
(1993) 05 GAU CK 0019
In the Gauhati High Court
Case No : Civil Revision No. 62 of 1993

Smt. Charu Deka

APPELLANT

Vs

Smt. Umeswari Nath and Others

RESPONDENT

Date of Decision : 13-05-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115, 115(1), 115(2)
Constitution of India, 1950 — Article 227

Citation : AIR 1995 Guw 9

Hon'ble Judges : Manisana, J

Bench : Single Bench

Advocate : A.S. Chaudhuri and I. Hussain, for the Appellant; A.M. Mazumdar and M.H. Choudhuri, for the Respondent

Final Decision : Dismissed

Judgement

Manisana, J.—In this application u/s 115 of the Civil P.C. read with Article 227 of the Constitution of India, the petitioner has challenged an order of the Munsiff (1) Morigaon made on 2-2-1993 in Misc (J) Case No, 75 of 1992 arising out of Title Suit No. 27 of 1992 granting ad interim injunction under Order 39, Rule 1, C.P.C.

2. Mr. A. M. Mazumdar, learned counsel for the opposite party-1, has submitted that the impugned order is appealable to the District Court and, therefore, no revision lies to the High Court u/s 115, C.P.C.

3. In the present case, the Munsiff made the impugned order under Order 39, Rule (1), granting interlocutory injunction. Such an order is appealable under Order 43, Rule 1(r). However, an appeal shall lie to the District Court and not to the High Court, and no second appeal shall lie to the High Court in view of Section 104(2), C.P.C.

4. The question which arises for consideration is whether the High Court u/s 115, C.P.C., is competent to exercise its power in respect of an order from which an

appeal shall lie to a Court subordinate to it. The relevant portion of Sub-section (1) of Section 115 may be extracted thus :

"(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....."

(Empahsis added)

Sub-section (2) of Section 115, C.P.C., reads : "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 any Court subordinate thereto."

5. In Smt. Vidya Vati Vs. Shri Devi Das, the Supreme Court has, while considering the words "no appeal lies thereto" employed in Sub-section (1) of Section 115, C.P.C., held -

"Now, there can be no doubt that u/s 115 of the Civil P.C. a revision application can lie before the High Court from an order made by the Subordinate Court only if no appeal lies from that order to the High Court."

In that case, Sub-Judge allowed a review application, and against the order allowing the review was appealable to the District Court and not to the High Court. Therefore, the decision of the Supreme Court cited above clearly lays down that mere fact that an order is appealable to a Court other than High Court is no bar to the exercise of the power of a High Court u/s 115.

6. The above decision was made before the Amending Act of 1976, By the Amendment Act of 1976, Sub-section (2) was added. Sub-section (2) provides that in revisional jurisdiction no order or decree can be reversed when appeal lies to the High Court or to the Subordinate Court. According to Sub-section (1), even if appeal lies to the Subordinate Court an order is revisable in view of the decision of the Supreme Court referred to above, But, according to Sub-section (2), if an order is appealable to the Subordinate Court the order or decree cannot be reversed. It, therefore, appears that Sub-section (2) is inconsistent with Sub-section (1). If there is inconsistency in same section, the Court will make an endeavour to give both effect, if possible. In Madanlal Fakirchand Dudhediya Vs. Shree Changdeo Sugar Mills Ltd., the Supreme Court has, while dealing with subsections (1) and (2) of the Companies Act of 1963, observed:

"The two sub-sections must be read as parts of an integral whole and as being interdependent; an attempt should be made in construing them to reconcile them if it is reasonably possible to do so, and to avoid repugnancy".

In that view of the matter, the rule of, harmonious construction is attracted, that is, effect should be given to both. If harmonious construction is not possible., doctrine of *leges posteriores priores contrarias abrogant* (later laws abrogate prior laws that are contrary to them) shall apply, that is to say, sub-section (2), which had been added by the Amending Act, 1976, shall prevail over Sub-section

(1).

7. There is a distinction between an appeal and a revision. A right to appeal carries with it a right of re-hearing on law as well as fact unless the statute conferring the right of appeal limits the re-hearing in some way. Right of revision u/s 115 is confined to jurisdiction and jurisdiction alone (see Hari Shankar v. Girdhari, AIR 1963 SC 698). On a reading of Sub-sections (1) and (2) together, it makes it clear that if an appeal lies to the High Court no revision can be entertained, however, the revision may be converted to appeal. But Sub-section (2) further provides that if an appeal lies to a Court subordinate to the High Court no decree or order shall be reversed. Here appears inconsistency between Sub-sections (1) and (2). The whole object of Section 115 is to provide means to an aggrieved party to seek remedy which is cheap and easy, in case of non-appealable order. Therefore, the two sub-sections may be reconciled, if it is held that even if; the High Court calls records from the subordinate Courts under Sub-section (1), the High Court shall not proceed to consider on merits, if such decree or order is appealable to the High Court or to any other Court subordinate to the High Court. In any event, Sub-section (2) shall control Sub-section (1).

8. In the above view of the matter, the High Court is not competent to exercise its power u/s 115, C.P.C., in respect of an order from which an appeal lies to the Court subordinate to it. Therefore, the present revision petition is not maintainable.

9. The next submission of Mr. Choudhury, learned counsel for the petitioner, is that even if no revision lies u/s 115, C.P.C., the High Court can exercise its power under Article 227 of the Constitution of India for the petitioner has challenged the jurisdiction of the Civil Court to try the suit in view of Section 79 of the Assam Co-operative Societies Act.

10. The object and reasons for amending Section 115, C.P.C. are as follows :

"The question whether it is at all necessary to retain Section 115 was carefully considered by the Committee. The Law Commission has expressed the view, that in view of Article 227 of the Constitution Section 115 of the Code is no longer necessary. The Committee however, feel that the remedy provided by Article 227 of the Constitution is likely to cause more delay and involve more expenditure. The remedy provided in Section 115 is, on the other hand, cheap and easy. The Committee, therefore, feel that action 115, which serves a useful purpose, need not be altogether omitted particularly on the ground that an alternative remedy is available under Article 227 of the Constitution".

At this stage it will be helpful to refer to a decision of the Supreme Court reported as Vishesh Kumar Vs. Shanti Prasad, in which it has been held that a revision petition u/s 115, C.P.C., is a separate and distinct proceeding from a petition under Article 227 of the Constitution, and one cannot be identified with the other.

Our High Court has its own rules. The High Court Rules prescribe the manner in which the petitions under Articles 226 and 227 are to be drawn up. The object and reason quoted above also clearly indicate that petition u/s 115, C.P.C., is a separate and distinct proceeding from a petition under Article 227, and that the remedy available under Article 227 is an alternative one. In the present case, the procedure prescribed under the High Court Rules has not been followed. The inferior Tribunal or authority against whose order relief is sought has also not been made a party. That apart, it appears that question of jurisdiction though raised in the written statement it was not taken up in the course of the hearing of injunction matter before the Munsiff. There is no such statement in the petition that it was raised; but, not dealt with by the Munsiff. For these reasons, I am not inclined to invoke the power under Article 227 of the Constitution. It may, however, be observed here that the learned Munsiff may frame an issue regarding jurisdiction to try the suit and decide the same in accordance with law.

11. In the result, the revision petition is dismissed. Interim order stands vacated. No costs.