

(1993) 02 J&K CK 0005
In the Jammu And Kashmir High Court
Case No : L.P.Appeal No. 228 of 1993

Sudershan Singh

APPELLANT

Vs

Santokh Singh

RESPONDENT

Date of Decision : 03-02-1993

Acts Referred:

Citation : (1994) 1 SriLJ 73

Hon'ble Judges : S.C.Mathur, C.J and S.M.Rizvi, J

Bench : Division Bench

Advocate : T.S.Thakur, S.L.Kotwal, Advocates appearing for the Parties

Judgement

1. Respondents in the writ petition have preferred the instant appeal under Clause 12 of the Letters Patent against the order dated July 29,1993

passed by a learned Single Judge on their application seeking clarification of court's orders dated June 28,1990 and Sept. 20,1990.

2. The Writ petition arose from proceedings relating to title to immovable property. According to the averments of the appellants, they were the

sole owners of the property and, therefore, entitled to receive the entire rent in respect thereof which was being deposited by the Army authorities

with the Collector of the District. The respondents 1 and 2 contested the appellant's claim of being sole owners of the property in question and

asserted that the property belonged to joint family in which they also had share. If all the contentions of the respondents are accepted even then

they will be entitled only to one half share in (he property and consequently to one half share in the rent which the property yields. Yet interim order

was passed on June 28, 1990 where the appellants were restrained completely from receiving amount of compensation with respect to the land in

question, This order was passed before admission of the writ petition. The writ petition was admitted on Sept. 20,1990 and interim order dated

June 28,1990 was continued. Sometime in the year 1993, application which has given rise to the present appeal was filed containing prayer in the

following terms:

It is respectfully prayed that the order dated 20.9.1990 read with order 28.6.1990 may kindly be clarified as being operative only to the extent of

the 1/2 share only and the rest 1/2 may kindly be allowed to be received by the applicants. The applicants further pray that the other 1/2 share

which is being claimed by the petitioner be also allowed to be received on being furnished (SIC) an undertaking that in the event the petitioners

succeed, the same would be refunded....

On July 29,1993, the learned Single Judge disposed of the application in the following terms:

'Heard learned counsel for the parties. As adjudication of this CMP requires determination of the rights of the parties arising out of the main writ

petition, I am not inclined to accede to the prayer made in this CMP at this stage.

The CMP is accordingly disposed of with a direction to the registry to expedite hearing of the main writ petition, if possible during the month of

October,1993.

3. The learned counsel for the appellants has submitted that there was no dispute regarding appellants one half share in the land and, therefore,

there was no occasion to deprive the appellants from their one half share in the rent.

4. Learned counsel for respondents 1 and 2 raised a preliminary objection against the maintainability of the appeal. He submitted that the order

under appeal was not ""judgment"" within the meaning of clause 12 of Letters Patent and, therefore, the appeal was not maintainable.

5. Under clause 12, an appeal indeed lies only against a judgment order which has the character of a judgment. This question has been considered

by a D.B. of this court in Abdul Samad and others Vs the State of Jammu & Kashmir, AIR 1969J&K:52. In this case also an objection was

raised against the maintainability of the appeal on the ground that the order appealed against was not judgment. By the order appealed against

interim injunction granted earlier was vacated. The only difference between this

case and that case is that while in this case the injunction was not vacated in the said case the injunction was vacated. The D.B. of this court held the appeal to be maintainable. In paragraph 14 of the Judgment reference has been made with approval to the judgment of the Rangoon High Court in *Arumugan Chettayar Vs Kanappa Chettayar*, AIR 1927 Rang.: 139, wherein it has been observed :

Where an appeal from an order is allowed by the Civil P.C. the court will construe such an order as the judgment within the meaning of CL.13 of the letters Patent.

It has been held by the D.B. that this test applies in view of the provision contained in section 60 of the J&K constitution Act, 1954. This judgment has been referred to (SIC) *Shah Babulal Khimji Vs Jayaben D. Kania* and another with approval by their Lordships of Supreme court (AIR 1981 SC: 1786). In view of the decision, we are unable to uphold the preliminary objection raised by the learned counsel for the respondents.

Learned counsel for the respondents strongly placed reliance upon the judgment of Bombay High court in *JK Chemicals Ltd Vs Kreba and Co. Ltd and others*, AIR 1967 Bombay:56. This Judgment has been specifically overruled in *Shah Babulal Khimji's case* (supra).

Learned counsel also referred to AIR 1970 Jammu & Kashmir: 190, *The J&K Cooperative Bank Vs ShamsudDin Bacha*. In this case, the question was whether an appeal lay (SIC) under clause 12 against an order passed in exercise of revisional jurisdiction by a Single judge under section 115 of the Code of Civil Procedure, This is not the position in the present case.

Learned counsel for the respondents submitted that the application which has given rise to the present appeal could not be said to be under order

43, Rule 1 clause (r) of Code of Civil Procedure, as the prayer did not seek variation, modification or vacation of the interim order and instead it sought clarification. The prayer made in the application has been reproduced herein above. That prayer read along with the relief granted earlier to

the respondents by the learned Single Judge did not make out a case for clarification, but only a case for modification or variation of the order. It is

the substance of the prayer that will determine its true character and not a stray

word used therein.

Coming to the merits of the case, the learned counsel for the respondents has failed to satisfy us that there was any contest between the parties

with regard to one half share in the property in dispute and in the rent which the said property is yielding. Accordingly, there can be no justification

to restrain the appellants from withdrawing their one half share from the Collector's office where the rent or compensation is being deposited.

On behalf of the appellants, It was also prayed that they may be allowed to withdraw the remaining one half share in the rent against undertaking.

Admittedly, the appellants have share in the immovable property. Therefore, the right of the respondents can be secured by requiring the appellants

not to transfer their one half share during the pendency of the proceedings in this court and on this condition they can be allowed to withdraw the

remaining one half share also in the rent.

In view of the above, the appeal is allowed and the order of learned Single judge is set aside. The application made on behalf of the appellants

before the learned Single Judge is hereby allowed. The appellants shall be entitled to withdraw the compensation/rent deposited by the Army

authorities with the Collector, Jammu to the extent of one half without furnishing any security or undertaking. The remaining one half they will be

entitled to withdraw only after furnishing an undertaking before the Additional Registrar of this court to refund the same to the Collector, Jammu in

the event of their' losing in the writ petition or in accordance with the direction of this court and further undertaking not to transfer their one half

share in the property during the pendency of the writ petition in this court. There shall be no order as to costs.