

Court No. - 4

Case :- S.C.C. REVISION No. - 97 of 2024

Revisionist :- Om Prakash And Another

Opposite Party :- Bn Public School And 3 Others

Counsel for Revisionist :- Arvind Srivastava

Counsel for Opposite Party :- Arun Kumar

Connected with:

Case :- S.C.C. REVISION No. - 5 of 2024

Revisionist :- Om Prakash And Another

Opposite Party :- Bn Public School And 3 Others

Counsel for Revisionist :- Arvind Srivastava

Counsel for Opposite Party :- Akhilesh Kumar Singh, Ved Byas Mishra

Hon'ble Ajit Kumar,J.

1. Heard Shri Arvind Srivastava, learned Advocate appearing for revision applicant and Shri Ved Byas Mishra, learned Advocate appearing for landlord respondents.

2. By means of this revision application instituted under Section 25 of the Provincial Small Causes Courts Act, 1887 revision applicant has challenged the order passed by the Judge Small Causes rejecting his application filed under Order IX Rule 13 CPC to set aside the *ex parte* judgment and decree dated 27.10.2015 decreeing the SCC suit No. 07 of 2014.

3. Briefly stated the facts of the case are that petitioner admittedly

being a tenant of the landlord respondent was subject to an eviction suit for recovery of arrears of rent vide SCC Case No. 07 of 2014. Petitioner sought to contest the matter on the plea that he was not the tenant of the landlord respondent but was the owner of the property in question and that the municipal records carried his name in the column of title of the property but ultimately for his non-appearance in the suit, the suit proceeded *ex parte* and got finally decreed vide judgment and decree dated 27.10.2015. Instead of challenging the same before the higher court, petitioner moved an application initially under Section 151 CPC registered as Misc. Case No. 1 of 2016 for recall of the *ex parte* judgment and decree. This application dated 30.03.2016 ultimately came to be rejected by the court on 04.04.2016 recording this fact that neither the compliance of the provision under Section 17 of the Provincial Small Causes Court Act was made, nor application was filed under Order IX Rule 13 CPC. The Court also observed that the application in these circumstances filed under Section 151 CPC was not maintainable.

4. This order was further challenged before this Court by means of petition filed under Article 227 of the Constitution bearing No. 2726 of 2016, however, the Court observed that the order was revisable and, therefore, liberty was granted to file revision and

further certified copy was directed to be returned to the petitioner after obtaining photocopy thereof on record. Petitioner was also directed to serve a copy to Shri Pravin Kumar Giri, the then counsel representing the landlord in the event revision was filed. The order dated 22.04.2016 is reproduced hereunder:

"The petitioners have an alternative remedy of revision under Section 25 of Provincial Small Cause Courts Act, 1887. The petition is dismissed on the ground of alternative remedy.

Office is directed to return the certified copies of the orders to the counsel for the petitioners after taking photostat copies of the same.

When the revision is filed notice of revision will be given to Sri Praveen Kumar Giri, who has filed caveat in the matter."

5. After this above order was passed, instead of pursuing the remedy of revision against the order rejecting the application for recall, petitioner filed a composite revision petition being SCC petition (Defective) No. 98 of 2016 both against the order rejecting the Misc. Recall Application dated 04.04.2016 and also *ex parte* judgment and decree dated 27.10.2015. However, before the court could proceed to hear the matter on merits, the counsel appearing on behalf of petitioner made a statement before the court that revision-applicant was giving up challenge to the order dated 04.04.2016 rejecting the recall application. It is after this statement came to be made that the Court recorded this statement in its order and ultimately dismissed the delay condonation application for there being no genuine explanation offered for delay in filing the

revision petition in respect of *ex parte* judgment and decree. The order passed by this Court rejecting the revision application and recording the statement made on behalf of petitioner giving up his challenge to the order dated 04.04.2016 even though revision was directed against that order also, is reproduced hereunder:

"Counsel for the revisionists states that he is giving up the challenge to order dated 4.4.2016 rejecting the recall application. He further states that he is confining the instant revision in so far as it seeks to challenge the exparte judgement and decree dated 27.10.2015 in SCC Suit No.7 of 2014.

Order on C.M. Delay Condonation Application NO.138010 of 2016

Heard counsel for the parties.

The revision in view of statement made above stands confined to order dated 27.10.2015, whereby SCC Suit No.7 of 2014 was decreed by the trial court for recovery of arrears of rent and for eviction of the defendants.

Indisputably, initially the revisionists filed an application under Section 151 CPC for recall of judgement and decree dated 27.10.2015 alleging that it is exparte against them. The application was rejected by the court below by order dated 4.4.2016 on the ground that the revisionists have not complied with Section 17 of the Provincial Small Cause Courts Act, 1887 (for short 'the Act'). The application filed under Section 151 CPC was also held to be not maintainable in view of there being a specific remedy available by way of Section 17 of the Act. It is an admitted fact that the revisionists thereafter filed a petition under Article 227 of the Constitution challenging the judgement dated 27.10.2015 and order dated 4.4.2016, but which was rejected by this Court on the ground of availability of alternative remedy.

The revision is reported to be beyond time by 152 days.

From the facts narrated above, it is clear that the revisionists sought recall of judgement by filing a recall application without depositing the decreetal amount as required by Section 17 of the Act. When the said application was rejected on the ground of non-compliance of Section 17, they approached this Court by way of a petition under Article 227 of the Constitution in which also they could not get any success. Thereafter, the instant revision has been filed challenging the order dated 4.4.2016 rejecting the recall application and also the judgement dated 27.10.2015. To escape from the liability to deposit the decreetal amount as required under Section 17, they have chosen to give up challenge to the order

dated 4.4.2016, though revision against the said order is within limitation.

The affidavit filed in support of the delay condonation application does not offer any explanation whatsoever for not seeking remedy by way of revision before this Court against the judgement passed in the suit within limitation prescribed by law. It is more than clear that the revisionists in order to avoid depositing of decretal amount in compliance of Section 17 of the Act have chosen to challenge the exparte judgement and decree much after the limitation has expired, without offering any explanation for the delay.

Consequently, the delay condonation application is rejected. As a result, the revision also stands dismissed."

(Emphasis added)

6. It appears that after the revision was dismissed, may be on the ground of delay, the petitioner moved another application, this time under order IX rule 13 CPC which was registered as Misc. Case No. 81 of 2016 against which petitioner separately also moved an application for compliance of Section 17 of Provincial Small Causes Court Act making a plea that his request to deposit security against the decretal amount may be accepted and he may be permitted to furnish the security bond. While these applications came up for orders before the court, the court rejected the same vide order dated 11.12.2023 rejecting the plea that petitioner was in any manner entitled to benefit of Section 14 of the Indian Limitation Act, 1963. The reason assigned in the order impugned is that since the application under Section 151 was moved before the Court having jurisdiction, therefore, principles of Section 14 would not be attracted. It is this order dated 11.12.2023 which is

assailed before this Court.

7. Shri Arvind Srivastava, learned Advocate appearing for revision applicant has submitted that the court fell in manifest error of law in rejecting the application on the ground that Section 14 of the Limitation Act, 1963 would not be attracted. In support of his submission, learned counsel for petitioner has placed before the Court relevant provision of Section 14 of the Limitation Act 1963, which is reproduced hereunder:

"14. Exclusion of time of proceeding bona fide in court without jurisdiction:- (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceedings, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceedings relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceedings, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceedings is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908) the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fall by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation - For the purposes of this section-

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted.

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding.

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction".

8. Mr. Srivastava, argued that the word and expression “jurisdiction or other cause of a like nature” needs interpretation. The cause of a like nature would be akin to jurisdiction or in a matter where entertainability of an application is questioned, may be not maintainable. In the instant case, it is submitted, though an application under Section 151 CPC was made before the same court which had the jurisdiction, and technically speaking it could not have been held maintainable as it was not entertainable only because there was an alternative provision available to the petitioner to move an application under Order IX Rule 13 CPC with compliance made under Section 17 of the Provincial Small Causes Court Act. Mr. Srivastava, argued that whether the an application is not maintainable or not entertainable would amount to same and, therefore, even if the application made was not competent and not entertainable then benefit under Section 14 would be attracted in the event a maintainable application was subsequently filed. Thus, according to him, the period spent in the

remedy being pursued by way of Section 151 CPC application and consequential petitions filed against the order rejecting the same, would be taken as previous period spent in pursuing a wrong remedy in good faith and as such condonable under Section 14 of the Act.

9. In support of his submission, learned counsel appearing for petitioner has relied upon the judgment in the case of ***Shakti Tubes Ltd. v. State of Bihar and others (2009) 1 Supreme Court Cases 786.***

10. *Per contra*, it is argued by Shri Mishra, that it is a settled legal position that if a court has jurisdiction to entertain an application or a suit/ case then merely because wrong provision has been quoted in an application or a suit, it will not render the court as *coram non judice* and, therefore, proper course for the petitioner was to pursue the remedy of revision that he had filed after the liberty stood granted by this Court on 22.04.2016 in a matter filed under Article 227 No. 2726 of 2016. It is submitted that since the petitioner himself had withdrawn the challenge laid to the order passed by the Court rejecting application for recall may be under Section 151 CPC, and did not seek any liberty from this Court while this Court dismissed the revision against the *ex parte* judgment and decree on 18.01.2019 quoting the statement of the

petitioner, it was not open for the petitioner to file any fresh application under Order IX Rule 13 CPC.

11. In support of his submission learned counsel for landlord respondent has relied upon judgment of Supreme Court in the Case of ***Pankajbhai Rameshbhai Zalavadia v. Jethabhai Kalabhai Zalavadia (Deceased) through LRs and others 2018 0 AIR (SC) 490/ 2017 0 Supreme (SC) 963*** he has placed before the Court paragraph-14 of the judgment, which is reproduced hereunder:

"14. In the matter on hand, though the trial court had rightly dismissed the application under Order 22 Rule 4 of the Code as not maintainable at an earlier point of time, in our considered opinion, it needs to be mentioned that the trial Court at that point of time itself could have treated the said application filed under Order 22 Rule 4 of the Code as one filed under Order 1 Rule 10 of the CPC, in order to do justice between the parties. Merely because of the non- mentioning of the correct provision as Order 1 Rule 10 of the Code at the initial stage by the advocate for the plaintiff, the parties should not be made to suffer. It is by now well settled that a mere wrong mention of the provision in the application would not prohibit a party to the litigation from getting justice. Ultimately, the Courts are meant to do justice and not to decide the applications based on technicalities. The provision under Order 1 Rule 10 CPC speaks about judicial discretion of the Court to strike out or add parties at any stage of the suit. It can strike out any party who is improperly joined, it can add any one as a plaintiff or defendant if it finds that such person is a necessary or proper party. The Court under Order 1 Rule 10(2) of the Code will of course act according to reason and fair play and not according to whims and caprice. The expression "to settle all questions involved" used in Order 1 Rule 10 (2) of the Code is susceptible to a liberal and wide interpretation, so as to adjudicate all the questions pertaining to the subject matter thereof. The Parliament in its wisdom while framing this rule must be held to have thought that all material questions common to the parties to the suit and to the third parties should be tried once for all. The

Court is clothed with the power to secure the aforesaid result with judicious discretion to add parties, including third parties. There cannot be any dispute that the party impleaded must have a direct interest in the subject matter of litigation. In a suit seeking cancellation of sale deed, as mentioned supra, a person who has purchased the property and whose rights are likely to be affected pursuant to the judgment in the suit is a necessary party, and he has to be added. If such purchaser has expired, his legal representatives are necessary parties. In the matter on hand, since the purchaser of the suit property, i.e., defendant no.7 has expired prior to the filing of the suit, his legal representatives ought to have been arrayed as parties in the suit while presenting the plaint. As such impleadment was not made at the time of filing of the plaint in view of the fact that the plaintiff did not know about the death of the purchaser, he cannot be non-suited merely because of his ignorance of the said fact. To do justice between the parties and as the legal representatives of the purchaser of the suit property are necessary parties, they have to be impleaded under Order 1 Rule 10 of the Code, inasmuch as the application under Order 22 Rule 4 of the Code was not maintainable.

As mentioned supra, it is only if a defendant dies during the pendency of the suit that the provisions of Order 22 Rule 4 of the Code can be invoked. Since one of the defendants i.e. defendant No.7 has expired prior to the filing of the suit, there is no legal impediment in impleading the legal representatives of the deceased defendant No.7 under Order 1 Rule 10 of the Code, for the simple reason that the plaintiff in any case could have instituted a fresh suit against these legal representatives on the date he moved an application for making them parties, subject of course to the law of limitation. Normally, if the plaintiff had known about the death of one of the defendants at the time of institution of the suit, he would have filed a suit in the first instance against his heirs or legal representatives. The difficulty that the High Court experienced in granting the application filed by the plaintiff under Order 1 Rule 10 of the Code discloses, with great respect, a hyper-technical approach which may result in the miscarriage of justice. As the heirs of the deceased defendant no.7 were the persons with vital interest in the outcome of the suit, such applications have to be approached keeping in mind that the Courts are meant to do substantial justice between the parties and that technical rules or procedures should not be given precedence over doing substantial justice. Undoubtedly, justice according to the law does not merely mean technical justice but means that law is to be administered to advance justice."

12. Having heard learned counsel appearing for respective parties and having perused the records, two points arise for consideration of the Court: (i) if a petition challenging the order rejecting the recall application under Section 151 CPC instead of Order IX Rule 13 was got dismissed with the liberty to challenge the order in revision and upon revision being filed, the same was withdrawn and that too without any further liberty, was it still open for such a party to file a miscellaneous application for recall of *ex parte* judgment taking recourse to Order IX Rule 13 CPC; and (ii) whether in a revision petition filed against the order passed upon a recall application filed under Section 151 CPC and the *ex parte* judgment, if against the former, revision is got dismissed as withdrawn without any further liberty and in respect of later revision is dismissed being barred by time, would it still entitle revision applicant to question the *ex parte* judgment by means of a fresh recall application under Order IX Rule 13 CPC. Both the above questions are inter-related and, hence, are being addressed and answered together.

13. While it is true that the judgment *in limine* or order dismissing the the matter in default may not amount to a judgment on merits to attract the principles of *res judicata* but at the same time it is a settled legal proposition that an application if filed before a

competent court under a wrong provision of law and decided holding it to be not maintainable, it being an incorrect view of law, it could have been challenged. This order passed under Section 151 CPC was challenged by petitioner by means of a petition filed under Article 227 of the Constitution bearing No. 2726 of 2016 which was disposed of with a liberty to file revision only. The revision was very much filed by the petitioner but he got the same dismissed, meaning thereby he got recall application dismissed may be on a wrong premise by competent court of law as withdrawn but without there being any further liberty. In my considered view the Court having the jurisdiction to hear and decide an application for recall under Order IX Rule 13 would be a competent court and merely because a wrong provision was mentioned in the application, the application could not have been rejected as not maintainable. This was a sound ground available to petitioner to question the order in revision and rightly so an opportunity was afforded to him but for the reasons best known to him, he got it dismissed as withdrawn and then again the revision *qua* judgment and decree was dismissed on the ground of delay. The application under Section 5 was dismissed for there being lack of proper explanation offered for delay in approaching the Court, inasmuch as the Court observed that petitioner was avoiding deposits that were to be made under Section 17 of the Act.

14. These above observations that have come up to be made by the Court makes it absolutely clear that Misc. Application for recall under Section 151 CPC was deliberately filed to avoid deposit of decretal amount under Section 17 which was a mandatory statutory requirement. Petitioner could have taken permission of the court to correct the provision mentioned in recall application because court hearing it had the jurisdiction to entertain application under Order IX Rule 13 as well. Further, he had equally an opportunity to correct this error while he had questioned the order rejecting recall in revision before this Court but he deliberately withdrew it for the reason that the court might have expressed the view that for non-deposit made under Section 17 no application for recall could have been made and I find that court recorded very categorically that present petitioner was avoiding compliance of Section 17 of Provincial Small Cause Courts Act, 1887.

15. It is thus, clear that Misc. Application for recall was filed before the competent court having jurisdiction may be mentioning a wrong provision of law and this itself could not have invalidated the application. The court could have tried it provided the petitioner had made deposit under Section 17 of the Act to press it on merits. The court of course, rejected the application on the ground that it was not maintainable but the petitioner had the

opportunity to question it in revision but instead of questioning it in revision on merits, he chose to withdraw the same and that too without any liberty to move any application afresh. Thus, for the observations that have come up to be made by a Co-ordinate Bench of this Court while deciding his revision petition filed against the *ex parte* judgment under its order dated 18.01.2019, and there being no liberty further availed by petitioner, the second recall application before the court under Order IX Rule 13 was clearly not maintainable.

16. Still further, I do not find there to be any averment coming up in the entire petition regarding any deposit made of the decretal amount under Section 17 of the Provincial Small Cause Courts Act, 1887. Petitioner's revision has also been dismissed, may be on the ground of delay, confirming the order passed by the Judge Small Causes for eviction.

17. Thus, the challenge laid to the *ex parte* judgment and decree dated 11.12.2023 is also over. It is not stated that this order of the High Court was further challenged.

18. In such above view of the matter, therefore, I do not find any justification to interfere with the order passed by the court rejecting application filed under Order IX Rule 13 CPC.

19. Revision application is devoid of merits and is accordingly, rejected. However, it is clarified that this order will not come in the way *qua* title of property between the parties if being contested before competent court of law/ forum.

20. For the reasons recorded and discussed together above, the review petition No. 5 of 2024 is also dismissed.

21. Cost made easy.

Order Date :- 10.12.2024

Nadeem