

M. Mohan and ors. Vs. P.G. Shankaramoorthy and ors.

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Court : Chennai

Decided On : Mar-01-1985

Reported in : (1987)2MLJ122

Appellant : M. Mohan and ors.

Respondent : P.G. Shankaramoorthy and ors.

Advocate for Pet/Ap. : Mr. Ramanathan

Judgement :

S. Ratnavel Pandian, J.

1. This appeal is preferred by the unsuccessful plaintiffs in O.S. No. 22 of 1977 on the file of the Court of the Subordinate Judge, Madurai, against the judgment and decree, dated 5th January, 1981, dismissing the said suit on the ground that the plaintiffs (appellants herein) have not paid the court-fee of Rs. 750.50 till 31st December, 1980 at per the direction of the High Court made in C.R.P. No. 2590 of 1978, dated 25th November, 1980.

2. The above suit was filed for partition and separate possession of the plaintiffs' 1/3rd share in the suit property by metes and bounds, for the consequential relief of permanent injunction restraining defendants 3 and 4 and their men from executing the order of eviction hi respect of the suit property passed in their favour in R.C.O.P. No. 622 of 1972, on the file of the First Additional Rent Controller of

Madurai town and for recovery of future mesne profits from defendants 1 and 2.

3. The averments made in the plaint are as follows : The suit property was purchased as a vacant site in the name of the second defendant, by her husband late S.P. Gurunathan Servai. The said Gurunathan Servai had two sons, viz., Mahalingam who died on 15th September, 1973 and one Sankaramurthi, the first defendant herein. The 8th plaintiff is the widow of the abovesaid late Mahalingam. Plaintiffs 1 and 2 are the sons and plaintiffs 3 to 7 are the daughters, of Mahalingam through the 8th plaintiff. Gurunathan Servai put up a construction in the suit property from and out of his own funds and in the said building, carried on his business under the name and style of Sri Mahalingam Tile Works, for a long time. Mahalingam carried on business separately at Sathamangalam styled as Mohan Industries Sankaramurthi (first defendant) carried on his own business at Othakadai, styled as Selvatn Mosaic Industries. However, Gurunathan, Mahalingam and Sankarmurthi lived together as members of a joint family. Gurunathan closed his business due to some difficulties and leased out the main portion of the building to defendants 5 and 6 and another small portion, to defendants 3 and 4 and utilised the rental income for the joint family. According to the plaintiffs, the second defendant had no separate funds to purchase the suit property, nor had she put up the construction over it. After the death of Gurunathan, defendants 1 and 2 and Mahalingam obtained a registered lease deed, dated 7th May, 1968 from the daughters of Gurunathan relinquishing their rights, title and interest in respect of the suit property in their favour in lieu of certain other properties already settled on them by Gurunathan. Thus, the suit property had all along been treated as joint family property of late Gurunathan and even after his death the rent obtained from the suit property had been utilised by them. Thus, the suit property has become the ancestral property in the hands of defendants 1 and 2. Mahalingam, who had been indulging himself in illegal and immoral acts, squandered all cash and properties left behind by his father Gurunathan except the suit property. While so, the first and the second defendants, with the ulterior motive, brought into existence sham and nominal registered sale deeds, dated 11th March, 1972 and 13th April, 1972 in respect of the suit property in favour defendants 3 and 4, who were close friends of the first defendant. Defendants 1 and 2 also obtained the signature of Mahalingam

fraudulently when he was not in a sound and disposing state of mind. No consideration was received either by Mahalingam or by defendants 1 and 2. In fact, the sale deeds were never acted upon. The suit property continues to be the joint family property belonging to the plaintiffs and defendants 1 and 2 and thus the plaintiffs are in constructive possession of the suit property. The father of the plaintiffs, Mahalingam, was entitled to 1/3rd share in the suit property as per the Hindu Succession Act. Plaintiffs 1 and 2 are each entitled to 1/9th share in the suit property as co-owners. After the demise of Mahalingam, the plaintiffs are entitled to 1/3rd share in the suit property. During the alleged sales, plaintiffs 1 to 7 were minors. Mahalingam had no right to sell the 2/9th share belonging to plaintiffs 1 and 2 and hence the said sale is void ab initio. After the death of Mahalingam, the plaintiffs are the only legal heirs. The first defendant, after the death of Mahalingam, began to act adversely to the interest of the minors, plaintiffs 1 to 7. Hence the suit for partition lest the interest of the plaintiffs in the joint family property would be jeopardised.

4. Defendants 3 and 4, who are the alleged vendees of the suit property, filed an eviction petition in R.C.O.P. No. 622 of 1972 on the file of the Rent Controller of Madurai, against the 5th defendant, with the co-operation of defendants 1 and 2, on the ground that the demised premises was required for demolition and reconstruction. The 5th defendant, colluding with defendants 1 to 4, made a farcical contention against the eviction petition. However, on 10th January, 1974, the R.C.O.P., was allowed and eviction was ordered. As the 6th defendant is at present in possession of the suit property and not the 5th defendant, the 6th defendant is added as a party to the suit. Unless defendants 3 and 4 are restrained by an order of injunction from executing the order of eviction passed in the above R.C.O.P., the plaintiffs would be put to irreparable loss. Hence, the suit for partition and separate possession and consequential injunction.

5. Defendants 1, 2 and 5 were set ex parte.

6. Defendants 3 and 4 filed a common written statement as follows : The plaintiffs have been set up by the 5th defendant, who is the tenant of the property, with the sole object of obstructing the execution of the eviction order. Defendants 3 and 4

are the present owners by virtue of the registered sale deeds. The eviction order passed by the Rent Controller was confirmed by the Appellate Authority in C.M.A. No. 30 of 1974 filed by the 5th defendant. The suit property was purchased by the second defendant out of her own funds and in fact the first defendant and Mahalingam had accepted that the property was the second defendant's separate property. Even assuming that the property was purchased by Gurunathan Servai, inasmuch as defendants 1 and 2 and Mahalingam had validly conveyed the property in favour of defendants 3 and 4, the sale deeds are binding on the plaintiffs' who have no right whatever in the alleged ancestral property.

7. The building was not leased by Gurunathan Servai to the 5th defendant, nor to these defendants who were never tenants in the suit property. The rental income had not been utilised for the joint family of Gurunathan Servai. Mahalingam was leading a responsible and respectable life with the plaintiffs and the allegations to the contrary are all false. He never acted to the detriment of the interests of the plaintiffs. The sale deeds were executed while Mahalingam was in a sound and disposing state of mind and those sale deeds executed by defendants 1 and 2 and Mahalingam cannot be characterised as sham and nominal transactions. The fifth defendant took a major portion of the suit property on lease by a registered lease deed dated 5th July, 1967, for a period of five years. The second defendant and her sons borrowed certain amounts from one Nagasundari Ammal and executed a registered deed of othi for a consideration of Rs. 35,000 which amount was needed for the family expenses. The mortgagee was authorised to collect the rents from the fifth defendant. The remaining portion was let by the mortgagee to the wife of the first defendant. Later on, defendants 1 and 2 and Mahalingam were in need of further amounts, they borrowed a sum of Rs. 15,000 from one Subburama Chettiar, on the strength of a hypothecation deed, dated 5th October, 1968 in respect of the same property. As the debt incurred by the mortgagors became due and repayable on the expiry of the period of limitation, and as there were certain decrees against the members of the second defendant and her sons, defendants 1 and 2 and Mahalingam decided to dispose of the property for the purpose of discharging their debts. These properties were sold in favour of defendants 3 and 4, under the registered sale deeds. Thus, these 'defendants purchased the suit property for valuable consideration bona fide and in good faith.

The allegations contrary to that are all false. Only after purchasing the property, defendants 3 and 4 filed the abovesaid eviction petition which ended in an order of eviction. The fifth defendant preferred an appeal in C.M.A. No. 30 of 1974. When the appeal was taken up for hearing, the fifth defendant prayed for time to vacate the building. Accordingly, on 10th September, 1974U the Appellate Authority, while confirming' the order of eviction, granted nine months' time for vacating the premises. A few days before the expiry of the nine months' period granted, the fifth defendant caused a suit to be filed in O.S. No. 276 of 1975 by the sixth defendant as the plaintiff on the ground that the sixth defendant was a partner of the fifth defendant and the order of eviction was passed without his knowledge. The prayer in. the said suit was only for a declaration that the eviction order passed in R.C.O.P. No. 622 of 1972 as confirmed in C.M.A. No. 30 of 1974 was null and void, and not binding on the sixth defendant and for a consequential injunction restraining the defendants 3 and 4 from executing the order of eviction. The Rent Controller, Madurai, granted a temporary injunction though opposed by defendants 3 and 4. Ultimately, the sixth defendant gave up the claim and got six months' time for vacating by a compromise. The suit was dismissed on 20th August, 1976. The time of six months was about to expire on 20th February, 1977. In the meantime, defendants 4 and 5 have engineered this vexatious suit to be filed in the name of the plaintiffs, and obtained an ex parte order of interim injunction restraining defendants 3 and 4 from executing the order of eviction. The allegation that the fifth defendant was not in possession of the property is false. Even though the plaintiffs have got any sustainable claim to their alleged 1/3rd share, there cannot possibly be any objection for the plaintiffs to defendants 3 and 4 taking possession of the premises from the tenant.

8. The sixth defendant has filed a separate written statement inter alia contending as follows : The fifth and the sixth defendants entered into a partnership business and obtained lease of the suit property from the second defendant, on a monthly rent of Rs. 320, sometime thereafter, the fifth defendant relinquished his right in the said business in favour of the sixth defendant, who has become entitled to the hotel business absolutely. The sixth defendant has been paying the rent regularly. In fact, the sixth defendant has been assessed to income-tax and commercial tax for running the abovesaid business in the suit premises. The suit is bad for non-

joinder of parties since the four sons of the first defendant are not impleaded. Defendants 3 and 4, at the instance of defendants 1 and 2, exclusively filed an eviction petition against the fifth defendant who was not in possession of the suit premises at that time and who was no longer the tenant and hence the order of eviction passed against the fifth defendant was ab initio void. Therefore, the sixth defendant, who was in possession of the property, was constrained to file a suit O.S. No. 276 of 1975 on the file of the District Munsif's court, Madurai against defendants 3 and 4. The sixth defendant did not press the suit as defendants 1 and 2 gave an undertaking that the eviction order obtained would not be executed. The sixth defendant is a statutory tenant of the suit premises wherein he is running a hotel by investing a huge amount of Rs. 30,000. Therefore, defendants 3 and 4 have no right whatsoever to evict this defendant as per the order of the Rent Controller.

9. For completion of the facts of the case and to understand circumstances under which the present appeal has been filed, the following facts have to be noted in the present suit O.S. No. 22 of 1977, the plaintiffs filed I.A. No. 49 of 1977 and got an ad interim injunction against defendants 3 and 4 who subsequently got the interim injunction set aside and vacated. Thereafter, on 5th July, 1974, I.A. No. 49 of 1977 was dismissed subject to the condition that defendants 3 and 4 should not demolish the building pending disposal of the suit. On 15th April, 1977 the delivery of the building was ordered. When defendants 3 and 4 were about to take delivery of the building, the fifth defendant filed E.A. No. 397 of 1977, for staying the order of execution of the R.C.O.P., in view of the undertaking given by defendants 3 and 4, I.A. No. 49 1977 and this execution application was dismissed. Then the fifth defendant filed a revision in C.R.P. No. 840 of 1977 before the High Court against the order of dismissal of E.A.No.397 of 1977 and obtained a stay. Subsequently, the C.R.P., was dismissed and defendant filed O.S. No. 770 of 1977 for a permanent injunction against defendants 3 and 4 from executing the order in the R.C.O.P., and filed a petition requesting that this O.S. No. 770 of 1977 and O.S. No. 22 of 1977, should be tried together. In O.S. No. 22 of 1977, as per check slip No. 329 of 1976, the plaintiffs were directed to pay a Court-fee of Rs. 750.50 for, the relief under Section 37(1) of the Tamil Nadu Court-Fees Act, as per order, dated 23.9.1978. Against this order, C.R.P. No. 2590 of 1978 was filed before the

High Court and the same was dismissed by Ratnam, J. on 25th November, 1980. While dismissing the said revision petition, this Court granted time to the plaintiffs till 31st December, 1980 to pay Court-fees. The suit was taken up for trial on 5th January, 1981, on which date the suit was dismissed for non-payment of deficit Court-fee of Rs. 750.50 as per the direction of the High Court in C.R.P. No. 2590 of 1978. On 14th January, 1981, the plaintiffs filed S.L.P. O.405 of 1981, before the Supreme Court and obtained an order of stay, but the above S.L.P., was dismissed on 16th September, 1983, evidently on the Supreme Court being informed that the suit itself had been dismissed on 5th January, 1981, i.e., much earlier to the filing of the S.L.P., and obtaining of stay on 14th January, 1981. Hence, the present appeal by the plaintiffs against the judgment and decree dismissing the suit O.S. No. 22 of 1977.

10. Mr. Ramanathan, learned Counsel appearing on behalf of the appellants-plaintiffs would, make the following submissions : (1) The order on the check slip and the order made in C.R.P. No. 2590 of 1978, are contrary to law, without jurisdiction and without conforming to the provisions of the Court-fees Act and against recognised principles laid down by the various decisions and therefore it should have been held, on the relevant materials on record, that the plaint had been properly valued and proper court-fee had been paid thereon. (2) The question relating to the correctness of the valuation as well as the sufficiency of the court-fees, affixed on the plaint can even now be reagitated in this regular appeal notwithstanding the order passed in C.R.P. No. 2590 of 1978 which was passed without jurisdiction. (3) Even if the valuation of the suit is incorrect and the court-fee is insufficient the dismissal of the suit on the ground of non-payment of the deficit court-fee is illegal, but the proper course would be to reject the plaint under Order 7, Rule 11(c), C.P.C., and under Section 12(2) of the Tamil Nadu Court-Fees and Suits Valuation Act, 1955 (Act XIV of 1955) (hereinafter referred to as the Court Fees Act). (4) In any event, this Court may be pleased to grant extension of time for payment of the deficit court-fee as per Sec12(4)(b) of the Court Fees Act.

11. Contention Nos. 1 and 2. The plaintiffs had valued the suit for purposes of court-fee and jurisdiction at Rs. 10,500 viz., Rs. 10,000 under Section 37(2)(ii), Rs.

400 under Section 27(c) and paid Rs. 100 for the relief of future mesne profits, and paid a total court-fee of Rs. 238.50 (Rs. 200 + Rs. 30.50 + Rs. 8). The Court below, on the check-slip, directed the plaintiffs to pay a total court-fee of Rs. 750.50 under Section 37-(1) of the Court-Fees Act. This order of the Court below has been confirmed by the High Court in C.R.P. No. 2590 of 1978 holding that the court-fee Has to be paid only under Section 37(1) and not under Section 37(2), and the revision petition preferred by. the plaintiffs has been dismissed. The S.L.P., preferred as against this order has been dismissed by the Supreme Court. The deficit court-fee in dispute is (Rs. 512 - Rs. 750.50 minus Rs. 238.50). Consequent upon the nonpayment of the deficit court-fee of Rs. 512, within the time allowed by the Court, the suit was dismissed by the Court below. Thus, so far as the valuation of the suit at Rs. 10,600 is concerned there is no dispute. The only question agitated by the appellants throughout has been whether the court-fee has to be paid under Section 32(2)(ii) or under Section 37-(1) of the Court-fees Act. Hence, this Court has to examine whether this aspect of the matter can be reagitated now.

12. Mr. Ramanathan would submit that the present appeal is from the decree passed by the trial Court and since the order passed in the C.R.P., affected the decision of the Court when passing the decree, it is clearly open in this Court by virtue of Section 105 C.P.C., to consider the correctness of the court-fee paid on the plaint and as such the appellants are not barred from reagitating this question in this appeal. In support of this contention he would rely upon Pichu Ayyanagar v. Ramanuja : AIR1940 Mad756 . According to Mr. M. Srinivasan the ruling in Pichu Ayyangar's case : AIR1940 Mad756 , cannot be made applicable to this case for two reasons : First, the order passed by Venkataramana Rao, J. as he then was, dismissing the suit, in the revision arising out of an interlocutory application, was one passed without jurisdiction, but in the present case, the order of Ratnam, J. was very much within the jurisdiction of this Court and had also subsequently received the approval of the Supreme Court. Secondly, the above proposition of law laid down in Pichu Ayyangar's case (1940) 1 M.L.J. 892, is no longer good law in view of the decisions in Satyadhyana Ghgsal v. Smt. Deorajan Debi : [1960]3SCR590 and Jasraj Inder Singh v. Muitan Chan : [1977]2SCR973 .

13. At the risk of repetition, I may mention here that the plaintiffs were directed to pay the court-fee of Rs. 750.50 for the relief under Section 37(1) of the Court fees Act, as per order dated 23rd September, 1978. As against this order C.R.P.2590 of 1978 was filed and the same was dismissed on 25th November, 1980. Time was granted by this Court in the revision to the plaintiffs to make good the deficiency in the Court-fee till 31st December, 1980. The trial Court on 5th January, 1981 dismissed the suit for non-payment of the deficit court-fee within the time granted by this Court. S.L.P. No. 405 of 1981, was moved before the Supreme Court on 14th January 1981, and an order of stay was obtained. It may be noted here that this was subsequently to the dismissal of the suit by the trial Court. Subsequently, the above S.L.P., was dismissed on 16th September 1983. Thus, it may be seen, as rightly pointed out by Mr. M. Srinivasan that the order passed in revision by Ratnam, J. had consummated into a finality.

14. Now, I shall, take up the second limb of the argument of Mr. M. Srinivasan. In Pichu Aiyangar's case : AIR1940 Mad756 , the applicants-plaintiffs filed a suit in the District Court, Tirunelveli, with the object of obtaining a settlement of a scheme under, the Madras Hindu Religious and Charitable Endowments Act, 1927. A preliminary objection was raised that the Court had no power to frame a scheme and that the matter should be adjudicated only before the Hindu Religious and Charitable Endowments Board. On this question, a preliminary issue was framed and was answered in favour of the plaintiffs by the District Court. Thereupon, respondents-defendants applied to the High Court to revise the order in exercise of its revisional powers. The application was heard by Venkataramana Rao, J., (as he then was), who decided that the trial Court had erred in holding that the suit lay. In addition to allowing the revision petition, the learned Judge dismissed the suit. On the basis of the above order dismissing the suit, the District Court passed a formal decree dismissing the suit with costs. A regular appeal was preferred against the said decree, which came up before a Division Bench of this Court consisting of Leach C.J., and Krishnaswami Iyengar, J. A preliminary objection was raised stating that the order of Venkataramana Rao, J., in the revision was final and therefore the appeal did not lie. The Bench, overruling the objection, held that the said order in revision was not final, but interlocutory, and was in appropriate inasmuch as this Court dismissed the suit itself instead of directing the

lower court to dispose of it according to law, and further observed:

The present appeal is from the decree, and as such, the order affected the decision of the Court when passing the decree, it is clearly open to this Court by virtue of Section 105 to consider its correctness.

The proposition of law laid down in the above case, according to Mr. M. Srinivasan, is no longer good law and the view of the decisions of the Supreme Court cited by him.

15. Satyadhyan Ghosal's case : [1960]3SCR590 , was a case where the landlord had obtained a decree for ejectment against the tenants for possession of some lands. After the decree was made, the Calcutta Thika Tenancy Act of 1949 came into force. The tenants then made an application under Section 28 of that Act, for rescission of the decree, which was dismissed by the Munsif holding that the tenants were made Thika tenants, within the meaning of the said Tenancy Act. The tenants then filed a revision petition under Section 115, C.P.C., against the order of the Munsif before the Calcutta High Court. By the time the revision came up for hearing, the Thika Tenancy Act was amended. The Amendment Act of 1953 inter alia omitted Section 28 of the original Act. The Calcutta High Court considered the effect of the amendment made in the Act and held that in view of the amended definition of the term 'Thika tenant' and the evidence which had been recorded by the Munsif, the tenants must be held to be Thika Tenants. Accordingly, the revision petition was allowed and the Munsif's order dismissing the tenant's application under Section 28 was set aside and the case was remitted to the Munsif's Court for disposal in accordance with law. Then the landlords came up in revision to the Calcutta High Court against the Munsif's order rescinding the decree. That revision petition was rejected by the Calcutta High Court taking the view that the question of rescission of the decree as between the parties was res judicata. Subsequently, the matter came up in the appeal preferred by the landlords in the Supreme Court. In that appeal it was contended on behalf of the tenants-respondents that the appellants-landlords were barred by the principle of res judicata from raising before the Supreme Court the question whether on the enactment of the Thika Tenancy (Amendment) Act 1953, Section 28, of the

original Act survived or not, inspite of the proceedings pending on the date of the commencement of the Thika Tenancy Ordinance of 1952. Dealing with this contention in extenso, the Supreme Court observed thus:

The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res judicata*, it shall not be adjudged again. Primarily it applies between past litigation and future litigation. When a matter, whether on a question of fact or on a question of law has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of *res judicata* is embodied in relation to suits in Section 11 of the Civil Procedure Code; but even where Sec 11 does not apply, the principle of *res judicata* has been applied by Courts for the purpose of achieving finality in litigation. The result of this is that the original Court as well as any higher Court must In any future litigation proceed on the basis that the previous decision was correct.

The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a Court, whether the trial Court or higher Court having at an earlier stage decided a matter in one way will not allow the parties to reagitate the matter again at a subsequent stage of the same proceedings.

After stating this proposition, the Supreme Court proceeded to consider the question whether because at an earlier stage of the litigation a Court had decided an interlocutory matter in one way and no appeal had been taken there from or on appeal did lie, a higher Court was precluded from considering the matter again at a later stage of the same litigation. In connection with this question, the Supreme Court examined the decisions of the Privy Council in *Maharaja Moheshur Singh v. Bengal Government* (1857) 7 M.I.A. 283 *Forbes v. Ameeroonnisa Begum* (1865) 20 M.I.A. 340 and *Sheonath v. Ramanath* (1865) 10 M.I.A. 413, and quoted with approval the following observations of the Privy Council in *Moheshur Singh's case* (1857) 7 M.I.A. 283:

We are of opinion that this objection cannot be sustained. We are not aware of any law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not so do, of forfeiting for ever the benefit of the consideration of the appellate Court. No authority or precedent has been cited in support of such a proposition and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity for so appealing; whereby on the one Hand he might be harassed with endless expense and delay and on the other hand upon his opponent similar calamities. We believe there have been very many cases before this Tribunal in which their Lordships have deemed it to be their duty to correct erroneous interlocutory orders, though not brought under their consideration until the whole cause had been decided, and brought hither by appeal for adjudication.

Then the Supreme Court made the following observation which is in support of Mr. Srinivasan's contention:

The very fact that in future litigation it will not be open to either of the parties to challenge the correctness of the decision in a matter finally decided in a past litigation makes it important that in the strict sense of the term, when a Court has decided the matter¹ it is certainly final as regards, that Court.

The Supreme Court also considered the decisions of the Privy Council in *Ram Kirpal Shukul v. Musumat Rup Kuari* (1883) 11 I.A. (P.C.) 37 : I.L.R. (1883) All. 269, *Bani Ram v. Nanhu Ma*, and *Hook v. Administrator General of Bengal* (1921) 40 M.L.J. 423 : (1921) 48 I.A. 187 : 14 L.W. 221 : A.I.R. 1921 P.C. 11, and distinguished these cases from the other Privy Council cases noticed by them, stating thus:

Interlocutory judgments which have the force of a decree must be distinguished from other interlocutory judgments which are a step towards the decision of the dispute between the parties by way of a decree or a final order, *Moheshur Singh's case* (1857) 7 M.I.A. 283, *Forbes case* (1865) 10 M.I.A. 340 and *Sheonath's case* (1865) 10 M.I.A. 413, dealt with interlocutory judgments which did not terminate

the proceedings and lead up to a decree or final order. Ram Kirpal Shukul's case (1883) 11 I.A. (P.C.) 37 : I.L.R. (1883) Ail. 269 and Hook's case (1921) 40 M.L.J. 423 : (1921) 48 I.A. 187 : 14 L.W. 221 : A.I.R. 1921 P.C. 11, deal with judgments which though called interlocutory had, in effect, terminated the previous proceedings.

On the above observations, the Supreme Court held that the appellants in the case before them were not precluded from raising before the Supreme Court the question that Section 28 of the Original Thika Tenancy Act was not available to the tenants after the Thika Tenancy (Amendment) Act of 1953 came into force. This authoritative pronouncement of the Supreme Court in the above case makes it clear that an interlocutory order is final as regards the court making that order, but its correctness can be challenged in an appeal from the final decree or order, even though no appeal had been filed against the interlocutory order either because none lay or because even though an appeal lay, none was filed.

16. A Division Bench of the Madhya Pradesh High Court in Shyamacharan v. Sheojee Bai : AIR 1964 MP288 , before which a similar question arose, following the decision of the Supreme Court in Satyadhyam Ghosal's Case : [1960]3SCR590 , has held that an order passed by the High Court in revision was final as regards that court and that its correctness could not be challenged in appeal before the High Court, and it could be challenged only before the Supreme Court in an appeal from the final decree. The said Bench has dissented from the Division Bench decision of this Court in Pichu Ayyangar's case (1940) 1 M.L.J. 822 : (1940) 51 L.W. 727 : A.I.R. 1940 Mad. 756. See also Ganapathi Thevar v. Sri Navaneethaswaraswami Devasthanam : [1969]1SCR508 Lonan Kutty v. Thomman : AIR 1976 SC1645 and Jas Raj Inder Singh v. Hem Raj Multan Chand : [1977]2SCR973 . In Jasraj Inder Singh's case : [1977]2SCR973 .

It is true that a subordinate Court is bound by the direction of the High Court. It is equally true that the same High Court, hearing the matter on a second occasion or any other court of a co-ordinate authority hearing the matter cannot discard the earlier holding, but a finding in a remand order cannot bind the 'High Court when it comes up in appeal before it...This is the correct view of the law, although Shri

Phadke controverted it without reliance on any authority. Nor did Shri S.T. Desai, who asserted this proposition, which we regard as correct, cite any precedent of this Court in support. However, it transpires that in Lonankutty, this proposition has been affirmed. Viewed simplistically, the remand matter by the trial Court is a finding in an intermediate stage of the same litigation. When it came to the trial Court, and escalated to the High Court, it remained the same litigation. The appeal before the Supreme Court was from the suit as a whole and therefore, the entire subject-matter is available for adjudication before us. If, on any other principle of finality statutorily conferred or on account of res judicata attracted by a decision in an allied litigation the matter is concluded, we too are bound in the Supreme Court. Otherwise, the whole lis for the first time comes to this Court and the 'High Court finding at an intermediate stage does not prevent examination of the position of law by this Court. Inter-stages of the litigation and orders passed at those stages have as provisional finality.

The next decision relied upon is Shankar Ramachandra Abyankar V. Krishnaji Dattatreya Bapai : [1970]1SCR322 . In that case, the respondent had chosen the remedy under Section 115, C.P.C., but a learned single Judge of the Bombay High Court dismissed the revision filed against the Bombay Rents, Hotel and Lodging House and Rates Control Act of 1947. Thereupon, the respondent moved the High Court, by invoking the extraordinary jurisdiction of the High Court under Articles 226 and 227 of the Constitution challenging the order of the appellate Court. A Division Bench of the said High Court held that in spite of the dismissal of the revision petition, it could interfere under Articles 226 and 227, on a proper case being made out, and after going into the merits of the case, it granted relief to the respondent. On appeal to the Supreme Court, a contention was raised that the High Court could not have interfered under Articles 226 and 227. That contention was upheld and the Supreme Court laid down the principle as follows:

Even on the assumption that the order of the appellate Court had not merged in the order of the single judge who had disposed of the revision petition, we are of the view that the writ petition ought not to have been entertained by the High Court when the respondent had already chosen the remedy under Section 115, Civil Procedure Code. If there are two modes of invoking the jurisdiction of the High

Court and one of those modes had been chosen and exhausted, it would not be a proper and sound exercise of discretion to grant relief in the other set of proceedings in respect of the same order of the subordinate Court. The refusal to grant relief in such circumstances would be in consonance with the anxiety of the Court to prevent abuse of process as also to respect and accord finality to its own decisions.

In a subsequent decision, viz., *Jharia v. State of Rajasthan* : [1983]3SCR475 , the Supreme Court, recognising the principle laid down in *Shankar v. Krishnaji* : [1970]1SCR322 , has observed thus:

There is no reason why the same principle should not be equally applied to proceedings under Article 22 of the Constitution which are initiated after the court had declined to interfere under Article 136.

Bearing in mind the principle laid down in the various decisions of the Supreme Court, referred to above, I shall now see whether the order passed by Ratnam, J., in the revision has become final so far as this Court is concerned.

17. A party who has been asked to pay additional court-fee has two remedies against that order - (1) He can file a revision under Section 115, C.P.C., and get a stay in which event the lower Court would not be in a position to pass a final order. If the said revision is allowed, the suit would proceed and a decree would be passed. On the other hand, if the revision is dismissed, the lower Court would reject the plaint if the deficiency in the Court-fee is not made good in time. (2) In case the plaint is rejected, the plaintiff has got a right of appeal. The appeal filed against the decree dismissing the suit for non-payment of deficit Court-fee amounts to an appeal against the order rejecting the plaint. If such an appeal is filed, and the plaintiff questions the order rejecting the plaint which has been considered earlier by the same appellate Court while sitting in revision on a previous occasion, the question would be whether the plaintiff could be permitted to re-agitate the same matter before the appellate Court at this stage. In view of the discussions made above, I am of the view that the answer is in the negative. How can a plaintiff who has got two remedies before the same Court having concurrent jurisdiction, having elected one course, again approach the same court

and canvass the correctness or otherwise of the decision which has been considered by the same Court while sitting in revision on an earlier occasion? The only answer would be that he cannot agitate the same question by preferring an appeal after having elected to file a revision earlier. Now, coming to the present case, the order passed by Ratnam, J. present case, the order passed by Ratnam, J., has become final so far as this Court is concerned, and though the respondents on 14th January, 1981, filed a S.L.P., before the Supreme Court challenging the validity of the order of Ratnam, J., the said S.L.P. has been on 16th September, 1983 dismissed.

18. Section 105 no doubt provides that-

Where a decree is appealed from any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

But, from the decision of the Supreme Court in Satyadhyan Ghosal's case : [1960]3SCR590 , reiterated by the Supreme Court in the subsequent decisions referred to above, it is clear that the challenge must be in an appeal from the final decree not in the court making the interlocutory order-attacked, but in the appeal ultimately taken to the higher Court from the final decree. Further, the question raised in Pichu Ayyangar's case : AIR1940 Mad756 , was whether the order passed by a single judge in revision upholding the preliminary objection regarding the jurisdiction of the District Court to frame a scheme and dismissing the suit, was an inappropriate one within the meaning of Section 115, C.P.C. That is not the position in this case. For all the reasons stated above, I hold that the appellants cannot be allowed to reagitate the question about the sufficiency or otherwise of the Court-fee paid on the plaint in this appeal.

19. Contention No. 3 : Much argument was advanced on this contention. Mr. Ramanathan, learned Counsel for the appellants would submit that the Court ought not to have dismissed the suit, when it has found that the plaintiffs have not made good the deficiency in the Court-fee on or before 31st December, 1980, the time-limit granted by this Court in C.R.P. No. 2590 of 1978.

According to him, the dismissal of the suit would operate as res judicata for filing a fresh suit on the same cause of action and in case the plaint is rejected, it would not preclude the appellants-plaintiffs from presenting a fresh plaint in respect of the same cause of action, as contemplated under Order 7, Rule 13 of the Code of Civil Procedure. Further, he would draw the attention of this Court to the latter part of Section 12(2) of the Court-fees Act, as per which the plaint has to be rejected if the deficit Court-fee is not paid within the time allowed. A catena or authoritative judicial pronouncements of the Supreme Court and various High Courts have been cited by both parties, which I shall refer to immediately after extracting the relevant provisions of the Civil Procedure Code, and the Court-fees Act, touching on this aspect of the case. Order 7, Rule 11(c) of the Civil Procedure Code reads thus:

The plaint shall be rejectee in the following cases...(c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so.

Order 7, Rule 13, C.P.C., is as follows:

Where rejection of plaint does not preclude presentation of fresh Plaint:

The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

Section 12, Sub-section (1) and (2) of the Court-fees Act reads thus:

Decision as to proper fee in other Courts:

(1) In every suit instituted in any Court other than the High Court, the Court shall, before ordering the plaint to be registered, decide on the materials and allegations contained in the plaint and on the materials contained in the statement, if any, filed under Section 10, the proper fee payable thereon, the decision being however subject to review, further review and correction in the manner specified in the succeeding Sub-sections.

(2) Any defendant may, by his written statement filed before the first hearing of the suit or before evidence is recorded on the merits of the claim but subject to the next succeeding sub-section not later, plead that the subject-matter of the suit had not been properly valued or that the fee paid is not sufficient. All questions arising, on such pleas shall be heard and decided before evidence is recorded affecting such defendant, on the merits of the claim. If the Court decides that the subject-matter of the suit has not been properly valued or that the fee paid is not sufficient, the Court shall fix a date before which the plaint shall be amended in accordance with the court's decision and the deficit fee shall be paid. If the plaint be not amended or if the deficit fee be not paid within the time allowed, the plaint shall be rejected and the Court shall pass such order as it deems just regarding costs of the suit.

The first decision cited by Mr. Ramanathan is Radha Kanta Saha v. Debendra Narayan Saha : AIR1922 Cal506 , wherein the following dictum has been laid down-

We desire to point out that even if the view taken by the Subordinate Judge had been well founded, the course pursued by him was contrary to the provisions of Order 7, Rule 11, C.P.C. The provisions of this rule are mandatory and they require that where a plaint is written upon a paper insufficiently stamped, the court is bound to give the plaintiff time to make good the deficiency...In this view, it follows that as soon as the Subordinate Judge held that the plaint was not adequately stamped, he should have proceeded to act in accordance with the provisions of Order 8, Rule 11, upon the failure of the plaintiff to carry out his order, he should have rejected the plaint and not dismissed the suit.

Then reliance was placed on Basavayya v. Venkatappayya : AIR1926 Mad676 . In that case it has been observed-

Order 7, Rule 11 declares that when a plaintiff does not pay the deficit Court-fee within a time to be fixed by the Court, the plaint shall be rejected.

The learned Counsel further cited the decision of a Division Bench of this High Court in Sriramulu Chettiar v. Raja Chettiar and Ors. : (1951)1MLJ100 , wherein it

has been ruled that where a Judge finds that a plaint has not been properly valued he should in accordance with the provisions of Rule 11 of Order 7, C.P.C, direct the plaintiff to value it properly and only after his failure to do so, reject the plaint and that where the suit is dismissed because the plaint is under-valued, the procedure is not justified and cannot be sustained.

20. Mr. M. Srinivasan would urge that Order 7, Rule 11(c), C.P.C. would apply only to the stage anterior to the filing of the written statement by the defendant on his appearance, but once the plaint is, taken on file and the defendant has filed his written statement, the only course left open to the Court is to dismiss the suit for non-payment of the deficit Court-fee and not to reject the plaint. In support of this contention, he cites a number of decisions which I shall presently refer to. First, he refers to *Narayanan v. Sankaran* A.I.R. 1929 Mad. 344. In that case the plaintiffs were ordered to pay additional court-fee and were given further time to pay the same; but on the date fixed they did not appear and the Court dismissed the suit. While dismissing the suit the Court noted-

The plaintiffs have not paid the additional court-fee. The plaintiffs are absent. The plaintiffs' pleader has no instructions.

In that case, the question arose whether the impugned order was -one made under Order 7, Rule 11, C.P.C., or under Order 9, Rule 8, C.P.C.; the court held as follows:

As there was no appearance, he could not very well grant further time, for, no application was made to him and, therefore, he had to reject the plaint, and, when the main reason given is that the plaintiffs have not paid the additional court-fee, it cannot be said that the suit was riot dismissed for non-payment of the proper Court-fee.

The next decision cited by him is *Beni Prasad v. Om Prakash* : AIR1938 All497 , wherein it has been held that the rejection of a plaint under Order 7, Rule 11, C.P.C., is a matter prior to the issue of notice to a defendant, and that after the issue of notice to the defendant the correct words to Use are, 'dismissal of the suit' and not 'rejection of the plaint'. The other decisions cited by the learned Counsel

are Jarimon Khatoon v. Secretary of State A.I.R. 1940 Cal. 541, Mahalakshmi Devi v. Ramacharan : AIR1953 Cal42 , Hubraj Singh v. Rama Dasi : AIR1954 All719 and Chamroon v. Basudevo Narayan : AIR1968 Pat48 .

21. Now, let me examine the circumstances under which the order In question came to be passed. In the present case, it is seen from the judgment of the court below that the 3rd, 4th and 6th defendants were represented by their respective counsel and they filed their written statements, while defendants 1 and 2 stood ex pane. Issues also were framed on 17th June, 1977, as seen from the records. One of the issues, viz., issue No. 4, was whether the Court-fee paid is correct. At this stage, it is pertinent to note that it is seen from the office note and the order of the Court below made at the time of taking the plaint on file on 12th January, 1977, that the question as to the proper Court-fee to be paid was raised, and the Court, after hearing the counsel for the plaintiff, took it on file subject to the question of Court-fee. It is seen from the B diary that after the issues were framed, the suit was transferred to the file of the III Additional Subordinate Judge, Madurai, on 8th September, 1977. The trial did not proceed immediately thereafter, but the case was adjourned on several occasions and ultimately posted to 26th July, 1978 by which time a chekslip was issued pointing out the deficiency in the Court-fee paid. The subsequent proceedings arose only out of the direction of, the Court to pay the deficit Court-fee. It is in this background that we have to decide whether the dismissal of the suit is just and proper or whether the plaint should have been rejected.

22. It would be appropriate in this connection to refer to the decision of this Court rendered by Venkatasubba Rao, J., C.M. Marroof Sahib v. Ayyakannu Naicker : AIR1935 Cal746 . In the said case, the plaintiff filed 14 suits in the court of the District Munsif in 1929 and a plea of res judicata having been raised and upheld, the suits were dismissed. Appeals were taken to the District Court and the finding of the learned District Munsif on the question of res judicata having been reversed, the suits were remanded on 22nd April, 1932, to the trial Court for fresh disposal. When the cases came back to the District Munsif is Court, the Court-fee examiner found on scrutiny that the reliefs were inadequately valued. The District Munsif upheld this view. A contention was raised in that case that the District Munsif was

wrong in reversing the valuation when the case came, back to him for fresh disposal on an order of remand. In that connection, the learned Judge held as follows:

The Court's power to correct the valuation is not limited under Order 7, Rule 11, C.P.C., to any particular stage of the suit. It has been held that the power under that provision to reject a plaint is not exhausted when it has been admitted and registered. That being so, -the Court must be held to retain the power till the point is raised and it decides it whatever the stage may be in the course of the trial. Moreover, the analogy of Sec 12 of the Court Fees Act, which says that even a court of appeal, if It finds that a question was wrongly decided to the detriment of the Revenue, may exact the proper court-fee also shows the trial Court's power may be exercised at any stage of the suit.

23. In *kiranchandra v. Purnachandra* 68 M.L.J. 755 : A.I.R. 1935 Mad. 569 : 41 L.W. 562 : I.L.R. (1935) Mad. 1051, the question arose whether a plaint can be rejected even after registration under Order 7, Rule 11, C.P.C Answering this question affirmatively a single Judge of the Calcutta High Court has observed thus:

The proper order in the circumstances would not be a dismissal of the suit, but the rejection of the plaint under Order 7, R.11, of the Code; and I must hold that the effect of the order dated 3rd August, 1931, should be the same if the court had passed the order in correct form, namely, an order rejecting the plaint. There can be no doubt that a plaint can be rejected at any stage of the suit even after its registration *Krishna Singh v. Sabdal Singh* I.L.R. (1890) All. 553, *Brahmomayi Debi v. Andi Si* I.L.R. (1900) Cal. 376 and *Radaa Kanta v. Debendra Narayan* : AIR1922 Cal506 , and the fact that the suit was registered, heard by the trial Court, and by the appellate Court, and remanded, would be of no moment, for, a plaint not correctly valued or stamped can be rejected under Order 7, Rule 11 of the Code at any stage of the suit the said provisions being mandatory.

A Division Bench of the Calcutta High Court in *Smt. Annapurna Dassi v. Saratchandra Bhattacharj* : AIR1935 Cal157 , has held that where a suit is dismissed because the proper Court-fee has not been paid within the time

allowed, this amounts to rejection of the plaint under Order 7, Rule 11, Clause (b) and (c). In *Shamarao v. Amolok Chimnira* A.I.R. 1935 Nag. 373, the facts were that the trial Court, after the completion of the trial but before the pronouncement of the judgment, dismissed the suit for non-payment of additional court-fee within the time granted by the Court. The question that was posed before the learned single Judge of the High Court was whether the said dismissal was correct. Relying on the decision of the Madras High Court in *C.M. Maroof Sahib's case* : AIR1935 Cal764 , and *Annapurna Dassi's case* : AIR1935 Cal157 , the learned Judge observed thus:

Though in this case, the suit has been thrown out for non-payment of additional Court-fee that came to be demanded after the suit has been tried to completion, that should nevertheless mean only rejection of the plaint. This rejection may come at any stage of the suit when the Court applies its mind to the question of proper valuation. Therefore, the power to reject the plaint may be exercised at any stage of a pending suit...So long as the original plaint has not been terminated in a decree, there can be a rejection of the plaint so as to take away the very basis of the suit. This would mean that no suit was filed and in such a case it may be open to the plaintiff to bring a fresh suit.

24. A Full Bench of the Calcutta High Court in *Bibhas Mohan v. Haricharan* : AIR1961 Cal491 (F.B.), has ruled that an order dismissing the suit under Section 8B(3) of the Bengal Court-fees Act is appealable as a decree within the meaning of Section 2(2) of the Civil Procedure Code as the order of dismissal amounts in law to an order rejecting the plaint under Order 7, Rule 11(c), C.P.C. The Full Bench examined the correctness of the decision rendered by the Division Bench of the Calcutta High Court in *Mahalakshmi Debi's case* : AIR1953 Cal491 and overruled the same. With regard to the decision in *Jarimon Khatoon's case* : AIR1940 Cal451 , the Full Bench observed that the form of the order under, Section 8B(3) of the Bengal Court Fees Act must no doubt, be a dismissal of the suit and under that section the Court was bound to dismiss the suit, because that was the mandate of the Legislature; but, its effect in law was rejection of the plaint under Order 7, Rule 11, C.P.C.

25. A Bench of this Court consisting of Govinda Menon and Basheer Ahmed Sayeed, JJ. in *Sriramulu Chettiar v. Raja Chettiar* (1951) 1 M.L.J. 180 : (1951) 63 L.W. 171, has expressed the view that where a suit is dismissed because the plaint is undervalued the procedure is not justified and cannot be sustained.

26. After carefully going through all the above decisions, I am of the view that a plaint can be rejected at any stage of the suit under Order 7, Rule 11(c), C.P.C., if the plaintiff has failed to make good the deficiency in the Court-fee due within the time granted by the Court and that the proper course for the court would be only to reject the plaint and not to dismiss the suit.

27. The two decisions relied on by Mr. M. Srinivasan viz., *Jarimon Khatoon's case* : AIR1940 Cal451 and *Mahalakshmi Debi's case* : AIR1953 Cal42 cannot at all be availed of by the respondents, because the latter case has been overruled by the Full Bench in *Bibhas Mohan's case* : AIR1961 Cal491 (F.B.) and with regard to the former case, the Full Bench has held that the effect of the dismissal under, Section 8-B(3) of the Bengal Court-fees Act was a rejection of the plaint under Order 7, Rule 11, C.P.C.

28. Now, coming to the case on hand it may be pointed out that the plaint in, this case has been admitted, as I have already pointed out only subject to the question of Court-fee and the checkslip was issued subsequently pointing out the deficiency in the Court-fee and hence the entire proceedings in the present suit should be taken to have been preceded with subject to the question of Court-fee and since the suit has been disposed of only on the plaintiff failing to pay Court-fee within the time granted, a fortiori it should be held that the failure of the plaintiffs to pay the Court-fee should date back to the date of the institution of the plaint. For all the reasons stated above, I hold that the court below was not justified in dismissing the suit, but it ought to have rejected the plaint under Order 7, Rule 11(c), C.P.C.

29. Contention No. 4 Mr. Ramanathan would submit that in case this Court comes to the conclusion that the Court-fee demanded should be paid, this Court may be pleased to extend the time for payment of the deficit Court-fee and in support of this contention he would draw the attention of this Court to Section 12(4) of the Court Fees Act and Sees. 148, 149 and 151, C.P.C. Mr. M. Srinivasan would

resist this argument and contend that since the appellants have not shown any sufficient cause for extension of time for this Court invoking its discretionary power, especially when the appellants have not been bona fide and have not made any honest attempt to make good the deficiency in the Court-fee, as demanded by the trial Court in its order which order, has been confirmed by Ratnam, J. in C.R.P. No. 2590 of 1978 and since the S.L.P., preferred against the said order in C.R.P.No.2590 of 1978 has been dismissed by the Supreme Court, the appellants are not at all entitled to request this Court to exercise its discretionary power in extending the time for payment of the deficit Court-fee. In support of his contention, Mr. Ramanathan would rely upon the decision of the Supreme Court in Mahanth Ram Das v. Ganga Das : [1961]3SCR763 , wherein the Supreme Court has ruled that Sections 148, 149 and 151, C.P.C., clothe the High Court, with ample powers to do justice to a litigation if sufficient cause has been shown for extension. As in the present case I am of the view that the appellants have not shown any sufficient cause for granting extension of time to pay the deficit Court-fee this judgment cannot be availed of by the appellants.

30. In this connection the appellants have filed C.M.P. No. 10406 of 1983 for permission to pay the additional Court-fee ascertained to be due and payable by the appellants in respect of the suit claim. As I have now come to the conclusion that there is no sufficient cause shown by the appellants for the Court granting extension of time to pay the deficit Court-fee this petition will stand dismissed.

31. Though Mr. Srinivasan had initially raised the contention that the appellants are not entitled to challenge the suit in this appeal since only a Court-fee of Rs. 39 has been paid on Rs. 512 being the disputed additional Court-fee ordered to be paid by the Court below and not in respect of the entire suit valuation, and though much argument had been advanced by both the parties on this aspect, Mr. M. Srinivasan has now given up that contention in view of the decision rendered by a Divisions Bench of this Court in Kalikappa Goundan v. Kandasami Goundan : AIR1938 Mad498 . Hence, I am not called upon to render any finding on this submission N made by Mr. Srinivasan.

32. For all the reasons stated above, as I have now come to the conclusion on contention No. 3, the Court below was not justified in dismissing the suit and the proper order would be only to reject the plaint under Order 7, Rule 11(c), C.P.C., the decree and judgment of the Court below dismissing the suit is set a aside and the plaint is rejected. The appeal is allowed to the extent indicated above. No costs.

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