

(2011) 07 J&K CK 0029

In the Jammu And Kashmir High Court

Case No : C. Rev. No. 37 of 2010 and CMP No. 128 of 2010

Mohamad Tariq Mir

APPELLANT

Vs

Ghulam Qadir Bhat

RESPONDENT

Date of Decision : 06-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115, 115(1)
Constitution of India, 1950 — Article 226, 227
Transfer of Property Act, 1882 — Section 116

Citation : AIR 2012 J&K 1 : (2011) 3 JKJ 164

Hon'ble Judges : Hasnain Massodi, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hasnain Massodi, J.—Shri Ghulam Qadir Bhat-respondent herein on 29.11.2006 filed a suit for mandatory injunction decree, commanding

the petitioner-defendant in the suit to vacate and handover the possession of shop No. 3 situated at General Bus Stand Anantnag, to the

respondent. The respondent's case before the trial Court was that possession of the suit shop was handed over to the petitioner under Licence

Deed executed on 27.12.2005 on payment of Licence fee of Rs. 10,000/-. The petitioner, it was pleaded, was to hold possession of suit shop as

a Licensee from 01.10.2005 to 30.09.2006 and under a contractual obligation to handover its possession to the respondent at the end of licence

period. The respondent's case was that though the licence period was over and the petitioner asked to handover possession of the suit shop to the

respondent, the petitioner avoided to vacate the suit shop and handover its possession to the respondent, constraining him to file the suit.

2. The petitioner in his written statement filed on 09.07.2007, admitted the respondent to be rightful owner of the suit shop and also admitted that the petitioner entered into possession of the said shop under Licence Deed dated 27th December 2005. The petitioner, admitted that the Licence Deed expired on 03.09.2006. The petitioner however, claimed that after the Licence Deed came to an end the petitioner approached the respondent with the request to allow the petitioner to continue in possession of the suit shop and execute a fresh Deed. It is pleaded, that the respondent in principle agreed to extension in occupation of the suit shop, but asked for enhancement of the rent. The case set up by the petitioner before the trial Court was that there was no dispute between the parties as regards petitioner's possession over the suit shop, though an agreement on quantum of rent was yet to be arrived at. The petitioner admitted to have received a notice from the respondent through his lawyer Sh. M.A. Parray, requiring him to vacate the premises, and that the legal notice was dispatched when the negotiations between the parties were going on. However it was insisted that the petitioner continued to have possession of the suit shop even after the notice period was over. The petitioner pleaded that respondent by his conduct had allowed the petitioner to continue as "tenant" of the suit shop on higher rent and that in terms of Section 116 of Transfer of Property Act, lease in favour of the petitioner was taken to have been automatically renewed. The petitioner while claiming to be in possession of the suit shop signified his intention to pay rent to the respondent even at enhanced rate.

3. The petitioner a little less than a year after written statement was filed on 8.03.2008, filed an application for grant of leave to amend the written statement. It was pleaded that the Licence Deed, mention whereof was made in the plaint, was fake and forged. It was averred that the Licence Deed was intended by the parties to be a Rent Deed and that the scribe of the Licence Deed did not read over and explain its contents to the petitioner at the time of its execution, and petitioner was given to understand by the scribe that what was executed was rent deed. It was further pleaded, that the aforementioned facts were narrated to Shri Khursheed Ahamad Wani Advocate, at the time of filing of written statement, but Shri Wani did not set out facts in written statement. The petitioner also denied to have received legal notice from the respondent requiring him to vacate

the suit shop. The petitioner in para 12 of his application, expressed his contention to withdraw the admissions made in written statement.

4. The amendment application was resisted inter alia on the grounds that the application was made to delay the proceedings. The respondent

insisted, that the petitioner was not competent to withdraw the admission made in the plaint as regards execution of Licence Deed and the

petitioner having regard to the allegations made in the application was required to throw challenge to the Licence Deed and not to seek amendment

of the written statement.

5. The trial Court vide order dated 05.08.2008 allowed the application and granted leave to the petitioner to amend the written statement subject

to payment of Rs. 2000/- as costs.

6. The trial Court order dated 05.08.2008 was questioned in Civil Revision No. 132/2008 before this Court. The Revision Petition was allowed

and the order set aside on the ground that there was no endorsement in the body of the application for grant of leave to amend the written

statement, filed before the trial Court to the effect that contents of the application were read over and explained to the petitioner by any person,

before the petitioner had put his signature thereon. However, the petitioner was given liberty ""to make a bonafide application seeking amendment

of the written statement"" provided the same was filed on or before 1st. October 2009.

7. The petitioner accordingly filed a fresh application for grant of leave to amend the written statement on 23.09.2009. The petitioner reiterated the

avermnt made in the earlier application, constraining him to seek amendment to the written statement. It was insisted, that the scribe of the Deed

in question had made the petitioner to put his signatures on the Deed under the mistaken belief that the Deed was a Rent Deed and not a Licence

Deed as it later turned out to be. The petitioner assailed the Deed as fake and forged. It was next pleaded, that the petitioner was deceived by his

lawyer Shri Khurhseed Ahamad Wani who did not set out facts narrated to him as regards nature of the Deed and the circumstances in which it

was executed, in written statement. The petitioner further pleaded that he had not received any legal notice from the respondent, through his lawyer

erroneously recorded an admission in the written statement on behalf of the

petitioner that the petitioner had duly received a notice from Sh. M.A.

Parray Advocate, on behalf of the respondent.

8. The trial Court vide order dated 02.03.2010 declined leave to amend the written statement opining that the amendment prayed for is unjust and

if allowed would result in prejudice to the respondent.

9. The trial Court order dated 02.03.2010 is questioned in the present Civil Revision on the grounds that trial Court has not appreciated the facts

and law in right perspective and erroneously held the amendment sought to be unjust and to result in prejudice to the respondent. The trial Court,

according to the petitioner while passing the impugned order depicted lack of understanding of underlying purpose and object of Order 6 Rule 17

of CPC, and also its scope and ambit. Insisting that the impugned order was passed in a mechanical manner without proper application of mind,

the petitioner pleads that the trial Court has illegally exercised jurisdiction vested in it, making it necessary to intervene u/s 115 CPC.

10. I have gone through the pleadings, trial Court record and have heard Counsel for the parties.

11. There can be no disagreement with the legal preposition that the rules of procedure are intended to secure the proper administration of justice

and not to be used to punish a litigant. Order 6 Rule 17 CPC empowers the Court to allow either of the party to alter or amend his pleadings at

any stage of the proceedings and mandatorily allow such amendments as are necessary for the purpose of determining the real question in

controversy between the parties. Like other rules or procedure O6 R17 CPC is to serve and be subordinate to the fundamental purpose of such

rules. However, it does not follow that the Court is to permit amendment to the pleadings at mere asking of either party to the suit, without making

out a case for grant of leave to amend the pleadings. While exercising the power to allow amendment of the pleadings, liberally the Court is to be

on guard that the amendment to the pleadings, not necessary for the purpose of determine the real questions in the controversy between the

parties, not allowed to be incorporated. Where the proposed amendment is to lead to total displacement of the case setup or where the effect of

the amendment to be would be to negate a right by lapse of time or would introduce a totally different new and inconsistent case and above all

where the amendment is not made in good faith or is malafide, the Court is to desist from granting leave to amend the pleadings. It is well settled

law that the amendment in the pleadings that amounts to withdrawal of important admission can not be allowed for simple reason that rights flow

out of bold and clear admission made by the party to the suit to his adversary in the litigation. While a party is to enjoy full freedom to amend his

pleadings, the dictates of public policy make it imperative that the matters concluded in wake of admissions in pleadings, should not be reopened

and the parties pushed to uncertainty. In the present case the petitioner in his written statement as already pointed out made a categoric, clear, bold

and ambiguous admission that he had executed Licence Deed dated 27.2.2005 and entered into possession of suit shop under the said Licence

Deed. The petitioner also admitted that he had received a legal notice from respondent through lawyer Sh. M.A. Parray Advocate, requiring him to

handover vacant possession of the suit shop to the respondent, and that the Licence Deed had come to an end by efflux of time and resultantly the

petitioner was required to handover possession of the shop to the respondent. However, the case set up by the petitioner in opposition to the suit

was that the respondent had already by his conduct extended his occupation of the suit shop and was thus estopped from asking the petitioner to

vacate the suit shop. The petitioner further pleaded that dispute, if any, between the parties was only as regards rent to be paid during the extended

period and not to the petitioner's occupation of the suit shop.

12. The petitioner by the proposed amendment intends to withdraw all admissions made in the written statement and introduce totally different,

new and inconsistent case in opposition to the respondent's suit. Such amendment to the written statement can not be permitted, as it would not

merely change the colour and complexion of the controversy between the parties but also it is very chemistry. The petitioner contrary to his stand in

written statement, proposes to project himself as a tenant of the suit shop, denying that he was under contractual obligation to handover the vacant

possession of the suit shop to the respondents and deny that he even received a legal notice from the respondent to hand over vacant possession of

suit shop. The proposed amendment is bound to change nature of the suit in as much as the petitioner in effect by insisting that the Licence Deed in

question was a piece of forgery and petitioner made to put his hands unto the Deed by misrepresentation, in effect seeks a declaration that the

Deed in the facts proposed to be pleaded, is void and inoperative against the petitioner.

13. The above discussion apart, the order impugned in the present petition does not appear to be maintainable in wake of amendment to Section

115 CPC incorporated in the year 2009. The proviso to Section 115(1) CPC has been by the aforementioned amendment substituted as under:-

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 proceeding"".

14. It follows that the revision u/s 115 CPC would be maintainable only in case the order deciding an issue, in the course of a suit or other

proceedings, if made in favour of the party questioning order, would have finally disposed of the suit or other proceedings. The impugned order

even if made in favour of the petitioner would not have disposed of the suit or other proceedings. The Supreme Court in Kamalnath Vs. Sudesh

Verma, , while dealing with question of maintainability of a Civil Revision under amended Section 115 CPC has observed:-

5. The proviso to sub-Section(1) of Section 115 puts a restriction on the powers of the High Court in as much as the High Court shall not, under

this Section vary or reverse any order made or any order deciding a issue, in course of a suit or other proceedings except where (i) the order made

would have finally disposes of the suit or other proceedings or (ii) the said order would occasion a failure of justice or cause irreparable injury to

the party against whom it is made. Under Clause (a), the High Court would be justified in interfering with an order of a subordinate Court if the

said finally dispose of the suit or other proceeding. By way of illustration we may say that if a trial Court holds by an interlocutory order that it has

no jurisdiction to proceed the case or that suit is barred by limitation, it would amount to finally deciding the case and such order would be

revisable. The order in question by which the amendment was allowed could not be said to have finally disposed of the case and, therefore, it

would not come under clause (a).

In Shiv Shakti Coop. Housing Society, Nagpur Vs. Swaraj Developers and Others, -the Supreme Court emphasising that a person has not a

vested right in the course of procedure and that once by a statutory change, the mode of procedure is altered, the parties, are to proceed

according to the altered mode without exception, and that while a party to litigation has a right to file an appeal no such right is conferred to file a

revision observed:-

It is fairly a well settled position in law that the right of appeal is a substantive right. But there is no such substantive right in making an application

u/s 115.....

14. Section 115 is essentially a source of power for the High Court to supervise the subordinate courts. It does not in any way confer a right on a

litigant aggrieved by any order of the subordinate court to approach the High Court for relief. The scope for making a revision under S.I 15 is not

linked with a substantive right.

The Court making a comparison of Section 115 CPC has it stood before the amendment and the Provision after the amendment held:-

A comparison of two provisions of S. 115 as they stood before amendment and after the amendment of 1999 shows that while proviso (a) of the

unamended provision has been retained in its totality. In the amended provisions clause (b) of the proviso has been omitted. It is to be noted that

prior to the amendments to the Code by the old Amendment Act, the power of revision was wider. By the amendment, certain positive restrictions

were put on the High court's power to deal with the revisions under S. 115. Prior to the said amendment, it was not strictly necessary that the

impugned order would have the result of finally deciding the lis or the proceedings in the lower courts. In fact, the power could be exercised in any

case where jurisdictional error was committed by the original court or where substantial injustice had resulted.....

A plain reading of S. 115 as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision

would have given finality to suit or other proceeding, if the answer is ""yes"" then the revision is maintainable. But on the contrary, if the answer is

no"" then the revision is not maintainable. Therefore, if the impugned order is of

interim in nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject matter of revision under S. 115.

15. The principle of law was reiterated in *Surya Dev Rai Vs. Ram Chander Rai and Others*, where the Supreme Court holding a civil revision u/s 115 CPC against an order disallowing appeal questioning the trial Court order under Order 39 CPC as not maintainable observed:-

4. Section 115 of the CPC as amended does not now permit a revision petition being filed against an order disposing of an appeal against the order of the Trial Court whether confirming, reversing or modifying the order of injunction granted by the trial Court. The reason is that the order of the High Court passed either way would not have the effect of finality disposing of the suit or other proceedings. The exercise of revisional jurisdiction such a case is taken away by the proviso inserted under sub-section (1) of S. 115 of the C.P.C. the amendment is based on the Malimath Committee's recommendations. The Committee was of the opinion that the expressions employed in S. 115 C.P.C., which enables interference in revision on the ground that the order if allowed to stand would occasion a failure of justice or cause irreparable injury to the party against whom it was made, left open wide scope for the exercise of the Revisional power with all types of interlocutory orders and this was substantially contributing towards delay in the disposal of the cases. The Committee did not favour denuding the High Court of the power of revision but strongly felt that the power should be suitably curtailed. The effect of the erstwhile Cl.(b) of the proviso, being deleted and a new proviso having been inserted, is that the revisional jurisdiction, in respect of an interlocutory order passed in a trial or other proceedings, is substantially curtailed. A revisional jurisdiction cannot be exercised unless the requirement of the proviso is satisfied.

In the aforementioned case an application grant of temporary injunction was rejected by the trial Court and so was the appeal preferred against the trial Court order. The revision against the order of the appellate Court was held to be non-maintainable in view of amendment made in Section 115 of CPC by the Amendment Act 46 of 1999, though remedy available under

Articles 226, 227 was held to be available and intact, unaffected by the said amendment.

16. The law laid down in Shiv Shankar's case and Suraya Dev Devi's (supra) was followed in V.B. Nayak v. S.R. Narsima Murthi & Others AIR

2003 Kant. H.C.R. 3112 where revision against an order rejecting application for amendment was held to be not maintainable in wake of amendment to Section 115 CPC.

17. From the above discussion it emerges that the expression ""other proceedings"" used in Section 115(1) and proviso is not used in

contradistinction to the expression ""suit"" and does not refer to the interim matters/ applications during course of the suit and decided at interim stage

i.e. during pendency of the suit. The expression ""other proceedings"" on the other hand is used to bring other proceedings though having colour and

character of a suit are known by a different nomenclature. Resultantly any order passed during pendency of the suit to be revisable has to satisfy

the test laid down u/s 115 (1) incorporated by the Amendment Act 2009 i.e. the order impugned is of such a nature that if passed in favour of the

party questioning the order, would have clinched the suit or other proceedings. The instant revision petition in the said background is not

maintainable as the order passed in favour of the petitioner would not have finally decided the suit or other proceedings within meaning of Section

115(1) proviso.

18. For the reasons discussed, the trial Court has rightly rejected the application and declined grant of leave to amend the written statement. The

impugned order does not suffer from any illegality. The trial Court can not be said to have acted in exercise of its jurisdiction illegally or with

material irregularity is sought to be projected by the petitioner.

The revision petition is accordingly dismissed along with connected CMP(s).