
(1973) 05 MAD CK 0014
In the Madras High Court

Muriyattu Nakaranna Krishna Dass Narayana Bhrahmananda
Dheerthar Peria Swamiyar Thirumum Pilli

APPELLANT

Vs

Panchayat Union Arudesom Village and Others

RESPONDENT

Date of Decision : 03-05-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 20

Citation : (1978) 87 LW 635 : (1973) 2 MLJ 461

Hon'ble Judges : V.V. Raghavan, J

Bench : Division Bench

Judgement

V.V. Raghavan, J.—This is an application filed by the plaintiff in O.S. No. 80 of 1965 and the first respondent in the above second appeal. The facts giving rise to the filing of the present application are as follows. The suit properties situate in Amdesom Village belonged to the plaintiff's Matom and subject to mortgage in favour of various persons. The first defendant is the Panchayat Union and the second defendant is the President of the Panchayat. The third defendant is a road contractor and the fourth defendant is the Union Commissioner, Munchira Panchayat Union in which Arudesom Panchayat is included. The plaintiff has filed a suit against the defendants for recovery of Rs. 5,500 as damages on the ground that the defendants have unlawfully and without obtaining the consent the plaintiff opened a road way over long portions of the suit properties, that such portions are wrongfully taken over and the road has been laid and thereby the defendants have completely destroyed the plaintiff's land. The plaintiff sent a notice to the first defendant. A reply was sent by the second defendant enclosing a copy of the resolution passed by the Panchayat and the third defendant sent a reply stating that the first defendant gave a contract to him to cut open the road and that the first defendant alone is answerable for all the loss. In view of the wrongful acts of the defendants the present suit for recovery of damages amounting to Rs. 5,500 was filed.

2. The first defendant denied the liability invoking the provisions of the Madras

Panchayat Act, 1958, and contending that the Commissioner of the Union alone has to represent the Union, and that the frame of the suit is bad.

3. The second defendant denied knowledge about the construction of the road and further contended that this defendant is an unnecessary party to the suit. The third defendant, who is a contractor, stated that he is not personally liable for the works which he executed as per the lawful directions of the Panchayat Union and that consequently he is not a necessary party to the suit and no claim could be made against him.

3-a. The Panchayat Union, the fourth defendant, denied the claim, contending that as the contractor had exceeded his authority, he alone is answerable and not the Union.

4. The trial Court decreed the suit against the third defendant alone for a sum of Rs. 2,218-75 and dismissed the rest of the claim.

5. The third defendant filed A.S. No. 213 of 1968 to the Court of the District Judge, Kanyakumari. The learned judge confirmed the judgment and decree of the trial Court on all the issues except on the issue as to the quantum of damages. While confirming the third defendant's liability the appellate Court remanded the matter to the trial Court to fix the liability on a different basis. The plaintiff was directed to pay the costs of the appeal to the first, second and the fourth respondents. The third defendant has filed the above second appeal and when the appeal came up for hearing before me at the first instance, I considered that the real parties are not before the Court in the second appeal in case I come to the conclusion that the third defendant is not liable, but that the plaintiff is entitled to get a decree against the third defendant's principal viz., the first defendant or the second defendant. I, therefore, directed the appellant to implead the other defendants as parties to the second appeal. After notice was served on the proposed respondents under Order 41, Rule 20 of the Code of Civil Procedure, Mr. A. Alagiriswami entered appearance on their behalf and opposed the application. The learned Counsel contended that Order 41, Rule 33 of the Civil Procedure Code, cannot be invoked in the circumstances of the case and drew my attention to Order 41, Rule 33 of the Code of Civil Procedure, which runs as follows:

The appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

By reason of Order 42, Rule 1, Civil Procedure Code, Order 41, Rule 33 Civil Procedure Code, applies to second appeals as well. The discretion conferred by Order 41, Rule 33 is very wide, But as the power is in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal

or cross-objection, it must be exercised with care and caution. Here what has happened is a decree was prayed for against 4 persons. The trial Court granted a decree against one of them. The judgment-debtor filed the appeal against the plaintiff alone leaving out the other parties and the decree was substantially confirmed by the appellate Court. The judgment-debtor filed a second appeal against the party. If the Court comes to the conclusion that the appellant is not liable, the question would then arise whether the plaintiff should go remediless. It is in those circumstances that I considered that Order 41, Rule 33, of the CPC can be invoked in a case of this kind and all the parties brought before the Court so that in case the third defendant gets rid of the liability under the decree, a proper decree could be passed in favour of the plaintiff against others whom the Court considers liable.

6. The learned Counsel for the respondents referred to several decisions in support of the contention that Order 41, Rule 33 of the CPC cannot be invoked and that the parties sought to be impleaded in the second appeal should not be added as parties. Though properly speaking I would be justified in hearing the arguments on the main question, as the learned Counsel argued with some vehemence even at the preliminary stage of impleading defendants 1, 2 and 4, I propose to examine the position and satisfy myself about the correctness of the stand taken by me.

7. The first decision referred to by the learned Counsel is *Muhammad Khaleef Shirazi and Sons v. Les Tanneries Lyonnaises* and Anr. ILR 49 Mad. 435 : 53 I.A. 84 : 51 M.L.J. 570 : AIR 1926 P.C. 34. The headnote correctly brings out the point decided, which runs as follows:

A suit was filed against A and B as agent of A. The trial Judge (The Original Side of the High Court) passed a decree against A but by his decree dismissed the suit against B, but decreed that B should pay to the plaintiffs taxed costs and interest thereon. The plaintiffs did not appeal to the High Court against the decree of the trial Judge dismissing the suit against B. A and B jointly appealed to the High Court against the decree which had been made against them. On that appeal the High Court found that A was not liable to pay anything in respect of one of the suit contracts and modified the decree in respect of their liability under the other suit contract with certain costs and dismissed the suit against A and B. Against that decree of the High Court the plaintiffs appealed to the Privy Council.

Held : the appeal to His Majesty in Council in so far as B was concerned was in effect an appeal direct to his Majesty in Council from the decree of the trial Judge, which is not allowable under the Code of Civil Procedure, or under the Letters Patent of the High Court, and that Order 41, Rule 33 is not intended to apply to such an appeal and accordingly the appeal so far as B was concerned should be dismissed.

That case is clearly distinguishable from the facts of the present case.

8. The next decision referred to is of the decision of the Privy Council in AIR 1927

252 (Privy Council) . There the plaintiffs had instituted 2-suits impeaching certain transfers made by a trustee in favour of the first defendant. The transferees from the first defendant were also made parties to the action. The trial Court decided that the original transfers in favour of the first defendant were good and accordingly dismissed the entire suit. The plaintiff appealed to the High Court against all the defendants excepting some defendants who were exonerated and the decree in whose favour had become final. The appeal was dismissed and when the matter was taken to the Judicial Committee their Lordships had to consider whether the Court in appeal could add the defendant No. 1 as respondent and give a decree against him in spite of the fact that the plaintiff had not filed any appeal against him and the period of limitation had expired. Following the decision in AIR 1936 34 (Privy Council) their Lordships held that Order 41, Rule 33 is inapplicable. This decision also, in my opinion, has no direct bearing on the present controversy.

9. The third decision referred to by the learned Counsel is again a decision of the AIR 1939 86 (Privy Council) where their Lordships observed at page 91 that they are clearly of opinion that Rule 33 could not rightly be used in the present case so as to abrogate the important condition which prevents an independent appeal from being in effect brought without any notice of the grounds of appeal being given to the parties who succeeded in the Court below. In my view, this decision is also distinguishable;

10. The learned Counsel referred to Palacherla Anandu and Anr. v. Mallipudu Acharyalu and Anr. (1958)2 A.W.R. 196 : AIR 1958 A.P. 743 where it was held that Order 41, Rule 33 cannot be invoked in a second appeal. It is unnecessary to go into this question as this Court has taken the view that Order 41, Rule 33 applies to second appeals also and Order 43. Rule 1 makes the provisions of Order 41 applicable to second appeals as well.

11. The last decision cited by the learned Counsel is Ammukutty Amma and Another Vs. Madhavi Amma, which followed the Privy Council decision in. AIR 1927 252 (Privy Council) .

12. The learned Counsel for the respondents in the petition drew my attention to several decisions the first of them being Subramaniam v. Sinnammal 59 M.L.J. 634 : ILR 53 Mad. 881 : AIR 1930 Mad. 801 where Order 41, Rule 33 was invoked in a case where the plaintiff dissatisfied with the decree passed in his favour preferred an appeal. In the appellate Court the question arose whether in a proper case the appellate Court has jurisdiction to exercise its power in favour of the respondent by dismissing the plaintiff's case in to, although the respondent did not prefer a cross-appeal or memorandum of objections challenging the decree passed by the first Court.

13. In Kannusami Chetti v. M. Rabiath Ammal and Anr. 65 M.L.J. 548 : AIR 1933 Mad. 806, Sundaram Chetty, J. held that the appellate Court has jurisdiction under Rule 30 to add a person as a party respondent for the purpose of

exercising the powers vested in it under Rule 33, though no appeal or memorandum of cross-objections had been filed. The learned Judge further held that the exercise of such extraordinary powers is a matter of discretion with the appellate Court which must depend upon the peculiar circumstances of each case.

14. In *Venukuri Krishna Reddi and Another Vs. Kota Ramireddi and Others*, , *Raiamannar, C.J., and Venkatarama Aiyar, J.*, observed at page 852 as follows:

But there are well recognised exceptions to this rule. One is where as a result of interference in favour of the appellant it becomes necessary to readjust the rights of other parties. This might happen when A files a suit claiming a relief in the alternative against B or C and obtains a decree against B and not against C and in an appeal by B the Court holds that it is C and not B that is liable. That is the illustration to the rule. The decision in *Srimati Charu Bala Dasi and Others Vs. Srimati Nihar Kumari Dasi and Others*, and *Kannusami Chetti v. Rabiath Ammal* 65 M.L.J. 548 : AIR 1933 Mad. 806 are other instances of the application of the principle.

A second class of cases based on the same principle is where the question is one of settling mutual rights and obligations between the same parties. The decision in *Attorney-General v. Simpson* (1902) 2 Ch. 671 is a leading authority falling under this category.

A third class of cases in which this rule has been applied is when the relief prayed for is single and indivisible but is claimed against a number of defendants. In such cases, if the suit is decreed and there is an appeal only by some of the defendants and if the relief is granted only to the appellants there is the possibility that there might come into operation at the same time and with reference to the same subject-matter two decrees which are inconsistent and contradictory.

This however, is not intended to be an exhaustive enumeration of the classes of cases in which Courts could interfere under Order 41, Rule 33. Such an enumeration would neither be possible nor even desirable for situations might arise which cannot be foreseen or predicted in which the Court must have the power to exercise its jurisdiction under that rule.

15. In the *The Great Eastern Shipping Co. Ltd. Vs. S. Mohammed Samiullah Saheb and Co. and Another*, , *Ramachandra Iyer, J.*, as he then was applied the principle of Order 41, Rule 33 to revision petitions u/s 115, CPC also. The learned Judge observed that where a decree passed against the revision petitioner and in favour of the first respondent is set aside in revision, there is no impediment in passing a decree against the second respondent, if he is found liable, for the amount in respect of which the first respondent is held entitled to.

16. In *State of Uttar Pradesh Vs. Tulsi Ram and Others*, , *Beg, J.*, held at page 166 as follows:

Powers conferred by Order 41, Rule 33, Civil Procedure Code, seem to be wide

enough to enable this Court to alter the decree, in order to do complete justice, so that it is set aside against the defendant appellant but passed against a defendant respondent who should have been actually held liable. It only involves the substitution of one defendant by the correct one, on findings given, as the judgment-debtor in the decree passed.

17. Following the above catena of the decisions of this Court, I am of opinion that the newly added persons to whom notice has been issued should be made parties to the second appeals to enable this Court to pass an appropriate decree ultimately.

18. The part-heard second appeal will be posted for hearing after the holidays.