
(2012) 10 KL CK 0115
In the High Court Of Kerala
Case No : C.R.P. No. 353 of 2006

Seetha Ramachandran

APPELLANT

Vs

Radhakrishnan

RESPONDENT

Date of Decision : 09-10-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 1, Order 23 Rule 1, Order 23 Rule 1(3), Order 23 Rule 3, Order 23 Rule 3A

Citation : (2013) 1 ILR (Ker) 798 : (2012) 4 KLJ 860 : (2012) 4 KLT 856

Hon'ble Judges : K. Vinod Chandran, J

Bench : Single Bench

Advocate : N. Subramaniam, M.S. Narayanan, P.T. Girijan and Usha Narayanan, for the Appellant; Dinesh R. Shenoy and N.N. Arun Bechu as Amicus Curiae, for the Respondent

Judgement

K. Vinod Chandran

1. The revision petitioners are the defendants in a suit for specific performance filed by the respondent. Suit was compromised and decree was

passed on 24.2.2000. Subsequently, alleging fraud and coercion as also challenging the competence of the Power of Attorney, of the plaintiff to

enter into a compromise, the defendants filed I.A. No. 3587/2000 dated 4.8.2000, under O. 47 R. 1 read with Sections 114 and 151 of the Civil

Procedure Code. The plaintiff filed objections. Subsequently, on advise, the defendants filed a memo stating.

the petitioners beg to withdraw I.A. No. 3587/00 as the same is not maintainable in law and the petitioners are today filing an interlocutory

application under the proper provisions of law.

The said memo was recorded and the I.A. was closed on 24.1.2001. On

25.1.2001 another I.A. was filed seeking the very same reliefs, but however, invoking the power of the Court under the proviso to R. 3 of O. 23. That was rejected holding that, the earlier I.A. was withdrawn; without reserving liberty, and the subsequent application cannot be entertained by reason of the specific bar under O. 23 R. 1.

The counsel for the revision petitioner Sri N. Subramaniam would canvass for the position that O. 23 R. 1 deals with only original proceedings and not interlocutory applications arising out of such original proceedings. The counsel for the plaintiff/respondent Sri. Dinesh R. Shenoy, however would contend that applying the provisions of S. 141 of the CPC, all proceedings in a Civil Court, including those termed as interlocutory, will come within the ambit of O.23 of R. 1. The learned counsel for the respondent would also appeal to this Court to consider the facts upon which the setting aside of the decree is sought for in the Court below and the hardship to which the respondent/plaintiff is put to in not being able to deal with the properties though having complied with the letter and spirit of the compromise. It is also specifically pointed out that the respondent had not objected to the application filed under O.23 R. 1 and only when the same was posted for evidence, the withdrawal memo was filed; clearly as a dilatory tactic.

2. At the outset, this Court is not persuaded to go into the facts or adjudicate upon the claim of fraud and coercion made before the Court below.

Though the impugned order extracts the pleadings in the interlocutory application; the consideration was confined to the maintainability of the application. Hence, bereft of the facts, this Court is called upon to consider only whether the application subsequently filed under a different

provision is barred by virtue of the provisions of O.23 R. 1, since the withdrawal of the earlier application was without leave to file a fresh

application. Further, this Court has also to deal with the question of limitation which was considered by the Lower Court and found against the revision petitioners.

3. Order 23 R. 1 deals with withdrawal and adjustment of suits. R.1 specifically confers on the plaintiff the right to abandon the suit as such or a part of the suit claim against all or any of the defendants. The only caveat being with respect to minors or other persons to whom the provisions of

R. 1 to 14 of O. 32 extend. We are not concerned with any such parties in the above case. By sub-r. (3) of R. 1 of O.23, it is provided that when the Court is satisfied that the suit is bound to fail by reason of some formal defect or there are sufficient grounds for allowing a plaintiff to institute a fresh suit; then, the plaintiff may be permitted to withdraw the suit or the part of the claim reserving liberty to institute a fresh suit. Sub-r. (4) also mandates that in the event of no liberty being granted under sub-r. (3), then the plaintiff shall be precluded from instituting any fresh suit in respect of the very same subject matter or such part of the claim. The first issue to be dealt with is whether an interlocutory application also would be regulated by the said provisions and whether it would be necessary for the plaintiff or even a defendant to apply for and obtain leave as provided under the provisions of sub-r. (3) of R. 1 of O.23.

4. The learned counsel for the petitioner would place reliance on the decisions of various High Courts and the Supreme Court to contend that what

is intended by O.23 R. 1 is only withdrawal of original proceedings instituted before a Civil Court and does not take within its sweep any

interlocutory proceedings which crop up in the course of the original proceedings. (Kanchumarthi) Latchayya and Another Vs. (Kuntamukkala)

Suryaprakasa Rao, , was a case in which after obtaining a decree for possession of certain items of land as also mesne profits; the plaintiff applied

before the Court for ascertainment of future mesne profits. This application was withdrawn since the Appellate Court had modified the decree, and

a second application asking for ascertainment of not only future mesne profits but also for re-ascertainment of past mesne profits, was filed. The

defendant contended that the withdrawal of the earlier application would tantamount to abandonment of the claim, since the plaintiff had not sought

for leave under O.23 R. 1(3). The Division Bench held that O. 23 R. 1(3) does not in terms apply. It was held to be intended to be applicable only

when a suit or a part of a suit claim is withdrawn. Thiruvankitachariar, J., in his concurring judgment, held that the withdrawal of the suit or

abandonment of the claim which has the effect of barring a fresh suit can only relate to withdrawal or abandonment before the decree is passed and

does not apply to suits in which decrees have already been passed. That was the case in Latchayya's case (supra) and also in the present revision.

5. Bengal Agency and Stores Syndicate and Others Vs. Stores and Engineering Supply Co., was a commercial suit in which under the rules of that

Court, the defendant ought to have filed its affidavit of documents within a fortnight of filing of written statement. The fortnight having expired, and

the defendant not having responded to a summons, the defence was struck off. When the matter was listed before Court the defendants appeared

for hearing and moved the Court for an order that the suit be removed from the list and leave granted to defend the suit and also file affidavit of

documents. That application was withdrawn by the defendant intimating that it would prefer an appeal from the order of the Master. In the appeal,

it was contended before Court that since one of the prayers in the first application before Court, which was withdrawn, was for extension of time,

the same having not been withdrawn with liberty, there cannot be a fresh application for a similar relief. The Court however held that O.23 R. 1

CPC was not shown to apply to orders in interlocutory applications in a suit.

6. Rameswar Sarkar Vs. State of West Bengal and Others, was a case in which an application for withdrawal of a suit was made by the plaintiff

before the Court below. Subsequently, the plaintiff filed another application under S. 151 of the CPC to withdraw the said application. The facts in

brief were that the plaintiff, awarded a contract by the State; in the course of such work, carried out some additional work. The awarded work

was subject of arbitration and with respect to the additional work the plaintiff filed a suit. The Court having expressed a view that this also should

be referred to arbitration, he filed an application under O.23 R. 1 for withdrawal of the suit. The Court dismissed the suit for non-prosecution. The

petitioner then realizing his folly filed an application under S. 151 for withdrawal of the application. The High Court was concerned with the

question as to whether in exercise of its inherent power, the Court could allow withdrawal of application for withdrawal and order setting aside of

the order dismissing the suit for non-prosecution. The Calcutta High Court held that the scope of S. 151 was very wide and the same is to be

invoked when there is no remedy prescribed under the C P C. O. 23 R. 1 was held to be confined to withdrawal of a suit with or without liberty to

file a fresh suit. That provision was held to be inapplicable in so far as the withdrawal of a interlocutory application for withdrawal of suit itself was

concerned. The scope of S. 151 as held by the Supreme Court in *Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal*, was extracted.

The section itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders

necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent

power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the Court; it is a power inherent in the Court by

virtue of its duty to do justice between the parties before it.

7. The said decision of the Calcutta High Court was quoted with approval by the Honourable Supreme Court in *Jet Ply Wood Private Ltd. and*

Another Vs. Madhukar Nowlakha and Others, . In that case the plaintiff sought for specific performance of an agreement to sell. After the

appearance of the defendants, the plaintiff sought for leave to withdraw the suit on the ground that the defendants were prepared to settle the

matter. No leave was sought to file a fresh suit. The owners of the property however sold the property to third parties within a month and the

plaintiff applied for withdrawal of the application for withdrawal of the suit. The plaintiff was before the High Court; against the rejection of his

application, which reversed the judgment of the lower courts and restored the suit to the file of the Trial Court. The Supreme Court while

confirming the order of the High Court, held that for filing of an application for recalling an order permitting withdrawal of the suit, the provisions

of S. 151 could be resorted to in the interest of justice.

8. In opposition to the contention taken by the respondent under S.141 of the C.P.C., the learned counsel for the petitioner would take me through

Medam Sankaranarayan Vs. Gaddala Tripathi Tao and Others, . In a suit, separate applications for amendment and impleadment was dismissed

for default and subsequent applications to restore them also were rejected. Again application for amendment and impleadment were separately

filed with the same prayers and the matter was in revision from the dismissal thereof. Relying on the provisions of O.9 R. 9, C.P.C., it was

contended that no fresh application could be brought on record. Since O.9 R. 9 provided for only suits, S. 141 was pressed into service. It was

held that O.9 R. 9 was applicable only to suits and S. 141 does not extend such

application to interlocutory orders. The words "all proceedings in any court of civil jurisdiction" was argued, as taking in interlocutory proceedings too. S. 141, was held to be, intended to enable the adoption of the procedure, provided in C.P.C. for conduct of suits, also in other civil proceedings of an original nature. Mulla on C.P.C., 13th edition, was quoted to show that S. 141 intended only that the procedure in probate, guardianship and so on and so forth shall also be regulated by the procedure of C.P.C. A plethora of decisions of the Privy Council and various High Courts were discussed and it was held:

The applications for amendment of pleadings and for addition of parties are only interlocutory matters and are not proceedings of original nature. I

am therefore, of the view that such applications are not "proceedings in Civil Court" within the meaning of S. 141 Civil Procedure Code.

9. On the strength of the judicial thought evinced in the decisions cited above, I am persuaded to hold that O.23 R. 1 deals with suits and part of

the claims raised in the suit. It cannot apply to interlocutory applications and the orders passed thereon. Further as held in Latchayya's case

(supra): here is a case in which a decree has been passed. I respectfully draw immense support from Jet Ply Wood (P) Ltd. case (supra): too.

While sub-r. (4) of O.23 R.1 was held to be restrictive of a fresh suit, if no leave had been sought; an application for withdrawal of a withdrawal

application under O.23 R.1 was held to be maintainable under S. 151. Of course, as pointed out by the learned counsel for the respondent, only in

extreme cases; where interests of justice demanded it.

10. In the instant case also, the suit was compromised on 24.2.2000. The defendants filed their application for setting aside the compromise

decree and restoring the suit on 4.8.2000 under the provisions of O. 47 as noticed above. Subsequently, a memo was filed seeking withdrawal of

that application purportedly on the premise that a review would not be maintainable in the case of a compromise decree, since the proviso to R. 3

of O.23 specifically provides a re-consideration by the very same Court. That memo dated 24.1.2001 was recorded and the Court closed the I.A.

The fresh application was filed on 25.1.2001. The memo was recorded and the I.A. closed. The memo set forth the plea of non-maintainability

and held out the intention to file a proper application. Here too there are

allegations of fraud and coercion. Despite the arguments attempted on such allegations, by both counsels, this Court refused to consider the same, for fear of arrogating to itself the powers of the original court; whose satisfaction under O.23 R. 3 is the essence of a compromise decree, and the proviso specifically confers such power to vary an order passed, on that Court itself.

11. In exercising revisional jurisdiction and examining as to whether the order is vitiated by illegality or material irregularity, this Court cannot but view the issue through the contextual lenses of ultimate justice. From what has been stated by the Supreme Court in Manoharlal Chopra's case (supra) the power under S. 151 is inherent and does not flow from the Code as such. Both under proviso to R. 3 of O. 23 as also S. 151, this Court is of the opinion that the findings above as also interests of justice makes it expedient that the Court below consider the matter afresh, shorn off the technical reservations; which in any event has been held by this Court as being nonexistent. But that is not to be taken as an expression by this Court on the allegations of fraud, coercion, competence of the Power of Attorney or any of the pleadings for sitting aside of the compromise decree. Those are left open.

12. Now what has to be examined is the question of limitation. The learned counsel for the revision petitioner would submit that Art. 137 of the Limitation Act, would be applicable since the proviso to O.23 R. 3 does not provide any period of limitation. In such circumstances, the limitation would be three years from, when, the right to apply accrues. The learned counsel for the respondent however, would contend that what is specified by the proviso is the forum in which a compromise decree can be challenged and essentially the power of the Court is to be drawn from O. 47 i.e., the power of review. Since, Art. 124 provides thirty days for such exercise to be initiated, the present petition as also the earlier petition is to be held as having been filed outside the period of limitation. The learned counsel for the respondent also would place reliance on Banwari Lal Vs. Smt. Chando Devi (through L.R.) and another, .

13. Banwari Lal's case (supra) was one in which the history and also the scope and ambit of the proviso introduced in R. 3 along with R. 3A in O.23 was considered extensively. It was noticed that earlier the compromise

decrees were challenged in separate suits which dragged on for years.

Hence, suits on the ground that the compromise on which the decree is based was not lawful was barred by R.3(A) of O. 23 by an Amendment of

1976. Simultaneously, sub-r. (m) under R. 1 of O. 43 which provided for an appeal against an order under O. 23 R. 3, was deleted. Hence, R.

1(A) was introduced in O. 43 providing a right of appeal against the order recording a compromise or refusing to record a compromise. The

position before amendment was that S. 96(3) though bars an appeal against the decree passed, with the consent of the parties, it is valid and

binding on the parties only so long as it is not set aside by the procedure prescribed in the Code itself. One such remedy available was of filing an

appeal under O.43 R. 1(m) against the order recording the compromise and if it was set aside there is no necessity to file an appeal against the

decree. Similarly, a suit also could be filed for setting aside such decree on the ground that the decree is passed on invalid and illegal compromise.

However, after the amendment neither an appeal against the order recording the compromise nor remedy by way of filing a suit is available. Sub-

rules (1) & (2) of R. 1-A of O.43 were introduced to question the decree on the ground that the compromise should or should not have been

recorded and in that appeal the order, recording the compromise or failing to do so, could also be challenged. It was also valid to approach the

very same court under the proviso to O.23 R. 3.

14. Rule 3 of O.23 provides the compromise of a suit on adjusting wholly or in part, by any lawful agreement in writing and signed by the parties

or where the defendant satisfied the plaintiff in respect of the whole or any part of the subject matter of the suit; and also satisfies the court of such

factum of compromise or satisfaction. However, on one of the parties denying that such adjustment had occurred or satisfaction of the plaintiff has

been arrived at, then, by the proviso the party denying such adjustment or satisfaction gets a remedy before the very same court. The Court while

considering such application has also to keep the explanation to the proviso i.e., the illegality of an agreement or compromise which is void or

voidable under the Indian Contract Act, 1872, in its mind. The application for exercise of power under proviso to R. 3 of O.23, has been held by

the Supreme Court in Banwari Lal's case (supra) to be one which, can be

labelled under S. 151 of the Code. But since, the Code specifically confers such power, in examining the validity of a compromise, the Court necessarily has to draw upon proviso to R. 3 of O.23 and not on its inherent powers. If so, then, it cannot be said that the power conferred under the proviso would be one drawn from O. 47. True, the forum in which an application under the proviso would lie is specified therein. But, that alone would not lead to a conclusion that the power is one of review and is one drawn from O. 47. When the amendment bringing in R. 3A of O.23 as also the proviso to R. 3 of O.23 and R. 1A of O.43 was brought in, the legislature was aware of O.47 by which power of review of its own order was granted to a Court. However, it was thought fit that a proviso be introduced akin to S. 151, providing for relief against fraudulent and illegal compromises.

15. The learned counsel for the respondent has a further contention that there are other provisos in the Code wherein power has been granted to the court to consider an interlocutory application and the Limitation Act specifically provides for the period after which such applications are barred. O. 9 R. 9 provides for setting aside a decree against a plaintiff for default and R. 13 provides for setting-aside ex parte decrees. Thirty days is the limitation provided under the Arts. 122 and 123 of the Limitation Act. R. 3 of O. 23, even if held to be not drawing power under O. 47, it is in the nature of a review and hence limitation would be thirty days under Art. 124, is the argument.

16. The proviso to R.3 of O. 23 is wider in its import and application, than review under O. 47. Review is confined to (i) discovery of new and important matter or evidence which was not within the knowledge of a person and could not be produced by that person even after exercise of due diligence at the time when the decree or order was made or (ii) on account of some mistake apparent on the face of the record or (iii) for any other sufficient reason. Though any other sufficient ground was also understood to be adopting the colour of the preceding grounds, in recent times the purport has been expanded taking in even subsequent events. Board of Control for Cricket in India v. Board of Control for Cricket, India and Another Vs. Netaji Cricket Club and Others, laid down that the rule that "any other sufficient reason" should be atleast analogous to the other specified

grounds; was not a universal rule. However, a later decision of the Honourable Supreme Court in *The State of West Bengal and Others Vs.*

Kamal Sengupta and Another, held that the one line observation regarding the deviation from the earlier judgments is to be treated as confined to

the facts of that case:

The one line observation contained in para 93 that while exercising review jurisdiction the Court can take into consideration subsequent event has

to be treated as confined to the facts of the case involving the controversy between rival Cricket Associations.

17. Culling out the principles underlying O. 47 R. 1 it was held

i. The expression ""any other sufficient reason"" appearing in O.47 R. 1 has to be interpreted in the light of other specified grounds.

ii. An error which is not self-evident and which can be discovered by a long process of reasoning, cannot be treated as an error apparent on the

face of record justifying exercise of power under S. 22(3)(f).

iii. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

iv. A decision/order cannot be reviewed under S. 22(3)(f) on the basis of subsequent decision/judgment of a coordinate or larger Bench of the

tribunal or of a superior court.

v. While considering an application for review, the tribunal must confine its adjudication with reference to material which was available at the time

of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as

vitiating an error apparent.

vi. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such

matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the

court/tribunal earlier.

18. This is not what is contemplated by the proviso to R. 3 O. 23. The proviso to R. 3 O.23 can be invoked on the mere denial that the

adjustment as recorded by the Court has actually happened or on denial of the satisfaction of the plaintiff's claim. The explanation also makes it

mandatory that an agreement or compromise which is void or voidable under the Indian Contract Act, 1872 shall not be deemed to be lawful

within the meaning of this rule. Even a voidable contract, without initiating any proceedings to that end, could result in the compromise decree being

set aside for the mere asking, on the satisfaction of the court that it is a voidable agreement under the Indian Contract Act, 1872. Art. 137 of the

Limitation Act specifically takes into account those situations where no limitation is provided for. Limitation is not regulated by the Code of Civil

Procedure, but by the Limitation Act. It cannot be said that the power of the Court under proviso to R. 3 of O.23 is one drawn from O. 47 or

even deemed to be a proceeding for review.

19. To clothe proviso to R.3 O.23 with the garb of review would be a turnabout from the classical allegory of the jackal falling into the blue dye.

O. 47 is fettered with the caution of self-restrain which is an essential attribute of all judicial action. Proviso to R. 3 O.23, as is S. 151, is an

exhortation to the innate judicial conscience of every Court to fulfill the ultimate goal of justice. In view of the findings above, especially, drawing

strength from the Supreme Court decision in Banwari Lal's case (supra); more specifically the power under O.23 R. 3 being compared and

likened to that under S. 151, the proviso under R. 3 of O.23 cannot be one conferring powers merely of review and hence would be regulated by

Art. 137 of the Limitation Act. The application before the Court below hence cannot be said to be one barred by limitation.

20. Incidentally, a question arose as to the invocation of the remedies available under the proviso to R. 3 of O.23 and R. 1A of O.43. Whether

after passing of a decree, proviso to R. 3 O.23 could be invoked. Banwari Lal's case (supra), was a case in which a compromise deed was

recorded and the suit dismissed as per the compromise deed. It was also directed that ""decree sheet be prepared accordingly"" (paragraph 3 of the

decision). After having considered the issue elaborately, the effect of the Amendment Act of 1976, introducing a proviso along with explanation to

R. 3 of O.23 and R. 1A of O.43 was summarised in Paragraph 13. It was also held.

As such a party challenging the compromise can file a petition under proviso to R. 3 of O.23, or an appeal under S. 96(1) of the Code, in which,

he can now question the validity of the compromise in view of R. 1A of O.43 of

the Code.

After holding so, as noticed earlier, the Hon"ble Supreme Court labelled the power under proviso to R. 3 O.23 as one under S. 151 of the Code

and found that since specifically such power has been vested by the proviso, it is not the inherent power which is to be invoked but the proviso

conferring such power. On the facts of the above case the Act of the Subordinate Judge in entertaining the application filed under the proviso to R.

3 O.23 was held to be perfectly justified. This, in effect, dispels the doubt in the mind of this Court, since the proviso was invoked after the decree

was passed.

21. It is also apposite to notice the decision of a three Judge Bench decision in Kishun @ Ram Kishun (Dead) through LRs. Vs. Bihari (D) by

LRs., . The dispute was between two brothers one of whom was gifted a property by their father. The donee son had approached the Tahsildar

for effecting mutation which was objected to by the other son. A compromise, purportedly entered into between the sons agreeing to share the

property was filed before the Tahsildar. The donee son objected to it and hence no final orders were passed by the Tahsildar. In the meanwhile,

the son, who disputed the gift, filed a suit seeking cancellation of the gift. Before Court, the plaintiff sought for a compromise decree based on the

compromise petition filed before the Tahsildar. The case had a chequered career and initially though the trial court refused to record the

compromise, in compliance with the appellate order, it subsequently did pass a decree. That decree was reversed again in appeal. In the course of

Second Appeal before the High Court, both the sons died. Without being aware of this the High Court disposed of the matter.

22. The legal representatives were before the Hon"ble Supreme Court. At the outset it was found that the decree passed against and in favour of

the parties, who were no more, was a nullity. What is pertinent to the instant case is the fact that the Hon"ble Supreme Court in the above decision

held that the interest of justice would be subserved if the orders and decree passed in the suit and the appeal and Second Appeals are set aside

and the suit remanded to the trial court for making a proper enquiry into the question whether there was a compromise of the disputes; in terms of

the proviso to O.23 R. 3 of the Code. This provides further support to this Court,

to remand the matter to the trial court for fresh consideration of the question as to whether the compromise was one validly entered into as provided under R. 3 of O.23.

23. The compromise is of the year 2000 and the impugned order of the year 2005. The Civil Revision Petition is pending before this Court from

the year 2006. Relegating the revision petitioner to the appellate remedy would not serve the purpose of ultimate justice nor can it be held to be an

absolute mandate of law. On the order recording the compromise being set aside, the basis or the substratum on which the decree was passed

vanishes and the decree would stand recalled. On the strength of the discussions above the impugned order is set aside. When the matter was

being remanded to the Court below for fresh consideration forceful submissions were made by the learned counsel for the respondent highlighting

the delay caused and alleging dilatory tactics adopted by the petitioner before the Court below. While expressing no opinion on whether the

petitioners had resorted to any dilatory tactics, this Court cannot but focus on the issue that the plaintiff has not been able to enjoy the fruits of the

compromise decree entered into long back. The specific bar against adjournment, unless for recorded reasons in R.3 also cannot be ignored. It

reflects the anxiety of the legislature and its concern to avoid delay when compromises are entered into and then resiled from, recklessly. In such

circumstances, it is directed that the petitioners and the respondent appear before the Court below on 26.11.2012. The court below shall give one

opportunity to both parties to adduce evidence within a week thereafter, and only if such request is made. The matter shall be heard and disposed

of at any rate within three months from the date of appearance i.e., before 26.2.2013.

This Court places on record the valuable assistance of the Amicus Curiae Sri. Arun Bechu N.N. in resolving the issue.