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**(1994) 02 J&K CK 0002**  
**In the Jammu And Kashmir High Court**  
**Case No : L.P. Appeal No. 228 of 1993**

Sudershan Singh & Ors.

APPELLANT

Vs

Santokh Singh & Ors.

RESPONDENT

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**Date of Decision :** 03-02-1994

**Acts Referred:**

Jammu and Kashmir Civil Procedure Code, 1977 — Order 43, Order 43 Rule 1  
Jammu and Kashmir Letters Patent — Clause 12

**Citation :** (1994) KashLJ 175 : (1994) SriLJ 73 : (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

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## Judgement

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.

The writ petition arose from proceedings relating to title to immoveable 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

which the Collector of the District. The respondents 1 and 2 contested the appellants 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 the property and consequently to one half share in the rent which the property yields. Yet interim order

was passed on June 28,1990 whereby the appellants were restrained completely

from receiving the 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 the interim order dated June 28,1990 was continued. Some time 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 prays that the other 1/2 share which is being claimed by the petitioner be also allowed to be received on being furnished 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 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.

The learned counsel for the appellants has submitted that there was no dispute regarding applicants one half share in the land and, therefore, there was no occasion to deprive the appellants from their one half share in the rent.

Learned counsel for respondents 1 and 2 raised a preliminary objection against the maintainability of the appeal. He submitted that the order under appeals was not ""judgment"" within the meaning of clause 12 of Letters Patent and, therefore, the appeal was not maintainable.

Under clause 12, an appeal indeed lies only against a judgment or an order which has the character of a judgment. This question has been considered by a DB of this court in Abdul Samad and others vs. The State of Jammu & Kashmir, AIR 1969 J&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 Arumugam Chettyar vs Kanappa

Chettyar, 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 a 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 ('0 of the Jammu & Kashmir Constitution Act,

1996Bikarmi. This judgment has been referred to Shah Babulal Khimji vs Jayaben D. Kania and another with approval by their Lordships of

Supreme Court (AIR 1981 SC 1786). In view of this 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 55 . This judgment has been specifically over ruled 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 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 one 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 hereinabove. That prayer read alongwith 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 immoveable 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 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 directions 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.