

SUPREME COURT OF INDIA

Kesho Ram (Dead) by LRs.

Vs.

Hem Raj

C.A.No.2096 of 2001

(Dalveer Bhandari and Harjit Singh Bedi JJ.)

23.10.2008

JUDGMENT

Harjit Singh Bedi, J.

1. The facts of the appeal are as under:

2. Civil Revision No. 22 of 1975 arising out of a civil suit was allowed on 8th June, 1976 by the High Court. Review Application No. 5 of 1976 was filed for re-calling the order dated 8th June, 1976. This application was allowed ex-parte on 8th September, 1987 as the counsel for the appellant, Mr. K.D. Raina did not appear to defend the case. As a result of the order dated 8th September, 1987, the order dated 8th June, 1976 was re-called, and the revision petition was dismissed thereby upholding the order of the trial court that the suit had abated. The appellant herein thereafter filed CMP No.266 of 1987 for setting aside the ex-parte order dated 8th September, 1987. In these proceedings, it was pleaded that Mr. K.D. Raina, Advocate had failed to appear in Court as he was not in regular practice and his absence was not wilful. An affidavit of Mr. Raina was also attached with the application. The learned Judge did not accept the plea and affidavit of Mr. Raina and dismissed CMP No. 266 of 1987 on 11th November 1988 leading to this Letters Patent Appeal against the aforementioned order. When this matter came up before the Division Bench, a difference of opinion arose between the two Judges, with one accepting Mr. Raina's affidavit and the other rejecting the same. It was in this situation that the matter was referred to a third Judge on the following points:

“1. Did the learned Single Bench commit an error of law by disbelieving the affidavit filed by late K.D. Raina, Advocate, on the plea that presumption of correctness of the court record was belied by such affidavit?

2. Is the order passed by the learned Single Bench on 11.11.1988 appealable under Clause 12 of Letters Patent Rules?

3. Is the appeal barred by Rule 7 of Order 47 *Code of Civil Procedure*?”

3. The third Hon'ble Judge held that the non- appearance of Mr. Raina was not wilful or intentional as he had virtually given up regular practice on account of ill-health and as such there was no justification in disbelieving his affidavit. With respect to point nos. 2 and 3, however, the learned Judge held that clause 12 of the Letters Patent of the High Court of Judicature for Jammu & Kashmir did not envisage an appeal to a Division Bench in matters arising out of revisional proceedings and that the application under Order 47 Rule 7 of the CPC for re-call was not maintainable. The questions having been decided thus, the appeal was dismissed leading to the present proceedings by way of special leave.

4. We have heard Mr. P.H. Parekh and Dr. A.M. Singhvi, the learned counsel for the appellant and respondents respectively. Mr. Parekh has reiterated the arguments that had been raised before the Division Bench while hearing the Letters Patent Appeal and also before the third Hon'ble Judge on the reference. He has submitted that an appeal was maintainable against the order dated 11th November, 1988 by virtue of Order 47 Rule 7(2) of the C.P.C and that in any case if the Letters Patent proceeding were to be treated as nonest, the present Special Leave Petition could be entertained as a challenge to the order dated 8th June, 1976 on oral prayer. Dr. Singhvi, on the other hand, has pointed out that an order rejecting an application in review was not appealable and the only remedy for having such an order for set aside was to file an application for review under Order 47 Rule 7(2), but when such an application had been dismissed, no further application could be entertained by virtue of Order 47 rule 9 of C.P.C. He has also stressed that a perusal of clause 12 of the Letters Patent also spelt out that an order in revision was not appealable under the said clause and that in any case, it was open to the appellant to challenge the order dated 8th September 1987, in appeal.

5. We have heard learned counsel for the parties very carefully. We find substance in Mr. Singhvi's argument based on Order 47 Rule 7(2) but as of today, the prime issue before us is with regard to the maintainability of the Letters Patent Appeal. A bare perusal of clause 12 reveals that an appeal against an order in revision is not maintainable. We are, therefore, of the opinion that all the observations/findings recorded by the Letters Patent Bench were nonest being completely unauthorized in law. We have therefore no hesitation in dismissing the present appeal as well. We, however, give liberty to the appellant to challenge the order dated 8th September, 1987 in appropriate legal proceedings with a further direction that it shall be open to the appellant, should an appeal be filed, to move an application for condonation of delay which would be considered with sympathy. We, however, dismiss the appeal. No costs.