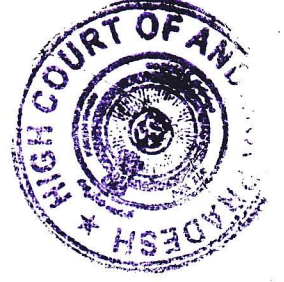


IN THE HIGH COURT OF ANDHRA PRADESH AT AMARAVATI

**FRIDAY, THE NINTH DAY OF MAY
TWO THOUSAND AND TWENTY FIVE**



PRESENT

THE HONOURABLE MS JUSTICE B.S.BHANUMATHI

CIVIL MISCELLANEOUS APPEAL NO: 150 OF 2024

Appeal under Order 43, Rule 1 (u) of CPC praying that the High Court may be pleased to call for the records of the Courts below and to set aside the Decree and Judgment of the Lower Appellate Court, so far as they went against the appellant, i.e., Clause No.2 of the Decree, made in A.S.No.47 of 2008 on the file of the Court of the V Additional District Judge, Rayachoty, Dated 22.12.2018, preferred against the decree and Judgment of the Principal Junior Civil Judge, Rayachoty made in OS No.14 of 2002, dated 10-12-2007.

Between:

Shaik Khader Mohiddin, S/o.Mohammad, aged about 73 years, Occ: Lorry owner, R/o.D.No.39/149, Mahaboob Basha Street, S.N.Colony Area, Rayachoty Village, Rayachoty Mandal, Kadapa District.

**...Appellant/
Appellant/Defendant No.1**

AND

1. Tanjore Ashif Ahammad, S/o.Late Ibrahim Sab, aged about 62 years, Occ:Business, R/o.D.No.212, Chunnambukar Street, Vaniambadi Rayachoty Town, Kadapa District (Died).

**...Respondent No.1/
Respondent No.1/Plaintiff**

2. Shaik Rahimunnisa, W/o.Late Shaik Khadervalli, aged about 77 years, Occ:Household affairs, R/o.Behind Old Telephone Exchange Office, Rayachoty, Kadapa District.
3. Shaik Mohammad Khasim, S/o.Late Shaik Khadervalli, aged about 57 years, Occ:Business, R/o.Behind Old Telephone Exchange Office, Rayachoty, Kadapa District.
4. Shaik Mohammad Ilyas, S/o.Late Shaik Khadervalli, aged about 53 years, Occ:Business, R/o.Behind Old Telephone Exchange Office, Rayachoty, Kadapa District.
5. Shaik Mohammad Fayaz, S/o.Late Shaik Khadervalli, aged about 48 years, Occ:Business, R/o.Behind Old Telephone Exchange Office, Rayachoty, Kadapa District.
6. Mohammad Riyaz, S/o.Late Shaik Khadervalli, aged about 46 years, Occ:Business, R/o.Behind Old Telephone Exchange Office, Rayachoty, Kadapa District.
7. Mohammad Akyaz, S/o.Late Shaik Khadervalli, aged about 77 years, Occ:Business, R/o.Behind Old Telephone Exchange Office, Rayachoty, Kadapa District.
8. Palagiri Khadirun, W/o.Palagiri Rafeeq, aged about 47 years, Occ: Household affairs, R/o.Tsakibanda Village, Chinnamandem Mandal, Kadapa District.
9. Shaik Heerajan, W/o.Shaik Khaleel, aged about 57 years, Occ:Household affairs, R/o.Alimabad Street, Rayachoty, Kadapa District.
10. Mabunnisa, W/o.Akhar Khadersab, aged about 52 years, Occ: Household affairs, R/o.D.No.61/59, Gandhi Bazar, Rayachoty, Kadapa District.

11. Aameena Bee, W/o.Abdual Azeez, aged about 40 years, Occ: Household affairs, R/o.44/122-D1, Bose Nagar, Rayachoty, Kadapa District.
12. Magbuijan, W/o.Shaik Basheer Sab, aged about 50 years, Occ: Household affairs, R/o.44/95, Bose Nagar, Rayachoty, Kadapa District.
13. Syed Naseeb Jan, W/o.Syed Shafrullah, aged about 53 years, Occ:Household affairs, R/o.Alimabad Street, Rayachoty, Kadapa District.
14. Rahamath Jan, W/o.Shaik Khader Basha, aged about 57 years, Occ:Household affairs, R/o.D.No.36/92, Chittoor Road, Opp:RESCO Section Office, West Rayachoty, Kadapa District.
15. Shaik Ajamathi Jan, W/o.Shaik Khader Basha, aged about 52 years, Occ:Household affairs, R/o.64/129, Cool Drink Shop, Trunk Road, Near Lakshmi Venkateswara Picture Palace, Rayachoty, Kadapa District.

...Respondent Nos.2 to 15/

Respondent Nos.2 to 15/Defendants 2 to 15

16. Tanjore Aafia, D/o.Late Asif Ahamed, aged about 23 years, Occ: Household affairs, R/o.Alimabad Street, Rayachoty, Kadapa District.
17. Tanjore Nadeem Ahamed, S/o.Nazeer Ahamed, aged about 22 years, Occ:Business, R/o.Alimabad Street, Rayachoty, Kadapa District.

...Respondent Nos.16 & 17/

LRs of the plaintiff

IA NO: 2 OF 2024

Petition filed 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 suspend the operation of Decree and Judgment made in AS



No.47 of 2008 on the file of the Court of the V Additional District Judge, Rayachoty, dated 22-12-2018, pending disposal of the CMA.

Counsel for Appellant :Sri S.V.Muni Reddy

Counsel for the Respondent Nos.16 & 17: Sri Syed Kaleemulla

Counsel for the Respondent Nos.2 to 15:--

The Court made the following:

APHC010038522021



IN THE HIGH COURT OF ANDHRA PRADESH

AT AMARAVATI

[3311]

(Special Original Jurisdiction)

Friday, the Ninth day of May, Two Thousand and Twenty Five

Present

The Honourable Ms. Justice B.S.Bhanumathi

Civil Miscellaneous Appeal No: 150 of 2024

Between:

Shaik Khader Mohiddin

...appellant

and

Tanjore Ashif Ahammad and others

...respondents

Counsel for the appellant:

1.S.V.Muni Reddy

Counsel for the respondents:

1.S. Kaleemulla

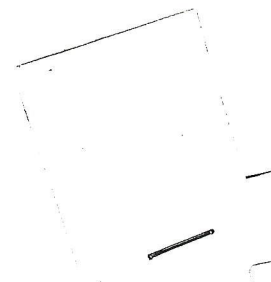
The Court made the following:

JUDGMENT:

This Civil Miscellaneous Appeal is filed under Order XLIII, Rule 1 (u) of C.P.C. against the decree and order dated 22.12.2018 remitting the case to the trial Court under Order XLI, Rule 27 of C.P.C. to appoint a commissioner to localize the suit schedule property, on allowing the appeal in A.S.No.47 of 2008 on the file of the Court of V Additional District Judge, Rayachoty, by setting aside decree and judgment dated 10.12.2007 allowing O.S.No.332 of 2002 on the file of the Court of Principal Junior Civil Judge, Rayachoty.

2. The respondent No.1 herein is the plaintiff. The appellant is the defendant No.1. The respondents No.2 to 15 are the defendants No.2 to 15. The respondents No.16 and 17 are added before the first appellate Court as the legal representatives of the respondent No.1 on his death. For the sake of convenience, the parties are called as before the trial Court.

3. The plaintiff filed suit initially seeking relief of mandatory injunction and perpetual injunction, but later sought the relief of declaration of title over the suit schedule property measuring Ac.0.07½ cents out of Ac.0.42 cents which covered under sale deed dated 05.05.1970, out of total extent of Ac.6.31 cents in circar dry, D.No.561/1 of Rayachoty Village, bounded by East-12 feet width road, on the West by Kadapa-Chittoor Road, on the North by the land of wife of Rama Mohana Reddy and on the South – land of Kuna Nagabushana Rao and another in between East-West = 40 cubits and North-South = 40 cubits (400 Square yards).





4. The case of the plaintiff is briefly as follows:

Originally, Shaik Mohammad Khasim who is the father of the defendant No.1 was the owner of Ac.6.31 cents in Survey No.561/1, Ac.0.56 cents in Survey No.753 and Ac.0.92 cents in Survey No.835 in Rayachoty, to a total extent of Ac.7.79 cents. On his death, his wife Bashiran Bee and the eldest son by name Khader Valli sold Ac.0.42 cents in Survey No.561/1, Ac.0.56 cents in Survey No.753 and Ac.0.92 cents in Survey No.835, a total extent of Ac.1.90 cents to Sayed Biram Sab under a registered sale deed dated 05.05.1970 to perform the marriage of Naseem Jan, daughter of Mohammad Khasim. The purchaser, in turn sold the entire extent of Ac.1.90 cents to K.Nagabushana Rao and G. Sree Ramulu on 11.07.1981. They made the land into plots of different extents and sold to different purchasers after preparing lay-out. Thus, the plaintiff purchased an extent of Ac.0.04½ cents out of Ac.0.42 cents land in Survey No.561/1 with specific boundaries under a registered sale deed dated 08.01.1985. He obtained a rectification deed dated 12.08.1986 from the vendors. On 08.01.1985, Gajula Abubakar also purchased an extent of Ac.0.03 cents in Survey No.561/1 within specific boundaries and later, on 20.02.1990, sold the said property to the plaintiff. Thus, the plaintiff is the owner and possessor of Ac.0.07 ½ cents in Survey No.561/1. The defendant No.1, under the colour of manipulated document, filed a suit in O.S.No.27 of 1998 on the file of the Court of Principal Junior Civil Judge, Rayachoty, against the plaintiff (defendant No.3) and five others for granting perpetual injunction in respect of Ac.2.74 cents in Survey No.561/1. The document is not binding on the plaintiff. As the defendant No.1 prevented the attempts of the plaintiff to lay foundation in his property i.e., suit schedule property, the present suit was filed.

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5. The defendants No.3 to 13 were set *ex parte*. The defendant No.1 and 2 filed the written statement with the averments as follows and the same was adopted by the defendants No.14 and 15:

The averments in the plaint were denied. It is true that Shaik Mohammad Khasim, who is the father of the defendant No.1 was the owner of Ac.6.30 cents in Survey No.561/1, Ac.0.56 cents in Survey No.753 and Ac.0.92 cents in Survey No.835 in Rayachoty. There was a partition of his property among his wife and children on 26.06.1984. In the said partition, the defendant No.1 was allotted Ac.2.74 cents in Survey No.561/1 showing it as schedule-C of the partition deed. Since then, the defendant No.1 has been in exclusive possession and enjoyment of the same. He filed the suit in O.S.No.27 of 1998. The suit was decreed granting perpetual injunction. The defendants filed appeal in A.S.No.14 of 2001 on the file of the Court of Senior Civil Judge, Rayachoti. The said appeal was dismissed. The aggrieved appellants / defendants filed second appeal in S.A.No.392 of 2002 before the erstwhile High Court of Andhra Pradesh and the same was also dismissed. The defendants prayed to dismiss the suit.

6. Initially, the trial Court framed the following issues:

- i. Whether the plaintiff is entitled for grant of mandatory injunction as prayed for?
- ii. Whether the plaintiff is entitled for grant of perpetual injunction as prayed for?
- iii. To what relief?

7. Subsequently, after amendment of the prayer in the suit, the following additional issue was framed:



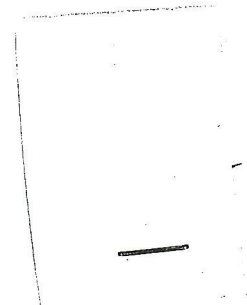
Whether the plaintiff is entitled for declaration of title in respect of the suit property as prayed for?

8. The plaintiff was examined as P.W.1 and P.Ws.2 to 4 were examined on behalf of plaintiff. Ex.A1 to Ex.A16 were marked on their behalf. The defendants were examined as D.W.1 to D.W.3 and Ex.B1 to Ex.B27 were marked on their behalf.

9. After hearing both sides, the suit was decreed in favour of the plaintiff with a direction to the defendants to deliver the vacant possession of the suit property to the plaintiff, by removing the structures made over it by the defendant No.1 within two months.

10. Before the appellate Court also, the respondents No.2 to 15 / defendants No.2 to 15 remained *ex parte*. After hearing the appellant and the respondents No.16 and 17 (legal representatives of respondent No.1 / plaintiff), the appellate Court allowed the appeal by setting aside the judgment and decree dated 10.12.2007 in O.S.No.332 of 2002 and after remitting the case back to the trial Court under Order XLI, Rule 27 of C.P.C. with specific direction to the trial Court to appoint an advocate commissioner for localization of the suit schedule property with the aid of the Mandal Surveyor with reference to the title deeds of both the parties viz., the plaintiff and the defendants and also other link documents, if any. The first appellate Court, however, directed the trial Court to dispose of the matter within three to five months by giving opportunity to both the parties to let in evidence, if any, after receipt of the report of the commissioner and then to dispose of the suit afresh.

11. Aggrieved by the same, the present Civil Miscellaneous Appeal was filed.



12. Notice sent to the respondents No.2 to 7, 9 and 13 returned unserved as 'insufficient address'. Notice sent to the respondent No.8 returned with endorsement "addressee not in village...". Notice sent to the respondent No.10 returned unserved with endorsement "addressee is not located in this address". Notice sent to the respondents No.11 and 12 returned unserved with endorsement "no such addressee in this door No.". The respondent No.14 returned unserved. The respondents No.16 and 17 are appearing through counsel.

13. The learned counsel for the appellant submitted that, because the first appellate Court allowed the appeal by setting aside the judgment and the decree in the suit finding that the evidence is insufficient to prove the title, after exhaustively dealing with the evidence, ought not to have remitted the matter to the trial Court under Order XLI, Rule 27, that too with a direction to appoint an advocate commissioner for localization of the schedule property and dispose of the suit afresh. In this regard, he further submitted that the title shall be decided basing on the documents which were already part of the evidence and therefore, there is no need to appoint a commissioner. He further submitted that the property of the appellant to an extent of Ac.2.74 cents in Survey No.561/1 is within the specific boundaries and moreover there is decree granting the permanent injunction in respect of the same property in his favour and against the plaintiff and the others and therefore, there is nothing more required now to be adjudicated again, as the said decree has been granted having found that the defendant No.1 who is the plaintiff in the suit (filed by him) was in possession of the total extent of Ac.2.74 cents. Therefore, he requested to set aside the order remanding the matter to the trial Court, while leaving intact the part of

the judgment and decree allowing the appeal by setting aside the judgment and decree in the suit.

14. On the other hand, the learned counsel for the respondents No.16 and 17 (legal representatives of the plaintiff) submitted that there is a need to appoint a commissioner to localize the property in view of the dispute that the structure made by the defendant No.1 is to be localized whether it was constructed encroaching into the plaintiff schedule property or not and the said fact cannot be decided by merely looking at the documentary evidence or even by oral evidence as the same needs survey by measuring the land with the help of documents of both parties.

15. Since the suit was filed not only for declaration of title but also for mandatory injunction to remove the structures made by the defendant no.1 alleging that it is within the suit schedule property, it is necessary to find out whether the structure is within the suit schedule property or not. For such assertion, documentary evidence of title alone is not sufficient and it is required to identify it on land. Therefore, the contention that the decision can be taken basing on the documentary and oral evidence to dispose of the suit or appeal is not correct. The trial Court basing on the title alone decreed the suit both in respect of the declaration of title and for the relief of mandatory injunction and perpetual injunction. Moreover, the trial Court disbelieved the title of the defendant No.1 over Ac.2.74 cents allotted in the partition, on the ground that the western boundary of such property cannot be a road as the property sold by the mother and brother of the defendant No.1 to Syed Biram Sab shows the road on western side. Merely basing on the flow of title from Shaik Mohammad Khasim to the plaintiff through Syed Biram Sab and the subsequent purchasers K. Nagabushana Rao and

G. Sree Ramulu, the trial Court adjudicated the validity of the plaintiff's title and consequently granted the other reliefs.

16. On the other hand, the appellate Court found fault with the trial Court for believing the title deeds without examining the attestors and scribes of those documents and also for not filing the evidence regarding the lay-out and also for not examining all the vendees of the plots in the lay-out. Further, the appellate Court observed that the suit in O.S.No.14 of 2002 was dismissed while O.S.No.332 of 2002 was decreed by the same Court, though the reliefs and flow of title are one and the same. The appellate Court noted that an appeal in A.S.No.50 of 2008 filed against the decree and the judgment in O.S.No.14 of 2002 was heard along with A.S.No.47 of 2008. The first appellate Court further observed that appointment of commissioner for localization of the property was made in O.S.No.27 of 2002 to note the physical features and such appointment is required in this suit also, in view of the dispute. Therefore, accordingly the judgment and decree under challenge were set aside by allowing the appeal and remitted the matter back to the trial Court as noted above.

17. The evidence placed by the plaintiff by filing documents of title through sale deeds was ignored by the appellate Court observing that the documents were not proved by examining attestors and scribes as required under Section 68 of the Indian Evidence Act, 1872.

18. As such, it is apt to mention Section 68 of the Indian Evidence Act, here as follows:

“68. Proof of execution of document required by law to be attested.

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence :

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

19. A reading of the above provision makes it clear that the said provision is applicable only for a document which requires, by law, to be attested, it cannot be extended to a document which is attested, though not required by law to be attested. Sale deed doesn't require attestation as per law. Merely because a sale deed is attested, it doesn't fall under the category of the documents referred in Section 68 of the Indian Evidence Act. As such, the first appellate Court committed grave error in making such observation to exclude the documentary evidence of title through sale deeds. However, since the trial Court disbelieved the version of the defendant No.1 with regard to Ac.2.74 cents basing on the boundaries and decided the title of the plaintiff solely relying on the flow of title through sale deeds, the case of the plaintiff regarding declaration of title requires re-consideration by examining the whole evidence afresh.

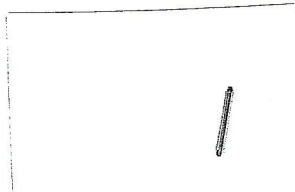
20. Since the plaintiff in this case pleaded that he and his vendor G.Abubakar purchased plots, the appellate Court erroneously observed



that all the vendees of the plots in the lay-out shall be described in the pleadings or in the evidence and summoned. This is a matter of appreciation of evidence again by the trial or retrial un-influenced by such observation.

21. At this juncture, it is pertinent to mention that the total extent of land in Survey No.561/1 is Ac.6.31 cents, whereas, the property sold to Syed Biram Sab is Ac.0.42 cents in Survey No.561/1 and the defendant No.1 was allotted Ac.2.74 cents. As such, both parts of land can be mutually exclusive. However, how the property of the defendant No.1 has one of the boundaries as road on western side, though, the property sold to Syed Biram Sab has road on western side and the remaining side of the vendees on the eastern side, as doubted by the trial Court requires a fresh consideration by evidence, if required by giving opportunity to both the parties to lead evidence on that aspect. That apart, localization of property sold to the plaintiff and also the property, if any allotted to the defendant No.1 in the partition deed would clinch the issue. Of course, the plaintiff in the present suit already suffered the decree of permanent injunction in O.S.No.27 of 1998 in respect of the property of the defendant No.1. The said fact cannot be lost sight. So, in these circumstances, this Court does not see any reason to interfere with the remand of the matter to the trial Court for taking decision in the suit afresh by receiving the evidence as indicated in the order impugned before this Court.

22. The appellate Court stated that the matter was remitted to the trial Court under Order XLI, Rule 27 of C.P.C. It is apt to mention Order XLI, Rules 23A, 27 and 28 of C.P.C. here as follows:





“23A. Remand in other cases.—Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

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

(aa) 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.

28. Mode of taking additional evidence.— Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.”

23. It is to be noted that Order XLI, Rule 27 of C.P.C. enables an appellate Court to receive additional evidence by itself or through the trial Court, whereas Order XLI, Rule 23-A enables an appellate Court to remand a case for re-trial, in a case not covered by Rule 23 which relates to a case disposed on preliminary point. Though, the appellate Court did not use the word ‘remand’, reading of the whole judgment in the appeal shows that the decree and judgment in the suit were set aside with a direction to decide the suit after receiving additional evidence.

24. If at all, the appellate Court decides to limit the order only to the extent of the additional evidence under Order XLI, Rule 27 of C.P.C. (r/w Rule 28), there is no need to finally allow the appeal and set aside the impugned decree and judgment and direct *de novo* trial after taking additional evidence. As such, it is evident that the appellate Court exercised its jurisdiction under Order XLI, Rule 23-A of C.P.C. Thus, the Civil Miscellaneous Appeal was filed before this Court as per Order XLIII, Rule 1 (u) of C.P.C.

25. Un-influenced by the observation of the first appellate Court that the plaintiff ought to have examined the witnesses as required under Section 68 of the Indian Evidence Act, the trial Court shall proceed with the direction given in the order of remand.

26. Since the result in the first appeal does not require interference, the civil miscellaneous appeal is accordingly, liable to be dismissed.

27. In the result, the appeal is dismissed. No costs.

Interim orders granted earlier, if any, shall stand vacated.

Pending miscellaneous applications, if any, shall stand closed.

//TRUE COPY//

Sd/- K TATA RAO
DEPUTY REGISTRAR

SECTION OFFICER

To,

1. The V Additional District Judge, Rayachoty, YSR Kadapa District.
2. The Principal Civil Judge (Junior Division), Rayachoty, YSR Kadapa District.
3. One CC to Sri S.V.Muni Reddy, Advocate [OPUC]
4. One CC to Sri Syed Kaleemulla, Advocate [OPUC]
5. **Three CD Copies**

BSV
sree

HIGH COURT

DATED:09/05/2025

JUDGMENT

CMA.NO.150 OF 2024



DISMISSING THE CMA WITHOUT COSTS