

(1993) 07 AHC CK 0016

Allahabad High Court (Lucknow Bench)

Case No: Civil Revision No. 63 of 1988

Sunder Lal and others

APPELLANT

Vs

Chet Ram and others

RESPONDENT

Date of Decision: July 30, 1993**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 2, Order 22 Rule 3, Order 22 Rule 4, 115

Hon'ble Judges: H.N.Tilhari, J**Final Decision:** Allowed

Judgement

H. N. Tilhari, J.

This Civil Revision arises out of an order dated 2151988, passed by Chandra Shekhar, I Addl. Civil Judge, Bahraich, on the two applications, one moved under Order 22 rule 3 CPC by defendants i. e. present opposite parties, namely, Chet Ram, Munejar and Sita Ram and the other application for substitution moved by the present revisionist claiming themselves to be entitled to be substituted on the basis of the will alleged to have been executed by the deceased in their favour and the court below without deciding the question of heirship has ordered that Smt. Parsanna whose name was sought to be substituted in place of Smt. Dhan Dei as well as that of the revisionist in place of Smt. Dhan Dei be brought on record.

2. The facts of the case in the nutshell are that a Civil Suit for cancellation of a Saled deed dated 1141983 had been filed by one Smt. Dhan Dei against Chet Ram, Munejar and Sita Ram, defendants opposite Parties 1 to 3. The said suit was numbered as Regular Suit No. 49 of 1984, The suit was filed on the ground that the saled deeds were got fraudulently executed by the defendants from the plaintiff Smt. Dhan Dei. Somehow or the other on 28187, the suit of Smt. Dhan Dei was decreed ex parte against the defendant opposite parties. The defendant i. e. opposite parties 1 to 3 moved an application under Order 9 rule 13 CPC for setting aside of the ex parte decree dated 28187, on 6287. During the pendency of the application for

setting aside ex parte decree on 31387, Smt. Dhan Dei, the original plaintiff died and, as such, on 2941987, the defendants i. e. opposite parties 1 to 3 moved an application under Order 22 rule 3 CPC for substitution of the name of Smt. Parsanna in place of Smt. Dhan Dei, the original plaintiff alleging that Smt. Parsanna is the husband's sister of the deceased Smt. Dhan Dei and so her name be substituted. They also mentioned that the present revisionist were claiming some rights to the property by succession to Smt. Dhan Dei on the basis of certain will. Lateron, the present revisionist also moved an application for substitution of their name in place of Smt. Dhan Dei, The revisionistsapplicants claimed that Smt. Dhan Dei had executed a registered will on September 30, 1985 of her entire property movable or immovable in favour of the present revisionists.

3. They also filed an objection to the application of the opposite parties 1 to 3 and denied the right of Smt. Parsanna, the present opposite parties 1 to 4 for being substituted as an heir. They denied that she was the sister of the husband of the deceased, or that she shall be entitled to be substituted.

4. The learned Trial Court by its order dated 3041988 without going into the disputed question of heirship and without giving any decision thereon, ordered that the persons who are sought to be substituted by the two applications, one moved by the present revisionists and the other by the application of opposite parties 1 to 3 that is, opposite party No. 4's may be substituted. In other words, the Trial Court directed that the present revisionists as well as Smt. Parsanna, both may be substituted as heirs of Smt. Dhan Dei and did not decide the question of heirship while so on.

5. Having felt aggrieved from the order dated 3041988, the revisio◆nist who had applied for substitution of the name on the basis of the will dated September 30, 1985 have comeup in revision under Section 115 of the Code of Civil Procedure,

6. I have heard Sri Anand Swaroop Chaudhary, learned Counsel for the revisionistapplicants as well as Shri Amar Nath Verma, learned Counsel for the oppositeparties at some length.

7. Shri Chaudhary contended before me that in view of the provisions of the order 22 rule 5 of the CPC it was the bounden duty of the court below to have adjudicated upon the question involved i. e. question of heirship as to which of the two sets of persons was the heir, whether oppo◆site party No. 4 was the heir of deceased Smt. Dhan Dei or in view of the will setup by the revisionist applicant the applicant was entitled to be substituted as the heir/legal representative of Smt. Dhan Dei and Smt. Parsanna was not entitled to be substituted. Shri Chaudhary submitted that when the Code of Code of Civil Procedure has prescribed a mode and has specifically provided like that, that in case there being a dispute as to who is and who is not the legal representative of the deceased such question shall be determined and that the provisions of Order 22 rule 2 and 3 CPC provide that the Court shall cause the legal

representative of the plaintiff to be made a party then it is not open to the court below to allow any person to be substituted in place of deceased plaintiff and deceased defendant who is not legal representative and in such a case, the bounded duty of the Court is to decide the dispute.

8. Shri Chaudhary submitted that this is a case of failure to exercise its jurisdiction in accordance with law by the Trial Court or in other words, it can also be said that ordering of substitution of the names of Smt. Parsanna as well as the revisionist without deciding the legal representativeship is an order passed in exercise its jurisdiction not vested. In any case such an order is result of the Court acting illegally and with material irregularities. Shri Chaudhary also submitted that such an order has got a tendency of causing substantial injury as well as it results in failure to finally dispose of the matter in substantial manner in accordance with law. As such Shri Chaudhary further submitted that this Court should interfere and set aside the order impugned and direction need be given in the matter to the Court below. He made references to some cases in support of his contentions that the procedure prescribed under rule 5 Order 22 is mandatory which case shall be referred at a proper stage.

9. Sri A. N. Verma has contended that the present revision is misconceived, the order in question is not a case decided. Sri Verma further submitted that the order that has been passed by Court below may be bad if Smt. Parsanna as well as revisionists have been allowed to be substituted but no irregularities have been committed by the Court below nor any error of jurisdiction has been committed. It may at the most be an error of law which does not come within the purview of the scope of Section 115 of the Code of Civil Procedure i. e. under the Clause "a" "b" "c" of Section 115 CPC. Sri Verma further submitted that in view of proviso to Section 115, this Court should not exercise its jurisdiction as the case does not come within any of the exception. Shri Verma has contended that no injury is going to be caused to the present applicant so far as the proceedings of the suit are concerned. The revisionist will have full opportunity of hearing in the matter of application for setting aside the ex parte decree and when the applicants have been impleaded they can place their respective cases before the Trial Court in all respects.

10. I have considered the respective submissions of the learned Counsels for the parties as regards the question about the maintainability of the revision on the ground that the order does not amount to a case decided or not.

11. Shri Chaudhary invited my attention to explanation to Section 115 of the Code of Civil Procedure.

12. In this section as per explanation, the expression "any case which has been decided" includes any order made or an order deciding an issue in course of suit or other proceedings. Even as per amendment made in Section 115 of the CPC by U. P. Act No. 31 of 1978 Section 115 of the Code of Civil Procedure reads as under :

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 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."

including the explanation to section itself.

13 According to explanation, the expression "any case which has been decided" has been defined by an illustrative definition which says that in the section, the expression any case which has been decided includes any order deciding an issue, in course of suit or other proceeding.

14. Taking into consideration, this explanation and pondering over it I find that an order which has the effect of deciding even any proceedings may be said to be a case decided and also deciding any issue involved in a proceeding may also be a case decided. But orders of routine nature such as adjournment or the like or fixing the case for some other date do not come within the purview of an order amounting to the case decided. Deciding the case that is some right of the parties, may be in relation to the conduct of the suit or proceedings, has been specifically or by implication has been decided and whereby certain rights have been allowed. Testing the order impugned whereby the trial court has allowed both the setup persons to be substituted in place of the deceased Smt. Dhandei decided to allow both claimants to be substituted as legal representatives without deciding the material question as to who of the two sets is the heir or legal representative and the order

in question is amounting to be a case decided.

15. This is not an order of the nature of an interlocutory order or an order passed in routine manner.

16. The power of revision under Section 115 of the Code of Civil Procedure are not appellate powers but are confined to the question touching jurisdiction, namely, jurisdictional error, it may be said to be confined to a case of exercise of jurisdiction not vested or failure to exercise the jurisdiction vested or acting exercise of this jurisdiction by the Court illegally or with material irregularity and if the order impugned comes within either of the two exceptions to the second proviso to Section 115, this Court has got jurisdiction to interfere with the same and then in those cases, there is no impediment to this Court's exercising its jurisdiction under Section 115 of the Code of Civil Procedure. As regards the merits of the revision, the only question for consideration is whether the learned Court below committed any jurisdictional error in passing the order impugned. The earlier court below has without applying his mind to the question involved and arising out of two applications for substitution whether Smt. Parsanna, opposite party No. 4 was not the legal representative of deceased Smt. Dhandei and other question whether the present revisionist were the legal representatives of Smt. Dhandei, deceased, on the basis of the will dated 30/9/1985 alleged to have been executed by Smt. Dhandei. There is, another ancillary question to the effect whether Smt. Dhandei did execute the will relied by the revisionist applicant in favour of the revisionist applicant and if yes, whether Smt. Parsanna could be impleaded at all or not and who is the really legal representative of Smt. Dhandei.

17. Order 22 rule 3 and 4 of the CPC deal with the matter of substitution of the legal representative of the deceased plaintiff or deceased defendant. A bare reading of Order 22 rule 3 subrule 1 and Order 22 rule 4 CPC per se shows that the Court has got the jurisdiction to order the impleadment or substitution of the legal representative only of a deceased plaintiff or deceased defendant as the case may be and none else. That ancillary to this, provisions of rule 5 of Order 22 have been framed.

18. The language of Order 22 rule 5 per se shows that in case of dispute, as to whether a person is or is not the legal representative of a deceased plaintiff or a deceased defendant, having arisen, it is the duty of the Court to decide the same. The material portion of rule 5 is that such question "shall be decided" by the Court. The use of expression "shall" in ordinary course of things is indicative of legislative's intent of its being mandatory and not discretionary. Thus read in context of subrule 1 of rule 3 and sub rule (1) and (4) of Order 22 the Court has got the jurisdiction and power only to direct and to allow as well as to order the impleadment or substitution of only the legal representative of a deceased party or a deceased person or deceased plaintiff or deceased defendant, then it has no jurisdiction to order an impleadment to any person in place of deceased and, as such, it is the duty

of the Court to first decide who is the legal representative of the deceased concerned before ordering the substitution of the name and it cannot act otherwise. This follows by a necessary implication that before it orders the impleadment of a person in place of a deceased person, the Court should decide the question if he is his legal representative to represent the estate of the deceased as rule 5 of Order 22 of Code is mandatory.

19. Thus considered, in my opinion, when the Court below proceeded to pass an order, allowing the applications for substitution moved by both the sets of revisionists and the opposite parties & when the question of legal representativenesship was in dispute without deciding the same, the Court below acted in breach and violation of the mandatory principles of law and the mode prescribed by law. That as such the order has to be set aside as being without jurisdiction and it is well settled principles of law as laid by the Hon'ble Supreme Court in *Raj Soni v. Air Officer Incharge*, 1990(3) SCC 261 that when a power to do certain thing is given and the law giving the power prescribing a specific mode for exercise of that power or doing of that act, the act has got to be done in that manner alone and not otherwise, all other modes are deemed to be closed & as such order in question having been passed in a mode otherwise than provided by law can be said to be an act done in exercise of jurisdiction not vested. Lastly, Sri Verma has contended that in view of the second proviso, this Court should not exercise its jurisdiction under Section 115, I have already quoted the second proviso, in my opinion, the case comes within the four corners of exception two of second proviso to Section 115 of the code as the order if it is allowed to stand, it would cause failure of justice, in the sense that a person who may not be having a right will be allowed to intermeddle with the course of due and proper decision of the case in improper manner being the mother of the defendant on one hand and on the other, there will be two contradictory pleadings from the side of the plaintiff in course of trial i. e. one pleading by defendant's mother as an alleged heir of the plaintiff and the other pleadings by the revisionist. Thus there is no substance in the contention of the learned Counsel for the opposite parties that revision is not maintainable.

20. Thus considered, in my opinion, order impugned, as mentioned above, suffers from jurisdictional error, having got the tendency of causing the failure of justice, as such is liable to be set aside, and as such, the revision is being allowed. The order impugned is set aside and the case is sent back to the Court below with the directions that it will proceed to decide the applications for substitution, keeping in view the provisions of Order 22 rule 5 and the following principles prescribed i.e. it shall order the substitution of the legal representative, after it has so tried the matter and found the legal heirs.

21. The revision is allowed. Costs of the revision are made easy.

(Revision allowed.)