

VISHWANATHA ACHARI

A

v

KANAKASABAPATHY

JULY 26, 2005

[ARIJIT PASAYAT AND H.K. SEMA, JJ.]

B

*Code of Civil Procedure, 1908—Section 100(4)—Second appeal—Dismissal of, on the ground that the finding recorded by First Appellate Court regarding adverse possession not challenged—Correctness of—Held: Question of law was formulated as required—However, is of no consequence since trial court did not frame any issue regarding adverse possession, and therefore, First Appellate Court not justified in deciding issues not framed—Furthermore, Appellate Court has power to frame issues other than those framed by trial court which are to be referred for trial giving opportunity to the defendant to adduce evidence—Hence, order of High Court set aside and matter remitted back—Section 107.*

C

D

Trial court dismissed the suit for declaration of title to the property by the respondent. However, the First Appellate Court allowed the appeal and granted title by adverse possession. Aggrieved appellant then filed second appeal which was dismissed on the ground that there was no challenge to the finding regarding adverse possession. Hence the present appeal.

E

Disposing of the appeal, the Court

**HELD:** High Court erred in holding that there was no challenge by the appellant in the second appeal to the conclusions regarding adverse possession. As a matter of fact, a question of law in this regard was formulated, as required under Section 100(4) of Code of Civil Procedure, 1908. A question was also formulated i.e. whether the lower Appellate Court is justified in dealing with issues other than those framed by the trial court and deciding the same in favour of the plaintiff depriving the defendant the opportunity to counter plaintiff's evidence. High Court seems to have taken a view that there was no direct reference to the issue of adverse possession. But that is really of no consequence when it has been clearly stated that the trial court had not specifically framed any issue regarding the adverse possession and as such the lower Appellate Court was not justified in deciding

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H

**A** issues which were not framed. However, under Section 107 of the CPC, the Appellate Court has power to frame issues other than those framed by the trial Court. But here again the requirement is to refer them for trial and consequentially, the defendant would get an opportunity to adduce evidence in that regard. Hence, the judgment of High Court is set aside and the matter is remitted back to High Court for fresh consideration. [819-C, F, G, H; 820-B]

**B**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3398 of 2000.

From the Judgment and Order dated 6.7.95 of the Madras High Court in S.A. No. 663 of 1995.

**C**

Balaji Srinivasan and S. Srinivasan for the Appellant.

Mrs. K. Sharda Devi, (NP) for the Respondent.

The Judgment of the Court was delivered by

**D**

**ARIJIT PASAYAT, J.** This appeal is directed against the judgment rendered by a learned Single Judge of the Madras High Court dismissing the second appeal filed by the appellant on the ground that there was no challenge to the finding recorded by the First Appellate Court regarding adverse possession.

**E**

A brief reference to the factual aspects would suffice.

A suit was filed by the respondents for declaration of title, and the suit was numbered as O.S. No. 59/88. Written statement was filed by the appellant who was the defendant. The trial Court framed the following issues:

**F**

(a) Whether the disputed property belongs to the plaintiff?

(b) Whether the suit is maintainable?

(c) What remedy/relief the plaintiff is entitled to?

**G**

The trial Court dismissed the suit. The plaintiff (respondent herein) preferred an appeal and by judgment and order dated 11.9.1991 learned Additional District Judge, Ramnad, Madurai allowed the appeal. One of the major conclusions of the First Appellate Court was that the plaintiff had perfected title by adverse possession. The appellant filed the second appeal taking the stand that no such issue was framed by the trial Court and, therefore, the defendant had no opportunity to adduce evidence on this

**H**

question. The High Court as noted above, dismissed the second appeal summarily on the ground that the First Appellate Court's observations regarding adverse possession were not questioned and no ground was taken in the second appeal. A

There is no appearance on behalf of the respondent in spite of the notice. B

Learned counsel submitted that the High Court has clearly fallen in error by observing that there was no challenge to the finding regarding adverse possession. He has referred to the memorandum of appeal in this regard.

We find that the High Court has clearly erred in holding that there was no challenge by the appellant in the second appeal to the conclusions regarding adverse possession. As a matter of fact, a question of law in this regard was formulated, as required under Section 100(4) of the Code of Civil Procedure, 1908 (in short 'CPC'). C

It appears from the memorandum of appeal that in the ground no. 8 it was specifically stated as follows: D

"the Appellate Court below had erred in passing issues other than those framed by the Trial Court thereby depriving appellant to tender evidence and documents on the new issues apart from the illegality and infirmity attached herewith." E

A question was also formulated i.e. whether the lower Appellate Court is justified in dealing with issues other than those framed by the Trial Court and deciding the same in favour of the plaintiff depriving the defendant the opportunity to counter to plaintiff's evidence. It has been clearly stated that there was no issue framed regarding the adverse possession. The lower Appellate Court was not justified in deciding issues which were not framed. The High Court seems to have taken a view that there was no direct reference to the issue of adverse possession. But that is really of no consequence when the specific stand of the appellant was that there was no issue framed relating to adverse possession and, therefore, the First Appellate Court should not have recorded any finding on that regard. The Trial Court had not specifically framed any issue relating to adverse possession. Under Section 107 of the CPC, the Appellate Court has power to frame issue other than those framed by the trial Court. But here again the requirement is to refer them for trial. Consequentially, the defendant would have got opportunity to adduce evidence F G H

A in that regard.

Above being the position, the conclusions of the High Court do not appear to be correct, the judgment cannot be maintained and is accordingly set aside. The matter is remitted to the High Court for fresh consideration. It is made clear that we have not expressed any opinion on the merits of the

B case.

The appeal is disposed of accordingly without any order as to costs.

N.J.

Appeal disposed of.