

(1996) 07 AHC CK 0038
In the Allahabad High Court
Case No : Civil Revision No. 116 of 1996

Gokul Dairy Farm and Others

APPELLANT

Vs

Canara Bank and Another

RESPONDENT

Date of Decision : 23-07-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 151
Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 151
Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 151

Citation : (1996) 3 AWC 1602 : (1999) 96 CompCas 516

Hon'ble Judges : S.K. Phaujdar, J

Bench : Single Bench

Advocate : V.M. Sahai, for the Appellant; Swami Dayal, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Phaujdar, J.—The revision u/s 115 of the Code of Civil Procedure, 1908, impugns an order dated February 19, 1996, recorded by the First Addl. District Judge, Agra, in Misc. Case No. 19 of 1995, between the parties. By the impugned order the learned court below had dismissed an application of the present revisionists u/s 151 of the Civil Procedure Code.

2. A suit was filed by the respondent-bank against the present revisionists for realisation of a certain sum. The suit was heard ex parte and was decreed on January 1, 1992. An application under Order 9, Rule 13 of the Civil Procedure Code, 1908, was preferred by the present revisionists along with a prayer for condonation of delay. The parties were heard. In the ex parte decree the decretal amount was more than Rs. 5 lakhs. The decree holder (plaintiff) conceded to the prayers for setting aside the ex parte decree and for condonation of delay subject to deposit of half of the decretal amount within two months. Under such concession the court allowed the application u/s 5 of the Indian Limitation Act, as also the prayer for setting aside the decree on condition that the defendants (present revisionists) deposited Rs. 2,50,000 in the plaintiff-bank within two

months from the date of the order, failing which the application would stand dismissed automatically and the bank would be entitled to move for execution of the decree passed in the suit. This order was recorded on February 24, 1995, in the presence of both the parties and the deposit should have been made by April 24, 1995.

3. The present revisionists came up with an application u/s 151 of the CPC to recall the order dated February 24, 1995. The ex parte decree was also brought to execution and before the executing court an application was moved for staying the execution proceedings after permitting the judgment-debtors to deposit 10 per cent, of the decretal amount. It is stated that the executing court had directed deposit of Rs. 1,00,000 for staying the execution proceedings and deposit was made. It was further submitted that the High Court also directed deposit of a further sum of Rs. 25,000 and upon such deposit execution was stayed. The revisionists contended that a total sum of Rs. 1,25,000 has been deposited by them and the order impugned should be set aside.

4. The opposite parties contended that the first ever deposit was made on June 1, 1995, in compliance with the order dated May 31, 1995, passed by the executing court. Prior to that, the period of two months limited by the conditional order of setting aside the decree, had been passed and the application under Order 9, Rule 13 stood dismissed. It was contended that the remedy of the revisionists lay in an appeal under Order 43 to challenge the dismissal of the application under Order 9, Rule 13 of the Civil Procedure Code, and not by way of revision after rejection of the Section 151 of the CPC application.

5. In this application u/s 115 of the CPC it is to be seen if the grounds for intervention by the High Court exist at all. It must be remembered that the original order dated February 24, 1995, making a conditional order for setting aside the order is not the one impugned here. The rejection of the application u/s 151 of the CPC is the order challenged by the revisionists. Order 9, Rule 13 empowers the trial court to set aside an ex parte decree "upon such terms as to costs, payment into court or otherwise as it thinks fit". Section 5 of the Limitation Act also empowers the court to allow an application for condonation of delay subject to payment of costs. The direction of the court below dated February 24, 1995, asking the revisionist to pay a certain sum as a condition precedent for condonation of delay and for setting aside the ex parte decree was certainly one within the competence of the trial court.

6. Section 151 of the CPC specifies the inherent powers of the court and states that nothing in the CPC shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The learned court below had observed that the revisionists should have moved a proper application under Order 47 of the CPC and an application u/s 151 of the CPC was not maintainable when a specific provision for review of an order was there in the Civil Procedure Code.

7. For the High Court to allow a revision, the first thing that is to be seen is whether there had been a jurisdictional error committed by the court below either in having exercised jurisdiction not vested in it by law or in having failed to exercise a jurisdiction so vested or having acted in the exercise of his jurisdiction illegally or with material irregularity. Once this bar is crossed and the court is satisfied about the existence of either of the above conditions, a second hurdle stands in the way of allowing a revision as indicated in the proviso which requires that the High Court shall not, u/s 115 of the Civil Procedure Code, vary or reverse any order including an order deciding an issue made in the course of a suit or other proceeding where :

(1) the order, if so varied or reversed, would finally dispose of the suit or other proceedings, or

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

The application that was rejected by the impugned order was only for the purpose of recalling the order dated February 24, 1985. Accepting for the sake of argument that the application of the revisionists for recall of the order dated February 24, 1995, was maintainable and sufficient reasons were there for recalling the order, the effect of allowing the application of recall would be at best to put the parties in a position that was there prior to the recording of the order dated February 24, 1995. In effect, allowing the application would not have set aside the ex parte decree but would have opened the matter for rehearing only. Thus, the desired order, if made in favour of the revisionists, would not have finally disposed of the suit or the proceeding.

8. It may now be examined that the impugned order if allowed to stand would occasion a failure of justice or cause irreparable injury to the revisionists. The order in question had simply disallowed the prayer for recall and in that sense affirmed the order of February 24, 1995, whereby the applicant was directed to deposit Rs. 2,50,000. The facts have been admitted in the course of argument here that the applicant had already deposited a sum of Rs. 1,25,000 and it may not, therefore, be inferred that there could be a failure of justice or any irreparable injury would have been caused to the present revisionists, as they are able to deposit.

9. On the question of jurisdiction also, the view of the trial court in discarding the application for recall on the ground that there should have been a prayer for review, is not to be attacked on the ground of jurisdiction. Order 47 permits an application for review when a person is aggrieved by a decree or order from which an appeal lies but no appeal had been preferred or from which no appeal is permitted. Review is possible, amongst others, on the ground of some mistake or error apparent on the face of record or for any other sufficient reason. Nothing was placed before the court below or even before this court to show as to what was the error apparent on the face of record in passing the order dated February

24, 1995. Barring the plea of hardship there is no other reason placed before the court and the theory of hardship must be given a go-by when in fact the revisionists had paid into court a sum of Rs. 1,25,000. Stress was laid on certain orders recorded by the executing court. It was stated that the executing court (the decreeing court itself) had stayed the execution of the decree on deposit of Rs. 1,00,000 only and as such it was wrong for the same court not to have allowed the recall. The same judicial officer was manning both the trial court and the executing court but the orders passed during execution may not be read as orders passed in the trial or as orders binding on the trial court.

10. There is much force in the argument of the learned counsel- for the respondents that the real relief of the applicants lay in an appeal under Order 43, Rule 1(d). The conditional order of setting aside the ex parte decree was passed on February 24, 1995, with a specific direction to deposit a sum within two months, failing which the order setting aside the ex parte decree would have lost its force and admittedly, no payment was made within two months nor was any application for recall filed within that period. On the date the recall application was filed, the application under Order 9, Rule 13 of the CPC stood rejected by efflux of time for non-compliance with the order. The revisionists, instead of moving the applications for recall in the trial court and for stay in the executing court, could have gone to the appellate court challenging the order of dismissal of the application under Order 9, Rule 13. The revisionists had not done so and on this score also the revision would be incompetent.

11. In the result, the present revision stands dismissed. The interim order stands vacated.