

Before R. N. Mittal, J.

KARAM SINGH,—Petitioner.

versus

KIRPAL SINGH,—Respondent.

Civil Revision No. 488 of 1979.

July 18, 1979.

Code of Civil Procedure (V of 1908)—Sections 2(2) 47, 96 and 99A—Order deciding objections under section 47—Whether appealable—Section 99A—Whether provides for an appeal against such an order.

Held, that by the Civil Procedure Code (Amendment) Act, 1976 the definition of the word 'decree' has been amended and the words that it shall include 'the determination of any question within section 47' have been deleted from it. The result is that now no appeal lies under section 96 of the Code of Civil Procedure, 1908 against the orders determining questions within section 47. It is an established principle of law that appeal is a creation of statute and unless power to file an appeal is given by it, no appeal can be maintained. Thus, after the passing of the amendment Act, no appeal is maintainable against the order passed in proceedings under section 47 of the Code.

(Para 3)

Held, that section 99A of the Code does not entitle a party to file an appeal against an order under section 47 of the said Code.

(Para 4).

Petition under Section 115 C.P.C. for revision of the order of Shri O. P. Saini, District Judge, Ludhiana, dated 9th February, 1979, modifying that of Shri G. C. Suman, P.C.S., Sub-Judge, Jagraon, dated 23rd May, 1978. The extent that the decree has been partly executed. The case is remitted back to the executing Court with a direction to issue fresh warrant, of possession in favour of the decree holder against the judgment-holder. The possession over the remaining part of the vacant plot measuring 10 marlas be delivered after demolishing the structure standing on the same and removing its malba and directing the parties to appear before the executing Court on 19th February, 1979.

Surjit Kaur, Advocate, for the Petitioner.

H. S. Brar, Advocate, for the Respondent.

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JUDGMENT

R. N. Mittal J. (Oral)

(1) Briefly, the facts are that a decree for possession by redemption was passed against the petitioner by Subordinate Judge, Ludhiana, on September 19, 1974. The decree holder started executing the decree on March 10, 1978. The petitioner filed objections against the execution to the effect that the decree had been partially satisfied. The learned executing court after recording the statement of the Bailiff held, that the decree had been fully satisfied and consequently it dismissed the execution petition. The decree holder filed an appeal before the District Judge, Ludhiana. At the time of hearing, the counsel for the judgement debtor raised an objection that the order under section 47 of the Code of Civil Procedure was not appealable and consequently the appeal was liable to be dismissed. The District Judge held that the appeal was maintainable. He accepted it and remanded the case to the executing court. The judgment debtor has come up in revision against the order of the District Judge to this Court.

(2) The only question that arises for determination is as to whether an appeal was maintainable against the order of the executing court deciding the objections under Section 47 of the Code of Civil Procedure. The counsel of the petitioner has vehemently urged that the definition of word 'decree' has been modified and the orders passed under Section 47 of the Code have been taken out of the purview of the definition. According to the counsel, on account of the said change the order under Section 47 is not appealable under Section 96 of the Code, which provides an appeal against a decree. On the other hand, the learned counsel for the respondent has submitted that a reading of Section 99A of the Code goes to show that an order under Section 47 is appealable to the extent provided in that section.

(3) I have heard the learned counsel for the parties at a considerable length and agree with the contention of the counsel for the petitioner. Prior to the passing of the Civil Procedure Code (Amendment) Act, 1976, (hereinafter referred to as the Amendment Act) the word 'decree' as defined in Section 2(2) included the determination of questions within section 47 of the Code. Section 96 provided appeals from the original decrees. Under the said Section

an appeal was maintainable from every decree passed by the Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court. If the definition of the word 'decree' before the amendment is read with Section 96, it is evident that the order deciding objections under Section 47 is appealable under Section 96. After passing of the Amendment Act, the position has changed. By the Amendment Act the definition of the word 'decree' has been amended and the words that it shall include the determination of any question within Section 47 have been deleted from it. The result is that now no appeal lies under Section 96 against the orders determining questions within Section 47. It is an established principle of law that appeal is a creation of statute and unless power to file an appeal is given by it, no appeal can be maintained. In these circumstances, in my view, after the passing of the Amendment Act, no appeal is maintainable against an order passed in proceedings under Section 47 of the Code.

(4) The learned counsel for the respondent referred to Section 99A of the Code which was added by the Amendment Act. It is as follows :—

99A. *"No order under section 47 to be reversed or modified unless decision of the case is prejudicially affected:— Without prejudice to the generality of the provisions of section 99, no order under section 47 shall be reversed or substantially varied, on account of any error, defect or irregularity in any proceeding relating to such order, unless such error, defect or irregularity has prejudicially affected the decision of the case."*

From a reading of the Section it is clear that it does not provide an appeal against an order under Section 47. I have already held that no appeal is maintainable against an order under Section 47. Therefore, the Section appears to be a superfluous one. The reason as to how it finds place in the Code has been given in the Law of Civil Procedure by S. C. Sarkar VIth Edition, at page 240. The relevant part is as follows:—

"S.99A was inserted in the original bill on the recommendation of Law Commission (vide 54th Report, p. 74) adopting the principles of S 99 specifically with regard to appeals against final orders under section 47. Joint Committee

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recommended amendment of the definition of "decree" in section 2(2) by excluding therefrom "determination of any question under section 47" to make the final order under section 47 non-appealable in order to reduce delay in the execution of decree, but did not recommend any consequential amendment to delete this section; and Bill as such was passed by the Legislature. The result has been that, as there will be no appeal against final order under section 47, this section remains in the statute as *otiose* serving no useful function."

After taking into consideration the aforesaid circumstances, I am of the view that Section 99A does not entitle a party to file an appeal against an order under Section 47 of the said Code. Consequently, the finding of the learned District Judge that an appeal is maintainable against such an order is not correct and I reverse it.

(5) In view of the fact that the District Judge had no jurisdiction to entertain the appeal, the course open for him was to return the memorandum of appeal to the appellant.

(6) For the reasons recorded above, I accept the revision petition and set aside the order of the District Judge. In the circumstances of the case, I, however, make no order as to costs.

S. C. K.

Before S. S. Sandhawalia, C.J. and I. S. Tiwana, J.

JAI CHAND and others,—Appellants.

versus

STATE OF HARYANA—Respondent.

Criminal Appeal No. 534 of 1977.

29th July, 1979.

Haryana Children Act (14 of 1974)—Sections 21 and 23—High Court Rules and Orders, Volume III, Chapter 1-G (Part G) (a) & (b)—Wide disparity between age given by an accused himself and visual assessment of the trial Judge—Assessment of Judge uncontroverted by the accused despite various opportunities—Duty of trial Court in such cases—Onus of proving age to secure benefit of the Act—Whether on the accused.