

(2002) 07 MAD CK 0012

In the Madras High Court

Case No : L.P.A. No"s. 65, 66 and 67 of 1996 and C.M.P. No"s. 8340, 8341 and 8342 of 2002

Jayarama Reddy

APPELLANT

Vs

Kumaran, Marappa Reddiar, Kanniappan, Pachai, Mangalam,
Seethammal, Alamelu Ammal @ Chinnaponnu, Kalangammal,
Vedavalli Ammal, Poongavanam, Sekar and Kesavan

RESPONDENT

Date of Decision : 10-07-2002

Acts Referred:

Charter Act, 1861 — Section 15
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, Order 41 Rule 23A
Constitution of India, 1950 — Article 133
Employees State Insurance Act, 1948 — Section 82

Citation : (2002) 3 LW 743

Hon'ble Judges : K. Gnanaprakasam, J;A.S. Venkatachalamoorthy, J

Bench : Division Bench

Advocate : R. Subramanian, for the Appellant; T.R. Mani, for Vijayakumari Natarajan, for No. 2, for the Respondent

Judgement

A.S. Venkatachalamoorthy, J.—One Jayaraman as plaintiff filed a suit in O.S.160 of 1974 on the file of Subordinate Judge, Vellore, (which

hereinafter referred to as "the first suit") praying the Court to grant a decree directing division of "A" and "B" scheduled properties into 28 shares

and allot to him his 49/168th share and put him in separate possession and enjoyment of the properties that may be allotted to him and for

appointment of a Commissioner to divide the suit properties and for other reliefs.

2. In the said suit, his two brothers by name Marappa Reddiar and Kanniappa Reddiar are defendants 1 and 2. Kalangammal, Rajammal and

Vedavalli Ammal are defendants 4, 5 and 6 respectively and are the sisters of plaintiff. The third defendant Kullammal is the mother of the plaintiff.

Muthappa Reddy is the brother of the third defendant, who is 12th defendant in the suit. Pending proceedings, 3rd, 5th and 12th defendants died

and their legal representatives are on record.

3. There are two schedules to plaint "A" and "B". "A" schedule consists of 16 items, while "B" schedule consists of 28 items. Out of the 28 items,

items other than 3 to 6 and 20 in "B" schedule are the properties in the name of the first defendant Marappa Reddiar as per the settlement deed,

settlor being the third defendant. Documents relating to items 9 to 19 and 27 in "B" schedule stand in the name of the 12th defendant.

4. First defendant Marappa Reddiar in O.S.160 of 1974 on the file of Sub Court, Vellore, as plaintiff, filed a suit earlier in O.S.176 of 1971 on the

file of District Munsif Court, Sholingar, which was later on transferred to the file of Sub Court, Vellore and renumbered as O.S.260 of 1974

(which hereinafter referred to as "the 2nd suit"). The suit is one for declaration and injunction, filed against Jayaraman as first defendant, who is the

plaintiff in the first suit O.S.160 of 1974 and Kanniappan as second defendant, who is also second defendant in the first suit. The scheduled

properties in the 2nd suit consist of two schedules "A" and "B", which is nothing but "B" schedule in O.S.160 of 1974. "A" schedule in O.S.260

of 1974 are the properties in the name of Marappa Reddiar, i.e., plaintiff in the 2nd suit and "B" schedule are the properties settled in the name of

Marappa Reddiar by mother Kullammal.

5. There was joint trial of these two suits viz., O.S.160 of 1974 as well as O.S.260 of 1974 and by a common Judgment dated 23.10.1980, the

learned Subordinate Judge disposed of both the suits and it has been declared that the plaintiff in O.S.160 of 1974 viz., Jayaraman shall be entitled

for 8/28th share in the entire "A" Scheduled properties in O.S.160 of 1974 and in items 1, 2, 7, 19, 21 to 28 in "B" Scheduled properties. The

suit O.S.260 of 1974 was dismissed with reference to "A" Scheduled properties in that suit (i.e.) 2nd suit and was decreed with reference to "B"

Scheduled properties in that suit.

6. The resultant position is, the plaintiff Jayaraman in O.S.160 of 1974 shall be entitled for 8/28th share in the entire "A" scheduled properties and

in "B" scheduled properties, except items 3 to 6 and 20. Marappa Reddiar, first defendant in O.S.160 of 1974 (plaintiff in O.S.260 of 1974) shall

be entitled for items 3 to 6 and 20 in "B" Scheduled properties in O.S.260 of 1974. The 12th defendant (since dead) in O.S.160 of 1974 and the legal representatives D-17 to D-20, who were brought on record are not entitled for items 9 to 19 and 27 in "B" Scheduled properties in O.S.160 of 1974.

7. For the purpose of convenience, hereinafter we adopt the cause title as given in O.S.160 of 1974 on the file of Sub Court, Vellore.

8. The first defendant being aggrieved by the Decree and Judgment in O.S.160 of 1974 on the file of Sub Court, Vellore filed A.S.49 of 1982

before this Court. 18th defendant, who is the legal representative of the 12th defendant filed A.S.288 of 1983. The plaintiff, who is the first

defendant in O.S.260 of 1974 being aggrieved by the Decree and Judgment in O.S.260 of 1974, preferred an appeal before the District Court,

which was later on transferred to the file of this Court and renumbered as A.S.837 of 1989. At this juncture, it may be stated only the above three

appeals were filed by the parties to the above proceedings being aggrieved by the Decree and Judgment in the two suits referred supra.

9. The learned single Judge of this Court, by a common Judgment, disposed of all the three appeals A.S.49 of 1982, 288 of 1983 and 837 of

1989 on 30.12.1994 setting aside the decree and Judgment in both the suits on the file of Sub Court, Vellore and remitting the matter to trial Court

for fresh disposal in the light of the observations made in his Judgment.

10. The plaintiff, being aggrieved by the said Judgment of the learned single Judge, preferred L.P.A.65 of 1996 as against the Judgment in A.S.288

of 1983; L.P.A.66 of 1996 as against the Judgment in A.S.837 of 1989 and L.P.A.67 of 1996 as against the Judgment in A.S.49 of 1982. In the

above facts and circumstances, this Court can dispose of all the above appeals by this common Judgment.

11. Before we proceed to refer to the case of the respective parties, we deem it necessary to first consider the preliminary objection raised by Sri.

T.R. Mani, Senior counsel appearing for the respondents. The learned Senior Counsel submitted that inasmuch as the Judgment of the learned

single Judge has not rendered any decision but has only remitted the matter back to the trial Court pointing out certain aspects of the matter, which

the learned single Judge has to consider, the present Letters Patent Appeals

would not lie. In other words, the learned Senior Counsel contended that since the entire matter is now thrown open by virtue of remittal order and the Court has been directed only to consider the matter in the light of the observations made in that Judgment, it cannot be said that the learned single Judge decided any issue against the appellants, which alone would enable the plaintiff to file these appeals.

12. Per contra, the learned counsel for the appellant contended that inasmuch as by the order in question the proceedings before this Court has been terminated, and that apart the learned single Judge has also rendered certain findings, which would certainly affect the merits of controversy between the parties in the suits, the Letters Patent Appeals are maintainable.

13. Let us proceed to consider various rulings on this point first and sum up the legal position.

(a) The earliest ruling that can be referred to is the one reported in ILR Vol. XXXV 1908 XXXV 1908 Calcutta 1096 (Gopinath Pati v.

Moheshwar Pradhan), where the Division Bench of Calcutta High Court ruled that an order of remand passed by a single Judge of the High Court

is a "Judgment" within the meaning of Section 15 of the Letters Patent and an appeal lies from such an order under the Charter. That was the case

where the suit was filed by the plaintiff as a tenant to recover possession of a certain holding. The trial Court decreed the suit, but on appeal, the

Subordinate Judge set aside the decree and Judgment of the trial Court mainly on the ground that plaintiff had not been able to prove his title to the

land, and that occupancy rights purchased by defendants were transferable. The plaintiff appealed to the High Court and the second appeal was

heard by the learned single Judge, who set aside the decree and Judgment and remanded the case for a satisfactory finding on the question viz.,

whether the holding in suit was transferable by local usage. Against that order of remand, defendants appealed u/s 15 of the Letters Patent. A

preliminary objection was taken that no appeal would lie because the order of the second appellate Court is not "Judgment" within the meaning of

Section 15 of the Charter Act. The Division Bench overruled the preliminary objection and held that the Letters Patent Appeal is maintainable,

following the earlier ruling of that Court in L.P.A.72 of 1907, decided on 19th July, 1907.

(b) In ILR 35 1912 Mad 1 (T.V. Tuljaram Row v. M.K.R.V. Alagappa Chettiar), a Full Bench of Madras High Court ruled that an order of a

single Judge on the original side refusing to frame an issue asked for by one of the parties is not a "judgment" within clause 15 of the Letters Patent

and is not appealable. The Chief Justice Sir Arnold White in his Judgment ruled as under,

The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect,

whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far

as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or

proceeding, I think the adjudication is a judgment within the meaning of the clause. ...

Justice Krishnaswamy Ayyar in his separate, but concurring Judgment observed thus,

... I would only stop here to remark that a decision which determines the cause or proceeding so far as the particular court is concerned, though it

refuses to adjudge the merits, must also be deemed to be a judgment: for otherwise the rejection of a plaint for defect of form or insufficiency of

court fee or a return of it for want of jurisdiction would be outside the definition of the learned Chief Justice which could hardly have been his

meaning. ...

(c) In the decision reported in (Gutta) Punneya Vs. (Kaza) Parandamayya and Others, , the Division Bench held that an order of a single Judge

calling for a finding on an issue newly framed by him, or old, whether raised in the pleadings or not is not a judgment within Clause 15, for no right

or title can be said to be adjudicated upon by the mere framing of an issue and by directing that issue to be tried.

(d) A person brought a suit for damages, but became insolvent during the pendency of the suit. The suit was thereafter dismissed for Official

Assignee's failure to furnish security. The appellate Court however held that the claim being one for damages did not vest in Official Assignee and

remanded the case for trial on merits. The question arose whether an appeal would arise u/s 109(a) of the CPC against the said order of remand.

The Privy Council in AIR 1933 58 (Privy Council) ruled that the test of finality is whether the order "finally disposes of the rights of the parties",

but as the appeal only left them to be determined by the Court in the ordinary way and even after the order, suit is still a live suit in which the rights

of parties are still to be determined, no appeal lies against it u/s 109(a) of the Code.

(e) Another ruling that has to be referred is the one reported in AIR 1949 Mad 169 (A.B.M.S. Mohamed Ali Maracoir and others v.

P.S.N.S.Ambalavana Chettiar), where the Court ruled that where the High Court decides that the plaintiff would be entitled to damages for breach

of warranty and to enable it to pass a decree directs the trial Court to take fresh evidence that may be adduced by the parties on a certain issue in

the case as regards the difference in the price of the goods on the date of receipt and the date of delivery and send up its findings on the evidence

so recorded, the order is not a "judgment" under Clause 15 of the Letters Patent and no appeal therefore lies from it. The Division Bench in that

Judgment referred to the Judgment reported in ILR 35 1912 Mad 1 (cited supra) and in particular to paragraph 14 and distinguished it by saying

that those observations are general in nature have reference only to cases where there are decrees of the nature of preliminary decrees for accounts

in a suit for dissolution of partnership or in a suit for partition or a preliminary decree for sale in a mortgage suit. The Court in that case came to the

conclusion that the order calling for a finding on a particular issue is not a judgment within the meaning of Clause 15 of Letters Patent.

At this juncture it may be mentioned that subsequent to the above ruling, we have the ruling of the Full Bench of Madras High Court reported in

Central Brokers Vs. Ramnarayana Poddar and Co., .

(f) The Supreme Court in Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others, , ruled that an order for transfer of a suit is not a Judgment

and hence not appealable as the order neither affects the merits of the controversy between the parties in the suit itself, nor it terminates or dispose

of the suit on any ground. In fact in paragraph 7 of the said Judgment, the Supreme Court referred to the ruling of the Full Bench of the Madras

High Court reported in ILR 35 1912 Mad 1 (cited supra). In the latter part of the said Judgment the Supreme Court ruled thus,

... The judgment must be the final pronouncement which puts an end to the proceeding so far as the Court dealing with it is concerned. It certainly involves the determination of some right or liability, though it may not be necessary that there must be a decision on the merits. This view, which is implied in the observation of Sir Richard Couch, C.J., quoted above, has been really made the basis of the definition of "judgment" by Sir Arnold White C.J., in the Full Bench decision of the Madras High Court to which reference has been made vide 35 Mad 1 (F.B.)(E). According to White, C.J., to find out whether an order is a "judgment" or not, we have to look to its effect upon the particular suit or proceeding in which it is made. If its effect is to terminate the suit or proceeding, the decision would be a "judgment" but not otherwise. ...

(g) The next ruling that can be usefully referred to is the one reported in Central Brokers Vs. Ramnarayana Poddar and Co., . The question as to

whether an order made u/s 10 of CPC or any other provision of law for the stay of trial of a suit is not a judgment within the meaning of that term in

Clause 15 of the Letters Patent was referred to that Full Bench. The Full Bench after referring to the ruling reported in ILR 35 1912 Mad 1 (cited

supra) observed that the reasoning of the learned Judges that the order did not put an end to the proceedings but merely adjourned the suit if the

appellant complied with the terms, and if not, the proceedings go on, is perfectly correct, affirmed it as correct. After considering a number of

rulings, the Court observed thus,

Most of the cases cited at the Bar have been noticed above and though it is difficult to ascertain whether a particular decision is a judgment or not

by reference and comparison to the discussion regarding the nature of similar or allied orders, the resulting conclusion is that if a decision satisfies

the test of finality as laid down by the Supreme Court or is one concerning the merits of the controversy between the parties then it must be termed

to be a judgment appealable under Clause 15 of the Letters Patent. The Letters Patent itself in Clauses 39 and 40 uses the word "final judgment

and therefore it is clear that there can be a final and a preliminary judgment. As stated by Lord Selborne L.C. in (1885) 14 QBD 627 (E), to

constitute an order a final judgment nothing more is necessary than that there should be a proper "litis contestatio" and a final adjudication between

the parties.

(h) In *In Re: A.K.D. Rangaswami Raja and Another*, , the Court ruled that an order directing that a party shall have liberty to adduce further

evidence on certain issue and that the opposite side will be given the fullest opportunity of meeting that evidence is not a judgment within the

meaning of Cl.15 and the appeals against such order is not competent.

(i) In *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, , the Supreme Court had to consider whether an order refusing to appoint receiver

or to grant an interim injunction is appealable. The Court answered in the positive. The Court ruled that it is undoubtedly a Judgment within the

meaning of Letters Patent both because Order 43 Rule 1 applies to internal appeals in the High Court and apart from it such an order even on

merits contains the quality of finality and would therefore be a judgment within the meaning of Clause 15 of the Letters Patent. A reading of the

Judgment would show that the Apex Court referred to the ruling of the Calcutta High Court reported in (1872) 8 Bengal Law Reports 433 (The

Justices of the Peace for Calcutta v. The Oriental Gas Co.), wherein the Judgment was rendered by Sir Couch, C.J., on interpretation of Clause

15 of the Letters Patent so also the ruling reported in ILR 35 1912 Mad 1 (cited supra) by Sir Arnold White, C.J. The Supreme Court in

paragraph 19 has indicated that the ruling in ILR 35 1912 Mad 1 seems to have found favour with most of the High Courts in India and in

paragraph 91 set out the test prescribed in the Judgment of Sir Arnold White, C.J. However in a subsequent paragraph i.e, in paragraph 93, after

referring to both these Judgments it is observed as under,

... The correct test seems to lie somewhere in between the tests laid down by the aforesaid jurists.

In the later part of the Judgment, Supreme Court referred to the earlier ruling of the Supreme Court reported in *Shanti Kumar R. Canji Vs. The*

Home Insurance Co. of New York, in which case the Supreme Court was considering the effect of an order passed by the trial Judge allowing an

amendment and a question of issue as to whether an order is a Judgment within the meaning of Clause 15 of the Letters Patent. In that ruling the

Supreme Court observed as under,

... The nature of the order will have to be examined in order to ascertain whether

there has been a determination of any right or liability. ...

In *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, , in para 113, the Supreme Court clearly ruled that the term "Judgment" should

receive much wider and more liberal interpretation than the word "Judgment" used in the Code of Civil Procedure. In para 120 of the said

Judgment, the Supreme Court gave as many as 15 illustrations of interlocutory orders.

At this juncture it has to be pointed out that the Supreme Court considered the entire matter with reference to interlocutory orders only.

(j) A Division Bench of Madras High Court in *Ramasyee Agro-Industries Limited Vs. The India Sugar Refineries Limited*, had to consider the

question as to whether an order refusing to issue subpoena to a witness is a Judgment or not. The Court ruled since it causes serious injury to party

concerned, the said order is a Judgment and hence appealable under Clause 15 of the Letters Patent. The Court while so holding placed reliance

on the ruling of the Supreme Court reported in *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, and quoted a passage found at page

1816, which reads as under,

Thus, in other words every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters

of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. Similarly, orders passed by the

trial Judge deciding question of admissibility or relevancy of a document also cannot be treated as judgments because the grievance on this score

can be corrected by the Appellate Court in appeal against the final judgment.

Hence, if an order decides matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party

concerned, it is a Judgment.

(k) In the decision reported in 1997 (1) LW 506 (*Somasundaram v. Thangaraju*), the Division Bench of Madras High Court ruled that against an

order dismissing the application to set aside the court sale, preferred under Order 21 Rule 90 of the Code of Civil Procedure, no appeal is

maintainable under Clause 15 of the Letters Patent.

(l) A question arose as to whether an appeal under clause 15 of the Letters Patent is competent against the judgment of a learned single Judge of

the High Court rendered u/s 82 of the Employees' State Insurance Act, 1948 (Act 34 of 1948). A Division Bench of this Court in the ruling

reported in 1997 (3) LW 448 (The Employees State Insurance Corporation, Madras v. M/sShanmugha Theatres, Coimbatore and others)

answered in the affirmative. The Division Bench considered various rulings and in paragraph 45 of the Judgment, after referring to ILR 35 1912

Mad 1 (cited supra), observed as under,

The same has stood the test all these days and has received universal acceptance, when it gives us the answer to the question what is the meaning

of the word, "judgment", found in clause 15 of the Letters Patent. To put it shortly, a judgment is that adjudication, whatever its form may be and

whatever may be the nature of the application in which it is made, if its effect be to put an end to the suit or proceeding so far as the Court before

which such suit or proceeding is pending is concerned.

14. The learned Senior Counsel who raised the preliminary objection placed reliance on the rulings on

(i) Jethanand and Sons Vs. The State of Uttar Pradesh, , (ii) Tarapore and Co. Vs. V/O Tractors Export, Moscow and Another, , and

(iii) Shri Prakash Chand Agarwal and Others Vs. Hindustan Steel Ltd.,

and we have no hesitation to say that they will not be of any use for deciding the issue under consideration as in those cases, the Court was

considering the question how the words occurring in Article 133 of Constitution of India viz., "Judgment", "Decree" or "Final Order" in a Civil

proceedings in High Court, should be understood.

15. From the various rulings referred supra, the legal position can be summed up as under,

(a) The word "Judgment" should receive a much wider and more liberal interpretation while considering Clause 15 of the Letters Patent, than the

word "Judgment" used in the Code of Civil Procedure.

(b) The word "Judgment" found in Clause 15 of Letters Patent has to be understood as "a judgment is that adjudication, whatever its form may be

and whatever may be the nature of application in which it is made, if its effect be to put an end to the suit or proceeding so far as the Court before

which such suit or proceeding is pending is concerned".

(c) The interlocutory orders in the nature enumerated in paragraph 120 of the Judgment reported in Shah Babulal Khimji Vs. Jayaben D. Kania

and Another, may be treated as Judgment. The Supreme Court has given only illustrations of interlocutory orders, which should mean it is not exhaustive.

To find out whether an interlocutory order which does not find a place in the illustrations given by the Supreme Court in paragraph 120 of the

Judgment referred supra is a Judgment or not, the test is whether there has been determination of any right or liability or whether it affects the

merits of controversy between the parties in the suit itself, or if the order affect vital and valuable rights of the parties and which work serious

injustice to the party concerned.

Thus, the impugned order of remand is a "Judgment" within the meaning of Clause 15 of the Letters Patent.

16. That apart, coming to the present case, it has to be noted, it is not as if that the learned Single Judge remitted the matter without giving any

finding and has simply called upon the trial court to consider and dispose of the matter afresh.

If one goes through the judgment of the learned Single Judge carefully, it could be seen that at least in two places, the learned Single Judge has

given a finding, which certainly touches what is called the merits of controversy. In para No.18 of the Judgment, while considering the testimonies

of Dws-16 and 17, the learned single Judge has categorically stated that the evidence of Dws-16 and 17 are supporting the case of the 12th

defendant both in respect of passing of consideration, delivery of possession, interest of the first defendant etc. Such a finding would certainly affect

the interests of the plaintiff and the learned Single Judge could have, after pointing out that the trial court has rejected their evidence by a single

sentence, directed the trial court to examine it and give a considered finding as to the acceptability or otherwise of the testimonies of Dws-16 and

17. Again, in para No.22 of the judgment, the learned Single Judge has rather held that the written statement of the first defendant would only

mean that he has no objection for the suit being decreed in favour of the plaintiff in respect of the properties which he admits as joint family

properties and not the entire "A" schedule properties. Certainly, this finding goes

against the case of the plaintiff. Hence, also on the ground that in the order of remand, the learned Single Judge has considered the merits of controversy and rendered some findings and which also would go against the plaintiff, the court is inclined to hold that an appeal is maintainable against the order of the learned Single Judge.

17. As narrated earlier, in A.S. No.160 of 1974, filed by the appellant/plaintiff, the trial court has held that the plaintiff would be entitled to 8/28th

share in entire "A" schedule properties and in the properties in the "B" schedule, other than items-3 to 6 and 20. Aggrieved by this, the first

defendant filed A.S. No.49 of 1982. The 18th defendant viz., one of the legal representatives of the 12th defendant has filed A.S.288/83. In the

2nd suit filed by the first defendant, ie., O.S.260/74, wherein the first defendant has sought for declaration and injunction, the suit is decreed only

with reference to the properties settled in the name of the first defendant by the 3rd defendant, that is to say, items-3 to 6 and 20 in the "B"

schedule in the first suit. As against the said judgment and decree, Jayaraman viz., the plaintiff in O.S. No.160/74 has filed the appeal in

A.S.837/89. Inasmuch as the plaintiff viz., Jayaraman failed to file any appeal as against the judgment and decree in O.S.160/74, so far the same is

against him, that is to say, with reference to items-3 to 6 and 20, the judgment in O.S.160/94 would operate as res judicata and that being so,

A.S.837/89, where Jayaraman questions the correctness of the Judgment only with reference to items-3 to 6 and 20 has to be dismissed.

18. Similarly, inasmuch as the first defendant Marappa Reddiar has failed to file any appeal against the Judgment and decree in A.S. No.837/89,

wherein the Court has ruled that the properties in the name of Marappa Reddiar are in the nature of ancestral properties, the same would operate

as res judicata. Consequently, A.S. No.49 of 1982 has to be dismissed.

19. Or in other words, when "A" files a suit, claiming certain rights in two properties viz., ""P-1"" and ""P-2"" and the rival claimant ""M"" files a suit

over the same properties against ""A"" and the two suits are disposed of by a Common Judgment, wherein it is declared that "A" is entitled for ""P-1

item but not ""P-2"" so also "M" is entitled for ""P-2"" item but not ""P-1"" , then "A" has to file two appeals ie., appeal namely, so far that part of the

claim (i.e.) item P-2, which went against him in his suit and in the suit filed by

"M". Equally, "M" has also to file two appeals. Thus, if "A" has failed to file an appeal with reference to the disallowed portion (item P-2) in his suit and files an appeal only with reference to the other suit filed by "M", then the Judgment in his suit would operate as res judicata and the appeal filed by him as against the Decree and Judgment in "M"s suit, has to be dismissed.

20. At this juncture, it will be useful to refer to the Ruling reported in Ram Prakash Vs. Smt. Charan Kaur and Another, . In that case, two suits were filed by rival parties, claiming damages against each other. Those suits were tried together. For convenience, we take it as "A" and "B". A's suit was dismissed and "A" did not file any appeal. But "B" filed an appeal and the appellate court decreed the suit. Second Appeal was preferred by "A" against the decree for damages granted against him by the lower appellate court. It was held by the Supreme Court that the Second Appeal is barred by res judicata.

21. Once this Court comes to such conclusion, then it automatically follows, A.S.49/82 as well as A.S.837/89 have to be dismissed, leaving alone the appeal in A.S.NO.288 of 1983.

22. Now let us proceed to consider whether the order of remand passed by the learned Single Judge is sustainable. The learned Single Judge, to put it briefly, has pointed out certain reasons for remanding the matter. They are:-

[a] The evidence of DW-15 has not been properly appreciated;

[b] The evidence of Dws-16 and 17 have been rejected by the trial court by a single sentence, stating that he is not inclined to accept their evidence;

[c] Benami Transaction Prohibition Act is only prospective in operation and not retrospective.

[d] Finally, the written statement of the first defendant has not been properly understood by the trial judge.

From the above, it could be seen that the learned Single Judge remanded the matter on the ground that the evidence of Dws-15, 16 and 17 have

not been properly appreciated and that the written statement of the first defendant has not been properly understood. The second reasoning is that

the lower court proceeded on the basis that Benami Transaction Prohibition Act is retrospective in nature.

23. The question is whether for these reasons, High Court can remand the matter?

As could be seen from the records, the suit was filed by the plaintiff way back in the year 1974. All the required materials were very much

available before the learned single Judge and that being so, the learned single Judge should have himself decided the appeal one way or other.

24. The observation of the learned Single Judge in para No.21 of the Judgment, viz., there is no evidence regarding the date of death of the father

of the first defendant, is not correct. In fact, DW-6 has categorically deposed that the father of the first defendant died during 1962. Or in other

words, all the materials required for the purpose of deciding various issues were very much available before the learned Single Judge. The

appellate court on the first appeal has got every jurisdiction to go into the factual aspects and give factual findings. There is no justification for the

learned Single Judge to remand the matter.

25. The Supreme Court had an occasion to consider about the powers of remand of the High Court in Ashwinkumar K. Patel Vs. Upendra J.

Patel and Others, . In para No.7 of the Judgement, the Court observed thus:-

In our view, the High Court should not ordinarily remand a case under Order-41 Rule-23 CPC. to the lower court merely because it considered

that the reasoning of the lower court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the

parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or other. It could have

considered the various aspects of the case mentioned in the order of the trial court and considered whether the order of the trial court ought to be

confirmed or reversed or modified.

In P. Purushottam Reddy and Another Vs. Pratap Steels Ltd., , the Supreme Court pointed out that the inherent powers can be availed of ex

debito justitiae only in the absence of express provisions in the Code and only in exceptional cases where the Court may now exercise the power

of remand dehors the Rules 23 and 23A. In para No.10, the Supreme Court has observed thus:-

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 Rule 23A

in Order 41 of the CPC by CPC Amendment Act, 1976, there were only two provisions contemplating remand by a Court of appeal in Order 41

of CPC. Rule 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. Rule 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 Rule 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 therefore of the trial

Court, are required to be returned to the appellate Court. However, still it was a settled position of law before 1976 Amendment that the Court, in

an appropriate case could exercise its inherent jurisdiction u/s 151 of the CPC to order a remand if such a remand was considered pre-eminently

necessary *ex debito justitiae*, though not covered by any specific provision of Order-41 of the CPC. In cases where additional evidence is required

to be taken in the event at any one of the clauses of sub-rule (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 23A has been inserted in Order 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 23A as it is under Rule 23. After the amendment all the cases of wholesale remand are covered by Rule 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 vs. Sushila*

(AIR 1965 SC 365, 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 dehors the Rules 23 and 23A. 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 Order 20 Rule 3 or

Order 11, Rule 31 of the CPC and hence it is no judgment in the eye of law it may set aside the same and send the matter back to re-writing 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 of the CPC. An unwarranted order of remand gives the litigation an undeserved lease of life

and, therefore, must be avoided.

26. In the result,

[a] L.P.A.67 of 1996 is allowed and A.S. No.49 of 1982 stands dismissed.

[b] L.P.A.66 of 1996 is allowed and A.S.837 of 1989 stands dismissed.

[c] L.P.A.65 of 1996 is allowed. The order of remand is set aside. A.S.288 of 1983 shall be disposed of on merits by the learned single Judge.

[d] C.M.Ps.8340 to 8342 of 2002 are closed.