

(1998) 02 CAL CK 0009
In the Calcutta High Court
Case No : Rev. T-310 of 1995

Kalyani Roy (Sm.)

APPELLANT

Vs

Mannujan Bewa

RESPONDENT

Date of Decision : 23-02-1998

Acts Referred:

Calcutta Municipal Act, 1923 — Section 586(1)
Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, Order 20 Rule 4(2), Order 20 Rule 5, Order 20 Rule 6A, Order 41 Rule 23A

Citation : (1998) 1 ILR (Cal) 291

Hon'ble Judges : Bijitendra Mohan Mitra, J

Bench : Single Bench

Advocate : Jayanta Nath Roy, for the Appellant; Jawaharlal Roy, for the Respondent

Final Decision : Dismissed

Judgement

Bijitendra Mohan Mitra, J.—This is an application for review arising out of a proceeding under Order 47, Rule 1(1)(c) read with Section 114 of the CPC for review of a judgment passed by this Court on August 11, 1994 in F.M.A. No. 1485 of 1990. At the outset it is required to be stated that previously the applicant for review of the petition has pressed the same being represented by an Advocate but thereafter the said Vakalatnama stood cancelled. Thereafter, a Power of Authority was executed by the applicant in favour of her husband who is a Doctor and he had prayed for permission to represent his wife in the instant proceeding. The Court has heard the respective submissions of the parties on the question of representation and after, having considered the High Court Rules of the Appellate Side and in view of cancellation of the Power executed in favour of the Lawyer concerned and after taking note of the Power of Attorney given by the wife applicant in favour of a doctor who is the husband of the applicant has allowed him to make his submissions. This Court have heard the applicant Petitioner with patience and sympathy which has been elicited on this Court that the applicant Petitioner is an elderly and ailing lady and she should be saved

from the marathon carriage of the proceeding. There has been impassioned appeal by the husband of the applicant and the Court has taken note of the same and has reserved the judgment for long time after being sympathetic to the fervency of the appeal made by the husband of the applicant. This Court is left with no other alternative but to dispose of a pending proceeding within the parameters of legal framework and cannot afford itself guided by emotions and sentiments unless the applicant can succeed in driving home her point for entertainment being followed by allowing the petition for review.

2. The review is in respect of a judgment delivered by this Court in F.M.A. No. 1485 of 1990 delivered on August 11, 1994. The connected misc. appeal is directed against the judgment and order dated May 8, 1990 passed by the 6th Court of Additional District Judge at Alipore in Title Appeal No. 442 of 1988 and in terms of the order passed therein the appeal was allowed and the Appeal Court remitted the case back to the trial Court. The original Title Appeal No. 442 of 1988 passed by the 6th Court of Additional District Judge at Alipore on May 15, 1997 and in terms of the order passed the appeal was allowed and the Appeal Court remitted the case back to the trial Court. The trial Court by judgment and order No. 47, dated August 29, 1988 disposed of the application by way of preliminary points as to whether the suit is maintainable in view of non-joinder of necessary parties and on the point of limitation. The trial Court recorded a finding while making disposal of the said application that the suit is barred by law and non-joinder of necessary parties. In the order disposing of the first miscellaneous appeal it has been observed that a plea of non-joinder of parties cannot be taken up as a preliminary point within the meaning of the proviso super-added to Order 14, Rule 2 of the Code of Civil Procedure. It is ex facie clear from the perusal of the language of the proviso to Order 14, Rule 2 of the CPC that only preliminary points can be disposed of (1) where the court is not competent to try the suit for want of jurisdiction and (2) where a part has been created by operation of law and/or self-contained statute, but point of non-joinder of parties does not ipso facto satisfy the test of preliminary point. Another point was the point of maintainability and the Appeal Court has reversed the finding of the trial Court on the footing that the question of limitation is a mixed question of fact and law and as such the same cannot be gone into at the point of threshold by way of preliminary point and it is outside the ambit of the proviso to Order 14, Rule 2 of the Code of Civil Procedure. This Court by an elaborate order passed in the misc. appeal has recorded that the two points, namely, the point of suit being not maintainable because of non-joinder of necessary parties and point of limitation cannot be taken as preliminary point and cannot be decided under Order 14, Rule 2 and the proviso added thereunder in the Code of Civil Procedure. It is significant to mention that there are altogether eight issues which have been framed and only on the said second issue the lower Appellate Court has sent the case back on remand. It is also significant to make a reference from the record of the court below that it does not appear that the learned Munsif framed any issue as to whether the suit was

bad for non-joinder of necessary parties. It has been observed in the order of the lower Appellate Court that the suit must fail for want of a proper notice u/s 586(1) of the Calcutta Municipal Act upon Defendant No. 1 before commencement of the suit. In the absence of any such notice the same cannot have any germane bearing as no relief has been prayed for against Defendant No. 2. Therefore, it was immaterial whether the Plaintiff served notice u/s 586(1) of the Calcutta Municipal Act upon Defendant No. 2 before the commencement of the suit. It was incumbent on the part of the learned Munsif to decide the suit not only on the basis of the pleadings of the parties but also on evidence and all issues should be decided. The concluding portion of the judgment impugned of the trial Court is cryptic in nature which indicates that the suit is not maintainable. It is necessary to refer in this context to the language of Order 20, Rule 6A of the CPC which provides the last paragraph of the judgment shall state in precise terms, the reliefs which have been granted by such judgment. Here, the judgment of the trial Court does not indicate any precise terms as to whether relief has been granted or not. In terms of provisions of Order 20, Rule 4(2) of the CPC judgments of other courts shall contain a concise statement of the case, the points for determination, the decision thereon and reasons for substitution. In terms of Rule 5 of Order 20, the court is required to state its decision on each issue which is altogether eight in number and which are distinctly separate. Here the trial Court has perfunctorily arrived at a decision on a misplaced reference that the suit is not maintainable. It is doubtful as to whether for non-joinder of necessary parties a suit can be declared as non-maintainable. It can at best be treated as a bad suit.

3. In the judgment passed by this Court where review is sought for, this Court has observed that the lower Appellate Court has rightly remitted the case back on remand because the points which have been disposed of as preliminary points would not have been done so by the learned trial Court as the preliminary points have a distinct connotation after the amendment of the CPC in 1976. The Appeal Court has sent the case back on remand in exercise of its powers under Order 41, Rule 23A of the Code of Civil Procedure. The High Court has felt that the case cannot be decided on preliminary points as points in issue cannot be deceived in terms of Order 14, Rule 2 as issues of law relating to the jurisdiction of the court and/or by way of a bar to the suit created by any law for the time being in force. Accordingly, the High Court has sustained the order of remand directing the trial and evidence on all the issues and not on determination of pending lis on piecemeal fragmentation of issues. It appears from the scrutiny of the memo of review that the same has been sought for on a purported reference about the discovery of a new and important matter and on account of some errors apparent on the face of record. An attempt has been made to ascribe error apparent on the face of record in the judgment impugned passed by this High Court is about its reference to the original application made under Order 14, Rule 2 proviso for dealing with two issues separately as preliminary issues. The said issues have been dealt with by holding inter alia that it is barred by limitation.

The trial Court on the said application for disposal of preliminary points under the proviso of Order 14, Rule 2 has decided one of the eight issues, namely, plea of the limitation and has also tried to determine the issue that the suit is not maintainable. Therefore, on the basis of an application meted before the trial Court, two issues about maintainability and about limitation are segregated and they have been decided. Therefore, the High Court has dilated the same in its judgment and order impugned by remitting reference to the original substantive application which is after being allowed the Court has decided the two issues, namely, the issue of maintainability and issue of limitation. Therefore, there is no error apparent on the face of record. By way of reading the record the High Court has referred to the same and as such it cannot be dubbed anything as error on the face of record. If the answer as put forward in the trial Court's judgment disposed of the two basic issues by holding that the suit is hit by limitation and it is not maintainable, then nothing remains in the suit for being further adjudicated upon. Therefore it cannot be stated that the other issues of fact being there suit itself is alive. The same is a misreading of the order-sheet and an unintelligible interpretation is being attempted to be given. The other points canvassed is that the trial Court's order and/or judgment as the texture of a decree has been decided is either way by the High Court. Therefore, the said point is not open to be agitated within the fetters of limits of review. It is needless to reiterate that there is no scope for confusion between the error in law and error apparent on the face of record. It is well-known because of the settled position that error in law is not to be equated to that of error apparent on the face of record. This Court does not feel from the scrutiny of the grounds and the adumbration made thereof by way of lay person's exercise can help in making out a case of review for which the application for the same can be allowed. Inspite of fervant appeal of the Petitioner's husband, this Court is not in a position to explain any people in favour of the applicant Petitioner within the four corners either of any of the percepts of Order 47, Rule 1 or of Section 114 of the Code of Civil Procedure. It is well-known that review is a circumscribed jurisdiction and there the court's powers are limited. Accordingly, this Court is constrained after thinking of the matter for a long period to dismiss the application. However, in view of pendency of the matter this Court hereby directs the Second Court of Munsif at Alipore to take expeditious steps for disposal of Title Suit No. 340 of 1985 in accordance with law for the ends of justice. Subject to the said observations the review application stands dismissed on contest.