

(1989) 11 MP CK 0014
In the Madhya Pradesh High Court
Case No : S.A. No. 72 of 1986

Vijay Prakash and Others

APPELLANT

Vs

Smt. Jankibai and Others

RESPONDENT

Date of Decision : 08-11-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11, Order 41 Rule 22, Order 42 Rule 1, Order 42 Rule 2, 100

Citation : (1990) JLJ 161 : (1990) 35 MPLJ 571 : (1990) MPLJ 571

Hon'ble Judges : B.M. Lal, J

Bench : Single Bench

Advocate : M.M. Sapre, for the Appellant; H.C. Kohli, for the Respondent

Judgement

B.M. Lal, J.

While hearing this Second Appeal on the substantial question of law framed on 7-1-1986, learned counsel appearing for the appellants raised an objection that the Cross-objection filed by the Respondents/plaintiffs invoking the provisions of Order 41, Rule 22, CPC (hereinafter referred to as the C.P.C.), is not liable to be looked into for want of processing it in accordance with the procedure contemplated under Rule 11 of Order 41 and framing substantial question of law as required to be framed in regular Second Appeal under Order 42, Rule 2 read with section 100.

This gave rise to determine:

"Whether the cross-objection filed in Second Appeal falls within the ambit of Order 42, Rule 2 read with section 100, C.P.C. and requires processing in accordance with Rule 11 of Order 41 by framing substantial question of law?"

Bare reading of Order 41, Rule 1 postulates that the entire Order 41 is applicable to appeals from original decrees, i.e. First Appeals, and not to Second Appeals. However, turning to the pages towards the provisions of Order 42, Rule 1, C. P. C. envisages that - "The Rules of Order 41 shall apply, so far as may be, to

appeals from appellate decrees." As such by virtue of Order 42, Rule 1 provisions of Order 41 are made applicable to Second Appeals as well.

In *Keshav v. Tukaram* AIR 1951 Nag. 8, while interpreting the words "so far as may be" used in Order 42, Rule 1, C.P.C. it has been ruled that -

".... this clearly means that if any other provision prohibits from agitating any of the grounds, the same would not be taken to support the decree on those grounds. What then we have to see as if section 100 lays down any prohibition?"

Provisions of Order 42, Rule 1 confer statutory powers for cross-objection by the aid of provisions of Order 41, Rule 22 in Second Appeals and therefore, the words used in Order 42, Rule 1 "so far as may be" are analogous to the words "as far as possible" and has got a wide connotation.

As held in *Keshav's* case (*supra*) we have to see if section 100 lays down any prohibition. Section 100 and Order 42, Rule 2, C.P.C. as amended by Act No. 104/1976 cannot be lost sight of. Read in conjunction, section 100 and Order 42, Rule 2, C.P.C, as amended, envisages that the memorandum of Second Appeal shall precisely state the substantial question of law involved in the appeal and that it be heard on the question so formulated by the Court. Rule 2 of Order 42 reads as under: -

"2. At the time of making an order under Rule 11 of Order XLI for the hearing of a Second Appeal, the Court shall formulate the substantial question of law as required by section 100, and in doing so, the Court may direct that the second appeal be heard on the question so formulated and it shall not be open to the appellant to urge any other ground in the appeal without the leave of the Court, given in accordance with the provisions of section 100."

In the light of the preceding para, the application of provisions of Rule 22 of Order 41, form of objection, provisions applicable and procedure prescribed has to be examined to determine the question raised by the learned counsel for appellants. Therefore, to ascertain whether the cross-objection also requires to be heard only on the substantial question of law, the entire provision of Rule 22 of Order 41 has to be critically examined in conjunction with the provisions of Order 42, C.P.C.

In sub-rule (1) of Rule 22 of Order 41, C.P.C. the word "support has been used although the opposite of word "support" i.e., "attack" has not been used, yet, all the same the respondents may attack the decree by filing the cross-objection, notwithstanding his right to do so to a limited extent and to support the same so far as it is favourable. Therefore, the use of word "support" makes it clear that the right extended in favour of the respondent to support the decree is limited so far as the decree impugned is in his favour and this right to support does not extend beyond enabling the respondent to obtain an alteration in the decree impugned.

This, however, the respondent can do only by invoking the provisions of Order

41, Rule 22, C.P.C. by filing a cross-objection or by filing a regular appeal u/s 100 subject to limitation available. That is to say, a party aggrieved by any part of the decree impugned may file a regular appeal against that part of the decree and has also an additional right under Order 41, Rule 22, C.P.C. of filing cross-objection, if regular appeal is filed by the opposite party and the same is admitted for hearing parties.

Besides this, this cannot be lost sight of that where the judgment impugned wholly dismissed or wholly decreed the lis, the litigant in that event does not get any right contemplated under Order 41, Rule 22, C.P.C. He only gets such right where the decree impugned partly allowed or partly dismissed the lis.

In this context a bare reading of sub-rule (2) of Rule 22 of Order 41 would reveal that such cross-objection shall be in the form of memorandum and all the provisions of Rule 1 of Order 41, C.P.C, so far as they relate to form and contents of memorandum of appeal, shall apply thereto. It has already been found that by virtue of Order 42, Rule 1 provisions of Order 41 are made applicable to Second Appeals as well. Therefore, initially sub-rule (2) of Rule 22 of Order 41 applies to First Appeals. But since it has been made applicable to Second Appeals as well, therefore, the provisions prescribed for forms of appeal etc. contemplated for Second Appeals shall also apply and memorandum of cross-objection filed under Order 41, Rule 22 shall be in accordance and in conformity with the provisions applicable to the memorandum of Second Appeal i.e. section 100, C.P.C. which requires framing and precisely pointing out the substantial question of law involved therein, for attacking the decree impugned.

This is more clear from perusal of provisions of sub-rule (4) of Rule 22 of Order 41, C.P.C. which gives jurisdiction to the appellate Court in dealing with and deciding the cross-objection even in the absence of second appeal, if dismissed for default or withdrawn. This, in the opinion of this Court, can only be done if the substantial question of law is framed without which the hearing of cross-objection is not possible and, therefore, the cross-objections require to pass through the stages of Order 41, Rule 11 read with Order 42, Rule 2, C.P.C.

Here it will not be out of place to mention that in appeals filed under clause (x) of the Letters Patent, cross-objection under Order 42, Rule 22. C.P.C. can also be filed by the respondent against the part of the decree which is against him, but this could only be done with the leave of the Single Judge from whose judgment the L.P.A. arises and not as a matter of right. See *Smt. Satyabhamadevi Choubey Vs. Ramkishore Pandey*, . This being so and despite the procedure as discussed above, how any contemporary cross-objection can be entertained without adhering to the provisions in strict form referred to above without processing it as required under Rule 11 of Order 41 read with Order 42, Rule 2, C.P.C. and framing substantial question of law?

It is further more clear that where the appellant wants to prefer an appeal against any part of the decree against him, he is required to show substantial

question of law arising in the appeal as required under Order 42, Rule 2 read with section 100, C.P.C. and if he fails to demonstrate the apparent error involving any substantial question of law, his appeal cannot be admitted. Similarly, this being the touchstone for the appellant, the same yardstick had to be applied for the respondent as well and as such the respondent cannot claim the right to prefer such an appeal by way of cross-objection merely because the appellant had preferred an appeal after showing the substantial question of law.

Learned counsel appearing for the respondents/defendants made strong reliance on Chanchalgauri Romlal and Ors. v. Narendra Kumar Chandulal and Ors., AIR 1986 Gujarat 55, and contended that cross-objection is not an appeal and cannot be converted into an appeal, but all the same this decision also rules that "cross-objection would be an appeal for all practical purposes". This being so, for giving effect to the words used "for all practical purposes", practically the cross-objection is also required to pass through the process of Rule 11 of Order 41, C.P.C. in framing substantial question of law and then only sub-rule (4) of Rule 22 of Order 41, C.P.C. could legitimately be given effect to i.e. in the event of dismissal or non-maintainability of the Second Appeal, the cross-objection may subsist independently and can be decided on merits as required under sub-rule (4) of Rule 22 of Order 41, C.P.C. In this context the amendment introduced in section 100 and Order 42, Rule 2, C.P.C. cannot be lost sight of and as such, Chanchalgauri Ram Lal's case (supra) virtually supports the contention raised by the learned counsel for appellants.

The amendment introduced in Order 42, Rule 2 and section 100, C.P.C. by the Act No. 104 of 1976 brought radical changes in hearing second appeals as well as cross-objections. Before this amendment, substantial question of law was not required to be framed in second appeal and once a second appeal is admitted for hearing parties, the entire decree impugned could be attacked by the appellant. But after the amendment referred to above, the entire situation has changed. The appellant now is required to mention the substantial question of law, so that the appellant may address the Court on that ground alone and the respondent may not be given surprise to reply the arguments advanced by the appellant.

Similarly, in the opinion of this Court, while filing the cross-objection, the respondent also has to mention the substantial question of law in the memorandum of cross objection and the same is required to be formulated by the appellate Court so as to allow the respondent to advance argument on that substantial question of law alone and the appellant may not be given surprise in attacking the decree impugned which is in favour of the appellant so as to avoid any discrimination between the parties litigating in Second Appeal.

It is noteworthy that as laid in Keshav's case (supra) that - "it is not that each and every rule and each and every part of each rule under Order 41 would apply to second appeals" clearly means that Order 41, Rule 22 is only an enabling provision for filing the cross-objection in Second Appeal, but the prohibition prescribed for Second Appeal u/s 100 read with Order 42, Rule 2, C.P.C. must be

adhered to.

From the discussions aforesaid, the answer to the question so framed for deciding the objection in para 2 hereinabove is that: the cross-objection filed in second appeal falls within the ambit of Order 42, Rule 2, read with section 100, C.P.C. and requires processing in accordance with Rule 11 of Order 41, C.P.C. and formulating substantial question of law.

In the result, the objection raised by the learned counsel for the appellants sustains, and it is directed that the cross-objection filed by the respondents/ plaintiffs be processed as contemplated under Order 41, Rule 11, read with Order 42, Rule 2, C.P.C. and be placed before the appropriate bench for admission formulating substantial question of law.