

HIGH COURT OF UTTARAKHAND
AT NAINITAL

Writ Petition (M/S) No. 2432 of 2023

Shubhra Pande

... Petitioner

Vs.

Smt. Durga Pande and others

... Respondents

Advocate: Mr. Siddhartha Sah, Advocate for the petitioner

Hon'ble Sharad Kumar Sharma, J.

The petitioner is a plaintiff of Suit No. 351 of 2016, Smt. Shubhra Pande Vs. Smt. Durga Pande and others, which stood instituted by her before the Court of Civil Judge (Senior Division), Dehradun, praying for the grant of decree of mandatory injunction particularly for removal of the boundaries, as well as for grant of decree of perpetual injunction. The same was contested by the defendants respondents by filing written statement, but however, during the pendency of the suit, the defendants have filed an Application under Order 26 Rule 9 of CPC, praying for appointment of a Local Commissioner in order to ascertain the measurement of passage and the boundary walls. The said application as it was preferred on 28.08.2017, which was objected by the petitioner by filing an application paper No. 71C, denying the statements, consequent to which, the learned trial Court vide its order dated 18.07.2023, rejected the application under Order 26 Rule 9 of CPC, inter alia on the ground that the parties cannot utilize the provisions as contained under Order 26 Rule 9 of CPC, to collect the evidence which may affect an adjudication of a trial on merits.

2. The matter was thereafter put to challenge in the Revision, being Civil Revision No. 115 of 2023, Smt. Durga Pande and others Vs. Smt. Subhra Pande, which has been allowed by the Court of 1st Additional Sessions Judge, Dehradun by the judgment impugned i.e. dated 18.07.2023 and had remitted the matter back; to the learned trial Court to re-decide the application under Order 26 Rule 9 of CPC. It is this order which has been put to challenge by the petitioner primarily on the following grounds:-

Firstly, the learned Revisional Court has not assigned any reasons, for reversing the order as it was passed by the learned trial Court, rejecting the application under Order 26 Rule 9 of CPC of the defendants.

3. To deal with this question, if the Revisional Court's order itself is taken into consideration, it has been rather argued by the learned counsel for the petitioner to the contrary, that the scope of revision itself is very limited and the scope of which cannot be enlarged to venture upon, to decide an issue on its own merit thereby effecting the trial. But here, the question would be quite distinct as to whether at all an application filed under Order 26 Rule 9 of CPC which stood rejected by the learned trial Court whether that order itself would be revisable or not?

4. For the purposes of bringing an order as to be a revisable, the provisions contained under Section 115 of CPC, as amended by Uttaranchal Amendment (Act No. 1 of 2006), is required to be referred to, which is extracted as hereunder:-

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;
 (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 effect that no revision in the case lies 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-

(i) 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

(ii) 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.

Explanation I, - In this section-

(i) the expression 'superior court' means---

(a) The district court, where the valuation of a case decided by a court subordinate to it does not exceed [fifteen lakh rupees.

(b) the High Court, where the order sought to be revised was passed in a case decided by the district court or where the value of the original suit or other proceedings in a case decided by a court subordinate to the district court exceed [fifteen lakh] rupees:

(ii) the expression "order" includes an order deciding an issue in any original suit or other proceedings.

Explanation II, The provisions of this section shall also be -- applicable to orders passed, before or after the commencement of this section, in original suits or other proceedings instituted before such commencement".

Explanation III, The provisions of this section shall not be applicable to the revisions already filed in the High Court before the commencement of this section.}"

In its applicability to state of Uttarakhand as amended by Act No. 01 of 2006.

5. Section 115 of CPC is invokable, when the impugned order which is under challenge before the Revisional Court even if it is being passed at an interlocutory stage, but when the nature of order in itself gives a finality to an

interlocutory proceeding, it would be revisable and would not be an interlocutory order for the reason being that rejection of an application under Order 26 Rule 9 of CPC by the impugned order dated 18.07.2023, would amount to be deciding a part of the proceedings to its finality which could be subjected to revision, because that order of rejection of an application under Order 26 Rule 9 of CPC in itself would be final qua the case decided so far it relates to the implications of Order 26 Rule 9 of CPC. Thus, it cannot be said that the order which was passed by the learned trial Court was not revisable under Section 115 of CPC, particularly in the context of Uttarakhand Amendment, because as per the opinion of this Court, any order, though it may take the shape of an interlocutory order, but if it is deciding a right between the parties during the course of the proceedings, the same would be revisable under Section 115 of CPC.

6. Apart from it, the Revision was contested by the petitioner and if at the first available opportunity he has never pressed this ground before the learned Revisional Court about the maintainability of revision and once he has not done so at the first available opportunity, and has contested the proceedings of revision on its merit, he cannot, at a later stage, after having failed in revision contend that the revisional Court was not having any jurisdiction to entertain the revision because the impugned order dated 18.07.2023, it will not be falling under any of the exception clauses to the proceedings as provided under Section 115 of CPC. Thus, in conclusion, it could be said that any order, may be that it is an interlocutory in nature, in case if it is deciding a right between the parties in

relation to an interlocutory proceeding that will be falling within an ambit of case decided and hence, would be revisable under Section 115 of CPC.

7. **Secondly**, it has been argued by the learned counsel for the petitioner, that in the absence of there being any logical reasons having being assigned by the revisional Court, the order of remand, of remitting the application under Order 26 Rule 9 of CPC to be decided by the learned trial Court afresh, would not be justified at all, because until and unless the lacunae which has been pointed out by the revisional Court in the impugned order, the matter should have been laid to rest by the revisional Court itself instead of remitting the matter to decide afresh.

8. The Revisional Court, as well as this Court too is of the view that the proceedings under Order 26 Rule 9 of CPC have got its own vital implications in the proceedings of the Civil Court and when the same is being considered, the learned trial Court has not to go into a detailed scrutiny about the propriety of the application itself, except for the fact as to whether the application under Order 26 Rule 9 of CPC, is not maliciously oriented to collect evidence for the purpose of the case by either of the parties to the suit, and that is why, the General Rule Civil which has been framed under Section 125 of the Code of Civil Procedure in its Rules 68 has confined its jurisdiction as to what would be the scope of exercise of its powers of revisional Court, when the Revisional Court is considering the order by virtue of which the application under Order 26 Rule 9 of CPC has been rejected. Rule 68 in itself provides, that when a particular order for local investigation is subjected to challenge, no

point has to be specifically pointed out by the Revisional Court, in order to enable the parties to carve out an exception in their favour, which may have an adverse effect on the principal suit itself.

9. Thus, while considering the application under Order 26 Rule 9 of CPC, at the revisional stage and the consequential orders passed on it, the Rule 68 of General Rules Civil specifically provides, that a detailed scrutiny on factual merits is not required to be made by the trial Court, which may have an adverse bearing on the proceedings of the merits of trial itself or on the proceedings of the interlocutory application which has been filed during pendency of the suit and that is why, this precaution has rightly been taken by the Court of 1st Additional Sessions Judge, Dehradun, while passing the impugned order without addressing the propriety and the necessity of an application under Order 26 Rule 9 of CPC and leaving it open to be considered and decided afresh by the trial Court after giving an opportunity to the parties.

10. The learned counsel for the petitioner has submitted, that since the Revisional Court has not assigned any reason as against the impugned order which is under challenge is *per se* contrary to the findings, which has been recorded because the Revisional Court has observed, that for the purposes of determining the expanse of the disputed propriety, which is the subject matter of the suit where the Commissioner's report becomes necessary for deciding the matter, it is necessary for the Commissioner to be thus appointed, to fix boundaries, thus determine the expanse of propriety and submit his report without addressing the

issue on merits of the matter or merits of the claim of the respective parties.

11. In fact, the Revisional Court has also considered, that when the application under Order 26 Rule 9 of CPC has been filed, the Court should have specifically recorded its finding as to the justification being given to reject the application and it cannot be merely rejected merely on the basis of no foundation that the application is maliciously intended to collect evidence for the party which may not be invariably correct in all the cases.

12. Owing to the aforesaid, and particularly, the intention contained under Rule 68 of General Rule Civil, Court has made a detailed deliberation on the propriety of an application under Order 26 Rule 9 of CPC, was not required to be considered, particularly when the trial Court has proceeded to decide the application only on the unsustainable ground that it intends to collect evidence by the defendants.

13. The learned counsel for the petitioner has referred to a judgment, as rendered by the Allahabad High Court, as reported in **2007 (1) ARC 159, Ram Ishwar @ Rameshwar and others Vs. Laxmi Narain and another.** The learned counsel for the petitioner has attempted to draw an exception, as it has been dealt in para 16 of the aforesaid judgment that as to whether an application deciding Order 26 Rule 9 of CPC would be revisable or not.

14. The learned coordinate Bench of Allahabad High Court has observed that order rejecting an application for

issuance of a commission does not attach finality to the proceedings therefore no revision would lie against the said order. The said principal as laid down by the Allahabad High Court and relied upon by the learned counsel for the petitioner in reference to para 16 and 17, which are extracted hereunder:-

“16. Thus what is clearly decipherable from the aforesaid discussion is that before a revision can be entertained in exercise of power under Section 115, C.P.C., the order which is said to be assailed under revisional jurisdiction has to be a case decided within the meaning of Section 115 of Code of Civil Procedure In view of the fact, by rejection of the application for issuance of a Commission, neither any issue is decided nor any of the rights of the parties are adjudicated upon, therefore, such an order does not amount to a case decided and in the considered opinion of this Court the Revision against the same is not maintainable.

17. Thus, in the backdrop of the discussions made hereinabove, the learned court below did not commit any illegality in not interfering with the order dated 1.7.2004 in exercise of its revisional jurisdiction. The learned District Judge was perfectly justified in holding that since the order under challenge did not amount to case decided and also the same being an interlocutory order, therefore, the revision was not maintainable.”

15. With all due reverence at my command, it cannot be unilaterally made applicable under all the circumstances of each and every case, particularly when the provisions of Section under Section 115 CPC as amended in its application to the State, because it is a settled law that even an interlocutory proceeding which decides a right, it will also take a shape of a case decided and hence it would be revisable under Section 115 of CPC.

16. The view expressed that it will not attached a finality by the coordinate Bench of Allahabad High Court, may not be applicable in the instant case for the reason being that the reason for rejection of the application under Order 26 Rule 9 of CPC by the learned trial Court by the impugned order, which was made as a subject matter of Revision i.e. dated 18.07.2023, was not an adjudication of the application on the merits of the propriety of an Application under Order 26 Rule 9 of CPC but rather it was simpliciter on a vague assertion without any credible basis, that the Application under Order 26 Rule 9 of CPC intended to collect evidence, hence would not be sustainable.

17. The ratio as laid down by the Allahabad High Court in Rameshwar's case (supra), could have been attracted, had the learned trial Court decided the Application under Order 26 Rule 9 of CPC on merits of the matter, by touching as to whether under the given set of circumstances and facts of plaint, the propriety demands holding of a commission or not. Since that was a vacuum existing, the revisional Court has appropriately observed that exclusively it cannot be derived as to be a reason to reject an Application under Order 26 Rule 9 of CPC, because if that is a concept to be propagated, it would render the provisions contained under Order 26 Rule 9 as to be otiose.

18. The argument of the learned counsel for the petitioner from the prospective that the scope of revision is limited, there cannot be any doubt in relation to the aforesaid principle, that the scope of revision is limited, but then the question is that up to what extent that limitation would apply in the context of Uttarakhand Amendment to Section

115 of CPC, particularly when it is effecting the material right of the party which was sought to be invoked by filing an Application under Order 26 Rule 9 of CPC.

19. There is a reason for not interfering in the instant writ petition, because it is not in dispute that the petitioner did participated in the proceedings before the Revisional Court in which the impugned order has been passed. All what has been argued by the learned counsel for the petitioner before the revisional Court, are not the contention which has been even raised by the petitioner even during the course of the argument in the Revision, which would have constituted as to be a ground which could have been considered by the revisional Court while passing the impugned order.

20. Another judgment on which the learned counsel for the petitioner has relied is that as reported in **2003 (2) ARC 276, Rajesh Kumar Gautam Vs. Maha Mandleshwar Vedabayasanad Geeta Ashram**. In this case, the coordinate Bench of this Court was dealing with an issue as to whether an application of Order 26 Rule 9 of CPC, where the plaintiff has filed a suit for declaration and in the said suit, an application for appointment of an Advocate Commissioner was filed, which stood rejected. The Court has observed that any order passed under Order 26 Rule 9 of CPC is neither a case decided nor any revision lies against such an order.

21. This principle was adjudicated by the coordinate Bench of this High Court in para 8, in the context of the provisions as it existed prior to the amendment made in CPC, prior to 2002. Para 8 of the said judgment is extracted hereunder:-

"8. Therefore, the learned Civil Judge (SD) has sufficiently safeguarded the interest of the petitioner and whenever for the purpose of elucidating any matter in dispute, will arise, the Court will be at liberty to exercise the powers under Order 26, Rule 9, C. P. C. Further it may be pointed out that it is the discretion of the Court as contained in Order 26, Rule 9, C. P. C. and the revision under Section 115, C. P. C. is not maintainable challenging the discretion of the Court below. Under Section 115, C. P. C. it has been provided as under :

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 its jurisdiction illegally or with material irregularity,

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

Thus order dated 30-10-2002 is also not a case decided as such order is not covered under any of the Clauses (a), (b) of Section 115, C. P. C."

22. There is another logic, to not to accept the argument as extended by the learned counsel for the petitioner about the scope of interference by the Courts, exercising the revisional jurisdiction under Section 115 of the CPC, in view of the amendment, which was made by the State of Uttarakhand, which was a state amendment as brought into effect from 2006 by Act No. 1 of 2006, where the scope of interference in a revisional jurisdiction in State of Uttarakhand was widened, to be applied as compared to

that as it existed prior to 2006. Hence, the scope as provided therein in the revisional jurisdiction, as applicable to the State of Uttarakhand, the same has been made applicable in relation to all the cases, where any failure to exercise the revisional jurisdiction would materially affect the right of a person or a party to the proceedings or an order under challenge in a revision would lead to a material injustice to be caused to the parties to the proceedings.

23. At the stage, when the coordinate Bench was adjudicating, on which the learned counsel for the petitioner has placed reliance and has rendered the judgment, it was not at the stage when the amendment was carried under Section 115 of CPC by the State of Uttarakhand by an Act No. 1 of 2006.

24. Thus, the complexity of the applicability of Section 115 of CPC, as it existed prior to the Uttarakhand amendment would be entirely different in its contextual implications to the State of Uttarakhand, after its amendment, which would be applicable in the instant case, when the application under Order 26 Rule 9 of CPC was decided by the trial Court and consequently, by the revisional Court by the impugned order which is under challenge before this Court, coupled with the fact, that since by the impugned revisional court's order, the matter has been remitted back to decide the application under Order 26 Rule 9 of CPC afresh, it will not materially affect the right of the petitioner, because all his contentions/objections, qua the application under Order 26 Rule 9 of CPC, are still open to be raised and addressed by him at the stage when the proceedings for considering the application under Order 26 Rule 9 of CPC, revives back

before the trial Court as a consequence of the revisional Court's order, which is impugned in the writ petition. Hence, I do not find any merit in the writ petition; the same is, accordingly, dismissed.

25. The consequential effect of order of remand under a legal parlance would be, that the application on the revival of the proceeding has to be decided independently.

(Sharad Kumar Sharma, J.)

29.08.2023

Mahinder/