

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1210 of 2019

Krishna Chandra Prasad Singh @ Anil Kumar Singh, Son of late R.P.N. Singh, R/o Chandrapura House, Cinema Road, P.O. and P.S. Hajipur, District- Vaishali, at Present residing at Bank Road, P.S. Gandhi Maidan, Town and District- Patna.

... .. Petitioner/s

Versus

1. Syed Hasan Francis Imam, Son of Syed Askari Hadi Ali Augustine Imam@ Tootoo Imam, Resident of Kehilan, Village- Kesura, P.O. Rola, P.S. Hazaribagh Mufassil, Town and District- Hazaribagh.,
2. Jitendra Kumar Sinha, Advocate, Son of not known through Syed Askari Hadi Ali Augustine Imam@ Tootoo Imam, R/o Venar Avenue, P.S. Hazaribagh, Town and District- Hazaribagh (as per plaint of T.S. No. 71/2000).
3. Dr. Shahida Hasan, D/o late Syed Hasan Ahmad Sami, W/o Azfar Hasan, R/o Ramna Road, Nayatola, Near Sapna Apartment, P.S. Pirbahore, Town and District- Patna.
4. Syed Akabir Hussain, Son of late Syed Shakir Hussain, R/o Hussain Khan Sarai, P.O. Sambhal, P.S. Muradabad, Town and District- Muradabad, (U.P).

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Jitendra Singh, Sr. Advocate Mr. Harsh Singh, Advocate
For the respondent nos. 1 & 2:		Mr. S.S. Dwivedi, Sr. Advocate Mr. Parth Gaurav, Advocate
For the Respondent No.4:		Mr. Jitendra Kishore Verma, Advocate Mr. Aditya Kumar Singh, Advocate

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV ORDER

7 13-05-2024 Heard learned senior counsel for the petitioner as well as learned counsel for the respondents on the point of admission and I intend to dispose of the present petition at the stage of admission itself.

2. The instant petition has been filed by the petitioner under Article 227 of the Constitution of India for setting aside the impugned order/inquiry report dated 06.04.2019 passed by



the court of learned Sub Judge-XI, Patna in Misc. Case No. 07 of 2014 arising out of Title Suit No. 71 of 2000 by which the petitioner's application dated 18.04.2018 filed in continuation of earlier application dated 27.09.2013 for substitution in place of original plaintiff, filed in the light of order dated 07.12.2017 passed in C. Misc. No. 1269 of 2017 passed by this Court, has been rejected and respondent no. 5 has been transposed as plaintiff in the aforesaid suit.

3. The short issue which arises for consideration in the present case is whether the order passed in a miscellaneous proceeding instituted under Order XXII Rule 5 of the Code of Civil Procedure (hereinafter referred to as 'the Code') is a revisable order under Section 115 of the Code or could be assailed in a proceeding under Article 227 of the Constitution of India in a civil miscellaneous petition treating it to be an interlocutory order.

4. The conspectus of the facts of the case is that one Syeda Mehndi Imam filed a suit bearing Title Suit No. 71 of 2000 seeking declaration of the Will dated 03.05.1998 purportedly executed by her daughter Shamim Amena Imam in favour of defendant nos. 1 and 2 to be forged, fabricated and fraudulent. The original plaintiff Syeda Mehndi Imam was per-



deceased by her husband and children including her spinster daughter Shamim Amena Imam. There was nobody to look after her and the present petitioner benevolently and selflessly took care of Syeda Mehndi Imam till she breathed her last on 22.04.2004. Late Syeda Mehndi Imam had only one near relative, who was Faiz Murtaza Ali, her brother's son. After the death of the original plaintiff Syeda Mehndi Imam, Faiz Murtaza Ali got himself substituted in her place in Title Suit No. 71 of 2000 vide order dated 09.01.2007. By the same order respondent Syed Akabir Hussain was also added to the suit in the category of defendant on the strength of a plain Will purportedly executed by the original plaintiff in favour of respondent Syed Akabir Hussain on 20.02.2004, i.e., merely two days before her death. In the same order the court stipulated that if Faiz Murtaza Ali did not prosecute the suit adequately, then respondent Syed Akabir Hussain could take steps to be transposed in place of the plaintiff. Subsequently, Dr. Shahida Hasan, respondent no.3 was added as co-plaintiff in Title Suit No. 71 of 2000 vide order dated 20.07.2010. This order was challenged by substituted plaintiff Faiz Murtaza Ali in CWJC No. 19030 of 2011 before the High Court and during its pendency, Faiz Murtaza Ali died and thereafter I.A. No. 6314 of



2013 and I. A No. 5527 of 2013 were filed seeking substitution of the deceased petitioner of the civil writ by his natural/legal heirs and order dated 07.02.2014 was passed in CWJC No. 19030 of 2011 directing the learned trial court to conduct an inquiry before passing any order on the applications seeking substitution of the sole plaintiff on the matter of substitution of deceased-plaintiff under Order XXII Rule 5 of the Code. After receipt of the inquiry report dated 29.09.2016, CWJC No. 19030 of 2011 was dismissed vide order dated 09.11.2016. Meanwhile, prior to his death, Faiz Murtaza Ali informed the petitioner about the last will executed by Syeda Mehndi Imam in favour of the petitioner Krishna Chandra Prasad Singh on 24.11.1999 which Syeda Mehndi Imam had got registered in the Office of Sub-Registrar-4, Seelampur, New Delhi on the same date. The petitioner had so far been unaware of the existence of the said Will and in order to verify the veracity of the original Will handed over to him by Faiz Murtaza Ali, the petitioner applied for and obtained a certified copy of the Will dated 24.11.1999 from the Office of Sub-Registrar-4, Seelampur, New Delhi on 23.07.2013. Within days of handing over the aforesaid Will, Faiz Murtaza Ali took his last breath on 20.06.2013. The Will dated 03.05.1998, purportedly executed by Shamim Amena



Imam has been challenged as forged and fabricated in Title Suit No. 71 of 2000, also contains the properties of Shamim Amana Imam. Such properties devolved upon her mother Syeda Mehndi Imam being the only legal heir and she in turn bequeathed all her properties to the petitioner by executing a registered Will in her lifetime dated 24.11.1999. Hence, the petitioner became a necessary and proper party and was required to be impleaded in the present suit in order to effectually and completely adjudicated upon and settle all issues involved in the suit. As such the petitioner moved an application under Order 1 Rule 10 read with Section 151 of the Code on 27.09.2023 for being impleaded as plaintiff in Title Suit No. 71 of 2000 in which Faiz Murtaza Ali had been wrongly substituted in place of late Syeda Mehndi Imam as it was the petitioner alone who would succeed to all her interest.

5. After the death of Faiz Murtaza Imam on 20.06.2013, two interlocutory applications for his substitution were filed by Seher Ali and Sehnaz Ali and one by Tehmina Punwani in CWJC No. 19030 of 2011 in which the aforementioned order dated 07.02.2014 was passed. The learned trial court, initially, in view of the directions of the High Court in CWJC No. 19030 of 2011, vide order dated 10.04.2014,



clubbed the application of the petitioner filed under Order 1 Rule 10 of the Code along with those filed by the heirs/legal representative for substitution under Order XXII Rule 3 of the Code and directed for a separate inquiry for deciding the same. Aggrieved by the order of the learned trial court treating the application under Order 1 Rule 10 of the Code to be at par with other petitioner seeking substitution under Order XXII Rule 3 of the Code, the present petitioner moved an application dated 09.09.2014 under Order 47 Rule 1 read with Section 151 of the Code seeking review of the order dated 10.04.2014 passed by the learned trial court but the petition was rejected vide order dated 13.08.2014. Thereafter, the petitioner preferred CWJC No. 19111 of 2014 assailing the orders dated 10.04.2014 and 13.08.2014. However, vide order dated 02.08.2016, the petitioner's application under Order 1 Rule 10 was separated from the inquiry by the learned trial court and the writ petition became infructuous. However, vide order dated 29.09.2016, the learned trial court rejected the petitioner's application dated 27.09.2013 under Order 1 Rule 10 read with Section 151 of the Code and allowed the application preferred by respondent no.4 on the premise that vide order dated 09.01.2007 it has been held that if the suit was not being adequately prosecuted then



respondent no.4 could take steps to transpose himself as plaintiff. This order came to be challenged before this Court in the C. Misc. No. 1269 of 2016 by the petitioner and the intervenors Seher Ali and Sehnaz Ali preferred another C. Misc. No. 1480 of 2016 assailing the order dated 29.09.2016. The C. Misc. No. 1480 of 2016 was allowed by this Court vide judgment and order dated 19.05.2017 holding that the learned trial court had erroneously proceeded to substitute respondent no. 4 on the basis of observation made in its earlier order dated 09.01.2007 inasmuch as death of the substituted plaintiff could not be held to be withdrawal or abandonment of suit so as to enable respondent no.4 to bypass the provisions of Order XXII Rule 3 of the Code and get himself transposed as plaintiff in terms of Order 23 Rule 1A of the Code when the conditions for invoking the right to transpose by the defendant, i.e., withdrawal or abandonment of suit by plaintiff, were absent.

6. Furthermore, the application preferred by the petitioner vide C. Misc. No. 1269 of 2016 was also allowed by order dated 07.12.2017 wherein this Court held that the question before the Court below was not one of substitution of the substituted plaintiff Faiz Murtaza Ali but that as to who represents the interest of original plaintiff Syeda Mehndi Imam



in Title Suit No. 71 of 2000. This Court has observed that the petitioner still had opportunity to participate in the inquiry pending before the learned trial court in view of the order dated 19.05.2017 passed in C. Misc. No. 1480 of 2016 and directed the learned trial court to treat the petitioner's application dated 27.09.2013 as one under Order XXII Rule 3 of the Code. Thus, in effect this Court reversed the order of the learned trial court dated 02.08.2016 separating the petitioner's application from inquiry. In view of liberty granted by this Court, the petitioner filed another petition dated 18.04.2018 and supplementary petition-cum-rejoinder dated 21.01.2019 in support of petitioner's claim to be substituted in place of the original plaintiff. Thereafter, vide order dated 06.04.2019 passed in Misc. Case No. 07 of 2014 arising out of Title Suit No. 70 of 2000, the learned trial court rejected the petition of the petitioner dated 18.04.2018 filed in continuation with earlier application dated 27.09.2013 for his substitution in place of the original plaintiff, filed in the light of order dated 07.12.2017 passed in C. Misc. No. 1269 of 2017 and respondent no.5 has been transposed as plaintiff in the aforementioned suit. The order dated 06.04.2019 of the learned trial court is under challenge before this Court.



7. At the outset, Mr. S.S. Dwivedi, learned senior counsel appearing on behalf of respondent nos. 1 and 2 raised the issue of maintainability of the present petition apart from taking the objection about parties to the suit not being made parties in the present petition. Even the heirs/legal representatives of late Faiz Murtaza Ali who were initially substituted in place of the original plaintiff in the title suit have not been made parties. Mr. Dwivedi further submitted that the original defendant no.1 and defendant no.4 died and their legal heirs have been substituted in their places but they were not made parties in the present petition. Mr. Dwivedi further submitted that there are a number of parties to the suit but the petitioner has chosen a few to be made parties in the present petition and, hence, the petition is not maintainable on this count.

8. Mr. Dwivedi referred to Annexure-6 and 7 which are the orders of this Court passed in C. Misc. No. 1480 of 2016 and C. Misc. No 1269 of 2016, respectively. Mr. Dwivedi pointed out that C. Misc. No. 1269 of 2016 was filed by the same petitioner in which he has made one Harish Reddy as party and in whose favour certain lands were settled. Therefore, this person has real interest in the present proceeding and for non-



joinder of necessary parties, the present petition is not maintainable.

9. Mr. Dwivedi further submitted that since the impugned order has become final and if the present petition comes to be allowed, two contradictory orders are possible. Mr. Dwivedi further submitted that both the petitioners of C. Misc. No. 1480 of 2016 and C. Misc. No. 1269 of 2016 have been claiming to be transposed as the plaintiff, not making the petitioner of C. Misc. No. 1480 of 2016 a party respondent in the present case may give rise to further litigation. Mr. Dwivedi further submitted that it is a moot question whether the present petition can proceed in absence of a person who is a necessary party and it is a question of law. Mr. Dwivedi referred to a decision of this Court in the case of ***Kamla Prasad Roy & Ors. Vs. Binod Kumar Roy***, reported in ***1989 PLJR 426***. Paragraph no. 14 of this judgment reads as under:-

“14. It is, thus, obvious that the trial court had a jurisdiction to pass appropriate order on the prayer of the opposite party-defendant no.1 for recall of the witnesses under Section 151 of the Civil Procedure Code, the order, therefore, cannot be said to be without jurisdiction. Even if, it were held to be illegal, which I do not think to be so, for the reasons given above, the impugned order cannot be held to be without jurisdiction. Merely because a court has passed an erroneous or illegal order it cannot be



entertained under Section 115 of the Code of Civil Procedure. There is also much force in the contention of the opposite party that some of the parties to the suit, having not been made party the application is not maintainable since the order under challenge has become final as against them.

(Underlined for emphasis)

10. Mr. Dwivedi further referred to a decision of the Hon'ble Supreme Court in the case of ***Rejeswari Amma & Anr. Vs. Joseph & Anr.***, reported in ***AIR 1995 SC 719 : (1995) 2 SCC 159*** wherein the Hon'ble Supreme Court held that due to non impleadment of one of the decree holders as respondents in civil revision, the order of the High Court reversing the order of the executing court as against two respondents was not right and even though this contention was not raised before the High Court, the same can be raised and considered being a question of law.

11. Mr. Dwivedi further submitted if the person left to be added as party respondent in the present case comes before this Court and any order is passed in his favour, there would be two contradictory orders which is simply not permissible.

12. Mr. Dwivedi further submitted that the petitioner could not now even add other persons as respondents as such prayer would be hit by delay and latches.

13. Mr. Dwivedi vehemently contended that moreover,



the present petition has been filed against an order, disposing of an application under Order XXII Rule 5 of the Code, which is a final non-appealable order and, hence, the said order is revisable under Section 115 of the Code and a petition under Article 227 of the Constitution of India could not be entertained by this Court. Mr. Dwivedi further submitted that the impugned order has been passed in a proceeding in miscellaneous case under Order XXII Rule 5 of the Code and since it's a final order in the proceeding though not appealable, such order is amenable to the revisional jurisdiction of this Court and could be challenged under only Section 115 of the Code and could not be entertained under Article 227 of the Constitution of India.

14. Supporting his contention, Mr. Jitendra Kishore Verma, learned counsel appearing on behalf of respondent no.4 questioned the maintainability of the present petition. Continuing with the argument of Mr. Dwivedi, Mr. Verma submitted that foremost issue is whether the impugned order is revisable and whether present petition under Article 227 is maintainable. Mr. Verma submitted that the instant order has been passed in a miscellaneous case which is instituted under Section 459 of the Civil Court Rules and an order passed in such proceeding disposing of the proceeding would naturally be a



final order. Against such an order if it is not appealable, only a revision would lie. For all purposes such order with regard to deciding the claim of a person to be transposed as plaintiff has become final and since it has attained finality, there is no question of such order being challenged before this Court under Article 227 of the Constitution of India. Mr. Verma referred to a decision of the Hon'ble Supreme Court in the case of ***Sadhana Lodh vs. National Insurance Co. Ltd.***, reported in ***AIR 2003 SC 1561***, paragraph no. 6 of this decision reads as under:-

“6. The right of appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge cannot be enlarged by filing a petition under Article 226/227 of the Constitution on the premise that the insurer has limited grounds available for challenging the award given by the Tribunal. Section 149(2) of the Act limits the insurer to file an appeal on those enumerated grounds and the appeal being a product of the statute it is not open to an insurer to take any plea other than those provided under Section 149(2) of the Act (see National Insurance Co. Ltd, Chandigarh vs. Nicolletta Rohtagi and others 2002(7) SCC 456). This being the legal position, the petition filed under Article 227 of the Constitution by the insurer was wholly misconceived. Where a statutory right to file an appeal has been provided for, it is not open to High Court to entertain a petition under Article 227 of the Constitution. Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a



District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 of the Code of Civil Procedure. Where remedy for filing a revision before the High Court under Section 115 of CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution. As a matter of an illustration, where a trial Court in a civil suit refused to grant temporary injunction and an appeal against refusal to grant injunction has been rejected, and a State enactment has barred the remedy of filing revision under Section 115 C.P.C., in such a situation a writ petition under Article 227 would lie and not under Article 226 of the Constitution. Thus, where the State legislature has barred a remedy of filing a revision petition before the High Court under Section 115 C.P.C., no petition under Article 226 of the Constitution would lie for the reason that a mere wrong decision without anything more is not enough to attract jurisdiction of High Court under Article 226 of the Constitution.

(Underlined for emphasis)

15. Mr. Verma reiterated that by the impugned order it has been decided who is competent to represent the deceased sole plaintiff and the said order is final for the ongoing proceeding, i.e., Title Suit No. 71 of 2000, though the same may not operate as res judicata in another proceeding. Mr. Verma further referred to the decision of the Division Bench of this Court in the case of ***Durga Devi Vs. Vijay Kumar Poddar & Ors.***, reported in ***(2010) 2 PLJR 954***. Paragraph nos. 30 and 33



read as under:-

“30. The learned counsel appearing for the revisionists would submit that civil revision is not barred if an order is passed which would tantamount to final disposal of the suit or other proceedings and the terms ‘other proceedings’ have to be understood in their connotative expanse. Their emphasis is on the terms ‘other proceedings’. Regard being had to the said submission, it is obligatory on our part to appreciate what the terms ‘other proceedings’ do convey.

.....

.....

33. The purpose of referring to the various law dictionaries is only to appreciate what meaning is to be placed on the terms ‘other proceeding’. As we have already indicated hereinabove, the proceeding must be akin to the suit and it should be an independent proceeding for the phrase used in the proviso to Section 115 of the Code is suit or proceeding. There are several applications which require independent adjudication relating to the maintainability of the suit and once the said adjudication is complete, there can be no doubt that the proceeding comes to an end inasmuch as it would have an effect of finally disposing of the proceeding. The two significant facts indicate that the interlocutory order passed must be such which must fit into the compartment engrafted in the restrictive spectrum of the proviso, i.e., the suit or



*proceeding would have been finally disposed of.
It is further worth noting that the language used
in the proviso in the course of a suit or 'other
proceeding' is of immense signification. There
can be independent proceeding."*

(Underlined for emphasis)

16. Thus, Mr. Verma submitted that the petitioner has wrongly assailed the order dated 06.04.2019 passed Order XXII Rule 5 of the Code in Misc. Case No. 07 of 2014 arising out of Title Suit No. 71 of 2000 in a proceeding before this Court under Article 227 of the Constitution of India and, hence, the same be dismissed *in limine*.

17. Mr. Verma further submitted that in the present case supervisory jurisdiction under Article 227 of the Constitution of India can be invoked only if the inferior court has exceeded its jurisdiction or passed an order in which error is apparent on the face of the record. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act an Appellate Court or Tribunal. It cannot review or reweigh the evidence upon which the inferior court or tribunal purports to have passed the order or to correct errors of law in the decision. Mr. Verma further submitted that in the present case, the learned trial court passed an order in a proceeding under Order XXII Rule 5 of the Code which was within its jurisdiction to pass and



it has been passed after consideration of all material and appreciating the evidence available on record. But in a proceeding under Article 227 of the Constitution of India, this Court cannot reappraise the evidence and review the order on this basis. However, in the present case what the petitioner is seeking is re-assessment of the facts and evidence which was considered by the learned trial court and the same is not permissible under Article 227 of the Constitution of India.

18. Mr. Jitendra Singh, learned senior counsel appearing on behalf of the petitioner vehemently contended that the present petition is maintainable under Article 227 of the Constitution of India. Mr. Singh further submitted that the orders have been passed in a proceeding which could not be said to be an independent proceeding rather it is a collateral proceeding when the main title suit is still pending. So there has been not a final order as such. Mr. Singh further pointed out paragraph no. 35 of the Division Bench decision of this Court in the case of ***Durga Devi*** (supra) to buttress the fact that the proceeding before the learned trial court was not a proceeding akin to a suit. Paragraph no. 35 of ***Durga Devi*** (supra) reads as under:-

*“35. In Words & Phrases, Permanent Edition,
Volumn 34, published by West Publishing Co.,*



the term `proceeding" used in the provision has to be treated as akin to the suit and it has to have the colour and character of an independent proceeding."

19. Mr. Singh further submitted that if the proceeding could not be said to be akin to a suit, the same could not be revisable. Mr. Singh further referred to paragraph nos. 30, 33, 36, 37 and 39 of the said decision. Mr. Singh referred to the decision of the Hon'ble Supreme Court in the case of ***Varadarajan Vs. Kanakavalli & Ors.***, reported in ***(2020) 11 SSC 598*** on the point of meaning of collateral and independent proceedings.

20. Mr. Singh further submitted that in Patna High Court, applications filed under Order XXII Rule 5 of the Code have always been entertained under Article 227 of the Constitution of India. In this regard, Mr. Singh referred to a decision of Patna High Court in the case of ***Anil Kumar Singh Vs. Bihar State Board of Hindu Religious Trust & Ors.***, reported in ***(2016) 1 PLJR 264*** to support his claim. Mr. Singh further referred to the decision of this Court in the case of ***Kanhaiya Singh & ors. Vs. Paras Nath Singh & Ors.***, passed in ***C. Misc. No. 340 of 2023***, wherein this Court differentiated between the matter of entertainability and maintainability of a petition under Article 227 of the Constitution of India in the



light of the decision of the Hon'ble Supreme Court in the case of ***Raj Shri Agrawal @ Ram Shri Agrawal & Anr. Vs. Sudheer Mohan & Ors.***, reported in ***2022 SCC OnLine SC 1775***. Mr. Singh also referred to a decision of this Court in the case of ***Rajesh Kumar Gupta & Ors. Vs. Sapna Kumari & Ors.***, reported in ***2023 SCC OnLine Pat 4108*** on the point of maintainability of a petition under Article 227 of the Constitution of India.

21. Mr. Singh further submitted that even earlier against such orders regarding transposition as plaintiff, civil miscellaneous petitions have been entertained specially C. Misc. No. 1480 of 2016. Mr. Singh referred to Advance Law Laxicon and Black's Law Dictionary as to how the words 'collateral' and 'independent' have been defined. According to Advance Law Laxicon, the word collateral means parallel or additional, however there is no technical legal definition of the word collateral distinct from its common signification. On the other hand, independent means not subject to the control or influence of another or not associated with another (often larger) entry. Independent also means not dependent or contingent on something else.

22. Mr. Singh further submitted that so far as issue of



other defendants not being made party in the case is concerned apart from petitioner of C. Misc. No. 1480 of 2016, the same is not relevant in the present facts and circumstances. Once the learned trial court disposed of the inquiry under Order XXII Rule 5 of the Code holding respondent no. 4 to be the fit person to represent the original plaintiff and the same has been challenged by the present petitioner, it is only appropriate that the person in whose favour order has been passed, is made party since the petitioner has been challenging the order nominating such person as plaintiff. As the petitioner is seeking relief only against respondent no.4, naturally he has not made other respondents or intervenors parties in the present petition. Moreover, if there appears collusiveness between the parties, it should be the endeavor of the court that such collusiveness does not come in the way of proper disposal of any application or proceeding. Since the other persons not made parties are in collusion with other defendants and no relief has been sought against them, they have rightly not been made parties. In this manner, Mr. Singh submitted that the present petition is maintainable and the same be disposed of at the earliest. Alternatively, Mr. Singh submitted that if a revision is found maintainable against the impugned order, then the petitioner



must be given an opportunity to convert the present petition in a civil revision petition and the learned trial court be directed not to pass any final orders.

23. I have given my thoughtful consideration to the rival submission of the parties in the light of the facts and circumstances of the case. At the outset, I would like to refer to the decision of the Hon'ble Supreme Court in the case of ***Raj Shri Agrawal @ Ram Shri Agrawal & Anr.*** (supra) wherein the Hon'ble Supreme Court held that there is a difference and distinction between the entertainability and maintainability of a petition. The remedy available under Article 227 of the Constitution of India is a constitutional remedy which cannot be taken away or fettered. The Hon'ble Supreme Court further observed that 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 Code. Relevant paragraph of the decision of ***Raj Shri Agrawal @ Ram Shri Agrawal & Anr.*** (supra) are paragraph nos. 3 and 4, which read as under:-

“(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.”

(Underlined for emphasis)

24. Further, in the case of ***Surya Dev Rai Vs. Ram Chander Rai & Ors.***, reported in ***(2003) 6 SCC 675***, the Division Bench of the Hon’ble Supreme Court has discussed the powers of the High Court under Article 227 of the Constitution of India and held as under:-

“(i) the jurisdiction under Article 227 cannot be limited or fettered by any Act of the state Legislature;

(ii) the supervisory jurisdiction is wide and can be used to meet the ends of justice, also to interfere even with interlocutory order;

(iii) the power must be exercised sparingly, only to move subordinate courts and Tribunals within the bounds of their authority to see that they obey the law. The power is not available to be exercised to correct mere errors (whether on the facts or laws) and also cannot be exercised "as the cloak of an appeal in disguise".”

25. In the case of ***Surya Dev Rai*** (supra) the Hon’ble Supreme Court was considering the amendment in Section 115 of the Code brought in by Act 46 of 1999 w.e.f. 01.07.2002 and



its impact on the power and jurisdiction of the High Court to entertain petitions seeking a writ of certiorari under Article 226 of the Constitution of India or invoking the power of superintendence under Article 227 of the Constitution of India as against similar orders, acts or proceeding of the subordinate courts against which earlier the remedy of filing civil revision under Section 115 of the Code was available to the person aggrieved.

26. Having considered the matter, the Hon'ble Supreme Court recorded its findings in paragraph no. 38 which reads as under:-

“38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:-

“(1) Amendment by Act No.46 of 1999 with effect from 01.07.2002 in Section 115 of Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Article 226 and 227 of the Constitution.

(2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by the CPC Amendment Act No. 46 of 1999 are nevertheless open to challenge in, and continue to be subject to,



certiorari and supervisory jurisdiction of the High Court.

(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate court is found to have acted (i) without jurisdiction-by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction-by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied : (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of



justice has occasioned thereby.

(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning.

Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.



(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case.”

(Underline Supplied for emphasis)

27. Evidently, from the facts of the case and submissions advanced on behalf of the parties, it is much apparent that what



is assailed by the petitioner herein is the appreciation of evidence while arriving at a conclusion by the learned trial court in a proceeding under Order XXII Rule 5 of the Code as to who would be the legal representative of the deceased plaintiff. Apparently, none of the conditions as emphasized hereinabove para 38 (4) and para 38 (5) of ***Surya Dev Rai*** (supra) case are satisfied. In the present case, it could not be said that the learned trial court went beyond the bounds of its jurisdiction or it has assumed the jurisdiction which he does not have or has failed to exercise its jurisdiction which he does have or the jurisdiction though available was exercised by the learned trial court in a manner not permitted by the law. At the same time, *prima facie* there appears no manifest error apparent on the face of proceeding based on clear ignorance or utter disregard of the provisions of law and failure of justice or grave injustice has occasioned thereby.

28. In the light of rival submission, I would like to consider first the nature of order passed under Order XXII Rule 5 of the Code. Now Section 115 of the Code provides for revision or orders of court subordinate to High Court which is as follows:-

“115. Revision.- 4 [(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:

1[Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision would have finally disposed of the suit or other proceedings.]

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

Explanation.—In this section, the expression “any case which has been decided” includes any order made, or any order deciding an issue in the course of a suit or other proceeding.”

The Division Bench of this Court in the case of **Durga**

Devi (supra) has held that interlocutory orders made in the



course of hearing of the suit or proceeding is not amenable to the revisional jurisdiction if such an order does not put an end to the suit or proceeding. Further, the proceeding has to have an independent character. It has been further held by the Division Bench that emphasis in the provision is whether the order in favour of a party applying for revision would have given finality to the suit or other proceeding. If the answer is yes then the revision is maintainable. If the answer is in negative, the revision is not maintainable. In the same case, it has also been made clear what is meant by other proceeding in Section 115 of the Code.

Then the Division Bench went to answer it that a proceeding must be akin to the suit and it should be an independent proceeding, for the term used in the proviso to Section 115 of the Code is suit or other proceeding.

29. The definition of ‘independent’ and ‘collateral’ extracted from Advance Law Lexicon and Black’s Law Dictionary reads as under:-

*“>**Collateral.** By the side; at the side; attached upon the side.*

The word “collateral” is of frequent use in law, where it bears its ordinary signification of “parallel” or “additional.” It is used in a variety of connections, e.g., we speak of a collateral



agreement, collateral security, collateral relations, and collateral facts. There is no technical legal definition of the word “collateral” distinct from its common signification. It is an additional security for the performance of the principal obligation, and on the discharge of the latter it is to be surrendered.

Descended from the same stock, but in a different line; lying aside from the main subject, action, issue etc.: situated or running side by side

An asset pledged against a loan. Banks now accept share certificates as collaterals; a certain percentage of the current market price of selected shares quoted in the stock exchange will be advanced as loans by banks. The shares are mortgaged to the bank by means of blank transfer deeds, and can be sold by the bank if the borrower defaults payments. (Stock Market)

Strictly, security that is put up for a loan by a third party, as opposed to the borrower’s own personal security. (Investment & International Accounting)

Informal term for security put up against a loan. (Banking) [Advance Law Lexicon, 3rd Edition, 2005, Book 1]

>Independent. 1. Not subject to the control or influence of another< independent investigation > 2. Not associated with another (often larger) entity < an independent subsidiary >. 3. Not dependent or contingent on something else < an independent person.” [Black’s Law Dictionary, 7th Edition]

30. Further, proceeding has been defined in Black’s

Law Dictionary as the form and manner of conducting judicial



business before a Court or Judicial Officer and includes all possible steps in an action from the commencement till the end. Further, in Advance Law Laxicon 3rd edition 2005, the term proceeding has been stated to signify that a proceeding in a civil action is an act necessary to be done in order to attend a given end. It is a prescribed mode of action in carrying into effect a legal right. Referring these terms at this stage is relevant for the purpose of arriving at a conclusion as to whether the proceeding taken up by the learned trial court under Order XXII Rule 5 is other proceeding akin to a suit. Order XXII Rule 5 of the Code reads as under:-

“5. Determination of question as to legal representative.—Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court:

1 [Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any, recorded at such trial, its findings and reasons therefor, and the Appellate Court may take the same into consideration in determining the question.]”

31. It has been submitted by the learned senior counsel



for the petitioner that the disposal of application under Order XXII Rule 5 is with limited purpose to decide who would represent the deceased plaintiff before the learned trial court and the inquiry is summary in nature. It is only for the purpose of bringing legal representative on record for conducting the proceedings. But I am afraid the submission though it appears to be tempting but is in fact specious. When there is inter se dispute between rival legal representatives and it has been decided in a proceeding independent to the suit, it gives finality for all purposes to claim of the parties as to who would represent the deceased plaintiff in the suit. Such proceedings are final so far as contention and rival claim of the parties are concerned. It would be considered as an independent proceeding and would be very akin to a suit and, therefore, amenable to the revisional jurisdiction of this Court under Section 115 of the Code. For these reasons, reliance placed by the petitioner on the case of *Varadarajan* (supra) or on the case of *Durga Devi* (supra) are not of any help to the cause of the petitioner.

32. Moreover, a proceeding under Order 22 Rule 5 requires consideration of various factual details and even evidence of the parties having contesting claims. It is trite that this Court could not appreciate facts or law for correcting mere



errors in a proceeding under Article 227 of the Constitution of India. The power is not available to be exercised to correct errors (whether on the facts or laws) and also cannot be exercised “as a cloak of an appeal in disguise”. [*Surya Dev Rai* (supra)].

33. So I have no hesitation in holding that proceeding under Order XXII Rule 5 culminating in passing the impugned order dated 06.04.2019 finally decided the dispute with regard to rights of the parties to represent the deceased plaintiff and, hence, against such order as it is not appealable, a revision would lie.

34. So far as reliance placed on the decision of this Court in the case of *Kanhaiya Singh & Ors.* (supra) is concerned, the facts are much different and this Court proceeded in the matter in the peculiar facts and circumstances of the said case. Hence, it is pertinent to refer the decision of the Hon’ble Supreme Court in the case of *Bharat Petroleum Corporation Limited & Anr. vs. N.R. Vairamani & Anr.*, reported in (2004) 8 SCC 579 wherein it has been observed that the judgments of the court should not be cited like a Euclid’s Theorem and the slight change in the facts of case would make a sea difference in the judgment of the Court.



35. As I have arrived at the conclusion that the present miscellaneous petition could not be entertained since the order is amenable to revisional jurisdiction of this Court under Section 115 of the Code, I refrain myself from making any observation as to non-joinder of the respondents in the present case and its effect on the petition.

36. In the result, I am of the considered view that this Court could not exercise the power under Article 227 of the Constitution of India as the petitioner has another efficacious remedy available in the form of Section 115 of the Code and, hence, the petitioner is directed to convert the present civil miscellaneous petition into a civil revision petition under Section 115 of the Code within a week of opening of the Court after annual vacation and the office is directed to extend its cooperation to the learned counsel for the petitioner in doing the needful.

37. Pending interlocutory application, if any, stands disposed of.

(Arun Kumar Jha, J)

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