
(2015) 10 KAR CK 0118

Karnataka High Court

Case No: Writ Petition No. 41415 of 2015 (GM-CPC)

Gundegowda and
Others

APPELLANT

Vs

Rangamma

RESPONDENT

Date of Decision: Oct. 15, 2015

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 14 Rule 5, Order 41 Rule 23, Order 41 Rule 23-A, Order 41 Rule 25

Citation: (2015) 10 KAR CK 0118

Hon'ble Judges: Aravind Kumar, J.

Bench: Single Bench

Advocate: Vighneshwar S. Shastri, Advocate, for the Appellant

Final Decision: Disposed Off

Judgement

@JUDGMENTTAG-ORDER

Aravind Kumar, J.

Petitioners are appellants in R.A. 155/2013. Being aggrieved by order of rejection of application filed by them under Order XLI Rule 25 of CPC wherein appellate Court was sought to frame an issue regarding limitation and to refer the matter to trial Court with a direction to trial Court to take additional evidence on the said issue and to decide suit on merits.

2. I have heard Sri Vighneshwar S. Shastri, learned counsel appearing for petitioners and perused case papers.

3. Appellants are legal representatives of deceased sole defendant. Respondent in R.A.67/2008 (New No. 155/2013) had filed O.S. 151/2005 for partition and separate possession of suit schedule properties which came to be decreed by judgment and

decree dated 5.6.2008. Being aggrieved by said judgment and decree, an appeal came to be filed by deceased defendant and during pendency of appeal, he expired and appellants-writ petitioners were brought on record as legal representatives. Having filed an application under Order XLI Rule 25 of CPC as per Annexure-E for the reliefs indicated hereinabove, said application came to be resisted by respondent-plaintiff and lower appellate Court after considering rival contentions and judgments pressed into service by respective learned advocates, first appellate Court has opined that issue of limitation is purely a question of law which can be decided along with main matter and as such, it has rejected the said application.

4. A bare reading of Order XLI Rule 25 of CPC would indicate that if in the opinion of the appellate Court, the trial Court has omitted to frame or try an issue or determine any question of fact which appears to the appellate Court was essential to arrive at a right decision of the suit on merits, in such an event, appellate Court can frame issue/s and can refer the same for trial to the trial Court from whose decree the appeal is preferred. Said Rule would also indicate that after such reference, such Court has to proceed to try such issue which has been framed by the appellate Court for adjudication by recording evidence and return evidence so recorded to appellate Court together with its finding recorded thereon and reasons therefor within the time that may have been fixed by the appellate Court. To put it differently, if appellate Court comes to a conclusion that trial Court has omitted to frame or try an important issue arising from pleadings and same was essential for arriving at a right decision in the suit, then no useful purpose would be served in remanding entire case. As such, appellate Court can frame an issue and refer it for being adjudicated by trial Court, retaining the appeal on its own file, and directing the trial Court to take evidence on such issue and submit the same with its finding thereon and on receipt of such finding, appellate Court may determine and proceed to adjudicate the appeal.

5. Keeping this in mind, when the facts on hand are examined, it would indicate that appellants before the first appellate Court had filed an application under Order XLI Rule 25 of CPC and had sought for following reliefs.

"For the reasons stated in the accompanying affidavit, it is prayed that the Hon"ble Court may be pleased to frame issue regarding limitation and refer the same to the trial Court and direct the trial Court to take additional evidence on the said point and decide the suit on merits in the interest of justice and equity."

6. A bare reading of the above prayer does not indicate that appellants having sought for a finding being recorded by trial Court on the issue of limitation and same being forwarded back to appellate Court. On the other hand, appellants had sought for an issue being framed by appellate Court to be adjudicated by trial Court and suit being decided on merits by trial Court itself. In other words, it is in disguise a prayer for remand of the appeal in its entirety.

7. At this juncture, it would be appropriate to note that in the written statement filed by deceased defendant before trial Court, at paragraph-15, an omnibus statement has been made with regard to limitation and it reads as under:

(Suit is barred by limitation)

8. When issues came to be framed by trial Court, deceased defendant did not raise his little finger. He kept quiet, participated in the proceedings and thereafter suffered an adverse judgment and decree. First available opportunity to seek for recasting of issues by invoking Order XIV Rule 5 of CPC was not availed of, for reasons best known to him.

9. After having suffered a judgment and decree, deceased defendant pursued his grievance, assailing the said judgment and decree by filing an appeal before appellate Court and in the appellate Court, at ground No. 8, issue regarding limitation has been raised in the appeal memorandum. In the words of appellant, it reads as under:

"The trial Court further erred in not framing the issues regarding limitation though the appellant/defendant take a stand in his written statement that the suit is barred by limitation."

10. Thus, it could be seen that appellant has raised an issue regarding limitation before trial Court, though vaguely and also before first appellate Court, specifically. It is because of this precise reason, appellate Court while considering application in question (filed under Order XLI Rule 25 of CPC) has observed that it is a question of law and can be decided along with appeal. This observation would not preclude appellate Court if it finds that issue of limitation cannot be decided as an abstract principle of law based on available documentary evidence, to frame an issue and seek evidence from trial Court. In other words, during the course of adjudicating appeal, if appellate Court were to come to a conclusion that evidence is required on said issue, it would be at liberty to exercise its power under Order XLI Rules 25, 23 or 23-A of CPC, as the case may be.

11. With these observations, writ petition stands disposed of.