

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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C.M.A.No.117 of 2015

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JUDGMENT:

This Civil Miscellaneous Appeal under Order XLIII Rule 1(u) of the Code of Civil Procedure, 1908 ('the Code', for short) is directed against the decree and judgment dated 24.10.2014 of the learned I Additional Chief Judge, City Civil Court at Secunderabad passed in A.S.no.124 of 2011. The learned Additional Chief Judge while allowing the said appeal and setting aside the decree and judgment dated 20.10.2011 of the learned XI Junior Civil Judge, City Civil Court at Secunderabad had remitted the suit to the trial Court with a direction to give fresh opportunity to the both the sides to amend their pleadings and adduce additional evidence, if necessary, and dispose of the suit on merits uninfluenced by the observations made therein.

2. I have heard the submissions of the learned counsel for both the sides. I have perused the material record.

3. The decision in **Jegannathan v. Raju Singamani and another** on a perusal would disclose that the trial Court had disposed of the suit on merits and not on a preliminary issue; however, the appellate Court had directed retrial; the Supreme Court had held that the judgment of the appellate Court directing re-trial is valid in terms of its powers under Order XLI Rule 23-A of the Code. As per the settled law, as laid down in **Jegannathan** (1 supra), an appeal under Order XLIII Rule 1 (u) from an order of remand under Order XLI, Rule 23-A is maintainable. However, the said appeal under Order XLIII Rule 1 (u) can only be heard on grounds a second appeal may be heard under Section 100 of the Code. The position of law as laid down in the decision in **Narayanan v. Kumaran** was echoed in the decision cited supra as

follows: ***“What has been held by this Court in Narayanan (2 supra) is that an appeal under Order 43 Rule 1 (u) should be heard only on the ground enumerated in section 100 of the Code. In other words, the constraints of Section 100 continue to be attached to an appeal under Order 43 Rule 1(u). The appeal under Order 43 Rule 1(u) can only be heard on the grounds a second appeal is heard under Section 100.”***

4. In view of the settled legal position, during the course of hearing, this Court had formulated the following substantial question of law:

Whether the 1st appellate Court was justified in setting aside the decree and judgment of the trial Court and remitting the matter to the trial court with a direction to decide the suit afresh after giving opportunity to both the parties to lead evidence, oral as well as documentary, when there are already pleadings and evidence on record as per the contentions of the plaintiff?

5. To adjudicate the *lis* and answer the substantial question of law, it is necessary to refer to the facts that lead to the filing of this appeal.

6. The cases of the plaintiff and the defendant club, in brief, are as follows:

The plaintiff was a member of the Secunderabad Club (‘the defendant club’, for brevity) for nearly two decades. According to the defendant-club, the plaintiff had not paid the club membership fee for a period exceeding six months; hence, notices/remainders were issued to him to pay the amount due and the said notices were followed by termination of membership for default i.e., non-payment of dues within the time stipulated; and, the said termination of membership of the plaintiff was done in accordance with the rules applicable to the case of the plaintiff; thus, for committing default in payment of dues, the plaintiff’s membership was duly terminated with effect from 08.12.2007 vide the defendant club’s letter dated 08.12.2007. However, according to the plaintiff, the defendant club had terminated his membership in an erroneous manner and without following the procedure applicable to his case and that despite a request made by the plaintiff, the defendant club did not bother to respond and that therefore, the plaintiff is constrained to file the

suit for a declaration that the termination of the plaintiff's membership with the defendant club, vide letter No.ASA/A-175, dated 08.12.2007 as null and void and for costs.

6.1 At trial, the General Power of Attorney Holder of the plaintiff and a supporting witness were examined as PWs 1 and 2 and exhibits A1 to A9 were marked on the side of the plaintiff. And the Secretary of the defendant-club was examined as DW1 and exhibits B1 to B13 were marked on the side of the defendant-club. After full-fledged trial, the trial Court had decreed the suit of the plaintiff. The court below, as already noted, while allowing the appeal had remanded the matter to the trial court for fresh disposal after giving an opportunity to both the sides to amend the pleadings and adduce additional evidence, if necessary.

6.2 Feeling aggrieved of the said judgment of the Court below, the plaintiff had preferred this Civil Miscellaneous Appeal.

6.3 The learned counsel for the plaintiff would contend as follows: "The Court below had grossly erred in allowing the appeal and setting aside the well reasoned judgment of the trial Court and in remanding the matter to the trial Court for fresh disposal on merits after giving an opportunity to both the sides to amend the pleadings and adduce further/additional evidence, if necessary. The approach of the Court below is totally erroneous and not warranted under facts and circumstances of the case. The finding of the court below that PW1 had admitted that the plaintiff had failed in his duty to pay the dues and its further finding that since the plaintiff had failed in his duty to pay the dues, the defendant club has issued exhibits A8 and A9 are erroneous. The further findings that it is in the interests of justice and that it is just and necessary to give an opportunity to the defendant to plead and prove the details as to during which period of six months, the plaintiff did not pay the dues, are totally erroneous. The reasons assigned by the Court below for setting aside the judgment of the trial court are not valid. The plaintiff did not specifically plead about the omission to mention the details in exhibit A9 termination letter and also failed to challenge the alleged dues in a sum of Rs.2,389/- and that the plaintiff's pleadings are lacking in material details and that the plaintiff had admitted the liability and had

paid Rs.3,000/- even without raising any protest and that the same implies that the plaintiff had admitted the dues are all erroneous findings. The court below had erroneously interpreted the rules and had applied the rules, which are inapplicable to the case of the plaintiff. The court below having held that in exhibit A9 termination of membership letter, there is no specific mention of the dues of the club with details of the period of six months ought to have dismissed the appeal instead of remanding the suit to the trial court for fresh disposal. The finding that the lapses were neither pleaded in the plaint nor proved through the evidence of the plaintiff, even though such detailed facts are crucial for determining the real issue involved in the suit, is also an erroneous finding. Without a request from the defendant club to remit the matter and without properly appreciating the evidence of DW1, the Court below had erroneously interfered with the well-considered findings of the trial court. The failure of the defendant club to mention the details in the termination notice cannot be a ground to saddle the plaintiff with the responsibility of pleading certain material facts; and, remanding the case to the trial court on such grounds is unjust and unfair. The judgment of the court below suffers from factual and legal infirmities. Hence, the impugned judgment may be set aside and the court below be directed to decide the appeal on merits.

6.4 On the other hand, the learned counsel for the defendant-club would contend as follows: 'In the plaint, it is averred that the membership of the plaintiff was terminated under letter dated 08.12.2007 and that the plaintiff made arrangements to collect the photostat copies of the notices dated 01.12.2007 and 08.12.2007 and that thereafter, the plaintiff had made arrangements for payment of the due amount vide receipt dated 11.01.2008 and that the plaintiff had accordingly paid an amount of Rs.3,000/- and that the plaintiff had written a letter dated 16.02.2008; but, the defendant club did not bother to respond to the said letter of the plaintiff and that the plaintiff thereafter had entered into correspondence. Having so averred in the plaint, the plaintiff had further averred that the termination notice was issued in an arbitrary manner and that there are no reasons whatsoever for terminating the membership of the plaintiff. The above plaint averments lay bare that the plaintiff did not dispute the dues, which are mentioned in the letters of the club. In the letter dated 01.12.2007 addressed by the defendant club to the plaintiff it was clearly mentioned that the current amount due is Rs.2,389/- plus accrued interest. And, by that letter the Club had demanded the

plaintiff to pay the above amount by 05.12.2007. In the said letter, it was further stated that on failure to do so, the membership will be deemed to cease under club Rule XVI (2) for non payment of Club dues for a period exceeding 6 (six) months. Similarly, in the letter dated 08.12.2007, it was stated that in view of the plaintiff's inability to clear the club dues within the time stipulated, the Managing Committee has decided to invoke the provisions of the Club Rule XVI (2) under which the membership of the plaintiff stood terminated with immediate effect for non-payment of club dues for a period exceeding six months. Thus, in the two letters, sufficient information was provided to the plaintiff. The plaintiff did not dispute in the plaint, the contents of the said letters or the dues, which remained unpaid for a period of six months as mentioned in the said letters. In fact, it is averred in the plaint that the plaintiff had made arrangements to collect copies of those two letters and also made payment of Rs.3,000/- towards the dues by receipt dated 11.01.2008. Thus, the plaintiff did not plead that the details of six months period are not mentioned either in the letter dated 01.12.2008 or the letter dated 08.12.2007. Without any support from the pleadings, the plaintiff had stated for the first time during the course of evidence that the letters do not contain the details of the six months period. PW1, who is the power of attorney holder of the plaintiff, had admitted in his evidence that the plaintiff had failed in his duty to pay the dues and that since the plaintiff had failed in his duty to pay the dues, the defendant club had issued exhibits A8 and A9 notices dated 01.12.2007 and 08.12.2007. When it was argued before the Court below that the details are not mentioned in the said letters of the club, it was brought to the notice of the court below that the club would have produced the bills to establish the amount due and payable in a sum of Rs.2,389/- had there been a denial in the plaint, but, the defendant club did not think it necessary to do so as the plaintiff had not disputed in his pleadings the contents of exhibits A8 and A9 letters and that on the other hand the plaintiff had paid Rs.3,000/- after collecting copies of the said letters. The court below had rightly applied the provision of Rule XVI (2) which according to the club is applicable to the case of the plaintiff. The court below had rightly observed that the plaintiff did not plead the material facts in the plaint and did not dispute the contents of exhibits A8 and A9. The Court below was correct in holding that the correctness of the contents of exhibits A8 and A9 was disputed for the first time before the trial court during the trial without any support from the pleadings and that therefore, an opportunity must be given to both the sides to amend the pleadings and adduce further evidence, if necessary. For the reasons assigned and findings recorded, the

court below is justified in reversing the judgment, which is impugned before it. There is no substance in the substantial question of law raised. There is no merit in the appeal and the appeal is liable to be dismissed.'

7. I have gone through the pleadings and the evidence brought on record. I have noted the submissions.

7.1 The plaintiff was a member of the defendant club for over a long period of two decades, before his membership was terminated. In exhibit A8 letter dated 01.12.2007 addressed by the defendant club to the plaintiff, it was informed to the plaintiff that it is noticed from the club records that the dues to the club from the month of April 2007 have not been paid by the plaintiff and the current amount due is Rs.2,389/- plus accrued interest. Therefore, in this letter, there was a demand in December 2007 pointing out that the bills from April 2007, i.e., for more than six months period have not been paid. It is also stated in this letter that if the amount is not remitted by 05.12.2007, the membership will be deemed to cease under Club Rule XVI (2) for non-payment of club dues for a period exceeding six months. This letter was followed by exhibit A9 letter dated 08.12.2007, wherein it was stated that in view of the plaintiff's inability to clear the club dues within the time stipulated, the Managing Committee has decided to invoke the provisions of the Club Rule XVI (2) under which the membership of the plaintiff stood terminated with immediate effect for non-payment of club dues for a period exceeding six months. When such notices were issued, the plaintiff did not dispute the contents of the said letters in the plaint by alleging that necessary details are lacking in those two letters. But, on the other hand, the plaintiff had simply stated that he had collected Photostat copies of the above said two letters and made payment of Rs.3,000/- under a receipt. However, when DW1 was examined on behalf of the club, several questions were put on the contents of exhibits A8 and A9 letters and the exact period of six months. Further, which rule of the club Rules is applicable to the case of the plaintiff is also an issue raised by the plaintiff/appellant. The trial Court had observed in its judgment that the defendant club did not properly explain as to how the Managing Committee had decided to issue the notice dated 08.12.2007 under the deeming provision without

verifying the due amount and hearing the plaintiff and that only on the content of the letter dated 01.12.2007, the defendant club's Managing Committee had issued notice stating that there is a cessation of membership of the plaintiff. The contention of the learned counsel for the defendant club is that the trial court had erroneously considered the contentions of the plaintiff, which do not find support from the pleadings. He had pointed out that in the plaint, the plaintiff had not challenged the contents of the letters dated 01.12.2007 and 08.12.2007. Nevertheless, in view of the fact that such contentions were sought to be advanced by the plaintiff for the first time during the course of trial and that such contentions were reiterated before the trial court without any foundation in the pleadings, the court below, while deciding the first appeal on merits, had thought it fit to remit the matter to the trial court for a fresh decision after giving an opportunity to both the sides, to amend the pleadings and adduce additional evidence, if necessary. Having noted the submissions and having thus examined the plaint averments in juxtaposition with the oral and documentary evidence, the Court below had passed a reasoned judgment before setting aside the judgment and decree of the trial Court and remitting the matter to the trial Court for a fresh decision on merits as directed in its judgment. This Court, on careful consideration of the pleadings of both the parties and the oral and documentary evidence brought on record, is satisfied that in view of the improvised stand taken by the plaintiff during the course of trial, the Court below was justified in allowing the appeal and setting aside the judgment and decree of the trial Court and remitting the suit with certain directions to the trial Court. As a sequel this Court finds no grounds calling for interference with the well considered judgment of the Court below.

8. Viewed thus, this Court finds that there is no substantial question of law involved in this Civil Miscellaneous Appeal and that the appeal is devoid of merit and is, hence, liable to be dismissed.

9. Accordingly, the Civil Miscellaneous Appeal is dismissed. No costs. It is needless to mention that the trial Court shall dispose of the suit on merits and in accordance with the procedure established by law and as per the directions in the judgment of the court below, however, uninfluenced by the observations, if any, made in this judgment by this Court.

Miscellaneous petitions, if any, pending in this appeal shall stand closed.

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M. SEETHARAMA MURTI, J

28th October 2015

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