

Bansi Lal Vs. Mohan Lal

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Court : Jammu and Kashmir

Decided On : Oct-17-2003

Reported in : AIR2005J& K3,2004(1)JKJ536

Judge : Permod Kohli, J.

Acts : Code of Civil Procedure (CPC) , Svt. 1977 - Sections 114 and 115(2) - Order 47, Rule 1; ;High Court Rules - Rule 66(1)

Appeal No. : Civil Review No. 9-A/2003

Appellant : Bansi Lal

Respondent : Mohan Lal

Advocate for Def. : A.V. Gupta, Sr. Adv.

Advocate for Pet/Ap. : Sunil Sethi, Adv.

Disposition : Petition allowed

Judgement :

Permod Kohli, J.

1. An interesting proposition is involved in the present review petition arising out of order dated 2.8.2003 passed by me whereby revision petition directed against the order passed by the subordinate court, was dismissed being not maintainable

under Section 115(2) of C.P.C. When this revision petition came up for consideration before me, a preliminary objection was raised on behalf of respondent regarding maintainability of the of the revision petition. Reference was made to Section 115 Sub-section 2 of CPC to canvas that in view of the specific statutory bar in respect to appealable order, revision is not maintainable and is liable to be dismissed only on that score. Counsel for the revision petitioner (review petitioner) was not present at the time of hearing of the revision and accordingly following order was passed by me :-

'This revision petition is directed against the order dated 4.3.2003 passed by the learned District Mobile Magistrate(Munsiff), Udampur, whereby the interim direction issued by the court on 18.2.2003 has been vacated. Learned counsel appearing for the respondent submits that the order under revision is appealable under Order 43, Rule -1(r) CPC. Revisional powers of this court can be exercised under Section 115 CPC only in respect to order where no appeal lies. Since the order impugned is appealable, the petitioner has efficacious statutory remedy available to him. Hence, the present revision petition is not maintainable. The same is accordingly dismissed. Petitioner is, however, at liberty to seek appropriate remedy available to him under law. Interim direction dated 7.3.2002 is vacated. Record of the trial court shall be sent back, Disposed of.'

2. The revision petitioner has sought to invoke review jurisdiction of this court under Section 114 read with Order 47 Rule-1 C.P.C. for setting aside the aforesaid order passed by me. It has been urged by Mr. Sunil Sethi, learned counsel appearing for petitioner that Sub-section 2 of Section 115 of C.P.C. was struck down by the Division Bench of this Court and it was not on the statute book when the revision petition was decided applying said provision. Hence, there is an error apparent on the face of record, which calls for review of judgment impugned.

3. Mr. A.V. Gupta, learned Senior Advocate appearing alongwith Ms. Swati Gupta for respondent at whose instance, revision petition was dismissed, has strenuously opposed the review primarily on the ground that it does not fall within the scope of Order 47 Rule-1 C.P.C.. It is argued even if order is erroneous having been passed contrary to the judgment of the Division Bench, the same cannot be

subjected to review of this court, though the petitioner may have a valid ground for preferring an appeal against this order. He relies upon the judgment of the Apex Court in *Parsion Devi and Ors. v. Sumitri Devi and Ors.* reported as (1997) 8 Supreme Court Cases 715.

4. First question that calls for adjudication, does order dated 2.8.2003 amenable to review jurisdiction of this court? A perusal of the order demonstrates that revision petition was dismissed by me on the solitary ground that the order under revision is subject to appeal under Order 43 Rule -1(r) of the C.P.C. and no revision lies against such appealable order. While holding this an obvious reference was made to Sub-section 2 of Section 115 of C.P.C. Division Bench of this court in case *State of J&K; and Ors. v. Ghulam Rasool and Ors.* reported as 1998 SLJ 22, struck down Sub-section 2 of Section 115 of C.P.C. and held as under:

'This constitutional power vested in the High Court of supervising the court hierarchy to be invoked in appropriate cases of non exercise or illegal exercise of the jurisdiction vested by law in any court cannot be taken away by incorporating any amendment in any law including the procedural law and if it comes in conflict with the constitutional provision it will be a dead letter on the statute. Revisional jurisdiction vested in this court under Section 115 CPC is limited one. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. The court has to satisfy itself on three matters:

(a) that the order of the subordinate court is within its jurisdiction;

(b) that the case is one in which the court ought to exercise jurisdiction; and

(c) that in exercising jurisdiction the court has not acted illegally ; that is, in breach of some provision of law or with material irregularity by committing some error or procedure in the court of the trial which is material in that it may have affected the ultimate decision.

And if the High Court is satisfied on these three matters it has no power to interfere because it differs from the conclusions of the subordinate court on question of fact or law. Sub-clause-2 of Section 115 CPC states that 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 clause has not to be read in contradistinction to Sub-clause (1) of the section but it only supplements the former. This can be said so because revisional powers under Sub-clause (1) touch upon jurisdiction, viz it exercise it, or the irregular or illegal exercise of it. The Apex Court in the case of *Shri M.L. Sethi v. Shri R.P. Kapoor*, (AIR 1972 SC 2379) has held that an erroneous decision on question of law reached by the subordinate court which has no relation to questions of jurisdiction of that court, cannot be corrected by High Court under Section 115 CPC. The appellate courts have distinct demarcated jurisdiction of their spheres. Thus, the revisional and appellate powers never overlap each other. This is the only harmonious interpretation which can be given to these two sub-sections incorporated in the section. An unwanted restriction on the exercise of powers of superintendence which is supervisory can in some cases result in denying relief to aggrieved litigant when it is most needed and may result in the perpetration of gross injustice. In this way an order which is though appealable yet cannot be taken away from the purview of the paternal revisional jurisdiction if it falls within the ambit of Sub-clause (1) Section 115 C.P.C.

5. The law is no longer *res-integra* that the power of the High Court under Article 226 and 227 which is *para -materia* with Sections 103 and 104 of the State Constitution is a power of judicial superintendence and only administrative superintendence and power of judicial superintendence over the subordinate courts is a part of basic structure of the Constitution. What Sub-section 2 of Section 115 has laid down is that it has excluded the revisional jurisdiction of the High Court in the matters in which an appeal lies either to the High Court or to any court subordinate to it. In practice, it would mean that if a Munsiff passes an order which is erroneous and is appealable before the District Judge, the High court cannot intervene in the matter. This situation cannot be permitted to exist in view of Section 104 of the Constitution of State, and such a situation will be against the basic structure of the Constitution. Therefore, in my view, Section 2 of Section 115 of Code of Civil Procedure is *ultravires* to the Constitution. Prior to the amendment of Section 115, no revision would lie against an order of the subordinate court in which an appeal lies to the High Court, but by the amendment, even those cases

have been taken out of the revisional jurisdiction of the High Court, in which appeal lies even before a Subordinate Court. Therefore, Section 115 of the Code of Civil Procedure is ultravires to the Constitution to the extent it takes away the jurisdiction of the High Court in entertaining a revision against an order, against which an appeal lies before a subordinate court.

6. Therefore, I strike down Sub-section 2 of Section 115 of the Code of Civil Procedure to the extent mentioned above, on the ground of being ultravires to the Constitution.

7. The aforesaid judgment of the Hon'ble Division Bench has not been set aside and has attained finality. Therefore, Sub-section (2) of Section 115 of the C.P.C. was not on the statute book when the order dated 2.8.2003 was passed by me. This fact now has been brought to my notice. As regard the power of the High Court to correct the errors of law and jurisdiction, also came to be considered in a recent judgment of the Apex Court in case *Surya Dev Rai v. Ram Chander Rai and Ors.* reported as 2003 AIR SCW 3872.

8. In the aforesaid case, by the latest amendment introduced in the Civil Procedure Code vide Amendment Act 46 of 1999 w.e.f. 1.7.2002, under Section 115 of C.P.C. power of the High Court to revise an appellate order passed by the Subordinate Court has been excluded. The Apex Court was considering the powers of the High Court after the amendment of Section 115 of C.P.C. to interfere in interlocutory orders in absence of its revisional power. The Apex Court on consideration of the entire issue, held as under:-

'Such like matters frequently arise before the High High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:-

(1) Amendment by Act No. 46 of 1999 with effect from 1.7.2002 in Section 115 of the Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Article 226 and 227 of the Constitution.

(2) Interlocutory orders, passed by the courts subordinate to the High Court against which remedy of revision has been excluded by the CPC Amendment Act No. 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.

(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e., when a subordinate court is found to have acted

(i) without jurisdiction - by assuming jurisdiction where there exists none, or

(ii) in excess of its jurisdiction by overstepping or crossing the limits of jurisdiction, or

(iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does not have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of laws, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any length or complicated argument or a long - drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the above said two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case.

The appeal is allowed. The order of the High Court refusing to entertain the petition filed by the appellant, holding it not maintainable, is set aside. The petition shall stand restored on the file of the High Court, to be dealt with by an appropriate Bench consistently with the rules of the High Court, depending on whether the petitioner before the High Court is seeking a writ of certiorari or invoking the supervisory jurisdiction of the High Court'.

The power of review and the scope of correction/rectification of errors on the face of record has been examined by the Apex Court in number of judgments including the one cited by the learned counsel for respondents referred to above. In the aforesaid judgment in case Parsion Devi and Ors. v. Sumitri Devi and Ors. reported as (1997) 8 Supreme Court cases 715, the Apex Court held as under :-

'Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of record justifying the court to exercise its power of review under Order 47 Rule 1 it is not permissible for an erroneous decision to be' reheard and corrected. A review petition, it must be remembered has a limited purpose and cannot be allowed to be 'an appeal in disguise.'

9. In view of the Division Bench judgment referred to above and the ratio of the Apex Court judgment, an error of law was committed while dismissing revision petition vide order dated 2.8.2003 and the error is apparent on the face of record, which can be rectified in exercise of the review jurisdiction.

Mr. A.V. Gupta, learned counsel has further argued that the review petition has not been filed in accordance with the Jammu and Kashmir High Court Rules. Reference has been made to Rule 66(1) and contended that the certificate appended to the review petition is not the same as is prescribed under the High Court Rules. Following certificate has been appended at the foot of the review petition :

'Certificate:

Verified that I Sunil Sethi, Advocate have gone through the judgment and record and am of the view that it is a fit case for review of the same.'

Whereas the High Court Rule has prescribed following certificate :

'I ...Advocate for the above named petitioner do hereby certify that I have perused the judgment and the relevant record of the case and in my opinion the grounds contained in the petition are good and sufficient for the review sought.'

10. I have considered both the certificates, the one prescribed under Rule 66(1) of the High Court Rules and the other appended to the review petition. It is true that the certificate appended to the review petition, is not the same as prescribed under Rule 66(1) of the High Court Rules. However, from the text of both the certificates, one can conveniently make out that it conveys the same intention which is evident from the one prescribed under rules.

11. I am of the considered opinion that the certificate at the foot of the review petition substantially complies the rules. This contention of the learned counsel, is also rejected.

12. In the light of discussion made hereinabove, this review petition is allowed and judgment dated 2.8.2003 passed by me, is set aside and the revision petition is revived. Let revision petition be listed for consideration.

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