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Deepa Vs. Laly Mathew

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Court : Kerala

Decided On : Nov-21-2002

Reported in : 2003(1)KLT87

Judge : K. Padmanabhan Nair, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 94, 115 and 141 - Order 23 - Order 41 - Order 47

Appeal No. : C.R.P. No. 1673 of 2002

Appellant : Deepa

Respondent : Laly Mathew

Advocate for Def. : T. Krishnna Unni and;K.K. Mohammed Ravuf

Advocate for Pet/Ap. : K. Jagadeeschandran Nair and; J. Krishnakumar, Advs.; S.

Judgement :
ORDER

K. Padmanabhan Nair, J.

1. Defendants 2 and 3 in a suit for declaration of title, recovery of possession and injunction are the revision petitioners. This C.R.P. is filed against the order passed

by the learned Sub Judge dismissing an application filed by the revision petitioners to send two documents containing the disputed signature and handwriting for expert opinion.

2. Respondents 1 and 2 filed the suit for declaration of title and recovery of possession and for consequential injunction. According to respondents 1 and 2, they are the legal heirs of deceased Anil Kumar and they alone are entitled to succeed the estate of Anil Kumar. The case put forward by respondents 1 and 2 in the plaint is that late Sri. Anil Kumar married the first respondent in accordance with the provisions of the Special Marriage Act and in that wedlock the second respondent was born. The first defendant who is the 4th respondent in the C.R.P. is the mother of deceased Anil Kumar. It is alleged that the suit properties originally belonged to Anil Kumar who died on 17.7.1995 in a road accident and after the death of Anil Kumar, all his assets devolved upon respondents 1 and 2. It is alleged that the first revision petitioner put forward a claim to the estate of the deceased Anil Kurnar on the ground that she is the widow of the deceased and the second respondent is the child born in that wedlock. It was contended that even if Anil Kumar and the first revision petitioner underwent any form of marriage that is void due to the subsistence of an earlier marriage between the first respondent and the deceased Anil Kumar. The revision petitioners entered appearance and disputed the marriage between the deceased and first respondent. They filed I.A. No. 381 of 2000 for sending two documents which according to respondents 1 and 2 contain the signature and handwriting of deceased Anil Kumar for comparison by an expert. It is alleged that the signature and handwriting purporting to be that of the deceased contained in the notice given under the Special Marriage Act were forged. The prayer was objected to by the learned counselappearing for respondents 1 and 2 stating that the certificate of marriage issued by the Marriage Officer appointed under the Special Marriage Act shall be deemed to be conclusive proof and hence the documents cannot be sent for expert opinion. The learned Subordinate Judge after hearing both sides dismissed that application. That order is under challenge in this Civil Revision Petition.

3. Sri. K. Jagadeeschandran Nair, the learned counsel appearing for the revision petitioners, argued that even though under Section 13(2) a conclusiveness is

attached to the certificate issued by the Marriage Officer, that is not a ground to reject the application filed by the revision petitioners as they are challenging the genuineness of the document. The learned counsel appearing for the revision petitioners relied on a decision reported in Altaf Hussain v. Nasreen Zahra (AIR 1978 All. 515) and argued that when the very identity of the person who is purported to have signed the notice and the certificate is disputed, no conclusiveness can be attached. It is contended that in this case the specific case put forward by the revision petitioners is that the signature and handwriting contained in the notice and the registers are not that of the deceased. It is argued that by disallowing the application, the fate of the suit itself is decided. Hence this is a fit case in which this Court shall interfere under Section 115 C.P.C. and allow the revision petition.

4. When the Civil Revision Petition came up for hearing, Sri. T. Krishnanunni, the learned counsel appearing for respondents 1 and 2 has raised a preliminary objection that in view of the proviso to Section 115(1) of the Civil Procedure Code, the Civil Revision Petition is not maintainable. It is argued that the order under challenge is only an interlocutory one and hence the Civil Revision Petition is only to be dismissed.

5. Considering the importance of the matter, notice was issued to the Bar Association informing that any Advocate who is interested in helping the Court regarding the effect of the proviso may appear and argue the case when the case comes up for hearing. In response to the notice a large number of Advocates appeared and highlighted various aspects regarding the effect of the proviso.

6. I heard learned counsel Shri. S.V. Balakrishna Iyer, appearing for the Bar Council of Kerala. I heard the arguments of learned Sr. Counsel Sri. K.C. John, Sri. P.N.K. Achan, Sri. S.V.S. lyer and learned counsel Sri. R.D. Shenoi, Sri. A.P.Chandrasekharan, Sri. Thottathil B. Radhakrishnan, Sri. G.S, Reghunath, Sri. K.T.Sankaran, Sri. N. Subramaniarn, Dr. P.S. Krishna PilSai, Sri. K.V. Sohan, Sri. T.G.Rajendran, Sri. V.R. Kesava Kaimal, Sri. Bechu Kurian Thomas, Sri. K. Divakaran Nair, Sri. Jacob Varghese, Sri. D. Anil Kumar, Smt. M. LalithaNair, Sri. Om. Prakash, Sri. P. Chandrasekhar, Sri. G. Rajappan Pillai and Sri. N.J. Antony.

7. A learned single Judge of this Court in Madhavan v. Narayana Das (2002 (3) KLT 493) had taken a view that no revision would lie unless the order sought to be revised if it had been made in favour of the party applying for revision, would havefinally disposed of the suit or other proceeding. It was also held that the amendment to Section 115 of the C.P.C. will apply to all pending proceeding which have not been finally disposed of prior to 1.7.2002. The learned counsel appearing for the respondents argued that in view of the principles laid down in Madhavan 's case this Civil Revision Petition is liable to be dismissed. It is submitted that in Phool Singh v. Mavlla @ Bhavaliaya (2002 (3) MPLJ 327), K.R. Subbaraju v. Vasavi Trading Corporation (ILR 2002 Kar. 3513) and Rajabhau v. Dinkar (2002 (3) Mh. L.J. 921) also it is held that no Civil Revision Petition is maintainable against interlocutory orders. In Nagorao @ Arun v. Narayan (2002 (4) Mh. L.J. 615) it is held that a Civil Revision Petition is not maintainable against an order passed in appeal granting or refusing injunction in view of the amendment.

8. In view of the preliminary objection raised by Sri. T. Krishnanunni, learned counsel for respondents 1 and 2, I shall deal that point first. The Code of Civil Procedure, 1859 did not contain any provision for exercise of the revisional powers by the High Court. When the Charter Act of 1861 was passed establishing the High Courts in the Presidencies of Bengal, Bombay and Madras a power of superintendence was conferred on them over subordinate courts subject to their appellate jurisdiction by Section 15 of that Act. But before the actual constitution of the High Courts, the Sudder Courts were empowered by Section 35 of Act XXIII of 1861 to call for the records of any case decided in appeal by the Subordinate Courts and in which no further appeal lay and it is shown that the Subordinate Court appeared to have exercised a jurisdiction not vested with it. That section is the foundation of the present section (See Commentaries on the Code of Civil Procedure, 1908 as amended by Act 104 of 1976 (page 505) 9th Edn. Vol. 2 by W.W. Chitaley and V.B, Bakhale). The section as it stood originally contained only two clauses. The third clause was added in 1879. Before the amendment to Section 115 effected by C.P.C. (Amendment) Act 104 of 1976 it reads as follows:-

Revision. (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,

(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:

By the Amendment Act of 1976, the proviso has been added to Section 115(1). Sub-section (2) was also added which reads as follows:-

'Provided that the High Court shall not, under the section vary or reverse any order made, or any order deciding an issue, in the course of a suit or other 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 an issue, in the course of a suit or other proceeding.'

Section 12 of the C.P.C. (Amendment) Act, 1999 amended Section 115 again. The existing proviso was substituted and Sub-section (3) was also added after Sub-section (2) but before the Explanation. The proviso and section read as follows:-

'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 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 proceedings.'

(2) .....

(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.'

There has been a lot of controversy as to what is the meaning of the words 'any case which has been decided.' The Privy Council had considered the meaning of the words 'case decided' in Bala Krishna Udayar v. Vqsudeva Aiyar (AIR 1917 PC 7) and Ryots of Garbandho v. Zamindar of Parlakimedi (AIR 1943 PC 164). The controversy was set at rest by the Supreme court in Keshardeo Chamria v. Radha Kissen Chamria and Ors. (AIR 1953 SC 23) in which it was held thus:-

'Section 115, Civil Procedure Code, applies to matters of jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it, and if a subordinate court had jurisdiction to make the order it has made and has not acted in breach of any provision of law or committed any error of procedure which is material and may have affected the ultimate decision, the High Court has no power to interfere, however profoundly it may differ from the conclusions of that court on questions of fact or law.'

The scope of Section 115(1) Civil Procedure Code was considered by a Full Bench of the Allahabad High Court reported in Ramrichpal Singh v. Dayanand Sarup (AIR 1955 All. 309 (FB)). The question arose in that case was whether an order passed under Section 10 C.P.C. for stay of suit is a Case decided or not. It was held as follows:-

'An application under Section 10 has nothing to do with the decision of the question in controversy between the parties in a case. In that sense it cannot be said to be ancillary to theproceedings. In an application under Section 10 the defendant admits that the Court has jurisdiction to entertain the suit. All that he prays for is that since the matters in issue are directly and substantially in issue in a previously instituted suit the hearing of the suit should remain stayed. The Court continues to have seisin of the case and ultimately it has to dispose it of according

to law. Viewed from this point of view, the decision of a question under Section 10, where the Court has to consider whether there is a previously instituted suit or not and whether the matters in issue are directly and substantially in issue in that other suit or not, are both questions which have to be determined judicially and if the decision of the two questions is in favour of the defendant, the Court has to stay the suit as the provisions of Section 10 appear to be mandatory. Hence an order under Section 10 is a case decided.'

In paragraphs 10 and 11 of the judgment, the Full Bench has traced out the history of Section 115. The meaning of the words 'case decided' was considered by the Apex Court in Major S.S. Khanna v. F.J. Dillon (AIR 1964 SC 497). After an elaborate survey of the case history the Apex Court approved the decision of the Privy Council in Balakrishna Udayar's case (supra). The Apex Court found that the meaning of the expression 'case' must be sought in the nature of the jurisdiction conferred by Section 115 and the purpose for which the High Courts were invested with it. The Apex Court considered the historical evolution of the powers of High Courts' supervisory jurisdiction. It was held as follows:-

'The expression 'case' is a word of comprehensive import: it includes civil proceedings other than suits, and is not restricted by anything contained in the section to the entirety of the proceeding in a civil court. To interpret the expression 'case' as an entire proceeding only and not a part of a proceeding would be to impose a restriction upon the exercise of powers of superintendence to which the jurisdiction to issue writs, and the supervisory jurisdiction are not subject, and may result in certain cases in denying relief to an aggrieved litigant where it is most needed, and may result in the perpetration of gross injustice. The expression 'case' includes a suit, but in ascertaining the limits of the jurisdiction of the High Court, there would be no warrant for equating it with a suit alone.'

The scope of Section 115 of the Civil Procedure Code was again considered by the Apex Court in Prem Bakshi v. Dharam Dev. (2002 (2) SCC 2). It was held as follows:-

'In Major S.S. Khanna v. Brig. F.J. Dillon (AIR 1964 SC 497:1964 (4) SCR 409) this Court considered the expression 'any case which has been decided' in Sub-

section (1) of Section 115 C.P.C. and held that the expression 'case' is a word of comprehensive import and includes civil proceedings other than suits and is not restricted by anything contained in the said section to the entirety of the proceeding in a civil court and to interpret the expression 'case' as an entire proceeding only and not a part of the proceeding would impose an unwarranted restriction on the exercise of powers of superintendence by the High Court. This view of the High Court has now been legislatively adopted by the Parliament by introducing the explanation to Sub-section (1) of Section 115C.P.C. and, therefore an interlocutory order would be revisable. There is no doubt that present order being an interlocutory order is revisable under Section 115, but for exercising powers under this section by the High Court, the order must satisfy one of the conditions mentioned in Clauses (a) and (b) of the proviso.'

In view of the principle laid down in S.S. Khanna's case and Prem Bakshi'x case, (supra) the only conclusion possible is that that a revision is maintainable against an interlocutory order also but to exercise the power under Section 115 C.P.C. it must satisfy the condition stated in the proviso to Section 115(1) of the Code. It is seen that the principles laid down in S.S. Khanna's case and Prem Bakshi's case (supra) were not brought to the notice of the learned Judge who decided Madhavan's case (supra). This aspect was not considered in Phool Singh v. Mavila @ Bhavaliaya ((2002) M.P.L.J. 327) K.R. Subbaraju v. Vasavi Trading Company and Ors. (ILR 2002 Kar. 3513) and also Rajabhau v. Dinkar (2002 (3) Mh. LJ. 921).

9. The learned counsel appearing for the respondents has argued that even accepting for the sake of argument that the revision is maintainable, this Court cannot interfere with the order passed in an interlocutory application in view of the proviso to Section 115(1) of the Code. As I have already stated, the proviso was added to Section 115 first time by the Amendment Act of 1976. When the Draft Bill of Act 104 of 1976 was published Clause 43 (original Clause 45) the proposal made was to omit Section 115 altogether based on the recommendation made by the Law Commission that in view of Article 227 of the Constitution, Section 115 is unnecessary. The Committee felt that the remedy provided under Article 227 is likely to cause more delay and involve more expenditure but the remedy provided

in Section 115 is cheap and easy. So the Committee was of the view that Section 115 need not be altogether omitted on the ground that alternate remedy is available under Article 227 of the Constitution. That is the reason why a proviso was added to Section 115 by the Amendment Act of 1976. The Legislature considered the recommendations made by the report of the Arrears Committee headed by Justice Malimath. The Committee agreed in principle that the scope of interference against interlocutory orders should be restricted. The Committee was of the view that the object sought to be achieved can more effectively be achieved, without, at the same time denuding the High Court of the power of revision, by deleting Clause (b) of the proviso to Sub-section (1) of Section 115 C.P.C. Therefore the Committee recommended that the only amendment which is required to be made in Sub-section (1) of Section 115 C.P.C. is to substitute the existing proviso to Sub-section (1). Clause 12 of the Notes on Clauses of C.P.C. Amendment Act 1999 shows that in view of the report made by the Arrears Committee headed by Chief Justice Malimath, the intention of the Legislature was to restrict the scope of interference against interlocutory orders. That is the reason why the present proviso is substituted to Section 115(1) of the Code after deleting the existing proviso.

10. Senior Counsel M/s. K.C. John, P.N.K. Achan, S.V.S. Iyer etc. have argued that the attempt of the court must be to give a meaningful interpretation of the provisionin the statute and it should not be interpreted in such a way as to make a section redundant or nugatory. It is argued that in view of the principle laid down in S.S. Khanna 's case and Prem Bakshi's case, now the position is settled that a revision is maintainable against interlocutory orders. It is submitted that the only question to be considered is how to reconcile the proviso and the Explanation with the provisions contained in Section 115(1) of the Civil Procedure Code. It is argued that if the principle laid down in Madhavaris case is accepted, the proceeding means a proceeding divorced of the suit and no proceeding in a suit can be considered as a case decided. It is argued that if such a view is taken, Section 115 will become redundant. It is argued that there are number of proceedings in a suit which will have no bearing with the final decision of the suit. It is pointed out that when a decision is rendered by the trial court on a petition filed under Section 10 and if a Civil Revision Petition is filed against that decision,

whatever be the decision rendered by the High Court under Section 115 against that order, the same cannot finally terminate the suit.

11. It is argued that if the proviso is given the literal meaning, the proviso, the High Court can vary or reverse the order passed by the court below only if it had been made in favour of the party applying for the revision would have finally disposed of the suit or other proceedings. The decision of the trial court in a suit or other proceedings may be wrong. The only remedy available to the party aggrieved by the decree passed in a suit filed under Section 6 of the Specific Relief Act is to file a Civil Revision Petition before the High Court. It is argued that going by the proviso the High Court can decree the suit if the same is dismissed by the trial court and dismiss the same if it was decreed thereby finally terminating the proceedings. It is pointed out that the High Court cannot remand the suit even if it finds that the trial court had failed to exercise the jurisdiction vested in it and the procedure followed is illegal and hence the whole matter requires reconsideration because if a case is remanded that will not finally dispose of the suit. On the other hand, in such cases, the lis revives and continues. It is argued that the position is same in the case of independent proceedings also. It is argued that a thorough change to various provisions of the Civil Procedure Code had been brought by the Amendment Act 104 of 1976 and as per the amended provisions, the dispute between the parties to suit and even strangers are to be adjudicated in the pending suit itself and not by way of separate suit. It is pointed out that some such decisions are given the effect of a decree and other orders are appealable under Order 43 Rule 1. It is submitted that in view of the proviso if such an appeal is filed with a petition to condone the delay and if the appellate court dismisses the petition to condone delay, and consequently dismisses the appeal, this Court will have no power to condone the delay because if the delay in filing the appeal is condoned the appeal will have to be remanded for disposal on merits and the result will be resurrecting a proceeding which has already been terminated.

12. In view of the various contentions raised by the learned counsel who appeared as amicus curiae it is necessary to consider what is the meaning of the word'proceeding' occurring in the Explanation to Section 115 Code of Civil Procedure. In Ramrichpal Singh v. Dayanand Sarup (AIR 1955 All. 309) it was

held that an application under Section 10 has nothing to do with the decision of the question in controversy between the parties in a case and in that sense it cannot be said to be ancillary to the proceedings. So the question to be considered is whether a petition filed under Section 10 to stay the suit can be considered as a 'proceeding'. Likewise if a party to the suit files a petition under Section 145 of the Civil Procedure Code calling upon the surety to comply with the security bond the decision rendered on that petition has nothing to do with the final decision of the suit but at the same time the decision will have serious consequences so far as the surety is concerned. He need not be even a party to the suit. If a narrow interpretation is given that proceeding also cannot be considered as proceedings for the purpose of the proviso. In S.S. Khanna's case (supra) it was held that 'to interpret the expression case as an entire proceeding only and not a part of proceeding would be to impose a restriction upon the exercise of powers of superintendence with the jurisdiction to issue writs, and the supervisory jurisdiction are not subject and may result in certain cases in denying relief to an aggrieved litigant where it is most needed and may result in the perpetration of gross injustice.'

13. The word proceeding is not defined in the C.P.C. The word proceeding is defined in the Civil Rules of Practice as follows:

'Proceeding' includes all documents presented to or filed in court by any party, or commissioner or other officer of court, other than documents produced as evidence;'

The said definition may not be of much help in deciding the issue. Sri. Krishnanunni, the learned counsel appearing for the respondents, submitted that the word proceeding must be considered as an independent proceeding divorced of the suit. He relied on the decision reported in K.R. Subbaraju v. Vasavi Trading Company (ILR 2002 Karnataka 3512) where it was held that the words other proceedings used in the proviso to Section 115(1) of the Code of Civil Procedure has to be understood as speaking of other proceedings divorced of the suit. It is argued that by the words other proceedings occurring in the Explanation to Section 115 of the Civil Procedure Code, the Legislature only wanted to bring the

proceedings filed under special enactments also within the purview of Section 115 and not an interlocutory application filed in a suit. He drew my attention to Sections 24 and 25 of the Civil Procedure Code which deal with the power of the Supreme Court and High Courts to transfer a case or proceedings pending in a court. It is pointed out that Sub-section (3)(b) of Section 24 defines the word proceeding and it is stated that proceeding includes a proceeding for the execution of a decree or order. It is argued that the same meaning has to be given to the word proceeding appearing in Section 25 also. Relying on decision reported in Ram Chandra v. State of U.P. (AIR 1966 SC 1888) Sri. Krishnanunni, the learned counsel appearing for the respondent, contended that the word proceeding before Civil Court is a proceedingother than the suit and hence the principle laid down in K.R. Subbaraju's case (supra) that the word proceeding used in the proviso and Explanation to Section 115 of the Code of Civil Procedure has to be understood as speaking about proceedings divorced of the suit.

14. The counsel who appeared as amicus curiae have vehemently argued that there is absolutely no justification for giving such a narrow meaning to the words 'other proceedings' occurring in the Explanation. In R.B. Thakur and Co. v. Shreeram Durgaprasad (AIR 1968 Bom. 35) it was held that an interim order is as much an order of the Court as a final order and is capable of being enforced. It is argued that if an interim order is capable of being enforced, there is absolutely no justification to hold that it cannot be considered as a proceeding. In Sub-Committee of Judicial Accountability v. Union of India (AIR 1992 SC 63) the Apex Court held that an interlocutory order if passed, having effect or tending to be susceptible of an inference of pre-judging some important and delicate issues in main matter, the court will abstain from passing such an interlocutory order. If a narrow interpretation is given to the word proceeding even if a subordinate court commits a grave jurisdictional error and passes an order in the nature of one stated in the above said decision, the High Court will not be in a position to interfere with the order. There is yet another aspect. The civil court may be called upon to decide a matter which is interlocutory in nature before, during or after the disposal of the suit. The proceeding like permission to sue an indigent person or a person seeking permission to sue in a representative capacity or one filed under Section 92 of the Civil Procedure Code are proceedings which are initiated before

the commencement of the suit. Likewise, during the pendency of a suit, a number of proceedings like application for amendment, injunction, attachment etc. can be initiated. If a petition under Order IX Rule 9 or 13 of the Code of Civil Procedure is filed, that is a proceeding initiated after the disposal of the suit. But still all these proceedings are considered as proceedings filed in the suit.

15. Part III of C.P.C. deals with incidental proceedings. That Chapter contains Sections 75 to 78. Section 75 deals with the power of the court to issue commissions. Section 75 reads as follows:-

'Power of Court to issue commissions.-

Subject to such conditions and limitations as may be prescribed, the Court may issue a commission -

(a) to examine any person;

(b) to make a local investigation;

(c) to examine or adjust accounts; or

(d) to make a partition;

(e) to hold a scientific, technical or expert investigation;

(f) to conduct sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit;

(g) to perform any ministerial act.'

16. A reading of Section 75 shows that the power is given to court to issue commission to examine any person, to make a local investigation, to examine or adjust accounts or to make a partition, to hold a scientific, technical or expert investigation and to conduct sale of property and to perform any ministerial act.

17. Part V of the Civil Procedure Code deals with Special Proceeding. Part V of the Civil Procedure Code contains Sections 89 to 93. Earlier Section 89 was repealed by Arbitration Act, 1940 but the new section was inserted with effect from

1.7.2002. Section 91 deals with public nuisances and other wrongful acts affecting the public. Section 92 deals with public charities and Section 93 deals with exercise of powers of Advocate-General outside Presidency towns.

18. Part VI of the Code deals with Supplemental Proceedings. That part consists of Sections 94 and 95. Section 94 is important. It reads as follows:-

'Supplemental Proceedings - In order to prevent the ends of justice from being, defeated the Court may, if it is so prescribed, -

(a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;

(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;

(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;

(e) make such other interlocutory orders as may appear to the Court to be just and convenient.'

So going by the wording of Section 94, the issuance of warrant calling upon a person to furnish security, granting interim injunctions and appointing receivers are all treated as supplemental proceedings in a suit. Clause (e) of Section 94 confers power to make such interlocutory order as may appear to the court to be just and convergent,

19. Part XI of the Code of Civil Procedure deals with miscellaneous proceedings. Section 141 is important. It reads as follows:-

'Miscellaneous Proceedings - The procedure provided in this Code in regard to suit shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

Explanation.- In this section, the expression 'proceedings' includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution.'

In Mahijibhai v. Manibhai (AIR 1965 SC 1477) the Supreme Court considered the scope of the word 'miscellaneous' used in Part XI of the Code of Civil Procedure. It was held as follows:-

'Section 144 may have been placed in Part XI under the heading 'Miscellaneous' as relief of restitution may cover cases other than those arising in execution of a decree of an appellate Court setting aside the decree of a Court under appeal. The placing of a particular section in a part of the Code dealing with a specific subject-matter may support the contention that that section deals with a part of the subject dealt with by that part, but that cannot be said when a particular section appears under a part dealing with miscellaneous matters. The part under the heading 'miscellaneous' indicates that the sections in that part cannot be allocated wholly to a part dealing with a specific subject, for the reason that the section entirely fall outside the other parts or for the reason that they cannot entirely fall within a particular part.'

When the Code itself treats interlocutory orders passed under Section 94(e) in a pending suit as supplemental proceedings, it does not appear to be just and proper to give a restricted meaning to the words 'other proceedings' occurring in the Explanation. It is to be noted that the Code itself provides for the procedure to be followed in other proceedings of civil nature in Section 141 of the Code. So according to me the words 'other proceedings' used in the Explanation to Section 115 have to be given a wider meaning so as to include all proceedings which are incidental, special, supplemental or miscellaneous in the suit.

20. It is argued that finality is to be determined in relation to the effect of the order. In Salaman v. Warner and Ors. (26) (1891) 1 QB 734) it was held as follows:-

'If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purpose of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory.'

It is argued that the rule laid down in the above said decision was reaffirmed in In re Herbert Reeves & Co. ((1902) 1 Ch. 29). In Firm Ramchand Manjimal and Ors v. Firm Goverdhandas Vishandas Ratanchand and Ors (AIR 1920 PC 86) the same principle was followed.

21. The meaning of the word 'interlocutory' has been considered by the Apex Court in Parmesharari Devi v. State (AIR 1977 SC 403), Madhu Limaye v. State of Maharastra (AIR 1978 SC 47) and V.C. Shukla v. State (AIR 1980 SC 962). The learned Senior Counsel submitted that the feasible test is whether by upholding the objections raised by the parties, it would result in culminating the proceedings, if so any order passed in such objection would not be merely interlocutory in nature. It is pointed out that similar expressions are used in Article 132 of the Constitution of India,which deals with appellate jurisdiction of Supreme Court in appeals from High Courts. The matter was argued with reference to the Explanation to Article 132 which reads as follows:-

'For the purpose of this article, the expression 'final order' includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case.'

22. Reliance is placed on the decision reported in Kanaran Nair v. Madhavan Nair (1996 (1) KLT 162) in which it was held that an order passed by the court declining to set aside the report of the Commissioner is not amenable to revisional jurisdiction since it is purely interlocutory in nature. Reliance is also placed on Baldevdas v. Filmistan Distributors (AIR 1970 SC 406) in which it was held that the order passed by the trial court overruling objection to certain questions put to witness will not come within the ambit of the word 'case decided'. In Mahammood v. All Haji (1999 (3) KLT 220) also a Division Bench of this Court found that no revision lies against the order rejecting the petition to remit the commission report.

This Court further held that by rejecting the prayer for remitting the commission report there was no final adjudication of any of the rights of the parties and the party has got a more effective remedy provided under the Code at a later stage of the same proceedings. In Mathew v. Saramma (1995 (1) KLT 61) another Division Bench of this Court found that a revision will lie if the order passed is one affecting the rights of the parties. In Padmanabhan Nair v. Grassim Industries (1997 (1) KLT 924) a single Judge of this Court found that a revision will lie against an interlocutory order in the course of a suit which affects the substantial rights of parties. If the finality provided under the proviso is given to the proceeding in the suit like commission applications, injunction application etc. and not to the final outcome of the suit the interlocutory orders passed affecting substantial rights of parties will be revisable under Section 115(1) of the Code but at the same time, orders which are purely interlocutory in nature and not affecting the substantive rights can be excluded from the scope of the revisional powers of the High Court.

23. Now I shall consider the effect of the proviso to Section 115 CPC. It is argued that the proviso cannot be given effect so as to nullify the main section itself and while interpreting the proviso, the court should make every endeavour to give a meaningful expression to the words used in the 'proviso'. It is argued that Section 115 of the Code is intended to set at right the jurisdictional error committed by the subordinate court. It is submitted that the Legislature at one stage even thought of repealing Section 115 altogether from the Code in view of the provision contained in Article 227 of the Constitution of India. Still it was retained as it was a speedier and cheaper remedy provided under Article 227 of the Constitution. It is argued that the section was retained though the Legislature wanted to restrict the scope of interference of High Court under thatsection. It is further argued that the power exercised by the High Court under Section 115 is exactly similar to that of a writ of certiorari power exercised by the High Court under Arts. 226 and 227 of the Constitution.

24. It is also argued that nowhere in the main section it is stated that the HighCourt can exercise a revisional power only on an application filed by the party. Goingby the plain meaning of the wording of the Section 115 of the Code it is clear that the powercan be exercised suo motu. Part VIII of the Civil Procedure Code deals with

therevisional powers of the High Court. This Chapter deals with Reference, Review andRevision. It is pointed out that Section 113 deals with reference and the procedure isprescribed under Order XLVI. It is pointed out that to invoke Section 114, a reference by thetrial court is necessary. To make reference, it is not necessary that a party should filean application before the court below. It is pointed out that if the trial court finds thatreference is to be made it can do so either on its own motion or on an application bythe parties. Section 114 of the Civil Procedure Code deals with power of review and thecorresponding procedure is prescribed under Order XLVII. It is submitted that to invokethe powers under Article 114 read with Order XLVII Rule 1 an application by the party isnecessary. It is argued that Section 115 stands alone without any corresponding scheduleor order and nowhere in the body of the main section it is stated that the revisionalpowers can be invoked only on an application. Reliance is placed on Kesavan v.Abraham (1962 KLT 117) to hold that the court can invoke revisional powers suomotu. The learned counsel appearing for the respondents submitted that the courtcan suo motu initiate the revisional powers, but before that the matter shall be broughtbefore the court by the party. It is argued that under the Criminal Procedure Codethere are provisions for sending the calender and judgments of the trial court to theappellate or revisional court which enables the appellate or revisional court to perusethe records and form an opinion as to whether suo motu revision is to be initiated. Itis argued that there is no similar provision in the C.P.C. or Civil Rules of Practice tosend any judgment to the appellate or revisional court. So unless the matter is broughtbefore the court by a party, no revisional power can be exercised. Going by thewording of the main section it is seen that no application by the party is contemplatedto invoke the revisional powers by the High Court. But at the same time the provisocontains a clause which says that an order cannot be interfered unless it has beenmade in favour of the party applying for a revision would have finally disposed of thesuit or other proceedings. So long as there is no provision in Section 115(1) of the CivilProcedure Code which says that the revisional powers can be invoked only on anapplication, the High Court can initiate a suo motu revision against an order providedit falls under one of the sub-clauses of Section 115(a) of the Code of Civil Procedure and insuch a case there will be no applicant. What is the effect of the proviso in a suo moturevision taken

by the High Court? This aspect also has not been brought before thelearned Single Judge who considered Madhavan's case.

25. It is pointed out that Sections 104 and 105 of C.P.C. deal with orders. It is argued that Section 104 read with Order XLIII C.P.C. deals with appealable orders and Section 105 provides that other orders can be challenged while filing an appeal against the final decree. It is pointed out that it is quite possible that there could be a third category of orders such as granting leave under Section 92 etc. which are only revisable under Section 115 of the Code. It is also pointed out that the word order is defined in Section 2(9) of the Code of Civil Procedure. It is also pointed out that if a narrow interpretation is given to the proviso, there will be conflict between the provisions contained in Section 99-A and Section 115 C.P.C. It is also argued that the power under Section 115 conferred on the High Court is really the certiorari power with suitable modifications. Reliance is placed on S.S. Khanna's case (supra) which has held that the power proceeding on a writ of certiorari but it differs from that power in many cases. It was further held as follows:-

'Interference with acase before an inferior court by prerogative writs could take place underthe English law:

(a) by stopping proceedings before the case was decided by a writ of prohibition;

(b) ordering the trial of a case and the delivery of judgment by mandamus.

(c) quashing an order in a completed case for want of jurisdiction or for an error of law apparent on the face of the record.'

It was also held thus:-

'Once a flaw of jurisdiction is found the High Court need not quash and remit as is the practice in English Law under the writ of Certiorari but pass such order as it thinks fit.'

It was argued that the proviso deals only with varying or reversing an order but it does not deal with the power of High Court to 'set aside' and direct an inferior court

to reconsider a matter if the High Court is convinced of the fact that the inferior court has transgressed the jurisdiction conferred on it. It was also argued that the framers of the Code are well versed with the meaning pf the words such as 'vary', 'reverse', 'set aside', 'quash' etc. My attention is drawn to the meaning of the words, 'vary', 'reverse', 'set aside' etc. given in Black' Law Dictionary and other Dictionaries. It is argued that the restriction imposed by the Legislature is only in regard to 'varying' or reversing the order because in such cases the High Court will be substituting its own reasoning. It is argued that the proviso does not take away the power of the High Court to 'set aside' or 'quash' an order.

26. Order IX Rule 9 provides that a plaintiff may apply for an order to set the dismissal aside and it further provides that if the plaintiff was able to show sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal and restore the suit. The title of Rule 13 of Order IX is also relevant. It reads as follows:-

'Setting aside decree ex pane against defendant.'

Rule 13 of Order IX confers this relief to a defendant to apply for setting aside a decree. Likewise, Order XXII Rule 9 deals with the power of the court to set aside the abatement or dismissal. Rule 14(2) of Order XXVI deals with the power of the court to 'confirm' or 'set aside' the report filed by the Commissioner appointed in a case. The provision contained in Order XLI Rule 23 is also relevant. It reads as follows:-

'Remand of case by Appellate Court. Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and. the decree is reversed in appeal, or where the Appellate Court in reversing or setting aside the decree under appeal considers it necessary in the interests of justice to remand the case, the Appellate Court may by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send acopy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial, shall, subject to all just exceptions be

evidence during the trial after remand.'

A reading of the above stated rules shows that the Legislature has used the words 'vary', 'confirm', 'reverse', 'setting aside' with specific meaning. It is well settled position of law that normally when the High Court exercises the power of certiorari, the High Court will not substitute a decision of its own but it will only quash the order and direct the lower authority to pass fresh orders. So whether the proviso imposes any restriction on the powers of the High Court to set aside and direct the inferior court to reconsider a proceeding in case it is established that the order under challenge suffers from jurisdictional error is not brought to the notice of the learned single Judge. In this connection it is very pertinent to note that the bar imposed under the proviso is not for entertaining a revision but only for varying or reversing the order under challenge as held in Prem Bakshi's case (supra).

27. Much was argued about the manner in which the proviso has to be interpreted. Reliance is placed on the Commentaries of Maxwell on Interpretation of Statutes, Principles of Statutory Interpretation by Justice G.P. Singh, (7th Edition Page 181), Francis Bennion on Statutory Interpretation (1992 Edn.) and Commentaries of Statute Law by Craies (7th Edn. at page 218). It is argued that by interpreting the provision an attempt should be made to given a meaningful interpretation to the main provision in the statute. It is argued that when two views are possible regarding a procedural law, the one which curtails the procedure without eluding justice to the other is to be adopted. The procedural law is always subservient to and is an aid to justice as held in Shreenath v. Rajesh (AIR 1998 SC 1827). In Dilip Kumar v. State of M.P. (AIR 1976 SC 133), the Apex Court has held as follows:-

'If two constructions are possible upon the language of the statute, the Court must choose the one which is consistent with good sense and fairness, and eschew the other which makesits operation unduly oppressive, unjust or unreasonable, or which would lead to strange, inconsistent results or otherwise introduce an element of bewildering uncertainty and practical inconvenience in the working of the statute.'

28. In Vishesh Kumar v. Shanti Prasad (AIR 1980 SC 893) where the Apex Court has held that a proviso cannot be permitted by construction to defeat the basic intent expressed in the substantive provision. Reliance is also placed on the decisions reported in Mahabir Prasad Singh v. Jacks Aviation Pvt. Ltd. ((1999) 1 SCC 37) and Madhavan v. Excise Inspector (2000 (1) KLT 311) in which it was held as follows:-

'Normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. Except as to cases dealt with by it, a proviso has no repercussion on the interpretation of the enacting portion of the section so as to exclude something by implication which is embraced by clear words in the enactment. So when on a fair construction the principle provision is clear, a proviso cannot expand or limit it. Where the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment so as to exclude from it by implication what clearly falls within its express terms.'

29. In Madhu Copal v. VI Additional District Judge (1988) 4 SCC 644) the Apex Court has held that unless clearly indicated, the proviso would not take away substantive rights given by the section or the sub-section. If a literal meaning is given to the proviso it will defeat the very purpose of Section 115(1) of the Code of Civil Procedure. In K.R. Subbaraju's case (supra) a learned single Judge of the Karnataka High Court found that even if the impugned order suffers from jurisdictional error it cannot be interfered with under Section 115 of the Code of Civil Procedure unless by allowing the revision, the suit or proceedings can be finally disposed of.

30. The Apex Court has held that there is no difference between the revisional power and appellate power. In Shankar v. Krishna (AIR 1970 SC 1) it was held by the Supreme Court that basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense. If the High Court finds that the trial court has committed a jurisdictional error and thereafter dismisses the revision holding that in view of the proviso it has

no jurisdiction to interfere with that order the litigant will have to wait indefinitely until the suit is finally disposed of. It may take years for a court to finally dispose of the suit. In the appeal filed against the decree this order can also be challenged. The appellate court can set aside the decree or order and remand the matter. The party can also move the trial court for review of that order and the trial court has got power to review that order and pass fresh orders. The plaintiff can also withdraw the suit under Order XXIII and file a fresh suit on the very same cause of action. There is no amendment to theprovisions contained in Orders XXIII, XLI or XLVII. It is argued that the position will be that the High Court will not be in a position to set right a jurisdictional error committed by the trial court which the trial court itself can correct under Section 114 of the Civil Procedure Code or the appellate court under Order XLI. It is argued that the purpose of incorporating the new proviso is to avoid the delay in disposing of the main matter and if a narrow interpretation is given to the proviso, it will only add to the agony of the litigant and cause more delay in resolving the disputes.

31. It is argued that the view taken by the learned single Judge in Madhavan's case that the proviso affects the pending cases in view of the provisions contained in Clause (i) of Section 32 of the Amending Act also requires reconsideration. It is argued that the word 'proceeding' is used with regard to the orders under challenge in the revision and not civil revision petition pending. It is also argued that in appropriate cases, it is open to this Court to hold that the procedural law will have no retrospective effect. Reliance is placed on the Commentary 'The Construction of Statutes' by Earl T. Crawford wherein the learned author has considered the effect of repeal in a pending proceeding at pages 580 and 581 of the Book. It is also argued that when a section or proviso to a section is substituted in view of the provisions of the General Clauses Act, the substituted section or proviso will normally take effect only from the date of amendment and the same will have no retrospective operation. Sri. T. Krishnanunni, the learned counsel appearing for the respondent has argued that the view taken by the learned single Judge in Madhavan 's case regarding the applicability of the proviso is perfectly correct and does not call for reconsideration. It is argued that it is the fundamental principle of law that the procedural law can have no retrospective application. It is argued that the same wording is used in Section 97(o) of the Code

of Civil Procedure (Amendment) Act, 1976, but Section 97(o) of the Amendment Act, 1976 specifically saved the pending revisions.

32. Finally it is argued that even if it is not possible to invoke the powers under Section 115 of the Code of Civil Procedure, in appropriate cases this Court shall invoke the powers conferred on it under Article 227 of the Constitution of India. The learned counsel for the respondent has argued that in Vishesh Kumar case (supra) the Supreme Court has specifically held that a petition under Section 115 C.P.C. cannot be converted into one under Article 227 of the Constitution of India. It is also argued that in Aundal Ammal v. Sadasivan Pillai (AIR 1987 SC 203) and in Madhu Gopal v. VI Addl. District Judge ((1988) 4 SCC 644) and also in Laxmikant R. Bhojwani v. Pratap Singh M. Paradeshi (1995 (6) SCC 576) it was very specifically held that once it is found that the revisional power under Section 115 of the Civil Procedure Code cannot be invoked, the proceedings cannot be treated as one under Article 227 of the Constitution of India. In Bharath Kumar v. Anitha Trust (2002 (4) Mh. L.J. 597) also it was held that a Civil Revision Petition cannot be allowed to be converted as a petition under Article 227 of the Constitution of India. In Aundal Ammal's case (supra) it washeld by the Supreme Court that a petition under Section 115 C.P.C. cannot be converted into one under Article 227 of the Constitution of India. A undal Ammal 's case and Madhu Copal's cases arose under the provisions of Buildings (Lease and Rent Control) Act. The scope of the principle laid down in those decisions was later on considered and it was found that even when the High Court finds that the revisional powers cannot be exercised, it can exercise the powers conferred on it under Article 227 of the Constitution.

33. In Kishori Devi v. Lala Ram Narain Saigal ((1969) 1 SCWR 133) a Bench consisting of three Judges of the Supreme Court held that if the revisional powers under Section 115 C.P.C. are barred, the High Court can exercise the jurisdiction under Article 227 of the Constitution of India. In Mani Narain Daruwala v. Phiroz N. Bhatena (AIR 1991 SC 1494) the Apex Court found that if the finding is supported by materials on record, the High Court cannot interfere under Article 227 of the Constitution. In Baby v. Travancore Devaswom Board ((1998) 8 SCC 310) the Apex Court held that the powers of the High Court are in addition to the power of

revision under other legislation and even if an order passed by the authority constituted under the Kerala Land Reforms Act cannot be interfered in exercise of the revisional powers conferred under Section 103 of the Kerala Land Reforms Act, still the High Court can invoke the powers conferred on it under Article 227 of the Constitution to quash tribunal orders if based on findings of fact arrived by non-consideration of relevant and material documents, consideration of which could have led to an opposite conclusion. In Municipal Corporation of Delhi v. R.R Khaitan & Anr. (79 (1999) Delhi Law Times 555 (SC)) a Bench of three Judges of the Supreme Court has considered the question whether the powers under Article 226 and 227 can be invoked if it was found that the power under Section 115 cannot be exercised. The Supreme Court considered the principle laid down in Vishesh Kumar's case, explained the same and held that even if the powers under Section 115 C.P.C. cannot be invoked, the power under Article 227 can be invoked. It was held as follows:-

'It is true that the extraordinary remedies provided under Article 226 and 227 of the Constitution are dependent upon the High Court willing to interfere in a matter for which a large measure of discretion rests with it. Its power is so wide so as to envelop not only all aspects of the matter but orders can be passed of such nature as the High Court thinks fit. The jurisdiction as such is not curtailed to meet questions of parameters. On the other hand, the regular remedy under Section 115 C.P.C. is hedged by the language of the provision. Only errors of jurisdiction and material irregularities in the exercise of jurisdiction bring about a cause within the ambit of that provision. All the same it is worthy of notice that the Forum for the aforementioned three remedies ordinary as well as extraordinary is with the High Court itself. We see no reason then as to why the frame of the cause be determinative. It is for the litigant to choose the remedy and it is for the High Court to grant or deny relief thereon having regard to the facts and circumstances of each case.'

In Vadivelu v. Sundaram ((2000) 8 SCC 355) a Bench of three Judges found that the revisional powers of High Court can be exercised under Article 227 of the Constitution of India and trial court orders set aside where there has been an error of jurisdiction or flagrant violation of law. In view of the principles laid down in the

case of Municipal Corporation of Delhi and Vadivelu's case (supra) it is idle to contend that this Court cannot invoke the powers conferred on it under Article 227 of the Constitution of India in case it is found that the trial court committed a jurisdictional error but this Court cannot interfere in exercise of the powers conferred on it under Section 115 C.P.C. because of the proviso. This aspect was also not brought before the learned Judge while deciding Madhavan's case.

34. It is also brought to my notice that another learned Judge has referred the scope of the amendment of Section 115 of the Code of Civil Procedure in C.R.P. No. 3147 of 2001 to be heard by a Division Bench.

35. Considering the importance of the matter, I am of the view that it is only just and proper that the matter is reconsidered by a Larger Bench or atleast by a Division Bench.

In the result, the Civil Revision Petition is adjourned for being heard and decided by a Division Bench.

I place on record my appreciation for the efforts put in by the various counsel who argued the matter and aided the Court.

Place the papers before the Hon'ble the Chief Justice for orders.

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