F.K

21/12/06

IN THE HIGH COURT OF SIKKIM
GANGTOK

Civil Revision No.6 of 2006

Pentook Lepcha
S/o Late Chigey Lepcha,
R/o Sangtok Block,
P.O & P.S. Mangan,
Lower Dzongu,
North Sikkim. ..... ***Petitioner***

Versus

1. **Sonam Lepcha**
2. **Ongdup Lepcha**
3. **Lhendup Lepcha**
4. **Penjom Lepcha alias Penzang Lepcha**

All sons of Late Pintso Lepcha,
R/o Sangtok Block,
P.O. & P. S. Manga,
Lower Dzongu,
North Sikkim. ..... ***Respondents***

For the Petitioner : Mr. A. J. Sharma, learned Counsel.

For the Respondents : Mr. J. K. Chandak, learned Counsel assisted by Ms. Ranjita Kumari, learned Counsel.

PRESENT : THE HON'BLE SHRI JUSTICE A. P. SUBBA, JUDGE.

Date of Judgment : December 2 , 2006

JUDGMENT

A. P. Subba, J.

This Revision Petition filed u/S. 115 CPC read with Sec. 151 CPC and Article 227 of the Constitution, is directed

against the order dated **19.4.2006** passed by the learned Civil Judge, North & East at Gangtok, setting aside the report of the Amin Commissioner dated **21.10.2005** in ***Civil Suit No.5 of 2005.***

2. The facts relevant for the disposal of this Revision Petition are that, the present Plaintiff/Petitioner in the year 2000, instituted a suit in the Court of the Civil Judge, North at Gangtok against the Respondents, for declaration and other reliefs in respect of piece of land covered by plot Nos. 46 and 565 situated at Santok, Sakyong Block, Lower Dzongu Elaka in the North District. The suit which was registered as ***Civil Suit No.1 of 2000*** was ultimately dismissed by the learned Court vide judgment and decree dated **20.7.2002**. Aggrieved by this order the Plaintiff/Petitioner preferred an appeal before the learned District Judge, East & North at Gangtok. The learned District Judge after hearing the parties, set aside the judgment and decree passed by the learned Civil Judge (E) and remanded the matter to the ld. trial Court. Since the ld. District Judge was of the view that the contesting parties had failed to establish identity of the suit land, he directed the ld. trial Court to appoint an Amin Commissioner to ascertain the identity of the suit land and to dispose of the suit as per law. In pursuance of the direction,

the learned trial Court with consent of both the learned Counsel for the parties, appointed one Shri Nimzang Bhutia as Amin Commissioner. The said Amin Commissioner submitted his report on **21.10.2005**. The defendant having died in the meantime, one of his sons who was brought on record as Defendant No.1, filed objection to the Amin Commissioner's report on **9.3.2006**, to which the Petitioner filed his reply on **28.3.2006**. The parties were then heard and vide order dated **19.4.2006** the report of the Amin Commissioner was set aside. It is against this order that the Petitioner has come up in the present Revision Petition.

3. Mr. A. J. Sharma, learned Counsel appearing on behalf of the Petitioner and Mr. J. K. Chandak, learned Counsel assisted by Ms. Ranjita Kumari, learned Counsel appearing on behalf of the Respondents were heard. While Mr. A. J. Sharma assailed the impugned order as bad in law and unsustainable on the ground that the learned trial Court exercised a jurisdiction not vested in it by law, Mr. Chandak supported the order contending that since the report submitted was not in terms of the directions made by the Appellate Court, there was no option but to set aside the same, and, as such, there was no legal infirmity in the impugned order.

4. The short question for consideration is, whether the learned ld. trial Court exercised a jurisdiction not vested in it by law or has acted in the exercise of its jurisdiction illegally or with material irregularity in passing the impugned order and also, whether the impugned order, if it had been made in favour of the Petitioner, would have given finality to the lis or other proceedings.

5. In order to appreciate the rival submissions made by the learned Counsel, it would be necessary in the first instance to notice the ambit and scope of Sec.115 of the Code of Civil Procedure. In this regard, it is relevant to note that the scope of interference by the High Court under Sec.115 CPC as it originally stood under 1898 Code has been considerably narrowed down by successive amendments of the Code over the years with the result that the powers u/S.115 are now restricted to a considerable extent.

6. In order to appreciate the above position, it would be useful to briefly notice the legislative changes brought about by the various amendments from time to time as follows -

Sec. 115 of the present Code under the original Code of 1898 stood as follows: -

> **"115. *Revision* – 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 jursdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit."

The Amendment Act of 1976 renumbered the above original Section and added a proviso besides inserting a new Sub-sec(2) and appending an explanation to it. Thus, after the 1976 amendment, the Section stood 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

(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.]"

The next amendment effected by Civil Procedure Code (Amendment) Act 1999 which came into force w.e.f. July 1, 2002, inter alia, amended the above proviso duly deleting the clause (b) while retaining clause (a). Thus, after this amendment, Sec. 115 stands 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 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 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 more, or any order deciding an issue, in the course of a suit or other proceeding."**

7. The above legislative history of Sec.115 would go to show that the Amendment Act of 1976 added a proviso to sub-Section (1) and after the addition of this proviso, only such order could be reversed or varied in the revisional jurisdiction which is not appellable and which would attract either proviso (a) or (b) and any of the clauses of Section 115(1) CPC. Thus, even if the order fell under any of the clauses of Sec. 115(1), the High Court would have no jurisdiction to vary or reverse any interlocutory order unless the order was such that had it been made in favour of the party applying for revision, it would have disposed of the suit or proceeding, or if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made. Since proviso (b) was deleted by the 1999 Amendment, the High Court can now interfere in revision u/S 115 C.P.C. only if the impugned order falls under any of the clauses of Sec. 115(1) and also if it is satisfied that had the impugned order been made in favour of the

applicant, it would have finally disposed of the suit or other proceedings.

8. While considering the effect of the above various amendments that came up for consideration in a batch of appeals, in ***Shiv Shakti Co-op Housing Society Nagpur vs.M/S Swaraj Developers& Others AIR 2003 SC 2434 and Others*** the Apex Court observed in paras 9 and 10 as follows: -

> **"9. It is to be noted prior to the amendments to the Code by Old Amendment Act, the power of revision was wider. By the amendment, certain positive restrictions were put on the High Court's power to deal with revisions under S.115. Prior to the said amendment, it was not strictly necessary that the impugned order would have the result of finally deciding the lis or the proceedings in the lower courts. In fact, the power could be exercised in any case where jurisdictional error was committed by the original court or where substantial injustice had resulted. By the Old Amendment Act, the condition of finally deciding of lis and the proceedings in the subordinate courts was introduced. The proviso which was introduced contains qualifications which are pre-requisites before exercise of power under S. 115. They were clauses (a) and (b) of the proviso. Logically, the High Court has suo motu power to revise an order where total failure of justice would have occasioned or where irreparable loss would have caused to the parties against whom it was made. These powers were retained by clause(b). Though, after 1976, the exercise of power was somewhat circumscribed, it was not totally curtailed. In other words, the High Court could even after the 1976 amendment interfere in cases where there was failure of justice or**

> **irreparable loss caused, the nature of the proceedings was substantially changed and the suo motu power of the High Court was retained. It was in the nature of power of superintendence of the High Court over the subordinate courts. Changes were related to indicating limitations in exercise of power.**
>
> **10. Even after the amendments in 1976, in 1999 and prior to the amendment in 1976, the revision power was exercisable in a case where the order or the decree, as the case may be, was not appealable."**(*emphasis added*).

As observed by the Apex Court in para 32 of the above judgment, the stress now is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceedings. As further laid down by the Court in the same paragraph, the test to be applied is, if the answer to the question as to whether the order if it were made in favour of the revision petition would have finally disposed of the suit or other proceedings is 'yes' then the revision would be maintainable, and if the answer is 'no' then the revision would not be maintainable.

9. Having thus noticed the relevant provision of law as it now stands, we may now proceed to see if the impugned order falls under any of the clauses of Sec. 115 (1) and also whether if it satisfies the condition of finality specified under the amended proviso.

10. Order XXVI Rule 10 of CPC under which the impugned order has been passed provides as follows :-

> **"10. *Procedure of Commissioner* – (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court.**
>
> **(2) Report *and depositions to be evidence in suit.* – The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court *or,* with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.**
>
> ***(3) Commissioner may be examined in person.* – Where the court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit."**

11. A bare reading of the above provision would make it clear that the report submitted by the Commissioner along with the evidence taken by him shall be evidence in the suit and shall form part of the record. Interpreting this provision, several decisions have held that the object of the local inspection/investigation is merely to assist the Court by obtaining evidence, which from its peculiar nature can best

be had from the spot itself. Such report clarifies or explains any point, which is left doubtful on the evidence on record. The sole purpose of the inspection/investigation is thus to enable the Court to properly and correctly understand and assess the evidence on record. It is, therefore, clear that the report of Commissioner is nothing but evidence like any other evidence on record. Thus, if the report submitted by the Commissioner under Order XXVI Rule 10 CPC is to be read as evidence in the suit and is to form part of the record, it is evident that the evidentiary value of such report has to be judged by the Court at the time of evaluating the entire evidence on record.

It is pertinent to note that Rule 10 already quoted above which deals with the manner in which a report of the Commissioner is to be treated, only permits the ordering of **'further enquiry'** where the report received is unsatisfactory. The rule does not authorize the Court to set aside a Commissioner's report even when it is deficient. Rule 10 sub-clause (3) only provides that if the Court is dissatisfied with the proceedings of the Commissioner, it may direct further enquiry and call for supplementary report from the same Commissioner. The rule does not say that supplementary report cannot be called for without setting aside the first

report in such eventuality. The words **'further enquiry'** occurring in sub-rule (3) of the section are of significance in this regard. Interpreting the word 'further' a Single Bench of Kerala High Court in ***Dr. P. Subramoniam vs. K.S.E. Board & Others (AIR 1988 Kerala 169)*** has observed that the word **'further'** means '**additional**' or '**going beyond what exists**' and then by the words '**further enquiry**' employed in the section, what is evidently intended by the legislature is to correct and bring on record something in addition to what has already been brought in earlier. Such being the position, it was observed that **'the intention could not have been to wipe the slate clean and start afresh'**.

12. It is evident from the above that the approach adopted by the learned trial Court for setting aside the Commissioner's report is not in conformity with the provisions contained in the Code with regard to the value to be attached to a report submitted by the Commissioner. However,a perusal of the impugned order goes to show that the learned trial Court while passing the impugned order relied on two old decisions, one reported in ***AIR (38) 1951 Assam 18*** and the other reported in ***AIR 1931 Madras 73***. Relying on these decisions, the learned Court came to the conclusion in paragraph 36 of the impugned order that it is

settled law that when the Court is of the opinion on considering the objection of the parties, if any, that the Commissioner has so misconceived his duties as to render the report valueless, it may wipe out and supercede the first report by a specific order to that effect and may issue a fresh commission, if required. It would therefore be necessary to see if the two decisions duly support the view taken by the learned trial Court in the matter.

13. A perusal of the decision reported in ***AIR (38) 1951 Assam 18*** goes to show that two attempts made by the Commissioner appointed under Order XXVI Rule 9 CPC to ascertain exact area of alleged encroachment having proved abortive, the Plaintiff applied for issue of fresh commission. This petition was however rejected by the ld. Trial Court. On appeal, the High Court of Assam held that the learned trial Court did not exercise its discretion judicially or in accordance with sound legal principle in declining to issue the fresh commission. It would, therefore, appear that the decision is not directly on the point as to whether the report of the first commission should be set aside while issuing the second commission. In the other Madras decision, it was, of course, observed that the report of the first Commissioner should be **'wiped out altogether'** and the

Court should look into the second report only as if the first report had never been made. However, a Division Bench of Patna High Court in ***Shib Charan Sahu & Others vs. Sarda Prasad & Another (AIR 1937 Pat 670)*** refused to recognize the above Madras High Court view as an authority for the proposition that the first Commissioner's report should or should not be wiped out and treated as non-est before a second Commission was issued. In that case, the contention raised by the defendants was that, when a Judge issues a commission, if he is dissatisfied with the report of the Commissioner and deems fit to direct a second commission to issue, he should wipe the first Commissioner's report off the record entirely, treating it as not being evidence. In regard to such submission, the Bench observed as follows:-

> **"There is nothing in O.26, R.10, Civil P.C. to justify such a contention. <u>It is in the power of the trial Court to send out a second or even a third commission, and when all the materials are before the Court it may at the time of delivering judgment attach very little or no weight to the first Commissioner's report, but this is very far from saying that this amounts to requiring the first report to be wiped out of the record and not considered as evidence</u>. That the argument is entirely unsound is seen on considering what, if it were true, would be the position in the case of an Appellate Court. The first Court's decision on the matter of fact is not final and if the contention were to be accepted, it would prevent an Appellate Court from taking into considering the first Commissioner's report : this consideration alone is sufficient to demonstrate the fallacy of the argument....."** *(emphasis added).*

14. Referring to and agreeing with the above Division Bench judgment of Patna High Court, the High Court of Punjab & Haryana in ***Chotu Mauju vs. Gurbhajan Singh (AIR 1972 P&B 265)*** in paragraphs 2 and 3 observed as follows :-

> **"If, rightly or wrongly, more than one commission are issued for legal investigation in respect of the same matter, the Court has no jurisdiction to exclude from the evidence in the case any one of the reports submitted by the Commissioners unless all the parties to the suit want the particular evidence to be excluded.**
>
> **The report of each Commissioner under Order 26, Rules 9 and 10 is nothing more than evidence on which either of the parties may or may not rely or which may or may not find favour with the Court wholly or partially."**

15. Taking note of the observation made in both the above decisions, the Kerala High Court in ***Hydru vs. Govindankutty Nair (AIR 1982 Ker. 49)*** observed as follows:-

> **"Rule 10(2) prescribes that the report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record. <u>When it is so prescribed, can the Court efface it from record by what is often called setting aside the report, in the absence of specific power conferred therefor by the statute itself? Sub-rule (3) does not specifically provide for wiping out evidence which is already part of the record; it only contemplates a further enquiry and therefore a further report, which will also become evidence and part of the record by virtue of sub-rule (2).</u> ....."** *(emphasis added).*

16. Quoting with approval the observation made above, a Single Bench of the same High Court in ***Dr. P.***

Subramoniam vs. K.S.F. Board & Others (AIR 1988 Ker.169)supra made the following further observation: -

> **"Now, if the mandate of the statute is that the report of the Commissioner shall be treated as evidence in the suit, how can any court set it aside or wipe it out unless it is authorized to do that also, by the statute? As already noticed, Rules 10 and 12 do not authorize the court to set aside a commission report which it is required to treat as evidence : the rules only permit the ordering of "further enquiry" where the report already received is unsatisfactory. A power to order further enquiry into a matter is entirely different from a power to set aside or wipe out that which has already become part of the evidence in the suit as a result of the initial enquiry and the mandate of the statute."** *(emphasis added).*

17. To the same effect are the following observations made by a Division Bench of Orissa High Court in ***Smt. Laltoomani Mohanty vs. First Addl. District Judge, Cuttack & Others (AIR 1996 Ori. 141)*** :-

> **"It is now well settled that the report of a survey knowing Commissioner is nothing more than evidence in a case. It is one of the items of evidence amongst other evidence adduced or to be adduced by the parties in the suit. The evidentiary value of the report would be judged by the court while evaluating the entire evidence on record. ...."**
> *(emphasis added).*

18. Thus, the clear view consistently expressed by the different High Courts in the various decisions cited above, hardly leaves any room for controversy in the matter. It must therefore be taken to be a fairly well-settled position in law that if a report submitted by a Commissioner appointed

under Order XXVI Rule 10 is found to be deficient in respect of any item, the Court is empowered to call for supplementary report in addition to what has already come on record and the evidentiary value of such report has to be assessed and judged while evaluating the entire evidence on record

19. The above discussion thus leads to the conclusion that the learned trial Court acted illegally and in excess of jurisdiction vested in it in setting aside the first Commissioner's report on the ground that the report was deficient and did not answer the points in controversy. The illegality so demonstrated further goes to show that the impugned order is also contrary to the well-established principle and abject behind Sec.115. This therefore, goes to show that the case in hand falls within the ambit and scope of any of the three alternative clauses of Sec.115.

20. The further question for consideration is, whether the case in hand is also covered by the proviso added to the Section. In other words, the question is whether the impugned order if it had been made in favour of the Petitioner, would have given finality to the suit or the proceedings. The proceedings in question in the case, it may be recalled, relate to the report submitted by the Amin

Commissioner appointed by the learned trial Court to inspect the suit land so as to ascertain its identity and the objection filed by the parties to it. The objection filed by the defendant/Respondent was to the effect that the report being false and biased was liable to be set aside. In the reply to the objection filed on behalf of the revision/Petitioner, on the other hand, it was contended that the local inspection was done in presence of both parties and not behind their back. As such, the objection filed by the defendant/Respondent was actuated by a malafide intention to thwart the course of law. A prayer was accordingly made for rejecting the objection. In this backdrop it is the contention of the learned Counsel for the Petitioner that if the impugned order had been made in favour of the Petitioner, there would have been no occasion to set aside the report. Such approach, it was further contended, would not only be in conformity with the well-established principle of law, but also would have given finality to the proceedings. In the alternative, it was contended by the ld. Counsel that even otherwise, the petition is one under Sec. 115 CPC read with Art.227 of the Constitution and this Court, in exercise of the wide powers available under Art. 227 could interfere in the matter in the

interest of justice so as to set right an order, which has been passed illegally, and arbitrarily against the well-established principle of law.

There is no doubt that when the test formulated by the Apex Court in above cited ***Shiv Shakti Coop Housing Society case (AIR 2003 SC 2434) supra*** is applied to the facts of the case in hand, the answer to the question as to whether the interlocutory order under challenge in the present proceedings would, if it were made in favour of the revision Petitioner, have given finality to the proceedings, would be in the affirmative. Besides, even the alternative submission made by the ld. Counsel does not appear to be devoid of any force particularly in view of the fact that the power of this Court under Art. 227 of the Constitution which the Petitioner has also invoked in the present proceedings are wider than the power of revision under Sec. 115 of the Code. It is the well-settled position of law that the power of superintendence of the High Court under Art. 227 of the Constitution is much wider than the power of revision u/S. 115 of the C.P.C. and the limitations which are applicable in case of power of revision u/S. 115 CPC do not apply to the supervisory jurisdiction of the High Court under Art. 227 of the Constitution. Of course it is also well-recognized principle

that the supervisory power under Art. 227 of the Constitution is to be sparingly used and such power should not be used for correcting a mere error. In this regard, it might be noted that it has already been demonstrated above that the impugned order is not in conformity with the related provisions contained in the order and also the well-established principles of law on the point. In view of this, it is manifest that the limitation placed on the exercise of power vested in High Court under Art. 227 of the Constitution would not extend to cases where the discretion exercised by the lower Court is found to be not only arbitrary but also against the well established principle of law as in the present case.

21. Hence, for the reasons given and the observations made in the foregoing discussions, it follows that the order impugned herein suffers from legal infirmity, and interference of this Court is called for, so as to set right the same in exercise of revisional jurisdiction vested in this Court under Sec.115 CPC., as well as the supervisory jurisdiction similarly vested in this Court under Art. 227 of the Constitution.

22. In the result, the impugned order is hereby set aside. The learned trial Court shall issue an order to the same Commissioner to inspect the suit land once again and submit an additional report in respect of the deficiency

detected in the report already submitted. It is needless to say that it would be open to the opposite parties to avail of the services of any other survey-knowing Commissioner in the matter, and if any other report is made available, the same may be considered in accordance with law.

The records of the lower Court be returned forthwith.

(A. P. Subba)
Judge
02/12/2006