

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.195 of 2008Order reserved on: 26-5-2020Order delivered on: 8-6-2020

1. Shriram, S/o Ramdayal, aged about 70 years, Caste Marar;
2. Ashok, S/o Shriram, aged about 28 years, Caste Marar;
3. Yuvraj, S/o Shriram, aged about 25 years, Caste Marar;
4. Kachra Bai, W/o Shriram, aged about 55 years, Caste Marar;

All R/o Village Jhalmala, Tahsil Balod, District Durg (C.G.)
 (Defendants)
 ---- Appellants

Versus

1. Suresh Kumar (Dead) through Legal Representative
 (Plaintiff)

Smt. Amrika Patel, W/o Suresh Kumar Patel, aged about 46 years,
 R/o Aadhari Nawagaon, Dhamtari, District Dhamtari (C.G.)

2. State of Chhattisgarh, through the Collector, Durg (C.G.)
 (Defendant No.5)
 ---- Respondents

 For Appellants / Defendants: -

Ms. Aditi Singhvi, Advocate.

For Respondent No.2 / State: -

Mr. Ravi Kumar Bhagat, Deputy Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. Heard on admission and formulation of substantial question of law for determination in this second appeal preferred by the defendants/ appellants herein.
2. The original plaintiff / respondent No.1 (now represented through his legal representative) filed a suit for declaration of title and possession against the appellants herein / defendants claiming that

he is the son of defendant No.1 from first wife of defendant No.1 namely Sukwaro Bai and the plaintiff has share in the subject suit property as well as the property of defendants No.2 & 3 purchased from the income of Hindu Undivided Family (HUF) property. The trial Court framed as many as twelve issues, out of which eight issues were decided against the plaintiff and eventually, the suit was dismissed by the trial Court. Aggrieved by the judgment & decree of the trial Court, the plaintiff preferred first appeal, whereas the defendants also preferred cross-objection against some of the findings which were recorded in favour of the plaintiff by the trial Court by answering the issues. The first appellate Court partly allowed the appeal filed by the plaintiff, but finally dismissed the suit of the plaintiff on technical ground deciding issue Nos.8 & 11 which relate to non-joinder of necessary party and non-payment of adequate court fees, against the plaintiff. Though the suit has been dismissed finally, but, yet, the defendants have preferred this second appeal stating inter alia that the findings on issues No.3 to 7 are adverse to them and if allowed to stand, it will operate as res judicata in subsequent proceeding (if any) against them and therefore second appeal would be maintainable under Section 100 of the CPC.

3. Ms. Aditi Singhvi, learned counsel appearing for the appellants herein / defendants No.1 to 4, would submit that findings on issue Nos.3 to 7 were recorded against the defendants by the first appellate Court though the plaintiff's suit as well as appeal has finally been dismissed by the first appellate Court, yet, appeal would be maintainable as, if the findings are allowed to stand qua issue Nos.3 to 7, that would operate as res judicata against them in the further / future proceeding, if any, initiated at the instance of the

plaintiff, therefore, second appeal would be maintainable against the finding, though there is no effective decree against them (defendants). She would rely upon the judgment of the Andhra Pradesh High Court in the matter of **Konda Lakshman Babu Ji and others v. The State of A.P. and others**¹ to buttress her submission. She would further submit that the first appellate Court has answered issue Nos.3 to 7 against the defendants by recording a finding which is perverse to the record, that gives rise to substantial question of law for determination and therefore appeal be admitted for hearing

4. I have considered the submissions made on behalf of the appellants herein / defendants No.1 to 4 on maintainability of appeal as well as on admission of appeal and went through the record with utmost circumspection.
5. Section 100 of the CPC provides for appeal against the decree and states as under: -

“100. Second appeal.—(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed *ex parte*.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of

1 AIR 1977 AP 427

the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

6. A careful perusal of the aforesaid provision would show that an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law. Therefore, an effective decree is *sine qua non* for maintaining an appeal under Section 100 of the CPC. Section 2(2) of the CPC defines "decree" as under: -

(2) "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.

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"

7. Decree as defined in Section 2(2) of the CPC 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. (See **Chandi Prasad and others v.**

Jagdish Prasad and others².)

8. The right to appeal is a creature of statute and an appeal can be presented, only: (i) by a party in the suit if he is aggrieved by the judgment; or (ii) by a person who is not a party but who is aggrieved by the judgment if he seeks and gets leave of the court to prefer an appeal against the judgment. Unless a right of appeal is clearly and expressly given by statute, it does not exist, whereas a litigant has independently of any statute a right to institute any suit of a civil nature in some court or another. No right of appeal can be given except by express words. In other words, a right of appeal inferences in no one and therefore an appeal for its maintainability must have the clear authority of law. The right of appeal, which is a statutory right, can be conditional or qualified. If the statute does not create any right of appeal, no appeal can be filed.
9. As noticed herein-above, it is also well settled law that right of appeal is a creature of statute. It cannot be conferred or inferred by the courts. The Constitution Bench of the Supreme Court in the matter of **U.P. Awas Evam Vikas Parishad v. Gyan Devi (Dead) by LRs. and others³** has held that right to appeal is statutory right and the courts cannot confer or infer it. It has further been held that what is legislatively not permitted cannot be read by implication, not in respect of right of appeal, as it "is a creature of statute". Relying upon the matter of **Shankar Kerba Jadhav v. State of Maharashtra⁴**, it was held as under: -

"A right of appeal is conferred by statute or equivalent legislative authority; it is not a mere matter of practice or procedure, and neither the superior nor the inferior court or Tribunal nor both combined can create or take away

² (2004) 8 SCC 724

³ (1995) 2 SCC 326

⁴ (1969) 2 SCC 793

such a right."⁵

10. Similarly, the Supreme Court in the matter of **Kamla Devi v. Kushal Kanwar and another**⁶ held as under: -

"11. A right of appeal under the Code is statutory. Such right of appeal is also conferred under the letters patent of the High Court or the statutes creating the High Court.

12. An appeal, as is well known, is the right of entering a superior court invoking its aid and interposition to redress an error of the court below. The central idea behind filing of an appeal revolves round the right as contradistinguished from the procedure laid down therefor."

11. It is equally well settled that power to create or enlarge jurisdiction of the court is legislative function. A Constitution Bench (seven Judges) of the Supreme Court in the matter of **A.R. Antulay v. R.S. Nayak and another**⁷ has held that the power to create or enlarge jurisdiction is legislative in character, so also the power to confer a right of appeal or to take away a right of appeal. Parliament alone can do it by law and no court, whether superior or inferior or both combined, can enlarge the jurisdiction of a court or divest a person of his rights of revision and appeal.

12. The Supreme Court in the matter of **Smt. Ganga Bai v. Vijay Kumar and others**⁸ demarcated the distinction between the right of suit and right of appeal by holding that a suit for its maintainability requires no authority of law, whereas for an appeal, its maintainability must have the clear authority of law. It has been observed as under: -

"15. ... There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of a civil nature and unless

5 Halsbury's Laws of England, Vol. 37, para 677

6 (2006) 13 SCC 295

7 (1988) 2 SCC 602

8 (1974) 2 SCC 393

the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous to claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute."

Their Lordships further held that under the Code of Civil Procedure, an appeal lies only as against a decree or as against an order passed under rules from which an appeal is expressly allowed by Order 43, Rule 1. No appeal can lie against a mere finding for the simple reason that the Code does not provide for any such appeal.

13. The principle of law laid down in **Smt. Ganga Bai** (supra) was followed with approval in the matter of **Deva Ram and another v. Ishwar Chand and another**⁹ and it was held that an appeal does not lie against mere 'findings' recorded by a court unless the findings amount to a 'decree' or 'order'. It was observed in paragraphs 25, 26 and 27 of the report as under: -

"25. Let us now consider the plea regarding the effect of an adverse finding recorded by the court against a party in whose favour the suit or the appeal is ultimately decided.

26. It is provided in Section 96 of the CPC that an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorised to hear appeal from the decision of such court. So also, Section 100 provides that an appeal shall lie to the High Court from every decree passed in appeal. Thus sine qua non in both the provisions is the 'decree' and unless the decree is passed, an appeal would not lie under Section 96 nor would it lie under Section 100 of the Civil Procedure Code. Similarly, an appeal lies against an 'order' under Section 104 read with Order 43 Rule 1 of the Civil Procedure Code where the 'orders' against which appeal would lie have been enumerated. Unless

there is an 'order' as defined in Section 2(14) and unless that 'order' falls within the list of 'orders' indicated in Order 43, an appeal would not lie.

27. Thus, an appeal does not lie against mere 'findings' recorded by a court unless the findings amount to a 'decree' or 'order'. Where a suit is dismissed, the defendant against whom an adverse finding might have come to be recorded on some issue has no right of appeal and he cannot question those findings before the appellate court. (See *Ganga Bai v. Vijay Kumar*, (1974) 2 SCC 393)."

As such, their Lordships have clearly held that appeal does not lie against mere finding unless the finding amounts to decree or order and further held that where suit is dismissed, the defendant against whom an adverse finding might have come to be recorded on some issue, has no right of appeal and he cannot question those findings before the appellate Court.

14. Furthermore, in the matter of **Banarsi and others v. Ram Phal**¹⁰ their Lordships of the Supreme Court have clearly held that no appeal lies against a mere finding. It was observed as under: -

"8. Sections 96 and 100 CPC make provision for an appeal being preferred from every original decree or from every decree passed in appeal respectively; none of the provisions enumerates the *person who can file an appeal*. However, it is settled by a long catena of decisions that to be entitled to file an appeal the person must be one aggrieved by the decree. Unless a person is prejudicially or adversely affected by the decree he is not entitled to file an appeal. (See *Phoolchand v. Gopal Lal*¹¹, *Jatan Kumar Golcha v. Golcha Properties (P) Ltd.*¹² and *Ganga Bai v. Vijay Kumar*, (1974) 2 SCC 393.) No appeal lies against a mere finding. It is significant to note that both Sections 96 and 100 CPC provide for an appeal against *decree* and not against *judgment*.

9. Any respondent though he may not have filed an appeal from any part of the decree may still *support the decree* to the extent to which it is already in his favour by

10 (2003) 9 SCC 606

11 AIR 1967 SC 1470

12 (1970) 3 SCC 573

laying challenge to a *finding* recorded in the impugned judgment against him. Where a plaintiff seeks a decree against the defendant on grounds (A) and (B), any one of the two grounds being enough to entitle the plaintiff to a decree and the court has passed a decree on ground (A) deciding it for the plaintiff while ground (B) has been decided against the plaintiff, in an appeal preferred by the defendant, in spite of the finding on ground (A) being reversed the plaintiff as a respondent can still seek to support the decree by challenging finding on ground (B) and persuade the appellate court to form an opinion that in spite of the finding on ground (A) being reversed to the benefit of defendant-appellant the decree could still be sustained by reversing the finding on ground (B) though the plaintiff-respondent has neither preferred an appeal of his own nor taken any cross objection. A right to file cross-objection is the exercise of right to appeal though in a different form. It was observed in *Sahadu Gangaram Bhagade v. Special Dy. Collector, Ahmednagar*¹³ that the right given to a respondent in an appeal to file cross-objection is a right given to the same extent as is a right of appeal to lay challenge to the impugned decree if he can be said to be aggrieved thereby. Taking any cross-objection is the exercise of right of appeal and takes the place of cross-appeal though the form differs. Thus it is clear that just as an appeal is preferred by a person aggrieved by the decree so also a cross-objection is preferred by one who can be said to be aggrieved by the decree. A party who has fully succeeded in the suit can and needs to neither prefer an appeal nor take any cross-objection though certain finding may be against him. Appeal and cross-objection – both are filed against *decree* and not against *judgment* and certainly not against any finding recorded in a judgment. This was the well-settled position of law under the unamended CPC.”

15. In the matter of **Hardevinder Singh v. Paramjit Singh and others**¹⁴ their Lordships of the Supreme Court while dealing with maintainability of appeal under Sections 100 & 96 of the CPC and locus standi/right to file appeal against a decree, observed as under: -

“19. In *Baldev Singh v. Surinder Mohan Sharma*¹⁵ a

13 (1970) 1 SCC 685

14 (2013) 9 SCC 261

15 (2003) 1 SCC 34

three-Judge Bench opined that an appeal under Section 96 of the Code would be maintainable only at the instance of a person aggrieved by and dissatisfied with the judgment and decree. In the said case, while dealing with the concept of “person aggrieved”, the Bench observed thus: (SCC pp. 39-40, para 15)

“15. ... A person aggrieved to file an appeal must be one whose right is affected by reason of the judgment and decree sought to be impugned. It is not the contention of Respondent 1 that in the event the said judgment and decree is allowed to stand, the same will cause any personal injury to him or shall affect his interest otherwise.”

Be it noted, in the said case, the challenge in appeal was to the dissolution of marriage of the appellant therein and his first wife which, this Court held, would have no repercussion on the property in the suit and, therefore, the High Court was not justified in disposing of the civil revision with the observation that the revisionist could prefer an appeal.

20. In *Sahadu Gangaram Bhagade v. Collector*, (1970) 1 SCC 685, it was observed that: (SCC p. 689, para 8)

“8. ... the right given to a respondent in an appeal is to challenge the order under appeal to the extent he is aggrieved by that order. The memorandum of cross-objection is but one form of appeal. It takes the place of a cross-appeal.”

In the said decision, emphasis was laid on the term “decree”.

16. Very recently, in the matter of **State of Andhra Pradesh and others v. B. Ranga Reddy (D) by LRs and others**¹⁶ it was held by their Lordships of the Supreme Court that appeal will not lie against the finding unless it amounts to decree within the meaning of Section 2(2) of the CPC. It was observed in paragraphs 36 & 37 of the report as under: -

“36. We find that the High Court has failed to draw the distinction between the decree and a finding on an issue. It is the decree against which an appeal lies in terms of Section 96 of the Code. Decree in terms of Section 2(2)

of the Code means formal expression of an adjudication conclusively determining the rights of the parties. The defendants-State could not file an appeal against a decree which was of a dismissal of a suit simpliciter. The findings on Issue No. 1 against the State could be challenged by way of cross-objections in terms of amended provisions of Order XLI Rule 22 of the Code but such filing of cross-objections is not necessary to dispute the findings recorded on Issue No. 1 as the defendants have a right to support the ultimate decree passed by the trial court of dismissal of suit on grounds other than which weighed with the learned trial court. Even in terms of Order XLI Rule 33 of the Code, the Appellate Court has the jurisdiction to pass any order which ought to have been passed or made in proceedings before it.

37. As per facts on record, Original Suit Nos. 274 of 1983 and 276 of 1983 have been dismissed. The plaintiffs are in appeal in both the suits before the First Appellate Court. Therefore, such decree including the finding on Issue No. 1 has not attained finality as the Appellate Court is ceased of the entire controversy including the findings of fact on Issue No. 1. The defendants have a right to dispute such findings by filing cross-objections under Order XLI Rule 22 of the Code as amended in the year 1976 or even in the exercise of the powers conferred on the Appellate Court under Order XLI Rule 33 of the Code.”

17. As such, it is quite vivid that an appeal against a mere finding is not maintainable unless it amounts to decree within the meaning of Section 2(2) of the CPC. The submission of learned counsel for the appellants herein / defendants that the finding on issue Nos.3 to 7 would operate as res judicata against them in further proceeding, therefore, appeal would be maintainable in light of the decision of the Andhra Pradesh High Court in **Konda Lakshman Babu Ji** (supra) also deserves to be noted for rejection.

18. The Supreme Court in the matter of **Ramesh Chandra v. Shiv Charan Dass and others**¹⁷ laid down the tests to ascertain if a finding operates as res judicata and one of such tests is as under: -

¹⁷ 1990 (Supp) SCC 633

“4. ... One of the tests to ascertain if a finding operates as res judicata is if the party aggrieved could challenge it. Since the dismissal of appeal or the appellate decree was not against defendants 2 and 3 they could not challenge it by way of appeal. Even assuming that defendant 1 could challenge the finding that liability of rent was of defendants 2 and 3 as they were in possession he did not file any written statement in the trial court raising any dispute between himself and defendants 2 and 3. There was thus no occasion for the appellate court to make the observation when there was neither pleading nor evidence. Therefore, from either point of view the finding could not operate against defendants 2 and 3 as res judicata. ...”

19. In the matter of **Asa Bai v. Prabhulal**¹⁸, it has been held by a Division Bench of the Rajasthan High Court while considering the scope of Section 11 of the CPC, that a finding wherein the plaintiff's suit was dismissed could not operate as res judicata against the defendant because he would have no right of appeal from that and because the ultimate judgment being in his favour.

20. Similarly, in the matter of **Ali Ahmad v. Amarnath**¹⁹, the Punjab High Court held as under: -

“Where a decree is ‘absolutely in favour’ of a party but some issues are found against him, he has no right of appeal against the findings because he is, ‘firstly’ not adversely affected thereby, and secondly because such findings are not embodied in and do not form part of the decree. Hence where the plaintiff's suit for injunction is dismissed by the two lower Courts, the defendant would have no right of appeal against the decree passed in his favour merely because he is dissatisfied with a finding in the judgment. Such a finding cannot be said to adversely affect the defendant inasmuch as it would not operate as res-judicata against the defendant in a subsequent suit because the finding must be taken to have been superseded by the decree and thus not having been heard and finally decided.”

21. The aforesaid two decisions have been followed further by the Rajasthan High Court in the matter of **Tara Singh v. Shakuntla**²⁰.

18 AIR 1960 Raj. 304

19 AIR 1951 Punjab 444

20 1973 RLW 732

22. Thus, from the aforesaid analysis, it is quite axiomatic that right of appeal is a creature of statute and party to lis is free to demonstrate that he has right of appeal against any particular decree, then it has to further demonstrate that decree has adversely affected the party.

23. Thus, considering the submission from any of the angles, it is clear that against adverse finding, if any, has been recorded against the appellants herein / defendants No.1 to 4, no appeal lies under Section 100 of the CPC against the said finding at the instance of the defendants as the suit has been dismissed finally by the first appellate Court, as appeal would lie against a decree passed in appeal by the Court subordinate to this Court, and decree means adjudication of lis between the parties. Since the suit has ultimately been dismissed and in respect of dismissal of suit filed by the plaintiff, the plaintiff can only be the aggrieved person, the defendant cannot challenge any finding so recorded. As such, the appeal as framed and filed by the defendants would not be maintainable against the mere finding and it is accordingly dismissed, *in limine*, leaving the appellants to bear their own cost.

Sd/-
(Sanjay K. Agrawal)
Judge