

Algu Vs. Bhola and ors.

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Court : Allahabad

Decided On : May-18-2006

Reported in : 2006(3)AWC2622

Judge : Umeshwar Pandey, J.

Acts : Code of Civil Procedure (CPC) , - Sections 115 and 115(3)- Order 39, Rules 1 and 2; Code of Civil Procedure (CPC) (Amendment) Act, 1999; Code of Civil Procedure (CPC) (Amendment) Act, 1976 - Sections 32(2) and 97(3); [Constitution of India](#) - Article 226 and 227

Appeal No. : C.M. Application No. 27305 of 2006

Appellant : Algu

Respondent : Bhola and ors.

Advocate for Def. : Ramesh Singh and; Sharda Chauhan, Adv.

Advocate for Pet/Ap. : Siddhartha Varma, Adv.

Disposition : Petition dismissed

Judgement :

Umeshwar Pandey, J.

1. Heard learned Counsel for the parties.

2. This writ petition, while challenging the order of the revisional court dated 18.4.2006 (Annexure-5), involves decision upon a precise question whether a revision against an order issuing show cause notice to the defendant by the trial court on an application seeking temporary injunction by the plaintiff is maintainable in the light of the State Amendment as incorporated in Section 115 of the Code of Civil Procedure (for short the 'C.P.C.') by U.P. Act No. 14 of 2003.

3. For a brief factual background of this case it may be stated that the petitioner plaintiff filed a suit (O.S. No. 503 of 2004) in the court of Civil Judge (Jr. Div.) seeking relief of permanent injunction against the respondents defendants restraining them from interfering in plaintiffs' possession over the disputed land of plot No. 45 shown by letters A, B, C, D in the plaint map. Along with this suit the petitioner also filed an interim application under Order XXXIX, Rules 1 and 2, C.P.C. to restrain the respondents from interfering into his possession over the land in question till disposal of the suit. The trial court upon hearing the plaintiffs' counsel and on perusal of the materials available before it, passed the order dated 16.8.2004, as stated in Para 10 of the petition and directed for issuance of show cause notice to the defendants respondents fixing a date for objection and disposal of the temporary injunction matter. Aggrieved against this order of the trial court the petitioner preferred a revision before the District Judge under Section 115, C.P.C. which has been dismissed by the impugned order (Annexure-5).

4. The revisional court while dismissing the revision has also held that such revision was not competent in the light of the case law of *Raj Pal v. Richh Pal Singh and Ors.* 2006 (2) AWC 1640 : 2006 (62) ALR 278.

5. Learned Counsel for the petitioner while urging for the petition has very strenuously hammered the point that though several pronouncements of the Hon'ble Supreme Court in reference to the cases pertaining to other States, a revision against such an order of the trial court directing issue of notice on an application under Order XXXIX, Rules 1 and 2 of the C.P.C. may not be competent in view of the amended provision of Section 115, C.P.C. but such case law, if duly appreciated in the light of existing provision of Section 115, C.P.C. as amended by the U.P. State amendment (U.P. Act No. 14 of 2003), it shall not be treated as a

precedent by the Courts of this State because the legal proposition of the Apex Court in this regard had been propounded in ignorance of such amended provision of Section 115, C.P.C., as applicable in this State of U.P. Learned Counsel has further tried to stress on the point that the case law of Raj Pal (supra) referred to in the judgment of the revisional court also does not discuss the existing provision of Section 115, C.P.C. as applicable in the present case. Learned Counsel has further made an endeavour to distinguish the judgment of mine dated 1.2.2006 delivered in Writ Petition No. 6432 of 2006, Mohd. Rais Khan v. Shri Naseeb Ullah Khan and Ors. 2006 (2) ALJ 790, which has also discussed the U.P. Amendment in a context that a revision against such an order issuing notice by the trial court, is not competent. It would be quite relevant for the purpose to have a detailed appreciation of the provision pre and post C.P.C. (Amendment) Act, 1999 of Section 115, C.P.C. For that purpose the provisions in chronological order as appear in the statute book are quoted below. Before subjecting to its first amendment in 1976 by virtue of Section 97(3) of C.P.C. (Amendment) Act, 1976, the Section 115 in its original note was as below :

Section 115, C.P.C.-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 the exercise of its Jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit.

6. In the chain of amendment, the provision, which was brought in Section 115 of the Code by 1976 amendment by virtue of Section 97(3) of the Code of Civil Procedure (Amendment) Act, 1976 (in short the old amendment Act) is as below :

- (1) 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 order proceeding, except where-

- (a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding, or
- (b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

(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.

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

7. The aforesaid Section 115, C.P.C. was further made subject to amendment by Code of Civil Procedure (Amendment) Act, 1999 (in short the amendment Act) which is given as below :

(1) 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 the 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 order proceeding, 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 proceeding.

(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.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

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

8. After central amendment recorded in Section 115, C.P.C. by the Amendment Act, the State of U.P. also introduced its own amendment in Section 115, C.P.C. by the U.P. Act No. 14 of 2003 and now as applicable in this State the section is as below :

115. Revision. - (1) A superior court may revise an order passed in a case decided in an original suit or other proceeding by a subordinate court where no appeal lies against the order and where the subordinate court has-

(a) exercised a jurisdiction not vested in it by law ; or

(b) failed to exercise of its jurisdiction so vested ; or

(c) acted in exercise of its jurisdiction illegally or with material irregularity.

(2) A revision application under Sub-section (1), when filed in the High Court, shall contain a certificate on the first page of such application, below the title of the case, to the effect that no revision in the case lies to the district court but lies only to the High Court either because of valuation or because the order sought to be revised was passed by the district court.

(3) The superior court shall not, under this section, vary or reverse any order made except where,-

(i) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding ; or

(ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made.

(4) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the Supreme Court.

Explanation I. - In this section,-

(i) the expression 'superior court' means-

(a) the district court, where the valuation of a case decided by a Court subordinate to it does not exceed five lakh rupees ;

(b) the High Court, where the order sought to be revised was passed in a case decided by the district court or where the value of the original suit or other proceedings in a case decided by a Court subordinate to the Court exceed five lakh rupees.

(ii) the expression 'order' includes an order deciding an issue in any original suit or other proceedings.

Explanation II. - The provisions of this section shall also be applicable to orders passed, before or after the commencement of this section, in original suits or other proceedings instituted before such commencement.

9. The amended provision of Section 115, C.P.C. by the Central Amendment Act of 1999 was made effective from 1.7.2002, whereas the U.P. amendment has been incorporated thereafter by Act No. 14 of 2003. A comparison of two provisions of Section 115, C.P.C. (after old Amendment Act and after Amendment Act) shows that while Clause (a) of the proviso of the unamended provision has been retained in its totality, in the amended provision Clause (b) of the proviso has been omitted. It is to be noted that prior to the amendments to the Code by the Old Amendment Act, the power of revision was wider. By the amendment, certain positive restrictions were put on the High Court's power to deal with revisions under Section 115. Prior to the said amendment, it was not strictly necessary that the impugned order would have the result of finally deciding the lis or the proceedings in the lower courts. In fact, the power could be exercised in any case where jurisdictional error was committed by the original court or where substantial injustice had resulted. By the Old Amendment Act, the condition of finally deciding of [is in the proceedings in the subordinate court was introduced. The proviso which was introduced contains qualifications which are pre-requisites before exercise of power under Section 115. They were Clauses (a) and (b) of the proviso. Logically, the High Court has suo motu power to revise an order where total failure of justice would have arisen or where irreparable loss would have caused to the parties against whom it was made. These powers were retained by Clause (b). Though, after 1976, the exercise of power was somewhat circumscribed, it was not totally curtailed. In other words, the High Court could even after 1976 amendment interfere in cases where there was failure of justice or irreparable loss caused, the nature of the proceedings was substantially changed and the suo motu power of the High Court was retained. It was in the nature of power of superintendence of the High Court over the subordinate courts. In the Amendment Act of 1999, Clause (b) of the proviso to Sub-section (1) of Section 115, C.P.C. has been omitted. It is emphasised by the learned Counsel for the petitioner that the Apex Court while interpreting Section 115, C.P.C. has held that the scope of revision before the High Court has been further minimised and that aspect of the matter has led the Hon'ble Supreme Court in the case of Shiv Shakti Co-op. Housing Society, Nagpur v. Swaraj Developers and Ors. 2003 (2) SCCD 651 : 2003 (3) AWC 2198 (SC) : 2003 (51) ALR 509, to lay down a proposition that

an order directing issue of notice on an application under Order XXXIX, Rules 1 and 2, C.P.C. by the trial court would not be an order subject to the revisional Jurisdiction of the High Court. Learned Counsel while supporting his view has made stress that Hon'ble Supreme Court did not have the provision as incorporated after amendment of Section 115. by the State amendment as applicable to the State of U.P. and therefore, the case law of Shiv Shakti (supra) would not be available to the courts of U.P. exercising jurisdiction within the State as binding precedent.

10. On perusal of the amended provision of Section 115. , C.P.C. as is available after 2003 State Amendment, it is notable that the provision is not totally parallel or identical to the amended provision of the said Section 115. as available after Central Amendment Act, 1999. In the Central amendment Sub-section (1) of Section 115. , C.P.C. retains the proviso permitting interference by the High Court in its revisional jurisdiction only in cases where the impugned order gives finality to the suit or other proceeding and if there is no such finality the scope of interference by the High Court under Section 115. , C.P.C. in such interim order, has been totally curtailed. After the old Amendment Act came into force there were two conditions, which had been retained in the proviso- (a) the order if it had been made in favour of the party applying for revision would have finally disposed of the suit or other proceeding or (b) the order if allowed to stand would occasion failure of Justice or cause irreparable injury to the party against whom it was made. Clause (b) of the said proviso has now been omitted by the Amendment Act, 1999 and it is in this view of the matter that the Hon'ble Supreme Court in the case of Shiv Shakti (supra) has categorically held that those orders which are interim in nature cannot be the subject-matter of revision under Section 115. , if the same does not finally decide the Us. There is marked distinction between Section 97(3) of the old Amendment Act and Section 32(2)(i) of the Amendment Act. The U.P. State Amendment to Section 115. as incorporated in 2003 has, however, retained both Clauses (a) and (b) of the old Amendment Act in form of 'Clauses (i) and (ii) of Sub-section (3) of Section 115. . Keeping in view the availability of Clause (ii) of Subsection (3) it has been strenuously argued by the learned Counsel for the petitioner that even though this Court has in earlier cases like Bhagwati Prasad Lohar and Ors. v. State of U.P. 2005 (3) ALR 512 ; Brij Bhushan v. District Judge,

Saharanpur and Ors. 2004 (1) AWC 502 ; Rajpal Singh (supra) ; Rajendra Singh and Ors. v. Brij Mohan Agarwal and Anr. 2003 (5) AWC 3857 : AIR 2003 All 180 and Mohd. Rals Khan (supra) has held that no revision under Section 115. would be competent against an order of the trial court issuing simplicitor notice to the defendants on temporary injunction application, yet those orders and judgments are not binding precedents because the U.P. State Amendment to provision of Section 115. , C.P.C. as introduced by U.P. Act No. 14 of 2003 has not been considered and the Judgment laying down such proposition are per incuriam and per ignoratium.

11. The Apex Court while dealing with such cases where essential provision has been overlooked or not pointed out before the Court and the decision has been passed and conclusion of law has been given otherwise without consideration of a particular point of law involved in the matter and the decision is not founded on reasons nor it proceeds on consideration of issue in the light of existing provisions, it has been observed that such proposition is not to be deemed to be a law declared to have binding effect as is contemplated by Article 141 of [Constitution of India](#). This decision of the Hon'ble Supreme Court is given in State of U.P. and Anr. v. Synthetics and Chemicals Ltd. and Anr. : 1993(41)ECC326 . The relevant paras 40 and 41 of the judgment being exhaustive on this point are reproduced below where the Apex Court has vividly dealt with the point:

40. 'Incuria' literally means 'care-lessness'. In practice per incuriam appears to mean per ignoratium. English Courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (Young v. Bristol Aeroplane Co. Ltd.). Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In Jalsri Sahu v. Rajdewan Dubey, this Court while pointing out the procedure to be followed when conflicting decisions are placed before a Bench extracted a passage from Halsbury's Laws of England incorporating one of the exceptions when the decision of an appellate court is not binding.

41. 'Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. 'A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind.' (Salmond on Jurisprudence 12th Edn., P. 153). In Lancaster Motor Company (London) v. Bremith Ltd., the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in Municipal Corporation of Delhi v. Gurnam Kaur. The Bench held that, 'precedents sub-silentio and without argument are of no moment.' The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the Judgment without any occasion is not ratio decidendi. In B. Shama Rao v. Union Territory of Pondicherry, it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law.

12. On perusal of the judgments rendered by this Court as referred to above including the one given by me in the case of Mohd. Rais Khan (supra), it becomes quite crystal that Clause (it) of Sub-section (3) of Section 115. , C.P.C. as available by virtue of U.P. Amendment of 2003 has not at all been considered by the Court in those judgments. Obviously, in the case of Shiv Shakti (supra) when this amended provision as available in U.P. State, was not under consideration by the Apex Court, the judgment so rendered by it would not be a precedent on this law

point, available to the Courts functioning within the State of U.P. Therefore, the decisions given by this Court on the basis of law laid down in Shiv Shakti (supra) that an order passed by the trial court issuing show cause notice to the defendants, since it does not result into finality of the matter, would not be subject to revisional jurisdiction of the High Court or the District Judge as the case may be, should not be treated as binding precedents for any further decision to be given on this line by the courts functioning within this State. Thus, on overall consideration of the entire legal position as appearing in the light of different case law discussed above, it is found that an order directing simplicitor issuance of notice to the defendants on an application for temporary injunction if occasions failure of justice or causes irreparable injury to the party against whom it is made, when challenged under Section 115. , C.P.C., such revision cannot be said to be wholly incompetent, not maintainable or without jurisdiction in the light of those legal precedents, which do not discuss or consider the aforesaid provisions of Clause (it) of Sub-section (3) of Section 115. , C.P.C. Of course the revisional court can dismiss the revision in limine in case it finds that such an order would not occasion failure of justice or cause irreparable injury to the revisionist. But that would depend upon the merits of each case, and which can also be perceived by the Courts at the very admission stage of the revision.

13. As regards the present case, the petitioner plaintiff had claimed an area of 3 biswa in plot No. 45 as his property over which he is said to be in possession and have a house constructed thereon. If the trial court had not preferred to pass an ex parte injunction order on the petitioner's application given under Order XXXIX, Rules 1 and 2, C.P.C. and had observed in its order for directing issue of notice to the defendants for such hearing upon the matter, I do not find that any ex parte protection was at all necessary to the petitioner while issuing notice to the defendants and the order was wholly justified having been passed under Order XXXIX, Rule 3, C.P.C. The revisional court also observes that there was no material on that particular date available before the Court making it essential to pass an ex parte injunction order and I do not find that order of the court below requires any interference in extraordinary Jurisdiction or the supervisory jurisdiction under Article 226 or 227 of [Constitution of India](#) by this Court.

14. This petition does not appear to have any force and is hereby dismissed.

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