

(1973) 05 MAD CK 0005

In the Madras High Court

Case No : C.M.P. No. 13669 of 1972 in S.A. 261 of 1971

Muriyattu Nakaranna Krishna Dass Narayana Brahmananda
Dheerthar Peria Swamiyar Thirumum Pillai

APPELLANT

Vs

Panchayat Union and Others

RESPONDENT

Date of Decision : 03-05-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 20, Order 41 Rule 33, Order 42 Rule 1, Order 43 Rule 1

Citation : AIR 1974 Mad 167 : (1974) 87 LW 635

Hon'ble Judges : Raghavan, J

Bench : Single Bench

Judgement

1. 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 Arudesom 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 of the plaintiff opened a roadway along portions of the suit properties, that such portions are

wrongfully taken and over which the road has been laid; thereby the defendants had 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 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. 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 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 came to the conclusion that

the third defendant is not liable, but that the plaintiff is entitled to get 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, C.P.C. Mr. A. Alagiriswami entered appearance on their behalf and opposed the application.

The learned counsel contended that Order 41, Rule 33, C.P.C. cannot be invoked

in the circumstances of the case and drew my attention to

Order 41, Rule 33, C.P.C. 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, C.P.C. Order 41, Rule 33, C.P.C. applies to second appeal 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 can not 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 that a decree was prayed for against four persons. The

trial court granted a decree against one of them. The judgment-debtor filed the appeal against the plaintiff alone leaving out 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, C.P.C. can be invoked in a case of this kind and all the parties brought before the court so that in case the

third defendant get 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, C.P.C. cannot be

involved 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 arrangements 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 Mohammed Khaleef

Shirazi v. Les Tanneries Lyonnaises AIR 1926 PC 34. the head

note 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 court 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 C. P. Code 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 plaintiff had instituted two suits

impeaching certain transfers made by the 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 first 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 1926 PC 34 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 Privy Council in 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 referred to Palacherla Anandu v. Mallipudu Acharyulu 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 S.M.S. Subramanian

Chettiar (dead) and Another Vs. Sinnammal and Others, 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 toto, 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 Vs. M. Rahimat Ammal and Another, , Sundaram Chetty J. held that the appellate court has jurisdiction under Rule 20 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*, ,
Rajamannar C. J. and Venkatarama Ayyar J. observed at p. 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 Vs. M. Rahimat Ammal and Another*, ,

are other instances of the application of the principle.

A second class based on the same principle is where the question is one of settling mutual rights and obligations between the same parties. The

decision in the *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.

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, C.P.C. 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.

15. In the State of Uttar Pradesh Vs. Tulsi Ram and Others, as follows:--

Powers conferred by Order 41, Rule 33, C.P.C. 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 decrees passed.

16. 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 appeal to enable this court to pass an appropriate decree ultimately.

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

18. Order accordingly.