THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED : 9th NOVEMBER, 2017

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

WP(C) No.47 of 2016

Petitioners :

1. Md. Shahid,
   S/o Late Md. Ibrahim,
   R/o Green Hotel,
   M. G. Marg,
   Gangtok, East Sikkim.

2. Salima Khatoon,
   W/o Karim Qazi,
   R/o New Green Hotel,
   Balwakhani,
   Gangtok, East Sikkim.

3. Sakina Ibrahim,
   D/o Late Md. Ibrahim,
   R/o Green Hotel,
   M. G. Marg,
   Gangtok, East Sikkim.

4. Nargis Wishart,
   W/o Gavin Robert Wishart,
   R/o Dubai,
   P.O. Box No.999,
   Dubai, UAE.

5. Zeenat Burdick,
   W/o Robert Burdick,
   R/o Canderra 66 Campbell Street Ainslie,
   Act 2602 Australia.

6. Nurjahan Ibrahim,
   W/o Shri M. S. Manku,
   R/o Flat No.104,
   Villa Royale, Hiranandani Estate,
   Off. Ghodbunder Road,
   Thane (West).

7. Hasina Kapadiya,
   W/o Yusuf Kapadiya,
   R/o P.O. Box 8508,
   Dubai, UAE.

versus

Respondents **:**

1. Mrs. Marium Iqbal,
   W/o Lt. Md. Iqbal,
   R/o Green Hotel,
   M. G. Marg,
   Gangtok, East Sikkim.

2. Madina Agarwal,
   W/o Sanjay Agarwal,
   C/o Darjeeling Photo Studio,
   P.O. Darjeeling,
   West Bengal.

3. The Registrar/District Collector,
   East District,
   Gangtok,
   East Sikkim.

Application under Articles 226/227 of the Constitution of India

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Appearance

Mr. A. K. Moulik, Senior Advocate with Mrs. K. D. Bhutia, Mr. Ranjit Prasad, Advocates for the Petitioners.

Mr. Rahul Rathi, Advocate for the Respondent No.1.

None for Respondent No.2.

Mr. S. K. Chettri, Assistant Government Advocate for the State-Respondent No.3.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The Order of the Learned Civil Judge, East Sikkim, at Gangtok, dated 20-09-2016, rejecting the prayer of the Petitioners under Order XVIII Rule 17, read with Section 151 of the Code of Civil Procedure, 1908 (for short "CPC") and Sections 137, 138 and 145 of the Indian Evidence Act, 1872, in Title Suit No.10 of 2013,

Mohd. Shahid and Others vs. *Mrs. Marium Iqbal and Others*, is being questioned herein.

2. The Petitioners aggrieved by the rejection of their Petition under Order XVIII Rule 17 read with Section 151 of the CPC and Sections 137, 138 and 145 of the Indian Evidence Act, 1872 (for short "Evidence Act"), have filed this Petition under Articles 226/227 of the Constitution of India, for issuance of a writ of/or in the nature of mandamus/certiorari and/or any other appropriate writ, orders or directions of like nature.

3. The grounds advanced herein are that on 16-08-2016, the date fixed for confirmation of the evidence on affidavit and cross-examination of the Defendants witness, Janab Ibrahim Naik, due to a mis-communication between Learned Assisting Junior Counsel, Mr. Manish Kr. Jain and Learned Senior Counsel, Mr. A. Moulik, for the Petitioners/Plaintiffs (hereinafter "Plaintiffs"), the Learned Senior Counsel was given to understand that no case was fixed in any of the Courts in the East District of Sikkim, at Gangtok. Consequently, the Senior Counsel proceeded to Gyalshing, West Sikkim, to attend to a Bail hearing before the Sessions Court. Once there, he received information from the Junior Counsel that the aforesaid witness was present in the Court and adjournment was declined. Counsel was permitted to inform the Senior Counsel to be present by 5 p.m. for cross-examination of the witness. The Senior Counsel accordingly reached the Court at Gangtok, at 3.45 p.m. by which time the witness had been cross-examined by the Junior Counsel, on the insistence of the opposing Counsel. It is now the

case of the Petitioners that, the cross-examination was conducted by a Counsel inexperienced in such matters. That, during the course of the cross-examination, the witness has brought out various facts and voluntary statements which were not revealed in his "evidence-on-affidavit". Moreover, the statements made by the witness are not correct, as he has inserted new facts, inasmuch as on one hand, the witness claims that the concerned property was 'gifted', then contradicts this stand by claiming it was 'partitioned', leading to anomalies. Confusion prevailed over the date fixed, leading to unpreparedness exacerbated by the lack of instructions and requisite experience of the Junior Counsel. It is vehemently contended that unless Senior Counsel is allowed to re-cross examine the witness in respect of the new facts brought out by the witness, through his voluntary statements, irreparable loss and prejudice will be caused to the Plaintiffs. That, the Learned Trial Court ought to have allowed the Application filed by the Plaintiffs in order to effectively adjudicate the Suit as the Senior Counsel had been conducting the matter. To fortify his submissions, strength was drawn from ***Hoffman Andreas*** vs. ***Inspector of Customs, Amritsar***[1]; ***Municipal Corporation, Gwalior*** vs. ***Ramcharan (D) by L.Rs. and Others***[2]; ***Brij Kishore S. Ghosh*** vs ***Jayantilal Maneklal Bhatt and Another***[3]; ***U.K. Ghosh*** vs. ***M/s. Voltas Ltd. and Another***[4]; ***C. T. Muniappan*** vs. ***The State of Madras***[5]; ***K. K. Velusamy*** vs. ***N. Palanisamy***[6] and ***S. Yuvaraj*** vs.

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[1] (2000) 10 SCC 430
[2] AIR 2003 SC 2164
[3] AIR 1989 Gujarat 227
[4] AIR 1994 Orissa 131
[5] AIR 1961 SC 175
[6] (2011) 11 SCC 275

State[7]. It is, therefore, prayed that the impugned Order be set aside and quashed and the Petitioner be allowed to re-cross examine the said witness.

4. Resisting the arguments advanced for the Petitioners, Learned Counsel for the Respondent No.1 submitted that, the Petitioners have not approached this Court with clean hands. Nowhere in the Application filed before the Learned Civil Judge have they stated that the Learned Counsel cross-examining the witness was not instructed sufficiently and neither was it mentioned that confusion emanated about the date fixed. The incompetence of the Learned Junior Counsel found no mention. That, averments to the effect that the Learned Court below had afforded time to the Counsel to inform the Senior Counsel is untrue. In fact, learned Junior Counsel did not pray for any adjournment, neither did he made any prayers for further cross-examination and/or re-examination. The records would reveal that the authorised Junior Counsel was conducting the matter from its inception, i.e., from 26-02-2010, and on 21-07-2016, undertaking to personally conduct the case in future even in the Senior's absence. That, the record of cross-examination of the witness indicate that the Junior Counsel had indeed put a specific question in cross-examination on the alleged voluntary statements. The reply being found unsuitable, the Plaintiffs now seek to fill the lacuna by raising the ground of inexperience of the Junior Counsel. That, the Evidence Act envisages

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[7] MANU/TN/2062/2013 : Crl. O.P. No.7142 of 2013 of the Madras High Court

no right to further cross-examine or re-cross examine a witness on completion of cross-examination. Thus, allowing the Petition would open a Pandora's box, as parties who replace their Counsel, raising the ground of incompetence of their previous Counsel would seek to re-examine the witnesses, against the principles of natural justice and fair play. The Respondent No.1 fortified his arguments with the ratio in ***Ram Rati*** vs. ***Mange Ram (D) through LRs and Others***[8]; ***Om Prakash*** vs. ***Vinod Kumar***[9]; ***Nagumothu Sriharinath*** vs. ***Nagumothu Vani***[10]; ***Vadiraj Naggappa Vernekar (deceased by L.Rs.)*** vs. ***Sharad Chand Prabhakar Gogate***[11]; ***M/s. Bagai Construction Thr. its proprietor Mr. Lalit Bagai*** vs. ***M/s. Gupta Building Material Store***[12]; ***Allumalla Kannam Naidu*** vs. ***Smt. Allumalia Simhachalam***[13] and ***Gayathri*** vs. ***M. Girish***[14]. It is prayed that the Application filed by the Petitioners be dismissed.

5. The opposing submissions of Learned Counsel have been heard at length. I have also perused the documents relied on by the Counsel, the impugned Order and the decisions cited at the Bar.

6. In order to understand the matter in its correct perspective, we may briefly surf through the relevant facts. The Plaintiffs are the sons and daughters of one Late Mohd. Ibrahim. The Respondent/Defendant No.1 (hereinafter "Defendant No.1") is his daughter-in-law, being the wife of Mohd. Iqbal, son of Mohd.

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[8] (2016) 3 Scale 219
[9] (2014) 2 RCR (Civil) 603
[10] (1997) 5 ALD 237
[11] AIR 2009 SC 1604
[12] AIR 2013 SC 1849
[13] AIR 2003 AP 239
[14] 2016 (3) RCR (Civil) 942

Ibrahim. Respondent/Defendant No.2 (hereinafter "Defendant No.2") is the former wife of Mohd. Shahid, son of Late Mohd. Ibrahim. The parties are Sunni Muslims and governed by the Shariat Law. The home of the Plaintiffs and their parents used to be a hotel at M. G. Marg, named "Green Hotel", in the two self-acquired buildings of their father Mohd. Ibrahim, owned by him. After Mohd. Ibrahim's death, the property was looked after by Mohd. Iqbal, and in August 2006, was leased out to the Axis Bank but no partition was effected. On 20-09-2009, the Plaintiff No.1 was handed over a document, purportedly a Partition Deed Agreement, dated 10-02-1989. The document was alleged to have been executed amongst Mohd. Ibrahim, Mohd. Iqbal and the Defendants No.1 and 2, partitioning the Schedule 'A' property, being a six storied RCC building, measuring 30' x 65' and a five storied RCC building, measuring 20' x 30', of which, the Defendants No.1 and 2 were also allegedly allotted property mentioned in Schedule III and IV of the Plaint, while those in Schedule I and II went to Mohd. Ibrahim and Mohd. Iqbal, respectively. The Plaintiffs contend that the signatures of all the executors to the alleged agreement were not found on the reverse page of the document and although the Register reflects the name of Mohd. Ibrahim as the presenter, but the reverse of the document reveals that it was presented by Mohd. Iqbal. The Plaintiffs, therefore, have reason to believe that the Deed of Partition, dated 10-02-1989, is a false and fabricated document, resulting in the Title Suit before the Learned Trial Court with prayers for cancelling the document allegedly a manufactured one.

7. Firstly, I deem it appropriate to consider the maintainability of the Petition filed by the Petitioners invoking the provisions of Articles 226/227 of the Constitution of India for issuance of a writ of/or in the nature of mandamus/certiorari and/or any other appropriate writ, orders or directions of like nature, while assailing the aforesaid Order of the Learned Trial Court in a Title Suit.

8. By the Code of Civil Procedure (Amendment Act) Act 1999 (Act 46 of 1999), Section 115 of the CPC was amended w.e.f. 1.7.2002. We may briefly look at the provisions of Section 115 of the Code of Civil Procedure, as they stood before this amendment and after.

Section 115 (before amendment)	**Section 115 (after amendment)**
"115. (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	**"**115. (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

(*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. (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. *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.**"**	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 made, or any order deciding an issue, in the course of a suit or other proceeding.**"**

The above would reveal that following the amendment restrictions have been put in place with regard to revision under Section 115 and the consequent powers of the High Court.

9. The Calcutta High Court while dealing with this matter in ***Mrityunjay Sen*** vs. ***Shrimati Sikha Sen***[15] in Paragraph 32, *inter alia*, observed as follows;

> **"32.** My reading of the present provisions of Section 115 of the Code of Civil Procedure is that with effect from July 1, 2002, when the amended provisions have come into force, the revisional jurisdiction of the High Court has been materially restricted. In order to invoke the revisional jurisdiction of the High Court, the party concerned is not only to satisfy the High Court that by the order impugned subordinate Court exercised a jurisdiction not vested in it by law or failed to exercise a jurisdiction vested in it by law or acted in the exercise of its jurisdiction illegally or with material irregularity, but, also, to satisfy the High Court that if the order had been made in his favour that would have finally disposed of the suit or other proceeding. I am not suggesting for a moment that the interlocutory orders or orders passed in supplemental proceedings cannot be challenged under present Section 115 of the Code. The section does not make any differentiation between the classes of orders, which can be challenged. It only provides that for invoking the revisional jurisdiction of the High Court, the petitioner must satisfy the requirements of the proviso to Section 115. The legislature in its wisdom introduced

[15] AIR 2003 Calcutta 165

> amendments for imposing restrictions on the powers of revision by the High Court. In view of deletion of Clause (b) from the proviso, which was introduced by 1976 Amendment, the revisional power can be exercised by the High Court only when the order impugned, if had been made in favour of the party applying for revision, would have finally disposed of the suit, or other proceeding. Now by the proposed amendment the legislature suggested that no revision would lie against such orders, which do not finally decided the lis. The High Court can, therefore, revise any order of any Court subordinate to it when it appears to the High Court that the said Court has exceeded jurisdiction vested in it by law or refused to exercise a jurisdiction vested in it by law or acted illegally and with material irregularity in the exercise of the jurisdiction, but in invoking the revisional jurisdiction it is incumbent, as required by the proviso, that the impugned order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding. The legislature consciously deleted the power of the High Court to interfere with any kind of order, which, if allowed to stand, would occasion a failure of justice of cause irreparable injury to the party against whom it was made.**"**

10. It was thus explained that for invoking the revisional jurisdiction of the High Court, the Petitioner must satisfy the requirement of the proviso to Section 115 of the CPC. Reference was made to the decision of the Hon'ble Supreme Court in the case of ***Prem Bakshi and Others*** vs. ***Dharam Dev and Others***[16] which while considering the power of the High Court under Section 115 of the CPC, as it stood prior to amendment of 1999, observed as under;

> **"34.** Therefore, it can never be suggested that the High Court can interfere with each and every order passed by a Court subordinate to it only if the requirements of sub-section (1) of Section 115 are satisfied or for ends of justice or to prevent abuse of the process of the Court can refused to look into the proviso to said sub-section (1). I hold that amendment was introduced by the amending Act of 1999 to restrict the power of revision only in respect of cases where the order would have finally disposed of the suit or the proceeding if it had been made in favour of the party applying for revision.**"**

[16] (2002) 2 SCC 2 : AIR 2002 SC 559

11. While discussing the meaning of the expression "*other proceeding*" referred to in the proviso to Sub-Section (1) of Section 115 of the Code, the Calcutta High Court opined that from a reading of the statute it was never the intention of the makers of the law that by inclusion of the expression "other proceeding" they intended to vest the High Court with the power of revision even in respect of order that may be passed in interlocutory or supplementary proceeding to a suit. It was analysed that by insertion of the expression "other proceeding", the Legislature intended to vest the High Court with the power of revision in respect of order passed in the civil proceedings, which are registered other than the suits. It was thus concluded that, now revisional application will only lie against such final or interlocutory 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.

I am in respectful agreement with the above ratiocination.

12. In ***Shiv Shakti Coop. Housing Society, Nagpur*** vs. ***Swaraj Developers and Others***[17], the Hon'ble Supreme Court took up the question of law involving the effect of the amendment to Section 115 of the CPC and discussed in Paragraph 32 as follows;

> **"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 interim in 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-

[17] (2003) 6 SCC 659

> matter of revision under Section 115. There is marked distinction in the language of Section 97(3) of the Old Amendment Act and Section 32(2)(*i*) of the Amendment Act. While in the former, there was a clear legislative intent to save applications admitted or pending before the amendment came into force. Such an intent is significantly absent in Section 32(2)(*i*). The amendment relates to procedures. No person has a vested right in a course of procedure. He has only the right of proceeding in the manner prescribed. If by a statutory change the mode of procedure is altered, the parties are to proceed according to the altered mode, without exception, unless there is a different stipulation.**"**

13. In view of the above extracted pronouncements, it is evident that a Petition under Article 115 would be maintainable only if the order in favour of the party applying for revision would have given finality to a suit or other proceeding. Obviously, an Application under Order XVIII Rule 17 would not fulfil the required condition of Section 115 of the CPC. It is in this eventuality that the provisions of Articles 226/227 of the Constitution have been invoked by the Petitioner.

14. It needs no reiteration that Article 226 of the Constitution deals the power of the High Court to issue certain writs, while Article 227 of the Constitution of the Constitution deals with the power of the High Court of superintendence over all Courts within its jurisdiction. Therefore, the question now arises as to whether Article 226 and Article 227 of the Constitution can be invoked together, for matters such as the instant one. In this regard the following decisions bear relevance.

5. In ***Umaji Keshao Meshram and Others*** vs. ***Smt. Radhikabai and Another***[18]***,*** a two Judge Bench of the Hon'ble Supreme Court while determining a question **"***Whether an appeal lies under Cl. 15 of the Letters Patent of the Bombay High Court to a Division Bench of two Judges of that High Court from the Judgment of a Single Judge of that High Court in a petition filed under Art.226 or 227 of the Constitution of India*?**"**, reference was made to the decision in ***Jagannath Ganbaji Chikkale*** vs. ***Gulabrao Raghobaji Bobde***[19], wherein it was observed, *inter alia*, as follows;

> **"99.** ..... Under Article 226 the High Courts have power to issue directions, orders and writs to any person or authority including any Government. Under Article 227 every High Court has the power of superintendence over all courts and tribunals throughout the territory in relation to which it exercises jurisdiction. The power to issue writs is not the same as the power of superintendence. By no stretch of imagination can a writ in the nature of habeas corpus or mandamus or quo warranto or prohibition or certiorari be equated with the power of superintendence. These are writs which are directed against persons, authorities and the State. The power of superintendence conferred upon every High Court by Article 227 is a supervisory jurisdiction intended to ensure that subordinate courts and tribunals act within the limits of their authority and according to law (see State of Gujarat v. Vakhatsinghji Vajesinghji Veghela, AIR. 1968 SC 1481, 1487, 1488 and Ahmedabad Mfg. & Calico Ptg. Co. Ltd. v. Ramtahel Ramnand, (AIR 1972 SC 1598)). The orders, directions and writs under Article 226 are not intended for this purpose and the power of superintendence conferred upon the High Courts by Article 227 is in addition to that conferred upon the High Courts by Article 226. Though at the first blush it may seem that a writ of certiorari or a writ of prohibition partakes of the nature of superintendence inasmuch as at times the end result is the same, the nature of the power to issue these writs is different from the supervisory or superintending power under Article 227. The powers conferred by Articles 226 and 227 are separate and distinct and operate in different fields. The fact that the same result can at times be achieved by two different

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[18] AIR 1986 SC 1272

[19] (1965) 67 Bom LR 609 : 1965 Mh LJ 426

> processes does not mean that these processes are the same.
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> (Emphasis supplied)

16. In ***Surya Dev Rai*** vs. ***Ram Chander Rai and Others***[20] a two Judge Bench was presented with a matter in which the Appellant had filed a suit for issuance of permanent preventive injunction, based on his title and possession over the suit property, in the Court of the Civil Judge. He also sought for relief by way of ad interim injunction under Order XXXIX Rules 1 and 2 of the CPC. The prayer was rejected by the Trial Court as also by the Appellate Court. Aggrieved the Appellant approached the High Court under Article 226 of the Constitution, which was summarily dismissed with the observation that the Petition was not maintainable as the Appellant was seeking interim injunction against private respondents. The Supreme Court in Paragraph 24 discussed the difference between Articles 226 and 227 of the Constitution as brought out in ***Umaji Keshao Meshram***[19] but went on to observe at Paragraph 25 that the distinction between the two jurisdictions stands almost 'obliterated' in practice. In the end result, the said Judgment allowed the Appeal setting aside the Order of the High Court.

17. Later in time however, contrary to the ratiocination above, in ***Radhey Shyam and Another*** vs. ***Chhabi Nath and Others***[21] a three Judge Bench had to decide a matter placed before them, in pursuance of an Order of two Hon'ble Judges, to consider the correctness of the Law laid down by the Court in ***Surya Dev Rai***[21], that

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[20] (2003) 6 SCC 675

[21] AIR 2015 SC 3269

an Order of a Civil Court was amenable to writ jurisdiction under Article 226 of the Constitution. The Hon'ble Supreme Court went on to discuss the decisions in ***T. C. Basappa*** vs. ***T. Nagappa and Another***[22]; ***Election Commission, India*** vs. ***Saka Venkata Subba Rao***[23]; ***Veerappa Pillai*** vs. ***Raman & Raman Ltd.***[24]; ***Smt. Ujjam Bai*** vs. ***State of Uttar Pradesh and Another***[25] and ***Naresh Shridhar Mirajkar and Others*** vs. ***State of Maharashtra***[26]; ***Rupa Ashok Hurra*** vs. ***Ashok Hurra and Another***[27] and a plethora of other decisions and observed that while the above Judgments dealt with the question whether judicial order could violate a fundamental right, it was clearly laid down that the challenge to judicial orders could lie by way of Appeal or Revision or under Article 227 of the Constitution but not by way of a writ under Article 226 and Article 32. It also discussed the Judgment dated 06-12-1989 in Civil Appeal No. 815 of 1989 : *Qamaruddin* vs. *Rasul Baksh and Another* which had been cited in the Allahabad High Court Judgment in ***Ganga Saran*** vs. ***Civil Judge, Hapur, Ghaziabad and Others***[28], which considered the issue of writ of certiorari and mandamus against interim order of civil court and held;

> "*If the order of injunction is passed by a competent court having jurisdiction in the matter, it is not permissible for the High Court Under Article 226 of the Constitution to quash the same by issuing a writ of certiorari. In the instant case, the Learned Single Judge of the High Court further failed to realise that a writ of mandamus could not be issued in this case. A writ of mandamus cannot be issued to a private individual unless he is under a statutory duty to perform a public*

[22] AIR 1954 SC 440
[23] AIR 1953 SC 210
[24] AIR 1952 SC 192
[25] AIR 1962 SC 1621
[26] AIR 1967 SC 1
[27] (2002) 4 SCC 388

[28] AIR 1991 Allahabad 114

> *duty. The dispute involved in the instant case was entirely between two private parties, which could not be a subject-matter of writ of mandamus Under Article 226 of the Constitution. The Learned Single Judge ignored this basic principle of writ jurisdiction conferred on the High Court under Article 226 of the Constitution. There was no occasion or justification for issue of a writ of certiorari or mandamus. The High Court committed serious error of jurisdiction in interfering with the order of the District Judge."*
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> *(Emphasis supplied)*

That, it had thus been clearly laid down by the Supreme Court that an Order of a Civil Court could be challenged under Article 227 of the Constitution but not under Article 226 of the Constitution. The Supreme Court went on to observe as follows;

> **"22.** The Bench in Surya Dev Rai also observed in Para 25 of its judgment that distinction between Articles 226 and 227 stood almost obliterated. In para 24 of the said judgment distinction in the two articles has been noted. In view thereof, observation that scope of Article 226 and 227 was obliterated was not correct as rightly observed by the referring Bench in Para 32 quoted above. We make it clear that though despite the curtailment of revisional jurisdiction Under Section 115 Code of Civil Procedure by Act 46 of 1999, jurisdiction of the High Court Under Article 227 remains unaffected, it has been wrongly assumed in certain quarters that the said jurisdiction has been expanded. Scope of Article 227 has been explained in several decisions including Waryam Singh and Anr. v. Amarnath and Anr.: AIR 1954 SC 215 : Ouseph Mathai v. M. Abdul Khadir: 2002 (1) SCC 319, Shalini Shyam Shetty v. Rajendra Shankar Patil: 2010 (8) SCC 329 and Sameer Suresh Gupta v. Rahul Kumar Agarwal: 2013 (9) SCC 374.
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> .....
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> **23.** Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. We are also in agreement with the view of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226.
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> **25.** Accordingly, we answer the question referred as follows:

> "(i) Judicial orders of civil court are not amenable to writ jurisdiction Under Article 226 of the Constitution;
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> (ii) Jurisdiction under Article 227 is distinct from jurisdiction from jurisdiction Under Article 226. Contrary view in Surya Dev Rai is overruled." **"**

18. In view of the above stated judicial pronouncement that presently rules, it is evident that while seeking revision of any orders of the Learned Trial Court, the party if so advised is required to approach the High Court under Article 227 of the Constitution and not under Article 226 of the Constitution, as it is now crystal clear that orders of a Civil Court are not amenable to a writ jurisdiction under Article 226 of the Constitution of India. In such circumstances, what would be the fate of this Petition under consideration?

19. Having carefully perused the contents of the Petition, I find that in pith and substance, it is a Petition invoking the supervisory jurisdiction of the High Court and consequently for this one time is being considered. Henceforth, all Petitions that seek to invoke such a jurisdiction shall be expected to be filed under Article 227 of the Constitution of India, unless the conditions as laid down in Section 115 stand fulfilled, in which case the petition would obviously lie under the said provision.

20. The cloud having been cleared on this aspect, I may now attend to the provisions of Order XVIII Rule 17 of the CPC. For the purpose of convenience, the said provision is extracted hereinbelow;

> **"17. Court may recall and examine witness**.— The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of

> evidence for the time being in force) put such questions to him as the Court thinks fit.**"**

It may be recapitulated here that previously the Code had a specific provision in Order XVIII Rule 7 A for production of evidence which was previously unknown or for evidence which could not be produced despite due diligence. The provision enabled the Court to permit a party to produce any evidence even after the conclusion of evidence, if the aforesaid conditions were fulfilled and the Court stood satisfied. This provision was however deleted from 1.7.2002, nevertheless such an exclusion does not now prevent the Court from receiving evidence or recalling any witness who has been examined, if such requirement exists and the Court thinks fit. Besides the above provision, Section 151 of the CPC which has also been invoked by the Petitioners envisages that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. This, provision empowers the Court to make orders *ex debito justitiae*.

21. In ***K. K. Velusamy***[6] while discussing the provision of Section 151 of the CPC, the Supreme Court relying on a catena of decisions pertaining to the scope of Section 151 of the CPC held that, they were unable to accept the submission of the Respondent therein that Section 151 could not be used for reopening evidence or for recalling witnesses. The Court was of the opinion that Section 151 is not a substantive provision which creates or confers any power or jurisdiction on courts, it merely recognises the

discretionary power inherent in every Court as a necessary corollary for rendering justice in accordance with law, to do what is 'right' and undo what is 'wrong'. In other words, to do all things necessary to secure the ends of justice and prevent abuse of its provisions. Nevertheless, the powers under Section 151 or for that matter Order XVIII Rule 17 of the Code are not intended to be used routinely at the drop of a hat.

22. On this line of reasoning, in my considered opinion, we may refer to the decision of the Hon'ble Supreme Court in ***Mahadev Govind Gharge and Others*** vs. ***Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka***[29] where the Supreme Court while considering the provision of Order XL1 Rule 22 of the CPC observed as follows;

> **"29.** Thus, it is an undisputed principle of law that the procedural laws are primarily intended to achieve the ends of justice and, normally, not to shut the doors of justice for the parties at the very threshold. We have already noticed that there is no indefeasible divestment of right of the cross-objector in case of a delay and his rights to file cross-objections are protected even at a belated stage by the discretion vested in the courts. But at the same time, the court cannot lose sight of the fact that the meaning of "ends of justice" essentially refers to justice for all the parties involved in the litigation. It will be unfair to give an interpretation to a provision to vest a party with a right at the cost of the other, particularly, when statutory provisions do not so specifically or even impliedly provide for the same."
>
> (Emphasis supplied)

23. On the same lines in ***S. Nagaraj and Others*** vs. ***State of Karnataka and Another***[30], it was held that;

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[29] (2011) 6 SCC 321
[30] 1993 Supp (4) SCC 595

> **"18.** Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice. ....."

24. In ***Rupa Ashok Hurra***[28] it was opined as hereunder;

> **69.** True, due regard shall have to be had as regards opinion of the Court in *Ranga Swamy* [(1990) 1 SCC 288] but the situation presently centres around that in the event of there being any manifest injustice would the doctrine of *ex debito justitiae* be said to be having a role to play in sheer passivity or to rise above the ordinary heights as it preaches that justice is above all. The second alternative seems to be in consonance with time and the present phase of socio-economic conditions of the society. Manifest injustice is curable in nature rather than incurable and this Court would lose its sanctity and thus would belie the expectations of the founding fathers that justice is above all. There is no manner of doubt that procedural law/procedural justice cannot overreach the concept of justice and in the event an order stands out to create manifest injustice, would the same be allowed to remain in silentio so as to affect the parties perpetually or the concept of justice ought to activate the Court to find a way out to resolve the erroneous approach to the problem? ..... In the event there is any affectation of such an administration of justice either by way of infraction of natural justice or an order being passed wholly without jurisdiction or affectation of public confidence as regards the doctrine of integrity in the justice delivery system, technicality ought not to outweigh the course of justice — the same being the true effect of the doctrine of *ex debito justitiae*. The oft-quoted statement of law of Lord Hewart, C.J. in *R.* v. *Sussex Justices, ex p McCarthy* [(1924) 1 KB 256 : 1923 All ER Rep 233 : 93 LJKB 129] that it is of fundamental importance that justice should not only be done, should manifestly and undoubtedly be seen to be done, had this doctrine underlined and administered therein."
>
> (Emphasis supplied)

The above extracted pronouncements lend succour to the expectation that technicality should not come in the way of meting out even handed justice. Procedure is to be seen as a mechanism to advance the course of justice and by no means to thwart the

process. In other words, technicalities should not draw a veil on achieving the ends of justice.

25. Addressing the argument of learned Counsel for the Respondent that Sections 137 and 138 of the Evidence Act do not contemplate recalling the witness, we may briefly walk through the provisions of Sections 137 and 138 of the Evidence Act for clarity.

> **"137**. **Examination-in-chief**.—The examination of a witness by the party who calls him shall be called his examination-in-chief.
>
> **Cross-examination**.—The examination of a witness by the adverse party shall be called his cross-examination.
>
> **Re-examination**.—The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.
>
> **138. Order of examinations**.—Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.
>
> The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.
>
> **Direction of re-examination**.—The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.**"**

26. On contemplating on the above provisions, nowhere in Section 137 it is stated that cross-examination has to be limited only to what has been stated by the Prosecution witness in examination-in-chief. But I hasten to add that this reasoning cannot be utilised routinely, circumspection by the Courts is to be exercised. Section 138 categorically provides that cross-examination need not necessarily be confined to the facts to which the witness testified on his examination-in-chief. True, it is, that, both Sections

do not speak specifically of a further round of cross-examination, at the same time, there is no provision in the Evidence Act to bar the party from exercising his right to cross-examination afresh, if the statement of the witness of the opposing party is prejudicial. Of course, it is for the Court to decide this aspect, with the ends of justice in sight. That, having been said, in the instant case, it is not disputed that a Senior Counsel had been engaged to conduct the matter. This is obviously with an eye on his experience. Cross-examination is a powerful tool in the hands of a Counsel, which requires a great deal of experience to hit the nail on the head. It is undoubtedly for the purposes of drawing out the truth latent in the witness for the purposes of reaching the bottom, or the crux of the matter and to enable the Court to reach a decision based on justice, equity and good conscience. In the case at hand, the Petitioner did engage a Senior Counsel to have the advantage of his experience and in the absence of an opportunity for the Senior Counsel to cross-examine the witness on the grounds put forth, it flies in the face of the reasons for his appointment. In my considered opinion, the Learned Trial Court ought to have taken into consideration all these circumstances as also the fact that the Senior Counsel reached the Court premises much before the time afforded by it. There was nothing to be gained by the party by keeping the Senior Counsel at bay on a date fixed, neither would it have benefitted the Senior Counsel. No doubt both the learned Counsel ought to have been vigilant but its absence under no circumstance justifies suffering or prejudice to a party. The statements made by the witness indubitably did not appear in his evidence on affidavit and

were of a voluntary nature requiring cross-examination, which could not be effectively met on account of the grounds already discussed.

27. In view of the spectrum of discussions that have ensued supra, and the reasons as made out therein, the impugned Order of the learned Trial Court deserves to be and is set aside and quashed, accordingly the Petition is allowed.

28. The learned Trial Court shall allow re-cross examination of the Defendants witness, Janab Ibrahim Naik, and complete it within a month from today.

29. However, the observations in this Judgment are by no means to be construed as expressions on the merits of the case. The fate of the Suit shall be decided by the Learned Trial Court on merits duly analysing the evidence that surfaces in course of the trial.

30. The records of the learned Trial Court be remitted forthwith.

31. In the circumstances, no order as to costs.

Sd/-

(Meenakshi Madan Rai)
Judge
9.11.2017

Index : Yes / ~~No~~
Internet : Yes / ~~No~~

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