

MALLURU MALLAPPA (D) THR. LRS.

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v.

KURUVATHAPPA & ORS.

(Civil Appeal No. 1485 of 2020)

FEBRUARY 12, 2020

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[S. ABDUL NAZEER AND SANJIV KHANNA, JJ.]

Code of Civil Procedure, 1908 – ss.96, 100 and Or.XLI, r.31 – Appellant-plaintiff filed suit against respondents-defendants for specific performance of agreement to sell – Defendant no.1 pleaded that the suit was barred by limitation and that the plaintiff was not ready and willing to perform his part of the contract – Suit dismissed – Confirmed by High Court – Held: s.96 provides for filing of an appeal from the decree passed by any court exercising original jurisdiction to the court authorized to hear the appeals from the decisions of such courts – In the instant case, the appeal from the decree passed by the trial court lies to High Court – An appeal is a continuation of the proceedings of the original court – Ordinarily, the appellate jurisdiction involves re-hearing on law as well as on fact and is invoked by an aggrieved person – First appeal is a valuable right of the appellant wherein all questions of fact and law decided by the trial court are open for re-consideration – A first appeal u/s.96 is entirely different from a second appeal u/s.100 – s.100 expressly bars second appeal unless a question of law is involved in a case and the question of law so involved is substantial in nature – In the present case, issue relating to readiness and willingness of the plaintiff to perform his part of the contract and limitation were held against him and the suit was dismissed – Appeal before High Court involved both disputed questions of law and fact – Without examination of any of these aspects it dismissed the appeal by a cryptic order – High Court failed to follow the provisions of Or.XLI, r.31 while deciding the appeal – Judgment set aside – Matter remanded to High Court for fresh disposal in accordance with law – Limitation Act, 1963 – Article 54 of the Schedule.

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Words & Expressions – ‘appeal’ – Meaning of – Held: Expression ‘appeal’ has not been defined in CPC – It is a judicial

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- A *examination of the decision by a higher court of the decision of a subordinate court to rectify any possible error in the order under appeal – Code of Civil Procedure, 1908 – s.96.*

Partly allowing the appeal, the Court

- B **HELD: 1.1** Section 96 of the CPC provides for filing of an appeal from the decree passed by any court exercising original jurisdiction to the court authorized to hear the appeals from the decisions of such courts. In the instant case, the appeal from the decree passed by the trial court lies to the High Court. The expression ‘appeal’ has not been defined in the CPC. It is a judicial examination of the decision by a higher court of the decision of a subordinate court to rectify any possible error in the order under appeal. An appeal is a continuation of the proceedings of the original court. Ordinarily, the appellate jurisdiction involves a re-hearing on law as well as on fact and is invoked by an aggrieved person. The first appeal is a valuable right of the appellant and therein all questions of fact and law decided by the trial court are open for re-consideration. The judgment of the first appellate court must display conscious application of mind and record findings supported by reasons on all issues and contentions. A first appeal under Section 96 of the CPC is entirely different from
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- E a second appeal under Section 100. Section 100 expressly bars second appeal unless a question of law is involved in a case and the question of law so involved is substantial in nature. [Paras 11, 14 and 15][793-G-H; 794-A-B, F-H; 795-A-C]

- F 1.2 The judgment of the first appellate court has to set out points for determination, record the decision thereon and give its own reasons. Even when the first appellate court affirms the judgment of the trial court, it is required to comply with the requirement of Order XLI Rule 31 and non-observance of this requirement leads to infirmity in the judgment of the first appellate court. The issue relating to readiness and willingness of the plaintiff to perform his part of the contract and issue relating to limitation were held against the plaintiff and the suit was dismissed. The appeal before the High Court involved both disputed questions of law and fact. The High Court without examination of any of these aspects dismissed the appeal by a cryptic order. The court below neither reappreciated the evidence
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of the parties, nor it passed a reasoned order. The High Court has failed to follow the provisions of Order XLI Rule 31 of the CPC while deciding the appeal. The judgment and decree of the High Court is set aside and the matter is remanded to the High Court for fresh disposal in accordance with law. [Paras 19-21] [797-B-G]

Hari Shankar v. Rao Girdhari Lal Chowdhury AIR 1963 SC 698 : [1962] Suppl. SCR 933; *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat* (1969) 2 SCC 74 : [1970] 1 SCR 322; *Vinod Kumar v. Gangadhar* (2015) 1 SCC 391 : [2014] 10 SCR 1050; *Shasidhar and Ors. v. Ashwani Uma Mathad & Anr.* (2015) 11 SCC 269 : [2015] 2 SCR 1– relied on.

Santosh Hazari v. Purushottam Tiwari (Deceased) By Lrs. (2001) 3 SCC 179 : [2001] 1 SCR 948; *Madhukar and others v. Sangram and Others* (2001) 4 SCC 756 : [2001] 3 SCR 138; *B. M. Narayana Gowda v. Shanthamma (Dead) By LRs. and Another* (2011) 15 SCC 476; *H. K. N. Swami v. Irshad Basith (Dead) By LRs.* (2005) 10 SCC 243; *M/s. Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar* (1980) 4 SCC 259 – referred to.

Black's Law Dictionary (7th Edn.) – referred to.

Case Law reference

[1962] Suppl. SCR 933	relied on	Para 12	
[1970] 1 SCR 322	relied on	Para 13	F
[2001] 1 SCR 948	referred to	Para 14	
[2001] 3 SCR 138	referred to	Para 14	
(2011) 15 SCC 476	referred to	Para 14	
(2005) 10 SCC 243	referred to	Para 14	G
(1980) 4 SCC 259	referred to	Para 14	
[2014] 10 SCR 1050	relied on	Para 17	
[2015] 2 SCR 1	relied on	Para 18	H

A CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1485 of 2020.

From the Judgment and Order dated 09.02.2012 of the High Court of Karnataka at Bangalore in Regular First Appeal No. 1731 of 2006 (SP).

B S. N. Bhat, Adv. for the Appellants.

The Judgment of the Court was delivered by

S. ABDUL NAZEER, J.

1. Delay condoned. Leave granted.

C 2. This is the plaintiff's appeal challenging the judgment and decree in RFA No.1731 of 2006 dated 09.02.2012 passed by the High Court of Karnataka at Bangalore, whereby the High Court has confirmed the judgment and decree passed by the trial court in O.S. No. 32 of 2005 dated 09.06.2006.

D 3. The plaintiff filed the above suit against the respondents/defendants for specific performance of the agreement to sell dated 30.3.2000. The agreement provided that the sale was to be executed within three years from the date of the agreement, subject to the defendants fulfilling certain obligations.

E 4. Defendant No.1 filed the written statement and the other defendants filed a memo adopting the same as their written statement. Defendant No.1 admitted the execution of the agreement to sell in favour of the plaintiff. However, the defendant pleaded that the suit was barred by limitation. It was further contended that plaintiff was not ready and willing to perform his part of the contract.

F 5. Based upon the rival pleadings of the parties, the trial court framed the following issues: -

G "1. Whether the plaintiff proves that, the defendants 1 and 2 their father have executed an agreement to sell on 30.3.2000 for Rs.2,00,000/- in favour of the plaintiff after receiving Rs.1,50,000/- as earnest money?

2. Whether the plaintiff proves that, he is always ready and willing to perform his part of contract?

H 3. Whether the suit of the plaintiff is barred by limitation?

4. What order or decree?” A

6. The plaintiff got himself examined as PW-1 and Ex. P-1, P1(a) to (c) were marked in his evidence. The defendant No.1 was examined as DW1 and three other witnesses were examined as DW-2 to 4. On appreciation of the evidence on record, the trial court held that the suit was barred by time. It was also held that the plaintiff was not ready and willing to perform his part of the contract. The suit was accordingly dismissed. B

7. As noticed above, the High Court has confirmed the said decree of the trial court.

8. We have heard Shri S.N. Bhat, learned counsel for the appellant/ plaintiff. Though notice was served on the respondents, no one has entered appearance on their behalf. C

9. Shri Bhat, learned counsel, has made two-fold submissions. Firstly, he submits that the High Court has passed a cryptic judgment without reappreciating the evidence on record. It was argued that the first appeal filed by the plaintiff under Section 96 of the Code of Civil Procedure, 1908 (for short ‘the CPC’) was a continuation of the suit and it was incumbent upon the High Court to reassess the entire evidence on record. It was argued that the High Court as an appellate court has failed to follow the guidelines provided under Order XLI Rule 31 of the CPC while deciding the appeal. Secondly, it was argued that the agreement to sell was dated 30.03.2000, providing for three years’ time from the date of the agreement to complete the execution of the sale deed. The suit was filed on 28.01.2005 which was well within time. Referring to Article 54 of the Schedule to the Limitation Act, 1963, (for short ‘the Limitation Act’) it was submitted that when a date is fixed for performance of the contract, the period of limitation for filing the suit is three years from the date fixed for the performance. It was further argued that there is no finding by the High Court as to the readiness and willingness of the plaintiff to perform his part of the contract. D E F

10. We have carefully considered the submission of the learned counsel made at the Bar and perused the materials placed on record. G

11. Section 96 of the CPC provides for filing of an appeal from the decree passed by any court exercising original jurisdiction to the court authorized to hear the appeals from the decisions of such courts. In the instant case, the appeal from the decree passed by the trial court H

- A lies to the High Court. The expression ‘appeal’ has not been defined in the CPC. Black’s Law Dictionary (7th Edn.) defines an appeal as “a proceeding undertaken to have a decision reconsidered by bringing it to a higher authority.” It is a judicial examination of the decision by a higher court of the decision of a subordinate court to rectify any possible error in the order under appeal. The law provides the remedy of an appeal because of the recognition that those manning the judicial tiers too commit errors.

12. In **Hari Shankar v. Rao Girdhari Lal Chowdhury**¹ it was held that a right of appeal carries with it a right of re-hearing on law as well as on fact, unless the statute conferring a right of appeal limits the re-hearing in some way as has been done in second appeal arising under the CPC.

13. In **Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat**² it was held thus:

5. In the well known work of *Story on Constitution* (of United States), Vol. 2, Article 1761, it is stated that the essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted and does not create that cause. The appellate jurisdiction may be exercised in a variety of forms and, indeed, in any form in which the Legislature may choose to prescribe. According to Article 1762 the most usual modes of exercising appellate jurisdiction, at least those which are most known in the United States, are by a writ of error, or by an appeal, or by some process of removal of a suit from an inferior tribunal. An appeal is a process of civil law origin and removes a cause, entirely subjecting the fact as well as the law, to a review and a retrial.....”

14. It is a settled position of law that an appeal is a continuation of the proceedings of the original court. Ordinarily, the appellate jurisdiction involves a re-hearing on law as well as on fact and is invoked by an aggrieved person. The first appeal is a valuable right of the appellant and therein all questions of fact and law decided by the trial court are open for re-consideration. Therefore, the first appellate court is required to address itself to all the issues and decide the case by giving reasons. The court of first appeal must record its findings only after dealing with

¹ AIR 1963 SC 698

H ² 1969 (2) SCC 74

all issues of law as well as fact and with the evidence, oral as well as documentary, led by the parties. The judgment of the first appellate court must display conscious application of mind and record findings supported by reasons on all issues and contentions [see: **Santosh Hazari v. Purushottam Tiwari (Deceased) By Lrs.**³, **Madhukar and others v. Sangram and Others**⁴, **B. M. Narayana Gowda v. Shanthamma (Dead) By Lrs. and Another**⁵, **H. K. N. Swami v. Irshad Basith (Dead) By Lrs.**⁶ and **M/s. Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar**⁷].

15. A first appeal under Section 96 of the CPC is entirely different from a second appeal under Section 100. Section 100 expressly bars second appeal unless a question of law is involved in a case and the question of law so involved is substantial in nature.

16. Order XLI Rule 31 of the CPC provides the guidelines for the appellate court to decide the matter. For ready reference Order XLI Rule 31 of the CPC is as under: -

“31. Contents, date and signature of judgment.- The judgment of the Appellate Court shall be in writing and shall state—

- (a) the points for determination;
- (b) the decision thereon;
- (c) the reasons for the decision; and
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;

and shall at the time it is pronounced be signed and dated by the Judge or by the Judges concurring therein.”

17. In **Vinod Kumar v. Gangadhar**⁸ this Court has reiterated the principles to be borne in mind while disposing of a first appeal, as under:-

“15. Again in *B.V. Nagesh v. H.V. Sreenivasa Murthy* [(2010) 13 SCC 530 : (2010) 4 SCC (Civ) 808], this Court taking note of

³(2001) 3 SCC 179

⁴(2001) 4 SCC 756

⁵(2011) 15 SCC 476

⁶(2005) 10 SCC 243

⁷(1980) 4 SCC 259

⁸(2015) 1 SCC 391

A all the earlier judgments of this Court reiterated the aforementioned principle with these words: (SCC pp. 530-31, paras 3-5)

B “3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:

(a) the points for determination;

(b) the decision thereon;

C (c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

D 4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide *Santosh Hazari v. Purushottam Tiwari* [(2001) 3 SCC 179 : (2001) 1 SCR 948] , SCC p. 188, para 15 and *Madhukar v. Sangram* [(2001) 4 SCC 756] SCC p. 758, para 5.)”

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G 18. In **Shasidhar and Ors. v. Ashwani Uma Mathad and Anr.**⁹, it was held as under:-

“21. Being the first appellate court, it was, therefore, the duty of the High Court to decide the first appeal keeping in view the scope and powers conferred on it under Section 96 read with Order 41

H ⁹ (2015) 11 SCC 269

Rule 31 of the Code mentioned above. It was unfortunately not done, thereby, causing prejudice to the appellants whose valuable right to prosecute the first appeal on facts and law was adversely affected which, in turn, deprived them of a hearing in the appeal in accordance with law.” A

19. It is clear from the above provisions and the decisions of this Court that the judgment of the first appellate court has to set out points for determination, record the decision thereon and give its own reasons. Even when the first appellate court affirms the judgment of the trial court, it is required to comply with the requirement of Order XLI Rule 31 and non-observance of this requirement leads to infirmity in the judgment of the first appellate court. No doubt, when the appellate court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by trial court. Expression of a general agreement with the reasons given by the trial court would ordinarily suffice. B C

20. Keeping in mind the above principles, let us examine the present case. As stated above, the issue relating to readiness and willingness of the plaintiff to perform his part of the contract and issue relating to limitation were held against the plaintiff and the suit was accordingly dismissed. The appeal before the High Court involved both disputed questions of law and fact. The High Court without examination of any of these aspects has dismissed the appeal by a cryptic order. The court below has neither reappreciated the evidence of the parties, nor it has passed a reasoned order. The High Court has failed to follow the provisions of Order XLI Rule 31 of the CPC while deciding the appeal. Mr. Bhat has argued that the suit was well within time under Article 54 of the Schedule to the Limitation Act. Even this question has not been examined in its proper perspective. D E F

21. In the result, the appeal succeeds and is accordingly allowed in part. The judgment and decree of the High Court in RFA No.1731 of 2006 dated 09.02.2012, is set aside and the matter is remanded to the High Court for fresh disposal in accordance with law. G

22. All the contentions of the parties are left open. There will be no order as to costs.