

Krishan Dev Vs. Smt. Ram Piari

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Court : Himachal Pradesh

Decided On : Oct-30-1964

Reported in : AIR1965HP23

Judge : Om Parkash, J.C.

Acts : [Constitution of India](#) - Article 133(1); ;Code of Civil Procedure (CPC) - Order 41, Rule 22

Appeal No. : Civil Misc. Petn. No. 85 of 1964

Appellant : Krishan Dev

Respondent : Smt. Ram Piari

Advocate for Def. : Mohan Lal Aukta, Adv.

Advocate for Pet/Ap. : Tek Chand Chitkara, Adv.

Disposition : Petition allowed

Judgement :

ORDER

Om Parkash, J.C.

1. This is a petition, for the grant of a certificate of fitness for appeal, to the Hon'ble the Supreme Court, against an order, dated the 20th June, 1964, of this Court,

whereby, Civil Revision Petition No. 10 of 1963, filed by the petitioner, was dismissed'. That revision petition had arisen out of a suit, brought by the respondent, for possession of a portion of a site, comprised in khasra No. 19, situated in bazar Badah, after demolition of the structures, put up by the petitioner. The allegation of the respondent, in the suit, was that she was the owner of the site and the petitioner had unlawfully encroached upon a portion of it, by putting up structures. The petitioner denied that the portion, encroached upon, belonged to the respondent. His plea was that the portion, formed part of the land, which he had purchased'. The learned Senior Subordinate Judge, who had tried the suit, held that the petitioner had unlawfully encroached upon, and put up structures, on a portion, measuring 132 Sq. Ft., of the site, belonging to the respondent. But he did not grant a decree for possession of the portion, encroached upon. Instead, he awarded compensation of Rs. 300/- to the respondent, for that portion. He also, issued a permanent injunction, restraining the petitioner, from interfering, in any way, with the site.

Against the decision of the Senior Subordinate Judge, rejecting her claim for possession and awarding compensation only, the respondent filed an appeal in the Court of the learned District Judge. Her claim, in the appeal, was that she should be granted possession of the portion, encroached upon, after removal of the structures. The petitioner had not filed any appeal or cross-objections, against the decree, passed against him. But, it was contended, on his behalf, in the appeal, filed by the respondent, that the finding of the Senior Subordinate Judge that the portion, encroached upon, belonged to the respondent, was incorrect and that, that portion, in fact, formed part of the land, belonging to the petitioner. The learned District Judge did not permit the petitioner to raise that contention and to question the finding of the learned Senior Subordinate Judge about the ownership of the portion. His reason was that as the petitioner had not filed any appeal or cross-objections, against the decree, passed against him, the decree had become final, against him, and he could not challenge the finding about the ownership of the portion. The learned District Judge accepted the appeal of the respondent and granted her a decree for possession of portion, measuring 132 Sq. Ft., after removal of the structures. The petitioner filed Revision-Petition No. 10 of 1963, in this Court, against the decree of the learned District Judge. One of the grounds,

taken up in revision, was that the petitioner was entitled to urge, under Order 41, Rule 22, C.P.C., in the appeal of the respondent, before the learned District Judge, that the portion, encroached upon, did not belong to the respondent and the finding of the Senior Subordinate Judge on the point of ownership was incorrect, without filing any appeal or cross-objections, and that the learned District Judge was in error in not permitting the petitioner to urge that contention. This ground was rejected, by this Court, with the following observations :

'It is, no doubt, true that a respondent is entitled, under Order 41, Rule 22, C.P.C., to support the decree on any of the grounds, decided against him, in the Court below. But, in the instant case, the petitioner was not supporting the decree of the learned Senior Subordinate Judge, by questioning the finding, about ownership of the portion, in dispute. On the other hand, by doing so, he was challenging the very basis of the decree. The decree for the issue of an injunction and the award of Rs. 300/-, as compensation, was based on the finding, that the portion, in dispute, belonged to the respondent. By challenging the ownership of that portion, the petitioner was attacking the decision of the learned Senior Subordinate Judge and was not supporting it. He could not do so, under Order 41, Rule 22, C.P.C.'

2. The revision petition of the petitioner was, ultimately, dismissed, by this Court, and the decree of the learned District Judge, passed in favour of the respondent, was affirmed.

3. The petitioner has filed the present petition for a certificate for appeal to the Hon'ble the Supreme Court. The certificate is sought, under Clauses (b) and (c) of Article 133(1) of the [Constitution of India](#). The petitioner will be entitled to obtain a certificate, under Clause (b), aforesaid, if he can show that the order of this Court involves, directly or indirectly, some claim or question, respecting property, additional to, or other than, the actual subject-matter, in dispute, and that the value of such claim or question is Rs. 20,000/-, or more, vide *Ramu v. Rana Vidya Bhushan Singh*, AIR 1961 Him Pra 27. The contention, on behalf of the petitioner, was that the decree of the District Judge, as affirmed by this Court, has adversely affected the whole of his building, and that as the building was worth more than Rs. 20,000/-, the case fell within the four corners of Clause (b).

This contention does not appear to be sound. As already stated, it is the value of the claim or question, involved, in the decree or order, and was only the value of the property, which is the determining factor, under Clause (b). The question is what detriment, of which he wants to get rid, on appeal, will be caused to the petitioner, by the order of this Court. The petitioner will have to remove the unauthorized structures and to restore possession of the portion, encroached upon, to the respondent, as a result of the order of this Court. It is not suggested that the whole of the building of the petitioner will fall down on the removal of the unauthorized structures. The affidavit of the petitioner does not show that the immediate damage, which he may sustain, on account of the removal of the structures, will be to the tune of Rs. 20,000/- or more. The mere fact that the building of the petitioner is worth Rs. 20,000/- cannot lead to the inference that he will suffer detriment to the extent of that amount, by the order of this Court. As the petitioner has failed to prove that the value of the question, involved, is, Rs. 20,000/- or more he is not entitled to get a certificate under Clause (b).

4. The next point is whether the petitioner is entitled to get a certificate under Clause (c). Certificate, under that clause, may be granted, if the case involves any substantial question of law. The test for determining what is a substantial question of law was laid down, in *Sir Chunilal V. Mehta and Sons Ltd. v. Century Spinning and Weaving Co. Ltd.*, AIR 1962 SC 1314, as follows :

'The proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views.'

5. One of the questions, raised in the revision petition, was whether the petitioner was entitled to question, under Order 41, Rule 22, C.P.C., in the appeal of the respondent, before the District Judge, without filing any appeal or cross-objections, against the decree, passed, against him, the finding of the Senior Subordinate Judge, that the portion, encroached upon, belonged to the respondent, and not to

the petitioner. This Court, as already stated, had answered the question against the petitioner. But there is a conflict of judicial opinion, upon the the point, whether a defendant-respondent, against whom, a suit has been partly decreed, can, in an appeal, by the plaintiff-appellant, urge a ground, under Order 41, Rule 22, C. P. C., which if accepted, would have necessitated the total dismissal of the suit. This conflict has been noted, on pages 4240 and 4241, Volume IV, of AIR Commentaries, on the Code of Civil Procedure, 7th Edition. Their Lordships of the Supreme Court have also noted this conflict in Management of Itakhoolie Tea Estate v. Its Workmen, AIR 1960 SC 1349. So, the question, referred to above, has not been finally settled, either by the Privy Council or by the Federal Court or by the Supreme Court. The question is not free from difficulty as is clear from the conflicting views, expressed by the various High Courts. The question will substantially affect the rights of the parties in the present case and is, also, of general public importance. The question raised is, therefore, a substantial question of law. The petitioner is entitled to the grant of a certificate, under Clause (c), on this ground.

6. The petition is allowed and it is certified that the case is a fit one for appeal to the Hon'ble the Supreme Court, under Clause (c) of Article 133 (i) of the [Constitution of India](#).

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