

(2011) 07 DEL CK 0289

In the Delhi High Court

Case No : CM (M) No. 1595 of 2010 and CM No's. 22382 of 2010, 12561-62 of 2011

Padam Chand Jain

APPELLANT

Vs

Piyush Jain and Others

RESPONDENT

Date of Decision : 14-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10, 114, 151
Constitution of India, 1950 — Article 227
Specific Relief Act, 1963 — Section 41

Citation : (2011) 07 DEL CK 0289

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Sanjay Jain and Ruchi Jain, for the Appellant; Parag Chawal and 2 and Shobha Gupta, for the Respondent

Final Decision : Allowed

Judgement

Indermeet Kaur, J.—The order impugned before this Court is the order dated 31.08.2010. Contention before this Court is that vide order dated 31.08.2010, the court of Additional District Judge had heard an appeal under Order XLIII of the CPC (hereinafter referred to as the "Code") against the dismissal of a review petition dated 19.02.2010; an appeal filed against an order which has dismissed a review petition is not maintainable under Order XLIII of the Code. Attention has been drawn to Order XLIII Rule 1 (w) of the Code which reads as under:

Order XLIII.

1. Appeal from orders.- an appeal shall lie from the following orders under the provisions of Section 104, namely

(w) an order under Rule 4 of the Order XLVII granting an application for review.

2. Vehement contention is that only where an order granting a review has been passed, an appeal is maintainable under Order XLIII of the Code; however, if the

order has dismissed a review application, the appeal under Order XLIII of the Code is not maintainable. Thus the order dated 19.08.2010 is non-est and being void ab initio; it is liable to be set aside. It is contended that the reliance by the concerned court while recording the impugned order on the judgment of the Apex Court reported in Shah Babulal Khimji Vs. Jayaben D. Kania and Another, was misplaced; in this case the Apex Court was concerned only with the right of the Appellant under the Letter Patent jurisdiction. It is submitted that Additional District Judge in his order dated 31.08.2010 has assumed a jurisdiction upon himself which was not vested in him; the order suffers from an illegality and is liable to be set aside under the supervisory jurisdiction of this Court.

3. Arguments have been rebutted. It is submitted that the order dated 19.02.2010 was a review petition which had been partly allowed and partly dismissed ; the very fact that there was a partial allowance of the review petition makes it permissible for an appeal to be maintained under Order XLIII Rule 1 (w) of the Code. The second submission is that since the impugned order dated 31.08.2010 has dismissed the suit of the Plaintiff, the remedy is not a petition under Article 227 of the Constitution. On the applicability of the judgment of Shah Babulal Khimji (Supra), learned Counsel for the Respondents has fairly conceded that the Additional District Judge in the impugned order dated 31.08.2010 has misapplied this judgment and the ratio of this judgment in fact related to the Letter Patent Appeal alone.

4. It is in this background that the respective submissions of learned Counsel for the parties are to be considered.

5. The present suit is a suit for permanent injunction seeking a restraint against the Defendants from interfering in the possession of the property i.e. municipal No. WZ-603 B Palam Village New Delhi. Two preliminary issues were framed in the said suit. They inter-alia read as follows:

1. Whether the plaint is liable to be rejected u/s 41(h) of the Specific Relief Act or not?

2. Whether the suit is liable to be stayed u/s 10 of the CPC?

6. Both these issues were decided in favour of the Plaintiff. Vide order dated 18.08.2009, it was held that the suit is maintainable. The aggrieved party had gone in appeal. The High Court on 18.09.2009 had recorded the submission of the Petitioner/Defendant therein that he would seek a review of this order before the concerned Court; the petition accordingly had been dismissed as withdrawn with liberty to the party to move a review application before the concerned trial Court. On 19.10.2009, the review petition had been disposed of. This was a petition under Order 47 Rules 1 & 2 read with Sections 114 & 151 of the Code seeking a review of the order dated 18.08.2009. While disposing of the review petition, the order passed by the trial Judge on the preliminary issues was maintained but certain clerical mistakes and corrections were allowed; to that extent the review was partly allowed; Thus while upholding the order dated

18.08.2009 on the maintainability of the suit, the clerical mistakes were reviewed. Para 8 of the said Order reads herein as under:

In the light of the above discussion the application for review filed by the Defendants No. 1 & 2 is allowed to the extent that in the impugned order dated 18.08.2009 on page No. 9 it shall now be read as general power of attorney dated 30.04.1998 which was a registered document and which was not for any consideration as alleged by the Plaintiff. However, no ground have been made by Defendants No. 1 & 2 to review the findings arrived at by this Court on both the preliminary issues.

7. Vehement contention of the Respondents is that since the review had been allowed in part and as has been noted in para 8 (supra), an appeal was well maintainable under order XLIII of the Code.

8. Learned Counsel for the Petitioner has vehemently submitted that the language of Order XLIII Rule 1 (w) of the Code clearly negatives this contention. It is reiterated out that an appeal is maintainable only when an application for review is allowed; contention being that the aggrieved party in appeal would not be a person whose application for review has been allowed; it would be in the converse; it would be the party whose review application has been rejected which was the Petitioner in this case.

9 The appeal as postulated under Order XLIII Rule 1 (w) of the Code can only be filed by a person where an application for review has been allowed; such an aggrieved person admittedly is not the Respondent before this Court; such an aggrieved person could only be the Petitioner; the appeal has admittedly been filed Order XLIII of the Code by the Respondent for whom there was a clear bar under Order XLIII Rule 1 (w) of the Code. The language of this statutory provision is clear. It is expressly stated that only when an application granting a review i.e. allowing a review is made can an appeal be filed. The order dated 19.02.2010 has allowed the review on the technical errors and corrections to be made; however the order on merits has been maintained; the order dated 18.08.2009 of the Civil Judge holding the suit to be maintainable was maintained and the review on this count had been dismissed. It is also a fact that this appeal Order XLIII of the Code has been preferred by the Respondent. He has filed a review impugning that portion of the order dated 19.02.2010 which has dismissed his review application. An appeal against the rejection of the review petition does not lie under Order XLIII Rule 1 (w) of the Code; Clause (w) makes it clear that such an appeal lies only in those cases where review petition had been granted; the appeal filed by the Respondent under Order XLIII of the Code was on his grievance that the review petition had been dismissed; he has not impugned that portion of the judgment which had granted/allowed review.

10. What necessarily follows is that the Court of Additional District Judge had assumed the appellate jurisdiction under Order XLIII of the Code when it was clearly not vested with him. An order passed by a Court who is not competent to

pass it is an order void ab initio; it has no sanctity. This is a patent illegality. The Apex Court in Waryam Singh and Another Vs. Amarnath and Another, has held that general superintendence of power vested in the High Court under Article 227 of the Constitution is a power which the High Court has over all courts and tribunals; it is the duty of the High Court to ensure that they do their duty as required and they do it in a legal manner. Where the error of law is apparent on the face of record, the Court is called upon to interfere.

11. Petition is allowed. The order dated 31.08.2010 is set aside. Parties to bear their own costs.