

(1986) 03 BOM CK 0065

In the Bombay High Court

Case No : Civil Revision Application No. 49 of 1986

Usman Gulam Hyder Kadri

APPELLANT

Vs

Abdul Hamid Abdul Karim Sheikh and Others

RESPONDENT

Date of Decision : 14-03-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : (1986) 3 BomCR 147

Hon'ble Judges : D.N. Mehta, J

Bench : Single Bench

Advocate : P.N. Karlekar, for the Appellant; S.M. Kazi and Amin S. Shaikh, for the Respondent

Judgement

D.N. Mehta, J.—This Civil Revision Application has been filed by the petitioner Usman Gulam Hyder Kadri impugning the order of the learned Civil Judge, (Junior Division), Shirpur, dated 1-10-1985, whereunder the learned Civil Judge was pleased to reject an application made by the defendants for the appointment of a Commissioner under Order XXVI, Rule 9 of the Code of Civil Procedure.

2. The five respondents herein filed a suit in the Court of the learned Civil Judge, (Junior Division), at Shirpur, being Suit No. 101 of 1981, praying for possession of certain premises on the ground of bona fide requirement u/s 13(1)(g) of the Bombay Rents, Hotel and Lodging Houses Rates Control Act, 1947.

3. In the course of the proceedings, an application was made on 30-9-1985 by the defendants for the appointment of a Commissioner for the purpose of "inspecting the internal and external condition of all the properties of the ownership of the plaintiffs". The learned Civil Judge felt that the burden of proving bona fide requirement was on the plaintiffs and, therefore, the appointment of a Commissioner would not serve any purpose. On this ground the learned Civil Judge rejected the application. The defendant has now approached this Court in revision against the said order.

4. At the outset, Shri Kazi, the learned Advocate appearing on behalf of respondents Nos. 1 to 5 who were the plaintiffs in the trial Court, raised a preliminary objection with regard to the maintainability of the revision application. Shri Kazi submitted that the order of the learned Civil Judge rejecting the prayer for appointment of a Commissioner was an interlocutory order and in any event it could not be stated that the impugned order had decided "any case" and hence it was not an order which would fall within the purview of section 115 of the Code of Civil Procedure. Shri Kazi has relied upon a decision of the Punjab and Haryana High Court which has held that an order rejecting an application for the appointment of a Commissioner was an interlocutory order and hence not revisable. I shall consider the authorities at a later stage.

5. Shri Karlekar, the learned Advocate appearing on behalf of the petitioner-defendant, has submitted that the order of the learned Civil Judge rejecting his client's application for the appointment of a Commissioner was not an interlocutory order and that such an order fell within the ambit of section 115 of the Code of Civil Procedure. Shri Karlekar has relied upon a judgement of a learned Single Judge of this Court as also a judgment of a Single Judge of the Madras High Court wherein it was held that an order rejecting the appointment of a Commissioner under Order XXVI, Rule 9 was a revisable order.

6. Now it will be relevant at this stage to set out the provisions of section 115 of the Code of Civil Procedure:---

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 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 proceedings, except where---

- (a) the order, if it has 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."

7. The expression "any case which has been decided" appearing in section 115 sub-section (1) has been defined by the Supreme Court in the case of Major S.S. Khanna Vs. Brig. F.J. Dillon, , Their Lordships 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 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.....

That is not to say that the High Court is obliged to exercise jurisdiction when a case is decided by a subordinate Court and the conditions in Clauses (a), (b) or (c) are satisfied. Exercise of the jurisdiction is discretionary : the High Court is not bound to interfere merely because the conditions are satisfied. 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. It may next be pointed out that the Supreme Court in the case of Baldevdas Shivilal and Another Vs. Filmistan Distributors (India) P. Ltd. and Others, , held that an order overruling an objection to a question put in cross-examination was not revisable for the purpose that it was "not a case decided". Their lordships observed:

"A case may be said to be decided, if the Court adjudicates for the purpose of the suit some right or obligation of the parties in controversy; every order in the suit cannot be regarded as a case decided within the meaning of section 115 of the Code of Civil Procedure"

9. I shall now deal with the submissions made by Shri Karlekar and consider the authorities relied upon by him. Shri Karlekar contended that an order rejecting an application for the appointment of a Commissioner was a case decided and, therefore, would fall within the purview of section 115 of the Code of Civil Procedure. Shri Karlekar contended that such an order was not an interlocutory order, in as much as it decided certain rights of the parties. Shri Karlekar relied upon a recent judgement of the Madras High Court in the case of Pormusamy Pandaram Vs. The Salem Vaiyappamalai Jangamar Sangam, . The learned Single

Judge was of the view that the order declining the appointment of Commissioner under Order XXVI, Rule 9 was a revisable order u/s 115 of the Code of Civil Procedure. The learned Single Judge was pleased to observed :

"The law of evidence enjoins upon the party to prove the fact which he relies on and in that sense, an obligation is cast upon the party and if he fails to discharge that obligation, adverse consequence will follow and he will have to face the repercussions of the same. This right of the party to adduce evidence gets adjudicated in the interlocutory proceedings under Order XXVI, Rule 9. When there is a decline by the Court to issue the commission asked for to make local investigation, the purpose behind it being significant and in stated cases, imperative too, that order certainly disposes of the right claimed by the party to place the requisite evidence on his behalf. The question as to whether a particular order adjudicates some rights or obligations of the parties in controversy will depend upon the nature of the right or obligation and is not possible to lay down an uniform rule and no decision, including any of the highest Court in the land, attempted to do so".

10. Shri Karlekar also relied on an unreported judgement of a learned Single Judge of this Court in (Writ Petition No. 155 of 1986 decided by Pratap. J. on 3-3-1986) . The learned Single Judge was pleased to observe :

"The CPC specifically provides for appointment of Commissioner in certain contingencies. Plaintiff's application for appointment of Commissioner makes out adequate grounds for the relief claimed. In the facts and circumstances grant of the said application would have assisted the parties as also the Court in correctly appreciating the rival claims relating to the issues arising u/s 13(1)(g) and section 13(2) of the Bombay Rent Act. I also see no prejudice ensuing to the defendant. On the contrary the defendant also should welcome the Commissioner and his report before the Court, which for ought one knows, may as well support the defendant".

It will be noticed that the learned Single Judge decided the matter solely on merits. The objection with regard to the maintainability of the revision application had not been invoked before the learned Single Judge.

11. Shri Kazi has submitted that the impugned order was an interlocutory order and that under no circumstances could it be said that by the said order "the case had been decided". That being the case, the order was not revisable. In support of his submission, Shri Kazi has relied on a decision of a Division Bench of the Punjab and Haryana High Court in the case of Harvinder Kaur and Another Vs. Godha Ram and Another, which decided a similar question as to whether an order refusing to appoint a Commissioner under Order XXVI, Rule 9 was not revisable u/s 115 of the Code of Civil Procedure. Their Lordships observed :

"In the light of the aforesaid observations, without dilating any more on this subject, the meaning that can be given to the explanation is that an order made in the course of a suit or proceeding would be revisable only when it determines

or adjudicates some right or obligation of the parties in controversy. Thus, a revision would lie against an interlocutory order only if it determines or adjudicates some right or obligation of the parties in controversy. However, even after the satisfaction of the aforesaid test the power of revision would be exercisable by this Court subject to the limitation put under sub-section (1) and the proviso to section 115 of the Civil P.C."

"Adverting to the facts of the present case, we find that the trial Court has only rejected the application for the issuance of a commission on the ground that Issue No. 3 could be proved by producing the relevant record and that demarcation was not necessary. From these observations, it is clear that the learned Subordinate Judge did not decide any issue nor did he adjudicate for the purposes of the suit some right or obligation of the parties in controversy".

12. Now in adjudicating the issue whether the impugned order is revisable or not, the decisive factor would be whether the order decides any right or obligation of the parties in controversy. The right or obligation need not necessarily have a nexus to the main issues in the suit or the list; it may not even have any connection with the final adjudication or resolution of the controversy between the parties. Certain rights or obligations do emerge and if such rights and obligations are decided by such interlocutory orders, or if they decide any case, then they would certainly fall within the ambit of section 115 of the Code of Civil Procedure. In the instant case, the order refusing the appointment of a Commissioner does not, to my mind, decide any issue in the suit or the case, nor does it affect any right or obligation of either party. That being the case, I do not think that this order would be revisable u/s 115 of the Code of Civil Procedure. With respect I find myself in agreement with the observations of Their Lordships of the Punjab and Haryana High Court in the case of Harvinder Kaur and Another Vs. Godha Ram and Another, and I find myself in disagreement, with respect, with the observations of the learned Single Judge of the Madras High Court in the case of Pormusamy Pandaram Vs. The Salem Vaiyappamalai Jangamar Sangam, . I am of the view that the order refusing the appointment of a Commissioner under Order XXVI Rule, 9, C.P.C. is not a revisable order.

13. With regard to the merits, I may only state that the learned trial Judge has exercised his discretion rightly in that the learned Civil Judge felt that the issue of bona fide requirement ought to be proved by the plaintiffs by independent evidence without relying upon the evidence collected by the Commissioner appointed by the Court. If the learned Civil Judge felt that the issues in the suit ought to be prayed by independent evidence procedure by the parties themselves without the intervention of the Commissioner appointed by the Court, I see nothing wrong with such a course of action. I am, therefore, of the view that this is not a proper case for interference by invoking the revisional powers of this Court.

14. In the result, the rule is discharged. There will be no order as to costs.