Ganga Bai vs Vijay Kumar & Ors on 9 April, 1974

Equivalent citations: 1974 AIR 1126, 1974 SCR (3) 882, AIR 1974 SUPREME COURT 1126, 1974 3 SCR 882, 1974 2 SCC 393, 1974 MAH LJ 602, 1974 MPLJ 629, 1974 SCD 682

Author: Y.V. Chandrachud

Bench: Y.V. Chandrachud, M. Hameedullah Beg

PETITIONER:
GANGA BAI

Vs.

RESPONDENT:
VIJAY KUMAR & ORS.

DATE OF JUDGMENT09/04/1974

BENCH:
CHANDRACHUD, Y.V.
BENCH:
CHANDRACHUD, Y.V.
BEG, M. HAMEEDULLAH

CITATION:
1974 AIR 1126 1974 SCR (3) 882
1974 SCC (2) 393
CITATOR INFO :
RF 1990 SC1480 (41)
RF 1992 SC2279 (28)

ACT:
C.P.C.--Amendment of the Memo of Appeal after 7-1/2 years without any application of condonation of delay or good cause shown--Whether proper--Appeal against a mere finding of fact--Whether maintainable.

HEADNOTE:
In 1953, defendant 1 executed on behalf of himself and his minor son, defendant 2, a deed of mortgage in favour of the plaintiff. Deft. 3 is also a son of deft. I who was born after the mortgage deed. In 1956, a regd. deed of partition was executed amongst the defendants under which the mortgaged property was allotted to the share of defts 2 & 3. Thereafter, the mortgagee filed a civil. suit to enforce the

mortgage and the trial court passed a preliminary decree for sale of deft. 1's interest in the mortgaged property. It held that part of the consideration for the mortgage was not supported by legal necessity and the balance of the debt incurred was tainted with immorality. Therefore, the debt was held not binding on the one half share of deft. 2 in the mortgaged property. As regards the partition, the trial court held that it was a colourable transaction effected to delay or defeat the creditors.

Being aggrieved, pltf. filed an appeal (40/59) in the High Court. Deft. 1 & 2 against whom the suit was dismissed, also filed an appeal (72/59) against the finding of the trial court that the partition was a colourable transaction. During the pendency of these 2 appeals, the preliminary decree was made final by the trial court and in 1960, the plaintiff purchased with the permission of the court, a joint half share of the mortgaged property in full satisfaction of his decree. Thereafter, the auction sale was confirmed and the plaintiff was put in joint possession of the property.

Thereafter, the appeals filed by the) plaintiff and defendants 2 and 3 came up for hearing and while the appeals were part-hard, defts 2 & 3 applied on August 2, 1966 (nearly 7-1/2 years after filing the appeals), applied for amendment of their Memorandum of appeal in first appeal No. 72/59 and sought permission of the High Court to challenge the preliminary decree passed by the trial Court. The plaintiff opposed that amendment and applied that she did not desire to prosecute first appeal No. 40/59 filed by her. The High Court did not pass any orders either on the application for amendment or the plaintiff's appeal, but adjourned the hearing of the appeals for 3 months to enable defendants to pay the amount due under the preliminary decree. Accordingly the defendants deposited the money towards the satisfaction of the preliminary decree.

After about 2 years, another division bench of the High Court, allowed the amendments of the defendants Memo of Appeal in Appeal No. 72/59 and allowed time to the defendants to pay the deficit Court fee, which they paid. The High Court, then took the 2 appeals for hearing and dismissed appeal No. 40/59 for non-prosecution and confirmed the findings of the trial court in favour of the defendants. As regards appeal No. 72/59, the High Court held that in view of Order 41, Rule 2 C.P.C ., it was open to the defendants. with the leave of the court, to urge additional grounds without amending the Memo of Appeal and therefore, the objection raised. by the plaintiff that amendment should not be allowed, cannot be upheld. The High Court further held that the defendants' appeal was competent and they had the right to redeem the mortgage. On the merits, the High Court held that the partition was real and genuine. In the result, the High Court set aside the preliminary decree as also the final decree and with it the auction

883

sale-in favour of the plaintiff. The High Court passed a fresh preliminary decree under order 34, Rule 4 C.P.C., directing that that the plaintiff was to recover Rs. 34,386/- and 'odd and directed the defendants to pay the entire decretal amount within 6 months of the date of decree. The plaintiff questions the correctness of the decree before this Court.

The appeal filed by defendants 2 & 3 Was against the finding recorded by the trial court that the partition between deft. 1 and his sons was a colourable transaction. Therefore, it was clear that the appeal filed by defts. 2 & 3 was directed originally not against any part of the preliminary decree but against a mere finding recorded by the trial court that the partition was not genuine. Before this Court, the main question was whether that appeal was maintainable and secondly, whether it was proper for the High Court to allow the amendment of the Memo of appeal after 7-1/2 years without good cause shown and Without any application for condonation of delay. Allowing the appeal,

HELD : (i) There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of at civil nature, but the right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. The various provisions in the C.P.C. show that under the Code, an appeal lies only as against a decree or as against an order passed under rates from which an appeal is expressly allowed by Order 43, Rule 1. No appeal can lie against a mere finding for the simple reason that the Codes does not provide for any such appeal. Therefore, the first appeal filed by. defendants 2 and 3 in the High Court was not maintainable as it was directed against a mere finding recorded by the trial court. [886 D-H]

(ii) The High Court should not have allowed the amendment of the Menlo of Appeal particularly when defendants 2 & 3 had neither explained the long delay nor sought its condonation. Defendants 2 & 3 were not denied by the preliminary decree the right to pay the decretal amount and the two defendants could even have applied under order 21, Rule 89 for setting aside the sale in favour of the appellant; but they failed to do so. The preliminary decree had remained unchallenged since September, 1958 and by lapse of time a valuable right had accrued in favour of the decree-holder. Therefore, to allow the amendment after such a long time without a good cause was not a proper exercise of judicial discretion in the circumstances of the case. [888 D-E]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 582 of 1969. Appeal from the Judgment and Decree dated the 19th March, 1968 of the Bombay High Court at Nagpur in First Appeal No. 72 of 1959.

M. N. Phadke, R. A. Gupta and K. B. Rohatgi for the Appellant.

B. N. Lokur, Arun Kumar Sanghi and A. G. Ratnaparkhi for the The Judgment of the Court was delivered by-

CHANDRACHUD, J. This is a plaintiff's appeal on a certificate granted by the High Court of Bombay, Nagpur Bench, under Article 133(1)(a) of the Constitution- On March 24, 1953 defendant 1 executed on behalf of himself and 'his minor son defendant 2, a deed of mortgage in favour of the plaintiff. Defendant 3 is also a son of defendant 1 but he was born, after the mortgage deed, on September 30, 1955. On January 11, 1956 a registered deed of partition was executed amongst the defendants under which the mortgaged property was allotted to the share of defendants 2 and 3.

On September 1, 1956 the mortgagee filed Civil Suit No. 3A of 1956 to enforce the mortgage. On September 20, 1958 the trial court passed a preliminary decree for sale of defendant 1's interest in the mortgaged property. It held that part of the consideration for the mortgage was not supported by legal necessity and the, balance of the debt incurred on the mortgage was tainted with immorality. Though, therefore, defendant 1 had executed the mortgage as a manager of the joint Hindu family consisting of himself and defendant 2, the debt was held not binding on the one- half share of defendant 2 in the mortgaged property. On the issue relating to the genuineness of the partition effected by defendant 1 between himself and his suits, the trial court recorded a finding that it wag a sham and colourable transaction and its object was to delay or 1 defeat the creditors.

Being aggrieved by. the decree directing the sale of half the mortgaged property only, the plaintiff filed First Appeal No. 40 of 1959 in the High Court of Bombay. Though the suit was dismissed as against defendants 2 and 3, they also filed an appeal in the High Court to challenge the finding of the trial court that the deed of partition was a sham and colourable transaction. That was First Appeal No. 72 of 1959.

During the pendency of these two appeals, the preliminary decree was made final by the trial court on October 23, 1958. On March 2, 1960 the plaintiff purchased, with the permission of tile court, a joint half share in the mortgaged property in full satisfaction of his decree. On September 21, 1960 the auction sale was confirmed and on November 25, 1960 the plaintiff was put in joint possession of the property.

On March 15, 1966 the appeals filed by the plaintiff and by defendants 2 and 3 came up for hearing before a.Division Bench consisting of Abhyankar and Deshmukh JJ. The hearing of the appeals was adjourned from time to time and while-the appeals were part-heard, defendants 2 and 3 applied on August 2, 1966 for amendment of their Memorandum of Appeal in-First Appeal No, 72 of 1959. By the proposed amendment they sought leave of the High Court to challenge the preliminary decree passed by the trial court. The plaintiff opposed that amendment and applied that she did not desire

to prosecute First Appeal No. 40 of 1959 filed by her. The High Court did not pass any orders either on the application for amendment made by defendants 2 and 3 or on the application of the plaintiff asking that her appeal be dismissed for non-prosecution. On August 24, 1966 the High Court adjourned the hearing of the appeals for three months to enable defendants to pay the amount due under the preliminary decree. On November 24, 1966 defendants 2 and 3 deposited Rs. 12,500 and applied for an extension of two months for paying the balance. The extension was granted by the High Court and on fabruary 25, 1967 defendants 2 and 3 deposited a further sum of Rs. 25,000 towards the satisfaction of the preliminary decree.

On February 14, 1968 another Division Bench of the High Court (Tambe and Badkas, JJ.) allowed the application of defendants 2 and 3 for amendment of their Memorandum of Appeal in First Appeal No. 72 of 1959. On an application made by their counsel, the High Court granted to those defendants time till February 23, 1968 to pay the deficit court fees, which they did. The High Court then took up the two First Appeals. for hearing in March, 1968.

As the plaintiff had applied that she did not desire to proceed with First Appeal No. 40 of 1959 filed by her, the High-Court dismissed that appeal for non-prosecution. As a consequence of this order the High Court observed that the findings recorded by the trial court in favour of the defendants and adverse to the plaintiff would stand confirmed.

In First Appeal No. 72 of 1959 filed by defendants 2 and 3 it was urged by the plaintiff that as the appeal was originally filed to challenge the finding of the trial court on the question of genuineness of the partition. defendants 2 and 3 were not entitled to include now grounds in the Memorandum of Appeal and that the Memorandum should not have been permitted to be amended. The High Court hold that in view of the Provisions of Order 41, Rule 2, Civil Procedure Code. it was oven to defendants 2 and 3. with leave of the court, to urge additional grounds in their appeal without amending the Memo randum of appeal and therefore the objection raised by the plaintiff as against the amendment was futile.

The High Court further held that the appeal filed by defendants 2 and 3 was competent even though the suit, was wholly dismissed as against them. According to the High Court, defendants 2 and 3 were aggrieved by the adverse finding on the question of partition and further they were denied under the preliminary decree the right to pay the decretal amount and to redeem the mortgage. It was there- fore open to them to file an appeal against that decree. On the merits of the appeal the High Court set aside the finding of the trial court and held that the partition was "real and genuine" and that it was not effected in order to defeat :lie creditors. Defendants 2 and 3 bad therefore become owners of the, equity of redemption and they could not be deprived of the right to redeem the mortgage. In the result, the High Court set aside the preliminary decree as also the final decree and with it the auction sale in favour of the plaintiff. The High Court passed a fresh preliminary decree under Order 34, Rule 4, Civil Procedure Code declaring that the plaintiff was entitled to recover Rs. 34, 386 and odd and directing the defendants to pay the entire decretal amount within six months of the date of decree. The plaintiff questions the correctness of that decree in this appeal.

It is necessary first to understand the nature of the appeal filed by ,defendants 2 and 3 in the High Court and the relief they sought therein. That appeal was in terms filed only against the finding recorded by the trial court that the partition between defendant 1 and his sons was a sham and colourable transaction intended to defeat or delay the creditors. The Memorandum of Appeal as filed originally contained seven grounds, each of which was directed against the finding given by the trial court on the question of partition. The Memorandum contained a note that as the subject-matter in dispute was not capable of being estimated in terms of a money value, a fixed court fee of Rs. 20 was paid thereon. Only one prayer was originally made in the Memorandum of Appeal that the partition deed be declared as genuine. Counsel for defendants 2 and 3, furnished to the registry of the High Court a written explanation as required by Rule 171 of the High Court Rules that as defendants 2 and 3 were only challenging the finding recorded by the trial court on the question of partition and as they were merely seeking a declaration that the partition was genuine, the fixed court fee of Rs. 20 was properly paid.

It is thus clear that the appeal filed by defendants 2 and 3 in the High Court was directed originally not against any part of the preliminary decree but against mere finding recorded by the trial court that the partition was not genuine. The main controversy before us centers round the question whether that appeal was maintainable on this question the position seems to us well-established. There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring suit of a civil nature and unless the suit is barred by statute one may, at one's peril,_bring a suit of one's choice. It is no answer to a suit howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute.

Under section 96(1) of the Code of Civil Procedure, save where otherwise expressly provided by the Code or by any other law for the time being in force, an appeal lies from every decree passed by any court exercising original jurisdiction, to the court authorised to hear appeals from the decisions of such court. Section 100 provides for a second appeal to the High Court from an appellate decree passed by a court subordinate to the High Court. Section 104(1) provides for appeals against orders of the kind therein mentioned and ordains that save as otherwise expressly provided by the Code or by any law for the time being in force an appeal shall lie "from no other orders". Clause (i) of this section provides for an appeal against "any orders made under Rules from which an appeal is expressly allowed by rules". 'Order 43, Rule 1 of the Code, which by reason of clause (i) of section 104(1) forms a part of that section, provides for appeals against orders passed under various rules referred to in clauses (a) to (w) thereof, Finally, section 105(1) of the Code lays down that save as otherwise expressly provided, no appeal shall lie from any order made by a court in exercise of its original or appellate jurisdiction.

These provisions show that under the Code of Civil Procedure, an appeal lies only as against a decree or as against an order passed under, rules from which an appeal is expressly allowed by Order 43, Rule 1.

No appeal can lie against a mere finding for the simple reason that the Code does not provide for any such appeal. It must follow that First Appeal No. 72 of 1959 filed by defendants 2 and 3 was not maintainable as it was directed against a mere finding recorded by the trial court. The High Court mixed up two distinct issues : one, whether it was competent to defendants 2 and 3, if they were aggrieved by the preliminary decree of file an appeal against that decree; and two, whether the appeal such as was filed by them was maintainable. If it be correct that defendants 2 and 3 could be said to have been aggrieved by the preliminary decree, it was certainly competent for them to challenge that decree in appeal. But they did not file an appeal against the preliminary decree and therefore the question whether they were aggrieved by that decree and could file an appeal therefrom was irrelevant. While deciding whether the appeal filed by defendants 2 and 3 was maintainable ' , the High Court digressed into the question of the competence of defendants 2 and 3 to file an appeal against the preliminary decree and taking the view that it was open to them to challenge that decree even though the suit was wholly dismissed against them, the High Court held that the appeal, which in fact Was directed against a find- ing given by the trial court, was maintainable. It the High Court had appreciated that the-two questions were distinct and separate, it would not have fallen into the error of deciding the latter question by considering the former. Adverting to the question which the High Court did consider, namely, whether defendants 2 and 3 could be said to be aggrieved by the preliminary decree, there is nothing in the terms of that decree which precluded those defendants from depositing the decretal amount to be able to redeem the mortgage. The trial court had passed the usual preliminary decree for sale in Form No. 5A, under Order 34, Rule 4, Civil Procedure Code. If the amount found due to the appellant under the decree was paid into the court within the stipulated or extended period, the appellant would have been obliged to deliver to the mortgagors all the documents in her possession or power relating to the mortgaged property and to deliver up to the defendants quiet and peaceable possession of the property free from the mortgage. The amount declared to be due to the appellant by the preliminary decree was not paid by the defendants, from which it would appear that they were not interested in paying the amount. It is significant that defendants 2 and 3 were served with the notice of final decree proceedings and they appeared therein. The Code is merciful to mortgagors and perhaps 'rightly, because the mortgagee ought to have no grievance if the loan advanced by him is repaid with permissible interest, costs and expenses. Under Order 21, Rule 89, it was open to defendants 2 and 3 as late as after the appellant purchased the property in the auction sale, to pay the amount due to her. These defendants had interest in the mortgaged property by virtue of a title acquired before the sale, that is, under the registered partition dated January 11, 1956. Under Order 21, Rule 89, where immovable property is sold in execution of a decree, any person owing the property or holding an interest there-

in by virtue of a title acquired before the sale, can apply to have the sale set aside on his depositing in Court, for payment to the purchaser a sum equal to five per cent of the purchase-money and for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered. Nothing of the kind was done and even the last significant opportunity was not availed of by the defendants. Counsel for the appellant seems right that the defendants were content that only half the mortgaged property was directed to be sold and that it was only because of the later appreciation in prices of real property that defendants 2 and 3 awoke to the exigency of challenging the preliminary decree. That was much too late. So late indeed, that

not having any plausible reason to assign for the inordinate delay caused in applying for an amendment of the appeal, they preferred not to file an application for condonation of delay at all. The appeal was filed on January 4, 1959 while, the application for amendment was made on August 2, 1966.. Event though no explanation was offered for the long delay of over 7-1/2 years, the High Court allowed the amendment with a laconic order "Application for amendment allowed". Thus, the appeal filed by defendants 2 and 3 being directed against a mere finding given by the trial court was not maintainable; defendants 2 and 3 were not denied by the preliminary decree the right to pay the decretal amount; and the two defendants could even have applied under Order 21, Rule 89, for setting aside the sale in favour of the appellant but they failed to do so as, presumably, they were not interested in paying the amount. The High Court was therefore wholly in error in allowing the amendment of the Memorandum of Appeal, particularly when defendants 2 and 3 had neither explained the long delay nor sought its condonation.

The preliminary decree had remained unchallenged since Sep- tember 1958 and by lapse of time a valuable right had accrued in favour of the decree-holder. The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far-reaching discretionary powers is governed by judicial considerations and wider the discretion, greater ought to be the care and circumspection on the part of the court. The appeal in terms was originally directed against the finding given by the trial court that the partition was sham and colourable. "Being aggrieved by the finding given in the Judgment and the Decree..... it is humbly prayed that findings given by the learned Judge in Para 34 of his Judgment may kindly be set aside, and instead the partition deed dated 11-1-56 may kindly be declared as genuine"--So ran the Memorandum of Appeal. Defendants 2 and 3 reiterated through their counsel by Ming a note to explain the payment of fixed court fees of Rs. 20 that they were "seeking the relief of declaration only" and therefore the court fee paid was proper and sufficient. Long years thereafter, the High Court allowed the Memorandum to be amended not a reason was cited to, explain the delay and not a reason was given to condone it. And it was not appreciated that in granting time to defendants 2 and 3 to make up the deficit of the court fees 71 years after the appeal was filed, an amendment was being allowed which had its impact not only on the preliminary decree but on the final decree which was passed in the meanwhile, the auction sale which was held in pursuance of the final decree and the sale certificate which was granted to _the appellant who, with the leave of the court and in full satisfaction of her decree, had purchased a joint 1/3 share in the mortgaged property. With the striking down of the preliminary decree, these proceedings had to fall but the error really lay in allowing the amendment so as to permit, without good cause shown, a belated challenge to the preliminary decree. One other aspect of the question relating to the maintainability of the appeal yet remains to be examined. Counsel for the respondents. argues that the finding of the trial court on the issue of partition would have operated as res judicata against them and they were therefore entitled to appeal therefrom.

In Harchandra Das v. Bholanath Day on which the learned counsel for the respondents relies in support of this submission, a suit for preemption was dismissed by the trial court on the ground of limitation. In an appeal filed by the plaintiff, the District Court reversed that finding but confirmed the decree dismissing the suit on the ground that the sale effected by defendants 4 and 5 in favour of defendants 1, 2 and 3 was not validly registered and there being no "sale", there can be no right of

preemption. Defendants 1 to 3 preferred an appeal to the High Court against the finding recorded by the District Court that the sale effected in their favour by defendants 4 and 5 was not valid as it was not lawfully registered. On a preliminary objection raised by the plaintiffs to the maintainability of the appeal, the High Court of Calcutta, held that though under the Code of Civil Procedure there can be no appeal as against a mere finding, "it may be taken to be the view of courts in India generally, that a party to the suit adver- sely affected by a finding contained in a judgment, on which a decree, is based, may appeal; and the test applied in some of the, cases for the purpose of determining whether a party has been aggrieved or not was whether the finding would be res judicata in other proceedings". The High Court, however, upheld the preliminary objection on the ground that the issue regarding validity of the sale which was decided against defendants 1 to 3 would not operate as res judicata in any subsequent proceeding and therefore the appeal which was solely directed against the finding on that issue was not maintainable.

The position here is similar to that in the Calcutta case. The trial court decreed the mortgagee"s suit only as against defendant 1, the father, and directed the sale of his one half interest in the mortgaged property on the ground that part of the consideration for the mortgage was not supported by legal necessity, the remaining part of the consideration was tainted with immorality and therefore the mortgage was not binding on the interest of the sons, defendants 2 and 3. Whether the partition between the father and sons was sham or real had no (1) I.L.R. [1935] 62 Cal. 701.

impact on the judgment of the trial court and made no material difference to the decree passed by it. The finding recorded by the trial court that the partition was a colourable transaction was unnecessary for the decision of the suit because even if the court were to find that the partition was genuine, the mortgage would only have bound the interest, of the father as the debt was not of a character which, under the .Hindu law, would bind the interest of the sons. There is no substance .in the submission made on behalf of the sons that if the partition was held to be genuine, the property would have been wholly freed from .the mortgage encumbrance. The validity or the binding nature of an .alienation cannot depend on a partition effected after the alienation; or else, a sale or a mortgage effected by the Karta of a joint-Hindu family ,can easily be avoided by effecting a partition amongst the members of .the joint family. As the matter relating to the partition was not directly and substantially in issue 'in the suit, the finding that the partition was sham cannot operate as res judicata. Therefore, the appeal filed by defendants 2 and 3 against that finding was not maintainable, even on ,,the assumption that the High Court of Calcutta is right in its vie", that though under the Code there could be no appeal against a finding, ,yet "On grounds of justice" an appeal may lie against a finding provided that it would operate as res judicata so as to preclude a party aggrieved by the finding from agitating the question covered by the .finding in any other proceeding. It is not necessary here to determine ,whether the view of the Calcutta High Court is correct.

For these reasons we allow the appeal with costs, set aside the judgment of the High Court and restore that of the trial court.

S. C. Appeal allowed.