?

iv) Whether the Trial Court erred in deleting issue no.3 and 9 which involved point of law in the suit under appeal?

v) Whether the judgment and decree of the Trial Court is opposed to law, facts and circumstances of the case and is liable to interfere by this Court?

vi) What order?

Point Nos.1, 4 and 5 were answered in the affirmative, point Nos. 2 and 3 were held as not surviving for consideration and as a result, by allowing I.A.II, the appeal was also allowed. The suit was remanded to the Trial Court, with a direction to:

(a) Restore the deleted issue Nos. 8 and 9, give opportunity to both parties to produce their evidence on the said issues and decide the same as preliminary issues;

(b) If the Trial Court finds that there was a cause of action to Pie the suit and it has pecuniary jurisdiction to try the suit, then, to give opportunity to both parties to lead additional evidence in respect of proving of genuineness of the will - Ex.D12;

(c) 7c dispose of the suit on merits afresh. Aggrieved, the plaintiffs have filed this appeal.

3. Learned counsel for the appellants contended The Trial Court deleted issue Nos.8 and 9, on the memo filed by the defendants 2 and 3 and hence, it is not open for them to raise a ground in the appeal, alleging non trial and consideration of issue Nos.8 and 9 by the Trial Court;

(ii) I.A.II to examine a witness, has been allowed mechanically and there is breach of the provisions under 0.41 R.27 CPC;

(iii) The learned first appellate Judge has no:

noticed the provisions under Rules 23 to 29 of 0 41 and the impugned judgment is in breach thereof;

(iv) The Court below has committed material error and illegality in setting aside the judgment and decree passed by the Trial Court and in remanding the suit.

3.1 In response, learned counsel for the respondents, contended that, the first appellate Court being satisfied of the fact that, the defendants for bonafide reasons, did not produce the evidence necessary for just decision in the suit, has permitted the production of additional evidence stated in I.A.II. It was submitted that, since both the parties to the suit should have the opportunity of examination and cross-examination of said Gopalappa, the impugned order of remand was passed. In the circumstances, no interference is called for. However, learned counsel did not insist for the trial and re-consideration of the deleted issues 8 and 9, by the Trial Court.

4. In view of the rival contentions and the record, which I have perused, the points for determination are:

(i) Whether the first appellate Court is justified in restoring the deleted issues 8 and 9 and in directing the Trial Court to try the said issues as preliminary issues?

(ii) Whether the appellate Court is justified in allowing I.A.II and in permitting the production of additional evidence?

(iii) Whether the first appellate Court is justified in remanding the suit to the Trial Court for disposal afresh?

5. Indisputably, issue Nos.8 and 9, were raised by the Trial Court, by taking into consideration the contentions of defendants 2 and 3, in their written statement. When the said issues were ordered to be tried as preliminary issues, the defendants 2 and 3, filed a memo dated 14.02.2000, wherein it was submitted that, they are not pressing issue Nos.8 and 9. Acting on the said memo, the Trial Court deleted the said issues and tried the suit on all other issues. In the circumstances, the core question for consideration is " When the defendants themselves have withdrawn the defence with regard to the sufficiency of court fee paid and the bar of pecuniary jurisdiction to try the suit, whether it was open for them, after the suit was decreed, to have made the same as a ground of attack, in the appellate Court?"

6. In my opinion, it is not permissible for the defendants to re-agitate the plea with regard to either the sufficiency of court fee or the objection with regard to either the pecuniary jurisdiction, after the deletion of the distinct issues raided in that regard, more particularly, after the defendants submitting themselves for trial with regard to the other issues. In my opinion it would not be proper to permit the defendants to raise a ground, which was specifically given up by them before the Trial Court and to make out a new case in the appeal. To allow a party to take grounds, not urged earlier or given up earlier, would not only result in taking the other party by surprise but it would deprive such party of any adjudication on the issue by the courts - a right to which each party is entitled. Even otherwise, let me consider the. tenability of the findings of the Court below, on the basis of which the appeal was allowed and the suit was remanded to the Trial Court, with the directions noticed supra.

Re: Finding on sufficiency of court fee:

7. In the case of GANGAWWA & ANOTHER v. GURUPPA SIDDAPPA BASAVADIER & ANOTHER -1973 (2) MYS. L.J, 435, the plaintiffs filed a suit for partition and separate possession. A plea in the written statement, related to the question of valuation of the suit for the purpose of payment of court fee and jurisdiction and the sufficiency of court fee paid on the plaint. The Trial Court framed issue No.6 in that regard. During the trial, it was submitted on behalf of the defendants that they are not pressing their case with regard to the valuation of the suit and the sufficiency of court fee paid on the plaint. Thereafter, the Trial Court proceeded to decree the suit. In the course of the judgment, it recorded that, no finding is called for with regard to issue No.6, which related to the aforesaid aspect, since the same was not pressed by the defendants. Aggrieved, the defendants filed appeal and during the course of the appeal, the first appellate Court noticed that issue Mo.6 relating to question of valuation of the suit and sufficiency of court fee paid on the plaint, had not been disposed of by the Trial Court, as a preliminary issue, as required under Sub-section (2) of S.ll of Mysore Court Fees and Suits Valuation Act, 1958 and it therefore, felt that the decree passed by the Trial Court was vitiated. The Trial Court decree was reversed and the suit was remanded for fresh disposal in accordance with law, after recording

findings on issue No.6. The first appellate Court also re-casted issue No.6. The said judgment, when questioned, this Court, made a reference to the decision in MSA 97/1972 dated 28.03.1973, wherein it had been held that:

"There is nothing in the appellate Court's judgment to show that in the absence of a plea by the defendants regarding court fees, the opinion of the Trial Court regarding sufficiency of the court fees is, in the opinion of the appellate Court, wrong. When the defendants themselves have withdrawn the plea, obligation of the Court nevertheless to retain the issue on record and try it as a preliminary issue cannot, in my opinion, arise. If the appellate Court thought on the merits of the question as to sufficiency or otherwise of the court fee, the fee actually paid on the plaint was incorrect, it had ample jurisdiction under sub-sec.(4) of S.ll of the Mysore Court Fees and Suits Valuation Act, to rectify the defect. When that power is available, the order of remand, in my opinion, must be held to be unjustifiable."

And by agreeing with the said observation, it was held, the first appellate Court was therefore wrong in setting aside the judgment and decree passed by the Trial Court and in remanding the case to the Trial Court for fresh disposal. The reasoning in the said decision is a complete answer to the findings recorded by the Court below, with regard to non-trial of issue No.8 - relating to insufficiency of court fee.

7.1 The first appellate Court has not noticed the provision under S.ll(4) of the Karnataka Court Fees and Suits Valuation Act, 1958. It has ample power there under, to rectify the defect, if any. It ought to have proceeded under S.ll(4) and determined the proper court fee payable on the plaint as well as the appeal memorandum. In the said view of the matter, the appellate Court is not justified in setting aside the judgment and decree of the Trial Court., on the ground that, there is no decision as to proper valuation of the suit & the sufficiency of the court fee, more particularly after the suit has been disposed of on merit.

Re: Finding on the pecuniary jurisdiction:

8. To answer this point, at the outset, it is necessary to notice the provision under sub-section (1) of S.21 of CPC, which reads as follows:

"No objection as to the place of suing shall be allowed by any Appellate Court or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in aii cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice." (underlining is by me)

8.1 In order that an objection to the place of suing may be entertained by an appellate Court or revisional Court, the fulfillment of the following 3 conditions is essential:

(i) The objection was taken in the Court of first instance;

(ii) It was taken at the earliest possible opportunity and in cases where issues are settled, at or before such settlement and;

(iii) There has been a consequent failure of justice. All the 3 conditions must co-exist.

8.2 In the instant case, conditions (i) and (ii) are no doubt satisfied; but then, before the appellate Court could allow the objection to be taken, it was further necessary that a case of failure of justice on account of the place of suing having been wrongly selected was made out. Not only was no attention paid to this aspect of the matter but, no material exists on the record from which such failure of justice may be inferred. The Court below ought to have taken into consideration, the fact that, the defendants filed memo dated 14.02.2000 and hence, issue Nos.8 and 9 were deleted. Issue No.9 was with regard to the pecuniary jurisdiction to try the suit. By seeking deletion of the said issue, the defendants waived their objections as to the lack of pecuniary jurisdiction to try the suit. Further, the defendants allowed the trial to be proceed and thereafter the Trial Court to pronounce judgment on merit of the suit by taking the chance of a verdict in their favour, which clearly shows that was waiver of the objection re: pecuniary jurisdiction. In this view of the matter, it has to be held that, the provisions of subsection above extracted made it imperative for the Court below not to entertain the objection, whether or not, it was otherwise well founded. The jurisdiction of a court may be classified mainly into three categories: (i) Territorial or local jurisdiction; (ii)

Pecuniary jurisdiction; and (iii) Jurisdiction over the subject matter So far as territorial and pecuniary jurisdiction are concerned, if the objection is not taken at the earliest it cannot be allowed to be taken at a subsequent stage, much less in an appeal, unless there has been a consequent failure of justice. Since the suit had been decreed after trial in which the defendants participated, no material exists on the record, from which a failure of justice may be inferred. In the said view of the matter, the appellate Court is not justified in setting aside the judgment and decree of the Trial Court on the ground that there is no decision with regard to the objection relating to pecuniary jurisdiction, more particularly, after the suit has been decreed on merit. May be on account of the factors, i.e., the memo dated 14.2.2000 filed in the trial Court acting on which issue Nos.8 and 9 were deleted and the defendants participating in the trial in respect of other issues and disposal of the suit on merit, learned counsel for the appellants, did not rightly pursue the ground with regard to the non trial of the deleted issues 5 and 9.

Re: finding on production of additional evidence:

9. 0 41 R 27 prescribes specific situation where production of additional evidence may otherwise be had. Incidentally, the provision of 0 41 R 27 has 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 evidence to be filled up.

9.1 It is too well settled that, the conditions precedent for application of clause (aa) of sub-rule (1) of R 27 of 0 41 are different from that of clauses (a) & (b). In the event, the former is to be applied, it would be for the applicant to show that, the ingredients or the conditions mentioned therein are satisfied. On the other hand, clauses (a) & (b) to sub-rule (1) of R 27 of 0 41 are to be taken recourse to, the appellate Court was bound to consider the entire evidence on record and come to an independent finding for arriving at a just decision; adduction of additional evidence as has been prayed by the appellant was necessary.

9.2 The Courts shall have to be cautious and must always act with great circumspection in dealing with the claims for getting in additional evidence particularly, in the form of oral evidence at the appellate stage. Appellate Court

should not pass an order so as to patch up the weakness of the evidence of the unsuccessful party before the Trial Court. The Court below has not noticed the fact that, the ingredients of clauses (a) and (b) of sub-rule (1) of Rule 27 of Order 41 are not attracted to the case. The case for production of additional evidence, if does not meet the conditions precedent stipulated under clause (aa) of 0 41 R 27(1), permission to produce additional evidence cannot be granted in view of the fact that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate Court, but upon satisfaction of the three conditions, under clauses (a), (aa) and (b). The first appellate Court has not bestowed its attention to the said provisions and has mechanically allowed I.A.II. Even if I.A.II were to have had been allowed, the first appellate Court ought to have kept in its view, the mode of taking additional evidence provided under n 28 and the points to be defined to which the evidence is to be confined 3S required under R 29 under O 41. Remand - effect of Amendment Act 104 of 1976.

10. After the enactment of Amendment Act 104 of 1976 and its insertion in CPC, open remand is permissible only in terms of Rules 23 and 23-A or limited remand under R 25 of O 41. Since in the case on hand, the suit had been decreed by answering all the issues tried, R 23 is not attracted, in as much as, remand in exercise of the power under R 23 can be resorted to, only if the suit had been disposed of by the Trial Court upon a preliminary issue and the decree is reversed in appeal. In case, the suit has been disposed of otherwise than on a preliminary point and the decree is reversed in appeal and a re-trial is considered necessary, by taking aid of the provision contained in R 23-A of 0 41, the appellate Court can exercise the power of remand available under R 23. The impugned judgment does not indicate that, the first appellate Court re-considered the findings of the Trial Court on the issues tried and answered by the Trial Court and reversed the judgment and decree under challenge before it. Since the appellate Court found merit in I.A.II for production of additional evidence, without even considering points (ii) & (iii) and answering the same, it has reversed the impugned judgment / decree, which is unjustified A remand in exercise of inherent powers under S.151 CPC is not permissible, in view of the specific provisions made in the Code under Rules 23, 23-A and 25 of O 41. Unless the mandatory ingredients of either Rules

23, 23-A and 25 are found to exist, the appellate Court cannot order remand.

11. The Court below, has committed the breach or the aforesaid provisions and hence, the impugned judgment is unsustainable. In the circumstances of the case, I pass the following:

ORDER

i) Appeal is allowed.

ii) Impugned judgment / order of First appellate Court is hereby set aside.

iii) Appeal stands restored to the first appellate Court for disposal in accordance with law.

iv) First appellate Court shall re-consider I.A.II in the light of the observations made supra & the decision in the case of SHANTAVEERAPPA v. JANARDHANACHARI - ILR 2007 KAR 1127 and also in accordance with law.

v) Needless to observe that, no finding on any question of fact or issue between the parties has been decided in this appeal.

vi) In order to expedite the hearing and disposal of the appeal, the parties are directed to appear before the first appellate Court on 16.07.2010 and receive orders.

Registry is directed to immediately return the LCR to the first appellate Court.

In the circumstances of the case, parties are directed to bear their respective costs.