

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 246 OF 2015**

M/s Balaji Electricals

..Petitioners

Vs

M/s Power Gun Systems Pvt Ltd t

.. Respondents

Mr. R. N. Sukhija, Advocate for the Petitioners.

Ms. Nirmala Gopal, Advocate for the Respondents.

CORAM : R.G.KETKAR,J.

DATE : 06/07/2015

PC:

1. Heard Mr. R.N.Sukhija, learned counsel for the petitioners and Ms. Nirmala Gopal, learned counsel for the respondents at length.

2. By this Petition under Section 115 of the Code of Civil Procedure, 1908 (for short, 'C.P.C.'), the original defendants have challenged the Judgment and order dated 11.2.2015 passed by the learned Judge, City Civil Court, Greater Mumai in Notice of Motion No. 3209 of 2014 in S.C.Suit No.3712 of 2009 (H.C.Suit No.1452 of 2009). By that order, the learned trial Judge allowed the Motion taken out by the plaintiffs for setting aside order of dismissal dated 14.10.2010 and for restoration of Summons for Judgment on file .

3. In support of this Petition, Mr. Sukhija strenuously submitted that the respondents, hereinafter referred to as

'plaintiffs, instituted suit No.1452 of 2009 on Original Side of this Court. On 14.10.2010 Summons for Judgment taken out by the plaintiffs was dismissed in default. The suit was transferred to the City Civil Court in October, 2012. The ground given by the plaintiffs for restoration is financial crunch as also Advocate engaged by the plaintiffs did not attend the matter. As against this, the plaintiffs' Advocate appeared on behalf of the plaintiffs in criminal matters filed in this Court. In particular, he submitted that on 21.1.2011 the plaintiffs filed Criminal Application No.5475 of 2010 for leave to prefer Appeal which was granted. The plaintiffs' Advocate also appeared in Criminal Application No.5583 of 2010 seeking leave to appeal and leave was granted on 8.6.2011. Thus, the plaintiffs' Advocate appeared in criminal matters filed in this Court. At the same time, he however did not attend to the suit instituted on the original side of this Court. Mr. Sukhija submitted that the ground of financial difficulty is not a sufficient cause for restoration.

4. On the other hand, Ms Gopal supported the impugned order. She submitted that after considering the material on record, the learned trial Judge allowed the Motion subject to costs of Rs.8000/- to the defendants. The defendants have accepted costs from the plaintiffs. She, therefore, submitted that after accepting costs from the plaintiffs, the defendants are precluded

from challenging the impugned order.

5. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. The learned trial Judge has noted in paragraph 5 that the suit was instituted on the original side of this Court. On 14.10.2010 Summons for Judgment was dismissed in default. In paragraph 5, learned trial Judge has dealt with progress of the suit. After considering the decision cited before him, it was observed in paragraph 8 that if the delay is not condoned, the dispute between the parties will remain uncontested and, therefore, the matter needs to be heard. The learned trial Judge further noted that Advocate for the plaintiffs was representing the plaintiffs in other cases and, therefore, that ground cannot be considered. Even though the plaintiffs' Advocate might be representing in other cases, the plaintiffs must get some chance to agitate his claim on merits. If the notice of motion is allowed the defendants will get opportunity to resist the claim, but if notice of motion is not allowed, the plaintiffs will be non-suited. The learned trial Judge accordingly allowed the Motion and in paragraph 9 it is observed that it is true that by the delay of the plaintiffs, defendants are dragged for years in the court and for this defendants need to be compensated by way of costs. Accordingly, the learned trial

Judge imposed costs of Rs.8000/- to the defendants. It is also evident that the defendants have accepted costs of Rs.8000/-. While accepting the costs, the defendants did not accept it under protest or by reserving right to challenge the impugned order.

6. In the case of M.L.Sethi Vs. R.P.Kapur, 1972 (2) SCC 427, the Apex Court has considered scope of Section 115 of C.P.C. In paragraph 12, it is observed as under :

"Counsel for the appellant contended that even if the order for discovery of documents was bad in law, the High Court was not justified in interfering with it. And as regards the order dated April 4, 1970, dismissing the application for permission to sue in forma pauperis after rejecting the application for time, be said, the High Court was really interfering with the discretion of the trial Court in the matter of adjournment, The jurisdiction of the High Court under section 115 of the C.P.C. is a limited one. As long ago as 1884, in Rajah Amir Hassan Khan v. Sheo Baksh Singh, the Privy Council made the following observation on Section. 622 of the former Code of Civil Procedure, which was replaced by Section 115 of the Code of 1908:

"The question then is, did the judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

In Balakrishna Udayar v. Vasudeva Aiyar, the Board observed:

"It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

In N. S. Venkatagiri Ayyangar v. Hindu Religious

Endowments Board, Madras, the Judicial Committee said that section 115 empowers the High Court to satisfy itself on three matters, (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, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. And if the High Court is satisfied on those three matters, it has no power to interfere because it differs from the conclusions of the subordinate court on questions of fact or law.

This Court in [Manindra Land and Building Corporation Ltd. v. Bhutnath Banerjee and others](#) and [Vora Abbashhai Alimahomed v. Haji Gulamnabi Haji Safibhai](#)) has held that a distinction must be drawn between the errors committed by sub-ordinate courts in deciding questions of law which have relation to, or are concerned with, questions of jurisdiction of the said Court, and errors of law which have no such relation or connection. [In Pandurang Dhoni Chougute v. Maruti Hari Jadhav](#)(3), this Court said :

"The provisions of Section 115 of the 'Code have been examined by judicial decisions on several occasions. While exercising its jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross they may be, or even errors of law, unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. As clauses (a), (b) and (c) of Section 115 indicate, it is only in cases where the subordinate Court has exercised a jurisdiction not vested in it by law, or has failed, to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate courts which are related to questions of jurisdiction. It is well settled that a plea of limitation or a plea of *res judicata* is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of s. 115 of the Code. But an

erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that court cannot be corrected by the High Court under Section 115."

The word "jurisdiction" is a verbal coat of many colours. Jurisdiction originally seems to have had the meaning which Lord Reid ascribed to it in *Anisminic Ltd. v. Foreign Compensation Commission*, namely, the entitlement "to enter upon the enquiry in question". If there was an entitlement to enter upon an enquiry into the question, then any subsequent error could only be regarded as an error within the jurisdiction. The best known formulation of this theory is that made by Lord Denning in *R. v. Bolton*. He said that the question of jurisdiction is determinable at the commencement, not at the conclusion of the enquiry. In *Anisminic Ltd. case* (supra), Lord Reid said:

"But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive."

In the same case, Lord Pearce said "

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or, in the intervening stage while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into

something not directed by Parliament and fail to make the inquiry which the Parliament did direct. Any of these things would cause its purported decision to be a nullity."

The dicta of the majority of the House of Lords in the above case would show the extent to which 'lack' and 'excess' of jurisdiction have been assimilated or, in other words, the extent to which we have moved away from the traditional concept of "jurisdiction". The effect of the dicta in that case is to reduce the difference 'between jurisdictional error and error of law within jurisdiction almost to vanishing point. The practical effect of the decision is that any error of law can be reckoned as jurisdictional. This comes perilously close to saying that there is jurisdiction if the decision is right in law but none if it is wrong. Almost any misconstruction of a statute can be represented as "basing their decision on a matter with which they have no right to deal", "imposing an unwarranted condition" or "addressing themselves to a wrong question". The majority opinion in the case leaves a Court or Tribunal with virtually no margin of legal error. Whether there is excess of jurisdiction or merely error within jurisdiction can be determined only by construing the empowering statute, which will, give little guidance. It is really a question of how much latitude the Court is prepared to allow. In the end it can only be a value judgment (see H.W.R. Wade, "Constitutional and Administrative Aspects of the Anismanic case", Law Quarterly Review, Vol. 85, 1969, p. 198). Why is it that a wrong decision on a question of limitation or res judicata 'was treated as a jurisdictional error and liable to be interfered with in revision ? It is a it difficult to understand how an erroneous decision on a question of limitation or res judicata would oust the jurisdiction of the Court in the primitive sense of the term and render the decision or a decree embodying the decision a nullity liable to collateral attack. The reason can only be that the error of law was considered as vital by the Court. And there is no yardstick to determine the magnitude of the error other than the opinion of the Court."

7. The Apex Court has held that under Section 115 of C.P.C., the High Court has to satisfy itself on 3 matters, (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, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. If the High Court is satisfied on these 3 matters, it has no power to interfere because it differs from conclusion of the subordinate Court on question of facts or of law.

8. Applying the tests laid down in the case of M.L.Sethi (supra), it cannot be said that the impugned order falls in any of the categories (a), (b) or (c) or Section 115 (1) of C.P.C. The impugned order is purely discretionary. That apart, the defendants have also accepted costs of Rs.8000/-. For all these reasons, no case is made out for invocation of powers under section 115 of C.P.C. Petition fails and the same is dismissed.

(R.G.KETKAR, J.)