(1975) 10 P&H CK 0001

High Court Of Punjab And Haryana At Chandigarh

Case No: Civil Revision No. 111 of 1974

M/s. Goverdhan Dass Gopi Nath, Amritsar		APPELLANT
	Vs	
Smt. Amolak Raj		RESPONDENT

Date of Decision: Oct. 6, 1975

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 115

Hon'ble Judges: S.C. Mittal, J

Bench: Single Bench

Advocate: R.L. Aggarwal, for the Appellant; D.V. Sehgal, for the Respondent

Final Decision: Dismissed

Judgement

S.C. Mittal, J.

This revision petition u/s 115 of the CPC is directed against the order of the Judge of the Small Cause Court, Amritsar, rejecting, the application of the Defendant-Petitioner for examining two witnesses residing in Bombay on commission

2. On behalf of the Plaintiff Respondent, a preliminary objection as to the maintainability of this petition has been raised. Reliance is placed on a Single Bench decision of this Court in Mangal Singh v. Piara Lal (1971) 73 P. L. R 531,(sic) laying down:

The remedy for a party if a coo mission is not issued as desired by it is not by revision u/s 115 of the CPC but the party can make it a ground of appeal if such an appeal becomes necessary against the final decree itself. The order refusing a commission is just an interlocutory one and cannot be said to be a case within the meaning of Section 115 of the Code of Civil Procedure.

3. On the other hand, strong reliance was placed on Major S.S. Khanna Vs. Brig. F.J. Dillon, , in which their Lordships held that the expression "case " is a word of comprehensive import. 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 the supervisory jurisdiction of the High Court. Their Lordships further held:

Once it is granted that the expression " case " includes a part of a case, there is no escape from the conclusion that revisional jurisdiction of the High Court may be exercised irrespective of the question whether an appeal lies from the ultimate decree or order passed in the suit. Any other view would impute to the Legislature an intention to restrict the exercise of this salutary jurisdiction to those comparatively unimportant suits and proceedings in which the appellate jurisdiction of the High Courts is excluded for reasons of public policy. Nor is the expression "in which no appeal lies thereto " susceptible of the interpretation that it excludes the exercise of the revisional jurisdiction when an appeal may be competent from the final order. The use of the word " in " is not intended to distinguish orders passed in proceedings not subject to appeal from the final adjudication, from those from which no appeal lies If an appeal lies against the adjudication directly to the High Court, or to another Court from the decision of which an appeal lies to the High Court, it has no power to exercise its revisionsl jurisdiction but where the decision itself is not appealable to the High Court directly or indirectly, exercise of the revisional jurisdiction by the High Court would not be deemed to be excluded.

4. Following the decision of Major S. S. Khanna''s case (supra), a Full Bench of this Court in M/s. Sadhu Ram Bali Ram v. M/s Ghanshak Dass Madan Lal 1975 Rev. L. R. 22, laid down that merely the fact that a person aggrieved from an interlocutory order could make it a ground of attack in appeal, would be no ground to refuse to entertain a revision petition. The learned Judge also laid down that an order refusing to change the onus of an issue fall within the ambit of words " case decided. " Hence such an order was revisable u/s 115 of the Code.

5. Having regard in to the ratio of Supreme Court and the Full Bench ruling eited above, in my opinion the afore-mentioned view in Mangal Singh''s cast (supra) has been impliedly overruled. Similarly with great respect to the learned Judge, I am unable to follow the view expressed in Gambhir Mal Pandya v. George Anthony John AIR 1934 All. 37, and AIR 1942 344 (Oudh) that an order refusing to issue commission does not amount to a " case decided. "

6. Learned Counsel for the Defendant than invited my attention to decision of Mehar Singh C. J., in Shri Dhanna Singh v. Shri Kishan Chand (1967) 69 P. L. R. 2 SN, decided on 26th August, 1966. In that case, the learned Judge relying on AIR 1924 475 (Lahore) observed that an order refusing to issue commission for the examination of a witness under Order 26, Rule 4 of the Code was open to revision u/s 115 of the Code. The Learned Counsel next placed reliance on Subbaraya Padayaahi v.

Kozhandaivar Udayer AIR 1949 Mad. 496, in which Subba Rao, J., (as he then was) set aside an order of the trial Court rejecting the application for the issue of commission to examine an expert witness residing beyond the limits prescribed by order 16, Rule 19(b) of the Code and allowed the revision petition u/s 115 of the Code.

7. For the foregoing reasons, I disallow the preliminary objection.

8. In the instant case, the Plaintiff filed a suit for recovery of Rs. 2,000/- the balance of the price of the good sold to the Defendant. During the proceedings, the Defendant, in rebuttal, applied under Order 26, Rule 4 of the Code for the examination of two witnesses, residing in Bombay on commission. By the impugned order, the application was rejected. Learned Counsel for the Plaintiff cited Shri M.L. Sethi Vs. Shri R.P. Kapur, , laying down that Section 115 of the Code empowers the High Court to satisfy itself on three matter: (a) that the order of the subordinate Court is within its jurisdiction: (b) that the case is one in which the Court ought to exercise jurisdiction ; and (c) that in exercising jurisdiction, the Court has not acted illegally or with material irregularity.

9. There can be ro two opinions that the trial Court had the jurisdiction to decide whether the two witnesses of the Defendant be examined on commission or not and that it did not fail to exercise the jurisdiction. The surviving question is whether the trial Court acted illegally or with material unregularity. It is no gainsaying that the impugned order has been passed by the trial Court in exercise of discretion vested in it. With regard to this aspect of the case, I am in res-pea ful agreement with the view expressed by the lerrned Judge in Mangal Singh''s case (supra) that the word ''may'' as used in Order 20, Rule 4 of the Code cannot be equated with ''shall'' thereby giving statutoiy right to the party to claim the issue of a commission. No doubt, Order 16, Rule 19 of the Code provides that a certain person residing beyond 20 miles cannot through process of the Court be forced to appear as witness, but it does not necessarily follow that commission must i sue for the examination of such a person it will be not out of place to mention here that even in Subbaraya Padayachi''s case (supra), while construing these provisions of the Code, Sutha Rao, J , (as he then was) made an exception by observing that commission should be issued as a matter of right, unless a party is guiliy of abuse of process of Court. In Dhanna Singh''s case (supra), Mehar Singh C.J , interfered because the trial Court disalloweo the examination of witness on commission, without assigning any reason Upon a consideration of the entire matter, in my judgment each case has to be decided upon its own facts.

10. In the instant case, the Defendant averred in his written statement that the goods sold by the Plaintiff in violation of the terms of the contract, instead of being woollen, were mixed with large quantities of corton(sic) yarn. Learned Counsel for the Defendant contended that for proving this averment the two witnesses, namely, Jugal Kishore Khanna and Dwarka Dass Mehra, admittedly resildding in Bombay, were to be examined on commission. The trial Court dismissed the application for

the reason that the Mukhtiar of the Plaintiff as P.W. 3 had admitted that woolen good5 meant mixed texture, but he could not tell the percentage thereof. In view of this admission by P.W. 3, according to the trial Court, no useful purpose could be served by issuing the commission. Before me, the learned counsel for the Defendant urged that from the witnesses, sought to be examined on commission, percentage of the maked texture was reqiured to be determined. Hence, the impugned order was liable to be set aside In reply, the Learned Counsel for the Plaintiff pointed out that in his application under order 26, rub 4 of the Code, nowhere did the Defendant state that the examination of the witnesses above-named on commission was required for determining the percentage of the mixed texture Further more, upon a perusal of the contents of the impugned order. I find that this was not the reason pressed before the trial Court. Above all, in the grounds of revision furnished in this Court nowhere is it specifically stated that the examination of the witnesses on commission was required for the object aforesaid.

11. In the result, I find that the trial Court does not appear to have acted in the exercise of its jurisdiction illegally or with material irregularity. The revision petition is accordingly dismissed, but no order as to costs.