

Kunchu Vs. Janaki

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Court : Kerala

Decided On : Sep-20-2004

Reported in : AIR2005Ker191; 2004(3)KLT878

Judge : P.R. Raman, J.

Acts : [Code of Civil Procedure \(CPC\) 1908](#), - Sections 115 - Order 7, Rule 10, 10A, 10A(1), 10A(2), 10A(3) and 10A(5) - Order 43, Rule 1

Appeal No. : C.R.P. No. 637 of 2002

Appellant : Kunchu

Respondent : Janaki

Advocate for Def. : T. Krishnan Unni, Adv.

Advocate for Pet/Ap. : S.V. Balakrishna Iyer,; K. Jayakumar,; P.B. Krishnan

Disposition : Petition dismissed

Judgement :

ORDER

P.R. Raman, J.

1. Plaintiffs in a suit O.S. No. 71/96 on the file of the Munsiff s Court, Parappanangadi are the revision petitioners. They laid the suit seeking a

declaration that an assignment deed and a purchase certificate were obtained by the defendants fraudulently, without notice and in derogation of the specific legal provisions. As such the said documents are void ab initio and not binding on the plaintiff schedule property. They also sought for other consequential reliefs. They paid the court fee under Section 25(b) of the Kerala Court Fees and Suits Valuation Act. The defendants raised an objection regarding the valuation and also the court fee paid thereon. Since the Court below did not decide this question as a preliminary objection, the defendants preferred C.R.P. No. 130/2001 which was disposed of by order dated 12.1.2001. The operative portion of the order is extracted in paragraph 8 of the order impugned in this revision. Thereafter, the Court below raised specific issues as to whether the court fee paid is correct and also whether the pecuniary jurisdiction shown in the plaint is correct and whether this Court has pecuniary jurisdiction to try this case? These issues were tried and the Court below held that the court fee paid under Section 25(b) is not correct and that the plaintiffs are liable to pay court fees under Section 40 of the Act. In that connection it also observed that the legal effect of the disputed purchase certificate cannot be taken away without setting aside the same. On the question regarding the pecuniary jurisdiction of the Court below held that the market value for the purpose of Section 40 of the Court Fees Act has to be calculated as per Section 7(3)(a) of the Act and that the value shall be which the property will fetch on the date of the institution of the suit. The Commissioner was found to have calculated the market value of both the A and B schedule properties at the rate of Rs. 2,000/- per cent. Thus A schedule property has to be valued at the rate Rs. 54,700/- while that of the B schedule is Rs. 16,700/-. However, the valuation of the house stood excluded, as the plaint A schedule did not include the house. Regarding the value of the other items includable it was found that it will exceed Rs. 1,00,000/- which is beyond the jurisdiction of the Munsiff s Court. Accordingly, the Court below found that it has no pecuniary jurisdiction to entertain the suit. In the result, LA. No. 16/2001 filed by the defendants was allowed holding that the plaintiffs are liable to pay the court fees under Section 40 of the Court Fees Act and that the Court has no pecuniary jurisdiction to entertain the suit. The plaint was liable to be returned to the plaintiffs under Order VII, Rule 10(A) of the C.P.C. It was also directed that intimation may be given to the plaintiffs on the decision of

the Court to return the plaint under Order VII, Rule 10(A) of the C.P.C. The said order is under challenge in this revision.

2. Before going to the merits of the contention regarding the finding on the aforesaid issues an objection was raised regarding the maintainability of the C.R.P. itself. It is therefore necessary to decide the question of maintainability of the C.R.P. and only if it is found that this revision is maintainable, further question on the merits of the contention raised will arise for consideration.

3. Order XLIII, Rule 1 of the C.P.C. deals with appeals from orders and as per the said order, an appeal shall lie from the following orders under the provisions of Section 104, namely:

(a) an order under Rule 10 of Order VII returning a plaint to be presented to the proper Court (except where the procedure specified in Rule 10A of Order VII has been followed).

4. Therefore, except in matters where procedure specified in Rule 10A of Order VII, an order under Rule 10 of Order VII is an appealable order. Hence what is the procedure to be considered is Rule 10A of Order VII. For the purpose of convenience Rule 10A is extracted hereunder:-

' 10A. Power of Court to fix a date of appearance in the Court where plaint is to be filed after its return.- (1) Where, in any suit, after the defendant has appeared, the Court is of opinion that the plaint should be returned, it shall, before doing so, intimate its decision to the plaintiff.'

5. From the reading of the above provision it can be seen that for completion of the procedure as contemplated under Rule 10A an intimation has to be given to the plaintiff by the Court. If it is of opinion that the plaint should be returned, once an intimation is given to the plaintiff, then the plaintiff may make an application to the Court below specifying that he proposes to present the plaint after its return and praying that the Court may fix a date for appearance of the parties in the said Court and requesting that notice of the date so fixed may be given to him and to the defendant as prescribed under Sub-rule 2 of Rule 10A of Order VII. Where an

application is made by the plaintiff, the Court below, before returning the plaint and notwithstanding that the order for return of plaint was made by it on the ground that it has no jurisdiction to try the suit, has to fix a date for appearance of the parties in the Court in which the plaint is proposed to be presented, and to give to the plaintiff and to the defendant notice of such date for appearance. This is what is prescribed under Sub-rule 3 of Rule 10A. As per Sub-rule 5 of Rule 10A where the application made by the plaintiff under Sub-rule 2 is allowed, the plaintiff shall not be entitled to appeal against the order returning the plaint.

6. Therefore, it can be seen that not only an intimation has to be given to the plaintiff by the Court but has further to be followed by the plaintiff by filing an application under Sub-rule 2 and an order has to be passed under Sub-rule 3 and only when an application under Sub-rule 2 is allowed by the Court, a further appeal against the order returning the plaint is clearly barred by Sub-rule 5 of Rule 10A. Therefore, even when an application filed by the plaintiff under Sub-rule 2 is disallowed by the Court while passing an order under Sub-rule 3, still it will not be hit by Sub-rule 5 of Rule 10A. In this case, admittedly only an intimation was given to the plaintiff as contemplated under Rule 10A(1) of Order VII. The further procedure contemplated in the same provision was however not adhered to by the plaintiff. Hence, there was no occasion for the Court to consider any application or to pass any order thereon. Order XLIII, Rule 1 read with Rule 10A(5) of Order VII makes it clear that only in a case where an application under Sub-rule 2 of Order VII of Rule 10A is allowed by the Court by passing an order that his right of appeal is taken away by virtue of the exception made under Order XLIII, Rule 1. When statute confers a right of appeal but however exempts therefrom a particular type of order from the purview of the appeal provision, such exception has to be strictly construed so as not to take away the conferred right of appeal. On true interpretation of the above provision it is to be found that the present order is an appealable order under Order XLIII, Rule 1 of the C.P.C. Similar view was also taken by the Delhi High Court in the decision in *Union of India v. New India Assurance Co. Ltd. and Anr.* (AIR 1997 Delhi 54) and also the Karnataka High Court in *M/s Instruments Incorporated v. M/s. Industrial Cables (India) Ltd.* (AIR 1996 Karnataka 360).

7. As per Section 115 of the C.P.C., the revision will lie only in cases from which no appeal lies thereto. Since the present order has been held to be an appealable order the Revision Petition has to be held as not maintainable under Section 115 of the C.P.C.

8. At this juncture, the learned Counsel for the petitioners Sri. K. Jayakumar submitted that even if the revision is held to be not maintainable, this Court can exercise its power under Articles 226 and 227 of the Constitution of India, when manifest injustice will result from the order impugned in this revision. He placed reliance on the decision of the Apex Court, in *Suryadev Rai v. Ramchander Rai and Ors.* (2003 (3) KLT 490 (SC) = (2003) 6 SCC 675).

9. On the other hand the learned counsel appearing for the 1st respondent Sri Krishnan Unni contended that the power under Articles 226 and 227 of the Constitution of India is, a constitutional power and an extraordinary power has no bounds. However, by a series of decisions of the Apex Court and this Court it is settled position that when a party has got a right of appeal, this Court will not exercise its extraordinary power by way of self imposed restriction.

10. Having heard both sides, the question to be considered is whether this Court should exercise its discretionary power under Articles 226 and 227 of the Constitution of India when there is a statutory right of appeal. It is true that a right of appeal by itself may not be a bar to the exercise of jurisdiction of the constitutional remedy and cannot be taken away by any statute. This was reiterated in *Suryadev Rai's case* (2003 (3) KLT 490 (SC) = (2003) 6 SCC 675) referred above. At the same time for exercising such jurisdiction there are certain parameters which are in the form of self imposed restriction. Even in a case where an order impugned is immediately not an appealable order the correctness of which however could be challenged after the culmination of the proceedings, it was held that this is one of the considerations which will waive with the Court not to exercise the jurisdiction under the constitutional provision.

11. In the decision of the Apex Court in *Sadhana Lodh v. National Insurance Co. Ltd. and Anr.* (2003 (2) KLT 47 (SC)=(AIR 2003 SC 1561) a question arose as to when there is a right of appeal on limited grounds only, can it be said to be

alternate remedy. The Apex Court held that the right of appeal being a statutory right and where the law provides remedy by way of filing an appeal though on limited grounds, the grounds of challenge cannot be enlarged by filing a petition under Articles 226 and 227 of the Constitution. It is true that in matters where miscarriage of justice is imminent, the bar created for entertaining a revision will not stand in the way of the Court considering the grant of relief under Articles 226 and 227 of the Constitution of India. However, no such situation arises in the present case. The mere fact that the petitioners contend that the order passed by the Court below is illegal for which they have got a right of remedy by way of appeal cannot be said to be an order resulting in miscarriage of justice, incapable of correction at the appellate stage. The petitioners have thus a remedy available by way of appeal against the order impugned in this revision. I do not find that the present case falls under this exceptional category warranting grant of relief at this stage by converting the C.R.P. into that of a Writ Petition. Hence, this contention fails.

12. It was contended by Sri K. Jayakumar, that the petitioners were bonafide prosecuting the matter ever since the C.R.P. was admitted and pending before this Court till now and as such in case an appeal is preferred, before the Appellate Court, the delay ought to be condoned and a direction be issued to consider the matter on merits. It is true that C.R.P. itself was filed within time which shows the bonafide of the petitioners in prosecuting the matter and that the C.R.P. was pending till now is a fact which can judicially be taken notice of. If that be so, I do not think that the Appellate Court will not condone the delay and entertain the matter on merits. However, it is for the Appellate Court to pass appropriate orders on a proper application being made in that behalf by the petitioner.

C.R.P. is dismissed subject to what is stated above.