

(1965) 09 MAD CK 0050
In the Madras High Court

Soosai Arulan and Others

APPELLANT

Vs

Irudayammal and Others

RESPONDENT

Date of Decision : 02-09-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, 105(2)

Citation : (1968) ILR (Mad) 653 : (1969) 1 MLJ 64

Hon'ble Judges : P.S. Kailasam, J

Bench : Division Bench

Judgement

P.S. Kailasam, J.—The defendants are the appellants in this Civil Miscellaneous Appeal. The plaintiffs filed a suit in the Court of the District Munsif of Ramanathapuram for redemption of an othi. dated nth October, 1923, executed by one Maria Soosai and his mother Arulayee in favour of Seenii Ahammad Ghani Rowther for Rs. 1,000. The first plaintiff Irudayammal claimed to be the wife and the second plaintiff, Thiresammal as the daughter of the mortgagor, Maria Soosai. Plaintiffs 3 to 6 purchased some of the properties from plaintiffs 1 and 2 by sale deeds, dated 3rd March, 1958 and 10th April, 1958. It was alleged that the mortgagee was enjoying the suit properties during his lifetime, and after him his brother, the fifteenth defendant was in possession and enjoyment. The twelfth defendant is the son of the mortgagee. It was further alleged that the fifteenth defendant handed over possession for consideration to one Esudayan. The first defendant is the wife of Esudayan and defendants 2 to 11 are the children of Esudayan. Plaintiffs 1 and 2 as heirs of the mortgagors and the other plaintiffs as purchasers from the heirs of the mortgagors claim the right to redeem the othi. They also claim that as the othi was more than thirty years ago and as the suit properties had been in possession and enjoyment of the mortgagees, the othi became wiped out as per statute.

2. The defendants resisted the suit on various grounds. They pleaded that the first plaintiff and the second plaintiff were not entitled to the properties of Maria Soosai, as the first plaintiff even during the lifetime of Maria Soosai left him and

was living with one Arokiam of Anandhana Kottai, and the second plaintiff is the daughter of that Arokiam. The defendants also claimed that the first defendant's husband purchased the suit properties othied in favour of Ahmed Seenii Rowther from Arulayee and Maria Soosai by sale deed, dated 22nd July, 1932. The defendants further contended that in any event the defendants had been enjoying the suit properties adversely to the plaintiffs for over the period of limitation, and thereby prescribed title. They also contended that the suit items 3, 7, 11, 24 and 28 never belonged to the plaintiffs and claimed title to items 3, 7, and 11 by purchase.

3. The trial Court found that plaintiffs 1 and 2 were not the heirs of Maria Soosai and, therefore, they were not entitled to file a suit for redemption, that the father of defendants 2 to 6 had purchased the suit properties and redeemed to othi from the fifteenth defendant, that they prescribed title by adverse possession and that items 3, 7, 11, 24 and 28 never belonged to the plaintiffs.

4. On appeal by the plaintiffs, the learned Subordinate Judge of Ramanathapuram found that the first plaintiff is the widow and the second plaintiff, the daughter of Maria Soosai, that they were entitled to inherit the properties and to redeem the othi, that the alleged sale of the suit properties in favour of the second defendant's father was not true, that the defendants have not prescribed title by adverse possession that items 3, 7 and 11 belonged to the plaintiff and that the defendants could not resist redemption of those items. On these findings the lower appellate Court set aside the decree of the trial Court, allowed the appeal and remanded the suit to the Lower Court directing it to frame an issue whether the mortgage debt was wiped out as per the provisions of the Agriculturists Relief Act and if not for the -determination of the amount payable to the defendants, as this issue was not decided by the trial Court during the trial.

5. The defendants have preferred this Civil Miscellaneous Appeal challenging the order of remand. In this appeal the appellants seek to attack all the findings of the lower appellate Court. It was urged on behalf of the appellants that the lower appellate Court ought to have found that the plaintiffs were not the wife and daughter and therefore not entitled to redeem the othi, that the defendants had purchased the suit items, that they have prescribed title by adverse possession and that the other items did not belong to the plaintiffs. Learned Counsel for the appellants contended that it is open to him to contest in this Court all the findings of the lower appellate Court on questions decided against them, which, if decided in their favour, would have obviated the order of remand. On the other hand learned Counsel for the respondents submitted that the appellants are entitled in an appeal against the order of remand to dispute its correctness alone and are not entitled to challenge the other findings, which were decided against them. On the contentions raised the scope of an appeal against an order of remand arises for determination.

6. Order 41, Rule 23, Civil Procedure Code, provides that when a suit is disposed

of upon a preliminary point and when the decree is reversed in appeal and when the appellate Court in reversing or setting aside the decree in appeal considers it necessary in the interest of justice to remand the case, the appellate Court may by order remand the case. Order 43, Rule 1 (v) provides an appeal from an order passed under Order 41, Rule 23. Section 105 (2), Civil Procedure Code, provides that where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness. Section 105 (2) therefore, enables the appellant against the order of remand to dispute the correctness of the order of remand. The correctness of the order of remand may be questioned on the ground that it is not in accordance with Order 41, Rule 23, in that the suit was not disposed of upon a preliminary point or that it was not necessary in the interests of justice to remand the case in reversing or setting aside the decree. It may be open to contend that the order of remand itself is unsustainable, as for instance in this case, it may be submitted that the order directing the trial Court to decide whether the mortgage debt is wiped out under the Agriculturists Relief Act itself is unsustainable in law. The grounds of challenge abovementioned would be disputing the correctness of the order of remand. A wider interpretation of the words disputing the correctness of the order of remand may embrace challenging all findings, which were decided against the appellant, and which, if found in his favour, would obviate an order of remand. The Courts, have not accepted either the restricted interpretation pleaded for by the respondents or the wider interpretation pleaded for by the appellants. In *Jainul Abideen Marakayar v. Habibulla Sahib* (1927) 27 L.W. 483, the trial Court disposed of a suit on a mortgage to enforce a covenant for pre-exemption in favour of the plaintiff in the mortgage deed. According to the covenant, the mortgagor agreed that in the event of his selling the mortgaged properties within the period fixed in the mortgage bond for the payment of the mortgage debt, he should offer them for sale at the then market rate in the first instance to the plaintiff. The first defendant sold the mortgaged properties to his wife by a registered sale deed. The plaintiff in that case also contended that the purchaser, the wife, had notice of his right of preemption and, therefore, the sale in her favour was not valid. On behalf of the defendants it was submitted that there was no agreement to sell the property to the plaintiff and that in any event it was unenforceable, as it was not supported by consideration. It was also pleaded that the property was conveyed by the first defendant to his wife not by sale but by gift. It was further contended that the second defendant was a bona fide purchaser without knowledge of the agreement in the plaintiff's favour. The trial Court found in the plaintiff's favour that under the mortgage deed he had a valid covenant for preemption in respect of the mortgaged properties, if the mortgagor wanted to sell those properties within the period fixed for redemption of the mortgage. The trial Court found further that the conveyance in favour of the second defendant by the first defendant was in the nature of a gift and, therefore, the plaintiff had no cause of action and dismissed the suit. Because of this finding the trial Court did not consider the issue whether the second defendant took the conveyance in her favour with the knowledge of

the first defendant's agreement with the plaintiff for pre-emption. In the appeal the learned Subordinate Judge upheld all the findings of the trial Court in favour of the plaintiff. It also held that the conveyance by the first defendant to the second defendant was a sale and not a gift and, therefore, the plaintiff had a right to enforce his right of pre-emption against her, if she had purchased with the knowledge of the agreement. But as the question of the purchase by the second defendant with the knowledge of the agreement of pre-emption in favour of the plaintiff was not considered by the trial Court, the lower appellate Court remanded the suit for fresh disposal after trying the question of knowledge. The defendants preferred an appeal to the High Court against the order of remand and sought to contest all the findings of the appellate Court against them, which if found in their favour, would, have obviated the remand. It was held that Section 105 (2) confined the scope of the appeal to the question of the correctness of the order of remand which might be impeached either on the ground that the remand itself was illegal as the decision of the first Court was not on a preliminary point or on the ground that the decision of the preliminary point by the appellate Court was erroneous, and that no other questions could be raised in the appeal, whatever bearing they might have upon the merits of the appellant's case. It was further observed (at page 486):

If such a second appeal comes to be preferred the only question which cannot be re-agitated in second appeal by reason of Section 105, Sub-section (2) is the correctness of the finding on the point upon which the order of remand had been made.

7. The Court declined to accede to the appellants' contention that he could challenge all the findings against them as that would have the effect of converting" the appeal against the order of remand into an appeal from the decree itself. The Court was of the opinion that the only point which might be raised in the appeal was the correctness of the finding of the Subordinate Judge that the conveyance by the first defendant in favour of the second defendant was a sale and not a gift as held by the trial Court. The scope of an appeal against an order of remand as laid down in this decision is with regard to not only disputing the correctness of the order of remand but also the correctness of the finding upon which the order of remand had been made. This decision was approved by a Full Bench decision of this Court in *The Right Honourable the Secretary of State for India in Council Vs. Allu Jagannadham*, . In the case before the Full Bench the plaintiff filed a suit against the Secretary of State for India for a decree for Rs. 426, which, according to him, was unlawfully collected from him as arrears of tax in pursuance of a notification. On behalf of the Secretary of State it was contended that the civil Court had no jurisdiction to try the suit. The trial Court rejected this contention and held that the Court had jurisdiction and that the notification which empowered the Government to collect the tax was invalid. The State preferred an appeal, and the appellate Court concurred with the findings of the trial Court holding that the civil Court had jurisdiction and that the notification relied on by the Government was not valid. The Government sought

to justify the collection of tax relying on an earlier notification. On the Government's request the lower appellate Court remanded the suit calling for a finding as to the validity of the earlier notification. The trial Court held that the earlier notification was also invalid and passed a fresh decree. The State appealed but the lower appellate Court concurred with the finding of the civil Court and dismissed the suit. The State in a second appeal sought to question the jurisdiction of the civil Court, but was met with the plea that the State having failed to prefer an appeal against the order of remand was barred u/s 105 (2) from questioning the correctness of the decision of the lower appellate Court holding that the civil Court had jurisdiction to try the case. The Full Bench held that the State was not aggrieved by the order of remand and that there was no ground for appeal and that it would be monstrously unjust to hold that the State was precluded from raising the question of jurisdiction. It upheld the right of the State to question all the decisions made by the lower appellate Court except the decision with regard to the order of remand. The Full Bench approved the decision in *Jainul Abideen Mamkayar v. Habibulla Sahib* (1927) 27 L.W. 483, holding that an order of remand might be impeached on the ground that it was illegal as the decision of the first Court was not on a preliminary point, or on the ground that the decision of the preliminary point by the first appellate Court was erroneous. In considering the scope of an appeal against an order of remand *Viswanatha Sastri, J.*, in *Kota Kanakayya and Another Vs. Kamepalli Lakshmayya and Others*, , 382 has stated thus:

A separate right of appeal is provided against such an order (order of remand). Not only is a right of appeal provided by Order 43, Rule 1, Clause (u) but an obligation is cast by Section 105 (2), Civil Procedure Code, upon a person dissatisfied with an order of remand to appeal against it on pain of losing his right to object to the propriety or the correctness of the order or the findings on which it is based in the later stages of the litigation.

In *Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another*, , the Supreme Court has held at page 946 as follows:

A special provision was made as regards orders of remand and that was to the effect that if an appeal lay and still the appeal was not taken the correctness of the order of remand could not later be challenged in an appeal from the final decision.

8. The scope of an appeal against an order of remand as laid down by *Jainul Abideen Marakayar v. Habibulla Sahib* (1927) 27 L.W. 483, and approved by the Full Bench in *The Right Honourable the Secretary of State for India in Council Vs. Allu Jagannadham*, ; and as explained in *Kota Kanakayya and Another Vs. Kamepalli Lakshmayya and Others*, , would include the right to object not only the propriety or the correctness of the order of remand but also the findings on which the order of remand is based.

9. In this case the lower appellate Court reversed the findings of the trial Court

and held that plaintiffs 1 and 2 were the wife and daughter of the mortgagor and were entitled to redeem, that the defendants had not purchased the suit items, that they had not prescribed title by adverse possession and that the several items, which they contended did not belong to the plaintiffs, belonged to the plaintiffs. It was contended by Mr. P.S. Ramachandran, learned Counsel for the appellants that the findings on which the order of remand is based would include the finding that the plaintiffs are the heirs of the mortgagor, the finding that the defendants did not purchase the mortgaged property, the finding that they have not prescribed title by adverse possession and the finding that the property belonged to the plaintiffs. It is no doubt true that if the findings regarding the purchase by the defendants of the mortgaged property and the defendants prescribing the title by adverse possession were found in favour of the appellants, it would have obviated the order of remand. But it cannot be said that the order of remand was based on these findings. The lower appellate Court, as it reversed the findings of the trial Court and held that the plaintiffs were entitled to redeem the property, found it necessary to remand the suit for fresh disposal on an issue, which was not decided by the trial Court. The order of remand, is, therefore, based on the finding that the plaintiffs, who are the heirs of the mortgagor, are entitled to redeem. In the appeal the appellants can only question the correctness of the findings that the plaintiffs are the heirs and they are entitled to redeem. The correctness of the other findings cannot be challenged in this Civil Miscellaneous Appeal but can only be questioned in a second appeal that may arise out of the decision of the appellate Court against the judgment of the trial Court on remand.

10. The question as to the correctness of the order of remand on the finding that the plaintiffs are entitled to redeem will have to be considered.

11. The trial Court found that the first plaintiff is not the wife and the second plaintiff not the daughter of Maria Soosai. In coming to that conclusion, the trial Court relied on Exhibit B-2 an application alleged to have been made by the first plaintiff to the Government Tahsildar claiming evacuee allowance. In Exhibit B-2, it is stated that the first plaintiff is the wife of Arokiam and that herself, her parents and daughter are in great difficulties and evacuee allowance might be granted to them. The trial Court accepted Exhibit B-2 as clearly establishing that the; first plaintiff was the wife of Arokiam. The lower appellate Court declined to accept Exhibit B-2, as, in its opinion, it was not satisfactorily proved that P.W. 4 filed Exhibit B-2. Exhibit B-2 was not put to P.W. 4 in her evidence and asked whether she affixed her thumb-impression to Exhibit B-2. According to the defendants,, Maria Soosai married the first plaintiff and after marriage she deserted her husband and was living with Arokiam, and that the second plaintiff was born to Arokiam and the first plaintiff. By this plea it is clear that the defendants admitted that Maria Soosai married the first plaintiff. The burden will be on the defendants to prove that there was a divorce and after the divorce the first plaintiff married Arokiam. There is no evidence whatsoever to establish a divorce and a subsequent marriage with Arokiam. Even if the entire story of the

defendants is believed, it may suggest that the first plaintiff was living with Arokiam. As the second plaintiff was born during the continuance of the marriage between Maria Soosai and the first plaintiff her legitimacy cannot be questioned. It is also pointed out that in the written statement also the defendants did not dispute the fact that plaintiff 1 is the wife and plaintiff 2 is the daughter of Maria Soosai. The finding that plaintiff 1 is the wife and plaintiff 2 is the daughter of Maria Soosai and that they are, therefore, entitled to redeem is correct and is confirmed.

12. The order of remand is confirmed and the trial Court will proceed to frame the issue, whether the mortgage debt was wiped out, as per the provisions of the Agriculturists Relief Act, or what or any amount is due to the defendants, and dispose of the matter according to law. There will be no order as to costs in this appeal.

13. Leave to appeal granted.