

**Shivappa Vs. Basavaraj**

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**Court :** Karnataka

**Decided On :** Nov-06-2007

**Reported in :** ILR2008KAR601; 2008(2)KCCR990; 2008(3)CivilLJ528;  
2008(3)ICC267

**Judge :** K. Bhakthavatsala, J.

**Acts :** Code of Civil Procedure (CPC) - Sections 96, 104(1), 104(2) and 151 -  
Order 39, Rules 1 and 2 - Order 41, Rule 1 - Order 43, Rule 1

**Appeal No. :** Writ Petition No. 17060 of 2007

**Appellant :** Shivappa

**Respondent :** Basavaraj

**Advocate for Pet/Ap. :** A.V. Gangadharappa, Adv.

**Disposition :** Petition allowed

**Judgement :**

ORDER

**K. Bhakthavatsala, J.**

1. The petitioner/defendant/appellant in M.A.No. 4/07 on the file of the District Judge at Haveri, is before this Court praying for quashing of the impugned order

dated 1.8.2007 made in M.A.No. 4/07, at Annexure-'E'.

2. Keeping in view that the Learned District Judge has dismissed the appeal filed under Order 43 Rule 1(r) of CPC as not maintainable, notice to the respondent is dispensed with.

3. Heard arguments.

4. A short question that arises for consideration is:

Whether the Learned District judge is justified in dismissing the appeal filed under Section 104(1) read with Order 43 Rule 1(r) of CPC, on the ground that it is not maintainable under Section 104(2) of CPC?

5. Answer to the above question is in the negative for the following reasons:

Learned Counsel for the petitioner submits that the petitioner filed an appeal before the Appellate Court (District Court) under Section 104(1) read with Order 43 Rule 1(r) CPC, challenging the order made on an application filed under Order 39 Rules 1 and 2 CPC, but learned District Judge erred in rejecting the appeal as not maintainable relying upon the decisions which are not applicable to the case on hand. He has cited a decision in *New Kenilworth Hotel (P) Limited v. Orissa State Finance Corporation and Ors.* : [1997]1SCR395 on the point that appeal is a creature of statute as Section 104(1) read with Order 43 Rule 1 provides for an appeal against an interlocutory order.

6. In the instant case, the respondent/ plaintiff filed an Appeal under Section 96 read with Order 41 Rule 1 of CPC in R.A.No. 55/06 on the file of Civil Judge (Sr. Dim), Haveri challenging the judgment and decree made in O.S.No. 150/95 on the file of Civil Judge (Jr.Dn.) at Haveri. An application under Order 39 Rules 1 and 2 of CPC praying for T.I was also filed alongwith the appeal. The learned Civil Judge (Senior Division) allowed the application filed under Order 39 Rules 1 and 2 of CPC, restraining the petitioner herein from interfering with the plaintiff-Appellant's peaceful possession and enjoyment of the suit land pending disposal of the appeal. Feeling aggrieved by the order, the petitioner herein filed an appeal under Section 104(1) read with Order 43 Rule 1(r) of CPC before the District Judge at

Haveri. But the learned District Judge has rejected the miscellaneous appeal holding that the same is barred under Section 104(2) of CPC following the decisions in Murari Kumar Saraf v. Jannanath Shaw AIR 1994 Calcutta 205 and Chellappan v. Varghese AIR 1964 Kerala 23. This is impugned in this Writ Petition.

7. In Chellappan's case, supra, rejection of an application for temporary filed in a Suit was challenged in an Appeal under Section 104(1) read with Order 43 Rule 1(r) of CPC before District Judge. In that Appeal, second application was filed for temporary injunction, but the same was dismissed. Against this dismissal, an Appeal was preferred before the High Court. The Kerala High Court has held that Appeal to the High Court against an interlocutory order passed by a District Judge in an appeal under Section 104 r/w Order 43 of CPC was incompetent.

8. Likewise, in Murari Kumar Saraf s case, supra, in a Miscellaneous Appeal filed under Section 104(1) r/w Order 43 Rule 1(r), an application under Order 39 Rules 1 and 2 r/w Section 151 of CPC was filed but the same was rejected. Therefore, the aggrieved party filed an Appeal under Section 104(1) r/w Order 43 Rule 1(r) of CPC. The Calcutta High Court held that an order rejecting prayer for interim injunction passed by the 1st Appellate Court during pendency of Appeal against the order of trial Court rejecting similar relief is not an original order, but an order passed in Appeal and therefore, dismissed the appeal as not maintainable.

9. An order passed by the appellate court (Civil Judge) (senior Division), in R.A.No. 55/06 (filed under Section 96 read with Order 41 Rule 1 of CPC) on an interlocutory application filed under Order 39 Rule 1 & 2 of CPC, in an appeal, shall not be construed as original order. The learned District Judge failed to note that the impugned order challenged in the Miscellaneous Appeal was an order made on an application filed under Order 39 Rules 1 and 2 of CPC, granting temporary injunction in favour of the plaintiff and against the defendant, and the same is appealable under Section 104(1) r/w Order 43 1(r) of CPC. The learned District Judge has committed an error in dismissing the appeal.

10. In the result, the writ petition is allowed and the impugned order dated 1.8.2007 made in M.A.No. 4/07, at Annexure-'E' is hereby quashed and the matter

is remitted back to the District Court for disposal of the miscellaneous Appeal in accordance with law.

11. The petitioner is directed to appear before the District Court on 29.11.2007 for further proceedings, without notice.

Since notice to respondent has been dispensed with, the petitioner is directed to send copy of this order to the respondent, within a week, from the date of obtaining certified copy of this order.

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