

(1993) 04 KAR CK 0001

In the Karnataka High Court

Case No : M.F.A. No. 2964 of 1987 (Misc) and CRP No. 1366 of 1993

S. Nagaraj

APPELLANT

Vs

S.V. Swaminathan

RESPONDENT

Date of Decision : 22-04-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, 104, 115
Transfer of Property Act, 1882 — Section 69 A

Citation : (1993) 2 DMC 241 : (1993) ILR (Kar) 1531 : (1993) 2 KarLJ 118

Hon'ble Judges : S. Venkataraman, J; M. Ramakrishna, J

Bench : Division Bench

Advocate : C.N. Seshagiri Rao, for the Appellant; K.V. Hegde Kangod, Narayana Hegde and S.G. Krishnamurthy, for the Respondent

Judgement

Venkataraman, J.—This Appeal has been filed by the respondent in Misc. No. 632 of 1984, on the file of the City Civil Judge (C.C.H.No. 7), Bangalore against the order dated 6th November, 1987 allowing the petition of the petitioner and appointing a Receiver.

2. The parties will be referred to by the rank they held in the lower-Court.

3. The petitioner has filed a petition in the lower-Court u/s 69-A of the Transfer of Property Act ("Act" for short), requesting the Court to appoint a Receiver for the mortgaged property. The respondent therein contested the petition and opposed the appointment of a Receiver on various grounds. The trial Court has passed the impugned order allowing the petition and appointing a Receiver.

4. Originally this Appeal had come up before a Single Judge and the Appeal was admitted and interim stay was granted. The petitioner (present respondent) filed objections and one of the contentions raised by him was that as the impugned order was not one passed under Order 40 Rule 1 C.P.C., the appeal would not lie under Order 43 Rule 1 C.P.C. and that consequently this Appeal cannot be heard by a single Judge under the provisions of the Karnataka High Court Act, This

objection was heard and on 25.10.1989 an order has been passed by Hon. Justice DP. Hiremath to the effect that the impugned order cannot be construed as an order falling under Order 40 of C.P.C.; that it is one passed u/s 69-A of the Act and that as such the appeal has to be heard by a Bench of two Judges u/s 10(v) of the Karnataka High Court Act. In that view of the matter, this appeal was directed to be placed before a Division Bench, Accordingly, this matter has come up before us.

5. When we heard the merits of the Appeal the petitioner (respondent herein) contended that no appeal lies against an order u/s 69-A of the Act and that as such this Appeal itself is not maintainable. The learned Counsel for the appellant/respondent in the Lower-Court was heard with regard to the maintainability of this appeal.

6. Section 69-A of the Act provides that a mortgagee having the right to exercise a power of sale u/s 69 shall be entitled to appoint a Receiver of the income of the mortgaged property or any part thereof; that a person who has been named in the mortgage-deed and is willing to act as Receiver, will have to be appointed by the mortgagee; that if no person has been so named and if the mortgagor does not agree to the appointment of any person as a Receiver, then the mortgagee shall be entitled to apply to the Court for appointment of a Receiver.

7. It is under this provision an application has been made before the Lower-Court for appointment of a Receiver and the Receiver has also been appointed under that provision by the lower Court.

8. At the outset it may be noted that the power of the Court to appoint a Receiver under Order 40 C.P.C. is quite distinct from the power to appoint a Receiver u/s 69-A of the Act. The circumstances under which a Receiver could be appointed under Order 40 C.P.C. are quite different from those under which a Receiver can be appointed u/s 69-A of the Act. A Receiver appointed under Order 40 C.P.C. is an officer of the Court, while the Receiver appointed u/s 69-A of the Act shall be deemed to be the Agent of the mortgagor. That apart though the Court appoints a Receiver u/s 69-A, the statute stipulates that he shall be deemed to have been duly appointed by the mortgagee. Thus an order appointing a Receiver on an application filed by a mortgagee u/s 69-A of the Act cannot be treated as an order under Order 40 C.P.C., against which an appeal is permissible under Order 43 Rule 1 C.P.C. if Order 43 Rule 1 C.P.C. is not applicable to file an appeal against the impugned order, then we have to see under which provision an appeal lies. Transfer of Property Act itself does not provide for any appeal against the appointment of a Receiver u/s 69-A.

9. The learned Counsel for the appellant (Respondent in the lower Court) contended that this Appeal is maintainable u/s 96 C.P.C. According to him, the order in question partakes the character of a decree and as such appeal u/s 96 can be filed. u/s 96 C.P.C. appeal is permitted only from a decree passed by a Court exercising original jurisdiction. Section 2(2) of C.P.C. defines "decree" and

as per that definition it means formal expression of an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the "suit", As such the expression "decree" can apply only to an adjudication in a suit. The impugned order which is passed on an application u/s 69-A of the Act is not a decree, as the same is not passed in any suit.

Merely because a Court has passed an order it does not necessarily follow that an appeal can be filed against that order. There must be some provision which enables a party to file an appeal against that particular order.

In this connection, a reference may be made to a Decision in MEENAKSHI NAIDOO v. SUBRAMANYA SASTRI 1986 Ind App 14 160 in which the Privy Council has observed at page 165 as under: -

"In approaching the consideration of this question, their Lordships cannot assume that there is a right of appeal in every matter which comes under the consideration of a Judge, such right must be given by statute, or by some authority equivalent to a statute".

10. In UNION OF INDIA AND ORS. v. NARASIYAPPA AND ORS. 1970 (1) Mys. LJ. 319 it has been held that the right to file appeal is a substantive right and not a mere matter of procedure and that the right to appeal has to be expressly conferred upon a party by the relevant statute (Para 16).

11. In the instant case no right of appeal is conferred against an order u/s 69-A of the Act.

12. The learned Counsel for the appellant cited the Decisions in GODOOBAI v. JANABAI AIR 1929 Nag 119 and in MR. CHANDRA WATI v. JAGAN NATH SINGH RAM LAL AND ORS. AIR 1925 Lah 489 to contend that where a Receiver is appointed even in proceedings under Guardian and Wards Act, an appeal under Order 43 Rule 1 C.P.C. is maintainable and that on the same analogy the present Appeal would also be maintainable. In these two Decisions it has been held that even in proceedings under Guardian and Wards Act a Receiver can be appointed under Order 40 Rule 1 C.P.C. and that against such an appointment, appeal under Order 43 Rule 1 C.P.C. is maintainable. In those cases the appointment of Receiver was made under Order 40 Rule 1 C.P.C. Hence those Decisions cannot be of any help to the appellant.

13. The Decision in Ram Khelawan Vs. Sudama Devi, relief upon by the appellant's Counsel would only show that a Receiver can be appointed under Order 40 Rule 1 C.P.C. even in proceedings other than suits.

14. The learned Counsel for the appellant contended that though Section 69-A of the Act empowers the Court to appoint a Receiver, the Court can appoint the Receiver only under Order 40 Rule 1 C.P.C. In support of this contention he relied on a Decision in Anandi Lal and Others Vs. Ram Sarup and Others, The "question that was referred to the Full Bench in that case was whether under the provisions

of the C.P.C. it is competent for the Appellate Court to appoint a Receiver for the mortgaged property pending decision of an appeal against a mortgage decree. It is while dealing with that question the Court has observed that the authority to appoint a Receiver is prescribed in Order 40 Rule 1 C.P.C. and that a Civil Court cannot therefore act outside that Rule. The Court after referring to Section 94(d) C.P.C. under which a Court has power to appoint a Receiver to any property "if it is so prescribed", has pointed out that it is Order 40 Rule 1 which prescribes the authority for appointing a Receiver. That Decision would only show that in a suit or in an appeal, it is only under the authority of Order 40 Rule 1 C.P.C. a Receiver will have to be appointed. In that case the Court had no occasion to deal with the power of the Court to appoint a Receiver u/s 69A of the Act. We are unable to agree that even in exercise of the power u/s 69A of the Act, the Court has to have recourse only to Order 40 Rule 1 C.P.C. to appoint a Receiver. We have already pointed out that the circumstances under which a receiver can be appointed u/s 69A of the Act and the circumstances under which a Receiver under Order 40 Rule 1 C.P.C. can be appointed are quite different.

15. The learned Counsel for the appellant next relied on the Decision in V. Venkatanarayana Rao Vs. Champalal Savansukha and Another, and in Krishnammal Vs. N. Krishna and Others, to demonstrate that an appeal is maintainable against an order appointing a Receiver u/s 69-A of the Act. He pointed out that in both the above cases the appeals had been filed against an order passed u/s 69-A of the Act. But it is conceded by him that in both the cases mentioned above, the question whether an appeal is maintainable against an order u/s 69-A of the Act did not at all arise for consideration and that that point has also not been dealt with in those cases. As such the above two Decisions cannot be of much help to the appellant.

16. Section 104 C.P.C. specifically provides that an appeal shall lie from the Orders mentioned therein 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. Section 104 or Order 43 Rule 1 C.P.C. does not authorise an appeal against an order passed u/s 69-A of the Act. Consequently, we have to hold that no appeal is maintainable against the impugned order.

17. The learned Counsel for the appellant submitted that in case this Court were to hold that an appeal against the impugned order is not maintainable, then this appeal itself may be converted into a Civil Revision Petition u/s 115 of C.P.C. in the interest of justice as there is patent illegality in the order passed by the lower-Court.

18. He relied upon the Decision in BAHORI v. VIDYA RAM, to contend that the Court has power u/s 151 C.P.C. to convert an appeal into a Revision or vice versa. There can be no doubt that this Court has got inherent power to convert a Miscellaneous First Appeal to a Revision Petition or a Revision Petition to a Miscellaneous First Appeal, if the interest of Justice warrants such a course of action.

19. In the present case, it is pointed out by the learned Counsel for the appellant that in the Lower Court though at first the cross-examination of P.W.1 was taken to be Nil, as the appellant's Advocate was absent, later, on an application made by the appellant, the Court passed an order permitting the appellant's Advocate to cross-examine P.W.1; that then the case was coming up for cross-examination of P.W.1, that on account of his absence the Court closed his evidence and that as P.W.1 was not tendered for cross-examination the appellant also closed his evidence; that the Court while passing the order has over-looked the above facts and has proceeded on the basis that the evidence of P.W.1 had not been challenged and that this has resulted in grave injustice to the appellant. There appears to be some force in the contention of the learned Counsel for the appellant and we feel that it is necessary in the interest of Justice that the grievance of the appellant has to be examined. We are aware that the impugned order was passed more than five years back and that this Appeal itself has been pending from quite a long time. But these facts should not come in the way of our exercising the inherent power u/s 151 C.P.C. in directing this Miscellaneous First Appeal to be registered as a Civil Revision Petition, inasmuch as, we are convinced that the interest of Justice requires examination of the impugned order by this Court.

20. For the above reasons, we hold that this Miscellaneous First Appeal is not maintainable against the impugned order. We direct the office to register this Miscellaneous First Appeal as a Civil Revision Petition and place the matter before the appropriate Bench.