IN THE HIGH COURT OF ANDHRA PRADESH

***

A.S.No.1983 of 1996 & A.S.M.P.No.1109 of 2016

Between:

1. K.Sriramamurthy

... APPELLANT

AND

1. State of A.P. rep.by its then Collector/Chairman
   For A.P.Residential Schools, Srikakulam & 7 others

... RESPONDENTS

Date of Judgment pronounced on : 15.03.2021

HON'BLE SRI JUSTICE M. VENKATA RAMANA

1. Whether Reporters of Local newspapers May be allowed to see the judgments? : Yes/No

2. Whether the copies of judgment may be marked to Law Reporters/Journals: : Yes/No

3. Whether The Lordship wishes to see the fair copy Of the Judgment? : Yes/No

_____

JUSTICE M.VENKATA RAMANA

***IN THE HIGH COURT OF ANDHRA PRADESH AT AMARAVATI**

***HONOURABLE SRI JUSTICE M. VENKATA RAMANA**

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! Counsel for appellants : Mr. P.V.Vidya Sagar

^Counsel for Respondents : Learned Government Pleader for appeals

<GIST:

>HEAD NOTE:

? Cases referred:

1. AIR 1914 PC 66
2. AIR 2008 GAUHATI 93
3. (2003)3 SCC 552
4. 1969(2) SCC 70
5. 1971(1) SCC 265
6. AIR 1953 SC 419

HON'BLE SRI JUSTICE M.VENKATA RAMANA

APPEAL SUIT No.1983 of 1996
&
A.S.M.P.No. 1109 of 2016

COMMON JUDGMENT :

This is a regular first appeal filed under Section 96 CPC by the 2nd defendant against the decree and judgment in O.S.No.42 of 1989 dated 27.10.1995.

2. The respondents 1 to 4 are the plaintiffs. The respondent No.5 is the 1st defendant and the respondents 6 to 8 are defendants 3 to 5 respectively.

3. The appeal against respondents 6 to 8 was dismissed for default by an order of this Court dated 01.02.2011.

4. The respondents 1 to 4 laid the suit against the respondents 5 to 8 and the appellant for recovery of Rs.3,00,000/- with future interest at 12% thereon from the date of filing the suit and for costs.

5. The appellant was an employee of the 4th respondent, which is a cooperative society running mini super bazaar at Srikakulam. The appellant worked as Special Officer therein from 17.09.1986 to 13.07.1987. He was incharge of transacting business on behalf of this society as Special Officer including purchase and sales as well as its administration. The 6th respondent was working in the 4th respondent cooperative society as an accountant during the tenure of the appellant. The respondents 7 and 8 were the Principals of the respondents 2 and 3 residential schools at about the same time.

6. The suit against the respondents 6 to 8 was dismissed by the impugned decree and judgment and whereas it was decreed against the 5th respondent and the appellant for Rs.3,00,000/- with costs and with future interest at 12% p.a. from the date of the suit till realisation.

7. The 5th respondent preferred A.S.No.1154 of 1996 against this decree and judgment. However, by judgment dated 17.08.2017 the same was dismissed for non-prosecution.

8. The respondents 1 to 4 laid the claim against the respondents 5 to 8 and the appellant in respect of supplies of furniture required by respondents 2 and 3 residential schools. This transaction was processed through the 4th respondent society when the appellant was its special officer.

9. The 4th respondent had agreed to supply furniture worth Rs.5,99,551-20 ps. in February, 1987 to these two residential schools at Rs.2,99,775-60 ps. Each. Their further claim is that the appellant had placed orders with the 5th respondent to supply the furniture and an agreement dated 05.03.1987 was entered into therefor between the 5th and 4th respondents. It was agreed to supply the furniture made up of teak wood and that no tenders were called for this purpose. It was also agreed according to the respondents 1 to 4, that the 5th respondent should directly deliver these items of furniture at his own costs to respondents 2 and 3 for which the 4th respondent would pay to the 5th respondent upon receiving a letter of satisfaction regarding the material supplied from these schools. The respondents 1 to 4 specifically alleged in the plaint that there was a conspiracy entered into by the appellant and

the 5th respondent as well as the respondents 7 and 8 whereby credit bills were issued on 15.03.1987 in the name of these two schools for Rs.2,99,775-60 ps. each, representing the cost of the furniture to be supplied even before they are actually supplied. It was also alleged in the plaint that basing on these credit bills, the respondents paid Rs.3,54,779-80 ps. each towards costs of the furniture as well as teaching aid articles, utensils etc., by means of demand drafts.

10. It was also alleged in the plaint that on account of the publication in Eenadu Telugu daily newspaper dated 23.06.1987 complaining of misappropriation in respect of the material under this agreement, alleging that cheap country wood material was supplied instead of teak wood, to these schools, an enquiry was initiated by the District Cooperative Officer, Srikakulam. Pursuant to the report submitted by him and his subordinates, it was alleged in the plaint that these substandard nature of the material was exposed. In this process the assistance of District Industries Center, Srikakulam was taken to know the quality of the wood materials supplied and then Manager of District Industries Center, Srikakulam in his letter stated that the entire value of the furniture supplied to these schools was only Rs.2,41,600/- as against the agreed value of Rs.5,41,600/-. Thus, it was alleged in the plaint that there was misappropriation of Rs.3,00,000/- in this process. It was also alleged in the plaint that on account of this incident the reputation of the 4th respondent society also suffered. Therefore, it was alleged in the plaint that the claim so made for recovery of Rs.3,00,000/- with future interest at 12% p.a., is justified.

11. The 5th respondent filed a written statement denying the averments in the plaint and contended that as per the agreement dated 15.03.1987, he supplied material for which he received payments through the 4th respondent, wherefor the respondents 7 and 8 had issued the letters of satisfaction. Denying that there was conspiracy or misappropriation and feigning ignorance of the alleged reports of District Cooperative Officer and his team as well as the Manager, District Industries Center, Srikakulam, he requested dismissal of the suit.

12. The 6th respondent also filed a written statement while denying the claim in the plaint stating that he being a subordinate of the appellant he was bound by his orders and that as per the instructions of the appellant he changed serial numbers of the folios in the concerned file without any intention to cause loss to the 2nd and 3rd respondents.

13. The 7th and 8th respondents filed separate written statements denying their liability towards the suit claim and justifying their action in receiving the furniture as per orders placed to the 4th respondent, which were supplied by the 5th respondent and of payments made to the 5th respondent. They further contended that there is no privity of contract between themselves and the 5th respondent and that they had transactions only through the 4th respondent. They also contended that their action in delivering demand drafts for the amounts payable for such supplies, which were in fact issued by the Secretary, A.P.Residential Schools Society, Hyderabad and thus denying their complicity in the alleged instances.

14. In his written statement, the appellant while denying the suit claim contended that there is no necessity for the 4th respondent Super Bazaar to call for tenders since there are no provisions or bylaws in relation thereto applicable to it. He further claimed that he had called for tenders by issuing notice dated 25.02.1987 and the 5th respondent; Sai Structures, Srikakulam; Magadapalli Sambamurthy and Sons, Srikakulam; Pradeep Traders, Veeraghattam and Devi Furniture Works, Srikakulam had given their tenders while a notice was also published for this purpose in 'Mahodaya' news paper dated 28.02.1987. He further contended in his written statement that the tender of the 5th respondent being lowest for Rs.5,41,600/-, was accepted on behalf of the 4th respondent.

15. The appellant also stated in his written statement that he had called for tenders to ascertain the rates since there was no material showing the rates available with the 4th respondent and it was so done when on behalf of the respondents 2 and 3 schools request was made by their principals by their letters dated 23.02.1997 for supply of such material. According to the appellant in his written statement, he had communicated on behalf of the 4th respondent, the rates item-wise to the respondents 2 and 3 informing that they should receive the furniture from the 5th respondent directly upon furnishing certificates of satisfaction and good condition. It is also stated in the written statement that payments would be made to the 5th respondent only upon receipt of such certificates, which terms and conditions were accepted by the respondents 2 and 4. He further stated in the written statement that the respondents 2 and 3 issued necessary certificates for this purpose and thereupon

payments were released by him on behalf of the 4th respondent society in terms of the agreement.

16. The appellant further stated in the written statement that there was no term and condition in the agreement dated 05.03.1987 that the 4th respondent through him should verify the nature of supplies and their quality and therefore his responsibility ceased in terms of this agreement once the furniture was delivered to the respondents 2 and 3 . He also stated in his written statement that the 4th respondent made a profit of Rs.21,000/- in this transaction.

17. The appellant also stated in his written statement that he had informed the Secretary of Residential Schools Society at Hyderabad about supply of the furniture to the respondents 2 and 3 by his letter dated 23.05.1987 and also the Commercial Tax Officer, Srikakulam by his letter dated 23.05.1987, for the purpose of levying sales tax to these sales. Denying that there was criminal conspiracy and fraud played in the transaction by him, he questioned the nature of enquiry conducted by the authorities of Cooperative Department at Srikakulam including the District Industries Center. He also stated that the 4th respondent is nowhere liable to indemnify loss caused to the respondents 2 and 3 in these transactions. He also questioned the very nature of the suit and its maintainability contending that the 4th respondent had already initiated action in a different forum filing ARC No.8 of 1988 for recovery of the alleged amount before the Deputy Registrar, Cooperative Societies, Srikakulam (District Co-operative Officer) and therefore, the suit as filed could not be maintained.

18. Basing on the above pleadings, the leaned trial Judge settled the following issues and additional issues for trial:

> *"1. Whether the furniture supplied by the 1st defendant to the plaintiffs 2 and 3 in accordance with the terms of the agreement?*
>
> *2. Whether the defendants played fraud in supplying the furniture to the plaintiff violating the contract?*
>
> *3. Whether the plaintiffs are entitled to recover the suit amount of Rs.3,00,000/-?*
>
> *4. Whether the record of the 4th plaintiff's society was tampered by the 2nd and 3rd defendants?*
>
> *5. Whether the suit is bad for misjoinder of 3rd defendant?*
>
> *6. Whether the suit is barred by time?*
>
> *7. Whether the alleged tender notices published in 'Mahodaya' paper is an antedated and concocted subsequent to the publication of news item of alleged fraud in Eenadu daily, dated 23.6.1987?*
>
> *8. To what relief?*
>
> ***Additional issue**:*
>
> *1. Whether the suit is not maintainable?"*

19. In the course of trial, on behalf of the respondents 1 to 4, P.Ws.1 to 5 were examined, exhibiting Ex.A1 to Ex.A53 in support of their claim. The 5th respondent examined himself as D.W.1, the appellant as D.W.2 and whereas the respondents 6 to 8 examined themselves as D.W.3 to D.W.5 respectively.

20. Basing on the pleadings, evidence and material, by the decree and judgment as stated above, the suit was decreed against the appellant and the 5th respondent only.

21. Heard Sri P.V.Vidya Sagar, learned counsel for the appellant and the learned Government Pleader for appeals for respondents 1 to 4. Other respondents though appeared through their Advocates, did not participate in the course of hearing.

22. On behalf of the appellant, A.S.M.P.No.1109 of 2016 is filed under Order-41, Rule-27 CPC requesting to receive copies of G.O.Rt.No.1519, Agriculture & Cooperation (COOP.II), Department, dated 18.12.1995, copy of the proceedings of the Commissioner for Cooperation and Registrar of Cooperative Societies dated 08.10.1996, a copy of order in W.P.No.1183 of 2000 and copies of G.O.Rt.No.1296 and 189, Agriculture & Cooperation (COOP.II), Department of 2011 and 2012 respectively in support of his contention.

23. In substance the contention of the appellant in this respect is that in the departmental enquiry, he was exonerated of the charges, that he had applied to his department for back wages including interest and when interest was not granted, he approached the then Administrative Tribunal at Hyderabad and when interest was not granted while directing refund of the amount due, he was constrained to file W.P.No.1183 of 2000 on the file of this Court against the Commissioner of cooperation & Registrar of Cooperative Societies, Hyderabad and three others, where the relief was granted by an order dated 10.06.2009 directing to pay interest from 07.08.1990 onwards at 6% p.a. It is also the contention of the appellant that by latter two G.Os. the Government directed to permit him to withdraw interest and also directing to pay the balance amount towards his retiral benefits.

24. It is the contention of the appellant that in view of these subsequent events, the purpose of filing the suit against him is lost and the trial Court did not consider any of these questions particularly relating to his liability in proper perspective. In those circumstances, the appellant

requested to receive these additional documents in support of his contention.

25. These subsequent events have no bearing at this stage in the appeal. When the respondents are continuing to contest this civil litigation including in this appeal, these subsequent events, which occurred long after the incidents alleged in this case, cannot have an impact. Merely because, one of such materials referred to direction given to the concerned to repay all his terminal benefits it did not automatically lead to infer that the relief claimed in the suit, against the appellant stood extinguished or abated.

26. Therefore, finding no utility and purpose to receive these documents in additional evidence nor their reception is warranted for ultimate adjudication in the matter in the interests of justice, this petition is dismissed and without costs.

27. Now, the following points arise for determination:

1. Whether material on record is making out satisfactorily that the wooden furniture supplied to respondents 2 and 3 residential schools was of inferior quality making them to suffer loss of Rs.3,00,000/- and if the appellant is cause and responsible for it?

2. Whether the judgment of the trial Court making the appellant responsible for the alleged loss along with the 5th respondent is proper?

3. To what relief?

POINT No.1:

28. The 4th respondent Super Bazaar was established at Srikakulam in the year 1967. The respondents 2 and 3 schools were established in the year 1983.

29. On account of paucity of facilities like furniture and other equipment in these schools, the Secretary A.P.Residential Schools Society allotted funds to a tune of Rs.3,00,000/- each to these schools by its order dated 19.01.1987 directing to utilize the same by the end of March, 1987 i.e. 31.03.1987. Therefore, these two residential schools approached the 4th respondent Society cum Super Bazaar to supply such material. Ex.A1 and Ex.A2 are the letters addressed by them respectively dated 23.02.1987 to the 4th respondent. Steps were taken thereon by the appellant and the furniture requested was supplied through the 5th respondent, in all, for Rs.5,41,600/-. Ex.A3 dated 05.03.1987 is the agreement entered into between the 5th respondent and the 4th respondent for this purpose.

30. It is the contention of the 2nd respondent that he had called for quotations for supplies to be made and among 5 dealers, the quotation or tender of the 5th respondent was found lowest and who was issued necessary orders to make these supplies. It is also the version of the appellant that the Principals of the respondents 2 and 3 schools requested him to communicate first, the rates of the items to be supplied and terms and conditions.

31. Credit bills were secured in Ex.A4 and Ex.A6 dated 15.03.1987 along with advance stamped receipts in Ex.A5 ad Ex.A7 from these

schools. The supplies were agreed to be made as per Ex.A3 agreement on or before 31.03.1987. However, the 5th respondent went on making supplies to these schools time to time. It appears that it went on upto middle of July, 1987. Whenever supplies were received from the 5th respondent as seen from Ex.A8 to Ex.A12, letters of satisfaction were issued by the respective Principals of these schools. Pursuant thereto, payments were also made time to time by means of demand drafts.

32. The whole issue cropped up on account of the publication in Eenadu Telugu newspaper as seen from Ex.A13 dated 23.06.1987 alleging misappropriation of the funds in these transactions. It was P.W.2, who took upon himself to probe into this affair. He was then auditor in the 4th respondent super bazaar. His evidence reflected that he went through the entire file relating to these transactions and ultimately presented special report in Ex.A16 dated 18.07.1987 to the District Collector. The report of P.W.2 and his evidence, who allegedly unearthed the alleged fraud in these transactions, is the sheet anchor of the case of the respondents 1 to 4 against the appellant and the respondents 5 to 8. The entire effort of P.W.2 in this context is without issuing notice to any of the affected parties including the appellant. Therefore, any amount of material gathered by him and basing on which he deposed at the trial in the suit, cannot have any effect nor outcome of such audit exercise behind the back of the appellant can bind him in any manner.

33. Even the evidence of P.W.2, on a careful examination makes out that the procedure which this appellant was expected to follow, which he had set out in his written statement and in his deposition, as D.W.2, was followed without any breach.

34. It is in the evidence of P.W.2 that the 4th respondent entered into agreement with the schools to supply furniture and in turn the 4th respondent sought supplies through the 5th respondent. His evidence further reflected that on behalf of the respondents 2 and 3, the respondents 7 and 8 placed orders to supply furniture and it was accepted on behalf of the 4th respondent. He also confirmed the terms and conditions on which the appellant on behalf of the 4th respondent agreed to supply this furniture to the schools subject to their furnishing letters of acceptance. Ex.A35 and Ex.A36 are such letters of acceptance wherein terms and conditions were set out, which is also deposed by P.W.2.

35. Though in many words P.W.2 tried to paint all these transactions as outcome of deliberate distortion of facts to project as fraud, he himself came out in cross-examination that the 4th respondent made a profit of Rs.57,950/- through these transactions.

36. Therefore, the version of the respondents 1 to 4 that the tenders were manipulated by the appellant as an afterthought, getting a publication made in 'Mahodaya' newspaper and the concerned file was tampered by re-arrangement of the folio therein as is deposed by D.W.3 (6th respondent), cannot be accepted.

37. The evidence of P.W.2 itself makes out that he had an opinion in respect of these transactions that the appellant had misappropriated money out of these transactions. He tried to call this misappropriation as a 'collective misappropriation'. The reason stated for this purpose is that the wood material used for the furniture so supplied included 13 different varieties. The specific version of P.W.2 in this respect is that the appellant

did not verify the quality of wood used for the purpose of this furniture. Therefore, according to him he thought that the appellant also participated in this misappropriation.

38. When the terms of agreement in Ex.A3 admittedly stated that these items of furniture should be directly supplied to these schools and with which the appellant did not have any role, as rightly contended for him, the question of misappropriation does not arise more so, when they were supported by the certificates of satisfaction and good condition issued by the respondents 7 and 8 time to time, whenever supplies were received by these schools.

39. P.W.2 had grouse against the appellant since the appellant had requested not to continue his services as an auditor for this super bazaar on account of financial burden which the 4th respondent was unable to meet and inspite of it, he was continued. In this respect, the appellant relied on one fact as to how P.W.2 could inject influence relying on Ex.B1 letter of then MLA of Narasannapet dated 21.03.1987 addressed to him where a request was made to continue the services of P.W.2. It is the version of the appellant that on account of the orders of the District Cooperative Officer, P.W.2 continued in the super bazaar as an auditor.

40. When a person could go to the extent of getting recommended to continue in this post from a local MLA, in spite of the special officer of this super bazaar expressing reluctance, it speaks volumes of conduct, character and nature of P.W.2. This instance alone is sufficient to reject the testimony of P.W.2. In view of the instances in which P.W.2 and the appellants were placed, during the period of these transactions, the

contention on behalf of the appellant that the whole effort of P.W.2 to implicate the appellant in a false case cannot be overlooked nor can be brushed aside. Therefore, no implicit reliance can be placed on the testimony of P.W.2.

41. The complaint of the respondents 1 to 4 against the appellant is that the quality of furniture was inferior in nature than agreed upon under Ex.A3 and that teak wood items were not supplied. In order to prove this fact, the respondents 1 to 4 made an attempt at the trial to examine P.W.4 and P.W.5. They both represented the District Industries Center, Srikakulam during that time. Their evidence is that they inspected the residential schools at Vomaravelli and Sharemahammad Puram along with the District Cooperative Officer and Sri Dhanalakshmi, Carpenter Instructor attached to the District Industries Centre, Srikakulam. Their visit to Vomaravelli was on 20.07.1997. They inspected the material so supplied and assessed the value of the furniture in this school at Rs.1,22,470/-. Ex.A27 statement was prepared in this context.

42. The evidence of P.W.4 and P.W.5 further is that the residential school at Sharemahammad Puram was visited by them on 29.07.1987 where they examined the furniture so supplied. Ex.A26 was the abstract prepared by them along with record in this context and the value of the furniture supplied according to their estimate was Rs.1,10,129.60 ps.

43. P.W.4, as admitted by him in his cross-examination, was not qualified to assess the quality of the wood. Though the purpose of deputing him by then General Manager of District Industries Center, Srikakulam to these schools was to assess the quality and quantity of the

furniture so supplied, when he did not have necessary qualification nor technical knowledge in this respect, his version at the trial cannot implicitly be relied on.

44. The evidence of P.W.4 further is that it was Sri Dhanalakshmi, Carpenter instructor, himself assessed the quality of the wood and basing on such assessment, he prepared Ex.A26 and Ex.A27 abstracts. When the testimony of P.W.4 is that he mentioned the value of the furniture supplied to both these schools as per the assessment of Sri Dhanalakshmi, who also gave value of the furniture stated in Ex.A26 and Ex.A27, he should have been examined as a witness on behalf of the respondents 1 to 4. Sri Dhanalakshmi, for the reasons best known, could not be examined. In his place, Sri V.Bhulokam was examined as P.W.5. P.W.4 did not refer to presence of Sri Bhulokam during any of these visits to these schools nor his role is referred to specifically by him at any stage for the purpose of assessment of value, quality and quantity of the furniture in these schools. Therefore, whatever material placed with reference to quality, value and quantity of the furniture by the respondents 1 to 4 at the trial and their attempts to prove these facts upon examining P.W.4 and P.W.5 turned out to be an exercise in futility and fringing on falsity.

45. Added to it, when the statement of P.W.4 himself in cross-examination is considered to the effect that most of the furniture supplied to these schools was of teak wood as per the extracts viz., Ex.A26 and Ex.A27, non-examination of Mr.Dhanalakshmi is fatal to their version. Therefore, testimony of Sri Dhanalakshmi assumed any amount of importance. In the absence of it, the material so placed including Ex.A26 and Ex.A27, cannot amount to appropriate proof.

46. The learned trial judge has misread evidence on record and was under the impression that Mr. Dhanalakshmi was examined at the trial. As rightly pointed out for the appellant, on more than one occasion the learned trial Judge has faltered in appreciation of the material and imported certain material, which is not available on record. So the conclusions so drawn by the learned trial Judge are without basis.

47. Therefore, on this crucial aspect, there is total failure of respondents 1 to 4 to offer reliable and acceptable evidence. The consequence necessary to flow from this is to reject such version.

48. The role of the appellant in the context of these transactions if considered, in the light of the evidence on record, it is clear that he did not have anything to do with the quality of the furniture and if proper wood as agreed upon under Ex.A3 agreement was used for the purpose of the furniture supplied to these schools. The terms of Ex.A3 are explicit that the furniture should be directly transported and delivered to these residential schools by the 5th respondent. The burden was placed upon these schools to satisfy themselves of the satisfactory nature and good condition of the furniture so received. Such certificates in the form of letters as stated supra were admittedly issued to the 5th respondent. Thereupon payments were made obtaining drafts, from the office of the Secretary, A.P.Residential Schools Society, Hyderabad and thus the 5th respondent was given away the dues for such supplies.

49. The whole arrangement in terms of Ex.A3 did not require personal participation of the appellant. Nonetheless, P.W.2 pointed out that the appellant should have looked into quality of the wood used for

this furniture. It is rather beyond the terms of the agreement in between these parties viz., the 5th respondent and these two residential schools.

50. Further, there was never any complaint by these two residential schools against quality of these supplies. Nor the Secretary of the A.P.Residential Schools Society made any complaint. Thus, the whole exercise began with the unwarranted role of P.W.2 by taking up an audit, leading to issuance of Ex.A16 report. Without proper verification. Unable to understand the consequences of an action proposed against the appellant, the 1st respondent District Collector obviously was mislead and was carried away by the impression so created by P.W.2 and then District Cooperative Officer initiated civil action including against the appellant.

51. In the light of all these circumstances and reasons assigned, the inference to draw is that liability of the appellant is not seen in any manner. The learned trial Judge gravely erred in making him liable by the decree and judgment on account of the improper appreciation of evidence and consideration of the material on record.

52. Sri P.Vidya Sagar, learned counsel for the appellant, has been fair in bringing to notice of this Court, the effect of dismissal of the appeal in A.S.No.1154 of 1996 by the judgment dated 17.08.2017 by this Court. Referring to the effect of Order-41, Rule-4 CPC r/w. Rule-33 of Order-41 CPC, the learned counsel for the appellant contended that in these circumstances when the appeal of the 5th respondent was dismissed for non-prosecution it cannot be construed that the decree and judgment of the trial Court stood confirmed and when it is not based on merits. The learned counsel also contended that such dismissal did not amount to *res*

judicata vis-à-vis this appeal. Thus, it is contended that dismissal of the earlier appeal cannot be regarded as an order accepting or confirming the decision of the trail Court.

53. Rightly, in this context, reliance is placed upon ***Chaudhri Abdul Majid vs. Jawahir Lal and others***[1] . The observations in this ruling in this case basing on facts are as under:

> *".....The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognised authoritatively that the appellant had not complied with the conditions under which the appeal was open to him and that therefore he was in the same position as if be had not appealed at all. To put it shortly, the only decree for sale that exists is the decree dated 8th April 1893 and that is a decree of the High Court of Allahabad. The operation of this decree has never been stayed and there is no decree of His Majesty in Council in which it has become merged....."*

54. Samsul Haque Borbhuiya (D) by LRs. V. Md. Ibrahim Ali Borbhuiya and others[2] is also relied on referring to effect of Order-41, Rule-4 CPC. Relevant observations are as follows:

> ***"18.*** *Admittedly, one of the several principal defendants namely, defendant No. 4, Md. Jalal Uddin Barbhuiya, preferred RFA No. 111/03 along with an application for condonation of delay in preferring the appeal. The said condonation application was dismissed for non prosecution and consequently the appeal being RFA No. 111/03 preferred by the said defendant was dismissed, meaning thereby, the decree passed against him has been upheld, as the dismissal of the application for condonation of delay and the consequent dismissal of the appeal on refusal to condone the delay as observed by the Apex Court in Shyam Sunder Sarma (supra). This would, however, in view of the provision contained in Order 41 Rule 33 of the CPC and also in view of the aforesaid discussion, would not preclude the Appellate Court to pass a decree appropriate to the nature of dispute in an appeal filed by one of the several persons against whom a decree was made on a ground which is common to him and others, as observed by the Apex Court in Mahabir Prasad (supra). That apart the earlier appeal being RFA No. 111/03 having not been decided on merit, it will not operate as res judicata. The Appellate Court still, even though the*

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[1] . AIR 1914 PC 66

[2]. AIR 2008 GAUHATI 93

RFA No. 111/03 has consequently been dismissed, upon rejection of the application for condonation of delay on the ground of non prosecution, has the power to pass any decree and make any order, which ought to have been passed by the learned Trial Court, reversing a joint decree appealed from on any common ground, if the appellate Court reaches a conclusion, which is inconsistent with that of the Court appealed from and in adjusting the rights claimed by the appellant, it is found necessary to grant a relief to the appellant in RFA No. 111/03. Hence, it cannot be said that the present appeal is not maintainable."

55. Chandrammohan Ramchandra Patil and others v. Bapu Koyappa Patil (dead) through LRs. And others[3] is also relied on for the appellant. In paras 14 and 15 in this ruling, it is stated as under:

"14. *Order 41 Rule 4 of the Code enables reversal of the decree by the court in appeal at the instance of one or some of the plaintiffs appealing and it can do so in favour of even non-appealing plaintiffs. As a necessary consequence such reversal of the decree can be against the interest of the defendants vis-à-vis non-appealing plaintiffs. Order 41 Rule 4 has to be read with Order 41 Rule 33. Order 41 Rule 33 empowers the appellate court to do complete justice between the parties by passing such order or decree which ought to have been passed or made although not all the parties affected by the decree had appealed.*

15. *In our opinion, therefore, the appellate court by invoking Order 41 Rule 4 read with Order 41 Rule 33 of the Code could grant relief even to the non-appealing plaintiffs and make an adverse order against all the defendants and in favour of all the plaintiffs. In such a situation, it is not open to urge on behalf of the defendants that the decree of dismissal of suit passed by the trial court had become final inter se between the non-appealing plaintiffs and the defendants."*

56. Ratan Lal Shah vs. Firm Lalmandas Chhadammalal and another[4]***, Mahabir Prasad vs. Jage Ram and others***[5] and ***Narhari and others vs. Shanker and others***[6] are also relied on for the applicant in the same context.

57. Now, the legal position is clear that dismissal of earlier appeal for non prosecution or default presented by one of the co-defendants

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[3]. (2003)3 SCC 552
[4]. 1969(2) SCC 70
[5]. 1971(1) SCC 265
[6].AIR 1953 SC 419

cannot affect nor influence consideration of another appeal against the same decree and judgment by one of the parties to the suit. Therefore, this contention of the learned counsel for the appellant has to be accepted holding that dismissal of earlier appeal of 5th appellant in A.S.No.1154 of 1996 has no bearing or effect to consider this present appeal independently basing on the material on record.

58. Thus, on conspectus, it has to be held that the claim against the appellant is not established nor proved making him liable, by respondents 1 to 4.

59. Thus, this point is answered in favour of the appellant and against the respondents 1 to 4.

POINT No.2:

60. The learned trial Judge did not appreciate the material in proper perspective. For the reasons stated in point no.1, the decree and judgment under appeal require interference in so far as the claim against the appellant brought out in the suit is concerned. Consequently, the suit against the appellant (2nd defendant) has to be dismissed. Thus, this point is answered.

POINT No.3:-

61. In view of the findings on points 1 and 2, this appeal has to be allowed setting aside that part of the decree and judgment went against the appellant (2nd defendant), of the trial Court.

62. In the result, the appeal is allowed setting aside the decree and judgment in O.S.No.42 of 1989 dated 27.10.1995 in so far as the

claim against the appellant is concerned. Consequently, the suit against the appellant (2nd defendant) is dismissed and without costs.

As a sequel, pending miscellaneous petitions, if any, stand closed. Interim Orders, if any, stand vacated.

JUSTICE M.VENKATA RAMANA

Dt:15.03.2021
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HON'BLE SRI JUSTICE M.VENKATA RAMANA

APPEAL SUIT No.1983 of 1996
&
A.S.M.P.No. 1109 of 2016

Dt:15.03.2021

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