

Ganesan Vs. Sadasivan

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Court : Kerala

Decided On : Oct-28-2003

Reported in : 2004(1)KLT523

Judge : R. Bhaskaran, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 104(2) - Order 40 - Order 43

Appeal No. : F.A.O. No. 150 of 2003

Appellant : Ganesan

Respondent : Sadasivan

Advocate for Def. : B. Krishnamani and; M. Mahesh, Advs.

Advocate for Pet/Ap. : Gopikrishnan, Amicus Curiae; N.N. Sugunapalan, Adv.

Judgement :

R. Bhaskaran, J.

1. This appeal is filed against the order in I.A.575/2003 in A.S.60/2003 on the file of the Sub Court, Neyyattinkara; The interlocutory application was filed for temporary injunction under Order 39, Rules 1 and 2 of Code of Civil Procedure restraining the respondent from forcible eviction of the petitioner from the plaint

schedule property. The suit filed by the petitioner was dismissed by the trial court and against the Judgment and Decree he filed appeal before the first appellate court. Pending appeal the above interlocutory application was filed for interim relief. The appellate court has declined to grant interim relief and therefore the appellant has approached this Court by way of this appeal. Learned Counsel for the respondent submitted that this appeal itself is not maintainable as the appeal is filed against an interim order passed in appeal. He relied on the decision of this Court reported in *Chellappan v. Varughese* (1963 KLT 502) where this Court has considered the maintainability of an appeal filed against an interlocutory order passed in C.M.A. This Court found that under Section 104(2) of Code of Civil Procedure there is a clear bar of filing further appeal. This decision is followed in various other decisions of this Court. This Court also said that the power given to an appellate court under Section 107 Code of Civil Procedure is only part of its appellate jurisdiction. It cannot be characterised as an original jurisdiction in an appellate court. It confers power on the appellate Judge not only to dispose of the appeal on its merits, but also to pass an interlocutory or incidental order deemed necessary in the circumstances of the case to maintain the status quo or to preserve the subject-matter of the appeal till the disposal of the appeal, as an original court is empowered to do in the case of suits before it.

2. This appeal is not a similar appeal but it is against the interlocutory order passed in a regular appeal and the bar under Section 104(2) of Code of Civil Procedure is not applicable. No decision of this Court is brought to my notice where this Court has held that an interlocutory order in a regular appeal is not appealable under Order 43 of the Code of Civil Procedure. The Madras High Court in the decision reported in *Ramaswamy v. Chinna Sithammal* (AIR 1976 Madras 63) has held that in order to attract the bar under Section 104(2), the appeal should be filed under Section 104 of Code of Civil Procedure, If the appeal is under Section 96 Code of Civil Procedure, and the order passed is otherwise appealable under Order 43, the same cannot be said to be not maintainable in law. In fact the question as in this case is directly answered by the Andhra Pradesh High Court in *K. Gangulappa Naidu v. K. Gangi Naidu* (AIR 1982 AP 284). In that case also the application for interim injunction filed in a regular appeal was disposed of by the appellate court and a C.M. A. was filed before the High

Court under Order 43, Rule 1(r), Code of Civil Procedure. The High Court held that the appeal is maintainable. I respectfully agree with the views of the learned Judges of the Andhra Pradesh and Madras High Courts. In fact Order 43 specifically provides for filing appeals against certain orders which can be passed only in first appeal. Therefore it cannot be said that in no case interlocutory orders passed in regular appeal is appealable. Therefore I find that this First Appeal from Order is maintainable.

3. Learned Counsel for the appellant submitted that the petitioner is being forcibly evicted from the plaint schedule property and the appellate court was not justified in declining to grant interim relief.

4. After hearing learned Counsel on both sides I do not think that the appellant is entitled for any relief in this appeal. The appellant has admittedly executed a sale deed in favour of one Sukumaran Nair who in turn transferred the same to the respondent. The claim of the appellant that it was only as a security for payment of certain amount advanced to the appellant and the sale deed did not take effect was considered in O.S.748/2000 wherein the appellant was the defendant and the respondent was the 5th additional plaintiff. It is not in dispute that O.S.748/2000 was decreed against the petitioner and eviction was ordered. That Decree can be stayed only in the appeal filed therefrom. According to learned Counsel for the appellant the only remedy available for the respondent is to execute O.S.748/2000 and not to take forceful possession of the property without due procedure in execution. According to learned Counsel for the respondent the appellant had already left the place after the Decree in O.S.748/2000. This is strongly disputed by the learned Counsel for the appellant. Learned Counsel for the respondent also submitted that if the appellant is in actual possession the respondent will only execute the Decree and there is no question of forcible dispossession of the appellant. This is recorded.

In the above circumstances I do not find any reason to interfere with the order passed by the appellate court in I.A. 575/2003 and this First Appeal from Order is dismissed. Since there was no direct decisions of this Court on the maintainability of the First Appeal from Orders, I requested Advocate Sri. Gopikrishnan to assist

the court and I record my thanks to him for bringing to my notice the decisions on the point.

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