NARAYANAN

*v.*

KUMARAN AND ORS.

MARCH 16, 2004

[R.C. LAHOTI AND DR. AR. LAKSHMANAN, JJ.]

*Code of Civil Procedure, 1908; Order 43 Rule (1) Clause (u) and Section 100: Father settling his properties excluding disputed property by executing settlement deeds thereof in favour of his daughters—Transferring part of properties earmarked in favour of minor daughter to a relative (Respondent)—Respondent manipulating the schedule to property—Sale of disputed property by the owner—Respondent on one side and owner and Vendee on the other filing separate suits for permanent injunction against the other—Trial Court decreed the suit of the respondent holding other suit barred by limitation—Reversed by District Court holding that the respondent did not acquire title to the disputed properties and remanded the matter to trial Court for preparing fresh plan for proper identification—High Court setting aside the judgment of District Court and restoring that of trial Court—On appeal, Held: No question of law arose for consideration—District Court had thoroughly examined the facts/evidence in arriving at its findings—In an appeal against order of remand, High Court should have confined itself to the facts/conclusions/decisions having bearing on it—But it had gone beyond its jurisdiction by appreciating facts in an appeal under Section 100 CPC—Hence, judgment of the High Court could not be sustained and set aside—Order of the District Court restored except the order of remand which stands deleted.*

**The owner of the properties in dispute, had executed a deed of Settlement settling his entire property excluding the disputed property (Schedule C to Ext.B1)in favour of his daughters including a minor daughter and kept the disputed property (Schedule D) with him. Later, he gave part of the properties earmarked for his minor daughter to 1st respondent, a close relative. Respondent No. 1 in connivance with Respondent No. 3 manipulated Schedule C and included in it the property as mentioned in Schedule D. However, the owner remained in possession of the property in dispute and sold part of the said properties to appellant/ Vendee. Respondent No. 1 filed a suit for permanent injunction. When**

A the owner came to know about the fraud committed by Respondent No. 1 in transferring the disputed properties in his favour, he along with Vendee filed a suit for injunction. Owner died during the pendency of the suit. Trial Court decreed the suit of Respondent No. 1 dismissing the other suit on the ground of limitation. Aggrieved, Vendee filed an appeal which was allowed by the District Court remanding the matter to the trial Court and B directing the preparation of a fresh plan for identification of the properties. 1st respondent filed an appeal which was allowed by the High Court. Hence the present appeals.

It was contended for the appellant that since no question of law was C involved, High Court had gone beyond its jurisdiction in excruciating facts/ evidence in an appeal under Section 100 CPC; and that the appellant should not have been heard by the High Court on question of facts.

Allowing the appeals, the Court

D HELD: 1.1. The order passed by the High Court clearly goes to show that it has gone into minute details of facts and has appreciated evidence which is not warranted under Section 100 CPC, and is beyond its jurisdiction. No question of law much less any substantial question of law arose before the High Court. Its jurisdiction is confined to entertain only such appeal as involving substantial question of law specifically set out in E the memoranda of appeal and formulated by it. High Court, in the instant case, has not framed any substantial question of law and has committed a patent error in disposing of the Civil Misc. Appeal. The existence of a substantial question of law is *sine qua non* for exercise of the jurisdiction under Section 100 CPC. [17-D-F]

F 1.2. It is obvious from Order 43 Rule 1 Clause (u) of CPC that an appeal would lie from an order of remand only in those cases in which an appeal lies against the decree if the Appellate Court instead of making an order of remand had passed a decree on the strength of the adjudication on which the order of remand was passed. The test is whether in the G circumstances an appeal would lie if the order of remand where it is to be treated as a decree and not a mere order. In these circumstances, it is quite safe to adopt that appeal under Order 43 Rule (1) Clause (u) should be heard only on the ground enumerated in Section 100 CPC. Hence, the appellant is not entitled to agitate questions of facts; and that in an appeal against an order of remand under this clause, the High Court can and H should confine itself to such facts, conclusions and decisions which have a

bearing on the order of remand and cannot canvass all the findings of facts arrived at by the Lower Appellate Court. [18-D-G] A

*Abdul Gani and Anr.* v. *Devi Lal and Anr.*, AIR (1960) Rajasthan 77; *Seshammal and Ors.* v. *Kuppanaiyyangar and Anr.*, AIR (1926) Madras 475; *Ambukutti Vaidier* v. *Kannoth Koottambath Kelan*, AIR (1933) Madras 460 and *Kaluvaroya Pillai and Ors.* v. *Ganesa Pandithan and Ors.*, AIR (1969) Madras 148, relied on. B

1.3. The Schedule to the document was prepared in excess of what was intended to be conveyed. It has been fraudulently prepared as rightly found by the District Court. It is a well established principle that when there is inconsistency in the body of the document, containing the evidence clause and the schedule, the former prevails over the latter. As such when the intention of the parties was clear, the Schedule to the document should not have been allowed to override the recital clause. The property in Schedule 'D' was not intended to be conveyed is evident from the fact that there was no mention of the accredition much less between Schedule C & D to Ext.B1. If really the entire property would have been conveyed the existence of the accredition or an intention to transfer the same would find their place in the document. The respondent has no case that he has any title to or possession of the said accredition. This very fact cuts the root of the case of the 1st respondent title to the disputed property. [21-B-D] C D E

1.4. The finding of possession of the 1st respondent is based on the document acquired after the commencement of the suit. There is no iota of evidence for the prior period even otherwise any acts on his part was only referable to his close association with the owner/transferor and his family and was looking after his property. Thus, the case of fraud put forward by the appellant was amply proved by the facts and circumstances of the case and as thoroughly discussed by the District Court and the findings of fact arrived at. Hence, the High Court was not justified in going into the excruciating details of facts in the second appeal. The High Court has exceeded its jurisdiction by reversing a well considered judgment of the First Appellate Court, the Final Court of facts especially when no questions of law much less a substantial question of law arose for consideration. Hence, the judgment passed by the High Court cannot be sustained and is set aside, and judgment of the District Court restored except the order of remand which is deleted. [21-H; 22-A-B, E] F G H

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 820-821 of 1999.

From the Judgment and Order dated 6.3.97 of the Kerala High Court in C.M.A. Nos. 208/94 and 43 of 1995.

B T.L.V. Iyer, Gopala Krishnan R., Abhay Kumar and Subramonium Prasad for the Appellant.

P. Krishnamurthy, Romy Chacko, P.N. Pillai and Ms. V. Mohana for the Respondents.

C The Judgment of the Court was delivered by

**DR. AR. LAKSHMANAN, J.** These two appeals were filed against the final judgment/order dated 6.3.1997 passed by the High Court of Kerala in C.M.A. Nos. 208/94 and 43/95 restoring the common judgment and decree of the Trial Court having set aside the remand order of the lower Appellate D Court. The short facts are.

The property in dispute in this appeal belong to one Kunjan who executed a deed of settlement settling his properties including the disputed property on his daughters. One of the daughters Sumathi was minor to whom the C Schedule to the Ext.B1 was allotted. The owner kept the D Schedule items E which is the disputed property to himself.

The 1st respondent Kumaran is a close relative of Kunjan and was very close to the family and treated as member of Kunjan's family till the dispute arose in 1986. The property settled on Sumathi of which possession continued F to be with Kunjan in terms of Ext.B1. In 1976 Kunjan executed Ext.A1 and some properties were transferred to the 1st respondent, Kumaran. It is clearly recited in the document that only property covered by C Schedule to Ext.B1 which was allotted to Sumathi was the subject of transfer. This had an extent of 1.51 acres. The D Schedule property was not included in Ext.A1. However, by fraudulently and with the connivance of the 3rd respondent, the 4th G defendant, the schedule to the document was also drafted as to bring the property owned and possessed by Kunjan under D Schedule to Ext.B1 as also 56 cents of lands not covered thereby. Despite this mistake described in the document, Kunjan continued to be in possession of the disputed property and its accredition while the 1st respondent, Kumaran was also closely moving H with the family and there was no action from Kunjan.

Kunjan accordingly sold the 50 cents covered by the D Schedule Ext.B1 as also the accredition to the appellant by the deed of sale Ext.B4 on 5.3.1986. The 1st respondent was displeased at the development and he filed a suit OS No. 125/86 for a permanent injunction restraining them from entering into the disputed property. Kunjan became aware of the mistake in Schedule Ext.A1 only when notice of this suit was received whereupon himself and the appellant filed a suit O.S. 146/86 for injunction against the interference with his possession of the 50 cents of disputed property. The plaintiff pleaded that the transfer to the 1st respondent was only 1.51 acre and that the disputed property was not comprised or intended to be transferred or to be in possession of the vendee. They pleaded that fraud was played by Pankajakshy and her husband in the incorrect preparation of the Schedule to the document.

This recital was very clear that only the property allotted to Sumathi, C Schedule to Ext.B1 was transferred. The trial court by its judgment dated 31.7.1990 held that the entirety of the C and D Schedules to Ext.B1 has been transferred. It also held that the suit filed by the appellant and Kunjan in OS No. 146/86 was barred by limitation. The trial court also did not project the plea of fraud set up by Kunjan and the appellant. Accordingly, OS 125/86 was decreed and OS 146/86 was dismissed.

Pending suit Kunjan died. The appellant was the other person interested, therefore, filed an appeal and the other parties in the suit filed appeals which was disposed of by a common judgment dated 24.6.1994.

The District Court went into the evidence very elaborately and came to the conclusion on appreciation of the evidence that what was intended to be transferred was only the 1.5 acres comprised in C Schedule to Ext.B1 and that the D Schedule property was not conveyed under Ext.B1. Accordingly, it held that the 1st respondent did not have title of the possession either over the Schedule or the accredition of 56 cents which lies in between the C & D Schedules properties. It also held that the misdescription in Ext.A1 sale deed was apparently due to the deceptive practice of the respondent and PW-4, was also a party. The District Court on the basis of the materials placed before him found that PW-4 was a person who habitually indulges in such mal-practice. The District Court further held that the 1st respondent did not go into the possession of the D Schedule and the accredition and that Kunjan came aware of the mistake only when notice of OS 125/86 was received by him. The appeals had, therefore, to be allowed. Since the Commissioner's plan prepared in the suit did not correctly identify the 1.51 acres which the

court felt was necessary to resolve future dispute, the learned District Court allowed the appeals and remitted the matter back to the trial court for preparing a proper plan for identification of the properties and pass a decree accordingly.

The 1st respondent challenged this order in Civil Misc. Appeals before the High Court filed under Order 43 Rule (1) clause (u) of the Code of Civil Procedure. Both parties agreed that the remand was unnecessary having regard to the fact that the identity of the properties covered by the various documents was not very much in dispute.

However, the High Court purported to go into the question of facts and allowed the appeals setting aside the judgment of the District Court and restoring that of the Munsiff Court.

Being aggrieved, the appellant preferred the Special Leave Petitions/ Appeals.

We heard Mr. T.L.V. Iyer, senior advocate for appellant and Mr. P. Krishnamurthy, senior advocate for respondent. Mr. Iyer raised the following contentions:-

1. The High Court has gone into excruciating of facts and has appreciated evidence which is not warranted under Section 100 of the C.P.C and is beyond its jurisdiction. No question of law much less any substantial question of law arose in the High Court

2. The High Court has not formulated any question of law for decision nor has it identified any such question of law anywhere in the judgment. The interference with the judgment of the District Judge is purely on question of facts.

3. The findings by the High Court are based on appreciation of evidence and are conclusions of facts. No substantial question of law arise therefrom. The High Court has grossly erred in verifying the facts.

4. The appeal under order 43 Rule (1) clause (u) should be heard only on the ground enumerated under Section 100. The appellant under order 43 Rule (1) clause (u) is not entitled to agitate question of facts as in a first appeal.

Mr. P. Krishnamurthy, learned counsel for the respondents submitted

the order passed by the High Court in the appeals does not call for any interference. He argued that Section 100 is confined to second appeals against decrees and, therefore, cannot be invoked in appeal against an order.

We have been taken through the pleadings and the judgments rendered by all the three courts. Our attention was also drawn to the records/documents.

The following questions of law arise for consideration by this Court:-

1. Whether the High Court was justified in going into excruciating details on facts in a second appeal?

2. Has not the High Court exceeded its jurisdiction under Section 100 of the C.P.C. by reversing a well-considered Judgment of the First Appellate Court on facts especially when no question of law much less any substantial question of law arose for consideration?

The submissions made by Mr. T.L.V. Iyer is well founded and merit acceptance. A close scrutiny of the order passed by the High Court clearly goes to show that the High Court has gone into minute details of facts and has appreciated evidence which is not warranted under Section 100 of C.P.C. and is beyond its jurisdiction. No question of law much less any substantial question of law arose in the High Court. The jurisdiction of the High Court is now confined to entertain only such appeal as involving substantial question of law specifically set out in the memoranda of appeal and formulated by the High Court. The High Court of Kerala in the instant case has not framed any substantial question of law as required by Section 100 C.P.C. and has committed a patent error in disposing of the Civil Misc. Appeal. The existence of a substantial question of law is thus the *sine qua non* for exercise of the jurisdiction under the provisions of Section 100 C.P.C.

Mr.T.L.V. Iyer, learned senior counsel for the appellant raised a controversy which related to the scope and nature of hearing an appeal under order 43 Rule (1) clause (u) of CPC. It was contended by Mr. Iyer that though it is filed as Civil Misc. Appeal against the order of remand, it is necessarily a second appeal and, therefore, can be competent only on the ground mentioned in Section 100. It is further argued that the appellants in Civil Misc. Appeals against question of facts and the findings of fact of the lower court even though found to be erroneous are binding in such an appeal.

Mr. Krishnamurthy, learned senior counsel for the respondent cited no

A contrary law. He, however, reiterated that Section 100 is confined to second appeals against decrees and, therefore, cannot be invoked in an appeal against an order. It is, of course, true that Section 100 in terms applies only to appeals second to decrees, but the contention of Mr. Krishnamurthy cannot be accepted on account of language of order 43 Rule (1) clause (u). It reads as follows:-

B

"Order 43 Rule (1). Appeals from orders.

An appeal shall lie from the following orders under the provisions of Section 104, namely:-

(a) .....

Xxxx Xxxx Xxxx

(t) .....

(u) an order under rule 23 [or rule 23A] of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court."

D

It is obvious from the above rule that an appeal will lie from an order of remand only in those cases in which an appeal would lie against the decree if the Appellate Court instead of making an order of remand had passed a decree on the strength of the adjudication on which the order of remand was passed. The test is whether in the circumstances an appeal would lie if the order of remand where it is to be treated as a decree and not a mere order. In these circumstances, it is quite safe to adopt that appeal under order 43 Rule (1) clause (u) should be heard only on the ground enumerated in Section 100. We, therefore, accept the contention of Mr. T.L.V. Iyer and hold that the appellant under an appeal under order 43 Rule (1) clause (u) is not entitled to agitate questions of facts. We, therefore, hold that in an appeal against an order of remand under this clause, the High Court can and should confine itself to such facts, conclusions and decisions which have a bearing on the order of remand and cannot convass all the findings of facts arrived at by the Lower Appellate Court.

E

F

G

The High Court of *Rajasthan in Abdul Gani and Anr.* v. Dev*i Lal and Anr.*, AIR (1960) RAJASTHAN 77 held that the appeal under this clause should be heard only on the grounds enumerated in Section 100 and not on question of facts as in the case of first appeal.

H

In *Seshammal and Ors.* v. *Kuppanaiyyangar and Anr.,* AIR (1926) Madras 475 ], this Court held as under: A

> "Although the civil appeal has taken the form of a civil miscellaneous appeal against an order of remand the Subordinate Judge is a final Judge of fact and the only grounds available to the appellant to attack the judgment are those which would be available to him in second appeal." B

In *Ambukutti Vaidier* v. *Kannoth Koottambath Kelan,* AIR (1933) Madras 460, the case of *Secretary of State* v. *Tripurna Sundarammal and Anr.,* AIR (1926) Madras 474 was followed. The Court held that civil miscellaneous appeals stand on the same footing as second appeals with regard to their being arguably only question of law. C

In *Kaluvaroya Pillai and Ors.* v. *Ganesa Pandithan and Ors.,* AIR (1969) Madras 148, the Court held as under:-

> "Though this is a case in which the lower appellate Court remanded the suit. It appears to me that the totality of the suit has been remanded to the trial Court for reconsideration in view of certain irregularities inhered therein. As a matter of fact the lower appellate court set aside the judgment and decree of the trial Court in full. Though it gave a liberty to the respondents to have a retrial in the trial Court, presumably, in the interests of justice, it appears to me that the lower appellate Court has substituted its own judgment to that of the trial Court and in the peculiar circumstances of the present case it is not open to the appellants in this civil miscellaneous appeal to canvass the entire judgment and decree of the lower appellate Court by filing an appeal under Order XLIII, Rule 1 (u), C.P.C. I shall presently advert to the right of an appellant in a civil miscellaneous appeal to canvass the correctness of the findings other than those relating to the order of remand in such an appeal. But in so far as this appeal is concerned, as there has been a substitution of the judgment and decree of the appellate Court to that of the trial Court, the only remedy available to the appellants in this case was to file a second appeal, if appeal under Order XLIII, Rule 1 (u), C.P.C. Thus in the peculiar circumstances and on the facts of this case, it is not open to the appellants to canvass the other findings of the lower appellate Court." D E F G

It is also useful to reproduce order 41 Rule 23 of CPC which reads H

A thus:

> "Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in
B the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just
C exceptions, be evidence during the trial after remand."

The High Court of Kerala has adopted an amendment made by the Madras High Court which reads thus:-

(a) After the words "the decree is reversed in appeal", insert the words, "or where the Appellate Court in reversing or setting
D aside the decree under appeal considers it necessary in the interests of justice to remand the case", and

(b) Delete the words "if it thinks fit", occurring after the words "the Appellate Court may". "

E Under the rule as amended in Kerala, Madras by the addition of words "or where the Appellate Court in reversing or setting aside the decree under appeal considers it necessary in the interest of justice to remand the case" after the words " the decree is reversed in appeal". The Court can remand the case even when the suit has not been disposed of on a preliminary point. Court has held that this power ought not to be lightly exercised by the
F Appellate Court.

Learned Counsel appearing on either side took us through the whole of the judgment/evidence and to elaborate statements on question of facts. As rightly pointed out by Mr. Iyer that High Court has gone into excruciating
G details of facts and has appreciated the evidence which is not warranted in this case. A perusal of the judgment of the District Court disclosed that there is an elaborate consideration of the entire evidence oral or documentary in the case and that the findings thereof are based on appreciation of evidence and are conclusions of facts. It was pointed out that the High Court has erred in verifying the recitals in Ext..1 makes it clear that the property under it was
H only the C Schedule to the deed of gift, Ext.B1 allotted to the Sumathi which

was sold. If really the D Schedule retained by Kunjan was also under transfer, the same should have on the place in the recitals regarding title and in the body of the document. Absence of such recitals is proof positive that the D Schedule was not intended to be conveyed.

In our view the Schedule to the document was prepared in excess of what was intended to be conveyed. It has been fraudulently prepared as rightly found by the District Court. It is a well established principle that when there is inconsistency in the body of the document, containing the evidence clause and the schedule, the former prevails over the latter. As such when the intention of the parties was clear, the Schedule to the document should not have been allowed to override the recital clause.

Like wise, the D Schedule was not intended to be conveyed is evident from the fact that there is no mention of the accredition much less between the C & D Schedule to Ext.B1. If really the entire property as bulk was being conveyed certainly the existence of the accredition or an intention to transfer the same would also have found their place in the document. The respondent has no case that he has any title to or possession of the said accredition. This very fact, in our view, cuts the root of the case of the 1st respondent to title to the disputed property.

The D Schedule to Ext.B1 could not have been common is very clear from entire fact. The agreement was that the property gifted to Sumiti would be sold and the proceeds would be given to Pankajakshy in view of which Pankajakshy consented to transfer her share in favour of Sumiti. Accordingly, it was only the share of Sumiti which was C Schedule to Ext.B1 which was sold and consideration thereunder was Rs. 9,000. No consideration for Kumaran's transfer was admitted to and on the other hand the consideration of Ext.A1 was received by Pankajakshy and her husband. There is no case for the 1st respondent that D Schedule to Ext.B1 was also intended to be transferred as part of the scheme of package.

Kunjan was in possession of the disputed property. He became aware of it only when notice of OS 125/86 was received by him. As noted by the District Court with reference to the evidence in the case, the 1st respondent Kumaran was moving very closely with Kunjan and his family and was one of the beneficiaries of Kunjan's magnificence. It is only in 1986 when Kunjan sold the disputed property to the appellant that he instituted the suit claiming title. The finding of possession of the 1st respondent is based on the document acquired after the commencement of the suit. There is no iota of evidence for

A the prior period even otherwise any acts on the part of the 1st respondent is only referable to the close association with Kunjan and his family and is looking after property of Kunjan. Thus, the case of fraud put forward by the appellant is amply proved by the facts and circumstances of the case and as thoroughly discussed by the District Court and the findings of fact arrived at. We are, therefore, of the opinion that the High Court was not justified in B going into the excruciating details of facts in the second appeal and that the High Court has exceeded its jurisdiction by reversing a well considered judgment of the First Appellate Court which is the Final Court of facts especially when no questions of law much less a substantial question of law arose for consideration.

C

It is seen from the judgment of the Lower Appellate Court that the matter was remanded back to the Court below for limited purpose on a proper identification of the disputed suit property. It is seen from para 3 of the common judgment in C.M.A. 208/94 and 43/95 that counsel appearing for both sides have conceded that the lower appellate court was not correct D in remanding the matter to the Trial Court. According to them there was no dispute regarding the identity and that the identity is clear from the rough sketch appended to the judgment of the lower appellate court. They submitted that there was no necessity of remanding the matter to the lower appellate court and the matter can be decided on merits by the High Court.

E We are of the opinion that the judgment passed by the High Court in C.M.A. 208/94 and 43/95 cannot be sustained for the reasons stated supra. We, therefore, set aside the judgment passed by the High Court and restore the judgment passed by the District Judge, Thodupuzha in Appeal Nos.125/86 and 146/86 on his file. However, we delete the directions given by the F District Court in regard to the order of remand and retain and sustain the judgment of the District Court dated 24.7.1994 in toto. In the result, the appeals filed by the appellant succeeds and we order no costs.

S.K.S. Appeals dismissed.