

(1974) 05 MAD CK 0003
In the Madras High Court
Case No : A.A.O. No. 130 of 1973

C. Kalahasti

APPELLANT

Vs

P.C. Munuswami Chetti

RESPONDENT

Date of Decision : 02-05-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 43 Rule 1, 100, 104(2), 105

Citation : AIR 1975 Mad 3 : (1973) ILR (Mad) 671 : (1975) 88 LW 170

Hon'ble Judges : Natarajan, J

Bench : Single Bench

Advocate : V. Shanmugham, for the Appellant; O. Radhakrishnan and W.S. Venkataramanujulu, for the Respondent

Final Decision : Dismissed

Judgement

1. The defendant in the suit is the appellant. The plaintiff who is the respondent in this appeal was the Secretary of the Board of Trustees in charge of the Thyagaraya Chetti Educational Institution and of which Board the defendant-appellant was the President. The plaintiff filed a suit against the defendant for reliefs of injunction etc. and, incidentally, filed a petition, I. A. No. 6291 of 1973, under Order XXXIX, Rule 1, Civil P. C. for an order of temporary injunction to restrain the defendant from calling for a meeting of the Board of the Trustees in the alleged exercise of his right as President of the Board of Trustees. The contention of the plaintiff was that he, in his capacity as secretary of the Board of Trustees, was the person solely competent to call for a meeting of the Board of Trustees and no one else could usurp his powers. The learned V Assistant Judge, City Civil Court, who heard the petition did not accept the case of the plaintiff and dismissed I. A. 6291 of 1973.

2. Against the dismissal of the petition, the plaintiff preferred C. M. A. 36 of 1973 to the City Civil Court and once again sought interim orders in

C. M. p. 49 of 1973 for a temporary injunction till the disposal of the appeal. The Second Additional City Civil Judge granted interim injunction in

C. M. P. 49 of 1973 and, aggrieved by the said order, the defendant has preferred the present civil miscellaneous appeal.

3. When this appeal was filed, the office raised a query as to how the appeal was admissible as the order appealed against had itself been parsed

in an appeal and would therefore not fall within the provisions of Order XLIII, Rule I, Civil P. C. The learned counsel for the appellant seems to

have prevailed upon the admission Judge the contention that though the order appealed against was one passed by the appellate court, it was

nevertheless an order passed under Order XXXIX, Rules 1 and 2, Civil P. C. that as such, it was not an order passed in appeal as contemplated

u/s 104(2), Civil P. C. that C. M. P. 49 of 1973 was an independent petition pending the appeal and as such, the aggrieved party was entitled to

prefer an appeal under Order XLIII, Rule 1. Civil P. C.

4. When the appeal was taken up, Mr. O. Radhakrishnan, learned counsel for the respondent, raised a preliminary objection stating that the appeal

was not maintainable and therefore, it should be dismissed in limine. Mr. V. Shanmugham learned counsel for the appellant, stated that though he

was not pressing the appeal on merits, he was nevertheless prepared to meet the challenge of the respondent's counsel about the maintainability of

the appeal and advance arguments to sustain his earlier stand that the order passed in C. M. P. 49 of 1973, though passed by an appellate court,

was nevertheless an appealable order under Order XLIII, Rule 1, Civil P. C.

5. The industry of counsel on either side as well as my own efforts in this behalf did not reveal any reported ease of this court on the controversy

raised in the appeal and hence, I am considering the matter in extenso, even though the learned counsel for the appellant represented that he was

none too keen to prosecute the appeal on merits. Before proceeding to consider the objection raised by Mr. O. Radhakrishnan regarding (he

maintainability of the appeal, the circumstances under which the appeal has been filed and about which there is no dispute need reiteration.

Admittedly, the order appealed against, viz., the order in C. M. P. 49 of 1973, is

an order passed by an appellate court. It is equally a matter of certainty that the petition, C. M. P. 49 of 1973 was filed under Order XXXIX, Rule 1, Civil P. C. and consequently, the interim order passed therein must be construed as an order passed under Order XXXIX, Rule 1, Civil P. C. The question for consideration is whether an appeal would lie against an order passed under Order XXXIX, Rule 1, Civil P. C. by an appellate court.

6. Section 104, Civil P. C., which provides for appeals from orders, reads as follows:--

Section 104(1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders--

(a) to (f) repealed

(ff) an order u/s 35A

(g) an order u/s 95;

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except

where such arrest or detention is in execution of a decree;

(1) any order made under rules from which an appeal is expressly allowed by rules:

Provided that no appeal shall lie against any order specified in Clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.

(2) No appeal shall lie from any order passed in appeal under this section"".

The express direction contained in Subsection (2) of Section 104 that ""no appeal shall lie from any order passed in appeal under this section

would ex facie mean that any order passed in appeal cannot be subjected to a further appeal. Mr. V. Shanmugham would, however, place reliance

on Section 107, Civil P. C. and contend that an order passed by an appellate court under Order XXXIX, Rule 1, Civil P. C. cannot really be

termed an order passed in appeal, but must only be classified as an order passed by the appellate court in exercise of its original jurisdiction.

Section 107, Civil P. C. reads as follows-

Section 107(1) Subject to such conditions and limitations as may be prescribed,

an appellate court shall have power -

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken;

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred

and imposed by this Code on courts of original jurisdiction in respect of suits instituted therein.

7. It is no doubt true that if an order passed by an appellate Court under Order XXXIX, Rule 1, Civil P. C. is to be construed as an order passed

by the court in exercise of its original jurisdiction, then the order would certainly be an appealable order because Order XLIII, Rule 1 (r), Civil P.

C. makes an order under Rule 1, Rule 2, Rule 4 or Rule 10 of Order XXXIX an appealable order.

8. I am however unable to agree with the contention of Mr. V. Shanmugham. Section 107(2), Civil P. C. certainly does not lend support to the

interpretation given to it by the learned counsel. All that Section 107(2), Civil P. C. provides for is that subject to the several modes of disposal of

an appeal, enumerated in Sub-section (1), the appellate court shall have the same powers and shall perform, as nearly as may be, the same duties

as are conferred and imposed by the Code on courts of original jurisdiction in respect of suits instituted therein. This provision will not alter the

nature and character of an order passed by an appellate court under Order XXXIX, Rule 1, Civil P. C. or any other order of a like nature, into an

order passed by a court of original jurisdiction from an order passed by a court of appellate jurisdiction. As a matter of fact, Section 107(2) does

not have the effect of rendering an appellate court a court of original jurisdiction when exercising its powers to pass incidental orders. All that Sub-

section (2) of Section 107 states is that subject to the limitations contained in the Code, the powers of the appellate court shall be co-extensive

with the powers and obligations conferred and imposed upon the courts of original jurisdiction in respect of suits filed before them. Apart from

Section 107(2) not lending support to the interpretation given by Mr. V. Shanmugham, the other provisions in the Code, viz, Sections 104 and

105 and Order XLIII, Rule 1 also go to show that an interim order passed by an appellate court cannot be deemed to be an order passed by the said court in exercise of its original jurisdiction.

9. Before proceeding to consider the provisions of Section 104 and Order XLIII, Rule 1, Civil P. C., it is apposite to remember that, while u/s 96

of the Code, every decree is appealable save where otherwise expressly provided in the body of the Code or by any other law for the time being

in force, every order is not necessarily appealable and, as a matter of fact, no other order except those specified in Section 104(1) or exempted

thereunder is appealable. Section 104, which is the relevant provision in the Code which makes provision for appeals from orders, provides inter

alia that any order made under rules, from which an appeal is expressly allowed by rules, is appealable. Order XLIII, Rule 1, Civil P. C. which

enumerates the orders from which an appeal can be preferred is referable to this provision in Section 104 and consequently, Order XLIII, Rule 1,

Civil P. C. cannot confer greater rights than what is conferred by Section 104. As a matter of fact, Order XLIII, Rule 1, Civil P. C. itself reads as

follows-- "An appeal shall lie from the following orders under the provisions of Section 104." (underlining mine). Inasmuch as reference is made to

Section 104 in Order XLIII, Rule 1, Civil P. C. it necessarily follows that Section 104 has to be considered in its entire conspectus to decide the

question whether an order referred to in Order XLIII, Rule 1 is an appealable order when it has been passed by an appellate court. As Section

104(2) clearly lays down that no appeal would lie from any order passed in appeal, it necessarily follows that the right of appeal given against the

orders enumerated in Order XLIII, Rule 1 will be subject to the stipulation contained in Section 104(2), Civil P. C. Moreover, Section 105 also

makes it clear that unless otherwise expressly provided, no appeal shall lie from an order made by a Court in the exercise of its original or appellate

jurisdiction.

The use of the words "original or appellate jurisdiction" in Section 105 makes it abundantly clear that the court can only exercise either original or

appellate jurisdiction, but cannot exercise both at one and the same time. Therefore, the contention of Mr. Shanmugham that even though the order

in C. M. P. 49 of 1973 was passed by an appellate court, the order must

nevertheless be construed to be one passed by the said court in the exercise of its original jurisdiction, cannot be countenanced, and it is clearly an untenable contention. It is only by virtue of the powers vested in it as an appellate court that the Additional City Civil Court passed the order in C. M. P. 49 of 1973 and consequently, the order will squarely fall within that class of orders which are contemplated in Section 104(2), Civil P. C. and which are expressly prohibited from being canvassed in further appeal. The fact that the order was passed in an interlocutory application will not make the order any the less an order pass in appeal.

10. Mr. O. Radhakrishnan, learned counsel for the respondent, brought to my notice a decision of the Kerala High Court in Chellappan Krishnan and Another Vs. K.P. Varughese and Another, , where an identical question as the one raised in this appeal had arisen for consideration. The

learned Judge of the Kerala High Court, who decided the case, has come to the same conclusion as the one reached by me and has held that the

power given to an appellate court u/s 107 is only part of its appellate jurisdiction, that it cannot be characterised as an original jurisdiction in an

appellate court, that incidental "orders passed by an appellate court in interlocutory applications moved in an appeal before it are orders passed in

an appeal" within the scope of Section 104(2), Civil P. C. and cannot, therefore, be appealed against. I am in respectful agreement with the view

expressed therein.

11. From another angle also, the argument advanced by Mr. Shanmugham is not worthy of acceptance. Section 100, Civil P. C. sets out the

grounds on which a second appeal can be filed and Section 101, Civil P. C. lays down in unambiguous terms that no second appeal shall lie except

on the grounds mentioned in Section 100 of the Code. It is thus seen that a litigant is not entitled to file a second appeal as of right or as a matter of

course and he is granted the right of a second appeal only if he satisfies the conditions adumbrated in Section 100, Civil P. C., If Mr.

Shanmugham's contention is to be accepted, it would then mean that orders passed by an appellate court in interlocutory applications are to be

placed on a better footing than appellate decrees themselves, because an order passed by an appellate court will automatically attract a second

appeal solely on the ground that the order appealed against was passed by the

appellate court in exercise of its original jurisdiction. Surely, the Legislature would not have intended to confer the advantage of a second appeal in respect of orders passed under the Code when even appeals from appellate decrees are required to satisfy the conditions laid down in Section 100, Civil P. C. The anomalous consequences that would ensue by the acceptance of the argument of the learned counsel for the appellant is yet another factor to be taken note of in deciding the question whether an order passed under Order XXXIX, Rule 1, Civil P. C. by an appellate, court is entitled to be appealed against.

12. In view of the reasons given above, am clearly of the opinion that the appeal is not maintainable and is clearly barred by Section 104(2), Civil P. C. The appeal should therefore fail on this technical ground as well.

13. In the result, the appeal will stand dismissed. But there will be no order as to costs.