

Gohli and anr. Vs. Bal Krishan

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Court : Jammu and Kashmir

Decided On : Jul-06-2007

Reported in : AIR2007J& K70,2008(1)JKJ347

Judge : J.P. Singh, J.

Appellant : Gohli and anr.

Respondent : Bal Krishan

Advocate for Def. : Mr. B.S. Bali

Disposition : Appeal dismissed

Judgement :

J.P. Singh, J.

1. Appellants have filed this appeal under Order 43, Rule 1(u) of the Code of Civil Procedure against order dated 21-12-2000 of learned Additional District Judge, Ramban, upsetting respondent Bal Krishan's suit's dismissal, ordered vide judgment dated 17-4-1999 of learned Sub-Judge, Ramban.

2. Respondent, Bal Krishan, had instituted a suit against the appellants, seeking declaration that property comprising of land and houses of one Mst. Ramku had vested in him by virtue of Will, and that ex-parte decree of learned Sub Judge, Ramban in file No. 11 /Civil dated 19-12-1988 was null and void. Learned Sub

Judge, Ramban, held the suit not maintainable, holding that a decree, be it ex-parte or otherwise, could be questioned in a subsequent suit only if it had been attacked on the ground of having been obtained by fraud or misrepresentation of facts. He found that Bal Krishan, plaintiff, had not averred any such thing in his plaint and in that view of the matter the suit was not maintainable.

3. On an appeal taken against the decree of learned Sub Judge, Ramban, learned Additional District Judge, Ramban, found on facts that plaintiff had specifically pleaded that appellants had obtained the decree by misrepresentation of facts. Learned appellate Court found that the trial Court had missed to notice that it had, in paragraph No. 4 of its judgment, recorded that the decree had been alleged to have been obtained by respondent herein, by misrepresentation of facts. Holding that the plaintiff made requisite pleadings that decree had been obtained by misrepresentation of facts, the first Appellate Court, upsetting the decree of learned Sub Judge, Ramban, remanded the suit to the trial Court for trial after affording opportunity to the parties to 'lead evidence.

4. Appellants have filed this appeal questioning the remand order of the learned appellate Court.

5. At the time of hearing of this appeal, Mr. B.S. Bali, learned Counsel for the respondent, raised a preliminary objection as to the maintainability of the appeal. Relying upon a judgment of this Court in Bindroo v. Badri Nath reported as , learned Counsel urged that neither any substantial question of law had been raised in the memo of appeal nor would any such question arise in the facts and circumstances of the case, the appeal of the appellants would not thus be maintainable in view of the law laid down by this Court in Bindroo's case supra.

6. Mr. D. K. Khajuria, learned Counsel appearing for the appellants, submitted that no question of law was required to be framed as appellant's appeal was one under Order 43, Rule 1(u) of the Code of Civil Procedure, which, according to learned Counsel, did not require framing of substantial question of law. Learned Counsel, however, conceded that no substantial question of law had arisen out of the remand order but maintained that appellant had a statutory right to question the remand order in view of provisions of Section 104 read with Order 43 of the Code

of Civil Procedure. Learned Counsel submitted that law laid down by this Court in Bindroo's case needs reconsideration.

7. I have considered the submissions of learned Counsel for the parties on the preliminary objection of respondent' counsel.

8. It is true that under Section 104 read with Order 43, Rule 1(u) of the Code of Civil Procedure, appeal lies against a remand order of the appellate Court. This right of appeal is, however, subject to what is contained in the later part of Order 43, Rule 1(u) i.e. 'where an appeal would lie from the decree of the appellate Court'.

In view of the provisions of Section 100 (amended) and Section 101 of the Code of Civil Procedure, the later part of Order 43, Rule 1(u) needs to be interpreted in such a way that it does not do any violence to the provisions of Section 100 and 101 of the Code of Civil Procedure and the intention of the Legislature in introducing amendment to Section 100 of the Code of Civil Procedure.

9. Considering thus I find that the provision of Order 43, Rule 1 (u) do not create an absolute right of appeal against a remand order of the appellate Court under Order 41, Rule 23 and 23-A of the Code of Civil Procedure.

10. I would, therefore, hold that while maintaining an appeal against a remand order a substantial question of law has to be spelled out by an appellant seeking indulgence of the Court. Factual matters cannot be made subject-matter of an appeal against an order of remand passed by the appellate Court under Rule 23 and 23(A) of Order 41 of Code of Civil Procedure. I am fortified in taking this view by a judgment of Hon'ble Supreme Court of India in Narayanan v. Kumaran reported as : (2004)4SCC26 . It would be profitable to refer to what has been held by their Lordship of the Hon'ble Supreme Court on the subject:

15. Mr. T.L.V. Iyer, learned Senior Counsel for the appellant raised a controversy which related to the scope and nature of hearing an appeal under Order 43, Rule 1 Clause (u) CPC. It was contended by Ma Iyer that though it is filed as civil miscellaneous appeal against the order of remand, it is necessarily a second

appeal and, there fore, can be competent only on the ground mention in Section 100. It is further argued that the appellants in civil miscellaneous appeals against question of facts and the findings of fact of the lower Court even, though found to be erroneous are binding in such an appeal.

16. Mr. Krishnamoorthy, learned Senior Counsel for the respondent cited no contrary law. He, however, reiterated that Section 100 is confined to second appeals against decrees and, therefore, cannot be invoked in an appeal against an order. It is, of course, true that Section 100 in terms applies only to appeals second to decrees, but the contention of Mr. Krishnamoorthy cannot be accepted on account of language of Order 43, Rule 1 Clause (u). It reads as follows:

43. (1) Appeals from orders.- An appeal shall lie from the following orders under the provision of Section 104, namely -

(a)(t)xx xx xx xx

(u) an order under Rule 23 or Rule 23-A of Order 41 remanding a case, where an appeal would lie from the decree of the appellate Court.

17. It is obvious from the above rule that an appeal will lie from an order of remand only in those cases in which an appeal would lie against the decree if the appellate Court instead of making an order of remand had passed a decree on the strength of the adjudication on which the order of remand was passed. The test is whether in the circumstances an appeal would lie if the order of remand were to be treated as a decree and not a mere order. In these circumstances, it is quite safe to adopt that appeal under Order 43, Rule 1 Clause (u) should be heard only on the agreement enumerated in Section 100. We, therefore, accept the contention of Mr. T.L.V. Iyer and hold that appellant under an appeal under Order 43, Rule 1 Clause (u) is not entitled to agitate questions of facts. We, therefore, hold that in an appeal against an order of remand under this clause, the High Court can and should confine itself to such facts, conclusions and decisions which have a bearing on the order of remand and cannot canvass all the findings of facts arrived at by the lower appellate Court.

11. In view of the judgment of Hon'ble Supreme Court of India (supra) there may not be any necessity of reconsidering the Judgment of this Court in Bindroo's case. Questions of fact raised by the appellants cannot thus be gone into in this appeal.

The preliminary objection raised by Mr. Bali, therefore, succeeds.

12. This appeal which does not raise any substantial question of law, is found to be incompetent. It is dismissed accordingly.

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