

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11169 OF 2014

Smt. Tahira Ibrahim .. Petitioner
vs.
Shri. Gopalkrishna G. Chandrashekaran .. Respondent

Mr. Madhuranjan Shetty for the Petitioner.
Mr. Sachin Shetye for the Respondent.

CORAM : M. S. SONAK, J.
DATE : 25 AUGUST 2015.

P.C. :-

1] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

2] The Appeal Court, in its judgment and decree dated 30 October 2014, at para '11' has observed thus:

'11. The learned counsel for the appellant has strongly opposed the counter foils of the rent receipts filed at Exh.43 & 44. So also he has taken strong objection at the stage when the trial Court has allowed this evidence. Since the trial Court has by its reasoned order allowed the additional evidence to be produced and opportunity was given to the appellant for cross-examining the witness, we are not suppose to comment about the stage at which those documents were admitted in evidence. The order of allowing the admission was not challenged by the appellant. However, the learned counsel for the appellant has objected the documents on the ground that they are fabricated one. We do not found much force in this submission for the reason that apart from the bare suggestion of forged document in respect of these documents there is nothing positive brought on record, so as to infer that these documents are fabricated. Needless to mention that any party which has takes up a plea of a forged document, heavy

burden lies upon the it to prove that plea with cogent evidence which is not discharged by the defendant before the trial Court.”

3] The aforesaid observations were in the context of the specific grounds raised by the petitioner-appellant in Clauses m, n and 2n of the memo of appeal in order to challenge the order made by the Trial Court admitting the counter foils of rent receipt in evidence. From the aforesaid observations in para '11' of the impugned judgment and decree, it does appear that the Appeal Court was under the impression that the interlocutory order, permitting the documents to be adduced on record, having not been challenged, any challenge to the same cannot be entertained in the substantive appeal to question the judgment and decree made by the Trial Court. This impression, is obviously not correct, if, the reference is made to the provisions of Section 105 of the Code of Civil Procedure, 1908 (CPC).

4] Section 105 of the CPC reads thus:

“105. Other orders.- (1) *Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the*

decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.”

5] The provisions contained in Section 105 of the CPC are quite clear in a case where decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, can always be set forth as a ground of objection in the memorandum of appeal. If it is so set forth, then the Appeal Court is obliged to consider such challenge. In the present case, the Appeal Court, despite specific grounds raised by the petitioner in the memo of appeal, has virtually declined to consider the challenge to the order by which additional evidence was permitted to be produced. This is, therefore, a case of failure to exercise jurisdiction which was indeed vested in the Appeal Court. On this short ground, it is necessary to set aside the impugned order and remand the matter to the Appeal Court for fresh decision in Appeal No. 457 of 2009.

6] The Apex Court, in case of *Achal Misra vs. Rama Shanker Singh & ors.*¹, has referred to decision of the Privy Council in case of

¹ (2005)5 SCC 531

Sheonath Vs. Ramnath², in which it was reiterated that a party is not bound to appeal from every interlocutory order which is a step that leads to final decree. It is open on appeal from such final decree to question an interlocutory order. After reference to the provisions contained in Section 105 of the CPC and Order 43 Rule 1-A of the CPC , the Apex Court at paragraph '13' has observed thus:

13. *This principle is recognized by Section 105(1) of the Code of Civil Procedure and reaffirmed by Order 43 Rule 1-A of the Code. The two exceptions to this rule are found in Section 97 of the Code of Civil Procedure, 1908, which provides that a preliminary decree passed in a suit could not be challenged in an appeal against the final decree based on that preliminary decree and Section 105(2) of the Code of Civil Procedure, 1908 which precludes a challenge to an order of remand at a subsequent stage while filing an appeal against the decree passed subsequent to the order of remand. All these aspects came to be considered by this Court in [Satyadhan Ghosal v. Deorajin Debi](#), (1960) 3 SCR 590 wherein, after referring to the decisions of the Privy Council, it was held that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay, an appeal was not taken, can be challenged in an appeal from a final decree or order. It was further held that a special provision was made in Section 105(2) of the Code of Civil Procedure as regards orders of remand where the order of remand itself was made appealable. Since [Section 105](#) (2) did not apply to the Privy Council and can have no application to appeals to the Supreme Court, the Privy Council and the Supreme Court could examine even the correctness of an original order of remand while considering the correctness of the decree passed subsequent to the order of remand. The same principle was reiterated in [Amar Chand Butail v. Union of India](#), AIR 1964 SC 1658 and in other subsequent decisions.*

2 (1865) 10 MIA 413

7] In view of the aforesaid, without expressing any opinion on the merits of rival controversies, the impugned judgment and decree dated 30 October 2014 is set aside. The matter is remanded to the Appeal Court which shall decide Appeal No. 457 of 2009 in accordance with law and on its own merits, as expeditiously as possible and in any case within a period of six months from the date of production of authenticated copy of this order.

8] Parties to appear before the Appeal Court on 7 September 2015 at 11.00 a.m. and produce authenticated copy of this order.

9] The petitioner is directed to deposit the reasonable compensation which had already been determined by the Appeal Court before the Appeal Court itself. The arrears to be deposited within a period of four weeks from today.

10] In view of above, writ petition is disposed of.

11] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)