

(2013) 01 AHC CK 0067

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 44410 of 1999

Kailash Nath

APPELLANT

Vs

Xth Additional District Judge and Others

RESPONDENT

Date of Decision : 09-01-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 43 Rule 1(d), Order 6 Rule 17, Order 9 Rule 13, Order 9 Rule 6
Constitution of India, 1950 — Article 226, 227

Citation : (2013) 5 ADJ 629 : (2014) 2 ALJ 477 : (2013) 6 AWC 6491

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : S.K. Rai, for the Appellant; A.K. Srivastava, Arvind Srivastava and Neeraj Sharma, for the Respondent

Final Decision : Allowed

Judgement

Sudhir Agarwal, J.—Heard Sri Salil Kumar Rai, learned counsel for the petitioner and Sri Arvind Srivastava, learned counsel for the respondents. This is a tenant's writ petition. Facing ejectment from property let out to him, pursuant to judgment dated 6.9.1994 (Annexure 7 to the writ petition), passed by Small Cause Court, Gorakhpur in S.C.C. Suit No. 6 of 1988 and judgment dated 31st August, 1999 (Annexure 9 to the writ petition) passed by Revisional Court i.e. Xth Additional District Judge, Gorakhpur dismissing petitioner's revision No. 205 of 1994, he has invoked jurisdiction of this Court under Article 226/ 227 of the Constitution with a prayer for issuance of writ of certiorari for quashing the aforesaid two judgments.

2. By way of amendment, petitioner has also assailed the order dated 23rd August, 1994 whereby application 81C for recall of order dated 15.10.1993 was rejected.

3. The dispute relates to house No. 2/47 situate at Mohalla Raghav Nagar, Deoria. Initially one Lallan Prasad was the owner of property in dispute. The

petitioner claimed that Sri Lallan Prasad executed an agreement for sale, dated 8.9.1978, with Smt. Surati Devi, wife of petitioner (Sri Kailash Nath) for aforesaid house, pursuant whereunto entire consideration was paid on 27th March, 1980. Thereafter a suit for specific performance i.e. O.S. No. 422 of 1986 (subsequently re-registered as O.S. No. 109 of 1988) was instituted by Smt. Surati Devi for execution of aforesaid agreement for sale. While the aforesaid suit was pending, owner of house in question namely Sri Lallan Prasad executed a sale-deed in favour of Agardi Mani Tripathi on 17.2.1987. In the circumstances, Smt. Surati Devi instituted suit No. 88 of 1987 for permanent injunction against Lallan Prasad as well as Agardi Mani Tripathi, restraining them from evicting her and petitioner from disputed building.

4. Both the suits instituted by Smt. Surati Devi i.e. O.S. No. 422 of 1986 (renumbered as 109 of 1988) and O.S. No. 88 of 1987 are still pending.

5. Sri Agardi Mani Tripathi (now deceased and substituted by his legal heirs i.e. respondent Nos. 3 to 6) instituted S.C.C. Suit No. 6 of 1988 claiming his title pursuant to sale-deed dated 17.2.1987 and sought ejectment of petitioner on the ground of default in payment of rent.

6. The Trial Court framed following nine issues:

1. Whether there is relationship of landlord and tenant between the parties?
2. Whether defendant has committed default in payment of rent?
3. Whether defendant had denied ownership of landlord?
4. Whether this Court has no jurisdiction to entertain the suit?
5. Whether the suit is liable to be stayed u/s 10 C.P.C.?
6. Whether this suit is bad on account of non joinder of necessary parties?
7. Whether this suit is not maintainable?
8. Whether plaintiff has no right to institute this suit?
9. To what relief plaintiff is entitled for?

(English Translation by the Court)

7. Issues No. 4 and 5, considered as preliminary issues, were decided in negative i.e. against defendant i.e. petitioner, vide order dated 18th July, 1989 (Annexure 2 to the writ petition). The Trial Court held that there is no substantial dispute of title in the matter and therefore, Small Causes Court does not lack jurisdiction. It further held that non impleadment of Lallan Prasad, the erstwhile owner, in the suit in question, would not render it defective for non joinder of necessary party for the reason that Lallan Prasad was neither necessary nor proper party.

8. Thereafter petitioner moved an application u/s 10 of Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") requesting for stay of proceedings of SCC

Suit No. 6 of 1988 till disposal of O.S. No. 109 of 1988 (old No. 422 of 1986) and O.S. No. 88 of 1987. This application was allowed by Trial Court vide order dated 20th July, 1990, and proceedings in suit in question were stayed till disposal of original suit No. 109 of 1988.

9. The plaintiff-respondent No. 7 aggrieved by order dated 20th July 1990, came to this Court in Civil Revision No. 960 of 1990. This Court vide interim order dated 2.1.1991 stayed operation of order dated 20th July, 1990. It is said that aforesaid revision is still pending. However, since order dated 20th July, 1990 was stayed by the Court, proceedings in SCC Suit No. 6 of 1988 revived and continued thereafter.

10. Oral evidence of plaintiff-respondent commenced on 25.10.1991. On 12.7.1993, the case was adjourned on the request of plaintiff. 23rd July, 1993 was fixed for remaining evidence. Order sheet records the order dated 12th July, 1993 as under:

Case called. Respondent present.

27C by plaintiff for another date as his counsel has not come to Court today.

No objection. Allowed.

Fix 23/7/93 for remaining evidence.

11. Thereafter, again the case was adjourned on various dates and on 15.10.1993, plaintiffs evidence completed in absence of defendant. The Court proceeded ex parte against defendant, heard the arguments and reserved judgment, to be pronounced on 28.10.1993.

12. The petitioner-defendant thereafter moved application for recall of order dated 15.10.1993, which was rejected on 23.8.1994 and thereafter judgment was pronounced on 6.9.1994 decreeing the suit.

13. The petitioner, aggrieved against judgment dated 6.9.1994, filed revision No. 205 of 1994, which has also been dismissed vide impugned judgment dated 31.8.1999.

14. The petitioner has also filed application seeking an amendment so as to challenge order dated 23.8.1994. Sri Arvind Srivastava seriously opposed this application.

15. Before proceeding to deal with the merits of the writ petition, first I propose to deal with the amendment application.

16. Sri Arvind Srivastava, learned counsel for the respondent-landlord contended that such a relief at this stage is barred by time and therefore amendment at this stage should not be allowed. He placed reliance on Apex Court's decisions in Radhika Devi Vs. Bajrangi Singh and others, , Mahavir Prasad and Another Vs. Ratan Lal and Another, , Ajendraprasadji N. Pande and Another Vs. Swami Keshavprakeshdasji N. and Others, , Vijendra Kumar Goel v. Kusum Bhuwania,

(1997) 11 SCC 457 , K. Raheja Constructions Ltd. Vs. Alliance Ministries and others, , T.L. Muddukrishanan and another Vs. Smt. Lalitha Ramchandra Rao, , Alkapuri Co-operative Housing Society Ltd. Vs. Jayantibhai Naginbhai (deceased) Thr. LRs., and Chander Kanta Bansal Vs. Rajinder Singh Anand, .

17. The proposition of law that an amendment, which will enable plaintiff to challenge an order, which has already become barred by time, should not be allowed, cannot be disputed. However, the aforesaid proposition does not apply in the present case. First I would like to refer various authorities cited at the Bar on behalf of respondents, to find out whether exposition of law, laid down therein, justify rejection of amendment sought by petitioner to challenge order dated 23rd August, 1994, passed on his application 81-C.

18. In K. Raheja constructions Ltd. and another (supra); OS No. 213 of 1993 was filed seeking relief of permanent injunction restraining defendant from alienating, encumbering, selling, disposing of, or in any way dealing with the property in dispute therein. The aforesaid relief was sought by plaintiff in the background of the fact stated in para 13 of the plaint that there was an agreement for sale between the parties and that plaintiff was ready and willing to perform his part of contract in accordance with terms and conditions agreed upon. The defendants rejected plaintiffs request by letter dated 4.5.1987 for execution of sale-deed. The Court found that in para 13 of the plaint, one of the date of cause of action was mentioned, being 29th April, 1987, when letter sent by plaintiff to defendant about non acceptance of offer of plaintiff by Trustees of defendant No. 1. However, no relief for specific performance of contract was sought in the plaint. It is only on 25.11.1994, an application under Order VI, Rule 17 was filed, seeking amendment in the plaint for grant of relief of specific performance. It is this application, which was rejected by Trial Court and the High Court. The matter then came up before Apex Court. It found that relief sought by way of amendment was an independent cause of action and independent relief. At the time, when suit was filed, there was no reason, why the relief for specific performance, could not have been sought in the plaint. The plaintiffs having expressly admitted that defendants have refused by the terms and conditions, should have asked for relief of specific performance in the original suit itself, but having failed to do so, seeking an amendment after expiry of period of limitation of three years, under Article 54 of the Schedule in Limitation Act, 1963 (hereinafter referred to as "Act, 1963"), the amendment sought could have defeated valuable right accrued to the respondent-defendant, after expiry of period of limitation. It is in these circumstances, the Court upheld the orders passed by Courts below rejecting amendment.

19. In T.L. Muddukrishana and another (supra), also an agreement for sale was executed on 28th May, 1989. The defendant repudiated the contract by notice dated 6.11.1989. A suit for injunction was filed 21st April, 1992 and amendment application dated 5.11.1992 was filed seeking amendment of plaint, with relief of specific performance of agreement. Here also the Court found that limitation

begins to run from the date, parties stipulated for performance of contract. The suit for specific performance was required to be filed within three years from the date, fixed by the parties, under the contract. Amendment sought to be made after expiry of three years, since was bound to change cause of action as required to be specified in the plaint, which was only for a mandatory injunction and not for specific performance, such a relief, if sought to be made part of the plaint, after expiry of period of limitation, it could not have been allowed. The Court said that limitation begins to run in respect of the cause of action sought to be added by way of amendment, in any case, from the date parties have repudiated the agreement. It also held that a suit for perpetual injunction is different from a suit for specific performance. The suit for specific performance in fact could have operated only on the application being in order. Since on the date when the order could have been passed on the amendment application it was after expiry of period of limitation, hence could not have been done in law. In taking the above view, the Court relied on its earlier decision in *Tarlok Singh Vs. Vijay Kumar Sabharwal*, . In para 7 of the judgment, the Court said:

8. Under these circumstances, it must be held that for the purpose of limitation, what is material is that the limitation begins to run from the date the parties have stipulated for performance of the contract. The suit is required to be filed within three years from the date fixed by the parties under the contract. Since the application for amendment of the plaint came to be filed after the expiry of three years, certainly it changed the cause of action as required to be specified in the plaint. The suit for mandatory injunction is filed and the specific performance was sought for by way of an amendment. The cause of action is required to be stated initially in the plaint but it was not pleaded. It was sought to be amended, alongwith an application for specific performance which, as stated earlier, was rejected. Under these circumstances, even by the date of filing of the application, namely, November 5, 1992, the suit was barred by limitation. The High Court, therefore, was right in refusing to permit the amendment of the plaint.

(emphasis added)

20. In *Vijendra Kumar Goel (supra)*, the suit founded on an agreement for sale dated 25.3.1985. The suit itself was instituted on 21.11.1990 for declaration that agreement for sale is still subsisting and defendant is bound to execute sale-deed. An injunction was also sought against defendant from transferring property in dispute. No relief for specific performance, however, was sought. The defence was taken that suit, as instituted, was barred by time. During pendency of suit, an application seeking amendment was filed on 16.4.1993 by adding a relief, with respect to deletion of certain words, which would amount to relief for specific performance of the contract. These amendment was declined by Trial Court but allowed by High Court in revision. The Apex Court reversing the judgment of High Court and upholding rejection of amendment, stated in para 4:

The suit, as framed, is a suit for declaration and injunction only. It was sought to be converted into a suit for specific performance by the plaintiff-respondent by

way of amendment in the plaint in 1993 when the claim for specific performance had become barred by limitation.

21. In *Radhika Devi (supra)* a suit for partition was instituted. In written statement, defendant disclosed about a gift deed executed and registered in his favour but no steps were taken by plaintiff to challenge the aforesaid gift deed within a period of three years thereafter. It is only after expiry of period of limitation, even from the date the information given by defendants through pleadings in written statement, an amendment application was filed, seeking a declaration that gift deed was obtained by defendant illegally and fraudulently and is not binding on the plaintiff. The Apex Court found that even from the date of knowledge, relief vis a vis gift deed, having rendered time barred, and, it was an independent relief from what actually had been sought in the plaint, therefore, such amendment after expiry of limitation could not have been allowed. In para 6 of the judgment, the Court said:

The ratio therein squarely applies to a fact situation where the party acquires right by bar of limitation and if the same is sought to be taken away by amendment of the pleading, amendment in such circumstances would be refused.

22. In *Laxmidas Dahyabhai Kabarwala Vs. Nanabhai Chunilal Kabarwala and Others*, , Apex Court said that save in exceptional cases, leave to amend under Order VI, Rule 17 of the Code will ordinarily be refused, when effect of amendment would be, to take away, from a party, a legal right which had accrued to him by lapse of time. But this rule can apply only when either fresh allegations are added or fresh relief is sought, by way of amendment. Where, for instance, an amendment is sought, which, merely clarifies an existing pleading and does not in substance add to or alter, there is no such bar. It has never been held that question of a bar of limitation is one of the questions to be considered in allowing such clarification of a matter, already contained in the original pleading.

23. In *Chander Kanta Bansal (supra)*, the Court considered and explained effect of proviso to Order VI, Rule 17 and said that it limits the power to allow amendment after commencement of trial but grants discretion to the Court to allow amendment if it feels that party could not have raised the matter before commencement of trial in spite of due diligence. The power of amendment should be liberally exercised. The principles, which guide such discretion, are that multiplicity of proceedings should be avoided. The amendments should not totally alter character of an action and care should be taken to see that injustice and prejudice of an irremediable character is not inflicted upon the opposite party under pretence of amendment.

24. In *Alkapuri Cooperative Housing Society Limited (supra)*, an injunction suit was filed and thereafter by filing an application of amendment, relief for giving possession of property in dispute was also sought. The High Court relied on two decisions of Apex Court in *L.J. Leach and Company Ltd. Vs. Jardine Skinner and*

Co., followed in *Pankaja and Another Vs. Yellappa (D) by Lrs. and Others*, , and held, that an application for amendment of plaint can be allowed by exercising discretionary jurisdiction even if the suit is barred by limitation. The Court in *Alkapuri Cooperative Housing Society Limited (supra)*, however, referred to its another decision in *Sampath Kumar Vs. Ayyakannu and Another*, , and quoted following observations laid therein:

10. An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation-back in the context of amendment of pleadings is not one of universal application and in appropriate cases the Court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the Court on the date on which the application seeking the amendment was filed. (See observations in *Siddalingamma and Another Vs. Mamtha Shenoy*,).

25. The Court said that in the garb of amendment, basic structure of suit cannot be allowed to be altered. When an amendment is sought by adding a new party, requirement for consideration is not that of only Order VI, Rule 17 CPC but also that of Order 1, Rule 10 and, hence, question of limitation in the context of new party sought to be impleaded would also arise.

26. In *Mahavir Prasad and another (supra)*, in a suit for partition, a preliminary decree was passed and after twenty years thereof, an amendment in the plaint was sought. It was rightly rejected by Apex Court being highly barred by time.

27. In *H.P. State Forest Company Ltd. Vs. United India Insurance Co. Ltd.*, , relied by respondents' counsel, I find no application thereof to this case at all, inasmuch as, therein, question up for consideration was, when limitation would commence under Article 44 to the Schedule in Act, 1963.

28. In *Ajendraprasadji N. Pandey and another (supra)*, the Court held that provisions relating to amendment would apply not only to suit, but also to all the proceedings in any Court of civil jurisdiction by virtue of Section 141 C.P.C. The question of amendment of pleadings can be raised in a representative suit, admiralty suit, matrimonial proceedings, proceedings involving fundamental rights under the constitution of India and proceedings involving high Public Interest. Having said so, the Court further said that proviso to Order VI, Rule 17 must be interpreted purposively and not mechanically or liberally.

29. Having referred to the above decisions, however, I do not find that legal proposition stated therein can come in the way in the present case against petitioner in seeking amendment of the kind, by means of amendment application filed herein. It was open to the petitioner to challenge ultimate judgment and decree of Trial Court, in appropriate proceedings on all possible grounds, including that before passing the said order, procedure followed by Trial Court was not in conformity with the mandatory provisions of the statute or the Court has committed material illegality in procedure, which has resulted in denial

of opportunity to the defendant and has violated principles of natural justice. The various orders contained in the order sheet are not to be challenged every time by filing writ petition before this Court but while assailing the ultimate order, it is always open to a party concerned to challenge ultimate order on the basis of illegalities committed, if any, by the Court, while proceeding with the matter. The order dated 15.10.1993 did not confer any substantive rights upon plaintiff. It was a kind of interlocutory order, which did not adjudicate upon rights of the plaintiff, and also did not adjudicate the issues in the matter but on procedural aspect, tried to pass an order so as to remove barrier so that it may not proceed in absence of defendant. The rules of procedure do not confer any substantive right upon a party to the proceedings unless such rule expressly or impliedly results in such a consequence.

30. In my view, order dated 15th October, 1993 did not result in such a consequence. Even if this order would not have been challenged separately by petitioner, he could have assailed the ultimate judgment, passed by Courts below, on the ground it has proceeded with material illegality, depriving opportunity to the defendant. It is in this very context, rejection of petitioner's application for recall of order dated 15th October, 1993 also stands in the same position. Even if the two orders dated 15th October, 1993 and 23rd October, 1994 are not assailed separately and no writ of certiorari is sought against aforesaid orders, they are only interlocutory orders passed during proceedings of suit so as to ultimately result in a final order. All such orders merge with final order and the final order can be challenged or assailed on all possible grounds including procedure followed by Trial Court, if not in conformity with statute or is patently illegal or in violation of principles of natural justice or on any other ground.

31. This Court also cannot ignore the fact that petitioner has invoked supervisory jurisdiction of this Court under Article 226/ 227 of the Constitution of India, whenever a Court finds patent illegality, it can always interfere to set the things right so as to undo the wrong done to the affected party. Such power can be exercised by Court whenever it comes to its knowledge.

32. In supervisory jurisdiction of this Court over subordinate Courts, the scope of judicial review is very limited and narrow. It is not to correct the errors in the orders of the Court below but to remove manifest and patent errors of law and jurisdiction without acting as an appellate authority.

33. This power involves a duty on the High Court to keep the inferior Courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. This case satisfies the above requirement.

34. In *D.N. Banerji Vs. P.R. Mukherjee and Others*, , the Court said:

Unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under articles 226 and 227 of the Constitution to interfere.

35. A Constitution Bench of Apex Court examined the scope of Article 227 of the Constitution in *Waryam Singh and Another Vs. Amarnath and Another*, and made following observations at p. 571:

This power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in *Dalmia Jain Airways Ltd. Vs. Sukumar Mukherjee*, , to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.

36. In *Mohd. Yunus Vs. Mohd. Mustaqim and Others*, , the Court held that this Court has very limited scope under Article 227 of the Constitution and even the errors of law cannot be corrected in exercise of power of judicial review under Article 227 of the Constitution. The power can be used sparingly when it comes to the conclusion that the Authority/Tribunal has exceeded its jurisdiction or proceeded under erroneous presumption of jurisdiction. The High Court cannot assume unlimited prerogative to correct all species of hardship or wrong decision. For interference, there must be a case of flagrant abuse of fundamental principles of law or where order of the Tribunal, etc. has resulted in grave injustice.

37. For interference under Article 227, the finding of facts recorded by the Authority should be found to be perverse or patently erroneous and de hors the factual and legal position on record. (See: *Nibaran Chandra Bag etc. Vs. Mahendra Nath Ghughu*, ; *Rukumanand Bairoliya Vs. The State of Bihar*, ; *Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others*, ; *Laxmikant Revchand Bhojwani and Another Vs. Pratapsing Mohansingh Pardeshi Deceased through his Heirs and Legal Representatives*, ; *Reliance Industries Ltd. Vs. Pravinbhai Jasbhai Patel and others*, ; *Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others*, ; and *Virendra Kashinath Ravat and Another Vs. Vinayak N. Joshi and Others*,).

38. It is well-settled that power under Article 227 is of the judicial superintendence which cannot be used to up-set conclusions of facts, howsoever erroneous those may be, unless such conclusions are so perverse or so unreasonable that no Court could ever have reached them. (See: *Mrs. Rena Drego Vs. Lalchand Soni, Etc.*, ; *Chandra Bhushan (Deceased) by Lrs. Vs. Beni Prasad and Others*, ; *Smt. Savitrabai Bhausahab Kevate and Others Vs. Raichand Dhanraj Lunja*, ; and *M/s. Savita Chemicals (Pvt.) Ltd. Vs. Dyes and Chemical Workers Union and Another*,).

39. Power under Article 227 of the Constitution is not in the nature of power of

appellate authority enabling re-appreciation of evidence. It should not alter the conclusion reached by the Competent Statutory Authority merely on the ground of insufficiency of evidence. (See: Union of India and Others Vs. Himmat Singh Chahar,).

40. In Ajaib Singh Vs. The Sirhind Co-Operative Marketing Cum-Processing Service Society Limited and Another, , the Court has held that there is no justification for the High Court to substitute its view for the opinion of the Authorities/Courts below as the same is not permissible in proceedings under Articles 226/ 227 of the Constitution.

41. In Mohan Amba Prasad Agnihotri and Others Vs. Bhaskar Balwant Aher (D) Through I.Rs., , the Court said that jurisdiction of High Court under Article 227 of the Constitution is not appealable but supervisory. Therefore, it cannot interfere with the findings of fact recorded by Courts below unless there is no evidence to support findings or the findings are totally perverse.

42. In Indian Overseas Bank Vs. I.O.B. Staff Canteen Workers" Union and Another, , the Court observed that it is impermissible for the Writ Court to reappreciate evidence liberally and drawing conclusions on its own on pure questions of fact for the reason that it is not exercising appellate jurisdiction over the awards passed by Tribunal. The findings of fact recorded by the fact finding authority duly constituted for the purpose ordinarily should be considered to have become final. The same cannot be disturbed for the mere reason of having based on materials or evidence not sufficient or credible in the opinion of Writ Court to warrant those findings. At any rate, as long as they are based upon some material which are relevant for the purpose no interference is called for. Even on the ground that there is yet another view which can reasonably and possibly be taken the High Court cannot interfere.

43. In Union of India and Others Vs. Rajendra Prabha and Another, , the Court observed that the High Court, in exercise of its extraordinary powers under Article 227 of the Constitution, cannot re-appreciate the evidence nor it can substitute its subjective opinion in place of the findings of Authorities below.

44. Similar view has been reiterated in State of Maharashtra Vs. Milind and Others, ; M/s. Estralla Rubber Vs. Dass Estate (Pvt.) Ltd., ; and Ouseph Mathai and Others Vs. M. Abdul Khadir, .

45. In Surya Dev Rai Vs. Ram Chander Rai and Others, , it was held that in exercise of supervisory power under Article 227, High Court can correct errors of jurisdiction committed by subordinate Courts. It also held that when subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or jurisdiction though available is being exercised in a manner not permitted by law and failure of justice or grave injustice has occasioned, the Court may step in to exercise its supervisory jurisdiction. However, it also said that be it a writ of certiorari or exercise of supervisory jurisdiction, none is available to correct mere errors of fact or law

unless error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or disregard of the provisions of law; or, a grave injustice or gross failure of justice has occasioned thereby.

46. In *Jasbir Singh Vs. State of Punjab*, , the Court said:

...while invoking the provisions of Article 227 of the Constitution, it is provided that the High Court would exercise such powers most sparingly and only in appropriate cases in order to keep the subordinate Courts within the bounds of their authority. The power of superintendence exercised over the subordinate Courts and tribunals does not imply that the High Court can intervene in the judicial functions of the lower judiciary. The independence of the subordinate Courts in the discharge of their judicial functions is of paramount importance, just as the independence of the superior Courts in the discharge of their judicial functions.

47. In *Shalini Shyam Shetty and Another Vs. Rajendra Shankar Patil*, , the Court said that power of interference under Article 227 is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court. The above authority has been cited and followed in *Kokkanda B. Poondacha and Others Vs. K.D. Ganapathi and Another*, and *Bandaru Satyanarayana Vs. Imandi Anasuya and Others*, .

48. In *Abdul Razak (D) through L.Rs. and Others Vs. Mangesh Rajaram Wagle and Others*, , Court reminded that while exercising jurisdiction under Article 226 or 227, High Courts should not act as if they are exercising an appellate jurisdiction.

49. In *T.G N. Kumar Vs. State of Kerala and Others*, , the Court said that power of superintendence conferred on the High Court under Article 227 of the Constitution of India is both administrative and judicial, but such power is to be exercised sparingly and only in appropriate cases in order to keep the subordinate Courts within the bounds of their authority.

50. In *The Commandant, 22 Battalion, CRPF Srinagar, C/o 56/APO and Others Vs. Surinder Kumar*, , Apex Court referring to its earlier decision in *Union of India and Others Vs. R.K. Sharma*, , observed that only in an extreme case, where on the face of it there is perversity or irrationality, there can be judicial review under Articles 226 or 227.

51. Looking to the application in question, in my view, it cannot be said that challenge to the order dated 23rd August, 1994 is barred by time, inasmuch as, the aforesaid order did not result either in passing of a decree or deciding a case or adjudication of rights between the parties so as to create any right in the plaintiff after expiry of alleged period of limitation and therefore, plea that amendment sought at this stage is barred by time, in my view, cannot sustain.

52. Applying the above propositions, I find that despite limited scope of interference, here is a case where the procedure followed by Court below has resulted not only in material illegality but has also caused grave injustice to the petitioner and hence there is no dearth of power to do justice by permitting the above amendment and not to deny relief to the petitioner on sheer inconsequential technicalities.

53. I, therefore, find no justification to refuse to grant amendment sought by petitioner. The application, therefore, is allowed. This amendment shall be treated to be part of writ petition and the petitioner may make formal incorporation during the course of the day.

54. Now, I proceed to decide the writ petition on merits.

55. Sri Salil Kumar Rai, learned counsel for the petitioner contended that 15th October, 1993 was the date fixed for remaining evidence, inasmuch as, plaintiffs evidence on earlier dates had not concluded. None appeared on behalf of the defendant on 15th October, 1993 before Trial Court and in absence of defendant or his counsel, plaintiffs evidence, i.e. deposition of PW-2 was completed and concluded. The plaintiff stated before Trial Court that he had not to adduce any further evidence. Thereafter, Trial Court then and there passed an order to proceed ex-parte against defendant and instead of fixing another date for hearing, proceeded to hear the matter on the same date and reserved judgment ex parte. This procedure adopted by Trial Court is patently illegal and not in accordance with the procedure contained in Order IX, Rule 6 CPC and therefore, the aforesaid order and entire subsequent proceedings are illegal, being in violation of principles of natural justice as also the mandatory procedure prescribed in law and are nullity in the eyes of law.

56. He (Sri Rai) also submitted that Trial Court has wrongly observed that an application under Order IX, Rule 7, CPC for recall of order dated 15.10.1993, was not maintainable and remedy available to the defendant was to move an application under Order IX, Rule 13 CPC, after ex parte decree and not before that. He said that aforesaid approach of Trial Court is wholly illegal and it has completely misconstrued Apex Court's decision in Arjun Singh Vs. Mohindra Kumar and Others, . He fortified the submissions by placing reliance on a decision of Bombay High Court in Lachhiram Chudiwala, H.U.F. through its Karta/ Manager Shri T.L. Chudiwala Vs. The Bank of Rajasthan Limited, (Bombay High Court) and Apex Court's decisions in Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, and Sahara India and Others Vs. M.C. Aggarwal Huf, . He further submitted that even if defendant has not appeared and adduced any evidence, it would not absolve Trial Court from looking into the fact that plaintiff has to prove his case in order to seek relief and mere failure of defendant to adduce evidence will not justify an inference or conclusion that plaintiff is entitled to relief. He buttressed his submissions placing reliance on Calcutta High Court's decision in State of West Bengal Vs. Lakshmi Narayan Singh and Another, and M.P. Narayan Vs. Sm. Sudhadevi and Others, and a decision of Madhya Pradesh

High Court in Nagar Palika Nigam, Gwalior Vs. Motilal Munnalal, . He also placed reliance on Apex Court's decision in Sudha Devi Vs. M.P. Narayanan and Others, .

57. Sri Arvind Srivastava, learned counsel for the respondents-landlord, however, contended that once defendant does not appear, it was always open to the Trial Court to proceed ex-parte and hear the arguments on the same date. Therefore, there was no error in the procedure adopted by Trial Court. He further contended that case set up by plaintiff stood duly proved by statement of witnesses PW-1 and 2, adduced by plaintiffs and since there was no evidence otherwise, the Courts below have rightly decreed the suit and there being no error apparent on the face of record, no interference is called for.

58. The first question would be, whether procedure followed by Trial Court on 15th October, 1993, which has ultimately culminated in the judgment and decree dated 6.9.1994, is consistent with statutory provisions or there is any violation of mandatory provisions of statute rendering entire subsequent proceedings, illegal.

59. Order IX, Rule 6 CPC contemplates procedure to be followed by Court when only plaintiff appears and defendant does not appear. It reads as under:

6. Procedure when only plaintiff appears.--(1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then-

(a) When summons duly served--If it is proved that the summons was duly served, the Court may make an order that the suit be heard ex-parte;]

(b) When summons not duly served--If it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;

(c) When summons served but not in due time--If it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiffs default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

> 60. Order IX, Rule 7 CPC then provides a situation where, on the date of hearing of suit, ex parte, fixed by the Court, defendant appears and assigns good cause for his non appearance on earlier date, enabling the Court to pass an order, upon such terms, as the Court directs as to costs or otherwise, permitting defendant to appear and place his case, as if, he had appeared on the day fixed for appearance.

61. The question raised before this Court is, whether Trial Court, while passing order to proceed ex parte against defendant, could have proceeded to hear arguments and concluded the same on the same date or it was obliged to fix

another date for ex parte hearing, so as to give an opportunity to defendant to either appear on the next date with justification for his absence on the earlier date and thereafter, if an application under Order IX, Rule 7, is given on such terms, as directed by the Court, allow him to participate in the proceedings.

62. It is pointed out that Order IX, Rule 6 clause (a) was substituted vide CPC Amendment Act, 104 of 1976, Section 59 w.e.f. 1.2.1977 and prior thereto, aforesaid clause read differently. The earlier clause read as under:

(1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then--

(a) if it is proved that the summons was duly served, the Court may proceed ex parte;

(b) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;

(c) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

63. If it is proved that summon was duly served, the Court may proceed ex parte. Earlier Order IX, Rule 6 Clause (a) came to be considered by Apex Court in Sangram Singh (supra) and it said:

When defendant has been served and has been afforded an opportunity of appearing then if he does not appear the Court may proceed in his absence. But the Court is not directed to make an "ex parte" order. Of course the fact that it is, proceeding "ex parte" will be recorded in the minutes of its proceedings but that is merely a statement of the fact and is not an order made against the defendant in the sense of an "ex parte" decree or other "ex parte" order which the Court is authorised to make. All that Rule 6(1)(a) does is to remove a bar and no more. It merely authorises the Court to do that which it could not have done without this authority namely to proceed in the absence of one of the parties.

(emphasis added)

64. The Court further observed that manner in which the Court should proceed, would depend upon the purpose for which, suit stood adjourned. If it is for final hearing, an "ex parte" decree can be passed, and if it is passed, then Order IX, Rule 13 comes into play and before the decree is set aside, the Court is required to "make an order to set it aside".

65. Referring to Order IX, Rule 7, Apex Court in Sangram Singh (supra) observed that, a party does not appear on "the day to which the hearing of the suit is adjourned," he cannot be stopped from participating in the proceedings, simply because he did not appear on the first or some other date of hearing. Though he has right to appear at an adjourned hearing, he has no right to set back the hands of the clock. Order IX, Rule 7 makes that clear. Unless he can show good cause, he must accept all that has gone before and be content to proceed from the stage at which he comes in. The Court thus examines the nature of order or the nature of adjudication, if an order is made under Order IX, Rule 7.

66. This decision was reconsidered by a three Judge Bench in Arjun Singh (supra), and, in para 16 of the judgment, it held that decision or direction in an interlocutory proceeding of the type provided for by Order IX, Rule 7, is not of the kind which can operate as res judicata so as to bar the hearing on the merits of an application under Order IX, Rule 13. Simultaneously referring to Order XLIII, Rule 1(d), the Court said that the scheme of the Court is clear that it provides remedy and requires a decision in suits after a hearing to the parties and not otherwise. In Arjun Singh (supra) the Court again considered and referred to as to what is open to the Court to proceed at the stage if has arisen, as contemplated in Order IX, Rule 6(1)(a). However, it cannot be disputed that firstly the discussion and observation is in respect to Clause (a) of Rule 6(1) as it was before Amendment 1977 and, secondly, in the case before Apex Court the situation had arisen when the case was already fixed for hearing and the hearing had also commenced though before pronouncement of the judgment. The Court observed that once hearing is completed, the parties have no further right or privilege in the matter and therefore in such a case Order IX, Rule 7 cannot be invoked when the Court proceeded to hear the matter ex parte.

67. The above decision, in my view, cannot be applied for the simple reason that 15.10.1993 was not a date fixed for hearing. Order sheet unequivocally reflects to the fact that on 12th July, 1993, the case was adjourned at the request of plaintiff since his counsel had not come to the Court and 23rd July, 1993 was fixed for remaining evidence. Thereafter on 23rd July, 1993 advocates abstained from work though plaintiff and defendant both were present and hence 6th August, 1993 was fixed for remaining evidence. On 6th August, 1993 the case was adjourned without any further proceedings. Though order sheet shows that it fixed 20th August, 1993 for final hearing. But in the contest of earlier orders, if it is read in the case here "final hearing" means "remaining evidence". Before 20th August, 1993 case was transferred by District Judge to the Court of JSCC by order dated 17th August, 1993. On 20th August, 1993 both parties were present but Presiding Officer was on leave. The case was adjourned for 20th September, 1993 for final hearing. Again on 20th September, 1993 due to paucity of time, the case was not taken up and hence it was adjourned to 15th October, 1993 for final disposal.

68. It is not the case of the parties that after 12th July, 1993 till 15th October,

1993, at any stage, remaining evidence had completed and case proceed further, therefore, though the order sheet has loosely used the word "final hearing" but the work which was to be conducted by Trial Court was recording of remaining evidence and this is what is evident from order dated 15.10.1993 showing that statement of PW-2 (Jai Prakash) was recorded by Trial Court since none was present to cross-examine him. His statement/deposition was concluded. Thereafter plaintiff made statement that he has no further evidence to adduce. Without giving any opportunity to the defendant to adduce his evidence (oral), Trial Court straight way proceeded, passed an order to proceed ex parte against defendant and then heard the matter and reserved the judgment. In fact, 15.10.1993 was a date fixed for evidence of the witness of the defendant and not for hearing of the matter as such.

69. Be that as it may, even if it is presumed that it was a date fixed for "final hearing", the matter has to be examined in the light of Order IX, Rule 6(1)(a) as it stands today after its substitution and amendment vide Section 59 CPC Amendment Act w.e.f. 1.2.1977.

70. From a bare reading of Clause (a), I have no manner of doubt that legislature has intended that Court must make order that the suit be heard ex parte on the date, when the defendant does not appear after service of summons, the Court can proceed to pass an order that the suit be heard ex parte but it does not permit the Court to hear the suit ex-parte on the same day then and there. The Court has to fix a date for hearing of the suit ex parte. On the date when the defendant does not appear, the Court is obliged to pass an order directing that the suit now be-heard ex parte and then a date for final hearing of suit ex parte will have to be fixed. The barrier that the Court cannot proceed ex parte shall stand disappear when the Court passes an order that suit be heard ex parte, but the aforesaid clause, as it stands now, does not empower the Court to proceed and decide the suit ex parte on the same day, when defendant is found absent on a particular date.

71. It is how, defendant gets an opportunity to appear on the next date and also satisfy the Court as to the reason or justification for his absence on earlier date, if his absence was for bona fide reason. Though there is no much discussion in the judgment of Apex Court in M/s. Sahara India and others (Supra), but I find that Apex Court has disapproved therein the procedure followed by Court when on the date matter is fixed and defendant is absent, the Court immediately proceed ex parte and decide the suit. In para 5 of the judgment, the Court observed:

Even if the defendants were not present the order could have been at the most to set the defendants ex parte and another date should have been fixed.

72. I also find that similar observations have been made in Lachhiram Chudiwala, H.U.F. (supra) and in para 12 of the judgment the Court says:

...The scheme of Rules 6 to 13 of Order 9 would show that if the defendants and

their advocate do not appear when the case is called on for hearing the Court is required to make an order that the suit be heard ex parte and adjourn the matter for recording of evidence and pass a decree. If on the adjourned date neither the defendants nor their advocate appear, as contemplated by Rule 7, the Court can proceed to pass a decree under Rule 6 of Order 9....

73. No authority so as to justify a view otherwise has been placed before this Court by learned counsel for the respondents but he submitted that it is discretion of the Court to hear the matter on that very date or to fix any other date but simply because no other date has been fixed after directing to proceed ex parte, it cannot be said that material illegality has been committed by Trial Court in the case in hand.

74. Having considered change in the statute i.e. Clause (a) of Order IX, Rule 6, CPC vide amendment made in 1977 and also public policy that an interpretation, which advances principle of fair play, opportunity of hearing and which is consistent with principles of natural justice, must be adopted by a Court so that without any unnecessary hindrance to expeditious and speedy disposal of a litigation, an adjudication may be made as much as possible, giving fair opportunity of hearing to both the sides. I am inclined to follow and adopt reasoning, i.e. Order IX, Rule 6(1)(a), as it stands today, which contemplates a situation where the Court has fixed a case for certain proceedings, and, defendant does not appear, to remove the barrier, it may pass an order that now the suit shall proceed ex parte, but then for such ex parte proceeding, another date has to be fixed, giving an intimation so that defendant may also have an opportunity to learn that now the case has been fixed on a particular date for ex parte hearing and if absence was for reasons beyond his control, or he had sufficient good reason justifying his absence on earlier date, he may not be prejudiced by being deprived of participation in a hearing on the matter and may have a decision on merits of the case. Such a view would advance legislative intention and would also be conducive to the principles of natural justice and fair play to all.

75. In my view, order dated 15.10.1993, in so far as Trial Court proceeded to hear the suit ex parte and reserved the judgment, was wholly illegal and beyond its competence. Consequently, the order dated 23rd August, 1994 passed by Trial Court rejecting application of the petitioner under Order IX, Rule 7, CPC also cannot sustain.

76. In the result the writ petition is allowed. The order dated 15.10.1993 in so far as Trial Court proceeded to hear the suit ex parte and reserved the judgment, and the further orders dated 23.8.1994 (Annexure 6 to the writ petition); 6.9.1994 (Annexure 7 to the writ petition) passed by Trial Court; and, revisional order dated 31.8.1999 (Annexure 9 to the writ petition) are hereby quashed. The case is remanded to the Trial Court to decide S.C.C. Suit No. 6 of 1988, afresh, from the stage at it was before 15th October, 1993.

77. However, it is made clear that Trial Court shall decide the suit expeditiously and in any case within six months from the date of production of a certified copy of this order. No order as to costs.