Karnataka High Court Shanthaveerappa S/O ... vs K.N. Janardhanachari S/O Late ... on 8 December, 2006 Equivalent citations: ILR 2007 KAR 1127, 2007 (6) KarLJ 531 Author: N Kumar Bench: N Kumar JUDGMENT N. Kumar, J. Page 0726 1. This is a Miscellaneous Second Appeal preferred by the defendant against the judgment and decree of the first Appellate Court which has set aside the judgment and decree of the trial Court without going into the merits, but only on the ground that the application filed under Order 41 Rule 27 requires to be considered and then remanded the matter to the trial Court for fresh consideration in accordance with law. 2. I have heard the learned Counsel for the parties. The questions that arise for consideration in this appeal are: (1) Whether the appeal preferred by the appellant is maintainable? (2) Whether the Appellate Court was justified in setting aside the judgment and decree of the trial Court solely on the ground that the application filed under Order 41 Rule 27 CPC is allowed? (3) Whether the Appellate Court was justified in remanding the matter and ordering for re-trial? 3. The plaintiff filed a suit for the relief of declaration of title and for permanent injunction against the defendant Suit was contested. Ultimately, the suit came to be decreed partly declaring that the plaintiff is the owner of three items of the property. In respect of the said extent of land a decree for permanent injunction was granted. Aggrieved by the said judgment and decree, the plaintiff preferred a Regular Appeal. In the Regular Appeal he filed an application under Order 41 Rule 27 CPC for production of additional evidence and produced 28 documents. Objections were filed for production of the said documents by the respondent. The first Appellate Court heard the appeal on merits and also the application filed under Order 41 Rule 27 CPC. After setting out the facts of the case, issues involved and the points for consideration, it declined to go into the merits of the judgment and decree of the trial Court. On the contrary it held that the application filed by the plaintiff under Order 41 Rule 27 CPC requires to be allowed. Because of that finding it set aside the entire judgment and decree of the trial Court and remanded the matter to the trial Court for fresh consideration in accordance with law in the light of the 28 documents produced by the plaintiff. Aggrieved by this order of remand, the defendant is in second appeal. 4. Learned Counsel for the appellant contends, in the first place that, merely because the first Appellate Court came to the conclusion that the application filed under Order 41 Rule 27 CPC requires to be allowed, that cannot be made the basis for setting aside the judgment and decree of the trial Court and remand the case. Secondly he contends that, the said application could not have been heard as an interlocutory application. It ought to be heard along with the merits of the appeal and then only the application could have been allowed. 5. Per contra, the learned Counsel for the respondent submits that, against an order passed under Order 41 Rule 27 CPC no appeal lies and, therefore, Page 0727 this Second Appeal is not maintainable. Secondly he contends that, there is no necessity for the first Appellate Court to go into the merits of the case when it comes to the conclusion that the application under Order 41 Rule 27 CPC requires to be allowed. Therefore, he submits the impugned order of remand is just and proper and does not call for any interference. 6 Point No. (1): The appeal is preferred against the

judgment and decree of the lower Appellate Court dated 22.6.2006 passed in R.A. No. 16/2004. This appeal is under Order 43 Rule 1(u) of CPC. It is true that the lower Appellate Court allowed the application filed by the appellant under Order 41 Rule 27 CPC for production of 28 documents as additional evidence. Consequently, it set aside the judgment and decree of the trial Court and remanded the matter to the trial Court for fresh disposal in accordance with law. Under these circumstances, it is not an appeal against an order passed under Order 41 Rule 27 CPC. No second appeal lies against an order passed under Order 41 Rule 27 CPC. If an application under Order 41 Rule 27 CPC is allowed or dismissed in a pending appeal as an interlocutory order certainly no second appeal lies against such an order. But, the impugned judgment and decree in this appeal is not such an interlocutory order. Consequent to allowing the application under Order 41 Rule 27 CPC, the lower Appellate Court has reversed the judgment and decree of the trial Court in appeal and has ordered for re-trial. Therefore, it is an order passed under Order 41 Rule 23A CPC. Against such an order, Order 43 Rule 1(u) specifically provides an appeal read with Section 104 of the CPC. Though what is impugned in this appeal is a judgment and decree of the lower Appellate Court, as it is an order of remand passed under Order 41 Rule 23A, it is not treated as a Regular Second Appeal, but is treated as a Miscellaneous Second Appeal under the High Court Rules. Therefore, the Miscellaneous Second Appeal is maintainable against an order of remand under Order 41 Rule 23A CPC. 7 Point No. (2) A reading of Order 41 Rules 27, 28 and 29 CPC make it clear that, whenever 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 to the Appellate Court. This is the requirement of law as contained in Rule 28. On receipt of such material, after hearing the parties, the Appellate Court shall pronounce the judgment on merits. The scheme of these provisions do not provide for setting aside a well considered judgment and the decree of the trial Court solely on the ground that the application filed for additional evidence is allowed. The Appellate Court should remember that merely because it decides to admit additional evidence under this Rule, it should not set aside the judgment and decree of the trial Court and remand the case to the trial Court, unless it falls within Rule 23. 8. Point No. (3): The question is under what circumstances the Appellate Court can exercise its power of remand. The Code of Civil Procedure contains specific provisions conferring power on the Appellate Court to remand a Page 0728 case under various circumstances. They are contained in Order 41 Rule 23 and Rule 23A which read as under: 23. Remand of case by Appellate Court. Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any)

recorded during the original trial shall, subject all just exceptions, be evidence during the trial after remand. 23A. Remand in other case.-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. 9. Order 41 Rule 23 CPC applies to a case where a suit is disposed of upon a preliminary point and the said decree is reversed in appeal. In other words, when the trial Court has not decided the case on merits or when it has not recorded evidence on all issues and pronounced its judgment on all issues but disposed of the suit upon a preliminary point, then the Appellate Court, even if it wants, is unable to pronounce judgment on merits. Therefore, in such circumstances, if the Appellate Court reverses the finding of the trial Court on preliminary issue, it has no option except to remand the suit to the trial Court for trial and disposal on merits. In other words, it is a case of an open remand. However, similar power is conferred on the Appellate Court under Rule 23A, even if the trial Court has disposed of the suit on merits and the said judgment is reversed in appeal and the Appellate Court feels a re-trial is necessary it has the jurisdiction to order for an open remand. 10. In cases where the trial Court has omitted to frame or try any issue or to determine any question of fact, the Appellate Court if necessary frame issues and refer the same for trial to the Court from whose decree the appeal is preferred and in such case shall direct such Court to take the additional evidence required with a direction to return the evidence to the Appellate Court together with findings thereon and the reasons therefor within a time to be fixed by the Appellate Court. On receipt of such finding the Appellate Court may dispose of the appeal on merits. Here it would be a case of limited remand and not an open remand. In case where the Appellate Court feels issues have to be resettled and that the trial Court has proceeded wholly upon some ground other than that on which the Appellate Court proceeds, still the evidence upon the record is sufficient, the Appellate Court without resorting to an order of remand resettle the issues and pronounce judgment on merits on all issues. Therefore, it is clear the legislature has provided for all contingencies. Page 0729 11. An appeal is a continuation of the original proceedings. In effect the entire proceedings are before the Appellate Court and it has power to re-appreciate the evidence. It has the power to amend the pleadings, frame issues, resettle issues, delete issues, receive evidence by way of additional evidence, record evidence, summon witnesses and documents, order for commission, pass interim orders. It can also take note of subsequent events. In addition to the power of trial Court, it has been vested with the power of remand. Power to set aside, modify, reverse and affirm the judgment of the trial Court. It also has the power to entertain Cross Appeal and power to grant relief to a party to the proceedings who has not preferred appeal and set aside the findings recorded against the respondent in the appellant's appeal. Thus, the power of the first Appellate Court is unlimited. The reason being that it should be able to meet any contingency or situation and pronounce judgment finally in order to do complete justice between the parties. It cannot plead or feel helpless to meet any situation arising in a case to resolve

the dispute between the parties. That is the ambit and scope of the jurisdiction of the first Appellate Court. Therefore, the legislature has entrusted a very important duty to the first Appellate Court, and it is for that Court to decide finally all questions of fact on which the disposal of the suit might depend. To order retrial of a case is a serious matter and may mean considerable waste of public time. An order of remand should not be taken to be a matter of course. The power of remand should be sparingly exercised. The endeavor should be to dispose of the case finally by the first Appellate Court itself. When the trial Court after considering the evidence, has come to a conclusion, the Appellate Court should not ordinarily remand the case. It should see first whether it can dispose of the case itself under Order 41 Rules 24 to 27 CPC. Only if it is not possible to do so and it is necessary in the interests of justice to remit the suit, remand should be resorted to. When additional evidence is tendered in appeal, the Court should act under Rule 28 and not remand the whole case under this rule. Such an order can be passed only in exceptional cases as, for example, where there had been no real trial of the dispute and no complete or effectual adjudication of the proceeding and the party complaining has suffered material prejudice on that account. Remand is not meant to provide fresh opportunity to a party to litigate. An order of remand could be made only if the finding of the lower Court is reversed in appeal. Where there is no reversal of the finding, the Appellate Court cannot proceed under this rule and remand the case for a fresh inquiry on the ground that a finding is necessary on a point not dealt with in the judgment or that the inquiry has been inadequate. A remand for the purpose of adducing fresh evidence to explain the evidence on record, where it was unambiguous or to cover up deficiencies or to fill in gaps is not warranted by this rule. If an issue can be decided by the Appellate Court on admitted facts, the empty formality of remand must be eschewed to advance the cause of justice. 12. Unfortunately, the first Appellate Courts are not appreciating these statutory provisions in proper perspective. Though the first Appellate Courts are vested with this unlimited power, greater the power, greater should be the care and Page 0730 caution which should be exercised by the Appellate Court in exercise of such power. Especially, the power of remand should be exercised sparingly and in rare cases. An unjustified remand is tantamount to abdication of duty by the first Appellate Court to decide the case on merits finally. When the trial Courts are over burdened with the cases, the first Appellate Courts which are better placed and presided over by Judges with greater experience, should take upon themselves the responsibility of recording evidence and decide the case on merits, thus shortening the length of litigation. That is the need of the hour. Today the litigant, the society and the judicial system cannot afford the luxury of the order of remand. Therefore, it is impressed upon the first Appellate Courts, that they would be doing a great service in the course of fight against delay in disposal of cases, by accepting the challenge, exercise their appellate power judiciously, receive and record additional evidence and decide the cases finally. They should avoid this temptation of remand on some pretext or other. They should demonstrate their resolve to shoulder responsibility and commitment in rendering justice to the litigant who is knocking at the door

of temple of justice patiently in anticipation of a just decision. Judges should decide the lis. This would be one of the ways of not only reducing the delay in disposal of cases, but also avoiding docket explosion, within the existing legal frame work. 13. In the instant case the lower Appellate Court on consideration of the material on record and after hearing the arguments framed the following points for consideration: 1. Whether the appellant-plaintiff proves that the impugned judgment passed by the trial Court is illegal, contrary to established principles of law, facts, oral and documentary evidence on record and it requires interference by this Court? 2. Whether the applicant-appellant plaintiff is entitled for the relief of permission to adduce additional evidence in respect of the documents produced along with IA No. II filed u/o 41 Rule 27 r/w Section 151 of CPC? 3. What order? 14. While answering point No. 1 it has set out in detail the evidence of PW1, DW1 and also referred to the documents produced by both the parties. Thereafter, it held that the plaintiff has filed I.A No. II under Order 41 Rule 27 read with Section 151 of CPC producing 28 documents at the appellate stage and sought for permission to adduce further evidence on his behalf. In view of the affidavit filed along with I.A No. II, innumerable documents sought to be produced at this appellate stage with some reasons to condone the delay in production of the documents and it appears that there is some merits in the contention of the appellant. Therefore, it was of the opinion that it is not proper for the Court to go into the merits of the case as the matter is to be remitted back to the trial Court and accordingly it held that the impugned judgment passed by the trial Court declaring the rights of defendant in the final order is not sustainable in law and accordingly it requires interference and, therefore, the point No. 1 was held in the affirmative. Page 0731 15. On point No. 2 it held that, on hearing the arguments and perusing affidavit filed along with I.A.No. 2, objections filed by the respondent-defendant and also 28 documents produced along with I.A. No. II, it goes to show that plaintiff has produced record of rights, index of lands, registered sale deeds dated 24.9.32, 28.1,1908, copies of legal notices, RTC extracts for the year 1986-87, sketch, ADLR's report. It appears that they are material documents supporting the case of the plaintiff. In view of the fact that the plaintiff is an aged retired person and it appears documents filed along with I.A.No. II are material documents of title, it was of the considered opinion that if one more chance is given to the plaintiff to adduce further evidence and for marking the said documents it meets the ends of justice and hence point No. 2 was held in the affirmative. Consequently, the judgment and decree of the trial Court was set aside and the matter was remitted back for re-trial. 16. Therefore, it is clear that the lower Appellate Court did not decide the appeal on merits and after such decision did not come to the conclusion that the finding of the trial Court requires to be reversed. Therefore, the lower Appellate Court was not justified in remanding the case for fresh enquiry. When additional evidence is tendered in appeal, the lower Appellate Court should have acted under Order 41 Rules 27 to 29 CPC and not remand the whole case under Order 41 Rule 23A. In the light of the aforesaid settled legal position, the impugned judgment and decree of the lower Appellate Court is wholly erroneous and requires to be set aside.

Hence, I pass the following order: (i) Appeal is allowed. (ii) The judgment and decree of the first Appellate Court passed in R.A.No. 16/2004 dated 22.6.2006 is hereby set aside. (iii) The Appellate Court is directed to hear the appeal on merits first and then take up the application filed for production of additional evidence for consideration. If it is of the view that it is unable to pronounce the judgment on merits and cannot do complete justice between the parties, without these documents being taken on record, it has the discretion to allow the said application. However, after allowing such applications if the parties request that they may be permitted to adduce oral evidence, then the first Appellate Court itself shall record the oral evidence and in the light of such oral evidence and the oral evidence already on record and documentary evidence, dispose of the appeal on merits in accordance with law without resorting to any remand. (iv) The entire exercise shall be done within three months from the date of receipt of this order. (v) Both the parties shall cooperate with the Court in disposing of the appeal within the period stipulated. (vi) Parties to bear their own costs. High Court registry is directed to send a copy of this judgment to all the Appellate Courts, in Karnataka, for guidance.