

(2014) 01 KL CK 0106

In the High Court Of Kerala

Case No : Z.F.A.O. No. 381 of 2012

Chalakudy N.S.S. Educational, Cultural and Charitable Society

APPELLANT

Vs

Narayana Menon

RESPONDENT

Date of Decision : 29-01-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 3, Order 39 Rule 2A, Order 41 Rule 1, Order 41 Rule 1(u), Order 41 Rule 23

Citation : (2014) 1 ILR 778 : (2014) 1 KHC 514 : (2014) 1 KLJ 703 : (2014) 1 KLT 643

Hon'ble Judges : K.M. Joseph, J;K. Harilal, J

Bench : Division Bench

Advocate : Ranjith Thampan, Sr. Advocate, V.M. Krishnakumar and Narendra Kumar, Amicus Curiae, Advocate for the Appellant

Judgement

K.M. Joseph, J.

O. XLIII R. 1(u) of C.P.C. reads as follows:

1. Appeals from Orders.--An appeal shall lie from the following orders under the provisions of Section 104, namely;--

(u) an order under Rule XXIII or Rule XXIIIA of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;

Registry has raised an objection that appeal may not lie for the reason that the F.A.O. is filed against the order remanding an interlocutory application in the suit by the Appellate Court. The application which was remanded was one filed by the respondent under O. XXXIX R. 2A of CPC ("C.P.C." for short) for the alleged violation of the order of injunction passed by the appellate court in C.M.A. No. 131/2008. It is pointed out by the Registry that under O. XLIII R. 1(u) only an order remanding a case is appealable. But, here, only the interlocutory application is remanded.

2. We appointed Sri. Narendra Kumar as Amicus Curiae. Thus, we heard the learned senior counsel for the appellants Sri. Ranjith Thampan and also the learned Amicus Curiae. The learned senior counsel for the appellants would submit that the appeal is indeed maintainable. He would submit that this is a case where the trial court has passed a decree under which the suit filed by the respondents was dismissed. However, the court passed a decree to the effect that the respondents/plaintiffs had made out a case for taking action under O. XXXIX R. 2A of C.P.C. and directed that the appellants should be detained in civil prison for a day. It is against the said decree that the appellants have filed the appeal which came to be decided along with the other appeals filed. The appellate court dismissed the appeal filed by the respondents/plaintiffs. However, the appeal filed by the appellants was allowed and the finding of issue No. 2 and I.A. No. 4887/2008 was remanded back to the court below for fresh disposal in accordance with law untrammelled by any of the observations or findings of the court. The Interlocutory Application which was remanded was one filed for violation of the order passed in C.M.A. No. 131/2008.

3. Learned senior counsel for the appellants would contend, in the circumstances, the appeal was filed by the appellants as the decree was drafted in which the finding entered was that the appellants had contravened the order of injunction and action was ordered to be taken thereunder. Sri. Ranjith Thampan drew our attention to Major S.S. Khanna Vs. Brig. F.J. Dillon, . He also relied on the Law Lexicon to substantiate his contention that the word "case" is not limited in its import to the entirety of the matter in dispute in an action. It is also stated in Law Lexicon inter alia that the case may be said to be decided if the court adjudicates for the purpose of the suit some right or obligation of parties in controversy.

4. Per contra, the learned Amicus Curiae would submit that proceedings under O. 39 R. 2A is separate and independent and even if it is considered and disposed of along with the suit appeal would lie under O. XLIII R. 1(r) C.P.C.. In this context, he referred to the decision In Choorakadan alias Rayyappadan Sanku and Others Vs. Antony, .

5. He would still further submit that the appeal is not maintainable for another reason and that is the latter limb of O. XLIII R. 1(u) which is that an appeal would lie against an order of remand under O. XLI R. 23 or R. 23A only where an appeal would lie from a decree of the appellate court. That is to say he would submit that supposing in this case instead of the appellate court remanding the matter back it had itself decided the issue he poses a question as to whether an appeal would lie from the same as a decree. In other words, according to him, when an application is decided under O. XXXIX R. 2A it is only an order and whether it is decided independently or along with the suit it is appealable as an order it does not become a decree and therefore by no stretch of imagination the appellants can maintain the present appeal under O. XLIII R. 1(u).

6. Let us consider the case law cited before us. In Major S.S. Khanna Vs. Brig.

F.J. Dillon, , the Apex Court was considering a case which was filed under S. 115 of the C.P.C. The trial court found that the Suit was not maintainable, as it was one filed by a Partner against another Partner of a dissolved firm which was in the process of winding up, inter alia, and it was not maintainable. The High Court set aside the order and directed the Suit to be expedited. It is against the same that the Appeal was filed before the Apex Court. It was contended that the order of the trial court did not amount to a case which has been decided within the meaning of S. 115 of the C.P.C. The Court, inter alia, held as follows:

11. The expression "case" is a word of comprehensive import: it includes civil proceedings other than suits, and is not restricted by anything contained in the section to the entirety of the proceeding in a civil court. To interpret the expression "case", as an entire proceeding only and not a part of a proceeding would be to impose a restriction upon the exercise of powers of superintendence which the jurisdiction to issue writs, and the supervisory jurisdiction are not subject, and may result in certain cases in denying relief to an aggrieved litigant where it is not most needed, and may result in the perpetration of gross injustice.

7. In Choorakadan alias Rayyappadan Sanku and Others Vs. Antony, , a learned Single Judge (as His Lordship then was) was considering a Second Appeal and where the party aggrieved by the dismissal of an application under O. XXXIX R. 2A of the C.P.C., could challenge the same in an appeal filed under O. XLI Rule 1 against the original decree without resorting to a separate appeal as provided under O. XLIII R. 1(r) of the C.P.C. In the said case, along with the Suit, an interim injunction order was obtained. An application for violation of the same was filed and finding that there was no violation, the application was dismissed. The Suit was also dismissed. The plaintiff filed Appeal against the decree. He also challenged the propriety of the dismissal of the application under O. XXXIX R. 2A therein. The appellate court interfered with the decree and decreed the Suit. In regard to the interlocutory applications filed, it was found that the appellant had violated the ad-interim injunction and, therefore, proceedings have to be initiated. The orders were set aside and the trial court was directed to take further action in the matter. A Second Appeal was filed against the interference by the lower appellate court in regard to the orders passed in the application under O. XXXIX R. 2A. The main contention of the appellant was that no appeal was preferred against the orders passed in the application under O. XXXIX R. 2A and in the absence of separate and specific appeal, interference by the lower appellate court was illegal. The Court considered the effect of Section 105 of the C.P.C. which makes it clear that save as otherwise provided in the Code, no appeal lies against any order made by the court in the exercise of its original or appellate jurisdiction. No doubt, S. 105 also provides that where decree is appealed from any error, defect or irregularity in any order affecting the decision of the case, can be impugned. Thus, only such orders which affect the decision of the case alone can be challenged along with the appeal filed against the original decree. It is thereafter that the Court proceeded to observe as follows:

4. The proceedings under O. XXXIX R. 2A C.P.C. is separate and independent. Whatever be the orders passed in O. XXXIX R. 2A petition, it may not have any bearing on the decision of the case. Even if the petition under O. XXXIX R. 2A was considered and disposed of along with the suit, the order passed thereunder would be distinct and separate and an appeal would lie under O. XLIII R. 1(r) of the C.P.C. As the respondent herein had not challenged the order passed under O. XXXIX R. 2A by a separate appeal, it was not open to the learned District Judge to interfere with the order passed by the Munsiff. The order passed in O. XXXIX R. 2A petition had not affected the decision of the case. Therefore, the same cannot be a ground for objection in the memorandum of appeal in A.S. No. 42/84. S. 105 of C.P.C. Expressly prohibits such recourse. Therefore, the order passed by the learned District Judge directing the trial court to proceed with I.A. Nos. 1925/82 and 621/83 is without jurisdiction and illegal.

8. Therefore, according to the learned Amicus Curiae, the present Appeal is not maintainable.

9. In K.N. Sushama Vs. Mercy Antony and Others, , the question which arose was whether Civil Revision Petitions are maintainable against the orders passed by the appellate court in Election Petitions under the Kerala Panchayat Raj Act, 1984 and the Kerala Municipality Act, 1994. The Court held that a Revision Petition is maintainable. The Court referred to the Judgment of the Apex Court in Major S.S. Khanna Vs. Brig. F.J. Dillon, wherein, the Court observed that the expression "case" is undoubtedly not restricted to a litigation in the nature of a Suit in a civil court. The Apex Court further held that it includes a proceeding in a civil court in which the jurisdiction of the civil court is invoked for the determination of some claim or right legally enforceable. In P. Purushottam Reddy and Another Vs. Pratap Steels Ltd., , a Suit for specific performance was filed which was decreed by the trial court. The High Court allowed the Appeal filed by the appellant and remanded the matter on three additional issues framed by the High Court on which additional trial was to be held. The Court, inter alia, held as follows:

10. The next question to be examined is the legality and propriety of the Order of remand made by the High Court. Prior to the insertion of R. 23-A in O. 41 of the CPC by the C.P.C. Amendment Act, 1976, there were only two provisions contemplating remand by a court of appeal in O. 41 C.P.C. R. 23 applies when the trial court disposes of the entire suit by recording its findings on a preliminary issue without deciding other issues and the finding on preliminary issue is reversed in appeal. R. 25 applies when the appellate court notices an omission on the part of the trial court to frame or try any issue or to determine any question of fact which in the opinion of the appellate court was essential to the right decision of the suit upon the merits. However, the remand contemplated by R. 25 is a limited remand inasmuch as the subordinate court can try only such issues as are referred to it for trial and having done so, the evidence recorded, together with findings and reasons therefor of the trial court,

are required to be returned to the appellate court. However, still it was a settled position of law before the 1976 Amendment that the court, in an appropriate case could exercise its inherent jurisdiction under S. 151 C.P.C. to order a remand if such a remand was considered pre-eminently necessary *ex debito justitiae*, though not covered by any specific provision of O. 41 C.P.C. In cases where additional evidence is required to be taken in the event of any one of the clauses of sub-r. (1) of Rule 27 being attracted, such additional evidence, oral or documentary, is allowed to be produced either before the appellate court itself or by directing any court subordinate to the appellate court to receive such evidence and send it to the appellate court. In 1976, Rule 23-A has been inserted in O. 41 which provides for a remand by an appellate court hearing an appeal against a decree if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate court can exercise the same power of remand under Rule 23-A as it is under Rule 23. After the amendment, all the cases of wholesale remand are covered by Rules 23 and 23-A. In view of the express provisions of these Rules, the High Court cannot have recourse to its inherent powers to make a remand because, as held in *Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati* (AIR at p. 399), it is well settled that inherent powers can be availed of *ex debito justitiae* only in the absence of express provisions in the Code. It is only in exceptional cases where the court may now exercise the power of remand *de hors* Rules 23 and 23-A. To wit, the superior court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by O. 20 Rule 3 or O. 41 Rule 31 C.P.C. and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for rewriting the judgment so as to protect valuable rights of the parties. An appellate court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23A or Rule 25 C.P.C. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided.

10. In *Narayanan Vs. Kumaran and Others*, , the Court held as follows:

It is clear from Rule 1(u) of Order 43(1) C.P.C. 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 had 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 to be treated as a decree and not a mere order.

11. A learned Single Judge of this Court in *Aravindaksha Menon Vs. Raghava Menon*, took the view that the fact that the suit was dismissed after trial, is not a ground to hold that the party who had violated the interim order should not be proceeded under O. XXXIX Rule 2A. In the Law Lexicon, under the word "case", it is, *inter alia*, stated as follows:

Whenever the law provides a remedy enforceable in the courts according to the

regular course of legal procedure and that remedy is pursued, there arises a case." As a remedy under the civil law, a case is a proceeding in a civil court in which the jurisdiction of the Court is invoked for the determination of some claim or right legally enforceable. Major S.S. Khanna Vs. Brig. F.J. Dillon,

12. In Trivandrum Golf Club Vs. State of Kerala, , a learned Single Judge of this Court took the view that a Revision is maintainable under S. 115 of the C.P.C. against an order declining leave to institute the Suit as it amounts to a case decided terminating the proceedings.

13. Two issues arises. Firstly, when the Appellate Court remanded the application under O. XXXIX Rule 2A, was it a case of remanding a case? The second question is even if it is a case being remanded, whether an appeal would lie as an appeal from the decree of the Appellate Court if the Appellate Court itself decided the matter under O. XXXIX Rule 2A?

14. As far as the question as to whether it is a "case" a proceeding under O. XXXIX Rule 2A is one which provides for consequences of disobedience of order of injunction.

(See Aravindaksha Menon Vs. Raghava Menon,). The order passed does not any bearing on the decision in the suit (See Choorakadan alias Rayyappadan Sanku and Others Vs. Antony,). In that sense, it cannot be treated as part of the suit and no part of the suit can be said to be decided by an order passed under O. XXXIX Rule 2A. Therefore, we would think that it cannot be said to be proceeding for determination of a claim or a right as was contemplated in the judgment of the Apex Court reported in S.S. Khanna, Major's case (cited supra).

15. We would however not rest our decision on the said score. O. XLI Rule 1(u), under which the present appeal is sought to be maintained, further requires that appeal must lie from the decree of the Appellate Court. In this case there was an order of injunction passed by the District Court in C.M.A. No. 131/2008. An application for taking action under O. XXXIX Rule 2A for violation of the said injunction was heard and disposed of by the trial court along with the suit itself. This means that the order was part of the judgment and consequently decree was also drawn up. In fact, going by the decision in Sanku's case (cited supra) an appeal would lie under O. XLIII Rule 1(r) against the order passed under O. XXXIX Rule 2A even if the decision is taken along with the suit or otherwise and the order could not be impugned in an appeal under S. 96. Whatever that may be, as far as the present appeal is concerned, if we ask ourselves the question as to whether at any rate if the appellate court had, instead of remanding the matter under O. XXXIX Rule 2A, decided it finally would a decree emerge? Would it not be an order which would be appealable as an order? We would think that the decision of the Appellate Court would not really be a decree (even though it is true that in this case it is disposed of by a common judgment and a decree is also said to be drawn up). We would think that in view of law laid down in Sanku's case (cited supra), an order passed under O. XXXIX Rule 2A whether it

is separate from the final disposal or along with the final disposal of the suit or appeal only an order which is appealable as such under O. XLIII would emerge. Therefore, the second limb of O. XLIII Rule 1(u) that an appeal must lie from the "decree" of the Appellate Court is a condition which cannot be satisfied as in this appeal the matter is one raising under O. XXXIX Rule 2A which was remanded back but had it been decided by the Appellate Court actually even if a decree is drawn up it is only an order. In view of the same we would think that the Objection of the office that appeal is not maintainable is to be sustained. We hold that the appeal is not maintainable.