

Chikkappa Vs. Doddappa

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Court : Karnataka

Decided On : Mar-13-1987

Reported in : ILR1987KAR1920; 1987(1)KarLJ299

Judge : K.A. Swami, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100 - Order 41, Rule 23 and 23A - Order 43, Rule 1

Appeal No. : RSA No. 1336 of 1987 and MSA No. 58 of 1987

Appellant : Chikkappa

Respondent : Doddappa

Advocate for Pet/Ap. : B. Rudragowda, Adv.

Judgement :

ORDER

K.A. Swami, J.

1. The Registry has raised an objection that as the R.S.A. in question is preferred under Section 100 of the Code of Civil Procedure against an order of remand passed under Order 41 Rule 23 of the CPC it is not maintainable. However, learned Counsel for the appellants maintains that the order of remand determines one of the issues involved in the suit finally and it remands only in respect of an

issue relating to a will; therefore, in so far it finally decides the issue it becomes a decree; hence, the R.S.A. filed under Section 100 of the CPC is maintainable.

2. If only the definition of the word 'decree' would not have excluded the order of remand from its purview probably there would not have been any difficulty in accepting this contention. The definition of the expression 'decree' specifically excludes 'any adjudication from which an appeal lies as an appeal from an order.' The order of remand is made either under Rule 23 or Rule 23A of Order 41 of the CPC as the case may be. Whether it is an open remand or limited to try a particular issue it is nevertheless an order of remand and as such it is an order which is appealable under Rule 1(u) of Order 43 of the CPC. Therefore it is excluded from the definition of the expression 'decree'. Under Section 100 of the CPC subject to the provisions of the Civil Procedure Code or any other law for the time being in force an appeal lies to the High Court from every decree passed in appeal by any Court subordinate to the High Court if the High Court is satisfied that the case involves a substantial question of law. That being so, the order of remand by reason of the definition of the word 'decree' even though it determines certain issue finally cannot be considered as a decree.

3. Learned Counsel for the appellants has placed reliance on a decision of the High Court of Calcutta reported in Jagadish Chandra Bose v. Baijnath Shaw, : AIR1966 Cal580 . In that case, though the order of remand decided certain issue, but it was not challenged in an appeal. The question that was considered was whether the finding recorded in an order of remand operated as res judicata. No argument is required to hold that it would operate as res judicata because whatever is decided in the order of remand if not challenged in an appeal filed under Order 43 Rule (1)(u) of the C.P.C. becomes final. The party will not be allowed to challenge it subsequently. Section 105 of the C.P.Code precludes him from disputing its correctness. Therefore, the decision has no bearing on the point at issue. I am of the view that the appeal having been preferred against the order of remand is not maintainable under Section 100 of the CPC. The objection raised by the Registry is upheld. At this stage, learned Counsel for the appellant submits that he may be permitted to convert the Regular Second Appeal into Miscellaneous Second Appeal under Order 43 Rule 1 (u) of the CPC. Permission

is accorded. Necessary amendments be carried out. Refund excess Court-fee if any.

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