

West Bengal Form No.3702

HIGH COURT FORM NO. (J) 3
HEADING OF JUDGMENT OF APPEAL

Sub-Division : Kalimpong

IN THE : Court of Additional District Judge, Kalimpong

PRESENT : Shri Nayyar Azam Khan, Addl. Dist. Judge, Kalimpong

Tuesday, the 20th day of February, 2018

CIVIL REVISION NO. 1 of 2017

from the order no. 40 dated 04.04.2017 passed by Ld. Court of Civil Judge
(Senior Division), Kalimpong in Money Suit No. 1/14.

1. Ajay Kumar Roy

Revisionist/Petitioner

-VERSUS-

1. State Bank of India

Respondent/O.P

This Civil Revision coming on this day (or having been heard on) in the
presence of

1. Arun Acharya

Advocate for Revisionist

1. Mazhar Ali

Advocate for Respondent

and having stood for consideration to this day, the Court delivered the following
judgment

This is a Civil Revision filed by the Defendants as Revisionist/Petitioner
under Section 115A of C.P.Code challenging the Order no. 40 dated 04.04.2017
passed by Ld. Court of Civil Judge (Senior Division), Kalimpong in Money Suit
No. 1/14.

The case of the petitioner, in short, is that the Opposite party/Respondent as plaintiff filed a Money Suit being No. 1/14 before the Ld. Court of Civil Judge (Senior Division) Kalimpong against the Defendants/Revisionist with a prayer for decree of recovery of money amounting to Rs. 99,648/- along with interest from the Defendants in which after the cross examination of D.W.1, the Ld. Lawyer for the Defendant filed a petition for the re-examination of the Defendant on the ground that he wanted to clarify the confusion that had erupted in his cross-examination due to the unwanted negative answers that was put into the mouth of the Defendant/D.W-1. It was alleged by the Revisionist that the Ld. Court below without going deep into the matter and without paying heed to the application filed by the Revisionist/Defendant u/s 138 of the Indian Evidence Act vide its Order No. 40 dated 04.04.2017 rejected the said petition without applying its judicial mind.

Being dissatisfied with the said Order No. 40 dated 04.04.2017 the instant Civil Revision has been preferred by the Revisionist/Defendant as Petitioner mainly on the ground that due to the tricky questions posed by the Ld. Counsel for the Plaintiff/Respondent to the Defendant during his cross examination, he got confused and deceived and incorrectly gave certain answers which he never intended to make for which the Defendant had filed a petition for his re-examination which due to non application of its mind and due to non perusal of section 138 of Indian Evidence Act in depth, was incorrectly not allowed by the Court below.

Now the point for consideration is whether the order passed by the Ld. Court below suffers from any illegality or impropriety or not.

Decision With Reasons

1) At the time of hearing of this revisionary application, the Ld. Lawyer for the Petitioner/Revisionist stated that Plaintiff/O.P had filed a suit for recovery of money against him in which after the examination in chief of his witness who is the defendant himself as D.W.-1, cross-examination was completed by the Ld. Lawyer for the Plaintiff/O.P wherein which he noticed that the said witness had inadvertently answered in the negative to some confusing questions put forwarded by the Ld. Lawyer for the Plaintiff which was purely because the witness had failed to comprehend the questions properly and was puzzled and

misled by the confusing questions put to him. Ld. Lawyer for the Revisionist also contended that although the answers given by D.W.-1 were incorrect, the same was correctly reflected in the matter on record but as the same was done by the Ld. Lawyer for the plaintiff to impeach his credit as a witness it was necessary to clear the air by his re-examination. He also stated that although D.W.-1 had in his cross examination answered that he had not filed the written statement in the Court below, it was incorrect as he had done so which he reiterated was due to the fact that D.W.-1 could not understand the question properly. Ld. Lawyer also stated that due to the confusion created by the incorrect answers of his witness it was pertinent to seek for his re-examination. He stated that although his petition for re-examination was kept for hearing on the next date i.e. 16.03.17, he was not given the opportunity to explain his case on the said day and the Court below wrongly rejected his petition simply on the basis of the written objection given to the same by the Plaintiff in which it was submitted that he had failed to provide the questions that were to be asked in the proposed re-examination and that the said petition was not supported by an affidavit. He further argued there is nothing in the Evidence Act which makes it obligatory upon a party seeking re-examination of a witness to specify the particular question which it desires to put to the witness during his re-examination before the Court which is very well explained in the ruling of *State of West Bengal Vs. Anuresh Pathak and Others*. He also stated that the other ground made out by the Court below for rejecting his petition for re-examination was the absence of supported affidavit with the said petition, for which he argued that it was not compulsory for the said petition to be supported by an affidavit as it is mandated in the C.P.C in Order VI Rule 15 that plaints be supported by affidavit and that the C.P.C did not specifically speak about affidavit in ordinary, intermediary petitions during the proceeding of a case. Ld. Lawyer also stressed that even if the Court below thought it to be compulsory, it should have given the Defendant opportunity to cure the said defect instead of summarily rejecting his petition as procedural bottleneck should not defeat substantive justice. Ld. Lawyer also argued that as both the aforesaid grounds for rejecting his petition for re-examination were not tenable in law, the said order was incorrect. He prayed for setting aside the said impugned Order No. 40 dated 04.04.2017 passed by Ld. Civil Judge (Senior Division) Kalimpong in Money Suit No. 1 of 2014.

2) Ld. lawyer for the Respondent/O.P in the course of hearing submitted that the Ld. Court below had rightly rejected the petition for re-examination of

the defendant/D.W-1 as it was not mentioned in the said petition as to what was the confusion that had erupted in the cross examination of the said witness and the same also did not suggest any questions for the purpose of clarification on the confusion that was alleged to have been caused in the said cross examination. He also stated that it was mandatory that the said petition filed by the Defendant should have been supported by an affidavit which was not the case. Ld. Lawyer also submitted that the instant revision application itself is barred by limitation and hence not maintainable. In the end he submitted that the said impugned Order No. 40 dated 04.04.2017 passed by Ld. Civil Judge (Senior Division) Kalimpong was perfect in law and facts and hence, needed no interference by this Court.

3) Before delving into the matter it is imperative that section 138 of Indian Evidence Act and Order 18 Rule 17 C.P.C be perused in order to know the correct position of law in this regard.

Section 138 of Indian Evidence Act states that “witnesses shall be examined in chief, then (if the adverse party so desires) cross examined, then (if the party calling him so desires) re-examined”

Order 18 Rule 17 C.P.C states that the Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit."

4) Now coming into the matter in controversy, the purpose of seeking the re-examination of the defendant/D.W.-1 as made out by him needs to be examined. On perusal of the petition dated 16.03.17 filed on behalf of the defendant No. 2 in the Court below which is found in the L.C.R it is clear that such purpose is not clear as the same only mentions that during the cross examination of the said witness, certain confusion erupted between the witness and the cross-examiner Counsel for the plaintiff which needed explanation and clarification by way of re-examination. It is not mentioned in the said petition as to what the confusions were or which part in the said cross examination needed clarification. Thus the said petition is not in proper form and manner. However, as the said matter of confusion and subsequent clarification is found in the instant revisionary application and the same was agitated in the hearing of the instant application, the same is needed to be looked into in the interest of justice and to avoid multiplicity of proceedings. Ld. Lawyer for the revisionist has agitated that two answers to the respective questions posed by the Ld. Lawyer for the plaintiff has resulted in the said confusion which was firstly that D.W.-1 answered that he

had not filed the written statement in the Court below and the other was that he did not file any petition, objection in the Court challenging the revival letter on the point of his signature. On perusal of the examination in chief of D.W.-1 and its subsequent cross examination in which the aforesaid answers were given by D.W.-1 and on perusal of the written statement filed by D.W.-1 found in the L.C.R., it is clear that there is only one confusion which relates to the filing of the written statement by D.W.-1 which though answered in the negative by D.W.-1 is a matter of record as it has been found filed and kept in the L.C.R. and hence, the confusion, if any, created on this account need not matter as matters of record would always be looked into by the Court instead of inadvertent answers of its absence. As regards the second answer the same is also not found to be creating any confusion as D.W.-1 had categorically stated in his cross examination that he had not filed any objection as regards to his signature on the revival letter which is also a matter of record as no document has been filed by him in the Court below to suggest that he had filed any objection or made any complaint as regards to his signature on the revival letter. As the said witness denied his signature on the revival letter shown to him in Court at the time of his examination in chief and the same was also reiterated by him in his cross examination when he said that the said revival letter did not bear his signature, there seems to be no confusion on this account. His further statement in his cross examination that he did not file any objection or petition challenging the revival letter also is in consonance with the above answers given by him prior thereto, which suggests that although he has denied his signature on the revival letter all through he did not file any written objection or petition or complaint to challenge his signature before any forum. Thus the aforesaid answers for which the petitioner is claiming that it has added to the confusion and which needed clarification by way of the re-examination of the said witness is not tenable in facts. As regards the objection of the O.P. herein on the point that the said petition was not supported by an affidavit which is also mentioned as one of the ground for rejecting the said petition by the Court below, it is settled that any petition made before the Court should be supported by an affidavit, but it is also well settled that the same is a matter of procedure which can very well be cured and that substantial justice should prevail over rules of procedure when it is pitted against it. On the point of limitation that was also agitated by the Ld. Lawyer for the O.P. wherein which he submitted that the period of limitation to file the instant revision was 30 days and as the same had expired before filing of the same, the instant revisionary application is not maintainable, the said

contention is not proper as Article 131 of the Limitation Act mentions a period of 90 days for filing of any revision before any Court and as the said application is within 90 days, the said plea is not tenable in law.

5) The respondent filed the application under Rule 17 read with Section 151 of the CPC in the Court below invoking the inherent powers of the Court to make orders for the ends of justice or to prevent abuse of the process of the Court. The basic purpose of Rule 17 is to enable the Court to clarify any position or doubt, and the Court may, either suo motu or on the request of any party, recall any witness at any stage in that regard. This power can be exercised at any stage of the suit. No doubt, once the Court recalls the witness for the purpose of any such clarification, the Court may permit the parties to assist the Court by examining the witness for the purpose of clarification required or permitted by the Court. The power under Rule 17 cannot be stretched any further. The said power cannot be invoked to fill up omission in the evidence already led by a witness. It cannot also be used for the purpose of filling up a lacuna in the evidence. 'No prejudice is caused to either party' is also not a permissible ground to invoke Rule 17. No doubt, it is a discretionary power of the court but to be used only sparingly, and in case, the Court decides to invoke the provision, it should also see that the trial is not unnecessarily protracted on that ground.

On going through the lower Court record and on hearing both the sides, I find that the contention of the petitioner that the recall of the witness was imperative is not sustainable as discussed above.

6) It would be profitable at this stage to visit the provisions of law mentioned in the C.P.C as regards to the powers of revision.

Section 115 A of C.P.C states that a District Court may exercise all or any of the powers which may be exercised by the High Court under section 115.....

Section 115 of C.P.C states that (1) The High Court may call for the record of any case which has been decided by 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 the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.]

(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 the Court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.]

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 proceedings.]

7) Thus the proviso mentioned in section 115 C.P.C clearly mentions that the Court would only vary or reverse any order made except where the order, if it had been made in favour of the party applying for revision would have finally disposed of the proceeding. There is nothing to suggest in this matter that the order rejecting the petition of the Revisionist for recall of its witness was such that if it had been ruled in his favour by the Court below would have finally disposed of the proceedings. There is also nothing suggestive that the issue of recall of the said witness was within the meaning of “case decided” or that the court below had exercised a jurisdiction not vested in it by law, or failed to exercise a jurisdiction vested in it by law, or acted in the exercise of its jurisdiction illegally or with material irregularity.

Thus the case of the Revisionist does not come under the periphery of revision under section 115 C.P.C and is itself not maintainable before this forum as the impugned order is purely interlocutory in nature and is not a case decided within the meaning of section 115 C.P.C.

Accordingly I do not find any merit in the instant Civil Revision.

Hence,

ORDERED

that the Civil Revision be and the same is hereby dismissed on contest, but without cost.

Let a copy of this judgment along with the lower court record be sent down forthwith to the Ld. Court below for its information and necessary action.

Dict. & corrected by me.

(NAYYAR AZAM KHAN)
Additional District Judge,
Kalimpong.

(NAYYAR AZAM KHAN)
Additional District Judge,
Kalimpong.