

REPORTABLEIN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTIONCIVIL APPEAL Nos. 3347-3348 OF 2012  
ARISING OUT OF  
Special Leave to Appeal (Civil) No(s).19439-19440/2010

JEGANNATHAN

APPELLANT

VERSUS

RAJU SIGAMANI &amp; ANR.

RESPONDENTS

**JUDGMENT**R.M. LODHA, J.

Delay condoned.

Leave granted.

The appellant herein is plaintiff No. 2. He, along with two others, namely, Gnanasoundari and George filed a Suit against the present respondent No.1 for declaration, permanent injunction and mandatory injunction.

The respondent No. 1 contested the Suit on diverse grounds.

After recording evidence and on hearing the parties, the trial Court on September 16, 1999 decreed plaintiffs' Suit for the grant of permanent injunction.

Aggrieved by the judgment and decree dated September 16, 1999, the respondent No.1 preferred first appeal which came up for hearing before the Subordinate

Judge, Tiruchirapalli. On hearing the parties, the first appellate Court, allowed the appeal, set aside the judgment of the trial Court and remanded the Suit back to the trial Court with a direction to give an opportunity to both the parties to let in evidence - oral and documentary- and then decide the Suit afresh on merits.

The order of remand dated April 8, 2002 was challenged by the present appellant and present respondent No. 2 by filing a Miscellaneous Appeal before the High Court under Order 43 Rule 1(u) of the Code of Civil Procedure, 1908 (for short 'the Code').

The High Court, by its order dated 26<sup>th</sup> September, 2008, held that the Civil Miscellaneous Appeal was not maintainable and dismissed the appeal on that ground.

The appellant and the respondent No. 2 then filed a petition before the High Court seeking review of the order dated September 26, 2008. However, the Review Petition was also dismissed on November 12, 2009. It is from these two orders that the present appeal has arisen.

Order 41 of the Code provides for appeals from original decrees. The Code empowers the appellate Court to order remand in three situations. These three situations are covered by Order 41 Rule 23, Order 41

Rule 23A and Order 41 Rule 25 which read as under:

23. Remand of case by Appellate Court -

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 the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which 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 exceptions, be evidence during the trial after remand.

23A. Remand in other cases -

Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a retrial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

25. Where Appellate Court may frame issues and refer them for trial to court whose decree appealed from -

Where the court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the court from whose decree the appeal is preferred and in such case shall direct such court to take the additional evidence required; and such court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons there for within such time as may be fixed by

the Appellate Court or extended by it from time to time.

Order 41 Rule 23 is invocable by the appellate Court where the appeal has arisen from the decree passed on a preliminary point. In other words, where the entire suit has been disposed of by the trial Court on a preliminary point and such decree is reversed in appeal and the appellate Court thinks proper to remand the case for fresh disposal. While doing so, the appellate Court may issue further direction for trial of certain issues.

Order 41 Rule 23A has been inserted in the Code by Act No. 104 of 1976 w.e.f. February 1, 1977. According to Order 41 Rule 23A of the Code, the appellate Court may remand the suit to the trial Court even though such suit has been disposed of on merits. It provides that where the trial Court has disposed of the Suit on merits and the decree is reversed in appeal and the appellate Court considers that retrial is necessary, the appellate Court may remand the suit to the trial Court.

Insofar as Order 41 Rule 25 of the Code is concerned, the appellate Court continues to be in seisin of the matter; it calls upon the trial Court to record the finding on some issue or issues and send that finding to the appellate Court. The power under

Order 41 Rule 25 is invoked by the appellate Court where it holds that the trial Court that passed the decree omitted to frame or try any issue or determine any question of fact essential to decide the matter finally. The appellate Court while remitting some issue or issues, may direct the trial Court to take additional evidence on such issue/s.

Insofar as the present case is concerned, the trial Court had disposed of the suit on merits and not on a preliminary issue. The first appellate Court set aside the judgment and decree of the trial Court and directed the trial Court to decide the suit afresh after giving parties an opportunity to lead evidence - oral as well as documentary. The nature of the order passed by the appellate Court leaves no manner of doubt that such order has been passed by the appellate Court in exercise of its power under Order 41 Rule 23A of the Code.

Order 43 of the Code provides for appeals from orders. Clause (u) of Rule 1 Order 43 was amended consequent upon insertion of Rule 23A in Order 41 w.e.f. February 1, 1977. It reads as under:

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

x x x x x

(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;

x x x x x

It is clear from the above provision that an order of remand passed under Order 41 Rule 23A is amenable to appeal under Order 43 Rule 1 (u) of the Code.

The High Court relied upon a decision of this Court in the case *Narayanan Vs. Kumaran & Ors.* (2004) 4 SCC 26 in holding that Civil Miscellaneous Appeal from the order of remand was not maintainable. The High Court was clearly in error. What has been held by this Court in *Narayanan* is that an appeal under Order 43 Rule 1 Clause (u) should be heard only on the ground enumerated in Section 100 of the Code. In other words, the constraints of Section 100 continue to be attached to an appeal under Order 43 Rule 1(u). The appeal under Order 43 Rule 1(u) can only be heard on the grounds a second appeal is heard under Section 100. There is a difference between maintainability of an appeal and the scope of hearing of an appeal. The High Court failed to keep in view this distinction and wrongly applied the case of *Narayanan* in holding that miscellaneous appeal preferred by the appellant was not maintainable.

The appeals are accordingly allowed.

The impugned order of the High Court is set aside.

The C.M.A. No. 1227 of 2002 titled as Jagannathan and Others Vs. Raju Sigamani is restored to the file of the Madras High Court, Madurai Bench for hearing and disposal in accordance with law.

No order as to costs.

.....J.  
(R.M. LODHA)

.....J.  
(H.L. GOKHALE)

NEW DELHI,  
02-04-2012

JUDGMENT