

(Kaluri) Narasimham Vs. (Kaluri) Narasinga Rao and ors.

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Court : Chennai

Decided On : Nov-14-1929

Reported in : AIR1930Mad707

Appellant : (Kaluri) Narasimham

Respondent : (Kaluri) Narasinga Rao and ors.

Judgement :

Wallace, J.

1. The plaintiffs sued to set aside the Court sale in execution of a decree obtained by defendant 6, the trustee of Vizianagaram Estate, against them and defendants 1 to 4 for arrears of quit rent. At the sale Survey No. 199 and 2/3 of 233 belonging to the plaintiffs and 1/3 of 233 and all lands belonging to defendants 1 to 4 were sold and purchased by defendant 5. Plaintiff's case was that the sale of their properties was fraudulent. The trial Court held that the inclusion of the plaintiff's properties in the sale proceedings was due to a fraud practiced by defendant 3 and defendant 6's gumastha, defendant 3 being the real purchaser, although defendant 5 was the nominal purchaser. The District Munsif, therefore, gave the plaintiffs a decree. Defendant 5 appealed. In the lower appellate Court, the plaintiffs and defendant 5 compromised and the appeal was withdrawn. The lower appellate Court exonerated defendant 3 from the plaintiff's costs, but directed him to bear his own costs throughout. The lower appellate Court also held, although it

was not necessary for its decision so to hold, that the suit was not maintainable, being barred by Order 21, Rule 90. Defendant 3 appeals here on two grounds: first that the lower appellate Court having found that the suit was not maintainable was bound to dismiss it against him; and secondly, that in the circumstances of the case, he should have got his costs from the plaintiff. He relies upon Order 41, Rule 33 and claims that rule is peremptory and that the lower appellate Court should not have refused to set aside the decree against him although he had not appealed against it. I am not shown any authority for holding that Rule 33, is peremptory, so that if the lower Court refuses to act under it, its refusal will be an error of law open to be dealt with by a second appellate Court. This Court has, so far as I am aware, always treated the application of Rule 33 as a matter of discretion. Clearly, if a second appellate Court is bound to decide as a matter of law whether a lower appellate Court was right in refusing to act under Rule 33, it will have to go into questions of fact as well as of law in order to decide whether the lower appellate Court's decree, the application of which it is asked to extend under Rule 33, was right or not, since the second appellate Court cannot be asked to extend the scope of a decree which it holds to be a wrong decree. But the second appellate Court is not permitted to go in this way into questions of fact. It would seem to follow from that, the refusal of the lower appellate Court to act under Rule 33 is not an error of law with which the second appellate Court is bound to interfere. I, therefore, find no substance in this contention.

2. Defendant 3 had as a matter of fact put in a memorandum of cross-objections in the matter of costs in the lower appellate Court, but in that memorandum, although he attacked the maintainability of the suit, the only relief he asked for was as regards his costs. It is urged that although the only relief he asked for in the memorandum of cross-objections was in the matter of costs, nevertheless, the lower appellate Court was bound to hear and give full effect to his memorandum of objections on the maintainability of the suit, since that Court itself held the suit to be not maintainable. This contention also I do not follow. The matter of costs was the only matter agitated in the memorandum of objections and such matter is always a matter of discretion for the Court. Both the lower Courts held that defendant 3, this appellant, was a party to the fraud by which the plaintiffs' properties had been sold, and the lower appellate Court cannot be said to have

exercised its discretion improperly in refusing costs to a party who was endeavouring to profit by his own fraud.

3. Finally, it was urged that defendant 5 who compromised the suit is really defendant 3, defendant 5 having purchased the suit properties as benamidar for defendant 3. This contention seems to me to be forbidden by Section 66, Civil P.C. In any case, defendant 5 was the appellant and defendant 3 was not. The party entitled to withdraw or maintain the appeal, was defendant 5, not defendant 3. In fact, defendant 3 chose to be absent when the appeal was called and withdrawn and that was the time when he should and could have objected to the withdrawal if it was to his prejudice. I find there is no substance in this second appeal and I dismiss it with costs of respondent 1.

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