

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.02.2020
PRONOUNCED ON : 06.03.2020

THE HONOURABLE MR.JUSTICE V.PARTHIBAN

S.A. No.849 of 2012 &
M.P.No.1 of 2012

V.Gopalakrishnan .. Appellant /1st Respondent/Plaintiff

Vs.

1.V.Krishnaraj

2.V.Manivannan

... Respondents 1 & 2/Appellants/
Defendants 2 & 3

3.V.Ravichandran

..3rd Respondent/2nd Respondent/
4th Plaintiff

Second Appeal filed under Section 100 of the Code of Civil Procedure as against the judgment and decree dated 10.12.2011 made in A.S.No.7 of 2010 on the file of the District Court No.2, Kancheepuram, reversing the judgment and decree made in O.S.No.7 of 2004, dated 10.07.2008 on the file of Subordinate Court at Kancheepuram by allowing this second appeal.

For Appellant : Mr.R.Singgaravelan
For R2 : Mr.S.Veeraraghavan
For R3 : No Appearance

JUDGMENT

This Second Appeal has been directed against the judgment and decree dated 10.12.2011 made in A.S.No.7 of 2010 on the file of the District Court No.2, Kancheepuram, reversing the judgment and decree made in O.S.No.7 of 2004, dated 10.07.2008 on the file of Subordinate Court at Kancheepuram.

2.1 The appellant is the plaintiff and the respondents are the defendants in the suit proceedings. The parties are described as per their litigative status in the suit proceedings.

2.2 The plaintiff has approached the Subordinate Court, Kancheepuram in O.S.No.7 of 2004, seeking for partition of plaint A and B schedule properties and for allotting 1/5th share of the properties mentioned in the schedule to the suit.

2.3 The case of the plaintiff was that A and B schedule properties belonging to one C.K.Lakshmana Mudaliar. The said

Lakshmana Mudaliar had two sons, namely, C.L.Vasudevan and C.L.Thangababu and he died in the month of March, 1970. After the death of C.K.Lakshmana Mudaliar, both of his sons had enjoyed the property jointly till June, 1994. On 29.06.1994, both of them had decided to divide the joint family properties by way of koorchit and divided the same as A and B and two separate koorchits were executed one for the landed property and another for the house property on the same day.

2.4 According to the plaintiff, A schedule property was allotted to C.L.Vasudevan and B schedule property was allotted to C.L.Thangababu. After division of the property, both C.L.Vasudevan and C.L.Thangababu had been enjoying the same and a separate patta had also been issued on 5.7.1994. The plaintiff was the son of C.L.Vasudevan. According to him, his father and his three brothers were living separately in different locations and enjoying the properties jointly. After division of the properties pursuant to koorchit arrangement, according to the plaintiff, since his father was already aged 75 years and his brothers/defendants are also aged and as they were living separately, he felt that it was no more convenient to hold the properties jointly. Therefore, a legal notice was issued on 20.03.2003 demanding for partition of the schedule mentioned properties and to allot him 1/5th share in A and B schedule properties. The plaintiff also averred in the plaint that his mother Rukmaniammal wife of C.L.Vasudevan was owning a house property at Nanganallore, Chennai-114 and she had executed a Will dated 24.2.1990 bequeathing the house property to the plaintiff and one V.Ravichandran, who is another brother of the plaintiff and a portion of the house property had been allotted as life estate to her husband C.L.Vasudevan. According to him, this property has nothing to do with the joint family properties and the Will executed by the said Rukmaniammal was also filed along with the plaint.

3. The suit was resisted by the defendants principally on the ground that the house property said to have been bequeathed to the plaintiff, which is situated in Naganallur by his mother Rukmaniammal was illegal and that property should have also been included in the suit schedule properties, otherwise, practically, the averments in the Written Statement, would show that the claim of the plaintiff for 1/5th share in A and B schedule properties, was admitted by the defendants.

4. The trial Court which went into the issues, has passed a preliminary decree on 10.07.2008. The trial Court found that there was no dispute regarding A and B schedule properties and also in regard to the claim of 1/5th share of the plaintiff. Since in respect of A and B schedule properties, there was no dispute at all and by the time, the first defendant died intestate, the trial Court decreed the suit, granting x1/4th

share to the plaintiff by passing a preliminary decree.

5. During the pendency of the suit proceedings, on behalf of the defendants, an interlocutory application in I.A.No.705 of 2007 was filed, praying to add the house property situated at Naganallur as C schedule in the plaint. However, the said I.A. was dismissed on merits on 20.09.2007. As against that, no further appeal was filed by the aggrieved parties. However, as against the passing of the judgment and preliminary decree by the trial Court, dated 10.07.2008, a regular appeal was filed by the defendants in A.S.No.7 of 2010 before the District Court No.2, Kancheepuram.

6. The first appellate Court which dealt with the appeal, has found that dismissal of I.A.No.705 of 2007 by the trial Court was wrong and in that view of the matter, the lower appellate Court has set aside the judgment and preliminary decree of the trial Court and directed the trial Court to consider the same and pass judgment and decree afresh. The lower appellate Court has also found that on the date when the appeal was disposed of, there was no appearance on behalf of any party. As against that, the present appeal has been preferred by the plaintiff.

7. Shri R.Singaravelan, learned Senior Counsel appearing for the appellant/plaintiff would submit that the judgment and decree of the first appellate Court are ex facie illegal and liable to be interfered with for the simple reason that when the interlocutory application in I.A.No.705 of 2007 was dismissed by the trial Court on 20.09.2007, the defendants had not preferred any appeal against that order. However, when a regular appeal was filed against the judgment and preliminary decree of the trial Court, the learned lower appellate Court has strangely felt that the approach of the trial Court in dealing with I.A.No.705 of 2007 was wrong and on that basis, set aside the entire judgment and preliminary decree. The judgment of the trial Court per se unsustainable and the same is liable to be set aside.

8. The learned Senior counsel would submit that when the defendants failed to file appeal against the order passed in I.A.No.705 of 2007, dated 20.09.2007, the question of lower appellate Court interfering in that order in the absence of any appeal, is absolutely unwarranted and the lower appellate Court has exceeded its jurisdiction by passing such an illegal judgment. The approach of the lower appellate Court is complete misunderstanding and misconception of the scope of appeal preferred before it. At this stage, the learned counsel appearing for the respondents/defendants would submit that the Second Appeal is not maintainable since the lower appellate

Court has only remanded the matter to the trial Court and therefore, only Civil Miscellaneous Appeal is to be filed. Therefore, he would request this Court to dismiss the appeal on the ground of maintainability.

9. As regards the lower appellate Court's conclusion in respect of I.A.No.705 of 2007, the learned counsel for the respondents/defendants has no answer at all. However, the learned counsel raised legal objections in regard to the maintainability of the Second Appeal for the purpose of non-suiting the appellant/plaintiff.

10. In this regard, the learned counsel appearing for the respondents/defendants would rely on Order XLIII Rule 1 (u) CPC and Order XLI Rule 23 CPC which read as under:

"Order XLIII-Appeals from Orders.

Rule 1 (u) an order under rule 23 (or rule 23-A) of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;

"Order XLI-Appeals from Original Decrees:

"Rule 23.Remand of case by Appellate Court.- Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand."

11. As per the above provision, Second Appeal is not the appeal remedy as provided under Section 100 of CPC. In support of his contention, the learned counsel would rely on a decision of the High Court of Gujarat in S.A.No.21 of 2018 dated 18.07.2018 in the case of "Laxmanbhai Govindbhai Solanki vs Amrutbhai Govindbhai Solanki". He would rely on paragraph Nos.22 to 25, which are extracted as under:

"22. It is also useful to reproduce order 41 Rule 23 of CPC which reads thus:

"Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit,

by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand."

23. In the case of Jamnagar Municipal Corporation (supra), it has been held by this Court that even if the Second Appeal has been admitted framing substantial questions of law, the issue with regard to its maintainability can be raised and decided. This is evident from the observations made by this Court, as contained in para 20 of the judgment.

24 In view of the above, this Second Appeal is disposed of as not maintainable in law. It shall be open for the appellant - original defendant to now avail of appropriate legal proceedings before the appropriate forum in accordance with law.

25 As this Court has taken the view that this Second Appeal is not maintainable, the interim order, which was earlier passed, needs to be vacated forthwith. The interim order is, accordingly, vacated."

12. Therefore, the learned counsel for the respondents/defendants would submit that the Second Appeal is to be dismissed as not maintainable.

13. Per contra, the learned Senior counsel would submit that the contention regarding the maintainability of the Second Appeal is completely misconceived and can not stand the test of proper judicial scrutiny. In this connection, he would place reliance on a decision of a learned single Judge of this Court made in CMA No.1227 of 2002, dated 26.09.2008 in the case of "Jegannathan and another versus Raju Sigamani", wherein, it has been held as under in paragraphs 13 to 20:

"13. In fact, the learned counsel appearing for the appellants/plaintiffs has not objected the point with regard to maintainability of the present civil

miscellaneous appeal, which has been raised by the learned counsel appearing for the respondent/defendant.

14. At this juncture, it would be more useful to look into the provision of Order 43 Rule 1 (u) of the Code of Civil Procedure, 1908 and the same reads as follows;

"An order under Rule 23 or Rule 23A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court."

15. Order 41 Rule 23 of the Code of Civil Procedure reads as follows;

"Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to readmit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidenced during the trial after remand."

16. Order 41 Rule 23-A of the said Code reads as follows;

"Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23."

17. From the conjoint reading of the Order 41 Rule 23 & 23-A of the said Code and also Order 43 Rule 1 (u) of the said Code, it is pellucid that if an appellant Court has set aside the judgment and decree passed by the trial Court and remanded the suit, only an appeal will lie against the judgment and decree passed by the appellate Court.

18. The learned counsel appearing for the respondent/defendant has befittingly drawn the attention of the Court to the decision reported in 2004(3) CTC 130 (Supreme Court) (Narayanan Vs.

Kumaran and others), wherein the Apex Court has held that it is obvious from the Rule 1 Order 43 that an appeal will lie from an order of remand only in those cases in which an appeal would lie against the decree if the appellate Court, instead of making an order of remand has passed a decree on the strength of the adjudication on which the order of remand was passed. The test is whether in the circumstances an appeal would lie if the order of remand were it is to be treated as a decree and not a mere order. In these circumstances, it is quite safe to adopt that the appeal under Order 43 Rule (1) clause (u) should be heard only on the ground enumerated in Section 100 of the Code of Civil Procedure, 1908.

19. In the instant case, as pointed out earlier, the first appellate Court has passed a full fledged judgment, wherein the judgment and decree passed by the trial Court have been set aside. The first appellate Court has not simply passed an order of remand with regard to particular aspect. The first appellate Court has passed a detailed judgment and thereby set aside the judgment and decree passed by the trial Court under Order 43 Rule 1 (u) of the Code of Civil Procedure, against the judgment and decree passed by the first appellate Court, only an appeal will lie, but the appellants/plaintiffs have filed the present civil miscellaneous appeal against the judgment and decree passed by the first appellate Court.

20. In view of the provision of law referred to supra and also in view of the dictum given by the Honourable Apex Court in the decision reported 2004 (3) CTC 130 (Supreme Court) (Narayanan Vs. Kumaran and others), it is very clear that the present civil miscellaneous appeal is not at all maintainable and on that ground alone, the same deserves dismissal. Since the present civil miscellaneous appeal is not at all maintainable and the same deserves dismissal, the merits of the argument advanced by the learned counsel appearing for the appellants/plaintiffs need not be gone into."

14. In fact, the above case is a converse one wherein, a learned Judge of this Court took a view that CMA was not maintainable and only it is the Second Appeal maintainable. The above decision completely supports the legal position taken by the learned Senior counsel for the appellant/plaintiff. Besides, the learned Senior counsel would also rely yet another decision of this Court in S.A.(MD) No.281 of 2011, dated 08.11.2011 in the case of "S.A.C. Alagan versus All India Islamic

Foundation, Chennai and another" wherein, in paragraph Nos.9 and 10, learned Judge of this Court has held as under:

"9. I would like to extract hereunder the relevant provisions of law, so to say Order XLIII Rule 1 (u) of Code of Civil Procedure:

"1 (u) an order under Rule 23 or Rule 23A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;" As such, it is palpably and pellucidly clear that if the appellate Court passed an order remanding the matter to the lower Court, then, it should be treated as an order, as against which appeal would lie and it cannot be treated as a decree.

10. No doubt, in the cited decision, taking into consideration the singularly singular features involved in that case, the learned Single Judge of this Court felt that only Second Appeal would lie and not Civil Miscellaneous Appeal. As such, each and every case has to be dealt with independently in the wake of Order 43 Rule 1(u) of the Code of Civil Procedure. Here I recollect the broad proposition of law that "a precedent should be applied only in consimili casu and not in a matter where factually that is distinguishable". Here, the fact remains that the first appellate Court did not decide anything on any issue, but only remanded the matter back to the trial Court for evidence and for fresh disposal. Hence, in such a case, this case squarely comes within the parameters of Order XLIII Rule 1(u) of C.P.C."

15. In the above case, the learned Judge has succinctly distinguished between the cases of appeal against judgments and decrees of the lower appellate Courts. The learned Senior counsel would submit that as far as the case on hand is concerned, it was not a remand simpliciter by the lower appellate Court, but the entire judgment and decree of the trial Court was set aside by misreading its jurisdiction. Therefore, the Second Appeal is maintainable.

16. The learned Senior counsel would also rely on a decision reported in "(2015) 11 SCC 782 (Lisamma Antony and another versus Karthiyayani and another)", wherein, he would draw attention of this Court to paragraph Nos.16 to 18, which are extracted as under:

"16. Rule 24 of Order XLI of the Code further provides that where evidence on record is sufficient, appellate court may determine case finally, instead of remanding the same to the lower court.

17. Needless to say, in the present case, the suit was not disposed of on any preliminary issue by the trial court. The second appellate court should have restrained itself from remanding a case to the trial court. Remanding a case for re-appreciation of evidence and fresh decision in the matter like the present one is nothing but harassment of the litigant. The unnecessary delay in final disposal of a lis, shakes the faith of litigants in the court.

18. With the above observations, after having found that there was no substantial question of law involved in the second appeal before the High Court, and that the High Court has, by merely re-appreciating the evidence, reversed concurrent findings of fact, and remanded the matter, we have no option but to allow these appeals."

17. The above decision was relied on by the learned Senior counsel for the purpose of impressing upon this Court that though the judgment of the lower appellate Court was palpably wrong and required to be set aside as no purpose would be served if the matter is remanded to the lower appellate Court for fresh consideration. He would particularly emphasize a fact that as regards 1/4th share to be enjoyed by the plaintiff and other defendants, there was no dispute at all in relation to schedule A and B properties. Therefore, the defendants are not going to be aggrieved at all. He would add that as far as the property which was not included in A and B schedule properties, it is always open to the defendants to work out their remedy in a manner known to law.

18. The learned Senior counsel finally relied upon a decision of the Hon'ble Supreme Court reported in "(2013) 4 SCC 97 (Laxmibai (Dead) through L.Rs., versus Bhagwantbuva (Dea) through L.Rs. and others)" wherein, he would draw the attention of this Court to paragraph 49 which is extracted as under:

"49. The appellate court has erred by considering the irrelevant material, while the most relevant evidence, i.e., the adoption ceremony and the adoption deed, have been disregarded on the basis of mere surmises and conjectures. The correctness or authenticity of adoption deed is not disputed. What is disputed is that the natural parents of adoptive child who were definitely executing parties of the deed have signed as witnesses alongwith 7 other witnesses. In such a fact-situation, by gathering the intention of the

parties and by reading the document as a whole and considering its purport, it can be concluded that the adoption stood the test of law. We think that cause of justice would be served, instead of being thwarted, where there has been substantial compliance of the legal requirements, specified in Section 16 of the Act 1956. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred and the courts may in the larger interests of administration of justice may excuse or overlook a mere irregularity or a trivial breach of law for doing real and substantial justice to the parties and pass orders which will serve the interest of justice best."

19. The above decision of the Hon'ble Sureme Court would emphasize the fact that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred. Therefore, he would submit that in order to render substantial justice, such technical objection if it has any force, must be circumvented in order to secure the ends of justice.

20. Considered the submissions of the learned Senior counsel for the appellant/plaintiff and the learned counsel for the respondents/defendants and perused the entire materials and the pleadings placed on record.

21. This Court is entirely in agreement with the learned Senior counsel appearing for the appellant. The approach of the lower appellate Court was fundamentally wrong and the same cannot be sustained at all in any circumstances. This Court is unable to appreciate as to how a lower appellate Court Judge could commit such a basic error in setting aside the judgment and preliminary decree of the trial Court on the basis of complete misconception and misunderstanding in exercise of its appellate power under the provisions of the CPC. The judgment of the lower appellate Court to say the least, is completely devoid of application of mind and the same has to go lock, stock and barrel. The legal objections raised on behalf of the respondents/defendants would be valid in case the lower appellate Court has merely remanded the matter for trying the issue which was not framed by the trial Court or its remand is a simpliciter for taking any further evidence. But in this case, the lower appellate Court has completely set aside the judgment and decree of the trial Court when the fact of the matter was that as regards A and B schedule properties, it was an admitted case of all the parties that each one of them was entitled to 1/5th share and on the death of the father of the plaintiff

during the pendency of the suit proceedings, the trial Court has rightly passed a preliminary decree holding that every party is entitled to 1/4th share including the plaintiff. When such was the position, the question of setting aside the judgment and decree did not arise at all. In the said circumstances, this Court cannot close its eyes and allowed to be swayed over such technical objections raised on behalf of the respondents/defendants when they had no locus standi to raise objection as they had failed to file an appeal against the order in I.A.No.705 of 2007 dated 20.09.2007. What the respondents/defendants could not achieve having missed their chance, ingeniously tried to resurrect the dead issue by indirect method and unfortunately, the lower appellate Court has fallen prey to such design and overstepped its limit by directing the trial Court to redo its exercise in respect of the issue raised in I.A.No.705 of 2007. The approach of the lower appellate Court is fundamentally flawed and suffered from total non-application of mind. In any event, this Court is convinced with the decision of this Court as cited above which would clinch the legal issue in favour of the appellant/plaintiff as the tenor of the judgment of the lower appellate Court would amount to completely reappraisal of the findings of the trial Court and not mere remand simpliciter as envisaged under Order XLIII Rule 1(u) and Order XLI Rule 23 of CPC. In that view of the matter, this Court has no hesitation in allowing the Second Appeal.

22. Accordingly, the Second Appeal is allowed and the judgment and decree dated 10.12.2011 passed in A.S.No.7 of 2010 by the learned II Addl.District Judge, Kancheepuram, reversing the judgment and decree passed in O.S.No.7 of 2004, dated 10.07.2008 by the learned Subordinate Judge, Kancheepuram, is hereby set aside. No costs. Consequently, connected MP is closed.

Sd/-

Assistant Registrar (CS-I)

//True Copy//

Sub Assistant Registrar

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To

1. II Addl.District Judge,
Kancheepuram.
2. Subordinate Judge,
Kancheepuram

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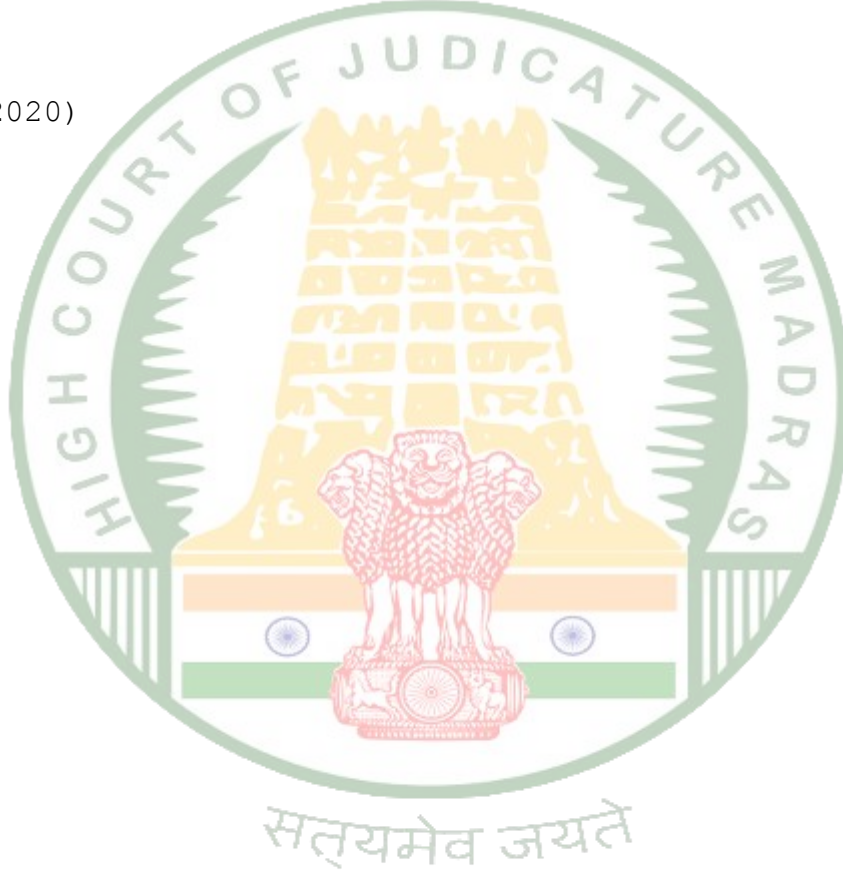
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+1cc to Mr.M.Srividhya, Advocate, S.R.No. 21264
+1cc to Mr.S.Veeraragavan, Advocate, S.R.No. 21285

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LN(CO)
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