

AFR

**Court No. - 5**

**Case :-** MATTERS UNDER ARTICLE 227 No. - 6686 of 2018

**Petitioner :-** Smt. Raj Shri Agarwal@ Ram Shri Agarwal And Another

**Respondent :-** Sri Sudheer Mohan And 2 Others

**Counsel for Petitioner :-** Ajay Kumar Pandey, Anoop Trivedi, Rishabh Agarwal, Syed Mohammad Abbas Abdy

**Counsel for Respondent :-** Namit Srivastava, Kshitij Shailendra, Parvez Alam

**Hon'ble Saral Srivastava, J.**

1. Heard Sri Rishabh Agarwal, learned counsel for the petitioners and Sri Kshitij Shailendra, learned counsel for the respondents.

2. The petitioners, by means of the present writ petition under Article 227 of the Constitution of India, have assailed the impugned order dated 21.07.2018 passed by Additional District Judge, Court no.18, Agra in Original Suit No.609 of 2015, by which the application for amendment of the petitioners-plaintiffs to incorporate certain facts in the plaint has been rejected.

3. A preliminary objection has been raised by Sri Kshitij Shailendra, learned counsel for the respondents regarding maintainability of the writ petition under Article 227 of the Constitution of India, inasmuch as according to him, a revision under Section 115 of C.P.C. shall lie against the order of trial Court, therefore, the present writ petition under Article 227 of the Constitution of India is liable to be dismissed being not maintainable.

4. To the aforesaid objection, learned counsel for the

petitioners has contended that after amendment in Section 115 of C.P.C. in the year 2002, a proviso has been inserted, the perusal of which shows that if the amendment application is allowed, then it amounts to case decided and only then the revision would lie whereas in the instant case, the amendment application has been rejected, therefore, the order impugned does not fall within the ambit of case decided, hence, the present writ petition under Article 227 of the Constitution of India is maintainable.

5. In support of his case, learned counsel for the petitioners has relied upon the judgement of the Apex court in the case of *Shiv Shakti Co-operative Housing Society, Nagpur Vs. Swaraj Developers & Others, reported in (2003) 6 SCC 659; Punjab Small Industries and Export Corporation Vs. Baldev Raj Ram Murti, reported in 2002 SCC Online P & H 814 & Uttam Chand Kothari Vs. Gauri Shankar Jalan and Others, reported in (2005) 1 Gauhati Law Reports 147.*

6. To rebut the aforesaid submissions, learned counsel for the respondents has contended that rejecting or allowing the amendment application under Order 6 Rule 17 amounts to disposal of a case decided in a Original Suit and, thus, it being a case decided, the revision against the order impugned is maintainable. Hence, in view of the fact that effective alternative remedy by way of revision under Section 115 of C.P.C. is available to the petitioners, the present petition under Article 227 of the Constitution of India is not maintainable.

7. In alternative, he submits that even if, without admitting that the argument of counsel for the petitioners is correct that the order impugned does not fall within the ambit of a case

decided, even then the revision would lie, as is evident from sub-section (3) of Section 115 of C.P.C. as applicable in Uttar Pradesh inasmuch as conditions stipulated in sub-section (i) & (ii) of sub-section 3 of Section 115 of C.P. C. are independent, and on existence of any of conditions as enumerated in Section 115 (3) (i) & (ii) of C.P.C., the revision would lie and not the writ petition under Article 227 of the Constitution of India. In such view of the fact, it is submitted that the present writ petition is not maintainable.

8. For better appreciation of facts, Section 115 defining revision in the Code of Civil Procedure is reproduced here-in-below:-

*“(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 the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.]*

*(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.*

*(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.”*

9. It is also apt to reproduce Section 115 of C.P.C. as applicable in the State of U.P. which have been substituted w.e.f. July, 1<sup>st</sup>, 2002.

*“115. Revision (1) A superior court may revise an order passed in a case decided in an original suit or other proceeding by a subordinate court where no appeal lies against the order and*

where the subordinate court has —

(a) exercised a jurisdiction not vested in it by law ; or

(b) failed to exercise a jurisdiction so vested ; or

(c) acted in exercise of its jurisdiction illegally or with material irregularity.

(2) A revision application under sub-section (1), when filed in the High Court, shall contain a certificate on the first page of such application, below the title of the case, to the effect that no revision in the case lies to the district court but lies only to the High Court either because of valuation or because the order sought to be revised was passed by the district court.

(3) *The superior court shall not, under this section, vary or reverse any order made except where,—*

*(i) 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 ; or*

*(ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made.”*

10. An emphasis has been laid by the learned counsel for the petitioners that reading of proviso to Section 115 of C.P.C. of Central Act clearly suggests that revision is barred against any order of the trial Court in a suit unless and until the conditions enumerated in the proviso, namely, where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings exist. Accordingly, he submits that as the rejection of application of amendment in the plaint does not bring the suit to an end, thus, the suit being not decided, the order rejecting the amendment application would not fall within the ambit of case decided. Therefore, the revision is barred and petition under Article 227 of the Constitution of India is maintainable.

11. Now, to appreciate the aforesaid argument of learned counsel for the petitioners, it would be apt to compare two sections as incorporated in Central Act of the C.P.C. and its applicability in the State of U.P.

12. From the comparison of proviso of Section 115 of C.P.C. in the Central Act and Section 115 (3) (i) of C.P.C. as applicable in the State of U.P., it is manifest and clear that revision is maintainable against any order if it had been in favour of the party applying for revision would have finally disposed of the suit or other proceeding. Thus, it is manifest that the proviso to Section 115 of Central Act has been adopted by the State of U.P. under sub-section (3) (i) of Section 115 of C.P.C. and are common, but by U.P. Amendment, (ii) to Section 115 (3) has been incorporated which provides that the revision will also lie against any order passed by the trial Court if the conditions elucidated in Section 115 (3) (ii) of C.P.C. exists, i.e., if the order is allowed to stand, it would occasion a failure of justice or cause irreparable injury to the party against whom it is made. So in either of the two contingencies, as referred in Section 115 (3) (i) & (ii) as applicable in U.P., revision is maintainable.

13. The learned counsel for the petitioners has laid emphasis upon paragraph no.32 of the judgement of ***Shiv Shakti Co-operative House Society, Nagpur (supra)***, to buttress his submission, paragraph no.32 is reproduced herein-below:-

*“32. A plain reading of Section 115 as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is 'yes' then the revision is maintainable. But on the contrary, if the answer is 'no' then the revision is not maintainable. Therefore, if the impugned order is interim in nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject matter of revision under Section 115. There is marked distinction in the language of Section 97(3) of the Old Amendment Act and Section 32(2)(i) of the Amendment Act. While in the former, there was clear legislative intent to save applications admitted or pending before the amendment came into force. Such an intent is*

*significantly absent in Section 32(2)(i). The amendment relates to procedures. No person has a vested right in a course of procedure. He has only the right of proceeding in the manner prescribed. If by a statutory change the mode of procedure is altered, the parties are to proceed according to the altered mode, without exception, unless there is a different stipulation. ”*

14. In the opinion of the Court, the said judgement is not applicable in the facts of the present case, inasmuch as it was a case dealing with an issue where application under Order 39 Rule 1 C.P.C. has been rejected, against which revision was preferred and the Apex Court in those facts and circumstances held that no revision is maintainable against the order passed by the trial Court, if the order is interlocutory in nature.

15. So far as the judgement in the case of ***Uttam Chand Kothari (supra)*** is concerned, the said judgement is also not applicable in the facts of the present case inasmuch as it was not considering the case under Section 115 of C.P.C. as applicable to the State of U.P. and further the judgement and arguments raised by the respondents which shall be dealt with in later part of this judgement were also not considered by the Gauhati High Court.

16. Similar is the case in the case of ***Punjab Small Industries and Export Corporation (supra)***.

17. Now coming to the judgement of Five Judges Bench of this Court in the case of ***Rama Shanker Tiwari Vs. Mahadeo and others, reported in 1968 A.W.R. 103 (FB)*** relied upon by the learned counsel for the respondents, the Full Bench considered the meaning of the 'case decided' and held that the order allowing or disallowing an application for amendment in pleading is a case decided and is revisable in this Section, if the amendment sought has or is likely to have direct bearing on the rights and obligation of the parties. Paras 23 & 24 of the said

judgement is reproduced here-in-below:-

*“23. I am, therefore, of opinion that every order granting or dismissing an application for amendment of pleading will not give rise to a case decided revisable u/S. 115 of the Code. An order allowing or disallowing an application for amendment of pleading may however, give rise to a case decided revisable under that Section if the amendment sought has or is likely to have a direct bearing on the rights and obligations of the parties and affects or is likely to affect the jurisdiction of the Court. To this extent the decision in Mst. Suraj Pali's case can, in my opinion, be said to be no longer good law.*

*24. The opinion of the majority of Judges constituting the Full Bench is that an order passed u/O. VI R.17 of the CPC, either allowing an amendment or refusing to allow an amendment, is a “case decided” within the meaning of that expression in S.115, Code of Civil Procedure.”*

18. The five Judges Bench judgement concludes the controversy in the instant case, since the order deciding the amendment application would have a direct bearing on the right of either parties, if it is allowed or rejected. Thus, the decision on an application under Order 6 Rule 17 of C.P.C. would amount to a case decided and revision would lie. The said finding is also supported by the first line of Section 115 (1) which states that “ superior Court may revise an order passed in a case decided in an original suit”,reading of said line suggests that legislation has envisaged cases where there may be circumstances where an order passed in original suit may amount to a case decided, though the suit has not been decided, and revision is maintainable against the said order.

19. Similarly, para-17 of the judgement reported in **2006 (1) AWC 825 (LB)** in the case of **Sultan Leather Finishers Pvt. Ltd. and others Vs. A.D.J. Court no.4, Unnao and others** being relevant in the context of present case is reproduced herein-below:-

*“In one another case in Sambhaunath Digambar Jain v. Mohanlal and Ors. 2003 (9) SCC 219, where the application under Order VI, Rule 17 and Order VIII, Rule 6A of the Code of Civil Procedure was rejected by the trial court declining to permit the defendant to amend the written statement and counter-claim, it was held by Hon'ble Supreme Court that such application can be challenged by invoking revisional jurisdiction.*

*For convenience paras 3 and 4 of the judgment of Hon'ble Supreme Court in Sambhavnath's case (supra) is reproduced as under :*

*“The respondents herein filed a suit against the appellant for setting aside the said order of the Registrar. On 13.9.1982, the appellant filed written statement wherein an averment was made that the portion of property where the girl's school was running was the property of the trust. It may be mentioned that the Registrar did not include the said portion of the school as trust property. On 15.9.1982, the appellant filed an application under Order VI, Rule 17 and Order VIII, Rule 6A of the Code of Civil Procedure read with Section 151 of the Code of Civil Procedure and sought to incorporate in its counter-claim the said school as a trust property. On 15.9.1982, the appellant filed an application under Order VI, Rule 17 and Order VIII, Rule 6A of the Code of Civil Procedure read with Section 151 of the Code of Civil Procedure and sought to incorporate in its counter-claim the said school as a trust property by way of an amendment to its written statement. The said application was rejected by the trial court and being aggrieved by the said order, the appellant filed a revision which was dismissed as not maintainable. That is how the parties are before us.*

*Learned counsel for the appellant has urged that the order passed by the trial court was revisable and view taken by the High Court is erroneous. We are of the view that the High Court for ends of justice ought to have considered the application on merit keeping in view Rule 6A of Order VIII of the Code of Civil Procedure and in accordance with the law. We, therefore, hold that the above order rejecting the application of the appellant by the trial court was revisable.”*

20. In this regard, it may also be apt to refer to paragraph-8 of the judgement of this Court reported in **2006 (3) AWC 2182, Mukhtar Ahmad vs. Sirajul Haw and Others**, wherein this Court has quashed the order of revisional Court rejecting the revisioin against the order passed in the amendment application. Paragraph-8 of the said judgement is reproduced herein-below:-

“8. In view of the aforesaid, the District Judge was not correct in holding that a revision against an order rejecting the amendment application is not maintainable. The District Judge was under law obliged to see as to whether the order passed by the court below rejecting the amendment application amounts to case decided or as to whether in the facts of the case revisional authority should vary or reverse the order passed by the court below in view of sub-section (3) of Section 115 of the Civil Procedure Code. It is needless to point out that this Court in the Judgment in *Smt. Pushpa alias Pooja v. State of U.P. and Ors.* 2005 (3) AWC 2587: AIR 2005 All 187, has taken note of the judgment in the case of *Shiv Shakti Co-operative Housing Society, Nagpur v. Swaraj Developers*, and has explained the legal proposition laid down by the Hon'ble Supreme Court in the case of *Shiv Shakti (supra)* in paragraphs 15 and 16 of the said Judgment, which may be reproduced here in below:

“15. The judgment of the Apex Court relied by the counsel for the petitioner in *Shiv Shakti Cooperative Housing Society, Nagpur v. Swaraj Developers and Ors.* (supra) lays down that the revision is not maintainable against an interlocutory or interim order. The Apex Court while considering provisions of Section 115 of the Code of Civil Procedure, made following observation in paragraph 32: .....(at page 2442 of AIR).

“32. A plain reading of Section 115, as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is "yes" then the revision is maintainable. But on the contrary, if the answer is "no" then the revision is not maintainable. Therefore, if the impugned order is of interim nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject-matter of revision under Section 115.”

16. As noted above, the order passed under Section 24 disposed of finally the issue of interim maintenance to a spouse during pendency of proceedings. After passing the order under Section 24 of the Act nothing more is required to be done with regard to question of interim maintenance during pendency of proceedings and the fact is that the order passed under Section 24 finally disposes the application for interim maintenance; hence as laid down by the Apex Court in above quoted paragraph the revision shall be maintainable against an order under Section 24 of Hindu Marriage Act, 1955.”

21. Section 115 (iii) of C.P.C. as applicable in Uttar Pradesh clearly states that the order, if allowed to stand, results in failure of justice or causes irreparable injury to the party against

whom it is made, the revision under Section 115 of C.P.C as applicable in the State of U.P. is maintainable.

22. Viewed from this angle, if any order illegally passed by the Court below on any application is allowed to stand affecting rights of parties, it is obvious that it would cause failure of justice or cause irreparable injury to the party against whom it is made, therefore, if said condition is present, the revision against any order passed by the Court below vide Section 115 (3) (ii) of C.P.C. as applicable in U.P. would lie.

23. The Apex Court in the case of ***Virudhunagar Hindu Nadargal Dharma Paribalana Sabai and Others Vs. Tuticorin Educational Society and Others, reported in (2019) 9 SCC 538*** that where there is availability of remedy under CPC, normally petition under Article 227 would not lie. Paragraph nos.11, 12 & 13 of the said judgement is reproduced here-in-below:

*“11.Secondly, the High Court ought to have seen that when a remedy of appeal under section 104 (1) (i) read with Order XLIII, Rule 1 (r) of the Code of Civil Procedure, 1908, was directly available, the respondents 1 and 2 ought to have taken recourse to the same. It is true that the availability of a remedy of appeal may not always be a bar for the exercise of supervisory jurisdiction of the High Court. In A. Venkatasubbiah Naidu Vs. S. Chellappan & Ors.1, this Court held that "though no hurdle can be put against the exercise of the constitutional powers of the High Court, it is a well recognized principle which gained judicial recognition that the High Court should direct the party to avail himself of such remedies before he resorts to a constitutional remedy".*

*12. But courts should always bear in mind a distinction between (i) cases where such alternative remedy is available before civil courts in terms of the provisions of Code of Civil Procedure and (ii) cases where such alternative remedy is available under special enactments and/or statutory rules and the fora provided therein happen to be quasi-judicial authorities and tribunals. In respect of cases falling under the first category, which may involve suits and other proceedings before civil courts, the availability of an appellate remedy in terms of the provisions of CPC, may have to be construed as a near total bar. Otherwise,*

*there is a danger that someone may challenge in a revision under Article 227, even a decree passed in a suit, on the same grounds on which the respondents 1 and 2 invoked the jurisdiction of the High Court. This is why, a 3 member Bench of this Court, while overruling the decision in Surya Dev Rai vs. Ram Chander Rai, pointed out in Radhey Shyam Vs. Chhabi Nath that "orders of civil court stand on different footing from the orders of authorities or Tribunals or courts other than judicial/civil courts.*

*13. Therefore wherever the proceedings are under the code of Civil Procedure and the forum is the civil court, the availability of a remedy under the CPC, will deter the High Court, not merely as a measure of self imposed restriction, but as a matter of discipline and prudence, from exercising its power of superintendence under the Constitution. Hence, the High Court ought not to have entertained the revision under Article 227 especially in a case where a specific remedy of appeal is provided under the Code of Civil Procedure itself."*

24. Thus, for the reasons given above, the present writ petition under Article 227 of the Constitution of India is not maintainable as remedy by way of revision under Section 115 of C.P.C. is available to the petitioners. It is, accordingly, **dismissed** with no order as to costs.

**Order Date :- 25.4.2022**

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