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Court : Kerala

Decided On : Sep-25-2015

Judge : Thottathil B. Radhakrishnan &Amp; Sunil Thomas

Appeal No. : FAO. No. 306 of 2014

Appellant : P.G. Vijayan and Another

Respondent : Mohanan and Another

Judgement :

Sunil Thomas, J.

1. The appellants herein who are the appellants in A.S.No.54 of 2013 of the lower appellate court are aggrieved by the dismissal of I.A.No.774 of 2013, by which they sought an ad interim order of prohibitory injunction.

2. The first appellant is the owner of the plaint A schedule property and the first respondent is his brother. On the western side of the A schedule property, there are properties belonging to the respondents herein. The appellant claimed that a thondu on the western side was developed jointly by the appellants and the respondents into a wider way. After widening it, first respondent allegedly started claiming exclusive right of the way and attempted to block it. Hence, a suit was filed seeking an injunction with respect to the plaint B schedule way. After trial, the suit was dismissed which was carried in appeal by the plaintiff, to the appellate

court. Along with the appeal, an interlocutory application was filed seeking an interim injunction against the respondents therein. The court below by impugned order dismissed the interlocutory application, which is the subject matter of this appeal.

3. The respondents appeared and raised a preliminary objection that the appeal is not maintainable in the light of specific bar under Section 104(2) of the Code of Civil Procedure, as explained by the Full Bench of the Honourable High Court in Sabyasachi Chatterjee Vs. Prasad Chatterjee and Ors. (AIR 2013 CALCUTTA 231).

4. Since the question of maintainability of appeal on a legal issue was raised and the Calcutta view did not appear to be in conformity with the view taken by the single Bench of this Court in Ganesan Vs. Sadasivan (2004(1) KLT 523) which was being consistently followed since thereafter, it was felt necessary to consider the question of maintainability. Mr.Gopikrishnan Nambiar was requested to assist this Court as Amicus Curiae which was readily accepted. The learned counsel has placed all the legal issues involved, supported by the views of Courts in other jurisdictions. He deserves encomium for the excellent research done and valuable assistance rendered as Amicus Curiae.

5. The crux of the contention of the learned counsel for the respondents was that in the light of Section 104(2) of the Code of Civil Procedure, an appeal against an interim order passed by the appellate court is not legally sustainable. Section 104 with special reference to Subsection (2) reads as follows:

104. Orders from which appeal lies:-

(1) An appeal shall lie from the following orders, 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:-

.....

(2) No appeal shall lie from any order passed in appeal under this Section.

6. One of the earliest decisions on this point is Ramaswamy Reddiar and Ors. Vs. Chinna Sithammal and Ors. (AIR 1976 MADRAS 63). In that case two appeals pending before the lower appellate court were dismissed for default. Applications filed to restore both the appeals were dismissed. Those were carried in appeal before the Honourable High Court. The objection raised by the learned counsel for the respondent was that such appeals were not maintainable against the interlocutory orders passed by the appellate court. Learned counsel also relied on the decision in O.C.Kalahasti Vs. Munnuswami Chettiar (AIR 1975 MADRAS 3). In that case, the trial court had refused to grant an injunction which was challenged in a civil miscellaneous appeal. In that appeal, an application for temporary injunction was filed, which was dismissed. That order was challenged in appeal before the Honourable High Court. The Honourable High Court held that in the light of the bar under Section 104(2), such an appeal was not maintainable. Distinguishing Kalahasti's case on facts, High Court in Ramaswamy's case held that the order which was appealed in Kalahasti was an order on an interlocutory application filed in an appeal, which arose from an interlocutory order passed by the trial court and hence, hit by Section 104(2) of the CPC.

7. The High Court in Ramaswamy's case further held that if the learned Judge in Kalahasti's case had really stated that an order passed even in a regular appeal coming under Section 96 CPC is not appealable, it would be purely obiter, for, in the matter before that learned Judge, the order has been passed, not in an appeal coming under section 96, but in an appeal coming under Section 104. The High Court held that Section 104(2) says that no appeal shall lie from any order passed in an appeal under the said section. In order to attract the bar under subsection (2), the appeal should be one falling under Section 104. If the appeal is one under Section 96 and not under Section 104, subsection (2) of the latter section is not applicable. The Court reiterated that subsection (2) of Section 104 has no application to an appeal challenging an order passed in an appeal coming under Section 96 of the CPC.

8. This question came up for consideration again in K. Gangulappa Naidu and Ors. Vs. K.Gangi Naidu (AIR 1982 ANDHRA PRADESH 284). That was a case wherein an interim order passed in an injunction application pending in a regular appeal

before the District Court was challenged before the Honourable High Court. Identical objection under Section 104 (2) CPC was raised, relying on Kalahasti's case along with Chellappan Vs. K.P.Varughese (AIR 1964 Ker 23) and Domlu Guno Vs. Yeshadabai (AIR 1978 Goa 31). The Andhra High Court, following the Madras High Court decision in Ramaswamy Reddiar's case made a similar distinction between those appeals arising under Section 96 read with Order 41 CPC and those appeals challenging orders arising from appeals filed under Section 104 read with Order 43 of the CPC. The Court held that the factual situation arising in Chellappan's case, Kalahasti's case and Domlu Guno's case were identical. In all those cases, interlocutory orders passed in pending suits, were challenged in appeals before the District Court and interim order passed in such appeals were challenged before the High Court. The Court struck a divergent note by holding that in all the above three cases the appeals were preferred from interlocutory orders passed in appeals filed under Section 104(2) r/w Order 43 CPC, whereas in the present case the factual scenario was different since the first appeal arose from a judgment and decree in a suit. On that basis, the Andhra High Court virtually followed the principle laid in Ramaswamy Reddiar's case. 9. Identical factual situation arose before this Court in Ganesan's case (supra). That was a case, wherein, in a pending appeal against a judgment and decree, the appellate court declined to grant an interim relief which was carried in appeal to the Honourable High Court. Relying on Chellappan's case, the maintainability of the appeal was objected to by the respondent. This High Court noted that the decision in Chellapan's case was followed in various subsequent decisions of this Court. The issue was considered by this Court in Moideen Kutty Bava Vs. Kadalundi Panchayath (1991 (2) KLT SN 7) and Sree Narayana Dharma Samajam Vs. V.P.Mohandas (2000 (3) KLT 933) However, it was held that the power given to an appellate court under Section 107 of the CPC was only part of its appellate jurisdiction, and that cannot be characterized as an original jurisdiction in an appellate court, conferred not only to dispose of the appeal on merit, but also to pass such interlocutory orders that are incidental for exercise of the appellate power of Court, as are required.

10. However, learned Single Judge in Ganesan's case noted the divergent stream of thought reiterated in both Ramaswamy Reddiar's case and in Gangulappa

Naidu's case and distinguished it from that of Chellapan's case. Virtually, Chellappan's case was in tune with Kalahasti and Dumlo Duno's cases, though not referred to in Ganesan's case. Learned Single Judge, following Ramaswamy Reddiar's case held that to attract the bar under Section 104(2), the first appeal from which impugned order arises should be one filed under Section 104 of the CPC. But if the appeal is one under Section 96 of the Code of Civil Procedure and if the order passed is otherwise appealable under Order 43, the same cannot be said to be not maintainable in law. Thus this Court approved the decision in Gangulappa Naidu's case and Ramaswamy Reddiar's case. The same view was expressed by the Allahabad High Court in Mohd. Tahir Khan Vs. Mohammed Yunas Khan and Ors. AIR 2006 (NOC) 1393 (All).

11. The above decisions indicate that in Ramaswamy Reddiar, Gangulappa Naidu and Ganesan's cases, the Courts have consistently followed the principle that, if an appeal filed before the High Court is one challenging the interim order passed by the lower appellate court in an appeal filed invoking jurisdiction under Section 104 read with Order 43 CPC, the bar under subsection (2) of Section 104 will operate. On the other hand, if the appeal arises from an interim order passed in an appeal filed under Section 96 read with Order 41, the bar under Section 104(2) of the CPC will not apply.

12. The above decisions show that the decisions in Ramaswamy Reddiar, Ganeshan and Gangulappa Naidu held the view that an appeal against an order passed by the appellate court in an appeal filed under Section 96 read with order 41 CPC will not be hit by Section 104(2) of the CPC. On the other hand, Chellappan's, Kalahasti's and Domlu Guno's cases (supra) referred to above relate to the bar under Section 104(2) with respect to appeal arising from orders passed in an appeal filed under Section 104 or order 43. Both these group of decisions are not contrary to each other but they deal with two different aspects of Section 104(2) CPC and it can be said that ratio one set of decisions is the counter part of the ratio of the other set of decisions.

13. The learned counsel for the respondents herein contended that Ganesan's case was wrongly decided and requires a reconsideration. It was contended that

the Full Bench decision of the Calcutta High Court in Sabyasachi Chatterjee Vs. Prasad Chatterjee and Ors. (AIR 2013 CALCUTTA 231) lays down the correct law. That was a case wherein an identical question involved in two cases were referred to the Full Bench. Out of the two references, one related to an original petition under Article 227 of the Constitution of India challenging an interlocutory order passed in the course of an appeal before the lower appellate court that arose from a preliminary decree in a partition suit. The authority of the appellate court to make an interim order was under challenge in the writ proceeding. In the next reference, an interlocutory order passed by the trial court was under challenge in another writ proceeding. The question was whether an appeal was maintainable in the former and whether a revision was maintainable in the latter. This was essential to be decided, since the writ petitions were not maintainable, if alternate remedy in the form of an appeal or a revision were maintainable. This naturally was dependent on the question whether such interim orders are susceptible to a challenge in a statutory forum and if not, whether it is liable to be challenged in the writ proceedings.

14. The Full Bench elaborately considered this question in the light of Section 104(2) of the Code of Civil Procedure. It appears that the ambit and scope of the bar under Section 104 (2) was dealt with not only with reference to the wording in Section 104(2) alone, but, with reference to the scope of the appellate jurisdiction under sections 105(1) and 107 of the CPC also.

15. The Full Bench held that under Section 96 of the Code, there is no provision similar to Section 104(2) CPC, particularly since the prohibition under Section 105(1) thereof applies to all orders not specifically covered by Section 104(2) of the Code. It was held that in the context of the unavoidable implication of Section 105(1) of the Code, only such orders passed in an appeal from a decree would be amenable to appeal as have been expressly provided for, or, if there is no express provision for an appeal from a certain order, there is no right of appeal. The Court referring to Kalahasti, Chellappan and Ramaswamy Reddiar cases held that all the decisions are unexceptionable. There is no conflict between them and all can co-exist. Kalahasti and Chellappan's cases both dealt with appeals from interlocutory orders passed in the course of appeals from orders. The Court held that since

Section 104(2) of the Code expressly prohibits an appeal from any order passed in appeal under this Section , there was no need to look into any provision elsewhere in the CPC. It was entirely a different aspect that fell for consideration in Ramaswamy Reddiar's case and the reasoning in Ramaswamy Reddiar's case must be appreciated at a more fundamental level.

16. The Full Bench of the Calcutta High Court on an evaluation of the legal position involved concluded that in both the matters referred to in, the appeals were not maintainable. This was largely on a premise that none of the provisions of the Code or any of the Rules therein permit an appeal from an interlocutory order passed in an appeal from a decree. To arrive at this conclusion, the Court also relied on the provisions in Section 105(1) and 107. The Full Bench held that, the authority of an appellate Court to exercise the same powers as are conferred by the Code, and the obligation of the appellate court to perform as nearly as may be the same duties as are imposed by the Code, on Courts of original jurisdiction may not be as wide in scope in an appeal from an interlocutory or interim order as in an appeal from a decree. Such authority and obligation, which would cover the entire ambit of the relevant suit in an appeal from a decree, would necessarily be restricted to the scope of the interlocutory petition on which the interim order under appeal was passed in an appeal from an order made under the Code. Though the Full Bench elaborately considered the genesis of authority exercisable by the appellate court and that of a Court exercising original jurisdiction, it is pertinent to note that Section 107 permits the appellate court to exercise all powers prescribed therein as exercisable by a Court in original jurisdiction. That being so, there is no reason as to why, it should be assumed that an interlocutory order passed by the appellate court should not be susceptible to an appeal, unless it falls within Section 104(2) of the Code.

17. Section 104(2) CPC specifically states that no appeal shall lie from any order passed in appeal under the Section . Evidently, the purport and the only interpretation possible is that an appeal will not lie against interlocutory orders passed in an appeal filed under Section 104 or order 43 CPC. Consequently, it will not apply in the case of an appeal filed against the original decree under Section 96 or Order 41 of the CPC. Evidently, both the references involved in Sabyasachi

Chatterjee's case above, did not deal with orders passed in appeals filed against interlocutory orders. In that view of the matter, the Full Bench decision cannot be considered as an authoritative pronouncement of legal position covered by Section 104(2) of the Code. The natural corollary is that the law laid down in Ganesan's case in the correct interpretation of Section 104(2) of the Code and we affirm the legal proposition therein.

18. In the light of the above findings, it is only to be held that the present appeal is perfectly maintainable.

19. Coming to the merits of the case, plaintiff claimed right of way over the B schedule way. His definite case was that there was an existing thondu widened by the plaintiffs and the defendants. On the other hand, first plaintiff pleaded that he had purchased the land for the purpose of widening his road. There is no contra evidence to his allegation that he himself had purchased it. The Commission report showed that a thondu existed, which was different from the B schedule property and both were found to be separate. On the above materials, court below prima facie held that the injunction sought in the appeal was intrinsically connected with the subject matter of the appeal itself. Without considering the appeal itself, the lower appellate court should not have considered the interim injunction application alone.

20. It is pertinent to note that the injunction was refused on 16.12.2013 and has been operating since then, without any stay being granted by this Court. Since the position remains so, we feel that no irreparable injury is likely to be caused and the impugned order does not call for any interference. However, the lower appellate court shall try to expedite the matter.

In the result, the appeal is dismissed confirming the impugned order. However, court below shall try to dispose of the appeal within a period of six months from the date of receipt of a copy of this judgment.

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