IN THE HIGH COURT OF DELHI AT NEW DELHI

Civil Revision No.103 of 2004

Shri Tej Pal ...Petitioner through
Mr. Yashbeer Sethi, Advocate.

Versus

Shri Govind Vashisht ...Respondent in person

Date of Hearing : March 15, 2004

Date of Decisions : March 22, 2004.

CORAM:
* HON'BLE MR. JUSTICE VIKRAMAJIT SEN

1. Whether reporters of local papers may be allowed to see the Judgment?

2. To be referred to the Reporter or not?

3. Whether the judgment should be reported in the Digest?

: **VIKRAMAJIT SEN, J.**

For Judgment, see the file of CRP No. 958 of 1998.

March 22, 2004
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(VIKRAMAJIT SEN)
JUDGE

IN THE HIGH COURT OF DELHI AT NEW DELHI

1. Civil Revision No.958 of 1998

V.S.Saini & Anr. ...Petitioner through
Mr.Shravan Sinha, Advocate.

Versus

D.C.M. Ltd. ...Respondent through
Mr.Mohit Gupta with Mr.Rakesh Mukheeja, Advocates.

WITH

2. Civil Revision No.313 of 2002

M.L.Tharad ...Petitioner through
Mr. Sudhir Kumar Sharma, Advocate.

Versus

Ms.Anuja Beri @ Anuja Wahi & Other ...Respondents through
Nemo

WITH

3. Civil Revision No.906 of 2002

M/s.Reliance Engg. & Electricals Corporation and Anr. ...Petitioner through
Mr. Pramod Saigal, Advocate.

Versus

Smt.Veena Aggarwal ...Respondent through
Mr.Raj Kumar Sehrawat with
Mr.K.V. Kumar, Advocate.

WITH

4. Civil Revision No.214 of 2003

Sharco Exports Pvt.Ltd. & Ors. ...Petitioner through
Mr. Shailender Paul, Advocate.

Versus

Continental Carriers Ltd. ...Respondent through
Nemo

WITH

5. Civil Revision No.518 of 2003

Alok Aggarwal ...Petitioner through
Mr. S.S. Jain, Advocate.

Versus

Towa Optics (India) Pvt. Ltd. ...Respondent through
Mr.Rohit Aggarwal with
Mr. Rajeev Merkhedkdar,
Advocates.

WITH

6. Civil Revision No.1020 of 2003

M/s. Pumpen International & Anr. ...Petitioners through Mr.J.C. Mahindroo, Advocate.

Versus

M/s. Sudarshan & Sons ...Respondents through Nemo

WITH

Civil Revision No.74 of 2004

Bal Dev Singh ...Petitioner through Mr.R.K.Saini, Advocate.

Versus

M/s Rare Fuel & Automobiles ...Respondent through Mr.Nalin Tripathi, Advocate.

WITH

8. Civil Revision No.102 of 2004

M/s.Sintex Industries Ltd. & Ors. ...Petitioner through Mr.Yakesh Anand, Advocate.

Versus

Sh.Ashutosh Ahluwalia & Anr. ...Respondent through Ms.Neerja, Advocates for Respondents No.1 & 2.

WITH

9. Civil Revision No.103 of 2004

Shri Tej Pal ...Petitioner through
Mr. Yashbeer Sethi, Advocate.

Versus

Shri Govind Vashisht ...Respondent in person

WITH

10. Civil Revision No.112 of 2004

M/s.Sintex Industries Ltd. & Ors. ...Petitioner through
Mr.Yakesh Anand, Advocate.

Versus

Sh.Ashutosh Ahluwalia & Anr. ...Respondents through
Ms.Neerja, Advocates for
Respondents No.1 & 2.

WITH

11. Civil Revision No.118 of 2004

Shri Ram Chander Mishra ...Petitioner through
Mr.Abhay Tripathi, Advocate.

Versus

M/s Public Financiers and Others ...Respondent through
Nemo

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Date of Hearing : March 15, 2004

Date of Decisions : March 22, 2004.

CORAM:
* HON'BLE MR. JUSTICE VIKRAMAJIT SEN

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

: **VIKRAMAJIT SEN, J.**

1. The Petitioners in these Revisions were Defendants in sundry summary suits who had unsuccessfully applied for leave to defend those suits. The Respondents have raised the preliminary objection questioning their very maintainability of the Revisions. It is not as if one is on virgin territory, since this question has been considered by the Division Bench of this Court in Siri Krishan Bhardwaj v. Manohar Lal Gupta and another, **AIR 1977 Delhi 226.** It had been noted in that Judgment that two Learned Judges had returned divergent opinions on this subject. B.C. Misra, J. had opined that a Revision is maintainable whereas D.K. Kapur, J. took the diametrically opposite view that only an appeal against the decree can be entertained. The Division Bench clarified that a Revision entailed only

the bringing of an `error` to the notice of the High Court and conferred no further right of hearing on the aggrieved party. It went on to discuss that an order refusing to grant Leave to Defend has far reaching consequences and would normally fall within the ambit of the phrase "any case which has been decided", bringing the adjudication to a virtual end so far as the Defendant is concerned. It held that irrespective of the decree that may have been passed, a Revision against such an order is competent. The Division Bench however decided the controversy on the assumption that such orders were not appealable. This view would normally have held sway but for two subsequent events – firstly the observations of the Hon'ble Supreme Court in Shah Babulal Khimji v. Jayaben D. Kania and another, **AIR 1981 SC 1786,** and secondly, the enforcement of the amendments carried to Section 115 of the CPC by Act 46 of 1999 with effect from 1.7.2002.

2. It may also be mentioned that S.N. Kapoor, J. has followed Siri Krishan's case (supra) in M/s. Skylark Motors v. Lakshmi Commercial Bank Limited, **AIR 1997 Delhi 46,** but Babulal Khimji's case (supra) was neither cited nor discussed by my Learned Brother. Copies of orders of various other Benches have also been filed where Revision

petitions against similar orders passed under Order XXXVII of the CPC had been heard and decided: None of these decisions, however, contain a discussion of whether revisory powers ought to have been exercised instead of directing the Petitioner to seek its remedy by way of an Appeal.

3. In Babulal Khimji's case (supra) a suit had been filed on the Original side of the Bombay High Court for the Specific Performance of a contract, in which proceedings the interim relief of the appointment of a Receiver of the suit property had been prayed for. The Learned Single Judge had declined the relief of the appointment of a Receiver and had also not granted the interim injunction prayed for. The ensuing appeal was dismissed by the Division Bench as not maintainable on the ground that the impugned order was not a 'Judgment' as contemplated by Clause 15 of the Letters Patent of the High Court. No doubt, in the course of its detailed Judgment the Hon'ble Supreme Court had clarified that the Court was not concerned with the revisional powers of the High Court (paragraph 75). The Apex Court took note of the fact that unless such interlocutory orders were to be held analogous to a judgment, these orders would be impervious to an attack except in the Supreme Court.

The favoured view was the treating of such orders as judgments, so as to be amenable to judicial review under the Letters Patent. In the 120th paragraph the Court enumerated some illustrations of interlocutory orders which may be treated as judgments within the meaning of Letters Patent, one of which is an order declining Leave to Defend the suit in an action under Order XXXVII of the CPC. Counsel for the Revisionist have strenuously submitted that the observations must be restricted only to cases of Letters Patent and not where the High Court exercises powers under Section 115 of the CPC in respect of such orders passed in the District Courts. Although this contention is attractive, in view of the settled position that even obiter dicta of the Supreme Court is binding on all the other Courts, the observation of the Apex Court that an interlocutory Order such as the refusal to permit Leave to Defend is a "judgment", renders the decision in Siri Krishna's Judgment inefficacious. On a deeper cogitation, it appears to me that if an order in respect of which the redress of an appeal has deliberately and consciously not been formally provided for can nevertheless be assailed in appeal by deeming or treating it as a judgment, no other remedy can be legitimately invoked where an appeal is eventually available against an order. Therefore, in my opinion the Khimji dicta would apply a fortiori to legal assaults of the

present genre, where the unsuccessful defendant can certainly avail of a second opportunity to present its defence by way of filing an appeal.

4. It will be of advantage to recall the provisions of Order XII Rule 6 of the CPC, which enables the Court to pass a decree forthwith, if in its opinion the Defendant has admitted vital facts. Such an order is not appealable under Order XLIII of the CPC. It has been held in Smt. Shaymala Bai and others v. Smt. S. Saraswathi Bai and others, **1996 A I H C 5050 (Kant.)** that such an order would partake of the nature of a judgment within the meaning of Section 2(2) of the CPC, which can be attacked only by way of an appeal and not via a revision. I respectfully concur with this view unreservedly. . This Court has also taken the view that an order returning a plaint under Order VII Rule 11 of the CPC is not vulnerable to a challenge either under Article 227 of the Constitution or Section 115 of the CPC. (See Tarun Chopra & Others v. Union of India & Others, 1992 (2) Delhi Lawyer 250, M.L. Aggarwal v. National Thermal Power Corporation Limited, 49 (1993) Delhi Law Times 735, Atma Prakash v. Roshan Lal, 1999 1 AD (Delhi) 815 and Shri Kartar Singh v. Smt. Shanti & Others, 110 (2004) DLT 156 which has been dismissed by me on this short ground on February 9, 2004). If such

orders can be viewed as `judgments` as envisaged in Section 2(2) of the CPC, on a parity of reasoning, refusal to grant leave to defend a Summary suit can only be assailed by the avenue of an appeal.

5. It must be borne in mind that Order XXXVII is a pandect of its own, and its frontiers can be breached only in the eventualities contained therein. It seems to me that Rule 7 is not given the weightage it commands. It prescribes that the procedure for summary as well as ordinary suits shall be the same save as provided in the fasciculus of Order XXXVII. Once summons in Form B are issued in accordance with Rule 2 thereof, sub-rule (3) stipulates that `appearance` must be entered by the Defendant otherwise the averments in the plaint would be deemed to have been admitted. While on this point and on an aside, I feel compelled to underscore the futility of this formality since in actuality its effect is to delay the determination of a summary suit. It only raises an alarm for the Defendant who, after entering appearance, employs every device and stratagem to delay the suit. The position would be appreciably better if, rather than complying with the facile formality of merely entering appearance, the Defendant is required to file the application seeking leave to defend the suit within a stipulated period, akin to what is

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envisaged under Section 25B of the Delhi Rent Control Act. Sub-section (4) of Rule 3 of the Order XXXVII is an even greater inanity since it cannot be expected that the Plaintiff would suddenly discover a defence to his plaint even where the Defendant does not show any cause against it by anticipating the defence by reading the mind of the Defendant. Even in the face of such pointless steps having punctiliously to be covered the Plaintiff nevertheless does so because the pandect expects this of him. Can the Plaintiff combine the issuance of notice with the service of summons for judgment? The answer is obviously in the negative because the special provisions cannot be breached. Rule (3) (b) of Order XXXVII of the CPC then deals with the possibilities which would attend the filing of or failure to apply for leave to defend the suit. Before parting with the narration of the sequence of Order XXXVII events, it will be interesting to note that whilst default in entering appearance leads to the consequence that "the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree", in the event of a default in applying for leave to defend "the plaintiff shall be entitled to judgment forthwith". The scope of Court's consideration in the second event is well nigh nil whereas in the first event the Court must peruse the plaint painstakingly to satisfy itself that a decree can be passed predicated on it.

Even in the instance of ordinary suits this distinction will soon vanish because under the amended regime of the CPC, a Written Statement is required to be filed within thirty days from the date of service of summons on him. Therefore seldom would such an occasion now occur since if a Defendant neglects to file a Written Statement within the restricted and prescribed period in the Code of Civil Procedure and also fails to put in appearance, a judgment would be pronounced forthwith. Since Order XXXVII Rule 3(6) specifically stipulates that if leave to defend the suit is refused the Plaintiff shall be entitled to judgment, I find no conceivable cause to digress from the established procedure, since this will additionally render Rule 7 of Order XXXVII wholly otiose. This Order constitutes a complete Code in itself. There is no justification for conceptualizing an intermediary stage in summary suits, viz. between this refusal of Leave to Defendant and the passing of a judgment/decree. Even in those cases where there is a hiatus between the two events, because a decree/judgment is not passed by the Judge simultaneously with the refusal of Leave to Defend, the Defendant should be heard only after the judgment is pronounced. This approach can be extrapolated from the celebrated decision of the Hon'ble Supreme Court in Arjun Singh vs. Mohindra Kumar and others, **AIR 1964 SC 993** where it had been

enunciated that once the Court has adjourned the suit for pronouncing judgment, the affected party cannot file an application under Order IX Rule 7 of the CPC but must await the final orders/judgment and thereafter seek for its setting aside under Order IX Rule 13 of the CPC. It is exactly this progression or sequence of events that is envisaged by the Legislature in the fasciculus of Order XXXVII of the CPC and I would not like to impart any violence to this salutary expectation. This must have been the dialectic which occasioned the observation of the Apex Court in Khimji's case (supra) that the interlocutory order refusing Leave to Defend a summary suit partakes the form of a judgment, thereby making it vulnerable to assault only through a substantive and regular appeal. If piecemeal assaults are permissible even at an inchoate stage the purpose of carving out a summary procedure would be rendered illusory. An interpretation leading to such results must be abjured by the Court.

6. The provisions of Section 115 of the Code of Civil Procedure as it presently exists, and what it was prior to the enforcement of the Civil Procedure Code Amendment Act, 1999 are reproduced below for facility of reference and comparison:

LAW PRIOR TO THE ENFORCEMENT OF CPC (AMENDMENT) ACT, 1999.	Present Provision
S.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.**	**S.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 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 oder against which an appeal lies either to the High Court or to any Court subordinate thereto.	(2) The High Court shall not, under this section, vary or reverse any decree or oder against which an appeal lies either to the High Court or to any 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 proceeding.	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. On a reading of the juxtaposed provisions of Section 115 of the CPC it will be easily discernible that two changes have been brought in. Firstly, the consideration is now irrelevant that the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made; secondly, it has been clarified that the pendency of a Revision shall not operate as a stay of a suit or other proceedings. The position that a Revision should be entertained only in respect of those orders which would have finally disposed of the suit or other proceedings has not been altered. In these circumstances assuming that a decree has not been passed although leave to defend has not been allowed since the proceedings are still pending this Revision is not maintainable. Prior to the amendment, the interference of this Court was possible under the deleted clause (b) of the Proviso. In Siri Krishan's case (supra) the Division Bench had poignantly observed the effect of the amendments which were at that point of time carried out to Section 115 of the CPC viz. the addition of proviso to sub-section (1). It thereafter opined that "obviously, the impugned order in this case does not fall under Clause (a) of the Proviso. In my opinion it, however, does fall under Clause (b). It will be a great failure of justice if Revision is barred at the threshold on account of the proviso because under Order

37 Rule 2 the effect of refusal to grant leave to appear and defend can be the automatic passing of a decree against the Defendant". Clause (b) of Section 115 of the CPC has now been deleted and, therefore, the applicability of this Judgment, even if the ratio in Khimji's case (supra) is to be ignored, has been reduced drastically, if not removed entirely. Moreover, the Division Bench had proceeded on the assumption that "admittedly, the impugned order is not an appealable order" which begs the very question which has been answered by the Hon'ble Supreme Court. It has been strenuously contended before me that an Order declining Leave to Defend is appealable as a Judgment.

8. It has also been observed by the Apex Court in Shiv Shakti Coop. Housing Society, Nagpur vs. Swaraj Developers and Others. **(2003) 6 SCC 659** that the amendments are procedural in character and are therefore to be applied to all proceedings that have to be decided. In other words, the amendments have retrospective applicability. In its more recent judgment rendered in Surya Dev Rai Versus Ram Chander Rai and other, **AIR 2003 Supreme Court 3044,** the Hon'ble Supreme Court has removed all possible doubts by posing the question - "is an aggrieved person completely deprived of the remedy of judicial review if he has lost at the hands of the original court and the

Appellate Court, though a case of gross failure of justice having been occasioned can be made out?" This was answered in the following paragraphs:

> "In Shiv Shakti Co-op. Housing Society, Nagpur Versus M/s. Swaraj Developers and others, (2003) 4 Scale 241, another two-Judges bench of this Court dealt with Section 115 of the CPC. The Court at the end of its judgment noted the submission of the learned counsel for a party that even if the revisional applications are held to be not maintainable, there should not be a bar on a challenge being made under Article 227 of the Constitution for which an opportunity was prayed to be allowed. The Court observed,-"if any remedy is available to a party, no liberty is necessary to be granted for availing the same."
>
> We are of the opinion that the curtailment of revisional jurisdiction of the High Court does not take away - and could not have taken away - the constitutional jurisdiction of the High Court to issue a writ of certiorari to a civil court nor the power of superintendence conferred on the High Court under Article 227 of the Constitution is taken away or whittled down. The power exists, untrammelled by the amendment in Section 115 of the CPC, and is available to be exercised subject to rules of self discipline and practice which are well settled.

9. If an order declining leave to defend a summary suit thereby making a judgment inevitable can be attacked in a Revision and also in an Appeal, it would lead to the anomalous situation where a summary suit becomes more tedious and time consuming than an ordinary action for

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recovery of money. I would assiduously endeavour to eradicate a regime allowing multitudinous avenues of redressal. In the wake of the amendments effected to Section 115 of the CPC a Revision can no longer be preferred on the ground that the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury. In preferring the conclusion that these Revisions are not maintainable, the Plaintiff/Defendants have not been adversely placed. The judgment can be assailed in an appeal, the only difference being the necessity to pay ad valorem court fees. This scarcely warrants any thought keeping in perspective that the alternative would inexorably lead to a multiplicity and plenitude of reliefs.

10. Applying the dicta of the Hon'ble Supreme Court in Khimji's case I have no hesitation in holding that a Revision is not maintainable against the refusal to grant Leave to Defend a summary suit. After the judgment is passed the Defendant may assail the decision by way of an appeal. In the event that conditional leave has been allowed to the Defendant he must abide it and perform the obligations cast upon him or face the inevitability of a judgment being pronounced against him because of non-compliance of the conditions. It would be incongruous if he were

to be better placed than the Defendant who has been denied leave to defend altogether.

11. The Revisions are dismissed. However, the interim Orders shall continue to operate for thirty days from today. Parties shall bear their respective costs.

March 22, 2004
`n/tp`

(VIKRAMAJIT SEN)
JUDGE

fresh cm-2970/m. (Criminal M No. 2970/04) for directions to SHO

Sr. No.	Date	Orders
		% **13.4.2004** Present: Mr.S.N.Bhardwaj, Advocate for the Petitioner. + CM No.2970/2004 in CRP No.103/2004 * The Revision itself having been disposed of, the Petition is dismissed as not maintainable. April 13,2004 Vikramajit Sen, J. **ac**

Revision petition 138/09

CM 4269/09 (delay)

%17.07.2009

Present: None for the Petitioner.
Mr. Keshav V. Hegde, Adv. for the Revisionist.

+CM No.4269/2009 & RP No.138/2009 in CRP No.103/2004

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There is a delay of 1820 days in filing the present Review Petition. Be that as it may, the dispute between the parties has come to an end in view of the Orders of the Hon'ble Supreme Court passed on 19.10.2006 in Special Leave Petition No.16863/2006, whereby the Special Leave Petition was dismissed on the facts of the case.

In this view of the matter, learned counsel for the Revisionist seeks leave to withdraw the Review Petition.

Review Petition is dismissed as withdrawn, as prayed for.

VIKRAMAJIT SEN, J.

JULY 17, 2009
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