

Muhamad Hasan Khan vs L. Bhikhari Lal And Ors. on 16 March, 1950

Equivalent citations: AIR1950ALL534, AIR 1950 ALLAHABAD 534

JUDGMENT

Malik, C.J.

1. This is a Letters Patent Appeal- The plaintiff had filed a suit No. 262 of 1943 for pre-emption. The defendants-vendees had claimed that they were not strangers and that the plaintiff was, therefore, not entitled to claim pre-emption as against them. The suit was decreed by the trial Court on a finding that the defendants-vendees were strangers and that the vendor had, therefore, no right to sell the property to them in preference to the plain-tiff. This decree was affirmed by the lower appellate Court, and the appeal filed there on behalf of the defendants was dismissed. After the dismissal of the appeal the defendants-vendees filed an application for review on the ground that they had discovered some fresh documentary evidence which clearly proved that they were co-sharers and were not strangers.

2. Order 47, Rule 1, Civil P. C., is in the these terms.

"(1) Any person considering himself aggrieved

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2)....."

Under Rule 4 (2), where the Court is of opinion that the application for review should be granted, it shall grant the same. Under Rule 8 on an application being granted the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit. The Court granted the

application for review and directed a re-hearing of the case in accordance with the provisions of Order 47, Civil P. C. An appeal against the said order was filed in this Court under Order 43. Rule 1, by the plaintiff. That appeal came, up for decision before a learned single Judge, who dismissed it on 25th August 1919, and refused to grant leave to file a Letters Patent Appeal. In spite of the refusal the Letters Patent Appeal was filed, as it was contended by learned counsel on behalf of the plaintiff appellant that leave had been wrongly asked for, it not being a condition pre-requisite for the filing of the appeal, and that in any case, it should have been granted. The relevant portion of Clause 10, Letters Patent of this Court was as follows:

"And we do further ordain that an appeal shall lie to the said High Court of Judicature at Allahabad from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of 'appellate jurisdiction by a Court subject to the superintendence of the High Court), of one Judge of the said High Court.... and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court made on after the first day of February one thousand nine hundred and twenty-nine in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal;" Learned counsel has urged that the appeal from order filed in this Court was not against an order passed by the lower appellate Court in the exercise of its appellate jurisdiction within the meaning of this clause. According to learned counsel the lower appellate Court was exercising, what he called, a 'jurisdiction in review.' It is true that the order appealed against was not passed on 'appeal,' but there can be no doubt that it was passed by the lower appellate Court in the exercise of its appellate jurisdiction. The case came up before that Court, and it be-came seised of it as a Court of appeal, and the application for review was filed before it, by invoking its jurisdiction as a Court of appeal to set aside its previous order and to re-hear the appeal. We are satisfied that the learned single Judge having refused leave for appeal the appellant had no right to file it and the appeal is, therefore, not maintainable.

3. The memorandum of appeal is accordingly rejected and the application for stay is also dismissed.