
(2002) 03 SHI CK 0005
In the High Court Of Himachal Pradesh
Case No : Civil Revision No. 283 of 1999

Vijay Kumar

APPELLANT

Vs

Jaswinder Singh and Others

RESPONDENT

Date of Decision : 18-03-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 10, Order 13 Rule 10, 10(2) , 115, 151

Citation : (2002) 2 ShimLC 248

Hon'ble Judges : M.R. Verma, J

Bench : Single Bench

Advocate : J.L. Kashyap, for the Appellant; Balwant Kukreja, for the Respondent

Final Decision : Allowed

Judgement

M.R. Verma, J.—This revision petition u/s 115 of the CPC (hereafter referred to as "the Code") is directed against the order dated 25.8.1999 passed by the learned Senior Sub Judge, Shimla, whereby the application of the Petitioner u/s 151 of the Code for sending for the records of the suit pending in Anr. Court has been dismissed.

2. Brief facts leading to the presentation of this revision petition are that the Petitioner/Decree Holder (hereafter referred to as the Petitioner) had filed an application under Order 21 Rule 32 of the Code against the Respondent/judgment debtor (hereafter referred to as the Respondent) in the Court of the learned Senior Sub Judge, Shimla, on the allegations that the Respondent had disobeyed the decree passed by the Court. The application was contested by the Respondent. Thereafter, the parties admittedly led evidence in support of their rival claims. When the application was fixed for arguments, the Petitioner moved an application u/s 151 of the Code praying for summoning Civil Suit file titled Sushil Kaur v. Vijay Kumar, pending in the Court of learned Sub Judge (1), Shimla, on the ground that in the said suit, the Respondent being Plaintiff, had attached original photographs of the disputed premises and certified copies of

such photographs had been produced by the Petitioner in evidence in the aforesaid application. However, the certified copy of the photo produced in evidence in the application cannot be very clearly deciphered and, therefore, it is necessary to summon the original file containing the photo filed by the Respondent in the aforesaid civil suit for proper appreciation. The application was resisted by the Respondent and the court below dismissed the application on the ground that the evidence on record of the application cannot be appreciated by looking into the evidence which has been led by the Respondent in the aforesaid suit.

3. I have heard the learned Counsel for the parties and have also gone through the records.

4. It was contended by the learned Counsel for the Petitioner that an attested copy of the photo placed on the suit file had already been produced and proved in evidence by the Petitioner. However, the copy so produced being dim, the spot position cannot be deciphered properly on its basis, therefore, the Petitioner had moved an application to call for the suit file in which Respondent has filed the photo just to inspect it with a view to appreciate the real position of the situation on the spot which is otherwise reflected in the certified copy produced in evidence by the Petitioner. Therefore, it was not a case of substitution of evidence or leading additional evidence and in the interest of justice, the application ought to have been allowed.

5. On the other hand, the learned Counsel for Respondent had contended that since there is specific provision in the Code for calling for the records of the Court, by a Court for inspection, therefore, an application u/s 151 of the Code was not maintainable. It was further contended that the evidence recorded in the suit between the parties case cannot be read as such in Anr. case but if it is intended to be led as evidence in the second case, it has to be led and proved independently and in accordance with the relevant provisions of law.

6. It was also contended that since the application ought to have been supported by an affidavit, but was not so supported, therefore, the application has rightly been dismissed.

7. It is true that there are provisions in the Code as contained in Rule 10 of Order 13 which enable a Court either on its own motion or in its discretion on the application of any of the parties to send for its own records or the records of any other Court in any other suit or proceedings and to inspect the same. Therefore, keeping in view the contents and prayer in the application of the Petitioner, the said application ought to have been filed under Rule 10 supra whereas the application has been filed u/s 151 of the Code. When an express provision in law exists for a certain purpose, an application invoking the inherent powers of the Court to achieve that purpose is not permissible. However, it is also equally true that if a certain relief has been claimed by party in a petition mentioning wrong provision of law, but can be granted under some other provision of law, the

interest of justice can be best served if the application is treated to be one under the enabling provision rather than dismissing it. In my view, therefore, the Court having powers to call for the requisite records under Rule 10 supra, could have treated the application of the Petitioner as one having been filed under the provisions of the enabling Rule so that substantial justice in the matter was done. The Court has not dismissed the application on the premises that it had no power to send for the records or that the application was not maintainable, therefore, the contention that the application, being one u/s 151, has rightly been dismissed as not maintainable, cannot be upheld.

8. The application under Rule 10 supra, is required to be accompanied by an affidavit showing how the record sought to be called for, is material to the case in which the application has been filed. However, Sub-rule (2) of Rule 10 supra while requiring filing of such affidavit confers a discretion on the Court to direct otherwise i.e. the Court can dispense with the requirement of filing of an affidavit in support of the application, if it is satisfied that the record sought to be called for, is material to the cause/proceedings in which it is sought to be summoned. There is no dispute that the suit, record whereof the Petitioner wanted to be called for, is between the same parties. It is also not in dispute that certain photo had been produced in evidence in the said suit. Again, it is not in dispute that a certified copy of such photograph has been produced by the Petitioner as evidence in the application. In view of these admitted facts, particularly, when the certified copy of the photo available on the suit file had been produced in evidence in the application, and once such record had admittedly been called for earlier but not retained, the requirement of affidavit could be dispensed with. The objection regarding non filing of the affidavit has also been raised by the Respondent for the first time at the time of arguments in this revision and not earlier. Therefore in the given circumstances of the case, the requirement of filing an affidavit in support of the application, could and should be dispensed with. Thus, the contention of the learned Counsel that since the application was not supported by affidavit, it should not be allowed, pales into insignificance.

9. The intention of the Petitioner in moving the application is only to enable the Court to properly appreciate the certified copy of the photo produced in evidence by the Petitioner with the help of the photo which is on the suit file, because the certified copy is not very clear to see. Thus, the application was not intended to read something in the suit file and substitute it as an evidence in the application. Ultimately, the Court was to read in evidence only the certified copy of the photo produced in evidence in the application and the requisite record was to be called for only for the sake of clarity by inspection thereof. Therefore, the contention of the learned Counsel that the requisite records, if summoned, would have amounted to reading the evidence recorded in the suit as evidence in the application, is also not tenable.

10. No doubt, it is discretionary with the Court to send for the papers/ records from its own records or from other Court. However, such discretion has to be

exercised on sound principles and in the interest of justice and not in a manner which may frustrate the ends of justice. In my view, the Court below had exercised its discretion illegally and if the impugned order is allowed to stand, it will cause prejudice to the Petitioner ultimately leading to injustice. Therefore, the impugned order cannot be sustained.

11. As a result, this petition is allowed and the impugned order is set aside. The application of the Petitioner for calling for the records of the civil suit titled Sushil Kaur v. Vijay Kumar, pending in the Court of learned Sub Judge (I), Shimla is, therefore, allowed. The trial Court is directed to send for the requisite records for the limited purpose of inspection and appreciation of evidence in the form of certified copy of the photo already on record of the application. In the facts and circumstances of the case, there is no order as to costs.