

Gian Chand Vs. Mangi Ram

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SooperKanoon Citation : sooperkanoon.com/901270

Court : Jammu and Kashmir

Decided On : Sep-15-2008

Reported in : 2008(3)JKJ359

Judge : Sunil Hali, J.

Appellant : Gian Chand

Respondent : Mangi Ram

Advocate for Pet/Ap. : Mr. P.R.Sharma

Disposition : Petition dismissed

Judgement :

Sunil Hali, J.

1. Petitioner claimed to be the adopted son of respondent. This contention of the petitioner has been rebutted by the respondent by filing a civil suit for declaration and perpetual injunction restraining him from interfering with the properties of respondent. The suit was decreed in favour of the respondent vide judgment and decree dated 30.12.1992. There was clear finding by the learned trial court that the petitioner is not the adopted son of the respondent. Thereafter, an appeal came to be filed and the learned Ist Appellate Court upheld the finding of the trial court stating therein that the petitioner is not the adopted son of the respondent

but the judgment of the trial court was set aside on the ground that the plaintiff/respondent has not claimed the relief of possession before seeking decree for declaration. As a consequence suit filed by the plaintiff/respondent was dismissed.

2. Both the petitioner and respondent preferred appeals before this Court. Appeal of the petitioner was dismissed as being concluded by concurrent findings of fact and the appeal of the respondent was allowed. Thereafter, S.L.P. came to be preferred before the Supreme Court who vide its judgment dated 26.07.2002 remanded the case back to this Court. After setting aside the judgment of the appellate court decision of the Supreme Court was primarily based on the facts that before proceeding with the 2nd appeal High Court has not formulated the substantial question of law.

3. Thereafter, both the appeals were again heard by this Court. Vide judgment dated 16.03.2005, learned Single Judge dismissed the appeal of the petitioner and allowed the appeal of the respondent. This Court by allowing the appeal of the respondent held that plaintiff was not required to seek relief of possession for want of which suit could be dismissed as not maintainable. While dealing with the question, this Court at page No. 10 of the judgment dated 16.03.2005 formulated the following substantial question of law:

Whether the suit for declaration can be dismissed on the ground of omission to seek the relief of possession where the plaintiff is in possession of the suit property along with the defendant.

4. This finding of the court was made after the formulation of substantial question of law. It is important to bear in mind that only ground on the basis of which an appeal was preferred by the respondent was that he was not required to claim relief of possession while seeking a decree for declaration. It was this finding recorded by the trial court which was upset by the first appellate court. Only substantial question of law which arose in the present petition was one which was framed by this Court. The suit of the petitioner that he was adopted son of respondent was dismissed.

5. Thereafter, execution petition came to be filed before the trial court/executing court who allowed the same and restrained the petitioner to leave the company of respondent and not to cause any interference. It is this order which is challenged by the petitioner in this revision petition.

6. I have heard learned Counsel for the parties and perused the record. The grievance of the petitioner is that decree was not capable of execution as it was non est and void in the eyes of law. The ground taken in the revision petition is that no substantial question of law was framed by this Court while deciding the civil 2nd appeal. Since the Supreme Court itself clearly mentioned that appellate court was required to frame the substantial question of law before proceeding in the matter and the same having not been done, the decree is nullity and is not capable of execution.

7. The contention of the petitioner seems to be misplaced. As already submitted hereinabove, this Court had vide its judgment dated 16.03.2005 clearly framed substantial question of law and returned findings on it. The manner and form in which substantial question of law is to be framed, is not material. What is material is that the court must be aware about the substantial question of law which is to be decided. This Court has already shown its awareness regarding the substantial question involved in this appeal and decided the same accordingly. All the issues which are raised in the appeal may not be substantial questions of law. The court dealing with the issues has to be aware about the substantial question of law so that mandate of Section 100-A CPC is carried out. The contention of Mr. P.R.Sharma, learned Counsel for the petitioner that substantial question of law has to be first framed before the court can decide all the issues, in my view is not the correct perspective in law. In the present case, this has been substantially complied with while deciding the appeal.

8. The other contention raised by the petitioner is that the doctrine of merger would not apply in the present case. He states that even though his civil second appeal has been dismissed and consequently SLP filed by him stands dismissed, plea of merger would not arise. He says so because order of the Supreme Court is not on merits but has been dismissed in limini. He has relied upon the judgment of the

Supreme Court reported in AIR 2000 SC 2587. In my opinion, this question does not arise in this case. The plea of the petitioner that even if appellate court has dismissed his appeal, the same has to be treated as nullity because no substantial question of law has been framed in pursuance of the direction of the Supreme Court passed in the year 2002. The plea of the petitioner that even if Civil 2nd Appeal has been dismissed by the appellate court and has assumed finality, it is nullity in the eyes of law as it is not in conformity with the direction of the Supreme Court. This plea does not arise in this case as the appellate court has decided the case after framing the substantial question of law. Assuming but not admitting that this decree is not capable of execution as being nullity, the proper remedy available to the petitioner was to file suit seeking cancellation of his decree. This remedy has not been pursued by the petitioner. To reiterate it is stated that the decree passed by this Court is strictly in consonance with the directions of the Supreme Court and there is no scope for any intervention at this stage.

9. The other judgment relied upon by the petitioner perhaps are not relevant for determining the present controversy. The executing court while dealing with the contention of the petitioner has strictly followed the law. The executing court has rightly held that it cannot go beyond the decree and it has to be executed strictly in terms of decree passed. The petitioner wants to raise all those questions which stood concluded by this Court.

10. I, therefore, find no force in this revision petition which is dismissed along with connected CMP(s). Interim direction, if any, shall stand vacated forthwith. Record of the trial court be sent back forthwith.