

Daniel and ors. Vs. Chellakkan Nadar

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Court : Chennai

Decided On : Aug-13-1990

Reported in : (1990)2MLJ542

Appellant : Daniel and ors.

Respondent : Chellakkan Nadar

Judgement :

ORDER

Raju, J.

1. The above appeal has been filed against the judgment and decree dated 7.12.1982 made in A.S.No.87 of 1981 on the file of the Subordinate Judge, Kuzhithurai whereunder the lower appellate Court set aside the order of the Principal District Munsif, Kuzhithurai dated 26.9.1981 made in E.P.No.281 of 1980 in O.S. No.34 of 1979 and remanded the matter to the trial Court for disposal afresh in the light of the observations made by the lower appellate Court.

2. The appellants before this Court were the plaintiffs and in the suit filed by them, a preliminary decree was passed for redemption of an usufructuary mortgage in favour of the respondent. A final decree was also passed. Consequently, the appellants filed E.P.No.281 of 1980 on 2.7.1980 praying for delivery of possession of the property after assessing the value of improvements, if any, made in terms of the final decree. After contest, the trial Court held that the respondent has not

produced any records to show that he has made improvements and that he was not entitled to anything towards the claim for improvement. Therefore, the petition for delivery was ordered.

3. As against this, the respondent herein preferred an appeal in A.S. No.87 of 1982 before the lower appellate Court. The lower appellate Court, by its judgment and decree dated 7.12.1982, felt that the commission warrant issued by the trial Court originally had to be reissued to assess the value of improvements in the light of the observations made by the lower appellate Court. Consequently, the appeal was allowed, the order of the trial Court was set aside and the matter was remanded to the trial Court for fresh disposal. As against this, the appellants have filed the above appeal under Order 43, Rule 1(a), C.P.C.

4. When the matter was taken up for hearing, learned Counsel for the appellants, even before going into the contentions on merits, submitted that the appeal before the lower appellate Court was not maintainable having regard to the amendment introduced to Section 2(2), C.P.C. by the Amendment Act 104 of 1976 which rendered an order under Section 47, C.P.C. passed in execution proceedings not to be a decree. It was also contended that in spite of the fact that the point was specifically raised, the same was not considered by the lower appellate Court. In support of the submissions made by the learned Counsel for the appellants, the decisions reported in *Visalakshi v. Muthiah Chettiar* : (1983)2MLJ447 , *Doraiswamy v. Premchand* : (1985)2MLJ345 , *Narmada Devi v. Ram Nandan Singh* : AIR1987 Pat33 . and *Jayalakshmi Ammal v. Barathe Gounder* 1978 T.L.N.J. 220 were referred to. On the other hand, in meeting the said submission, learned Counsel appearing for the respondent referred to the decision reported in *Parashava Properties Limited v. A.K. Bose* : AIR1979 Pat308 and *Sundaresan v. Ramachandra and Company* 1981 T.L.N.J. 176 and contended that since the matter involved adjudication of rights of parties, the appeal before the lower appellate Court was maintainable notwithstanding the amendment introduced by the Amendment Act 104 of 1976.

5. After careful consideration of the submissions made by the learned Counsel on either side and after considering the authorities placed in support of their

contentions, I am of the view that the appeal before the lower appellate Court filed by the respondent herein was not maintainable. The authorities referred to by the learned Counsel for the appellants are squarely on the point and the submission made by the learned Counsel for the respondent has to be referred only for being rejected. The decision of the Patna High Court in *Parshava Properties Limited v. A.K. Bose* : AIR1979 Pat308 referred to by the learned Counsel for the respondent was specifically considered and overruled in the Full Bench Judgment in *Narmada Devi v. Ram Nandan Singh* : AIR1987 Pat33 . So far as the decision reported in *Sundaresan v. Ramachandra and Company* 1984 T.L.N.J. 176 is concerned, Ratnam, J. sustained the plea of the appellants in that case in favour of an appeal on the interpretation of Section 25(1) of the Tamil Nadu Debt Relief Act 40 of 1979 since it was a case which arose under the said Act. In my opinion, the said judgment has no direct bearing on the issue now raised before me. Applying the ratio of the decision in *Visalakshmi v. Muthiah Chettiar* : (1983)2MLJ447 , *Doraiswamy v. Prem Chand* : (1985)2MLJ345 and *Jayalakshmi Ammal v. Barathra Gounder* (1978) T.L.N.J. 220 I hold that the appeal filed before the lower appellate Court by the respondent herein was not maintainable at all and the lower appellate Court exceeded its jurisdiction in entertaining the appeal and disposing of the same on merits.

6. Before concluding the matter, learned Counsel for the respondent made an ingenuous submission that he concedes the position that the appeal before the lower appellate Court at the instance of the respondent was not maintainable and, therefore, this Court should also hold that the present appeal presented under Order 43, Rule 1(a), C.P.C. is equally not maintainable. I am not prepared to accept the said submission. Sustaining the submission of the respondent in this regard will result not only in manifest injustice but it is not open to the respondent to blow hot and cold as it suit him and at the same time try to retain a benefit secured under a judgment passed in a proceeding which was not maintainable. While I say a benefit it is meant to refer that the trial Court rejected the plea of the respondent for improvements and straightaway ordered for delivery and such an order of the trial Court was undone at the instance of the respondent. The effect of sustaining a plea now advanced will result in allowing an illegal order passed without jurisdiction by the lower appellate Court to hold the field. The Courts are

not to be taken to be so helpless or powerless to take hold of the situation and render justice. It would be well open to this Court to even convert the above appeal into a revision under Section 115, C.P.C. and render justice. But on further consideration, I found that even without doing so, substantial justice could be rendered, and I am fortified in my said view by a series of judgments of this Court.

7. This Court as early as in a decision reported in *Muthiah Chettiar v. Lodd Govinda Doss and Anr.* : AIR1921 Mad599 . held that when a Court below passes an order in the purported exercise of its powers under a particular provision, the appeal against that order, if is otherwise maintainable in respect of the provision in the purported exercise of which power the order has been so made can be entertained by this Court. In coming to the said conclusion, the earlier decisions reported in *Abdul Rahiman Sahib v. Ganapathi Bhattu* I.L.R. (1900) Mad 517 and *Lakshmana Chetty v. Ramanathan Chetty* I.L.R. (1904) Mad 127 were relied upon by the Full Bench. In another decision, a Division Bench of this Court in a decision reported in *Oor Nayakkan v. Arunachala Chettiar* : AIR1948 Mad245 categorically held that where a Court wrongly acts under an appealable provision of law and passes an order a party aggrieved is not deprived of the right of appeal though on the facts the order should not have been passed under that provision. That was a case in which a suit of a small cause nature was tried as an original suit and an appeal was filed from such decree of the trial Court. When an issue was raised as to whether an appeal was maintainable at all having regard to the fact that the suit was one of a small cause nature, the Division Bench considered the issue in the light of the earlier judgments of this Court and came to the conclusion as referred to above. In the decision reported in *Abdul Rahiman Sahib v. Ganapathi Bhattu* I.L.R. 23 Mad517 a Division Bench of this Court held that the fact that the District Judge had no power to pass an order under a particular section does not bar the High Court from treating the said order as having been passed there-under for the purposes of entertaining an appeal against the order and in coming to such a conclusion, the learned Judge also referred to the decision of the Privy Council in *Hurrish Chunder Chowdhury v. Kali Sundari Debi* I.L.R. (1882) Cal. 482. A similar view was also taken in the decision in *Lakshmana Chetty v. Ramanathan Chetty* I.L.R. (1904) Mad 127. Consequently, I hold that the appeal before this Court is maintainable since the lower appellate Court purported to exercise the powers of

an appeal and that conclusion of mine is notwithstanding the fact that this Court had come to the conclusion that such an appeal is not maintainable before the lower appellate Court.

8. For all the reasons stated above, I set aside the judgment and decree of the lower appellate Court. Consequently, this appeal is allowed. But in the circumstances, there will be no order as to costs.

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