

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

THURSDAY, THE 23RD FEBRUARY 2006 / 4TH PHALGUNA, 1927

CMA.No. 10 of 1994()

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AS.221/1992 of DISTRICT COURT, THALASSERY  
OS.352/1989 of MUNSIF COURT, THALASSERY  
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APPELLANTS:

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1. K.T.SHAMSUDDEEN,  
S/O.MUHAMMED, BUSINESS, IRIVERY AMSOM,  
KANAYANNUR DESOM, THALASSERY.
2. C.V.KUNHAMMAD, S/O.KUNHAN, BUSINESS,  
MUZHAPPILANGAD AMSOM DESOM, THALASSERY.
3. C.P.HAMSA, S/O.ABDURAHIMANKUTTY,  
BUSINESS, MUZHAPPILANGAD AMSOM DESOM,  
THALASSERY.
4. C.P.MAYAN ALI, S/O.ABDURAHIMANKUTTY,  
MUZHAPPILANGAD AMSOM DESOM, THALASSERY.

BY ADV. SRI.P.N.KRISHNANKUTTY ACHAN (SR.)  
SRI.K.MOHANA KANNAN

RESPONDENTS:

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1. KOOLIKKULANGARA DEVAKI,  
W/O.LATE K.K.CHANDUKUTTY,  
RESIDING AT MUZHAPPILANGAD AMSOM DESOM,  
THALASSERY.
2. DAUGHTER ROHINI, DO. DO.
3. BROTHER SADANANDAN, DO. DO. (DIED).
4. SISTER NARAYANI, DO. DO.
5. SISTER PADMAVATHI, DO. DO.
6. SISTER KAMALAKSHI,  
RESIDING AT MUZHAPPILANGAD AMSOM DESOM,  
THALASSERY.

7. SISTER SHEELAVATHI, DO. DO.
8. BROTHER SUKUMARAN, DO. DO.
9. BROTHER PAVITHRAN, DO. DO.
10. KAKKARAYIL SAROJINI, DO. DO.
11. SON SURESH BABU, DO. DO.
12. SISTER GEETHA, DO. DO.
13. SISTER GIRIJA, DO. DO.
14. BROTHER JAGADISH, DO. DO.
- ADDL. 15. SANTHA, W/O.LATE SADANANDAN, "KRISHNA KRIPA",  
KEEZTHALI, THAZECHOWA (PO), KANNUR DISTRICT.
16. MURALI, S/O.LATE SADANANDAN, DO. DO.
17. PRASHANT, S/O.LATE SADANANDAN, DO. DO.
18. PRAMOD, S/O.LATESADANANDAN, DO. DO.
19. PRASEEDA, D/O.LATE SADANANDAN, DO. DO.
20. PRAJIT, S/O.LATE SADANANDAN, DO. DO.

ADDL. RESPONDENTS 15 TO 20 ARE IMPEADED AS THE LEGAL HEIRS OF  
DECEASED 3RD RESPONDENT VIDE ORDER DATED 1.12.2005 ON IA.947/2005.

BY ADV. SRI.V.R.VENKATAKRISHNAN,N.C.JOSEPH  
SRI.S.ANANTHAKRISHNAN  
SRI.N.K.SUBRAMANIAN

THIS CIVIL MISC. APPEAL HAVING BEEN FINALLY HEARD ON 23/02/2006,  
ALONG WITH CMA NO. 67 OF 1994 THE COURT ON THE SAME DAY DELIVERED  
THE FOLLOWING:

**'C.R'**

**K.HEMA, J.**

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**C.M.A.NO. 10 OF 1994**

**&**

**C.M.A.NO.67 OF 1994**  
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**Dated this the 23<sup>rd</sup> day of February, 2006**

**JUDGMENT**

The appellants ( in C.M.A.No. 67 of 1994) filed O.S.No.131 of 1990 before Munsiff Court for recovery of possession and injunction. The respondents are the defendants in the said suit ( the above parties will be referred to in these appeals as appellants and respondents). The respondents filed another suit (as O.S.No.352 of 1989) for injunction against appellants. The Munsiff' Court dismissed the suit filed by respondents and decreed the suit filed by appellants. The decree and judgment in both the suits were challenged in appeals as A.S. 220 and A.S. 221 of 1992 before the District Court.

2. Both the appeals were heard and disposed of by a common judgment which is challenged in CMA no. 67 of 1994 and CMA 10 of 1994. ( these appeals are disposed of by this common judgments). As per the impugned judgment, the lower appellate court found that the Munsiff Court omitted to frame an issue regarding adverse

possession and limitation. According to learned District Judge, an appropriate issue on adverse possession and limitation must be raised and parties must be given an opportunity to adduce evidence on such issue. It was also found that another issue has to be framed for taking a right decision in the suit and the issue relates to the possession of the land appurtenant to and around the Srambi which forms part of plaint schedule property.

3. The lower appellate court, accordingly framed the following issues:

“i) Whether the defendants are in actual possession of any land appurtenant to and around the Srambi necessary for the convenient enjoyment of the Srambi ?

ii) Whether the claim of the defendants for recovery of any such area in plot B (after excluding the Srambi and land if any as ascertained in issue no..1 above) is barred by adverse possession and limitation.”

4. Both the suits were remanded to Munsiff Court for taking a fresh decision on the above issues. It was also directed that the Munsiff Court shall dispose of the matter, as expeditiously as possible and at any rate prior to 28.2.1994. It is evident from the nature of issues framed by lower appellate court that evidence will have to be adduced to determine the issues.

5. Sri.V.R.Venkitakrishnan, learned counsel appearing for

respondents strongly contended that the no appeal will lie against the common judgment under Order 43 Rule 1 of Civil Procedure ('CPC', for short), since the impugned order falls under Order 41 Rule 25. Learned counsel appearing for the appellants, Sri. Sri.P.N.K.Achan, on the other hand maintained the stand that the impugned order is not one coming under Order 41 Rule 25 and the appeal is perfectly maintainable and the argument to the contrary is not of any merit at all.

6. In the light of the rival contentions, I have to firstly decide whether the impugned order comes under Order 41 Rule 25 CPC or not. I shall read Order 41 Rule 25 C.P.C which is extracted hereunder:

**"Order 41 Rule 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 therefore within such time as may be fixed by the appellate Court or extended by it from time to time."

7. A reading of Order 41 Rule 25 of CPC shows that when 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 on 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. The appellate court shall also direct the court which passed the decree to take the additional evidence required and the latter court shall proceed to try such issues, and return the evidence to the appellate court, together with its findings thereon, and the reasons therefore, within such time as may be fixed by the appellate court or extended by it from time to time.

8. In this case, the lower appellate court found that there is an omission to frame vital issues relating to adverse possession and limitation, and also possession of a particular land. The court below therefore, framed the issues and referred the same to the trial court. Since lower appellate court found such course necessary to take the right decision in the suit on merits. On reference of the issues to the trial court by the appellate court, the trial court shall have no other option than to try such issues, after taking such evidence as required and return it to the appellate court together with its

findings thereon, and the reasons therefore, within such time as may be fixed by the appellate Court or extended by it from time to time. The appellate court, as per the impugned order directed the Munsiff Court to dispose of the matter afresh as expeditiously as possible, and at any rate prior to 28.2.1994. From the above facts, it will be clear that the procedure adopted by appellate court and the order of reference passed by it squarely fall under Order 41 Rule 25 CPC, as evident from a reading of the said provision.

9. So, the next question is whether an order passed under Order 41 Rule 25 is appealable or not. A reading of Section 104 and Order 43 of CPC is essential in this context. Section 104 reads as follows:

“Section 104. **Orders from which appeal lies.**— (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:—

XXXXXXXXXX

XXXXXXXXXX

(ff) an order under Section 35-A;

(ffa) an order under Section 91 or Section 92 refusing leave to institute a suit of the nature referred to in Section 91 or Section 92, as the case may be;

(g) an order under Section 95;

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any

person except where such arrest or detention is in execution of a decree;

(i) any order made under rules from which an appeal is expressly allowed by rules: Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.

(2) No appeal shall lie from any order passed in appeal under this section.

10. It is clear from Section 104 CPC itself that an appeal shall lie only from the orders which are specifically mentioned in Section 104 of CPC and save as otherwise expressly provided in CPC or by any law for the time being in force. It is also laid down that in section 104 of CPC that an appeal from no other order shall lie. The other provision in the CPC which relates to appeals from orders is, Order 43 Rule 1 CPC. In such circumstances, Order 43 Rule 1 CPC has to be looked into and it reads as follows:

**Order 43 Rule 1. Appeals from orders.**—An appeal shall lie from the following orders under the provisions of Section 104, namely:—

(a) an order under Rule 10 of Order VII returning a plaint to be presented to the proper Court except where the procedure specified in Rule 10-A of Order VII has been followed;

(b) xxxxxx

(c) an order under Rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(d) an order under Rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree



passed *ex parte*;

- (e) xxxxxx
- (f) an order under Rule 21 of Order XI;
- (g) xxxxxxxx
- (h) xxxxxxxx
- (i) an order under Rule 34 of Order XXI on an objection to the draft of a document or of an endorsement;
- (j) an order under Rule 72 or Rule 92 of Order XXI setting aside or refusing to set aside a sale;
- (ja) an order rejecting an application made under sub-rule (1) of Rule 106 of Order XXI, provided that an order on the original application, that is to say, the application referred to in sub-rule (1) of Rule 105 of that Order is appealable;]
- (k) an order under Rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit;
- (l) an order under Rule 10 of Order XXII giving or refusing to give leave;
- (m) xxxxxx
- (n) an order under Rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;
- (na) an order under Rule 5 or Rule 7 of Order XXXIII rejecting an application for permission to sue as an indigent person;
- (o) xxxxxxxx
- (p) orders in interpleader-suit under Rule 3, Rule 4 or Rule 6 of Order XXXV;
- (q) an order under Rule 2, Rule 3 or Rule 6 of Order XXXVIII;
- (r) an order under Rule 1, Rule 2–Rule 2-A, Rule 4 or Rule 10 of Order XXXIX;
- (s) an order under Rule 1 or Rule 4 of Order XL;
- (t) an order of refusal under Rule 19 of

Order XLI to readmit, or under Rule 21 of Order XLI to rehear, an appeal;

(u) an order under Rule 23 or Rule 23-A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;

(v) xxxxxxxxxxxx

(w) an order under Rule 4 of Order XLVII granting an application for review.

**[High Court Amendments- KERALA** by notification in the Kerala Gazette No.23 dated 9.6.59:

The following sub-rules read as follows:

(jj) an order rejecting an application made under sub-rule (1) of rule 105 of Order XXI provided an order on the main application referred to in sub-rule (1) of rule 104 of that Order is appealable;

(2) Add the following after Rule1(n).

(nn) An order under rule 5 or rule 7 of Order XXXIII rejecting an application for permission to sue as a pauper on the ground specified in clause (d) or clause (d-1) o rule 5 aforesaid;

(3) Add the following to Rule 1(s).

“except an order under the provision to sub-rule (2) of Rule 4”

11. It is thus, clear from the provisions contained in CPC that an appeal shall lie from only from those “orders” which are specifically mentioned in Section 104 and also in Order 43 Rule 1 of CPC. But, neither in Section 104 nor in Order 43 Rule 1, an order passed under Order 41 Rule 25 is made appealable. Therefore, an order of reference passed by the appellate court under Order 41 Rule 25 is

not appealable either under section 104 or under Order 43 Rule 1 of CPC.

12. Learned counsel appearing for the appellants Sri.P.N.K.Achan raised another contention that the order under challenge is to be treated as a “decree” and not an “order” and hence a second appeal will be the remedy of the appellants. A petition was also filed for conversion of Civil Miscellaneous Appeals to Second Appeals. It was argued that appellants' rights are concluded as far as the appellate court is concerned, by passing of the impugned judgment and there is a final decision of the appellate court in respect of his claim. According to him, a person who is aggrieved by an order of the nature challenged in this appeal must have liberty to challenge it in a regular appeal, especially when several adverse decisions are taken against him by the appellate court on certain matters.

13. It was also pointed out by learned counsel appearing for appellants that lower appellate court took several decisions as per paragraph 73 of the judgment and those vitally affect the right of the appellants. Therefore, unless the appellants can challenge those decisions, their right will be seriously prejudiced. Therefore, according to learned counsel for appellants, the impugned order is to be treated as a “decree” and not an “order” and Second Appeal has

to be entertained against the adverse decisions.

14. In the light of the above contentions, I shall consider whether the impugned order is a “decree” or not, and if a second appeal will lie against the alleged “decree” of the lower appellate court. To appreciate the above contention, the difference between a 'decree' and an 'order' has to be understood. “Decree” is defined under Section 2(2) CPC and “order” is defined under Section 2 (14) CPC which read as hereunder:

“Section 2. Definitions.—In this Act, unless there is anything repugnant in the subject or context,—

(2)“decree” means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

**Explanation.**— A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;

XXXXXXXXXXXXXXXXXXXXX  
 XXXXXXXXXXXXXXXXXXXXX  
 XXXXXXXXXXXXXXXXXXXXX

“(14) “order” means the formal expression of any decision of a Civil Court which is not a decree;”

15. As per section 2(2) of CPC, to constitute a “decree”, there must be a formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties, with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. On going through the judgment of the lower appellate court, I do not find therein, any formal expression of any adjudication, which conclusively determines the rights of the parties with regard to the matters in controversy in the suit. No final decision is taken by the appellate court which conclusively determines the rights of the parties relating to the claim which is in controversy in the suits and the suits are not finally disposed of.

16. Since the lower appellate court framed issues and referred those issues for trial to the court which passed the decree, the suits can be finally disposed of, only after receiving the findings of the latter court on such issues, the reasons therefore, along with the evidence recorded by the said court. The appellate court can adjudicate upon and finally dispose of the suit on merit and make a formal expression of the adjudication, conclusively determining the rights of the parties which is in controversy in the suit, only after the

trial court enter findings on the issues referred to it for trial.

17. Therefore, there is no “decree” passed by the appellate court in the appeals, but there is only a reference of the issues by the appellate court for trial, under Order 41 Rule 25 of CPC. In cases where appellate court refers the issues for trial to the court which passed the decree, in accordance with Order 41 Rule 25 of CPC, there is only a formal expression of a decision of the appellate court, without any conclusive determination of the rights of the parties in respect of the matter in controversy in the suit. Therefore, such “reference” made by appellate court under Order 41 Rule 25 CPC does not amount to any “decree” as defined under section 2(2) of CPC. Such “reference” only constitutes the formal expression of the decision of the appellate court to refer the issues for trial to the latter court. It is only an “order” falling under section 2(14) of CPC, but it falls short of the definition of a “decree” under section 2(2) of CPC. “Order” means the formal expression of any decision of a Civil Court which is not a decree, as per Section 2(14) CPC.

18. Needless to say, in the present case, in the absence of findings on the vital issues regarding the adverse possession and limitation etc., the suit cannot be finally disposed of and no decree can be passed. Therefore, whatever be the findings entered into by lower appellate court in paragraph 73 of its judgment or the order

passed to refer the issues for trial, those findings and order cannot be treated as “decree”. The appellate court has not pronounced anything conclusively on the right of the parties in the suit as per the order of reference passed under Order 41 Rule 25 of CPC. Therefore, the impugned order passed does not satisfy the definition of “decree” as stated in Section 2(2) of CPC.

19. Learned counsel appearing for the appellants vehemently contended that at least so far as the lower appellate court is concerned, there is a final decision on the matters which are referred to in paragraph 73 of the judgment. It was argued that the question is not whether the court disposes of the suit or not finally, but what is to be looked into is whether the findings arrived at by such court conclusively determines the rights of the parties or not. On going through paragraph 73 of the judgment I find that whatever is stated therein cannot be called the formal expression of an adjudication which conclusively determines the right of the parties so as to constitute a “decree”, as defined under section 2(2) CPC. In the above circumstances, the order under challenge cannot be called a “decree” but it can only be treated as an “order” falling under Order 41 Rule 25 CPC.

20. In such circumstances, as indicated in Order 43 Rule 1 and section 104 of CPC, no appeal will lie against the order under

challenge which is passed under Order 41 R.25 CPC. So long as there is no “decree” passed in this case, there is no scope for filing a Second Appeal also. The Second Appeal as provided under Section 100 CPC as per the then existing law, would lie only from a “decree” and not from an “order”, as evident from the said provision itself. Therefore, it is too premature for the appellants to approach this Court by filing appeals and those cannot be entertained.

21. In this context, it is also relevant to go through a decision of this court cited by learned counsel for the respondents. It is reported in **Krishnan Kuttan v. Poullose Chacko** (1954 KLT 881) wherein it is held as follows:

“A Civil Miscellaneous Appeal can be filed only against an order passed under O.41, R.23 and not against one passed under O.41, R.25. The court which reheard the appeal after the remand under O.41, R.25 and the submission of the trial court's finding on the new issues is bound by the observations made in the remand order and cannot go behind those observations. It will be open to the parties to canvass in second appeal against the final decree of the appellate court, the merits of the remand order.”

22. Concluding my discussion, I hold that no civil miscellaneous appeal will lie under Order 43 Rule 1 CPC against an order of reference made under Order 41 Rule 25 CPC because such reference only constitutes an “order” and not a “decree”, as defined in CPC. The trial court will have to try the issues referred to it by the



appellate court and return the findings thereon along with the reasons therefore and also the evidence recorded. Thereafter, when the appellate court disposes of the suits finally, it will be open to the parties to canvass the merit of the findings of the appellate court or the remand order or any findings made in such remand order etc., in a second appeal, if any, filed. But, as long as there is no “decree” passed by lower appellate court, there is no question of entertaining a second appeal, as requested. The prayer to convert the appeal as Second Appeal can only be rejected and I do so.

In the result, both these appeals are dismissed.

**K.HEMA,JUDGE**

vgs.

K.HEMA, J.

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*CMA.NOS.10 & 67/94*  
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JUDGMENT

18.9.2007