

Khem Chand Vs. Hari Shingh

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Court : Delhi

Decided On : May-05-1978

Reported in : AIR1979Delhi7

Judge : Dalip K. Kapur, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 115 and 115(2) - Order 37, Rule 4; Code of Civil Procedure (CPC) (Amendment) Act, 1976; [Constitution of India](#) - Article 227; [Constitution of India](#) (43rd Amendment) Act

Appeal No. : Civil Revn. No. 376 of 1977

Appellant : Khem Chand

Respondent : Hari Shingh

Advocate for Pet/Ap. : Madhusudan Sharma, Adv

Judgement :

ORDER

1. This is a Revision directed against the judgment and decree recorded in a suit for recovery of Rs.9,495/- which was decided under O.37 of the Civil P.C. Leave to defend was refused and a decree for Rs.7,000/- with costs was passed on 6th May, 1977. The present Revision is under S. 115 of the Civil P.C. There was some doubt regarding the maintenance of a Revision under S. 115 of the Code in a case like the present, because at one time some Courts had taken the view that a

Revision could be brought to the High Court in a case where an appeal lay to some other Court and even a decree could, be set aside in this way. This doubt has now been set at rest by the amendment to the Civil P.C. effective from 1st Feb. 1977.

2. In order to explain the doubt and its resolution, it may be useful to refer to the opening words of S. 115 of the Code which read: -

'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, etc

Thus, a Revision is maintainable in a case in which no appeal lies to the High Court. At present, appeals of the value of Rs.7,000/- which is the jurisdictional value of the present matter would lie to the Court of the District Judge and not to the High Court. Hence, the Revision would be maintainable under S. 115(1) but even earlier it was the practice not to interfere in such Revisions because an appeal would lie to the District Judge, The new amendment to the Civil P.C, has now clarified that under this Section the High Court has no power to interfere in Revision if an appeal lies to some other Court. This clarification is contained in sub-section (2) of S. 115 that is newly introduced. It reads: -

'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.'

This means that, the present Revision even if maintainable cannot lead to any relief to the petitioner. Having decided this, it is necessary to mention the error, which has occurred in the judgment of the trial Court, and also, I make some reference to the remedy available under the present law.

3. The suit from which the present Revision has arisen was instituted on 17th Feb 1977, which was after the Civil P.C. (Amendment) Act, 1976 had come into force. This meant that the present suit had to be tried under O.37 of the Code as newly amended and not under O.37 as it previously existed. The mistake made by the

Court was to issue summons under the old Code. There is a clear admission in the order sought to be revised that the summons was not issued in the amended form No.4 appearing in Appendix B to the First Sch. of the Code, but was issued in the previous form. The difference in the two procedures is quite marked. Under the Act as it applied before 1st Feb. 1977, the defendant had to appear and file an application for leave to defend, but in the present form only appearance has to be put in and leave to defend has not to be applied for immediately. Unfortunately, the Court served the wrong documents with the result that the defendant was forced to apply for leave to defend within ten days, as he was required to do under the amended Civil P.C. The Court thereupon refused to hear the defendant's plea that he had been served wrongly and he should be given more time. In fact, he should have been allowed to file an application for leave to defend after the plaintiff had taken out a summons for judgment as is required by the amended procedure.

4. It is necessary now to state the difference between the two procedures, i.e., the procedure as it existed before 1st Feb. 1977 and the procedure as now applicable. Firstly, previously only suits on bills of exchange, Hundis and promissory notes could be brought under Order 37.

Now some other suits for liquidated claims of money are also maintainable under O.37. Secondly, previously, the defendant had to apply for leave to defend within ten days of service, but now he has only to put in appearance. Thirdly, after the defendant puts in appearance, he has to give notice to the plaintiff and then, the plaintiff has to take out a summons for judgment in form No.4-A. The period of ten days for filing the application for leave to defend is calculated from the date of service of the summons. Fourthly, the law regarding how the leave to defend has to be given has been varied and fifthly, if part of the claim is admitted, the defendant has to deposit that amount before leave to defend can be granted. These five changes show that the procedure under the new Code is if not essentially different, at least markedly different.

5. The defendant brought to the notice of the Court that he had been served under the wrong procedure and he also took up the position that the promissory note on which the suit was based was without consideration to the extent of Rs.4,000/- for

reasons disclosed in his application for leave to defend. This means that the amount of Rs.3,000/- had to be deposited as a condition for getting leave to defend and the Court had to record a positive finding that there was nothing in the defense and it was only a vexatious defense.

6. As a matter of fact when the summons was in the wrong form, the learned Court should have insisted on a summons for judgment being taken out and should have allowed the defendant time to file a fresh application for leave to defend after the summons had been taken out. The defendant has clearly been made the victim of the Court's own error and it is well-known that no person can be made to suffer because of an error of the Court. Instead of attempting to rectify the error, the learned Subordinate Judge chose to say that it was the defendant's fault for applying to leave to defend and having so applied, he was estopped from raising the point that there was a procedural error in as much as the unamended Code was being sought to be applied instead of the amended Code.

7. It is quite clear to me that the order recorded by the Subordinate Judge is unsupportable in law and is not in accordance with equity or good conscience. However, as I have just said, I find that I have no jurisdiction to interfere with the order in Revision because of the amendment to S. 115 of the Code. At the same time, I find that I am unable to interfere under Art. 227 of the Constitution because the 43rd Amendment of the Constitution has not restored the power the High Court to interfere judicially under Art. 227. This means that in spite of the order being wrong, I find that I am unable to accept this Revision either under S. 115 of the Code or under the Constitution. I may say that if the power of judicial superintendence had not been cut down as per the 42nd Amendment, I would have interfered under Art. 227.

8. The only remedy then available to the petitioner was to file an appeal before the District Judge, but no such appeal has been filed. This brings me to the question whether there is any other course open to the petitioner. I notice that in the admission order in this case, Deshpande J. had stated that the petitioner was advised to make an application under O.37, R.4 to the Court. I find that that is a remedy open to the petitioner, because the provisions of O.37, R.4 are to the

following effect: -

'After decree the Court may, under special circumstances, set aside the decree, and If necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.' Though, I would not like to predict what the Court should do, I feel that in a case like the present, the trial Court should apply the amended Civil P.C. with all its variations and stay or set aside execution Of the decree and decide whether leave to defend has to be given under the amended provisions of O.37. In order to guide the trial Court's exercise of discretion in this matter, I would bring to that Court's notice the fact that under O.37, R.3 as it existed, leave to defend had to be given upon affidavit 'which disclose such facts as would make it incumbent on the holder to prove consideration or such other facts as the Court may deem sufficient to support the application'. But, under the present Code, 'leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defense to raise or that the defense intended to be put up by the defendant is frivolous or vexatious'. The second proviso to O.37, R.3 (5) provides that if a part of the amount claimed by the plaintiff is admitted as due, leave to defend shall not be granted unless the amount as admitted due is deposited by the defenant in the Court. The procedure that should be followed by the trial Court is to call upon the plaintiff to take out a summons for judgment in form 4-A and if the defendant moves an application for leave to defend which is substantially the same as before, the Court should consider whether leave should be given and if leave is to be given, it should be considered whether any amount is to be deposited by the defendant. If of course, the application for leave to defend is different, then the Court will consider that particular application. I am making these observations because there is an application under O.37, R.4 pending before the trial Court which is still undisposed of and this case presents some defect which cannot be rectified by a revisional order in view of this Court's lack of jurisdiction in this matter.

9. With the above observations, this Revision Petition is dismissed. No costs as there is no appearance for the other side.

10. Petition dismissed.

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