

RAJASTHAN HIGH COURT

Modi Ram

Vs.

SuganBai

Civil Revision Petition No. 59 of 2004

(Sunil Kumar Garg, J.)

19.05.2004

ORDER

Sunil Kumar Garg, J.

1. This civil revision petition has been filed by the petitioners-defendants (hereinafter referred to as the defendants) with a prayer that the order dated 9-12-2003 passed by the learned Civil Judge (Senior Division), Badi Sadri whereby the defendants were asked to pay Rs. 1750/- as stamp duty and order dated 18-12-2003, by which right of the defendants to defend the suit was closed as defendants did not comply with the order dated 9-12-2003 be quashed and set aside.

2. It arises in the following circumstances:

(i) That respondent-plaintiff (hereinafter referred to as the plaintiff) filed a suit against defendants under Order 37, Civil Procedure Code for the recovery of a sum of Rs. 34,730/- along with interest @ 24% per annum on 2-7-2002.

(ii) On receiving the summons of the suit on 17-1-2003, the defendants-applicants moved an application under Order 37, Rule 2, Civil Procedure Code on 27-1-2003 for allowing the defendants-applicants to defend the suit filed by the plaintiff against the defendants.

(iii) The application filed by the defendants under Order 37, Rule 2, Civil Procedure Code was allowed by the learned trial Court through order dated 15-11-2003 on the condition that the defendants would submit indemnity bond as well as surety bond for a sum of Rs. 35,000/- within 7 days of the order.

(iv) In compliance to the order dated 15-11-2003 passed by the learned Civil

Judge, the defendants (applicants) submitted the indemnity bond as well as surety bond on 21-11-2003 before the trial Court.

(v) Thereafter the plaintiff submitted her objection regarding submission of indemnity bond as well as surety bond on the ground that they were not executed on sufficient stamp papers as stamp duty @ Rs. 5 per thousand was required to be paid on the valuation of the indemnity bond submitted by the defendants.

(vi) After hearing both the parties, the learned civil Judge through one of the impugned orders dated 9-12-2003 asked the defendants to submit stamp duty of Rs. 1750/- on the indemnity bond up to 18-12-2003 failing which indemnity bond submitted by the defendants would not be verified and the defendants would lose their right to defend the suit as ordered by the Civil Judge through order dated 15-11-2003.

(vii) Thereafter the learned Civil Judge through order dated 18-12-2003 closed the right of the defendants (applicants) to defend the suit as they did not submit the stamp duty in compliance of the order dated 9-12-2003.

3. In this revision petition, the orders dated 9-12-2003 and 18-12-2003 have been challenged on various grounds and the main submission of the learned Counsel for the defendants is that in the conditional order dated 15-11-2003 by which right to defend the suit was allowed to the defendants (applicants) on furnishing indemnity bond as well as surety bond for a sum of Rupees 35,000/- within seven days, there was no such condition as imposed by the learned Civil Judge through order dated 9-12-2003 and, therefore, imposition of such a condition is illegal and without jurisdiction and hence this revision petition should be allowed and the impugned orders dated 9-12-2003 and 18-12-2003 are liable to be quashed and set aside.

4. On the other hand, the learned counsel for the plaintiff has supported the orders dated 9-12-2003 and 18-12-2003 and submitted that the same are based on proper appreciation of facts and law and do not require any interference by this Court and further it has been submitted by the learned counsel for the respondent that in view of amendment in Section 115, Civil Procedure Code, the present revision petition is not maintainable.

5. Heard and perused the case file.

6. There is no dispute on the point that the application of the applicants- defendants to

defend the suit was allowed by the learned Civil Judge through order dated 15-11-2003 on conditions as mentioned in the order dated 15-11-2003.

7. There is also no dispute on the point that through the order dated 18-12-2003, the right to defend the suit allowed to the defendants through order dated 15-11-2003 was closed and the case was fixed for final arguments on 2-1-2004.

8. Before proceeding further, this Court would like to decide the objection raised by the plaintiff as to whether in the facts and circumstances just mentioned above the present revision petition is maintainable or not.

9. For convenience Section 115, Civil Procedure Code as amended is quoted hereunder:

"115. Revision - The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears -

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit :

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceedings, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings. (Substituted by the Civil Procedure Code (Amendment) Act, 1999, Section 12 (i) (w.e.f. 1-7-2002)).

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto. (Inserted by the Civil Procedure Code (Amendment) Act, 1976, Section 43 (w.e.f. 1-2-1977)).

(3) A revision shall not operate as a stay of suit or other proceedings before the Court except where such suit or other proceeding is stayed by the High Court. (Inserted by the Civil Procedure Code (Amendment) Act, 1999, Section 12(ii) (w.e.f. 1-7-2002)).

Explanation :- In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceedings."

EFFECT OF STATUTORY AMENDMENT ACT, 1999

10. The Amendment Act, 1999 amends the proviso to Section 115(1), Civil Procedure Code so as to delete Clause (b). The effect would be to bar interference in revision against interlocutory orders, even where there is a failure of justice or irreparable injury. The proposal is intended to cut the number of revisions or petitions. However, it is to be noted that the effect would be to bar interference in cases of serious injustice resulting from an interlocutory order. For example, an order of the trial Court refusing an amendment of pleadings, even where the amendment is sought because of intervening events or to rectify a *bona fide* mistake or to remedy unintentional omission to implead a party or unintentional omission to take a plea in defence which is left out, would cease to be revisable after the amendment. Similarly, an order rejecting a document as inadmissible would cease to be revisable, even though the document may be very material. (Such order can possibly be made a ground of attack in appeal against the ultimate decree, but the lapse of time would itself cause serious injustice).

11. The provision to sub-section (1) of Section 115, Civil Procedure Code introduced by the Civil Procedure Code (Amendment) Act, 1976, restricts the High Court's power of revision created by sub-section (1) of Section 115 to those cases which fall within Clauses (a) and (b) of the proviso. The proviso, therefore, operates to limit or restrict the general power of revision created by sub-section (1) of Section 115. The proviso does not even remotely imply or mean that an order made during the pendency of a suit or proceedings, irrespective of whether it decides a right or obligation or not, is "any case which has been decided" within the meaning of sub-section (1) of Section 115. Similarly, the Explanation introduced by the Civil Procedure Code (Amendment) Act, 1976 does not enlarge and extend the meaning of the expression "any case which has been decided" to every interlocutory order irrespective of whether it decides or adjudicates upon a right or obligation or not. The Explanation merely lays down that an interlocutory order may also constitute "any case which has been decided". It does not lay down that a decision or adjudication or a right or obligation is not necessary to constitute "any case which has been decided".

12. The ambit and scope of the revision under Section 115 is very much limited to the

extent that when it appears to the High Court that the subordinate Court has exercised the jurisdiction not vested in it by law or has failed to exercise the jurisdiction so vested or to have acted in exercise of its jurisdiction illegally or with material irregularity and in the opinion of the High Court, the order under challenge, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made, then the High Court could interfere in the order under challenge by exercising the power conferred on it under Section 115. (Clause (b) of proviso to Section 115(1), Civil Procedure Code containing the words "the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made" has been omitted by the Amendment Act, 1999).

13. The nature, quality and extent of appellate jurisdiction being exercised in the first appeal and of revisional jurisdiction are very different. The limits of revisional jurisdiction are prescribed and its boundaries defined by Section 115. Under this section, the revisional jurisdiction is to be exercised by the High Court in a case in which no appeal lies to it from the decision of a subordinate Court, if it appears to it that the subordinate Court has exercised a jurisdiction not vested in it by law or has failed to exercise the jurisdiction illegally or with material irregularity. The exercise of the power of revision is, thus, confined to questions of jurisdiction. While in a first appeal, the Court is free to decide all questions of law and facts which arise in the case, in the exercise of its revisional jurisdiction, the High Court is not entitled to re-examine or re-assess the evidence on record and substitute its own findings of facts for those of the subordinate Court.

14. The remedy under Section 115, Civil Procedure Code being a discretionary remedy, the High Court need not interfere with an order without jurisdiction or illegal order where substantial justice has been done.

15. A revisional jurisdiction cannot be equated with appellate powers in all its parameters. The power to call for and examine the records is for the purpose of the High Court to satisfy itself as to the "legality, regularity, and propriety" of the order of the lower authority.

16. The provisions of sub-section (2) of Section 115 of Civil Procedure Code are directory in nature empowering the Court to dismiss revision, if alternative remedy against the order impugned in the revision, by way of appeal even before the District Court is available. It is discretionary power under Section 115 (2) of Civil Procedure Code to refuse, to vary or reverse the order, if appeal did lay to District Court,

provided the Court exercises discretion judiciously keeping in view primarily that merely on account of technicality, no justice is caused nor therefrom emanated failure of justice or irreparable loss to innocent litigant at that stage, nor is there delay in the decision or delay in justice.

17. Apart from above position of law, there are two authorities of the Hon'ble Supreme Court which need to be mentioned here.

18. The Hon'ble Supreme Court in the case of *Shiv Shakti Co-operative Housing Society, Nagpur v. Swaraj Developers reported¹in* has issued guidelines as to when revision petition is maintainable. The Hon'ble Supreme Court in the case of *Shiv Shakti Co-operative Housing Society* has observed that the question to be asked is whether the order in favour of the party applying for revision in the Courts below would have given finality to the suit or other proceedings and if answer is in the affirmative, then revision petition is maintainable, otherwise not.

19. Similarly, the Hon'ble Supreme Court in another case reported in (*Surya DevRai v. Ram ChanderRai*,² has further observed that the amendment made in the Civil Procedure Code does not effect the jurisdiction of High Court under Articles 226 and 227 of the Constitution of India and, therefore, party can seek remedy through writ of *certiorari* in the High Court.

20. Thus, the legal position in respect of maintainability of revision petition can be summarized in the following manner:

(i) That the Civil Revision Petition under Section 115, Civil Procedure Code is maintainable against the order if that order amounts to finality of the suit or other proceedings, otherwise, no revision petition lies against the interlocutory order and if revision lies that would be subject to following propositions :

(a) That the civil revision petition is maintainable where no appeal lies and if Subordinate Court appears :

(i) to have exercised a jurisdiction not vested in it by law, or

(ii) to have failed to exercise a jurisdiction so vested, or

(iii) to have acted in the exercise of its jurisdiction illegally or with material irregularity.

(ii) The power of the High Court under Arts. 226 and 227 of the Constitution of

India is always in addition to the revisional jurisdiction conferred on it. The curtailment of revisional jurisdiction of the High Court under Section 115, Civil Procedure Code by Amendment Act 46 of 1999 does not take away the constitutional jurisdiction of the High Court to issue a writ of *certiorari* under Articles 226 and 227 of the Constitution of India.

21. In the present case, since by the impugned order dated 18-12-2003, the right of the defendants to defend the suit was closed, therefore, as per the law laid down by the Hon'ble Supreme Court in Shiv Shakti Co-operative Housing Society (supra), the impugned order amounts to finality of the suit as the right of defendants (applicants) to defend the suit was closed and thus, this revision petition is maintainable. Apart from this, in my opinion, the order refusing the leave to defend or order granting leave to defend on the condition of furnishing surety and indemnity bond is revisable and when it is revisable, the present revision petition is maintainable and in the present case the position is more strong as the order dated 15-11-2003 by which leave to defend was granted to the defendants, was later on refused through order dated 18-12-2003 and therefore, from every point of view, the present revision petition is maintainable.

ON MERITS

22. Before proceeding further something should be said about sub-clause (3) of Rule 3 of Order 37, Civil Procedure Code. For convenience sub-clause (3) of Rule 3 of Order 37 is quoted hereunder:

"3. Procedure for appearance of defendant :-

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5. The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just :

Provided that leave to defend shall not be refused unless Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous and vexatious :

Provided further that, where a part of the amount claimed by the plaintiff is

admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court."

23. The Hon'ble Supreme Court in the case of *Mechalec Engineers and Manufacturers v. Basic Equipment Corporation* reported in, ⁴has laid down the following principles for giving leave to defend under post Amendment Order 37, Civil Procedure Code.

(a) If the pleadings and the parties' affidavits disclose a triable issue, the leave should ordinarily be granted unconditionally;

(b) If the facts disclosed by the defendant indicate that he has no defense or his defense is; frivolous or vexatious the leave may be refused.

(c) If there is a genuine doubt about there being a triable issue or if the defiance is plausible but improbable, the leave may be granted by putting the defendant on terms.

(d) If a part of the claim is admitted, the leave should not be granted unless the admitted amount is deposited by the defendant.

(e) The Court should see that the grant of leave should not defeat the object or the rule which is expeditious disposal of the summary cases; and

(f) The real and genuine triable issues are not shut out by unduly harsh orders as to deposit.

24. From the first proviso under sub-Rule (5) of Rule 3 of Order 37, it is clear that leave to defend cannot be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defense intended to be put up by the defendant is frivolous and vexatiously.

ON CONDITIONAL LEAVE

25. A reading of the provisions under Order 37, Rule 3(5) Civil Procedure Code makes it abundantly clear that the Court while granting leave to defend may impose certain conditions as may appear to the Court to be just. The provision has to be construed to say that what all required to be seen by the Court below is whether imposing a condition is warranted in a given set of circumstances and if the Court is satisfied that permitting the petitioner to participate in the proceedings could be only on certain terms, an order passed by the Court in such circumstances cannot be said to

be improper.

26. Thus, leave can be granted unconditionally as well as on such terms and conditions as the Court thinks fit to be just.

27. When a discretionary order is passed by the Court on an application under Order 37, Rule 3(5) Civil Procedure Code such an order shall not be interfered with unless and until the circumstances warrant interference under Section 115 such as where in the opinion of the High Court, the order passed, if allowed to be sustained, there will be miscarriage of justice.

28. In my opinion, when the learned Civil Judge through order dated 15-11-2003 has granted leave to the defendants to defend the suit on the condition of furnishing indemnity bond as well as surety bond for a sum of Rs. 35,000/- and the same was submitted by the defendants-applicants, then further imposing a condition of submitting stamp duty on the indemnity bond to the tune of Rs. 1750/- through order dated 9-12-2003 is *per se* illegal as these bonds were made for the purpose of security and they were not being used in evidence and therefore, asking the defendants to pay stamp duty of Rs. 1750/- through order dated 9-12-2003 is nothing but illegal and the learned trial Court Judge had exceeded the jurisdiction vested in it and thus, it can easily be said that learned Civil Judge has acted in exercise of its jurisdiction illegally or with material irregularity and therefore, such an order should not be allowed to stand, as it has resulted in miscarriage of justice.

29. For the reasons mentioned above, the orders dated 9-12-2003 and 18-12-2003 passed by the learned Civil Judge are *per se* illegal and perverse and the same deserve to be quashed and set aside and this revision petition deserves to be allowed.

Accordingly, the present revision petition is allowed and the orders dated 9- 12-2003 and 18-12-2003 passed by the learned Civil Judge (Sr. Division), Badi Sadri are quashed and set aside.

Revision allowed.

Cases Referred.

1. (2003) 6 SCC 659: (AIR 2003 SC 2434)
2. 2003) 6 SCC 675: (AIR 2003 SC 3044)
3. AIR 1977 SC 577
4. AIR 1977 SC 577