

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

WEDNESDAY, THE 18TH DAY OF NOVEMBER 2015/27TH KARTHIKA, 1937

RSA.No. 726 of 2014 (C)

**AS 11/2010 OF SUB COURT, PALA DATED 16-03-2012
OS 162/2008 OF MUNSIF COURT, KANJIRAPPALLY DATED 26-11-2009**

APPELLANT(S)/2ND RESPONDENT IN A.S./5TH DEFENDANT IN OS:

**THOMAS GEORGE, AGED 57 YEARS,
PARAYIL, KOLLAKKADAVU, CHENGANNOOR,
ALAPPUZHA DISTRICT - 688 001.**

**BY ADVS.SRI.S.V.BALAKRISHNA IYER (SR.)
SRI.SREEVALSAN.V
SMT.M.K.SHIMI
SRI.D.SREENATH
SRI.BIMAL K.NATH**

RESPONDENT(S)/1ST RESPONDENT/PLAINTIFF, APPELLANTS/DEFENDANTS NO.1-4:

- 1. A.T.JOSEPH, AGED 59 YEARS,
S/O. LATE A.T. THOMAS, ATHYALIL,
PONKUNNAM P.O - 686 506, CHIRAKKADAVU VILLAGE,
VADAKKUMBHAGOM KARA, NOW WORKING AS GENERAL MANAGER,
AZZAD TRADING GROUP, KUWAIT.**
- 2. MANGALAM PUBLICATIONS (INDIA) PRIVATE LIMITED,
A COMPANY INCORPORATED UNDER THE INDIAN COMPANIES ACT
WITH REGISTERED OFFICE AT S.H. MOUNT,
KOTTAYAM, REPRESENTED BY ITS MANAGING DIRECTOR.**
- 3. SABU VARGHESE, CHIEF EDITOR, AGED 50 YEARS,
MANGALAM DAILY, S.H. MOUNT, KOTTAYAM - 686 001.**
- 4. SAJAN VARGHESE, AGED 53 YEARS,
PRINTER AND PUBLISHER, MANGALAM DAILY, S.H. MOUNT,
KOTTAYAM - 686 001.**
- 5. SAJITH PARAMESWARAN, AGED 45 YEARS,
REPORTER, MANGALAM DAILY, PATHANAMTHITTA - 689 645.**

**R1 BY ADV. SRI.LIJI.J.VADAKEDOM
R2-R4 BY ADV. SRI.GEORGEKUTTY MATHEW
ADV.SRI.M.GOPIKRISHNAN NAMBIAR (AMICUS CURIAE)**

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 21/10/2015 THE COURT ON 18-11-2015, DELIVERED THE FOLLOWING:**

C.R.

P.B.SURESH KUMAR, J.

R.S.A.No.726 of 2014

Dated 18th November, 2015.

J U D G M E N T

The fifth defendant in a suit for damages is the appellant in this second appeal.

2. The first defendant is a company publishing a newspaper and defendants 2 to 4 are the chief editor, printer and reporter respectively of the newspaper published by the first defendant. The case of the plaintiff is that at the instance of the fifth defendant, defendants 1 to 4 published a defamatory news item in their newspaper on 22.11.2007 concerning the plaintiff and the same affected the reputation of the plaintiff. The fifth defendant remained ex-parte. Defendants 1 to 4 contested the suit. The contention raised by the defendants 1 to 4 was that what is reported by them in the news item is true and therefore, the plaintiff has no cause of

action against them. The trial court accepted the case of the plaintiff and passed a decree permitting him to recover a sum of Rs.1,00,000/- with interest from defendants 1 to 5. The fifth defendant did not challenge the decision of the trial court in appeal. Defendants 1 to 4 though challenged the decision of the trial court in appeal, the appellate court did not interfere with the decision of the trial court. Defendants 1 to 4 did not challenge the decision of the appellate court. However, the fifth defendant, who was the second respondent in the appeal preferred by defendants 1 to 4, has preferred this second appeal challenging the decision of the trial court as confirmed in appeal.

3. When the second appeal came up for admission, this Court entertained a doubt as to the maintainability of the second appeal challenging the decision of the trial court as confirmed in appeal by the fifth defendant who did not challenge the decision of the trial court in appeal. Consequently, the learned counsel on either side were directed to address on the question of maintainability of the second

appeal. Adv.M.Gopikrishnan Nambiar was also appointed as amicus curiae in the matter.

4. Heard the learned Senior counsel for the appellant, the learned counsel for the first respondent as also the learned amicus curiae.

5. As noticed above, the short question falls consideration is whether a second appeal challenging the decision of the trial court as confirmed in appeal is maintainable at the instance of a defendant who did not challenge the decision of the trial court in appeal. It is now settled by a long catena of decisions that only a person who is aggrieved by the appellate decree is entitled to file a second appeal (See **Banarsi v. Ram Phal** [(2003) 9 SCC 606]). As such, I must first consider the question as to whether the fifth defendant can be regarded as a person aggrieved by the decision of the appellate court. As noticed above, the decision impugned in this second appeal is a decision by which the appellate court dismissed the appeal preferred by defendants 1 to 4 challenging the decree passed against them by the trial court.

The fifth defendant has not challenged the decree passed against him by the trial court in appeal and consequently the said decision has become final as against him. As such, it cannot be said that the sustainability or otherwise of the decree passed by the trial court against fifth defendant was the subject matter of the appeal. True, Rules 4 and 33 of Order 41 of the Code of Civil Procedure ('the Code' for short) confers power on the appellate court to reverse or vary the decision of the trial court in favour of a non appealing party. Rules 4 and 33 of Order 41 of the Code read thus:

"4. One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all.--Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be."

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x x x x x

"33. Power of Court of Appeal -- The Appellate Court shall have power to pass any decree and make any order which

ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees.

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

Rule 4 of Order 41 of the Code confers power on the appellate court to reverse or vary the decision appealed against in favour of a non-appealing party, if the appeal proceeds on a ground common to all. The policy of this rule is to avoid contradictory decisions on same questions. Rule 33 of Order 41 of the Code confers power on the appellate court to pass any decree and make any order which ought to have been passed or made or make such further or other decree or order as the case may require, notwithstanding that the appeal is as to part only of the

decree, in favour of all or any of the parties, although such parties may not have filed any appeal or cross objection. The policy of this rule is to enable the appellate court to do complete justice to the parties. The power of the court under the aforesaid rules can be exercised by the court only as a necessary consequence of the reliefs to be granted to the appellant when the court finds that the appeal must succeed on its merits and not independent of it. As such, merely for the reason that the appellate court has power to interfere with the decree passed by the trial court against a non-appealing party, it cannot be said that the decree against the non-appealing party is also the subject matter of the appeal. If the correctness of the decree passed by the trial court against the fifth defendant was not the subject matter of the appeal, it cannot be said that there is any reason for the fifth defendant to feel aggrieved by the decision of the appellate court. If the fifth defendant cannot be treated as a person aggrieved by the decision of the appellate court, it cannot be said that he is entitled to challenge the decision of the appellate court in a

second appeal. If it is held that the fifth the defendant is entitled to challenge the decree of the trial court as confirmed by the appellate court in a second appeal, the said decision will have the effect of conferring on the fifth defendant a right to prefer a second appeal directly against the decision of the trial court. A similar view has been taken by the High Court of Madras in **Perumal v. Gurunathan and others** (AIR 1996 Madras 415). The learned Senior Counsel for the appellant, relying on the decision of the Andhra Pradesh High Court in **P.Narasimham v. P.V.Narasimham** (AIR 1973 Andhra Pradesh 162), contended that where a suit was decreed against all the defendants on a common finding and if the common finding is reversed in appeal by one of the defendants, the other defendants can certainly challenge the decision of the appellate court. The said decision cannot have any application to the facts of the present case, for, the same was a case where the appellate court allowed the appeal and varied the decision of the trial court. As far the present case is concerned, the appellate court has only confirmed the decision of the trial

court. For the aforesaid reasons, I hold that this second appeal is not maintainable and the same is, accordingly, dismissed.

Before parting with this judgment, I place on record my deep appreciation and gratitude to Adv.M.Gopikrishnan Nambiar, the learned amicus curiae for the able assistance rendered.

Sd/-

P.B.SURESH KUMAR, JUDGE.

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