Fakhruddin vs Nasiruddin on 17 November, 1950

Equivalent citations: AIR1951ALL497, AIR 1951 ALLAHABAD 497

Author: V. Bhargava

Bench: V. Bhargava

JUDGMENT

Y. Bhargava, J.

1. This is a second appeal arising out of a suit brought by the plaintiff-appellant against the defendant-respondent for an injunction restraining the latter from interfering with the possession of the appellant over the plots in suit and for possession in case it be held that the appellant is not in possession over the plots in suit. This suit was instituted on 7-11-1945, and was decided by the trial Court on 22-7-1946. The appeal before the lower appellate Court was filed on 30-8-1946, and was decided on 23-9-1947. The lower Court, by its decision, directed the plaint to be returned to the appellant for presentation to the proper Court holding that, under the provisions of the U. P. Tenancy (Amendment) Act (NO. X [10] of 1947) which had the retrospective effect, the suit lay in the revenue Court and not in the civil Court. It is against this order that the present second appeal has been filed before me.

2. When this appeal came up for hearing, a preliminary objection was raised by the learned counsel for the respondent that no second appeal lay from an order by the first appellate Court directing return of the plaint for presentation to the proper Court. His contention was that in such a case a first appeal from order will lie and not a second appeal. This contention is well founded but a request has been put up by the learned counsel for the appellant that this second appeal may be treated as a first appeal from order. The court-fee, already paid on the memorandum of appeal, would be more than sufficient if this is treated as a first appeal from order instead of as a second appeal. There is, therefore, nothing in law which would stand in the way of this appeal being treated as first appeal from order and, treating it as such, I proceed to decide it on merits.

3. On merits, the contention of the learned counsel for the appellant that this appeal should have been entertained by the lower appellate Court and there should have been no order for return of the plaint for presentation to the proper Court appears to be sound. It is true that Section 31, U. P. Tenancy (Amendment) Act (NO. X [10] of 1947) makes the provisions of that Act retrospectively applicable to all proceedings, suits, appeals and revisions pending at the time of the commencement of that Act but this section is subject to five provisos. Proviso 5 to Sub-Section (1) of Section 31 clearly lays down that nothing in that sub-section is to affect the forum of appeal or revision from a decree or order passed by a civil Court under the U. P. Tenancy Act. The present suit was filed on

7-11-1945, when it lay before a civil Court and it was decided by the civil Court on 22-7-1946, before the U. P. Tenancy (Amendment) Act (No. X [10] of 1947) came into force. The last-named Act came into force on 14-6-1947. As a result of this amendment of the Act coming into force, all the pending suits, appeals and revisions had to be decided in accordance with that Act but Proviso 5 makes it clear that the provisions of this Act are not to affect the forum of an appeal or revision from a decree passed before this Act came into force. In the present case, the decree had already been passed by the trial Court and, therefore, the appeal would still lie before the lower appellate Court. The lower appellate Court should, therefore, have decided this appeal on merits and it committed an error in directing return of the plaint for presentation to the proper Court on the view that the proper Court was the revenue Court. In these circumstances, this appeal must be allowed.

4. It may, however, be noticed that, in the lower appellate Court, the appellant had conceded that the Act had retrospective effect so that the appeal could not be entertained by it. It appears that it was at some later stage that the appellant realised that there was Proviso 5 to Sub-Section (1) of Section 31, U. P. Tenancy (Amendment) Act (NO. X [10] of 1947) and, therefore, he came up in appeal to this Court. This appeal in this Court became necessary only because the appellant made an incorrect admission before the lower appellate Court. In these circumstances, I consider it fair that the respondent should get his costs of this appeal from the appellant. I, therefore, allow this appeal, set aside the order passed by the Tower appellate Court and direct the lower Court to rehear the appeal on merits. The costs of this appeal in this Court shall be payable by the appellant to the respondent. The rest of the costs will be in the discretion of the lower appellate Court.