

(1976) 05 J&K CK 0004
In the Jammu And Kashmir High Court
Case No : Civil Revision No. 118 of 1975

Smt. Shiv Kaur

APPELLANT

Vs

Lala Nanak Chand and Others

RESPONDENT

Date of Decision : 26-05-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Limitation Act, 1963 — Section 5

Citation : AIR 1977 J&K 33

Hon'ble Judges : Mufti, J

Bench : Single Bench

Advocate : M.A. Nehvi, for the Appellant; A.N. Raina, for the Respondent

Judgement

Mufti, J.—Lala Nanak Chand and Ors. (hereinafter called ""the plaintiffs'") filed a suit for ejectment and recovery of arrears of rent against

Smt. Shiv Kaur and Ors., (hereinafter called' the defendants'"), in the court of Sub Judge, Chief Judicial Magistrate, Srinagar. By his judgment

dated 24-12-1973, the learned Sub Judge decreed the suit. The defendants filed an appeal to the District Judge, which was transferred for

disposal to the Additional District Judge, Srinagar. The appeal was filed beyond time. Along with the appeal the defendants filed an application for

condonation of delay on the ground that they were kept in dark by their lawyer about the result of the suit. At the hearing of the application counsel

for the defendant sought opportunity to produce evidence in support of the allegations made in the application. The learned Additional District

Judge declined the request observing:

In this appeal which admittedly has been filed beyond the period of limitation an application u/s 5 of the Limitation Act for condonation of delay has

been presented alongwith the appeal. The learned Counsel for the appellant has today pressed that I should record his evidence in support of his application. But on going through the application itself I find that the grounds advanced for extension of time and condonation of delay are such which can be decided after taking into consideration the record itself. I do not think there is any necessity to record any evidence. In the circumstances the appeal as well as the application for condonation of delay shall simultaneously be argued on 29-10-1975.

Aggrieved by this order the defendants have filed this revision in this Court.

2. Appearing for the respondents, Mr. A.N. Raina raised a preliminary objection that the revision was incompetent because, as he put it, the order

is a mere interlocutory order closing the evidence and does not amount to a ""case which has been decided"" within the meaning of Section 115

Code of Civil Procedure. The determination of this question depends on the true interpretation of Section 115 of the Code of Civil Procedure,

which provides:

The High Court may call for the record of any case which has been decided by any Court subordinate to the 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, or
- d. to have caused failure of justice.

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

3. This is as we have it in the CPC prevailing in our State. It differs from Section 115 of the CPC prevailing in the rest of India in one respect and,

that is, it contains an additional Clause (d) which does not find place in Section 115 of the CPC prevailing elsewhere in India. In either case,

however, the jurisdiction of the High Court arises only if there is a case decided by the subordinate court in which no appeal lies to the High Court.

But whereas the High Courts in India can exercise the jurisdiction if the impugned order involves a matter of jurisdiction, our High Court can

exercise it also if it raises a matter of failure of justice.

4. The expression 'case' is nowhere defined either in the CPC prevailing in our State or in that prevailing in the rest of India. The generally accepted view always was that the expression 'case' does not mean a suit only. It also includes a proceeding in a civil court in which the jurisdiction of the court is invoked for determination of some claim or right legally enforceable. But the opinion was by no means unanimous on the question whether an order, which did not finally dispose of the suit or proceedings, amounted to "a case which has been decided". One view accepted by the majority of the High Courts was that the expression 'case' includes an interlocutory proceeding relating to the rights and obligations of the parties and the expression 'record of the case' includes so much of the proceeding as relates to order disposing of the interlocutory proceeding. The other view was that the expression 'case' does not include any issue or a part of a suit or proceeding and therefore an order on an issue or a part of a suit or proceeding is not a 'case decided' and the High Court has no power to revise such an order. This divergence of opinion was eventually set at rest by the Supreme Court in *Major S.S. Khanna Vs. Brig. F.J. Dillon*, . The Court examined the history and nature of the jurisdiction conferred by Section 115 and, then, Shah J. speaking on behalf of Sarkar J. and himself, observed:

The expression 'case' is a word of comprehensive import; it includes civil proceedings other than suits, and is not restricted by anything contained in the section to the entirety of the proceeding in a civil court. To interpret the expression 'case' as an entire proceeding only and not a part of a proceeding would be to impose a restriction upon the exercise of powers of superintendence to which the jurisdiction to issue writs, and the supervisory jurisdiction are not subject, and may result in certain cases in denying relief to an aggrieved litigant where it is most needed, and may result in the perpetration of gross injustice.

Hidayatullah J, in the concurrent judgment observed:

...and the word (case) does not mean a concluded suit or proceeding but each decision which terminates a part of the controversy involving a matter of jurisdiction.

In this background the Court held that the interlocutory order of the subordinate Judge, holding that the suit filed by Dillon for the recovery of the

amount advanced to Khanna was not maintainable, must be regarded as 'case decided' because it was manifestly a decision having direct bearing

on the rights of Dillon to a decree for recovery of loan allegedly advanced by him to Mr. Khanna.

5. These observations clearly suggest that if, by an interlocutory order, a subordinate court decides any question in controversy between the parties

to a suit or proceeding and the decision is one having direct bearing on their rights and obligations in such suit or proceeding, expressly so stated or

as a necessary consequence of the order, then, irrespective of the fact whether such question forms the subject-matter of a separate issue or not,

the order would be a 'case decided' even if it does not finally decide the suit or proceeding. Accordingly the view expressed by a Full Bench of this

Court in *Rasul Makru v. Des Raj I J& KLR 26* that only such proceedings as are complete and independent in themselves although they may be a

part of the suit would fall within the term 'case' as used in Section 115 of the CPC must be treated to have been superseded by the judgment of the

Supreme Court and, so, it can no longer be held to be a good law.

6. The question in controversy between the parties in the present case was whether the appellant was entitled to produce evidence in support of

the application u/s 5 of the Limitation Act for condonation of delay in filing the appeal. By the impugned order the learned Additional District Judge

decided the question against the appellant and absolutely shut out the evidence that the appellant proposed to produce in support of the

application. The decision has a direct bearing on the appellant's claim for condonation of delay which might even fail when there is no evidence to

support it. In this view, as a matter of direct and inevitable consequence, the order decides the claim of the appellant for condonation of delay u/s 5

of the Limitation Act. On the principle stated above, it must be regarded as a 'case decided' within the meaning of Section 115 of the Code of

Civil Procedure. The preliminary objection is, therefore, overruled.

7. This takes me to the question whether the impugned order involves matter of jurisdiction or even justice. In other words whether the order

satisfies the conditions of clause (a), (b), (c) or (d) of Section 115. Before dealing with this question let me make it clear that even if an order

satisfies the conditions set out in clauses (a), (b), (c) or (d), the High Court is

not obliged to exercise its jurisdiction and interfere with the order

because the exercise of the jurisdiction is discretionary and the court may refuse to interfere in proper case even if these conditions are satisfied. As

was observed by the Supreme Court in Major S.S. Khanna Vs. Brig. F.J. Dillon, .

The interlocutory character of the order, the existence of another remedy to an aggrieved party by way of an appeal, from the ultimate order or

decree in the proceeding or by a suit, and the general equities of the case being served by the order made are all matters to be taken into account

in considering whether the High Court, even in cases where the conditions which attract the jurisdiction exist, should exercise its jurisdiction.

8. Reverting to the question stated above let me see if the impugned order satisfies the conditions in clauses (a), (b), (c) or (d) of Section 115. The

decision, in my opinion, affected directly the rights and obligations of the parties in the matter of the application for condonation of delay u/s 5 of

the Limitation Act. The learned Additional District Judge purported to decide the matter without a trial of the application on evidence. The learned

Counsel for the respondent urged that the questions involved in the application were pure questions of law. The learned Additional District Judge

does not say so. On the other hand what he says is that the matter can be decided 'after taking into consideration the record itself', implying that the

application raises question of fact and, in any case, mixed questions of fact and law which can be decided with reference to the available material

on record. Thus, on his own showing, the learned Additional District Judge wanted to assume facts which he had no jurisdiction to do. The

exercise of his jurisdiction depended on the determination of the question of fact on evidence. In this view he has exercised jurisdiction which was

not vested in him by law and the case squarely falls under clause (a) and, in any case, under clause (d) which was interpreted by a Full Bench of

this Court in (I JKLR 26) (supra) to contemplate circumstances like the following:

(1) Where the effect of the order was to cause a multiplicity of litigation or to prolong the trial.

(2) Where there is a patent irregularity in procedure.

(3) Where the effect of the order is to cause unnecessary delay or expense.

(4) Where the order passed is perverse or such that unless set aside irreparable harm is likely to be caused to one of the litigants.

(5) Where the effect of the order is to make the trial take an illegal course.

(6) Where the order works manifest injustice.

9. The question then is whether this Court should appropriately interfere in the order. It is true that the appellant can re-agitate the matter after her

appeal is ultimately thrown out by the Additional District Judge on the ground that it is barred by limitation. But it will unnecessarily prolong the

litigation inasmuch as if the second appellate court finds that the application for condonation should have been decided on evidence, it will have to

send the case back for trial in that matter. Then again it is noticeable that the appellant has not abused the opportunity given to her to produce

evidence when, perhaps, it could be said that the order was equitable. The fact of the matter is that the appellant was given absolutely no

opportunity to produce the evidence. The learned Additional District Judge has tried to stop it at the threshold. In this he has acted with undue

haste without perhaps realising that the implications of his action were very grave so far as the appellant was concerned. The order is manifestly

unjust and illegal and must be set aside.

10. In the result I allow this revision petition; set aside the impugned order, and, send the case back to the Additional District Judge with the

direction that he will afford opportunity to the parties to produce their evidence with regard to the aforesaid application and then dispose of the

matter in accordance with law. The parties are directed to appear in the court of Additional District Judge on 7th June, 1976.