

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

CR No.8432 of 2014.
Decided on:-May 19th, 2015.

Daya Nand.Appellant.

Versus

Mahinder and othersRespondents.

CORAM: *HON'BLE MR. JUSTICE DR. BHARAT BHUSHAN PARSOON.*

Present:- Mr. Arun Jain, Senior Advocate with
Mr. Arjun Veer Sharma, Advocate
for the petitioner.

Mr. J.M. Kalia, Advocate
for respondent No.1.

Dr. Bharat Bhushan Parsoon, J.

This civil revision petition is directed against order dated 7.11.2014 (Annexure P-6) passed by the lower court whereby the review application filed by respondent No.1 was allowed.

2. It is claimed that neither the review petition was maintainable nor it could be entertained and allowed. Thus, it is averred that the impugned order is illegal, arbitrary and against the provisions of law.

3. To understand the controversy between the parties, it would be appropriate to take stock of the factual matrix little more closely. Mahinder,

plaintiff in the court below and respondent No.1 herein, had filed a suit for declaration to the effect that decree dated 16.10.1987 passed in civil suit No.377/1987 had been procured fraudulently. Relief of permanent injunction was also sought. Kachheru father of respondent No.1 had been impleaded as defendant No.7; he died on 4.4.2002. Daya Nand, contesting defendant in the suit (petitioner herein), had contested the said suit. The defendant, petitioner herein, had made an application under Order VII Rule 11 CPC on 9.2.2010 (Annexure P-1) with a plea that the suit had neither been valued correctly nor was legally maintainable and thus, had prayed for rejection of the plaint. The said application was contested vide reply (Annexure P-2) by the plaintiff, respondent herein.

4. After hearing the counsel for the parties, the lower court vide order dated 17.1.2012 (Annexure P-3), accepting the application (Annexure P-1) of the defendant, petitioner herein, had rejected the plaint. Thereafter, plaintiff (respondent No.1 herein) had filed an application (Annexure P-4) for review of order dated 17.1.2012 (Annexure P-3) vide which his plaint had been rejected. The said application was strongly resisted by the defendant (petitioner herein) who had filed reply (Annexure P-5) on 11.2.2014. Despite resistance from the petitioner-defendant, said application of respondent No.1/plaintiff was allowed vide impugned order of 7.11.2014 (Annexure P-6).

5. It is this order of 7.11.2014 (Annexure P-6) which is under challenge on the following grounds:

- (i) Application for review of order of 17.1.2012 was filed by J.K. Kalia and Company and was argued by Sh. Ram Babu Ambavata, Advocate on behalf of respondent No.1-plaintiff whereas application under Order VII Rule 11 CPC which had resulted in order dated 17.1.2012 (Annexure P-3) had been filed and

argued by Sh. Dinesh Kaushik, Advocate. In short, application for review was made by a lawyer different from the one who had made an application under Order VII Rule 11 CPC;

- (ii) Suit had been filed against a dead person as defendant No.7 had died on 4.4.2002 whereas the suit was filed in February, 2010. Suit against a dead person is a nullity;
- (iii) While allowing application for review of order (Annexure P-6), the lower court had failed to discuss the fact of death of defendant No.7 prior to filing of the suit;
- (iv) The lower court also ignored the fact that rejection of plaint under Order VII Rule 11 CPC being a decree, is appealable and review could not be an alternative of the appeal;
- (v) Application for review was not maintainable because the matter had already been decided on merits by hearing both the parties. It then amounted to re-hearing of the case for rendering a decision different from the earlier one, which could not have been done;
- (vi) No new point was raised which was earlier not the knowledge of the applicant;
- (vii) There was no error apparent on the face of order and review application was not maintainable; and,
- (viii) Application for review on the ground that decision is erroneous could not be entertained.

6. Counsel for the petitioner-defendant has urged that once the plaint had been rejected pursuant to his application under Order VII Rule 11 CPC, there was no occasion for rehearing of the matter and consequent withdrawal of the earlier order.

7. Counsel for the respondent, on the other hand, has urged that law has to bend before justice. It is claimed that if the court finds that the

error pointed out in the review petition had crept in under a mistake and the earlier order could not have been made but for erroneous assumption, the court is not precluded from rectifying the error.

8. Counsel for the parties have been heard while perusing the paper book and considering the attending circumstances.

9. Order dated 17.1.2012 (Annexure P-3) was made by the lower court on an application under Order VII Rule 11 CPC filed by the petitioner-defendant. When Sh. Dinesh Kaushik, Advocate had appeared for the plaintiff, respondent herein, the matter was argued at length. It was conceded by the respondent-plaintiff that ad-valorem court fee was payable. Notwithstanding this fact of admission made by the respondent-plaintiff, defendant, petitioner herein, had made his version clear and transparent even by citing various authorities that in the facts and circumstances of the case, ad-valorem court fee was in fact payable but had not been paid and thus deficiency was there.

10. The application for review (Annexure P-4) was made through a different counsel taking a plea primarily that due to over-sight, the lower court had “wrongly held that ad-valorem court fee has not been affixed. It is submitted that ad-valorem court fee of Rs.25/- has been affixed on the face of the plaint itself. Hence, there is an error apparent on the face of the record.”

11. This application for review was strongly resisted. Despite that the order of rejection of the plaint was reviewed reasoning out that ad-valorem court fee was not payable for various reasons stated in the impugned order of 7.11.2014 (Annexure P-6) and further that for relief of declaration, court fee of Rs.25/- had rightly been affixed. The lower court

had ignored the aspect of filing of suit by the plaintiff against a dead person and had also byepassed this plea even in order dated 7.11.2014.

12. Though contesting the application for review of order dated 17.1.2012, counsel for the petitioner-defendant had cited number of authorities which of course have been quoted in the order but without discussion even of one of those. It is merely observed that the case law so relied upon by the defendant was not “pare-materia with the facts of the present case” and then had ignored the same.

13. The impugned order made on application for review, is clearly bad in law, for the following reasons:

- (i) There is neither any error on the face of record nor it is so highlighted in the impugned order;
- (ii) The impugned order, rather, reasons out that ad-valorem court fee was not payable since the plaintiff is not a party to the decree under challenge and had also not sought the relief of possession. This assertion of the lower court in reviewing its earlier order clearly shows a complete change in the line of thinking and reasoning of the court below;
- (iii) Case law cited by the respondent-defendant was merely brushed aside holding the application for review to be maintainable, whereas it was clearly not so maintainable in view of the adjudication made by the court and there being no error apparent on the face of record. In ***Rajesh Ekka and others Versus Controller of Examinations, Sambalpur University and others AIR 2000 Orissa 82***, it was held that the court cannot review its earlier decision merely because interpretation of a particular document is not in its proper perspective. Reference may also be made to ***Smt. Bidya Devi Versus Commissioner of Income Tax, Allahabad and***

others AIR 2004 Calcutta 63;

- (iv) Application for review was moved by a counsel other than the one who had earlier argued the case which resulted in the order under review. In ***Smt. Shanti Devi Versus Ran Singh and others 1997(2) PLJ 418***, this court relying on ***Tamil Nadu Electricity Board and another Versus N. Raju Reddiar and another AIR 1997 Supreme Court 1005*** had held that the court should not show any indulgence in the matter of review when an application is moved by a counsel other than the one who had originally argued the case.

14. The authority cited by counsel for the respondent reported as ***S. Nagaraj and others Versus State of Karnataka and another 1993 Supp (4) SCC 595*** with due deference to the law laid down therein, facts of the case in hand being entirely different, does not advance the cause of the respondent. In the present case, the matter of court fee payable by the plaintiff had been determined on the facts and circumstances of the case and later by interpreting the facts differently, which could not have been deduced by the court observing that earlier facts had not been properly construed and conclusion arrived at was not proper. Similarly, authority cited as ***Board of Control for Cricket, India and another Versus Netaji Cricket Club and others CDJ 2005 SC 142*** cited by counsel for the respondent, since there is no new and important fact or piece of evidence nor any error apparent on the face of record nor any sufficient reason, the authority does not support the cause of the respondent.

15. It is, however, to be observed that when the trial court had found that ad-valorem court fee was payable but had not been so affixed with the plaint, the plaint could not have been rejected straightway and time was to be given to the plaintiff to make up deficiency in the court fee. Had the application for review confined only to this extent, it would have been

welcome. Instead, the order of review went to the extent of reappraisal and re-evaluation of the entire factual matrix to come to a finding directly opposite to the one given in the order under review, by further reasoning out that ad-valorem court fee was not payable at all.

16. Sequelly, setting aside impugned order dated 7.11.2014 (Annexure P-6)l, order dated 17.1.2012 (Annexure P-3) is modified to this extent that the plaintiff is to make up deficiency in the ad-valorem court fee within one month from the date of passing of this order failing which the plaint would stand rejected in terms of order dated 17.1.2012 (Annexure P-3).

17. Disposed of in these terms.

18. Parties are directed to appear before the lower court on 14.7.2015.

May 19th, 2015
'Yag Dutt'

(Dr. Bharat Bhushan Parsoon)
Judge

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. Whether to be referred to the Reporters or not? Yes
3. Whether the judgment should be reported in the Digest? Yes