

(2002) 08 BOM CK 0075

In the Bombay High Court

Case No : Civil Revision Application No's. 239, 686, 803, 907, 908, 936, 998, 999, 1097, 1240 and 1302 of 1996, 7, 16, 20, 24, 32, 57, 69, 85, 118, 119, 128, 137, 162, 252, 303, 406, 409, 458, 555, 584, 612, 622, 634, 646, 685, 686, 689, 701, 710, 726, 729, 743, 7

Nagorao alias Arun Yerawar, Sunil Yerawar and Sou.
Mandakini Yerawar

APPELLANT

Vs

Narayan Yerawar and Sou. Sudhabai Yerawar

RESPONDENT

Date of Decision : 29-08-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 3, Order 39 Rule 4, Order 39 Rule 5

Citation : AIR 2003 Bom 178 : (2003) 2 BomCR 148 : (2002) 4 MhLj 615

Hon'ble Judges : V.G. Palshikar, J

Bench : Single Bench

Advocate : A.M. Gorday, for the Appellant; S.R. Deshpande, for the Respondent

Final Decision : Dismissed

Judgement

V.G. Palshikar, J.—This revision application is directed against the order passed in Misc. Civil Appeal No. 6/95 passed on 6-8-1996 below (Exh.114) in Regular Civil Suit No. 56/92 whereby the order of status-quo was granted. The learned appellate Court vacating the order of status-quo granted injunction in favour of the appellants before it and, therefore, the unsuccessful respondent has come up in Revision u/s 115 of the Civil Procedure Code.

2. When this matter came up for arguments, it was noticed that several revisions of such nature are pending in this Court. All these revisions challenged the orders passed by the trial Court and the appellate Court either when they are concurrent or when they are reversing. The learned Counsel appearing in the above revision application No. 803/96 desired for some time to argue the matter. Accordingly, the matter was adjourned till today. In the meantime, the office also identified about 150 revision applications wherein identical question of law arose, namely, maintainability of all such revision applications after 1-7-2002 when the

amended provisions of Section 115 of the C.P.C. came into operation and the amended proviso substantially curtailed the revisional jurisdiction of this Court and prohibited entertainment of revision application in any interim or interlocutory order. Again this being important question of law, the matter was adjourned and learned members of the Bar were invited to address this Court all the facets of this question. Accordingly, Shri M.G. Bhangde, Shri R.L. Khapre, Shri P.N. Kothari, Shri V.P. Panpalia, Shri A.P. Watches under and Shri S.P. Kshirsagar appearing for various applications in the revision applications contended that such revision applications are maintainable in spite of the amendments with effect from 1-7-2002. Shri S.R. Deshpande, Shri Rajeev Chhabra and Shri L.G. Deshpande, learned Advocates submitted that after the amendment, there is no question of such revision applications being maintained and, therefore, prayed that all these revision applications be dismissed as not maintainable.

3. We have to first note the submissions made by the learned Counsel in this behalf. Shri M.G. Bhangde, learned Counsel appearing for the applicants, submitted that the proviso to Section 115 as amended upto date covers only four situations, i.e. (i) order made in the course of a suit, (ii) order made in the course of other proceedings, (iii) order deciding any issue in the course of a suit and (iv) order deciding any issue in any other proceedings. His contention is that the proviso is attracted only in relation to the above four categories and, therefore, no revision application u/s 115 of the C.P. Code will be maintainable after 1-7-2002 only in cases where the above four contingencies occur. In all other cases, according to the learned Counsel, a revision application will be maintainable. He then contended that an order under Order 39 Rules 1 & 2 of the C.P. Code is not an interim order in any way as it finally decides the proceedings, namely, the appeal against order and consequently, it is not an order either in the course of the suit or in the course of other proceedings, it being a final order in the other proceedings and, therefore, the revision application is maintainable.

4. Shri R.L. Khapre, the learned Counsel appearing for the applicants, submitted that he adopts the arguments of Shri Bhangde and he placed heavy reliance on a judgment of this Court in Pundlik Balkrushna Patil and others .vs. Arun Shankar Patil and others reported in 1985 Mh. L.J. 296 to contend that the revision application is maintainable. I will advert to this judgment at a later stage.

5. Relying on the provisions of Order 39 and Rules 1 & 2 of the Order 39, Shri P.N. Kothari, the learned Counsel contended that an order under Rule 1 or 2 of Order 39 adjudicates, though prima facie, on the rights of the parties, in an application under that proviso and, therefore, though temporary it is a final adjudication of rights and, therefore, revision is maintainable. The proceedings are not interlocutory in nature and, therefore, there is no question of revision not being maintained.

6. Shri Panpalia, learned Counsel appearing on behalf of the applicants, submitted that the very construction of the provisions of Order 39 denotes that

the proceedings for temporary injunction are not of interlocutory nature. Relying on the title of Order 39, he pointed out that Order 39 provides for temporary injunctions and interlocutory orders. He then took me through the provisions of Rules 1 to 6 and submitted that they apply to temporary injunctions and under a sub-heading interlocutory orders that can be passed by a Court under Order 39 are mentioned. According to him, therefore, an interlocutory order is only that which is mentioned from Rule 6 onwards under Order 39 and an order granting or rejecting temporary injunction is not an interlocutory order and, therefore, revision u/s 115 in the circumstances is maintainable.

7. Countering these submissions, Shri S.R. Deshpande, the learned Advocate submitted that either by grant or refusal of an interim order by way of temporary injunction the suit is not terminated or finally decided. The grant or refusal is only for the disposal of the suit. It is a step taken by the Court to keep alive the lis and protect the suit property. Merely because an appeal is provided against an order of such interim nature, it cannot acquire finality of any kind in any manner. To the same effect was the submission of Shri Rajeev Chhabra, the learned Advocate, who submitted that even if the appeal is decided by the Appellate Authority under Order 41 Rule 1, that decision on an appeal does not decide the suit which is the main litigation and in that main litigation, temporary injunction is granted to keep alive the lis and protect the suit property and, therefore, merely because the appeal under Order 43 Rule 1 C.P.C. is finally decided, it does not become a final order taking it outside the purview of the provisions of Section 115 or making it revisable u/s 115 of the C.P. Code.

8. Shri L.G. Deshpande, the learned Advocate appearing on behalf of the non-applicants, submitted that by the Amending Act of 1999, the provisions of Section 115 were reconstituted. If the object for reconstitution is considered, it will be seen that the object was decidedly to reduce the delay caused in disposal of a litigation and, therefore, reducing the number of interim remedies available. According to the learned Counsel, provisions of Order 39 are obviously interim measures that can be taken by a Court and any order made therein is obviously interim in nature. Merely because an appeal is provided against that order, it cannot now be said after reconstitution of the Section by the 1999 Amending Act that in spite of the clear mandate of the Legislature a revision application against such order passed by the appellate Authority under Order 43 Rule 1 would be maintainable.

9. I have to consider these rival contentions in the light of the several provisions of the CPC and several decisions cited at the Bar as also noticed by me. I would again like to consider the provisions of Section 115 of the C.P. Code as they traveled via amendments from the inception of the CPC till date. Section 115 from 1908 till 1976 read as under :-

"S. 115. The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears-

- (a) to have exercised a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit."

The High Court, therefore, had the power or the jurisdiction to revise the orders of the subordinate Courts if they were such as are covered by clauses (a), (b) & (c) of Section 115 quoted above. Till 1976 there were no fetters on the powers of the High Court and any order passed by any Court subordinate to it was liable to be revised if it answered to the description mentioned in any of the three clauses in Section 115. About this position, there never was any doubt. However, by passage of time the arrears kept mounting and it was deemed necessary by the Parliament of India to curtail delays that occurred in pending suits. Extensive amendments, therefore, were made to the provisions of the Civil Procedure Code, 1908 introducing several reforms for reducing the delay in disposal of the suits. We are concerned in this revision with the reforms introduced by the Parliament in the matter of revisional powers of this Court. Section 115 of the C.P. Code was amended and certain restrictions were placed on the power of the High Court. The Section as amended in 1976 reads as under :-

"S. 115(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears,

- (a) to have exercised a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case it thinks fit;

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 -

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

(2) The High Court shall not, under this section vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

Explanation.-- In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding."

From the above, it will be seen that by the amendments of 1976, Section 115 was renumbered and it was divided into two sub-sections. Sub-section (1) retained the original Section 115 to it, the amendment added in the proviso and sub-section (2) was further added putting a positive restriction on the right of the High Court to revise an order in cases where an appeal lay from that order either to the High Court or to any Court subordinate thereto. From the amendments, it will, therefore, be seen that earlier u/s 115 the only fetter was that the High Court could not exercise the revisional powers in cases where the order impugned was such in which no appeal lay thereto meaning thereby to the High Court. If an appeal was maintainable to the High Court from that order, revisional jurisdiction could not be exercised by the High Court. This position was altered and the High Court was prohibited from entertaining a revision application against any order against which an appeal lay either to the High Court or any Court subordinate thereto. By adding this sub-section, a revision was made not maintainable in cases where appeal lies either to the High Court or to any Court subordinate thereto. After the amendment of Section 115 by the Amending Act, 1976, therefore, it was specifically provided that the High Court shall not under this Section vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto. Prior to introduction of this sub-section, there were several cases in which an appeal lay to the District Court under the provisions of Section 104 of the CPC read with Order 43 Rule 1 of C.P. Code and depending upon the pecuniary jurisdiction of the Court concerned, such appeals lay to the High Court also. The original Section 115 as it stood prior to 1976 prohibited interference by the High Court only in cases in which no appeal lies thereto. Till 1976 it was, therefore, open for the High Court to revise an order in which no appeal lies to it. It could, therefore, till then entertain a revision application in case of an order passed in appeal under Order 43 Rule 1 if no further appeal lay to it. This jurisdiction of the High Court was curtailed by adding sub-section (2) to Section 115 and it was provided that the High Court shall not under this Section vary or reverse any decree or order against which an appeal lies either to the High Court or any subordinate Court. After the addition, therefore, an order against which an appeal is maintainable before the District Court is made not revisable directly by the High Court but there was nothing in these amended provisions to prevent the High Court from considering in revision an order made by the Appellate Authority as no appeal lay to it as contemplated by Section 115(1). It is obvious from all this, therefore, that first inroad was made on the powers of the High Court to revise the orders of the subordinate Court by amendment of 1976. Certain restrictions were put on the powers of the High Court to revise any orders of the Court subordinate thereto.

10. It was after this amendment in 1976 came into force that the question of

extent of jurisdiction of this Court u/s 115 was considered by this Court in a decision in *Pundlik Balkrushna Patil and others .vs. Arun Shankar Patil and others* reported in 1985 MH.L.J. 296. In that case this Court took the view on scrutiny of the provisions of Section 115(2) as it then stood that the order sought to be revised having been passed under Order 43 of the C.P. Code was not appealable either to the High Court or to any other Court subordinate to it and, therefore, a revision was held maintainable. There is yet another reason why the revision in those circumstances was maintainable. It will be seen with reference to the provisions of Section 115 as amended in 1976 that the proviso had two clauses to it and with reference to the second clause, i.e. clause (b) it was permissible for the High Court to interfere in revision in a matter where gross injustice was done. The clause read as under :-

"(b)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 ban imposed by the proviso was, therefore, not total and hence, interference was possible. This was the position in relation to maintainability of revision till the provisions of Section 115 of the C.P. Code were further amended by the Act of 1999. By that Act, proviso to Section 115(1) was restructured, sub-section (2) though kept intact was reintroduced and sub-section (3) was added. The Section after amendment reads as under :-

"S. 115(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears,

- (a) to have exercised a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case it thinks fit;

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 proceedings.

(2) The High Court shall not, under this section vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the court except where such suit or other proceeding is stayed by the High Court.

Explanation.-- In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit

or other proceeding."

It will be seen that the newly introduced proviso is restructured from the old proviso, clause (b) thereof is deleted and (a) is merged in the proviso, thereby providing that the High Court shall not vary or reverse any order made in the course of a suit or 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 proceedings. The removal of clause (b) of the proviso is significant and the submissions made at the Bar mentioned above are to be considered in light of these amendments. The main submission that the proviso to Section 115 covers only four situations quoted above and the proviso is attracted only in those situations is based basically on the premise that an order made under Order 39 Rules 1 & 2 is not an interim order.

11. It is, however, not possible for me to accept the contention that order made under Order 39 Rules 1 & 2 is not an interim order. Bare look at the heading of Order 39 in the C.P. Code is enough for this purpose. It reads :-

"TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS"

The injunctions granted under the Order by nature of the provisions of law are temporary. It is not, therefore, permissible in law to hold that though the provision under which it is made is called temporary, it is not a temporary order. Apart from this, the fact that the orders under Order 39 are temporary or interim or interlocutory is established beyond reasonable doubt. The Supreme Court in *The Saharanpur Co-Operative Cane Development Union Ltd. Vs. The Lord Krishna Sugar Mills Ltd. and Others*, has observed in paragraph no. 13 as under :

"13. After hearing learned advocates appearing for the different parties we have no doubt in our mind that this is a case where we should not interfere with the stay order passed by the High Court. For one thing it is only in the most exceptional circumstances that this Court ever agrees to interfere with an interim working order passed by the High Courts. The principal contentions of the different parties in this case are yet to be heard and adjudicated by the High Court. It is not desirable that in delivering this judgment we make any observation which might influence the High Court in any manner in passing the final order in the writ application. Both the parties have sought to make out before us that the stand they are taking in this matter is the only possible stand that one can possibly take in the light of the relevant statutory provisions. It is apparent that the time for deciding which of these rival contentions is correct has not yet come. In the circumstances, we do not see how we can interfere with the interim order passed by the High Court. The High Court apparently took into consideration the fact that any indefinite postponement of the payment of the outstanding dues of the petitioner might seriously prejudice the cane growers. The High Court must have considered at the same time that to allow the certificate proceedings to be completed would have rendered the writ application made by the petitioner completely in fructuous. They, therefore, passed a

working order protecting the interests of the cane-growers and at the same time keeping open issues which can be brought out at the time of adjudication. It was suggested to us on behalf of the Cane-growers Society that the proper order for the High Court in such circumstances would have been to maintain the status quo and to keep the attachments undisturbed until the disposal of the writ petitions and at the same time to insist on the petitioner depositing the entire amount in court, so that the interests of the cane-growers could be protected in the event of dismissal of the writ petition. While we are not in a position, in the absence of a judgment in this matter, to contemplate the reasons which induced the High Court to pass the instant order in its present form, it is impossible for us not to appreciate the fact that even if the High Court had passed an order asking the petitioner to deposit the entire amount at once that would not have helped the immediate needs of the cane-growers which according to the counsel of the Society are so pressing that it is incumbent on us to interfere even with an interim order passed by the High Court. At one stage, we considered the feasibility of making an order by which the petitioner could be compelled to make a deposit in court of a sum of Rupees 8.26 lakhs which, according to the petitioner, is the amount that is still outstanding if one takes into account the various payments made by the petitioner after the issue of the certificates either on its own or in terms of the order of the High Court. We, however, refrain from passing such an order for the simple reason that such an order would make very little difference to the parties. This sum would in any case be payable by the petitioner in course of a little over two months time. Had we passed such an order we would have only expedited the realisation of the outstanding dues of the cane-growers by an insignificantly short period. This we are unwilling to do. This cannot help any of the parties and there can be hardly any point in taking the extraordinary step of interfering with an interim order of the High Court when such interference cannot serve the interests of any party whatsoever. In this view of the matter these appeals fail. In the particular facts and circumstances of the case we make no order as to costs."

The position of an order under Order 39 is, in my opinion, identical. The principal contentions raised by different parties in the suit regarding the subject matter for which the interim order is made are yet to be decided. The findings recorded by the learned trial Court or the appellate Court under Order 43 Rule 1 are prima facie findings dealing with the continuation or discontinuation of a temporary injunction granted or not granted. There can, therefore, be no doubt that the order under Order 39 C.P.C. is a temporary order.

12. The decision in *Terene Traders .vs. Rameshchandra Jamnadas & Co.* and another reported in AIR 1987 S.C. 1492 in my opinion, clinches the issue that the orders passed under Order 39 are temporary or interlocutory in nature.

"2. In this case a learned Judge of the Bombay High Court by his order dated July 1, 1986 has in revision set aside the order of the Bombay City Civil Court dated September 5, 1983 and allowed the plaintiffs application for grant of

temporary injunction under Order XXXIX R. 1 of the Code of Civil Procedure, 1908.

3. Normally, this Court does not, as a rule, interfere with an interlocutory order of this nature except under very exceptional circumstances....."

It will be seen that the very nature of the orders indicates that they are temporary and the Supreme Court has in most unequivocal terms observed that to be so.

13. The latest judgment of the Supreme Court in *Laxmikant V. Patel Vs. Chetanbhat Shah and Another*, , in my opinion, decisively holds that the orders under Order 39 are temporary or interlocutory in nature. The Supreme Court has held as under :-

"The Supreme Court would not ordinarily interfere with the exercise of discretion in the matter of grant of temporary injunction by the High Court and the Trial Court and substitute its own discretion therefore except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the order of the Court under scrutiny ignores the settled principles of law regulating grant or refusal of interlocutory injunction. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the Court below solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion."

It is thus clear that the order passed under Order 39 is temporary or interlocutory in nature. According to Shri M.G. Bhangde, learned Counsel appearing for applicants, even if the order under Order 39 Rules 1 & 2 of the CPC is interlocutory, after an appeal is filed under Order 43 C.P.C. the appellate order is no longer an order either in the suit or proceedings and, therefore, is open for revision. According to him, as noted above, the proviso bars a revision application only in the four contingencies where the order is made in the course of a suit or proceedings and where order is made in the course of suit or proceeding deciding any issue in course of that suit or proceeding. The order passed by the appellate authority under Order 43 Rule 1 read with Section 104 of C.P. Code is not such an order. It finally decides the proceedings of Miscellaneous Appeal u/s 104 and, therefore, the revision is maintainable. I am unable to accept this contention for the reason that an appeal against an order granting or refusing injunction is maintainable under Order 43 Rule 1 and that appeal is a continuation of the proceedings. An order granting injunction if maintained in appeal merges into the appellate order and if reversed ceases to exist and an order dismissing an application for grant of temporary injunction comes into existence. Even that order continues to be temporary. In either case it is an order in continuation of the proceedings which are pending and, therefore, it cannot be said that it is an order in a proceeding which is neither a suit nor a proceeding as contemplated by Order 39 and, therefore, is a final order is not

acceptable. Even if it is presumed that the order passed by the appellate Court under Order 43 decides the appeal finally and the proceedings by way of Misc. Appeal come to an end, the lis pending in the Civil Suit does not stand decided by reason of that order. What is contemplated by Section 115 as amended in 2002 is that the order should be such if made in favour of the revision applicant would have finally disposed of the suit or other proceedings. The Civil Suit in which temporary injunction is granted or not granted is not decided finally either by grant or refusal thereof and continues to pending. Taking into consideration this aspect of the matter, therefore, it cannot be said that merely because the revision application is directed against an order passed by appellate Court finally deciding the Misc. Appeal under Order 39 Rule 1 read with Order 43 Rule 1 C.P.C., the revision is maintainable. What is now necessary after July, 2002 for maintaining a revision is that the order impugned in revision must have the effect of finally disposing of the suit or proceedings in favour of the person who applies for revision. By very nature of things and the nature of Order 39 itself, such a contingency cannot occur and consequently, a revision application whether against an appellate order or original order granting or refusing injunction is not maintainable after 1-7-2002.

14. In my opinion, such revision application is not maintainable after 1-7-2002 as the legislative intent to prohibit such interference in revision is made abundantly clear by the Amendment Act and the provisions of the Section. It will be seen that by the 1999 Amendment the proviso to Section 115(1) was substituted. Clause (b) of the proviso was deleted. Section 115(2) was maintained and clause (3) was added to Section 115. As long as the clause (b) of proviso existed on the statute book, it was possible for the High Court to interfere in its revisional jurisdiction even if the order is of interim or interlocutory nature provided if such order is allowed to stand, it would result in failure of justice or irreparable loss. Conscious deletion of this provision by the Legislature is, therefore, a positive indication of the intent of the Legislature that even if the interlocutory order if allowed to stand caused failure of justice or irreparable loss, it should not be interfered with because it is of interim nature and parties can always be relegated to their rights by the appropriate final adjudication of the lis between the parties which will be decided only when the suit from which this arises is decided. That being the clear intent of the Legislature to severely restrict the scope of revisional powers of the High Court, to interpret the proviso in a manner which will require reading into that proviso the contents of clause (b) which was definitely and positively eliminated by the Legislature by restructuring the proviso, is impermissible in law. It will have, therefore, to be held that the revision application against orders under Order 39 Rule 1 whether passed by the trial Court or in appeal by the appellate Authority under Order 43 Rule 1 are not liable to be revised u/s 115 of the CPC after 1-7-2002.

15. In the result, therefore, all these revision applications fail and are dismissed. There will be no order as to the costs.