

(2002) 02 GAU CK 0002**Gauhati High Court****Case No:** CRP No. 352 of 2002

Md. Motiur Rahman

APPELLANT

Vs

Mustt Achia Kahtoon and Others

RESPONDENT

Date of Decision: Feb. 11, 2002**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 101, Order 21 Rule 99, 115(1), 151

Citation: (2003) 2 GLR 104**Hon'ble Judges:** I.A. Ansari, J**Bench:** Single Bench**Advocate:** S.P. Roy, for the Appellant; P. Khataniar, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

I.A. Ansari, J.

This revision has arisen out of the order, dated 29-8-2002, passed by learned Civil Judge (Sr. Divn.) No. 2, Guwahati, in Title Execution No. 2/2001 arising out of Title Suit No. 22/84, whereby the petitioners application made under Order 21, Rules 99 and 101 read with Section 151 CPC was rejected.

2. In a nutshell, material facts and various stages, which has given rise to this revision, may be narrated as follows :-

For execution of the decree granted in Title Suit No. 22/84, Title Execution No. 2/01 aforementioned was commenced, the opposite party Nos. 1 to 8 being the decree holders and opposite party No. 9 being judgment debtor. The petitioner who has not a party to the suit or to the execution proceeding, made an application in the execution proceeding under Order 21, Rules 99 and 101 read with Section 151 of the CPC, his case being that he had been in occupation and use of a portion of the suit property since 1972 by constructing his dwelling houses thereon, but he was never made a party to the suit and though he was a stranger to the suit he was now, being

sought to be evicted from the said portion of the suit land. Upon hearing the learned counsel for the parties, the learned executing Court passed the impugned order rejecting the petitioner's prayer for allowing him to resist the execution of the decree. Aggrieved by this order, the revision petitioner has approached this Court.

3. This revision has been resisted at its very threshold, that is, at the very admission stage on behalf of the opposite-parties-decree-holder.

4. I have carefully, perused the materials on record including the impugned order. I have heard Mr. S.P. Roy, learned counsel for the petitioner, and Mr. P Khataniar, learned counsel appearing on behalf of the opposite party Nos. 1 to 8.

5. Resisting the revision, Mr. Khataniar has submitted that no revision against the impugned order, dated 29.8.2002, aforementioned is maintainable inasmuch as under the proviso to Section 115(1), only such an order can be varied or reversed which, if the same had been passed in favour of party applying for revision, would have finally disposed of the suit or proceeding. It is contended by Mr. Khataniar that if the order, which is sought to be revised, would have been decided in favour of the petitioner, execution proceeding would not have stood terminated, and, hence against such an order, revision is not maintainable.

6. Controverting the above submissions made on behalf of the present opposite party, Mr. S.P. Roy has submitted that the impugned order is ex facie without jurisdiction inasmuch as the learned Court below rejected the application made in the execution proceeding by the petitioner merely on the ground that the petitioner has quoted wrong provisions of law in his application seeking to resist to execution of the decree and if such an order is not interfered with in revision, it will cause serious miscarriage of justice.

7. Before entering into the merit of the order, it is pertinent to refer to, and quote hereinbelow, Section 115 as it existed before the CPC (Amendment) Act, 2002, was given effect to on 1st of July, 2002. Section 115, as per the CPC (Amendment) Act, 1976, read as follows :-

"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

(6) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made."

8. A careful reading of the above unamended provisions of Section 115 CPC reveals that an order, which decided a case, but not appealable, could have been interfered with, in revision, if the subordinate Court appeared to have exercised of the jurisdiction not vested in it by law or have failed to exercise a jurisdiction vested in it or have acted in the exercise of its jurisdiction illegally or with material irregularity. This exercise of revisional power was, however, subject to two conditions, which were embodied in Clauses (a) and (b) of the proviso to Section 115(1), namely, (a) that the order, which is sought to get revised, was such that if the order had been made in favour of the party applying for revision, it would have terminated the suit or the proceeding, or (b) if the order was such that it could cause, if allowed to stand, failure of justice or irreparable loss or injury to the party against whom the order was made.

9. I am guided to adopt the above views from the observations of the Apex Court in the case of Prem Bakshi and Others Vs. Dharam Dev and Others, In this case, the Apex Court laid down as follows :-

"4. In Major S.S. Khanna v. Brig. F.J. Dillion this Court considered the expression "any case which has been decided" in Sub-section (1) of Section 115 CPC and held that the expression "case" is a word of comprehensive import and includes civil proceedings other than suits and is not restricted by anything contained in the said section to the entirety of the proceeding in a civil court and to interpret the expression "case" as an entire proceeding only and not a part of the proceeding would impose an unwarranted restriction on the exercise of powers of superintendence by the High Court. This view of the High Court has now been legislatively adopted by Parliament by introducing the Explanation to Sub-section (1) of Section 115 CPC and, therefore, an interlocutory order would be revisable. There is no doubt that the present order being an interlocutory order is revisable u/s 115, but for exercising powers under this section by the High Court, the order must satisfy one of the conditions mentioned in Clauses (a) and (b) of the proviso.

5. The proviso to Sub-section (1) of Section 115 puts a restriction on the powers of the High Court inasmuch as the High Court shall not, under this section, vary or reverse any order made or any order deciding a issue, in course of a suit or other proceedings, except where (i) the other made would have finally disposed of the suit or other proceedings, or (ii) the said order would occasion a failure of justice or cause irreparable injury to the party against whom it is made. Under Clause (a), the High Court would be justified in interfering with an order of a subordinate court if the said order finally disposes of the suit or other proceeding. By way of illustration,

we may say that if a trial court holds by an interlocutory order that it has no jurisdiction to proceed with the case or that suit is barred by limitation, it would amount to finally deciding the case and such order would be revisable. The order in question by which the amendment was allowed could not be said to have finally disposed of the case and, therefore, it would not come under Clause (a). (emphasis is supplied)

10. What is, now, of paramount importance to note is that Clause (b) of the proviso to Section 115(1) has been deleted by the CPC (Amendment) Act, 2002.

11. The question, therefore, is as to what will be the effect of the deletion of Clause (b) of the proviso to Section 115(1) ? The answer to this question is not very difficult to seek.

In the past, i.e., before the CPC (Amendment) Act, 2002, came into force, an order, which suffered from jurisdictional error, could have been interfered with by the High Court in exercise of its revisional jurisdiction u/s 115 if the order under challenge was likely to cause failure of justice or irreparable loss or injury to the party approaching the revisional court, but with Clause (b) of the proviso to Section 115(1) having been deleted under the new Act, the implication is that even if an order suffers from jurisdictional error or causes failure of justice or irreparable injury to the party approaching the Court, the order will not be interfered with in revision unless the order which is sought to get revised, is such that had the order been made in favour of the party applying for revision, it would have terminated the suit or the proceeding.

12. It is now of immense importance to note that a careful reading of the proviso to Section 115(1) will show that this proviso applies in the case of orders, which are interlocutory in nature and not final orders concluding the proceeding or determining the suit. If during the course of progress of a suit or proceeding, an order is made, which suffers from jurisdictional error, the party aggrieved may apply u/s 115(1) for revision, but such an order will not be interfered with in revision, even if the same is ex facie without jurisdiction, unless the order is such, which would have, if the order had been made in favour of the party applying for revision, finally disposed of the suit or the proceeding. If the order is such, which even if interfered with, will not terminate the progress of the suit or of the proceeding, the order will not be interfered with. It, therefore, logically follows that a final order, which disposes of the suit or the proceeding, cannot fall within the ambit of the proviso to Section 115(1). To a final order, the limitations imposed by the proviso to Section 115(1) on the revisional exercise of powers will not apply.

13. In short, from a bare reading of the proviso to Section 115(1), it becomes abundantly clear that for revising an interlocutory order passed during the progress of the suit or proceeding, the condition precedent in that the order, which is sought to be revised, is an order, which if it had been made in favour of the party applying

for revision, would have finally disposed of the suit or the proceeding. No such condition, precedent can exist in the case of the final order, which suffers from jurisdictional errors or satisfies the conditions laid down in Clauses (a), (b) and/or (c) to Sub-section (1) of Section 115.

14. Thus, the proviso to Section 115(1) will apply to interlocutory orders alone. I am guided to adopt this view, if I may reiterate, from the law laid down in Prem Bakshi's case (*supra*), wherein the Apex Court has observed thus :

"Under Clause (a), the High Court would be justified in interfering with an order of a subordinate Court if the said order finally disposes of the suit or the proceeding. By way of illustration, we may say that if a trial court holds by an interlocutory order that it has no jurisdiction to proceed with the case or that suit is barred by limitation, it would amount to finally deciding the case or that suit is barred by limitation, it would amount to finally deciding the case and such order would be revisable. (emphasis is added)

15. Coupled with the above, it is also worthnoticing that the expression "any case, which has been decided by any Court sub-ordinate to such High Court" occurring in Section 115(1), does not necessarily mean final orders, but will also include interlocutory orders, which determine the rights of the parties. Reference, in this regard, may be made to Major S.S. Khanna Vs. Brig. F.J. Dillon, However, the interlocutory order will be interfered with in revision, if the order is such, which, if it had been made in favour of the party applying for revision, would have terminated the suit or the proceeding. As far as the final orders deciding the case is concerned, the limitation contained in the proviso to Section 115(1) will not as indicated hereinabove, apply.

16. I am also fortified in coming to the above conclusion from the observations made in K. Anjaneya Setty Vs. K.H. Rangiah Setty, which run as follows :

"Therefore, Section 115 of the CPC which confers a supervisory role on this Court has to be exercised at an interlocutory stage prior to judgment and decree and against orders which are not covered under Order 43 CPC and would have the effect of deciding the case between the parties. Therefore, it necessarily follows it has to be against an interlocutory order passed in a suit. From the stage of institution of the suit till its final disposal by way of a judgment and decree there are various stages in a suit where the court is called upon to decide several important right of the parties. The said rights may be substantial or procedural deciding such rights, interlocutory orders are passed and if these orders tend to decide the rights of the parties conclusively and finally, then, the correctness or legality of the order as set out in Section 115 has to be gone into by this Court in its jurisdiction u/s 115 of CPC." (emphasis is supplied)

17. In view of the fact that the order impugned in this revision is an order, which has finally disposed of the application made under Order 21, Rules 99 and 101 with

Section 151 CPC, and when against such an order, no appeal is provided for, the order, in question, can be examined to determine if the same need interference in revision.

18. In the above view of the matter, this revision is admitted for hearing.

19. LCR need to be called for.

20. No notices need be issued on the opposite party No. 1 to 8 as they have already entered appearance. Issue notice to the opposite party No. 9 by registered post with AD as well as by ordinary process. Steps shall be taken within three days.

21. In view of the fact that this revision needs to be expeditiously disposed of list this revision for hearing on 17.3.2003.

22. Send forthwith a copy of this order to the learned Court below.