

(2005) 09 AHC CK 0299**Allahabad High Court****Case No:** C.M.W.P. No. 40558 of 2004

Mukhtar Ahmad

APPELLANT

Vs

Sirajul Haq and Others

RESPONDENT

Date of Decision: Sept. 7, 2005**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 6 Rule 6, 115, 115(1), 115(3)
- Hindu Marriage Act, 1955 - Section 24

Citation: (2006) 9 ADJ 354 : (2006) 3 AWC 2182 : (2006) 2 RD 103**Hon'ble Judges:** Arun Tandon, J**Bench:** Single Bench**Advocate:** A.P. Srivastava, for the Appellant; Komal Mehrotra, for the Respondent**Final Decision:** Allowed**Judgement**

Arun Tandon, J.

Heard counsel for the parties.

2. Petitioner initiated original suit proceedings No. 302 of 1987 seeking declaration of his title and share over House No. 23/188 as well as for delivery of possession. Respondent No. 1 Sri Sirajul Haq initiated independent original suit proceedings, being Original Suit No. 179 of 1978 claiming title over the entire property with possession thereto. In the suit filed by the petitioner-plaintiff. Sri Sirajul Haq filed his written statement. The petitioner, however, filed an application for amendment of the plaint allegation under Order VI, Rule 6 of the Civil Procedure Code. The application was numbered as Paper No. 77Ka. Sri Sirajul Haq, who was defendant in the said suit, filed his objections. The trial court by means of the order dated 21.8.2004 has rejected the application filed by the petitioner. Feeling aggrieved by the said order of the First Additional Civil Judge (Senior Division), petitioner preferred Civil Revision No. 239 of 2004 u/s 115 of the Civil Procedure Code. The revision so filed by the petitioner has been dismissed by the District Judge only on

the ground that the Revision is directed against an order rejecting the amendment application and Revision against such an order is not maintainable in view of the Judgment of the Hon'ble High Court of Judicature at Allahabad, in Brij Bhushan Vs. District Judge and Others, ; which in turn is based on the Judgment of the Hon'ble Supreme Court in the case of Shiv Shakti Cooperative Housing Society, Nagpur v. Swaraj Developers and Ors. 2003 (3) AWC 2198 (SC). It is against this order of District Judge the present writ petition has been filed.

3. The controversy in the present writ petition is confined to the issue as to whether a revision against an order rejecting the amendment application is maintainable u/s 115 of the CPC or not. It would be worthwhile to reproduce Section 115 of the Civil Procedure Code, as amended by the U.P. Act No. 14 of 2003, which is quoted herein below:

115. Revision.♦(1) A superior Court may revise an order passed in a case decided in an original suit or other proceeding by a subordinate Court where no appeal lies against the order and where the subordinate Court has-

- (a) exercised a jurisdiction not vested in it by law; or
- (b) failed to exercise a jurisdiction so vested; or
- (c) acted in exercise of its jurisdiction illegally or with material irregularity.

(2) A revision application under Sub-section (1), when filed in the High Court, shall contain a certificate on the first page of such application, below the title of the case, to the district Court but lies only to the High Court either because of valuation or because the order sought to be revised was passed by the District Court.

(3) The superior Court shall not, under this section, vary or reverse any order made except where,-

1. 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

2. the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made.

(4) 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 superior Court.

4. From the aforesaid provision, it cannot be disputed that a revision would be maintainable against an order, deciding an issue in an original suit or other proceedings, if the same is passed by a subordinate court, as provided under Sub-section (1) of Section 115 of the Civil Procedure Code.

5. In view of the aforesaid, the issue required to be considered by the revisional court, while exercising Jurisdiction u/s 115 of the Civil Procedure Code, is as to whether issue decided by the subordinate court amounts to case decided in the

facts of the case.

6. The District Judge, while passing the impugned order has not appreciated the ratio laid down by the Hon"ble High Court in the case of Brij Bhushan v. District Judge, Saharanpur and Ors. (supra) inasmuch this Court in paragraph 4 has held as follows:

4. In view of the aforesaid proposition of law, in my opinion, since finding is already recorded by the revisional court that no prejudice is caused to the petitioner, I do not see any illegality or irregularity committed by the revisional court in refusing to entertain the revision.

7. Therefore, this Court in the case of Brij Bhushan has not laid as proposition of law that in no case revision would be entertained where an amendment application has been rejected. The High Court had upheld the order passed by the District Judge refusing to entertain revision on the ground that no prejudice has been caused to the petitioner in the said case. Similarly, the Hon"ble Supreme Court in the case of Shiv Shakti Cooperative Housing Society, Nagpur v. Swaraj Developers, has only held that no revision would be maintainable against an interim order, which does not finally decide the case or the issue.

8. In view of the aforesaid, the District Judge was not correct in holding that a revision against an order rejecting the amendment application is not maintainable. The District Judge was under law obliged to see as to whether the order passed by the court below rejecting the amendment application amounts to case decided or as to whether in the facts of the case revisional authority should vary or reverse the order passed by the court below in view of Sub-section (3) of Section 115 of the Civil Procedure Code. It is needless to point out that this Court in the Judgment in Smt. Pushpa @ Pooja @ Bhawna Vs. State of U.P., District Judge and Shiv Kumar Gautam, has taken note of the judgment in the case of Shiv Shakti Co-operative Housing Society, Nagpur v. Swaraj Developers, and has explained the legal proposition laid down by the Hon"ble Supreme Court in the case of Shiv Shakti (supra) in paragraphs 15 and 16 of the said Judgment, which may be reproduced here in below:

15. The judgment of the Apex Court relied by the counsel for the petitioner in Shiv Shakti Cooperative Housing Society, Nagpur v. Swaraj Developers and Ors. (supra) lays down that the revision is not maintainable against an interlocutory or interim order. The Apex Court while considering provisions of Section 115 of the Code of Civil Procedure, made following observation in paragraph 32: (at page 2442 of AIR).

32. A plain reading of Section 115, as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is "yes" then the revision is maintainable. But on the contrary, if the answer is "no" then the revision is not[^] maintainable. Therefore, if the impugned order is of interim nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is

crystal clear. Those orders, which are interim in nature, cannot be the subject-matter of revision u/s 115.

16. As noted above, the order passed u/s 24 disposed of finally the issue of interim maintenance to a spouse during pendency of proceedings. After passing the order u/s 24 of the Act nothing more is required to be done with regard to question of interim maintenance during pendency of proceedings and the fact is that the order passed u/s 24 finally disposes the application for interim maintenance; hence as laid down by the Apex Court in above quoted paragraph the revision shall be maintainable against an order u/s 24 of the Hindu Marriage Act, 1955.

9. In view of the aforesaid, the order passed by the District Judge being based on incorrect application of law laid down by this Court in the case of Brij Bhushan and Shiv Shakti Co-operative Housing Society, Nagpur v. Swaraj Developers, therefore cannot be permitted to stand. Accordingly the order dated 21.9.2004 passed by the District Judge is quashed. Writ petition is allowed. The revision filed by the petitioner is restored to its original number. The District Judge is directed to decide the revision afresh in accordance with law, preferably within three months from the date a certified copy of this order is filed before him.