

Gurbachan Singh v. Labh Singh and another (A. L. Bahri, J.)

the plaintiff, there was interference by this Court in revision and so was in *Jai Bhagwan's case* (supra). Therefore, the argument which has been raised in this behalf does not stand in our way to grant relief to the revision-petitioner, because if the suit for specific performance is allowed to continue, when such a relief cannot be ultimately allowed, it is certainly going to cause manifest injustice to the petitioner.

(19) For the reasons recorded above, we allow the revision and after setting aside the order of the trial Court, allowing the amendment, the application for amendment of the plaint is dismissed, leaving the parties to bear their own costs in this revision.

(20) In case the plaintiff filed the amended plaint with additional Court-fee after the grant of application for amendment of the plaint by the trial Court, the additional Court-fee paid by the plaintiff would be refunded to her. The trial Court would issue the refund order.

RNR.

Before : A. L. Bahri, J.

GURBACHAN SINGH,—Petitioner.

versus

LABH SINGH AND ANOTHER,—Respondents.

Civil Revision No. 1443 of 1988.

14th May, 1990.

Code of Civil Procedure, 1908—S. 96, O. 41 Rl. 1 Sub Rl. 3—Decree for payment of money—Appeal against such decree—Admission of appeal subject to deposit of decretal amount—Such deposit—Whether a condition precedent to the filing appeal.

Held, that the appeal is a statutory right as enjoined under S. 96 of the Code of Civil Procedure. This right is not subject to any condition. Obviously at the time of filing the memorandum of appeal there was no obligation on the appellant to deposit the disputed amount as a condition precedent. Admission of the appeal by the District Judge subject to deposit of the disputed amount in appeal within 15 days was obviously without jurisdiction.

(Paras 3 & 5)

Petition under section 115 C.P.C. for revision of the order of the Court of District Judge, Ludhiana dated 25th May, 1988 admitting the appeal with subject to the appellant's depositing in the Trial Court within 15 days the amount disputed in appeal and notice to the respondents and their counsel to be named within 5 days on process fee for 7th August, 1988 and further ordering that records of the trial court be also summoned.

Claim : Suit for recovery of Rs. 4,000.

Claim in Revision : For reversal of the order of lower court.

O. P. Goyal, Senior Advocate with S. S. Salar, Advocate, for the appellant.

Nemo, for the Respondents.

ORDER

A. L. Bahri, J. (Oral).

(1) This revision petition is directed against order of the District Judge, Ludhiana, dated May 25, 1988, which is reproduced below:—

“Head. Admitted subject to the appellant's depositing in the Trial Court within 15 days the amount disputed in appeal. Notice to the respondent and their counsel to be named within 5 days on process fee for 7th August, 1988.. Records of the trial Court be also summoned.”

The aforesaid order was passed on the appeal filed by Gurbachan Singh, who was defendant in a suit which was decreed by the trial Court for the recovery of Rs. 4,000 as stated. It appears that the said order of admitting the appeal subject to the condition of depositing the decretal amount within 15 days was passed under Order XLI Rule 1(3) of the C.P.C., which reads as under:—

“Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit.”

(2) Shri O. P. Goyal, learned counsel for the petitioner, has rightly argued that admission of the appeal could not be subject

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to deposit of the amount decreed by the trial Court, as different consequences could flow from non-compliance of such an order as is provided under Order XLI Rule 5(5) of the C.P.C., which reads as under :—

“Notwithstanding anything contained in the foregoing sub-rules where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of Rule 1, the Court shall not make an order staying the execution of the decree”.

(3) The appeal is a statutory right as enjoined under Section 96 of the Code of Civil Procedure. This right is not subject to any conditions. The form of appeal is provided under Order XLI Rule 1 of the C.P.C. The contents of the memorandum of appeal which are to be grounds of objection to the decree of appeal are to be specifically stated therein as provided under Order XLI Rule 1(2) of the C.P.C. Sub-Rule (3) of Rule 1 as reproduced above empowers the appellate Court in an appeal against a decree for payment of money to call upon the appellant to deposit the disputed amount in appeal within a specified period or to furnish such security within a period as the Court may think fit. Rule 3 of Order XLI provides for rejection of memorandum of appeal if it is not in conformity with Rules 1 and 2 of Order XLI. Obviously at the time of filing the memorandum of appeal there was no obligation on the appellant to deposit the disputed amount as a condition precedent. Thus, memorandum of appeal could not be rejected in view of Rule 3 of Order XLI of the C.P.C.

(4) The next question for consideration is with regard to granting stay of the execution proceedings by the appellate Court. It is in this context that order could not be passed under Order XLI Rule 1(3) calling upon the appellant to deposit the amount in dispute in appeal or to furnish security for the same and if such an order is passed but not complied with by the appellant, the Court was not required to order stay of the execution of the decree of the appeal as provided under Order XLI Rule 5(5) of the C.P.C.

(5) In view of the position of law as stated above, admission of the appeal by the District Judge subject to deposit of the disputed amount in appeal within 15 days was obviously without jurisdiction. This matter has been considered by the Andhra Pradesh High Court

in *J. Lakshmikantham v. Uppala Rajamma and others*, (1) wherein it was held that deposit of the decretal amount or furnishing security in the appellate Court was not a condition precedent for hearing and disposal of the appeal. The same view was taken by the Bombay High Court in *Prabhakar versus Vinayakrao* (2).

(6) When the revision petition was admitted by the High Court the petitioner was asked to deposit a sum of Rs. 2,600 with the Additional Registrar of this Court. The petitioner complied with the said order and the said amount has been deposited in this Court.

(7) For the reasons stated above, this revision is allowed. The order of the District Judge imposing condition in the admission order of the appeal is set aside. The District Judge will decide the appeal on merits. However, execution of the decree shall stand stayed during pendency of the appeal as the petitioner has deposited a sum of Rs. 2,600 in this Court. The amount deposited in this Court will be disbursed according to the decision made in the appeal. There will be no order as to costs.

S.C.K.

Before : J. V. Gupta, A.C.J.

NAURATA RAM,—Petitioner.

versus

BHAGWANTI AND OTHERS,—Respondents.

Civil Revision No. 2365 of 1987.

4th June, 1990.

Code of Civil Procedure, 1908—S. 11—Eviction of Tenant ordered Execution of order stayed by Supreme Court—Fresh proceedings for eviction comenced—Eviction again ordered—Execution of subsequent order—Effect of stay granted by Supreme Court.

Held, that the order passed by Supreme Court in earlier ejection application does not operate as *res judicata qua* the second ejection application which is altogether an independent proceeding.

(Para 3)

(1) AIR 1982 A.P. 337.

(2) AIR 1983 Bom., 301.