

**IN THE HIGH COURT OF MANIPUR
AT IMPHAL**

CRP (CRP Art. 227) No. 46 of 2014

Md. Hussimuddin, aged about 62 years S/o (L) Md. Nijimuddin,
resident of Mantripukhi, P.O. Mantripukhi, P.S. Heingang, Imphal
East District, Manipur. ***Petitioner***

Vs.

1. Shri Chandra Bahadur Sunwar, aged about 57 years, S/o (L) Nar Bahadur Sunwar, resident of Mantripukhi, P.O. Mantripukhi, P.S. Heingang, Imphal East District, Manipur r.
2. Ms. Nazima Shah @ Ibem, aged about 42 years, D/o (L) Ajij, resident of Mantripukhi, P.O. Mantripukhi, P.S. Heingang, Imphal East District, Manipur.
3. Shri Prasan Kumar Mukhya, aged about 42 years, S/o Chandra Bahadur Sunwar, resident of Mantripukhi, P.O. Mantripukhi, P.S. Heingang, Imphal East District, Manipur.

..... ***Respondents***

**B E F O R E
HON'BLE MR. JUSTICE AHANTHEM BIMOL SINGH**

For the Petitioner : Mr. H. Dijen, Advocate.
For the respondents No. 1 & 2 : Mr. Ng. Premkumar. Advocate
Date of Hearing : 17.01.2024.
Date of Judgment : 14.03.2024.

**JUDGMENT
(CAV)**

[1] Heard Mr. H. Dijen, learned counsel appearing for the petitioner and Mr. Ng. Premkumar, learned counsel appearing for the respondents No. 1 & 2.

None appeared for the respondent No. 3, despite service of notice.

[2] The present petition had been filed with a prayer for setting aside the impugned order dated 17.09.2014 passed by the learned Civil Judge, Junior Division, Imphal East, Manipur in Judicial Misc. Case No. 66 of 2008/16 of 2014 (Ref: Original Suit No. 1 of 2007).

[3] The facts of the present case in a nutshell are that a piece of homestead land measuring .06 acre under Patta No. 101 (part) (Old), 74/619 (New), covered by C.S. Dag No. 236/767, situated at Village No. 8-Mantripukhi (herein after referred to as 'suit land') was owned by the respondent No. 3 as owner and pattadar.

[4] An agreement of sale dated 12.08.2006 was executed by the respondent No. 3 in favour of the petitioner for transfer of the said suit land at the consideration amount of Rs. 4,50,000/- (Rupees four lakh fifty thousand) and thereafter, the petitioner paid a sum of Rs. 2,00,000/- (Rupees two lakh) as advance payment to the respondent No. 3 with the agreement that the balance amount of Rs. 2,50,000/- (Rupees two lakh fifty thousand) will be paid in the month of January, 2007. In the said agreement of sale, the respondent No. 1, who is the father of the respondent No. 3, also put his signature as one of the attesting witnesses

[5] When the petitioner came to know that the name of the respondent No. 1 was entered into the land record of the suit land vide Mutation order dated 29.11.2006 passed by the SDC, Imphal East, Heingang in Mutation Case No. 717/2006 and thereafter, the suit land was transferred by way of sale by the respondent No. 1 in favour of the respondent No. 2 by executing a registered sale deed bearing No. 79 (V) for the year 2007 dated 18.01.2007 and the name of the respondent No. 2 had been entered in the land record of the suit land, the petitioner filed Original Suit No. 1 of 2007 before the Civil Judge, Junior Division, Imphal East, Manipur claiming the following reliefs:-

- "(i) a decree thereby declaring that the suit land is the absolute property of the Respondent No. 3 and that Respondent No. 1 has no right and title over the suit land;*
- (ii) a decree thereby declaring that the order dated 29.11.2006 passed in Mutation Case No. 717/2006 of the SDC, Impha East, Heingang is illegal and void as ultra vires the provisions of the MLR and LR Act, 1961;*
- (iii) a decree for setting aside the sale deed being Regd. No. 79 (V) for the year 2007 dated 18.01.2007 executed by the Respondent No. 1*

- in favour of the Respondent No. 2, as executed without any saleable right and to set aside the order dated 18.01.2007 passed in Mutation Case No. 31 of 2007 of the SDC, Imphal East, Heingang;*
- (iv) a decree for specific performance of the agreement for sale in favour of the Petitioner;*
 - (v) a decree for possession of the suit land by evicting the Respondent No. 2 therefrom;*
 - (vi) costs of the suit;*
 - (vii) such other further decree or decrees that the Ld. Court may deem fit proper and just."*

[6] As required by Order V of the Code of Civil Procedure, 1908, summons were issued to the respondents by the Ld. Civil Judge for appearing before the Court to answer the claims and to file written statement of their defence. The summons to the respondent No. 1 was served on 08.02.2007 while he was in judicial custody in connection with a criminal case and summons to the respondent No. 2 was duly served on 07.02.2007. Summons to the respondent No. 3 could not be served in the ordinary manner and as such, substitute service by way of publishing it in the newspaper was made. When the respondents failed to appear before the Trial Court, the suit was proceeded ex-parte against the respondents and the suit was decreed in favour of the petitioner vide judgment and decree dated 07.05.2008. Thereafter, the petitioner filed an Execution Case No. 4 of 2008 before the Trial Court for execution of the ex-parte judgment and decree dated 07.05.2008.

[7] The respondents No. 1 & 2, thereafter, filed Judicial Misc. Case No. 66 of 2008/16 of 2014 before the Trial Court for setting aside the ex-parte judgment and decree dated 07.05.2008 on the ground, inter-alia, that they came to know about the existence of the judgment and decree only on 24.07.2008. The petitioner filed his objection denying all the allegations made by the respondents No. 1 & 2 in their application, however, the respondent No. 3 did not appear before the Trial Court to contest the said application filed by the respondents No. 1 & 2.

[8] The case set up by the respondent No. 1 before the Trial Court in the said application is that the respondent No. 1's father (late) Narbahadur was the owner

of the suit land and after the death of Narbahadur, the respondent No. 3 got his name mutated in the land record of the suit land stealthily and without giving notice to the respondent No. 1. After knowing the wrong entry of the name of the respondent No. 3 in the revenue record of the suit land, the respondent No. 1 and the respondent No. 3 come to a family settlement for allowing to mutate the name of the respondent No. 1 in the revenue record of the suit land and thereafter, the name of the respondent No. 1 got mutated in the revenue record vide mutation order 29.11.2006 in mutation case No. 717/SDC/I.E./HNG/2006 after cancelling the name of the respondent No. 3. Thereafter, the respondent No. 1 sold off the suit land to the respondent No. 2 by executing a registered sale deed and the respondent No. 2 got her name mutated in the land records of the suit land vide order dated 18.01.2007 passed by the SDC, Imphal East, Heingang in Mutation Case No. 31 of 2007.

[9] The petitioner lodged a complaint at the Heingang Police Station against the respondent No. 1 in connection with the sale of the suit land and the Heingang Police Station registered a case being F.I.R. No. 10 (1) 2007 Heingang P.S. u/s 420/120-B 34 I.P.C. Thereafter, the respondent No. 1 was arrested by the Heingang Police on 22.01.2007 and he was in Police and Judicial Custody from 22.01.2007 to 21.04.2007 in connection with the said case. The respondent No. 1 was released on bail on 21.04.2007 by an order passed by the Judicial Magistrate, Imphal East. It is the case of the respondent No. 1 that while he was in Police and Judicial custody, he never receive any summon in connection with the Original Suit filed by the petitioner and that he has no knowledge about the Original Suit pending before the Trial Court and that he came to know about the existence of the ex-parte judgment and decree only on 24.07.2008.

[10] The case set out by the respondent No. 2 in the said application is that she was suffering from several ailments, viz., swelling below right ear and also forgetfulness and mental depression. The respondent No. 2 got admitted in the

Regional Institute of Medical Sciences Hospital on 22.01.2007 and operation was performed on 01.02.2007 and thereafter she was discharged from the Hospital on 04.02.2007. The respondent No. 2 was also under the supervision of a medical expert and a sorcery expert after believing that she was a victim of sorcery. It is the case of the respondent No. 2 that she was not able to remember anything of the suit as well as the summon which was alleged to have been served to her and that she did not appear and defend the suit as she has no knowledge of the suit. The respondent No. 2 mental condition was improved in the 2nd week of July, 2008 and came to know about the existence of the said ex-parte judgment and decree only on 24.07.2008. It is the case of both the respondents No. 1 & 2 that the summon was not duly served to both of them for hearing of the suit and that there are sufficient cause for not appearing before the Trial Court when the case was called on for hearing.

[11] The Trial Court after hearing both the parties came to the conclusion that summons to the respondents No. 1 & 2 were duly served on 08.02.2007 and 07.02.2007 respectively, however, the Trial Court set aside the ex-parte judgment and decree dated 07.05.2008 on the ground, inter-alia, that the respondents No. 1 & 2 were prevented from appearing before the Trial Court when the suit was called for hearing by passing the order dated 17.09.2014, impugned herein. Hence, the present petition.

[12] Mr. H. Dijen, learned advocate appearing for the petitioner submitted that under order IX Rule 13 of the CPC, it is provided that an ex-parte decree can be set aside only on 2 (two) grounds, i.e., when the Court is satisfied that the summon was not duly served or when the Court is satisfied that there was sufficient cause which prevented the defendant from appearing before it when the suit was called on for appearing. It has been submitted that in the present case, there is clear-cut finding given by the Trial Court in the impugned order that summon was duly served upon respondent No. 1 on 08.02.2007 and summon was duly served to the

respondent No. 2 on 07.02.2007 and that summon on the respondent No. 3 was served by way of substitute service by publishing the notice in the newspaper. The learned counsel submitted that this finding given by the Trial Court is supported by materials available on record. The learned counsel further submitted that the Trial Court set aside the ex-parte decree only on the ground that the respondents were prevented from appearing when the suit was called for hearing.

[13] With regard to the ground given by the Trial Court for setting aside the ex-parte decree, it has been submitted by the learned counsel appearing for the petitioner that in the application filed by the respondents No. 1 & 2 before the Trial Court for setting aside the ex-parte judgment and decree, it has been clearly stated that the respondent No. 1 was arrested by the Heingang Police on 22.01.2007 in connection with a criminal case and he was kept in Police and Judicial custody from 22.01.2007 till 21.04.2007, on which date the respondent No. 1 was released on bail and that the respondent No. 2 was admitted at the Regional Institute of Medical Sciences Hospital on 22.01.2007 and after performing an operation on 01.02.2007, she was discharged from the Hospital on 04.02.2007. The learned counsel submitted that the ex-parte judgment and decree was passed by the Trial Court on 05.07.2008 after more than 1 (one) year from the date the respondent No. 1 was released from police and Judicial custody and after the discharge of the respondent No. 2 from the Hospital and that the respondents No. 1 & 2 never gave any explanation or show any sufficient cause which prevented them from appearing before the Trial Court and to contest the suit during the aforesaid period of more than 1 (one) year. The learned counsel vehemently submitted that the Trial Court never considered this crucial point and wrongly arrived at a conclusion that the respondents No. 1 & 2 were prevented from appearing when the suit was called for hearing, without any supporting material and set aside the ex-parte judgment and decree, thereby causing a grave miscarriage of justice. The learned counsel

accordingly submitted that the impugned order is not sustainable in the eyes of law and the same is liable to be set aside.

[14] Mr. Ng. Premkumar, learned counsel appearing for the respondents No. 1 & 2 submitted that against the impugned order passed under Order IX Rule 13 of the CPC, a revision lies as provided under section 115 of the CPC. As there is an effective and alternative statutory remedy for filing a revision petition against the impugned order, the present petition filed under article 227 of the constitution of India is not maintainable. It has also been submitted that the words “any sufficient cause from appearing when the suit was called on for hearing” under Order IX rule 13 of the CPC must be liberally construed and that it is not justified in taking hyper technical view while considering an application under Order IX Rule 13 for setting aside an ex-parte decree. The learned counsel also reiterated the stand taken by the respondents No. 1 & 2 in their applications filed under Order IX Rule 13, i.e., Judl. Misc. Case No. 66 of 2008/16 of 2014.

In support of his contention about the maintainability of the present petition, the learned counsel cited the following case laws:-

- (i) ***"Miss Maneck Gustedji Burjarji vs. Sarafazali Nawabali Mirza"*** reported in (1977) 1 SCC 227 wherein, it has been held, inter-alia by the Hon'ble Apex Court at Paragraph 6 of the judgment that the High Court does not ordinarily, in exercise of its discretion, entertained an application under article 227 of the constitution where an adequate alternative legal remedy of filing an appeal is available.
- (ii) ***"Mohamed Ali vs. V. Jaya and Others"*** reported in (2022) 10 SCC 477 wherein, it has been held as under:-

"7.1. Applying the law laid down by this Court in the aforesaid decision to the facts of the case on hand, the High Court ought not to have entertained the revision petition under Article 227 of the Constitution of India against the ex-parte judgment and decree passed by the learned Trial Court in view of a specific remedy of appeal as provided under the Code of Civil

Procedure itself. Therefore, the High Court has committed a grave error in entertaining the revision petition under Article 227 challenging the ex-parte judgment and decree passed by the learned Trial Court and in quashing and setting aside the same in exercise of powers under Article 227 of the Constitution of India."

(iii) **"Nimai Kar vs. Bishnupada Saha and Another"** reported in AIR 2011 Gauhati 1 wherein, a single Bench of the High Court held that when there is a specific provision in the CPC prescribing a specific mode for preferring either revision or appeal, an application under article 227 of the constitution is not maintainable.

[15] The 2 (two) judgments of the Apex Court, in the case of "**Miss Maneck Gustedji Burjarji**" (*Supra*) and "**Mohamed Ali**" (*Supra*) cited by the learned counsel for the petitioner, have been passed in the particular facts and circumstances of the cases and the Hon'ble Apex Court held that when there is a statutory alternative remedy by way of an appeal is available, the High court ought not to have entertained a revision application under article 227 of the constitution of India.

On careful perusal of the said 2 (two) judgments, this Court is of the considered view that in the said judgments, the Hon'ble Apex Court did not lay down any principle of law having universal application that when a revision under section 115 of the CPC is available, an application under article 227 of the constitution is not maintainable. Accordingly, this Court is of the considered view that the aforesaid 2 (two) judgments of the Apex Court does not support the contention raised by the learned counsel appearing for the petitioner regarding maintainability of the present petition.

[16] In the case of "**Nimai Kar**" (*Supra*) the learned Single Judge held in paragraph 28 of the Judgment as under:-

"28. From the aforesaid findings of the Apex Court, it can be easily said that the power u/s 115 of the CPC and the power under Article 227

*of the Constitution is quite distinct and different and not interchangeable. Therefore, when there is a remedy available u/s 115 Code of Civil Procedure, then the Court should not exercise its power under Article 227 of the Constitution unless it is an exceptional case where it is so necessary to interfere with the order of the Court subordinate to it to prevent from miscarriage of justice. In *Koyilerian Janaki and Ors. v. Rent Controller (Munsif) Cannore and Ors.*, (2000) 9 SCC 406 the Apex Court in para-4 of the said report held that.... "The power under Article 227 is exercisable where it is found by the High Court that due to a certain grave error an injustice has been caused to a party."*

[17] On perusal of the above quoted paragraph 28 of the judgment, it is cleared that the learned Single Judge also acknowledged and held that where it is so necessary to interfere with the order of the Court subordinate to it, the High court can exercise its power under article 227 of the constitution to prevent miscarriage of justice despite availability of an alternative remedy of revision under section 115 of the CPC. In view of the above, this Court is of the considered view that the judgment relied on by the learned counsel for the petitioner is of no help to the petitioner in view of the peculiar facts and circumstances of the present case.

[18] In the case of **"Municipal Corporation of Delhi vs. R.P. Khaitan and Ors."** reported in MANU/SC/1760/1999, a Bench of 3 (three) Judges of the Hon'ble Apex Court held as under:-

- "2. The right to approach the High Court under [Articles 226](#) or 227 of the Constitution or both is within the ambit of the right to avail constitutional remedies enshrined under [Article 32](#) of the Constitution. These are styled as extraordinary remedies because they are not part of the ordinary procedure prescribed for adjudication of dispute in the ordinary Courts of Law. The remedy of revision under [Section 115](#) of the Code of Civil Procedure whereby the High Court is empowered to call for the record of any case which has been decided by any Court subordinate to it and in which no appeal lies thereto is an ordinary one empowering it to pass appropriate orders when the subordinate Court appears to have exercised a jurisdiction not vested in it by law or to have failed to exercise its jurisdiction illegally or with material irregularity. This remedy presupposes the cause having been in a Court subordinate to such High Court.
- "3. In these set of appeals the view expressed by the Delhi High Court has been questioned whereby petitions under [Article 226](#) of the

Constitution were held by it to be not maintainable in the presence of the regular remedy available under [Section 115](#), C.P.C. towards challenging the orders of the District Judge, Delhi passed under [Section 169\(1\)](#) of the Delhi Municipal Corporation Act. Few of these appeals are by the Municipal Corporation of Delhi and the remaining are by the tax-prayers. We treat them all as identical.

*"3.1. It is true that the extraordinary remedies provided under [Articles 226](#) and [227](#) of the Constitution are dependent upon the High Court willing to interfere in a matter for which a large measure of discretion rests with it. Its power is so wide so as to envelop not only all aspects of the matter but orders can be passed of such nature as the High Court thinks fit. The jurisdiction as such is not curtailed to meet questions of parameters. On the other hand, the regular remedy under [Section 115](#), C.P.C. is hedged by the language of the provision. Only errors of jurisdiction and material irregularities in the exercise of jurisdiction bring about a cause within the ambit of that provision. All the same it is worthy of notice that the Forum for the aforementioned three remedies ordinary as well as extraordinary is with the High Court itself. We see no reason then as to why the frame of the cause be determinative. It is for the litigant to choose the remedy and it is for the High Court to grant or deny relief thereon having regard to the facts and circumstances of each case. We may, however, add that the existence of an alternative remedy can by itself be a ground for the High Court refusing to exercise jurisdiction but it is not as if jurisdiction of the High Court is ousted by such existence. The High Court's dependence on *Visheh Kumar v. Shanti Prasad* MANU/SC/0052/1980: [1980]3SCR32 in refusing to convert a petition under [Section 115](#), C.P.C. to be one under [Article 227](#) of the Constitution may have been justified on the facts of that case, but the same cannot be treated as a precedent to oust jurisdiction of the High Court vested in it under the law. The High Court certainly is entitled to convert any proceeding instituted before it in one manner to be that of another provided a proper cause has been made out and in the interest of justice.*

"4. For the foregoing reasons, we allow these appeals, set aside the impugned orders of the High Court and remit the matters back to it to be placed on its file for further consideration on merits in accordance with law."

[19] In the case of **"*Raj Shri Agarwal alias Ram Shri Agarwal and Another vs. Sudheer Mohan and Others*"** reported in 2022 SCC Online SC 1775, the Hon'ble Apex Court held as under:-

"2. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 25.04.2022 passed by the High Court of Judicature at

Allahabad dismissing the writ petition preferred by the appellants, filed under Article 227 of the Constitution of India, challenging the order passed by the learned trial Court dismissing the application under Order 6 Rule 17 CPC, the original revisionist has preferred the present Appeal.

- "3. By the impugned judgment and order, the High Court has dismissed the writ petition, under Article 227 of the Constitution of India, observing that the writ petition, under Article 227 of the Constitution of India, is not maintainable as remedy by way of revision under Section 115 CPC is available to the appellants/plaintiffs. As observed by this Court in catena of decisions and even in the decisions considered by the High Court, the view taken by this Court is that where there is availability of remedy under Section 115 CPC normally "the petition under Article 227 of the Constitution of India would not lie". That does not mean that writ petition, under Article 227 of the Constitution of India, shall not be maintainable at all. There is a difference and distinction between the entertainability and maintainability. The remedy under Article 227 of the Constitution of India available is a constitutional remedy under the Constitution of India which cannot be taken away. In a given case the Court may not exercise the power under Article 227 of the Constitution of India if the Court is of the opinion that the aggrieved party has another efficacious remedy available under the CPC. However, to say that the writ petition under Article 227 of the Constitution of India shall not be maintainable at all is not tenable*
- "4. Even otherwise, it is required to be noted that, even according to the High Court, the remedy available to the original plaintiffs was under Section 115 of the CPC. In that view of the matter, the High Court ought to have converted the writ petition under Article 227 of the Constitution of India into revision petition under Section 115 CPC and ought to have considered the same in accordance with law and on its own merits, rather than permitting the writ petitioners to file a fresh revision application under Section 115 of the CPC. It would unnecessary increase the burden of the Court. To avoid further multiplicity, even the High Court ought to have converted the writ petition under Article 227 of the Constitution into revision under Section 115 of the CPC.*
- "5. In view of the above and for the reasons stated above, the present Appeal succeeds. The impugned judgment and order passed by the High Court dismissing the writ petition, under Article 227 of the Constitution of India, on the ground that the same shall not be maintainable is hereby quashed and set aside. The matter is remanded to the High Court to consider the writ petition in accordance with law and on merits for which we have not expressed anything on merits in favour of either parties."*

[20] In view of the facts and circumstances of the present case and the principle of law laid down by the Hon'ble Apex Court in the case of **"Municipal Corporation of Delhi"** (Supra) and **"Raj Shri Agarwal alias Ram Shri Agarwal"** (Supra), this Court cannot agree with the submission advanced by the learned counsel appearing for the respondents that the present petition is not maintainable and accordingly, this Court is not inclined to dismiss the present petition as not maintainable.

[21] In the present case summons to the respondent No. 1 were duly served on 08.02.2007 while he was in Judicial Custody and summons to the respondent No. 2 were duly served on 07.02.2007 after her discharged from hospital on 04.02.2007. Since summons have been duly served upon the said respondents No. 1 & 2, it shall be deemed that they have knowledge about the civil suit filed by the petitioner. Despite having knowledge about the said civil suit filed by the petitioner in the Court of Civil Judge, Junior Division, Imphal East, the respondents No. 1 & 2 did not appear before the Trial Court to contest the said civil suit.

For the period of more than 1 (one) year, w.e.f. 21.04.2007 (when the respondent No. 1 was released from Judicial Custody) and 04.02.2007 (when the respondent No. 2 was discharged from the Hospital) till the date of passing the ex-parte judgment and decree on 07.05.2008, no explanation or sufficient cause had been given by the said respondents No. 1 & 2 which prevented them from appearing before the Trial Court to contest the suit.

[22] In my considered view, for setting aside an ex-parte decree under Order IX Rule 13, the Trial Court should first satisfy itself that there were sufficient cause which prevented the respondents No. 1 & 2 from appearing before it when the suit was called on for hearing. However, in the present case, the Trial Court completely failed to consider and to take into account the fact that the respondents No. 1 & 2 did not give any explanation or show any sufficient cause which prevented them from appearing before the Trial Court during the aforesaid period of more than 1

(one) year and passed the impugned order setting aside the ex-parte judgment and decree thereby causing a grave miscarriage of justice to the petitioner.

[23] In the case of "***M/s. Garment Craft Vs. Prakash Chand Goel***" reported in AIR 2022 SC 422, it has been held, inter-alia by the Hon'ble Supreme Court at paragraph 18 of its judgment that the jurisdiction exercised by the High Court under Article 227 of the constitution is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice and that the power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the Court or Tribunal has come to. It has also been held that it is axiomatic that such discretionary relief must be exercised to ensure that there is no miscarriage of justice.

[24] On careful perusal of the impugned order passed by the Trial Court and on careful examination of the materials available on record, this Court come to the conclusion that there was no evidence or materials available on record to support the conclusion arrived at by the Trial Court that the respondents No. 1 & 2 were prevented from appearing when the suit was called for hearing and as such, the impugned order is not sustainable.

Taking into account the totality of the facts and circumstances of the present case and keeping in view the principle of law laid down by the Hon'ble Apex Court referred to hereinabove, this Court is satisfied that it is a fit case to exercise the power under article 227 of the constitution of India and accordingly, this Court has no hesitation to quash and set aside the impugned order dated 17.09.2014 passed by the Civil Judge, Junior Division, Imphal East in Judl. Misc. Case No. 66 of 2008/16 of 2014 (Reference O.S. No. 1 of 2007) to avoid any miscarriage of justice. Accordingly, the present petition is allowed by quashing and setting aside the said

impugned order dated 17.09.2014. The present petition is accordingly disposed of without any order as to costs.

JUDGE

Sapana
FR/NFR