

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(s). 3224-3225 OF 2016
(Arising out of S.L.P. (C) Nos. 24085-24086 of 2011)

LAKSHMANAN & ORS.

APPELLANTS(S)

VERSUS

G. AYYASAMY

RESPONDENT(S)

O R D E R

Leave granted.

The appellants/defendants have questioned the correctness of the common impugned judgment and order dated 24.01.2011 passed by the High Court of Judicature at Madras in Second Appeal Nos. 479 and 480 of 2008 and M.P. No. 1 of 2008 wherein the High Court, after answering the following substantial questions of law disposed of the second appeals by granting certain relief(s):

"(i) Whether the trial Court was justified in rejecting the prayer of the defendants in the counter claim for having the projection of the roof of the defendants over the suit property which belong to the plaintiff and whether the first appellate court was justified in reversing the said finding relating to the aforesaid relief by ordering that such projection of the roof of the defendants could exist, so as to enable the rain water to fall into the suit property of the plaintiff without the backing of the law in support of the appellate Court's finding?

(ii) Whether the first appellate Court was right in reversing the finding of the trial Court, in the absence of any law supporting the findings of the appellate Court, which held that the defendants should have ingress and egress into the suit property of the plaintiff to whitewash and repair the wall of the defendants?

(iii) Whether there is any perversity or illegality in the judgments passed by both the Courts below?"

The High Court, recorded its reasons, placing reliance upon the judgment of the co-ordinate Bench of the Madras High Court in L. Damodaraswami Naidu vs. S.T. Damodaraswami Naidu, reported in 1965 (II) M.L.J. 522 after referring to its earlier judgments in N. Kamalammal, wife of A. Manjia Pillai vs. S. Chakravarthy, reported in 1965 (II) M.L.J. 241 and Bhagavatulu Subramanya Sastri vs. Bhagavatula Lakshminarasimhan in which the Court observed as follows:

"In that case all that was held was that a house owner in order to repair his wall on his neighbour's side of the premises had the right to go to the other side of the wall on the land of his neighbour, the right being in the nature of a necessary easement."

Therefore, the second appeals were allowed setting aside the judgment and decree passed by the first appellate court insofar as the permanent injunction against the appellants/defendants

restraining them, their men, agents or servants or any person in any way interfering with the peaceful possession and enjoyment of the suit property of the plaintiff. While granting the said relief, the learned single Judge of the High Court answered the substantial question Nos. (i) to (iii), referred to supra, in favour of the appellants. It has been clearly held that the grant of permanent injunction against the appellants/defendants, as stated supra, is in contravention of the judgment of the High Court in the case of L. Damodaraswami Naidu, referred to supra, and further extracted the relevant portion from the judgment in the case of N. Kamalammal, referred to supra, and the excerpts of the famous treaties and also the provisions of the Easement Act, which would unambiguously and unequivocally highlight and spotlight the fact that an owner of a particular house has a right to go into his neighbour's land for the purpose of repairing his outer side wall and also for whitewashing the same. Having stated so in the impugned judgment it has been held that the trial court was not right in holding that the suit property is the common property of both the plaintiff and the defendants and that was not the plea of the defendants themselves.

With the aforesaid reasons, question of No.

(i) is answered holding that the trial court was justified in rejecting the prayer of the defendants in the counter claim for having the roof of the suit property, which belongs to the plaintiff and accordingly the first appellate court was wrong in reversing the finding of the trial court that the defendants should have ingress and egress to the suit property of the plaintiff to whitewash and repair the wall of the defendants. Having said so, regarding question No. (iii), it is observed that, the findings and reasons recorded in the judgments of the Courts below suffer from perversity and illegality in not properly understanding the reliefs prayed and in granting the same, therefore, the High Court held that interference in the second appeal is warranted and that too, by invoking Order 41 Rule 33 of the C.P.C.

Having pronounced the judgment, the learned Single Judge of the High Court had again gone into the matter on the basis of a mention being made orally on behalf of the respondent and while setting aside the permanent injunction granted in favour of the respondent/plaintiff, at Para 3, the learned Judge had stated that the windows in the Western wall of the defendants, the prayer in the plaint was for removing those three windows, however, in the counter claim

filed before the trial court, the appellants/defendants did not even make any prayer for retaining those three windows but granted the relief. The trial court dismissed the prayer of the appellants/defendants and the respondent/plaintiff but granted the relief on its own understanding and discretion. The first appellate court did not grant any relief relating to the windows. In the counter claim filed in the trial court, there is no prayer for retaining those windows by the appellants/defendants. The fact remains that as per the finding of the trial court, the suit came to be filed in the year 2002 and the windows had been in existence for nearly four years only anterior to the filing of the said suit and not for 20 years, so as to attract the acquisition by prescription as provided under Section 15 of the Indian Easements Act, 1882, wherefor, the respondent/plaintiff was entitled to the relief of removal of those three windows in the Western wall of the appellants/defendants and for closure of that area occupied by those windows and the defendants shall comply with the same by closing down the windows, the said decree is granted even though there is neither an appeal nor cross-objection filed by the respondent/plaintiff before the High Court contending the substantial question of law would arise in his

appeal/cross objection in view of the fact that the said relief(s) was rejected by both the courts below.

Learned counsel for the appellants Mr. K.K. Mani submits that the grant of such relief by the High Court in exercise of its second appellate jurisdiction is contrary to law laid down by this Court in the case of Banarsi and Ors. vs. Ram Phal, reported in (2003) 9 SCC 606. Paras 6, 7 and 15 read thus:

"6. The appeals raise a short but interesting question of frequent recurrence as to the power of the appellant court to interfere with and reverse or modify the decree appealed against by the appellants in the absence of any cross-appeal or cross-objection by the respondent under Order 41 Rule 22 CPC and the scope of power conferred on the appellate court under Rule 33 of Order 41 CPC.

7. The first question is whether without cross-objection by the respondent, could the appellate court have set aside the decree passed by the trial court and instead granted straight away a decree for specific performance of contract. This would require reference to the principles underlying right to file an appeal and right to prefer cross-objection or when does it become necessary to prefer cross-objection without which decree under appeal cannot be altered or varied to the advantage of the respondent and/or to the disadvantage of the appellant.

It has also been held by this Court in Samundra Devi v. Narendra Kaur SCC(para 21), that this power under Order 41 Rule 33 CPC cannot be exercised ignoring a legal interdict.

15. Rule 4 seeks to achieve one of the several objects sought to be achieved by Rule 33, that is, avoiding a situation of conflicting decrees coming into existence in the same suit. The abovesaid provisions confer power of widest amplitude on the appellate court so as to do complete justice between the parties and such power is unfettered by consideration of facts like what is the subject matter of appeal, who has filed the appeal and whether the appeal is being dismissed, allowed or disposed of by modifying the judgment appealed against. While dismissing an appeal and though confirming the impugned decree, the appellate court may still direct passing of such decree or making of such order which ought to have been passed or made by the court below in accordance with the findings of fact and law arrived at by the court below and which it would have done had it been conscious of the error committed by it and noticed by the Appellate Court. While allowing the appeal or otherwise interfering with the decree or order appealed against, the appellate court may pass or make such further or other, decree or order, as the case would require being done, consistently with the findings arrived at by the appellate court. The object sought to be achieved by conferment of such power on the appellate court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care while exercising the power. Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage

of a person not a party before the Court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the appellate court exercising power under Rule 33 of Order 41." (emphasis supplied)

In support of the same proposition of law, learned counsel for the appellants placed reliance upon another judgment of this Court in the case of Pralhad and Ors. vs. State of Maharashtra and Anr., reported in (2010) 10 SCC 458, wherein this Court after interpretation of Order 41 Rule 33 CPC has clearly held that in the absence of an independent appeal or cross-objection being filed by the aggrieved party, the relief which was denied by the courts below cannot be granted in the second appeal filed by the appellant.

In view of the law laid down by this Court on the same question of law as has been raised in this case, we are of the considered view that the principles laid down in the abovesaid cases are squarely applicable to the fact situation, therefore, we have to set aside the judgment and decree passed by the first appellate court, particularly the direction to the

appellants/defendants to remove the windows in the Western wall of the defendants and for closure of that area occupied by those windows. It is also needless to make an observation that the respondent/plaintiff had not even questioned the setting aside of the judgment and decree of permanent injunction granted by the first appellate court against the appellants/defendants regarding ingress and egress to the suit property etc. etc.

For the reasons stated supra, the appeals are allowed by setting aside that portion of the judgment which granted relief in favour of the respondent/plaintiff. The costs of these proceedings are granted.

.....J.
(V. GOPALA GOWDA)

.....J.
(ARUN MISHRA)

NEW DELHI,
MARCH 29, 2016

ITEM NO.14

COURT NO.9

SECTION XII

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Petition(s) for Special Leave to Appeal (C) No(s).
24085-24086/2011

(Arising out of impugned final judgment and order dated 24/01/2011
in SA Nos. 479/2008 and SA No. 480/2008 passed by the High Court Of
Madras)

LAKSHMANAN & ORS.

Petitioner(s)

VERSUS

G. AYYASAMY

Respondent(s)

(With interim relief and office report)

Date : 29/03/2016 These petitions were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE V. GOPALA GOWDA
HON'BLE MR. JUSTICE ARUN MISHRA

For Petitioner(s) Mr. K. K. Mani, Adv.
Ms. T. Archana, Adv.

For Respondent(s) Mr. B. Raghunath, Adv.
Mr. Sriram P., Adv.
Mr. Atul N., Adv.
Mr. Vijay Kumar, Adv.

UPON hearing the counsel the Court made the following
O R D E R

Leave granted.

The appeals are allowed in terms of the signed order.

(S. K. RAKHEJA)
COURT MASTER

(CHANDER BALA)
COURT MASTER

(Signed order is placed on the file)