
(1993) 03 PAT CK 0019
In the Patna High Court
Case No : Civil Revision No. 140 of 1990

Sri Awadh Kishore Singh and Another	APPELLANT
Vs	
Sri Brij Bihari Singh and Others	RESPONDENT

Date of Decision : 12-03-1993

Acts Referred:

Citation : (1993) 03 PAT CK 0019

Final Decision : Allowed

Judgement

B.N. Agrawal, J.—This revision application is directed against the impugned order by which the plaintiffs have been debarred from examining defendant No. 2 Brijbihari Prasad Singh as a witness on their behalf on the sole ground that no order was passed for acceptance of the written statement filed by defendant No. 2.

2. The short facts for disposal of this civil revision application are that the plaintiffs filed a suit for partition against the defendants in which defendants 1 to 5 filed written statement contesting the claim for partition. Defendant No. 2 entered appearance in the suit on 14-8-1984 and filed written statement but the petition for acceptance of his written statement was not moved at any point of time and, consequently, no order could be passed thereupon. In the suit, pursuant to the direction of this Court, the contesting defendants led evidence first. Thereafter, the plaintiffs started examining their witnesses and on 13-12-1989 they wanted to examine defendant No. 2 as P. W. 18 on their behalf and when his examination-in-chief was going on, an objection was raised on behalf of the contesting defendants that this witness cannot be allowed to be examined on behalf of the plaintiffs in view of the fact that no order was passed accepting the written statement filed on behalf of this defendant. The said objection has been upheld by trial court under the impugned order and the plaintiffs have been disallowed to examine defendant No. 2 as witness on their behalf. Hence the plaintiffs have moved this Court by filing the present revision application.

3. This revision application was placed for hearing before a learned Single Judge of this Court who by order dated 24-6-1991 directed that the case be placed for hearing before a Division Bench and, accordingly, this application has been placed before us.

4. Shri Sudhir Chandra Ghosh, learned Senior Advocate, appearing on behalf of the opposite parties, raised a preliminary objection in regard to maintainability of the revision application on the ground that the impugned order does not come within the ambit of the expression "case decided" as postulated u/s 115 of the CPC (hereinafter referred to as the Code). On the other hand, learned counsel appearing on behalf of the petitioners contended that after amendment in the Code by the CPC (Amendment) Act, 1976 (Central Act 104 of 1976) which came into force on 1-2-1977, every order passed by a Court would come within the expression "case decided" especially in view of the explanation added to Sub-section (2) of Section 115 of the Code. In view of this, it is necessary first to decide the question as to whether this revision application is maintainable or not.

5. Learned counsel appearing on behalf of the petitioners has placed reliance upon the decision of this Court in Ramgulam Choudhary and Others Vs. Nawin Choudhary and Others, in which it was laid down that an order passed by trial court allowing the plaintiffs to adduce further evidence after close of case of the defendant did not amount to "case decided" and, therefore, revision u/s 115 of the Code was not maintainable against such an order after placing reliance upon two decisions of the Supreme Court in Major S.S. Khanna Vs. Brig. F.J. Dillon, and Baldevdas Shivilal and Another Vs. Filmistan Distributors (India) P. Ltd. and Others, wherein it was laid down that a particular order would come within the expression "case decided", if thereby the court adjudicates for the purpose of suit some rights or obligation of the parties in controversy.

6. Question arises what would be the effect of amendment in Section 115 of the Code by inserting an explanation in Sub-section (2) of Section 115 of the Code and whether in spite of the aforesaid amendment the decisions of the Supreme Court in the cases of Major S. S. Khanna (supra) and Baldevdas Shivilal (supra) still hold the field. The present case will be governed by amended provision of Section 115 of the Code, which runs thus, and the underlined portion has been brought by way of amendment:

"115. Revision : -- (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 as 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 the 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."

7. From a bare perusal of Section 115 of the Code, as it stood before amendment, it would appear that High Court can interfere with an order impugned if two conditions are satisfied; firstly, the impugned order comes within the purview of the expression "case decided" and, secondly, any of the three clauses of Section 115 of the Code is satisfied. What was the meaning of the expression "case decided" before amendment of the CPC was set at rest by the aforesaid decisions of the apex Court in *S. S. Khanna* (supra) and *Baldevdas Shivlal* (supra). But after amendment, the Supreme Court has not considered in any case as to whether the meaning of the expression "case decided" remains the same or the same has changed by virtue of amendment in the Code. After amendment, Section 115 of the Code has been divided into two parts. Sub-section (1) contains the existing Section 115 after inserting a proviso therein which lays down that High Court shall not interfere with any order made in the course of a suit or other proceeding or any order deciding an issue in the course of a suit or other proceeding, unless any of the two conditions is fulfilled. The first condition is that the order, if it had been made in favour of the party applying for the revision would have finally disposed of the suit or other proceeding and second is that if the order is allowed to stand, the same would occasion failure of justice or cause irreparable injury to the party against whom it was made. So far as the first condition is concerned, the same was never there in the statute and has been introduced for the first time by amendment. The second condition was implicit as even before amendment, most of the High Courts had taken view that even if the case comes within any of the three clauses of Section 115, as it stood before amendment, the court may refuse to interfere with the order impugned, if there will be no failure of justice or irreparable injury to the party against whom it was made. Now by amendment, it has been made explicit and restriction has been put upon the powers of the High Court to interfere with the order impugned even if the case comes within any of the three clauses of Sub-section (1) of Section 115 of the Code unless it comes to the conclusion that 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 if allowed to stand, would occasion failure of justice or cause irreparable injury to the party against whom it was made. Sub-section (2) has been added in the Code by amendment. Prior to amendment, if an appeal was provided before the High Court against an order impugned, revision application was not maintainable. By amendment, revisional jurisdiction of the High Court has been ousted even with regard to those orders against which an appeal does not lie to the High Court but to any Court subordinate thereto. In amended Sub-section (2), an explanation has been also brought by which the expression "any case which has been decided" has been defined. The definition is inclusive and not exclusive. According to the explanation, any order made in the course of a suit or other proceeding will come within the ambit of the expression case decided. Further any order deciding an issue in course of a suit or other proceeding will also come within the sweep of the expression "case decided". If the legislature intended that only such order, by which an issue is decided, would come within the mischief of expression "case decided" then it would have simply stated, "any order deciding an issue" and there was no necessity of separately using the expression "any order made". If it is interpreted that only those orders will come within the expression "case decided", if thereby any issue has been decided, then the expression "any order made" becomes redundant and it is well settled canon of interpretation that legislature does not use redundant words in a statute. Thus, in my view, every order passed by Court below in a suit or proceeding would come within the expression "case decided", as envisaged in Section 115 of the Code, by virtue of the explanation referred to above and the decisions of the Supreme Court in the cases of S. S. Khanna (supra) and Baldevdas Shivilal (supra) do not hold the field after aforesaid amendment in Section 115 of the Code.

8. This question was considered by a learned single Judge of this Court in Dwarika Prasad Kejriwal Vs. Rajendra Prasad Sao, in which this question has been decided after examining all pros and cons of the matter and it has been laid down that after amendment, the position has completely changed and every order would come within the expression "case decided". The Court came to the conclusion that the decisions of the Supreme Court in the cases of S. S. Khanna (supra) and Baldevdas Shivilal. (supra) do not hold the filed after amendment and observed thus:

"If the explanation and the proviso are as they must be read together, it is plain that what legislature intended was to give the widest possible meaning to the expression "a case which has been decided" so as to cover all interlocutory orders which may be passed in a suit or other proceeding in order to vest the High Court with the power of preventing any failure of justice caused by jurisdictional errors of the subordinate courts but at the same time limit its interference in revision to such erroneous interlocutory orders which if rightly decided would terminate the suit or proceeding or if not interfered with would occasion a failure of justice either directly; or indirectly by causing irreparable

loss to a party to the suit or proceeding."

9. The decision of the learned single Judge in the case of Dwarika Prasad Kejriwal (supra) has been approved by a Division Bench of this Court in the case of Smt. Kanti Modih Vs. Bhagwat Prasad Bhuwalka, and the Court laid down thus:

"It will be noticed that by the explanation an inclusive definition of "any case which has been decided" has been introduced. Where an inclusive definition is used, it would be inappropriate to put a restricted interpretation upon the terms of wider connotation All orders passed in the course of a suit or other proceeding are included within the expression "any case which has been decided" which appears in the explanation to Section 115 of the Code"

10. A Division Bench of the Calcutta High Court in the case of Food Corporation of India Vs. Birendra Nath Dhar, and two single Judges" decisions, one of Delhi High Court and the other of Orissa High Court, in cases of The Rajasthan Golden Transport Co. (Pvt.) Ltd. Vs. Avon Footwear Industries Pvt. Ltd., and Tata Iron and Steel Co. Ltd. Vs. Rajarishi Exports (P) Ltd., after taking into consideration the effect of explanation, which has been inserted in Section 115 of the Code, have taken the same view and laid down that ratio of decision of the Supreme Court in the case of Baldevdas Shivilal (supra) does not hold the field and every order passed by a Court subordinate to the High Court would come within the expression "case decided". Likewise, Andhra Pradesh High Court in the case of Chintapatla Arvind Babu and another Vs. Smt. K. Balakristamma alias Bhargavi and another, , after taking into consideration the effect of the proviso has taken the same view and held that the decision of the Supreme Court in the case of S. S. Khanna (supra) does not hold the field.

11. Learned counsel appearing on behalf of the opposite parties, in support of his contention that the impugned order does not amount to case decided and revision application is accordingly fit to be dismissed, has placed reliance upon two decisions two different learned single Judges of this Court as well as the decisions of the Allahabad and Punjab and Haryana High Courts in the cases of Damru Mahato v. Khagia 1984 BLJR 159 Bijendra Mishra and Others Vs. Jagdish Mishra and Others, Modi Spinning and Weaving Mills Co. and Another Vs. Ladha Ram and Co., and Harvinder Kaur and Another Vs. Godha Ram and Another,

12. So far as the decision of this Court in the case of Damru Mahato (supra) is concerned, the same need not detain me as that decision has not taken note of amendment in the Code of Civil Procedure. Moreover, the law laid down in this decision is per incuriam, as the earlier judgment of this Court by a learned single Judge in the case of Dwarika Prasad Kejriwal (supra) has not been noticed therein. Therefore, this decision cannot be a binding precedent.

13. In the case of Bijendra Mishra (supra), another learned single Judge of this Court in agreement with the decision of this Court in the case of Damru Mahato (supra) has laid down that amendment in Section 115 of the Code has not, in any way, affected case decided theory. Learned single Judge has not taken into

consideration either the decision in Dwarika Prasad Kejriwal (supra) or that in Smt. Kanti Modih (supra). In the opinion of the learned single Judge, the law laid down by the Supreme Court in the case of Baldevdas (supra) has been reiterated in the case of Madhu Limaye Vs. The State of Maharashtra, . In my view, the case of Madhu Limaye (supra) has no application for deciding the present controversy, as in that case, their Lordships of the Supreme Court were considering what is the meaning of the expression interlocutory order, as envisaged u/s 397(2) of the Code of Criminal Procedure. A question had arisen in that case as to whether the order taking cognizance is interlocutory order or not and in that light their Lordships considered various decisions of the Supreme Court as also the decision of the Federal Court and Privy Council in relation to final order within the meaning of Article 133 of the Constitution. In that context, the case of Baldevdas (supra) was also taken into consideration and it was held that the order taking cognizance is not an interlocutory order. In that case, the Court had no occasion to consider the effect of amendment in Section 115 of the Code so far as the case decided theory is concerned. Therefore, it cannot be said that the law laid down in the case of Baldevdas (supra) has been reiterated by the Supreme Court in the case of Madhu Limaye (supra). In my view, the decision of the Supreme Court in the case of Ballabhadas Mathurdas Lakhani and Others Vs. Municipal Committee, Malkapur, was not very apt on the point as in the case of Madhu Limaye (supra) the apex Court was not considering the scope of Section 115 of the Code. Therefore, I find myself unable to agree with the view expressed in the case of Bijendra Mishra (supra) by the learned single Judge of this Court for whom I have all due regard.

14. In the case of Modi Spinning and Weaving Mills (supra), a learned single Judge of Allahabad High Court has not taken into consideration the amendment made in the Code of Civil Procedure, and has simply followed the decision of the Supreme Court in the case of S. S. Khanna (supra). In the case of Smt. Harvinder Kaur (supra) a Division Bench has taken note of the amendment in Section 115 of the Code, particularly the explanation thereto, and has come to the conclusion that the same has not, in any way, affected the case decided theory. I am in respectful disagreement with the aforesaid two decisions.

In view of the foregoing discussions. I am of the view that the preliminary objection raised on behalf of the opposite parties is devoid of any substance and the same must be rejected.

15. In my view, after amendment in Section 115 of the Code for interference with an order in exercise of revisional jurisdiction, three conditions must be fulfilled, firstly, that the case comes within any of the three clauses of Sub-section (1) of Section 115 of the Code; secondly, that against the order impugned, no appeal has been provided either to the High Court or to any Court subordinate thereto, and, thirdly, that the order impugned should be such that if it had been made in favour of the party applying for revision, would have finally disposed of the proceeding/suit, or if the order impugned is allowed to stand, the

same would occasion failure of justice or cause irreparable injury to the party against whom it was made. If any of these three conditions is not fulfilled, High Court cannot interfere with the order in exercise of its revisional jurisdiction.

16. Now I proceed to consider the merit of the impugned order. By the impugned order, the plaintiffs have been debarred from examining defendant No. 2 as a witness on their behalf, as no order was passed by trial Court for acceptance of written statement filed by this defendant. No provision could be brought to our notice on behalf of any of the parties to show that a party is debarred from examining its adversary as a witness on his behalf. A plaintiff can examine any witness he so likes -- the witness may be a stranger, may be a man of his own party or party himself or may be a defendant or his man. Therefore, if a plaintiff wants to examine a defendant as a witness on his behalf, he cannot be precluded from examining him on the ground that the said defendant has neither appeared in the suit nor upon appearance filed written statement nor prayer for filing written statement has been rejected. Therefore, in my view, trial Court has committed material irregularity in the exercise of jurisdiction in debarring the plaintiffs from examining defendant No. 2 as a witness on their behalf.

17. Learned counsel appearing on behalf of the opposite parties submitted that the plaintiff should not be allowed to examine defendant No. 2 as a witness on his behalf, as no order was passed by the Court below for accepting the written statement filed by defendant No. 2. In support of his submission, learned counsel has placed reliance upon an unreported decision of this Court in the case of Siai Sinha v. Shivdhari Sinha, C.R. No. 1525 of 1968 disposed of on 3rd March, 1971. In that case, a learned single Judge of this Court was considering a revision application which was directed against an order passed by trial Court refusing to permit the defendants to file written statement. By the same very order, the trial Court did not grant permission to the defendants to be present at, and take part in, hearing of the suit. The impugned order, so far the same related to refusal of the prayer for filing written statement concerned, was interfered with. With regard to the other portion of the impugned order, the learned single Judge laid down that a defendant, even without filing written statement can take part in the hearing of the suit and may cross examine plaintiffs' witnesses to demolish their version in examination-in-chief. It was further laid down that without written statement, however, a defendant cannot be permitted to cross examine witnesses of the plaintiffs on the question of fact which he himself has not pleaded nor he can be allowed to adduce evidence on the question of fact which has not been pleaded by him by filing written statement. In that case, trial Court was directed to permit the defendant to take part in the proceedings of the suit at the time of its hearing keeping this position of law clearly in mind. This decision, in my view, is not relevant to the present case, as in this case, there is nothing to show that defendant No. 2 wanted to take part in the proceeding rather the fact shows that he was not inclined to take part in the proceeding, but the plaintiffs wanted to examine him as a witness on their behalf. Therefore, the decision cited on behalf of the opposite parties is quite distinguishable from the

facts of the present case.

18. In view of the foregoing discussions, in my view, it is a fit case for interference in exercise of revisional jurisdiction of this Court as the impugned order suffers from jurisdictional error and if the same is allowed to stand, it would occasion failure of justice and cause irreparable injury to the plaintiffs who wanted to examine defendant No. 2 as a witness on their behalf,

19. In the result, the revision application is allowed, the impugned order is set aside and trial Court is directed to permit the plaintiffs to examine defendant No. 2 as a witness on their behalf. In the circumstances of the case, I direct that parties shall bear their own costs.

Gurusharan Sharma, J.

20. I agree.