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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 235 OF 2015
WITH
CIVIL APPLICATION NO. 499 OF 2015

Mr.Jitendra H.Pathak .. Appellant

Vs.

Mr.Dhanchandra R.Marathe .. Respondent

Mr.S.M.Oak i/b Mr.Sagar Joshi, Advocate for the Appellant.

CORAM : R. G. KETKAR, J.
DATE : 06th MAY, 2015

P.C. :

Not on board. At the request of Mr.S.M.Oak, taken up in the Production Board.

2. Heard Mr.S.M.Oak, learned Counsel for the appellant at length.

3. By this appeal under section 100 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') the appellant has challenged the judgment and order dated 07/11/2014 passed by the learned District Judge-07, Thane in Civil Appeal No. 122 of 2012. By that order, the learned District Judge quashed and set aside the judgment and decree dated 11/09/2003 passed by the learned Civil Judge, Senior Division, Thane in Summary Suit No. 12 of 2002 and remitted the matter for fresh trial to the trial Court. The learned trial Judge is

directed to re-register the suit as a Regular Civil Suit and decide the same by giving opportunity to the defendant to file his written statement. The parties were given liberty to lead their evidence.

4. Mr.Oak submitted that Second Appeal is perfectly maintainable as the learned District Judge has finally and conclusively determined the rights of the parties. He relied upon clause 4 of the operative part of the order in support of his submission. He submitted that clause 4 of the operative part is not referable to either Rule 23 or Rule 23A of Order 41 of C.P.C. and therefore, Appeal From Order under Order 43 Rule 1(u) is not maintainable. The learned District Judge has passed a decree and therefore, substantive Second Appeal under section 100 of C.P.C. is maintainable against the decree passed by the learned District Judge.

5. Mr.Oak submitted that the learned District Judge has conclusively determined the rights of the parties by directing the trial Court to convert the Summary Suit into Regular Civil Suit and decide the same. In other words, the suit instituted by the plaintiff as Summary Suit under Order 37 of C.P.C. will have to be tried as a Regular Civil Suit.

6. It is not possible to accept the submission. Operative part of the order reads as under :

- “1. The appeal is disposed of in the following manner.
2. The judgment and decree passed in Summary Suit No.12/2002 dated 11/09/2003 is hereby set aside.
3. Summary Suit No.12/2002 is hereby remanded for fresh trial to the Trial Court.
4. The learned Trial Judge is hereby directed to re-register this suit as a regular civil suit and decide it by giving opportunities to Defendant to file his written statement and parties to lead their evidence and record judgment and decree afresh in accordance with the law.”

7. Section 2(2) of C.P.C. defines the expression “decree” and the relevant portion thereof reads as under :

"decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include-

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default.

8. Section 2 (14) of C.P.C. defines the expression “order” which reads under:

“order means the formal expression of any decision of a Civil Court which is not a decree.”

9. Perusal of clause 4 of the operative part of the impugned order extracted hereinabove shows that the learned District Judge has converted the Summary Suit into Regular Civil suit and question is whether by converting Summary Suit into Regular Civil Suit, rights of the parties are conclusively determined. In my opinion, answer to this question is emphatically in the negative. The learned District Judge has not conclusively determined the rights between the parties

and merely converted the Summary Suit into the Regular Civil Suit. The question whether the learned District Judge was justified in passing that order can be agitated in appropriate proceedings including Appeal From Order. Mr.Oak submitted that clause 4 of the operative part of the impugned order is not referable to either Rules 23 or 23A of Order 41 of C.P.C.

10. In my opinion, in terms of clause 3 of the operative part of the order extracted hereinabove, the learned District Judge has remitted the matter to the trial Court. The impugned order passed by the learned District Judge is referable to Order 43 Rule 23-A of C.P.C. and hence, Appeal From Order under Order 43 Rule 1(u) of C.P.C. is maintainable.

11. In view thereof, Second Appeal is dismissed as not maintainable with liberty to file Appeal From Order. It is expressly made clear that I have not expressed any opinion on merits of the case. All the contentions of the parties are expressly kept open.

12. In view of the dismissal of the Second Appeal, Civil Application No. 499 of 2015 does not survive and the same is disposed of accordingly.

(R. G. KETKAR, J.)