

Bindroo Vs. Badri Nath

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Court : Jammu and Kashmir

Decided On : Sep-19-2005

Reported in : AIR2006J& K36,2006(1)JKJ28

Judge : Y.P. Nargotra, J.

Acts : Agrarian Reforms Act; ;Requisition and Acquisition of Immovable Property Act; ;Specific Relief Act - Section 56; ;Jammu and Kashmir Code of Civil Procedure (CPC) , 1977 Smvt. - Sections 100 and 104 - Order 41, Rule 23 and 23A - Order 43, Rules 1

Appeal No. : C.S.A. No. 14 of 2005

Appellant : Bindroo

Respondent : Badri Nath

Advocate for Pet/Ap. : V.R. Vazir and; Tabasum Mughal, Adv.

Disposition : Appeal dismissed

Judgement :

Y.P. Nargotra, J.

1.'Whether an appeal lies against an order of appellate Court passed under Order 41, Rule 23 or 23-A, C.P.C. for remanding a case for re-trial to the trial Court after

setting aside its decree, as a matter of right on a question of fact as well as question of law?' is the vital question involved in this case.

2. The defendant-appellant has filed this Civil Second Appeal against the judgment of learned 2nd Addl. District Judge Jammu dated 30-4-2005 whereby the learned District Judge has set aside the judgment and decree of the trial Court dated 22-1-2003 and remanded the suit back for re-trial after framing issues afresh as per pleadings of the parties. Since the 1st appellate Court has not dismissed or decreed the suit of the plaintiff its judgment cannot be treated as decree and therefore civil second appeal u/S. 100, C.P.C. does not lie. Faced with such situation learned Counsel for the appellant submits that his appeal be treated to be an appeal under Order 43, Rule I(u), CPC and he submits that the appeal is maintainable under the said provision of law as a matter of right.

3. The facts of the case briefly stated are that plaintiff-respondent herein filed a civil suit against the defendant-appellant for permanent prohibitory injunction for restraining him from taking compensation of the suit land from the army on the allegation that he was in possession of the land in question as a tenant under the defendant at a monthly rental of Rs. 200/- since 1969; that in view of the provisions of Agrarian Reforms Act the defendant could not have got back the possession of the said land from him so he agreed to sell the land to him for a consideration of Rs. 5000/-; the plaintiff paid Rs. 900/- as part consideration to him in the year 1971 and rest of the amount on 6-2-1979. It is also the case of the plaintiff that the defendant executed an agreement to sell in his favour in which he has admitted the possession of the plaintiff over the suitland. Further case of the plaintiff is that in December, 1992 the army took the land in question under Requisition and Acquisition of Immovable Property Act from the plaintiff so he is entitled to receive compensation from the army.

4. The case of the defendant as set up by him in the written statement is that he is owner of the land and defendant is not in possession of the same. The land was taken by the army in the year 1968 and thereafter he received compensation but payment came to be stopped because of litigation between the parties. He has however admitted that he had executed an agreement to sell in favour of the

plaintiff and received Rs. 900/-but had refused to execute the sale deed when he came to know that the plaintiff intended to grab whole of his land. The defendant has also questioned the maintainability of the suit and sufficiency of court-fee on the plaint.

5. On the pleadings of the parties the trial Court framed the following issues for determination :-

1. Whether the plaintiff is in possession of the land measuring 10 kanal and 15 marlas situate in village Manda Tehsil Akhnoor and defendant are trying to take compensation of the same without any right? OPP

2. Whether this Court has no jurisdiction to try the present suit? OPD

3. Whether the valuation for court-fee is not properly fixed and the suit deserves to be dismissed OPD

4. Relief.

6. After putting the parties to evidence for and against the proof of issues learned trial Court vide judgment dated 22-1-2002 decided issue No. 1 against the plaintiff holding that he is not in possession of the land as the land admittedly is in possession of the army. By an agreement to sell no charge in his favour can be created. While deciding issue No. 2 the trial Court held that the suit on the basis of agreement to sell was not maintainable. Issue No. 3 has been decided in favour of the plaintiff. In view of the findings returned on issue Nos. 1 and 2 the trial Court dismissed the suit of the plaintiff.

7. The 1st appellate Court has set aside the decree of dismissal of the suit and remanded the case back for re-trial after framing issues as per pleadings of the parties by its judgment dated 13-4-2005. Regarding issue No. 1 the appellate Court observed that the suit of the plaintiff was on the premise that he was in possession of the suit land as a tenant and he was in possession when the land was taken over by the army. According to the appellate Court the trial Court had not properly framed the issue No. 1. Regarding issue No. 2 it observed that objection of the defendant was to the maintainability of the suit and not to the

jurisdiction of the Court and therefore framing of issue No. 2 as it stands was also not proper. The appellate Court thus exercising its power under Order 41, Rule 23-A has remanded the case for re-trial after framing issues as per pleadings of the parties to the trial Court.

8. Since the order of the 1st appellate Court falls within the ambit of Rule 23-A, Order 41, CPC same is appealable in terms of Order 43, Rule 1 Clause (u), CPC which reads as under :-

(1) Appeals from orders- An appeal shall lie from the following order under the provisions of Section 104 namely :-

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

9. The contention of learned Counsel for the appellant is that appeal in terms of the aforesaid provision can be maintained by the defendant as a matter of right. In support of his contention he relies upon a single Bench judgment of Karnataka High Court rendered in case titled Mohandas v. U.F.M.Mukand Honnappa Nath AIR 2003 Karnataka 428.

10. I have considered the contention raised. From the opening words used in Rule 1 supra 'an appeal shall lie' in the first flush it appears that appeal lies as a matter of right against the orders which fall under Clause (u). But when we closely read the aforesaid expression with the provision made in Rule 1(u) supra it becomes manifest that an appeal shall lie only if the order under challenge satisfies the conditions embedded in Clause (u) itself. Clause (u) of Rule 1, Order 43, CPC contemplates such an order which satisfies two conditions namely (a) the order has been passed by the appellate Court under Order 41, Rule 23 or 23-A for remanding the case for re-trial after reversing the decree of the trial Court and (b) the order has been passed in a case where an appeal would lie from the decree of the appellate Court, meaning thereby that if the appellate Court instead of remanding the case back to the trial Court had passed a decree an appeal would have been maintainable against such a decree. As the appeal against the decree of the appellate can be maintained only in terms of Section 100 CPC therefore

appeal under Clause (u), in my considered opinion, shall only lie on the grounds enumerated in Section 100, CPC, Section 100 reads as follows :-

100. Second appeal.-(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that case involves a substantial question of law.

(2). An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section the memorandum of appeal shall precisely state the substantial question of law involved in the appeal;

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question.

11. Thus in terms of Section 100 an appeal can be maintained only on the satisfaction of the High Court that the case involves substantial question of law. Therefore an appeal under Order 43, Rule1(u), CPC against an order passed in appeal under Order 41, Rule 23 or 23-A does not lie as a matter of right on a question of fact as well as question of law but lies only on the satisfaction that it involves a substantial question of law. It is also necessary that such substantial question of law in the case must arise from the order of remand.

12. learned Counsel for the appellant in support of his contention that appeal can be maintained as a matter of right on question of fact as well as question of law has relied upon the case AIR 2003 Kant 428 (supra). In that case a contention was raised by learned Counsel for the appellant while relying upon the decision rendered in Abdul Gani v. Devi Lal AIR 1960 Raj 77 that an appeal under Order 43, Rule 1(u) should be heard only on the grounds enumerated in Section 100 and it was contended that the appellant in an appeal under Order 43, Rule1(u) is not

entitled to agitate the questions of facts as in a first appeal. In Abdul Gani's case, para 12 Rajasthan High Court had held :-

It is obvious from Order 43, Rule 1 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 itself to be treated as a decree and not a mere order.

In these circumstances it is quite safe to adopt that an appeal under Order 43, Rule 1 Clause (u) should be heard only on the grounds enumerated in Section 100. On other considerations also the same conclusion is inescapable. If the preliminary point raises a question of fact it stands certainly adjudicated upon by the trial Court and the first appellate Court and therefore, on general principles there seems to be no good reason why the ordinary rule regarding second appeal on questions of fact be not applied to such appeals.

13. The learned single Judge of Karnataka High Court after noticing the view of Rajasthan High Court observed : AIR2003 Kant428 :-

In my considered view, the law laid down as above by the learned single Judge cannot be supported in law. The *ratione decidendi* is not based on any legal principle nor does the decision give any reasoning as to why the consideration should be limited only to questions of law that too substantial and not extended to questions of fact. The consideration has been arrived at on mere supposition as is clear when the Court observed 'in these circumstances it is quite safe to adopt that an appeal under Order 43, Rule 1 Clause (u) should be heard only on the grounds enumerated in Section 100'. This assumption is incorrect as Order 43, Rule 1, CPC is only an enabling provision for regulating the procedure and prescribing the various orders from which appeal would lie to a higher Court. A rule prescribing the procedure can never be understood in law as circumscribing the powers of the higher Court hearing the matter in appeal unless the rule specifically speaks of it. Where an order of remand is questioned as being improper and uncalled for in an appeal provided against such an order, it would be always open to the Court

hearing the appeal to consider all questions, both of fact and law to determine whether or not the order of remand is right in law. The learned Judge by taking such a view of the matter has equated an appeal under Section 100, CPC whereunder the jurisdiction of the High Court to entertain a second appeal after the 1976 amendment is confined only to such appeals which would involve a substantial question of law, with an appeal under Section 104, CPC whereunder no such limitation is imposed on the powers of the High Court. That is quite improper. In an appeal from an order of remand preferred under Order 43, Rule 1, Clause (u) the High Court is not confined on the question whether the order satisfies the requirement of the rule. It may also determine the correctness of the lower appellate court's decision on the point on which the trial Court disposed of the case. Thus where the trial Court decrees a suit on rejection of the defence of perfection of title by adverse possession and the appellate Court reverses the decree and remands the case under this rule, the High Court has the power to determine whether the point of adverse possession was correctly decided on merits by the lower Court. But the impugned order in the present appeal presents worse scenario as the court below has not considered the case on merits at all before exercising its power of remand under the rule. In my considered view the decision relied upon by the learned Counsel for the respondent does not lay down the correct law and therefore cannot be relied upon.

14. With respects and due deference to the view expressed by his Lordship of Karnataka High Court I cannot persuade myself to agree. Learned single Bench of Karnataka High Court, in my view, missed to take into consideration the rule, purport and scope of Section 104, CPC. Section 104, CPC (provides that an appeal shall lie from the orders mentioned in the section and save otherwise provided expressly in the body of the Code of Civil Procedure or by any law for the time being in force, from no other order. Therefore, from an order an appeal can lie only if the same has been provided either by C.P.C. or by any law for the time being in force. The appeal being only a statutory right it can lie only if a statute in force, so provides. The appeal against an order passed by the appellate Court under Rule 23 or 23-A of Order 41 has been provided by the provision contained in Rule 1(u), Order 43, CPC. Therefore, unless the order satisfied the conditions specified in Clause (u) no appeal can be maintained against the order.

15. For the reasons I have already given, I am in full agreement with the view expressed by Rajasthan High Court in Abdul Gani's case AIR 1960 Raj 77 (supra) and hold that an appeal under Order 43, Rule 1(u), CPC can be heard only on the grounds enumerated in Section 100, CPC and it does not lie as a matter of right on question of fact and law.

16. learned Counsel for the appellant has also argued in the alternative that the appeal involves a substantial question of law which he has formulated as question No. 4 in the memorandum of appeal which reads as under:-

That the suit of the respondent is not maintainable for the reason that the respondent has got an efficacious remedy by way of specific performance of contract available which remedy the respondent has not availed of. Injunction is a discretionary relief which is not available to the respondent. Thus the suit of the respondent is liable to dismissal. This aspect of the matter has not been examined by the 1st appellate Court. Under Section 56 of the Specific Relief Act an injunction cannot be granted if equally efficacious relief/remedy is available to the other side. Equally efficacious remedy by way of suit for specific performance Act is available to the respondent, therefore, the suit for injunction to restrain the appellant from receiving the compensation is not maintainable. The judgment and decree on this score dated 30-4-2005 is liable to be set aside?

17. In my considered opinion the aforesaid question does not arise in the case at all as it was not the case of the plaintiff that he is entitled to compensation because appellant had executed the agreement to sell. He was not seeking to enforce any right flowing from the execution of the agreement to sell by the defendant. He has claimed the relief on the basis of his possession over the suit land. The question arising for consideration in the suit was as to whether the plaintiff was in possession of the suit land till the same was taken over by the army. I have gone through the judgment of the trial Court as well as the 1st appellate Court and do not find any substantial question of law arising for consideration therefrom. The appeal of the appellant, as such, is not maintainable. Same is therefore, dismissed.

