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SONI DINESHBHAI MANILAL AND ORS.

v.

JAGJIVAN MULCHAND CHOKSHI

DECEMBER 14, 2007

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[S.B. SINHA AND HARJIT SINGH BEDI, JJ.]

Code of Civil Procedure, 1908:

C *Or XXVI r 11 and 16—Commission to examine accounts or adjust accounts—Appointment of—Held: Commissioner is competent to decide all questions raised before him, taking into consideration all aspects of the matter—He is to assist the Court—Commissioner’s Report is part of record and is to be treated as evidence in the suit—On facts, objection against Commissioner’s report rejected—Civil*
D *revision application was not filed there against, thus, rejection order attained finality—Also appellant did not adduce any evidence in support of the objection raised though he was permitted to do so.*

E *ss. 100, 105 and Or XLIII r 1(u)—Second appeal—Maintainability of—On facts, appeal against order rejecting objections allowed—Cross objections raised by respondent, rejected—Respondent filing second appeal—Allowed by High Court—On appeal, held: The said interlocutory orders not subjected to revision—They should not have been appealed against—If revision was filed, doctrine of merger and*
F *s 105 would not be applicable—Each of those orders attained finality—In view of Or XLIII r 1(u) second appeal was not maintainable—Scope of appeal u/s. 100 narrower—Further, appellate court in exercise of its inherent jurisdiction could convert one type of appeal to other—In view of the facts of the case, interference under special leave*
G *jurisdiction declined—Constitution of India, 1950—Article 136.*

Final decree was passed in a suit for dissolution of the partnership firm of the appellants’ father and the respondent and the shares of the parties were determined. Decree was also passed

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for the accounts. Thereafter, application was filed for initiation of final decree proceedings. The Court Commissioner was appointed for examining the accounts of the dissolved partnership firm. The Commissioner submitted a report. Appellants' father raised objections to the report. He also filed for permission to cross-examine the Court Commissioner which was dismissed. Appellants' father then filed Civil Revision application which was dismissed as withdrawn. Thereafter, application was filed to allow Chartered Accountant to verify the records and accounts books and the same was dismissed. Trial court rejected the objection raised by the appellants to the Commissioner's report. Appellants' father filed appeal against the rejection order and the same was allowed. Aggrieved respondent filed cross-objection which was rejected. Respondent then filed second appeal which was allowed. Hence the present appeals.

Appellant contended that having regard to the provisions of Order XLIII Rule 1(u) CPC the second appeal was not maintainable; that the High Court erred in relying upon the orders passed by trial court from time to time without taking into consideration the fact that in view of s. 105 CPC, such orders are open to challenge in an appeal preferred against a final order; that the Commissioner appointed to take accounts should be allowed to be cross-examined by a party taking objection to his report and in any event, he is entitled to adduce his own evidence in support of his objection; and that the Commissioner having ignored vital facts including non-production of books of accounts and ledger, his report could not have been accepted.

Respondent contended that the appeal filed by the respondent being a composite one both against the order dismissing the cross-objection as also the appeal filed by the appellants, a second appeal was maintainable; that a distinction must be made between a Commissioner appointed to examine accounts and other Commissioners inasmuch as the report in the former case is to be treated as evidence in the suit; and that in any view of the matter, the preliminary decree having been passed as far back as 13th

A **October, 1978, the impugned judgment should not be interfered with.**

Dismissing the appeals, the Court

B **HELD: 1.1. Order XXVI Rule 11 CPC provides for appointment of a Commissioner to examine or adjust accounts, if necessary. He is competent to decide all questions raised before him, taking into consideration all aspects of the matter. He is to assist the Court. A Commissioner's report can be set aside only upon assignment of proper and sufficient reasons. In the event any defect in the conduct of enquiry by him is found out, the court may issue any further directions. A further enquiry can also be ordered. A report of the Commissioner is a part of the record. It is to be treated as evidence in the suit. [Para 19] [929-C-E]**

D **1.2. It is not the case of the appellants that while preparing the said report he was not allowed to place any document before him or call for any document which was in custody or possession of the respondent. For the purpose of determining the issue referred to him by the Court in terms of Order XXVI Rule 11 CPC, principally the books of accounts which were maintained by the firm were required to be taken into consideration. If any additional books of accounts or any other document was required to be taken into consideration therefor, it was for the appellants to point out the same. It appears that the first objection which was taken by the appellant was non production of "ublek" books and stock books. An objection was filed to that effect which was rejected. It does not appear that any civil revision application was filed thereagainst. Therefore, the said order attained finality. A civil revision application was filed against one of the orders, which was later withdrawn. It is accepted at the Bar that the other civil revision application was also withdrawn. The High Court in its impugned judgment had taken the said facts into consideration.**

G **[Paras 15, 18 and 19] [928-C-E; 929-B-C]**

H **1.3. Appellants' father was entitled to raise all the contentions in regard to non-production of books of accounts and other matters. It was also permissible for him to examine witnesses in support of his case before the Commissioner. Before the Court, objections to**

the report of the Commissioner had been taken. Several orders were passed. There is nothing on record to show that the appellant intended to adduce any evidence in support of his case. In fact, he was permitted to do so. [Paras 21 and 22] [930-A-B-E] A

2.1. It may be true that any order passed can be questioned in the grounds taken in the appeal against the final orders, but such interlocutory orders are required to be challenged. Nothing has been shown that such interlocutory orders and particularly those which are referred to had specifically been challenged in the Memorandum of Appeal but the said interlocutory orders were not subjected to revision. What is essential is that they should not have been appealed against. If a revision has been filed which is a part of the appellate jurisdiction, although stricto sensu, doctrine of merger may not apply but Section 105 CPC also would not apply in such cases. Each of those orders attained finality. [Para 21] [930-B-D] B C D

Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat, AIR (1970) SC 1, referred to.

2.2. It may be true that in view of Rule 1(u) of Order XLIII a second appeal was not maintainable but the scope of an appeal under Section 100 of the Code of Civil Procedure is narrower. If the appeal had been entertained upon hearing both the parties, this Court may not exercise its extra ordinary jurisdiction to set aside that order, as what matters most is to see whether substantial justice has been done to the parties and not the technicalities involved therein. E

[Para 23] [930-F-G] F

2.3. In a given case the appellate court in exercise of its inherent jurisdiction can convert one type of appeal to the other. Forum for preferring a second appeal as also an appeal under Order XLIII Rule 1(u) is the same, namely the High Court. As the scope of an appeal under Order XLIII Rule 1(u) is wider than a second appeal, the appellants on their own showing are not prejudiced in any manner, if the High Court proceeded to consider the question involved in the appeal in its impugned judgment. [Para 24] [930-H; 931-A] G

2.4. Even substantial questions of law were framed and the same H

A **have been answered. However, although it is agreed that technically a second appeal was not maintainable from one part of the judgment, keeping in view the fact that the matter is pending for more than 40 years and in view of the nature of the dispute as also the quantum of amount involved, it is not a fit case where discretionary jurisdiction under Article 136 of the Constitution should be exercised. It is now well settled that this Court may decline to exercise its jurisdiction, although it would be lawful to do so. [Para 25] [931-B-C]**

Management, Pandiyan Roadways Corporation Ltd. v. N. Balakrishnan, (2007) 7 SCALE 758, relied on.

C CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5945 of 2007.

D From the Final Judgment and Order dated 06.04.2005 of the High Court of Gujarat at Ahmedabad in Second Appeal Petition No. 37 of 1998.

Pravin Satale, Naresh Kumar, Meenakshi and D. Singh for the Appearing parties.

E The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

F 2. Appellants in both the appeals are before us, aggrieved by and dis-satisfied with the judgment and order dated 6th April, 2005 passed by a learned Single Judge of the High Court of Gujarat in Second Appeal No.37 of 1998.

G 3. For the purpose of determining the question involved in these appeals, Soni Dineshbhai Manilal and others are being referred to as the appellants, while Jagjivan Mulchand Chokshi is being referred to as the respondent.

H 4. Appellants' father and the respondent were partners of a partnership firm known as 'Bhagyoday Engineering Company'. A decision was taken to dissolve the said firm. A deed of dissolution was entered into on the 9th day of September, 1965. A suit for dissolution of the

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partnership firm and accounts was filed by the respondent herein, *inter alia* on the premise of the existing dispute in regard to shares of the parties in the said partnership firm. A

5. The suit was dismissed on 29th July, 1975. However, the appeal preferred thereagainst was allowed holding that the respondent-plaintiff was entitled to 56 % shares, whereas the father of the appellants was entitled to 44 % share. A decree was also passed for accounts for the period 19th January, 1960 and 9th September, 1965. Father of the appellants filed a second appeal before the High Court which was partly allowed, whereby the shares of the parties were determined at 50 % each. The said decree was affirmed by this Court by its order dated 25th February, 1994. B C

6. An application was thereafter filed for initiation of a final decree proceedings. A Court Commissioner was appointed for taking accounts. The Commissioner submitted his report on 13th August, 1986. Objection thereto was filed by the father of the appellants. An application was also filed for permission to cross-examine the Court Commissioner. The same was rejected. A civil revision application was filed by the father of the appellants which was dismissed by an order dated 22nd April, 1996, stating :- D E

“Mr. D.K. Acharya, learned Advocate for the petitioner seeks leave to withdraw the Civil Revision Application. Leave granted. Rejected as withdrawn.

It is, however, clarified that the petitioner-defendant would be entitled to prove or disprove the accounts that may be submitted by the parties with regard to the partnership firm.” F

7. An application was also filed by the father of the appellants before the trial court to allow a Chartered Accountant to verify the records and, accounts books. The said prayer was also rejected. G

8. By an order dated 2nd May, 1997 the trial court rejected the objections of the appellants opining :-

“Taking into consideration, the submissions, replies and evidences of both the sides, Civil Court had rejected the said suit and against H

A the said order, Appeal No. 79 of 1975 was being admitted in the District Court. The appellate Court had quashed the order of the civil Court and share of the Plaintiff was decided and it was ordered in respect of accounts to appoint the Court Commissioner for taking accounts. Thereafter in the Hon'ble High Court and in the Hon'ble Supreme Court, the said matter was filed and thereafter to draw final decree the same matter was adjourned....

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C In the said case, being kept for hearing on the debated point in respect of legal question, but both he parties were given proper time and reasonable opportunity, even though, their rights were closed as there was no submissions.

D In the said case, Commissioner's Report at Mark 44/1, which was being admitted in evidence according to provisions of Order 2-G Rule 11, 12, which was taken on record by Exh. 124 for taking into consideration for evidence. In the said case, the record and Commissioner's report which were produced before me, being taken into consideration and if determined as per law, the Commissioner's report and the finding which were given by taking into account the fact, are found reasonable and when said report was given by the defendant by violating the provisions of existing law, have been failed to prove the same, in that circumstances, it is found that it is reasonable and just to give sanction to the details of the report of Court Commissioner. So taking into consideration the facts and documentary evidence produced, I pass the following order in the interest of justice."

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9. An appeal preferred thereagainst, however, was allowed by an order dated 11th December, 1997. Cross-objection was filed by the respondent therein and while rejecting the said cross-objection, the first appellate court observed :-

G "The cross objections Ex.11 filed by the respondent plaintiff are hereby rejected. However, the learned trial Judge is directed to allow the said party to agitate the question regarding interest and the same be decided as per law. "

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10. Respondent filed a second appeal thereagainst which has been allowed by reason of the impugned judgment. A

11. Mr. Pravin Satale, learned counsel appearing on behalf of the appellant submitted :

- (i) having regard to the provisions of Order XLIII Rule 1 sub-rule (u) of the Code of Civil Procedure the second appeal was not maintainable ; B
- (ii) High Court committed a serious error in relying upon the orders passed by the trial court from time to time without taking into consideration the fact that in view of Section 105 of the Code of Civil Procedure, such orders are open to challenge in an appeal preferred against a final order ; C
- (iii) The Commissioner appointed to take accounts should be allowed to be cross-examined by a party taking objection to his report and in any event, he is entitled to adduce his own evidence in support of his objection. D
- (iv) The Commissioner having ignored vital facts including non-production of books of accounts and ledger, his report could not have been accepted. E

12. Ms. Meenakshi Arora, learned counsel appearing on behalf of the respondent, on the other hand, contended :

- (i) The appeal preferred by the respondent being a composite one both against the order dismissing the cross-objection as also the appeal preferred by the appellants, a second appeal was maintainable. F
- (ii) A distinction must be made between a Commissioner appointed to examine accounts and other Commissioners inasmuch as the report in the former case is to be treated as evidence in the suit. In any view of the matter, keeping in view the facts and circumstances of the case, in particular the fact that the preliminary decree was passed as far back as 13th October, 1978, the impugned judgment should not be interfered with. G
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A 13. The learned trial Judge *inter alia* opined that opportunities have been granted to the appellants to adduce evidence which they did not avail.

B 14. The learned Court of Appeal, on the other hand, held that the appellants were prejudiced as the objections filed by them had not been considered.

C 15. In the final decree proceeding, one Shri Vardhilal A. Shah was appointed as a Commissioner. He was asked to examine the accounts of the dissolved partnership firm. He submitted a detailed report. It is not the case of the appellants that while preparing the said report he was not allowed to place any document before him or call for any document which was in custody or possession of the respondent. For the purpose of determining the issue referred to him by the Court in terms of Order XXVI Rule 11 of the Code of Civil Procedure, principally the books of accounts D which were maintained by the firm were required to be taken into consideration. If any additional books of accounts or any other document was required to be taken into consideration therefor, it was for the appellants to point out the same. It appears that the first objection which was taken by the appellant was non production of “ublek” books and E stock books. An objection was filed to that effect on 1st July, 1985 which was rejected by an order dated 26th July, 1985. It does not appear that any civil revision application was filed thereagainst. The said order, therefore, attained finality.

F 16. Another application was filed in 1994 to cross-examine the Commissioner. The same was rejected on 29th April, 1995. However, an observation was made by the trial court that the “averments are fabricated with bad intention by the defendant and that the delay may be caused for recovery of decretal amount”. Another objection filed by the respondent was rejected by a very detailed order dated 31st January, G 1996 not only taking into consideration the provisions of law but also the precedents operating in the field. Conduct of the parties had also been taken into consideration therein. The learned Judge also considered the nature of the objections raised, one of which, we may notice, is that the Commissioner was not an expert in accounts. It was pointed that no such

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objection was raised at the time of the appointment of the Commissioner. A

17. Appellants' principal grievance centers round the non-production of "ublak" books which, as noticed hereinabove, had been dealt with in the earlier orders of the court. It was pointed out that the Commissioner had prepared a balance sheet *inter alia* on the basis of the purchase bills and the sales bills. B

18. A civil revision application, as noticed hereinbefore, was filed against one of the orders, which was later withdrawn. It is accepted at the Bar that the other civil revision application was also withdrawn.

19. The High Court in its impugned judgment had taken the said facts into consideration. Order XXVI Rule 11 of the Code of Civil Procedure provides for appointment of a commissioner to examine or adjust accounts, if necessary. He is competent to decide all questions raised before him, taking into consideration all aspects of the matter. He is to assist the Court. A Commissioner's report can be set aside only upon assignment of proper and sufficient reasons. In the event any defect in the conduct of enquiry by him is found out, the court may issue any further directions. A further enquiry can also be ordered. A report of the Commissioner is a part of the record. It is to be treated as evidence in the suit. C D E

20. Rule 16 of Order XXVI of the Code of Civil Procedures provides for powers of the Commissioners which is in the following terms :-

"16. Powers of Commissioners – Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment, - F

(a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him ; G

(b) call for and examine documents and other things relevant to the subject of inquiry ;

A (c) at any reasonable time enter upon or into any land or building mentioned in the order.”

B 21. Appellants’ father was, therefore, entitled to raise all the contentions in regard to non-production of books of accounts and other matters. It was also permissible for him to examine witnesses in support of his case before the Commissioner. It may be true that any order passed can be questioned in the grounds taken in the appeal against the final orders, but such interlocutory orders are required to be challenged. Nothing has been shown before us that such interlocutory orders and particularly those which are referred to hereinbefore had specifically been C challenged in the Memorandum of Appeal but the said interlocutory orders were not subjected to revision. What is essential is that they should not have been appealed against. If a revision has been filed which is a part of the appellate jurisdiction, although stricto sensu, doctrine of merger may not apply but Section 105 of the Code of Civil Procedure also would D not apply in such cases. Each of those orders attained finality.

It has been held in *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat*, AIR (1970) SC 1, that civil revision is a part of appellate jurisdiction.

E 22. As noticed hereinbefore, before the Court, objections to the report of the Commissioner had been taken. Several orders were passed. There is nothing on record to show that the appellant intended to adduce any evidence in support of his case. In fact he was permitted to do so.

F 23. It may be true that in view of Rule 1(u) of Order XLIII a second appeal was not maintainable but the scope of an appeal under Section 100 of the Code of Civil Procedure is narrower. If the appeal had been entertained upon hearing both the parties, this Court may not exercise its extra ordinary jurisdiction to set aside that order, as what matters most is G to see whether substantial justice has been done to the parties and not the technicalities involved therein.

H 24. In a given case the appellate court in exercise of its inherent jurisdiction can convert one type of appeal to the other. Forum for preferring a second appeal as also an appeal under Order XVIII Rule

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1(u) is the same, namely the High Court. As the scope of an appeal under Order XVIII Rule 1(u) is wider than a second appeal, the appellants on their own showing are not prejudiced in any manner, if the High Court proceeded to consider the question involved in the appeal in its impugned judgment. A

25. Even substantial questions of law were framed and the same have been answered. We, however, although agree that technically a second appeal was not maintainable from one part of the judgment, keeping in view of the fact that the matter is pending for more than 40 years and in view of the nature of the dispute as also the *quantum* of amount involved, we are of the opinion that it is not a fit case where we should exercise our discretionary jurisdiction under Article 136 of the Constitution of India. It is now well settled that this Court may decline to exercise its jurisdiction, although it would be lawful to do so. [See *Management, Pandiyan Roadways Corporation Ltd. v. N. Balakrishnan*, (2007) 7 SCALE 758]. B
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26. In the above circumstances both the appeals fail and are dismissed. However, in the facts and circumstances of the case there shall be no order as to costs.

N.J.

Appeals dismissed. E