

Before Prem Chand Jain and J. M. Tandon, JJ.

HARVINDER KAUR ETC.,—*Petitioners.*

*versus*

GODHA RAM, ETC.,—*Respondents.*

Civil Revision No. 1198 of 1977

August 24, 1978.

*Code of Civil Procedure (V of 1908)—Section 115 and Order 26, Rule 9—Order refusing to appoint Local Commissioner—Whether revisable.*

*Held*, that section 115 of the Code of Civil Procedure 1908 consists of two parts, the first prescribes the conditions in which jurisdiction of the High Court arises, i.e., there is a case decided by a subordinate Court in which no appeal lies to the High Court; the second sets out the circumstances in which the jurisdiction may be exercised, but the power of the High Court is exercisable in respect of "any case which has been decided". The intention of adding the explanation to section 115 was only to define the words "case decided". i.e., that a revision would lie against an order passed during the course of a suit or other proceeding. But the explanation cannot be given the meaning that every order made in the course of a suit or other proceeding would be revisable. The meaning that can be given to the explanation is that an order made in the course of a suit or proceeding would be revisable only when it determines or adjudicates some right or obligation of the parties in controversy. Thus a revision would lie against an interlocutory order only if it determines or adjudicates some right or obligation of the parties in controversy. However, even, after the satisfaction of the aforesaid test the power of revision would be exercisable by the High Court subject to the limitations put under subsection (1) and the proviso to section 115 of the Code. An order refusing to appoint a local Commissioner does not decide any issue nor does it adjudicate any right or obligation of the parties for the purposes of the suit and is, therefore, not revisable.

(Paras 4, 5, 7 and 8).

*Goverdhan Dass Gopi Nath v. Smt. Amolok Raj*, 1975 Cur. L.J. 744  
OVERRULED.

*Petition under section 115 CPC for revision of the Order of Shri Subhash Chander, H.C.S., Sub-Judge, 2nd Class, Kaizhal; dated 8th August 1977, dismissing the application for appointment of Local Commissioner.*

H. L. Sarin, Advocate, for the *Petitioners.*

C. B. Goel, Advocate, for the *Respondents.*

## JUDGMENT

*Prem Chand Jain, J.*

(1) On the reference that has been made by the learned Single Judge,—*vide* his order dated May 3, 1978, the question of law that requires determination may be formulated thus:—

“Whether revision lies against an order passed under Order 26, rule 9 of the Code of Civil Procedure refusing to appoint a local commissioner?”

The reference has been made as in the opinion of the learned Judge there appeared to be a conflict of opinion on this aspect of the matter. In *Dalmir Singh alias Dalmira v. Sant Parkash and others* (1), R. S. Narula, C.J. (as he then was), on the basis of the judgment of Pattar, J., in *Messrs Mohinder Kumar Rajinder Parkash v. Basheshar Nath* (2), held that no revision lay against such an order. On the contrary, S. C. Mital, J., in *M/s. Goverdhan Das Gopi Nath v. Smt. Amolak Raj* (3), has held that an order refusing to issue a commission is revisable under section 115 of the Code of Civil Procedure.

(2) Mr. Sarin, learned counsel for the petitioners, contended that a revision lay against an order refusing to appoint a local commissioner and that the view taken in *M/s. Goverdhan Das Gopi Nath's* case was the correct view and deserved to be upheld. Besides relying on the reasoning given in *M/s. Goverdhan Dass Gopi Nath's* case, the learned counsel relied on the explanation added to section 115 of the Code of Civil Procedure, which is in the following terms:—

“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.”

On the strength of the aforesaid explanation, it was contended by Mr Sarin that the order declining to appoint a commission was passed in the course of a suit and such an order fell within the expression ‘case decided’.

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(1) C.R. 1459 of 1975 decided on 21st September, 1976.

(2) 1976 P.L.R. 280.

(3) 1975 Curr. L.J. 744.

Harvinder Kaur etc. v. Godha Ram, etc. (P. C. Jain, J.)

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(3) After hearing the learned counsel for the parties, we find ourselves unable to agree with the contention of the learned counsel.

(4) Section 115 consists of two parts, the first prescribes the conditions in which jurisdiction of the High Court arises, i.e., there is a case decided by a subordinate Court in which no appeal lies to the High Court; the second, sets out the circumstances in which the jurisdiction may be exercised. But the power of the High Court is exercisable in respect of "any case which has been decided". The expression "case decided" was not defined in the Code, with the result that there was a conflict of judicial decisions on the question whether the expression "case decided" included interlocutory orders or not. Though this conflict was resolved by the Supreme Court in *Major S. S. Khanna v. Brigadier F. J. Dhillon* (4), yet in order to clear all doubts about the maintainability of a revision against an interlocutory order, the explanation has been added by the Amendment Act in the year 1976. However, in the instant case, the explanation by itself is of no help as it has still to be decided whether in view of the provisions of the explanation an order declining to appoint a commission would be revisable or not? In our view, in the circumstances of this case, the answer has to be in the negative.

(5) Before the amendment of section 115 in the year 1976, the power of revision was exercisable subject to the restriction imposed in clauses (a), (b) and (c) of sub-section (1). As earlier observed, the words "case decided" had not been defined and for that reason, a conflict of judicial decisions in respect of interpretation of these words had crept in. The intention of adding the explanation was only to define the words "case decided", i.e., that a revision would lie against an order passed during the course of a suit or other proceeding. But the explanation cannot be given this meaning that every order made in the course of a suit or other proceeding would be revisable. Even, Mr. Sarin, learned counsel, during the course of arguments, did not go to that extent that every order passed in the course of a suit or other proceeding would be revisable under section 115 of the Code.

(6) In this situation, it has now to be found out as to which type of interlocutory orders would be revisable by this Court in exercise of its powers under section 115 of the Code of Civil Procedure? To

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(4) A.I.R. 1964 S.C. 497.

this question, the answer is available from the judgment of their Lordships of the Supreme Court in *Baldevdas Shival and another v. Filmistan Distributors (India) Pvt. Ltd. and others* (5), wherein after considering *Major S. S. Khanna's* case it was observed thus:—

“But it was not decided in *Major S. S. Khanna's* case, (1964) 4 SCR 409=(AIR 1964 SC 497) that every order of the Court in the course of a suit amounts to a case decided. A case may be said to be decided, if the Court adjudicates for the purposes of the suit some right or obligation of the parties in controversy; every order in the suit cannot be regarded as a case decided within the meaning of section 115 of the Code of Civil Procedure.”

(7) In the light of the aforesaid observation, without dilating any more on this subject, the meaning that can be given to the explanation is that an order made in the course of a suit or proceeding would be revisable only when it determines or adjudicates some right or obligation of the parties in controversy. Thus, a revision would lie against an interlocutory order only if it determines or adjudicates some right or obligation of the parties in controversy. However, even after the satisfaction of the aforesaid test the power of revision would be exercisable by this Court subject to the limitations put under sub-section (1) and the proviso to section 115 of the Code of Civil Procedure.

(8) Adverting to the facts of the present case, we find that the trial Court has only rejected the application for the issuance of a commission on the ground that issue No. 3 could be proved by producing the relevant record and that demarcation was not necessary. From these observations, it is clear that the learned Subordinate Judge did not decide any issue nor did he adjudicate for the purposes of the suit some right or obligation of the parties in controversy.

(9) Adverting to the case law, reference may be made to *M/s. Goverdhan Das Gopi Nath's* case, the only judgment on which reliance had been placed by Mr Sarin and which decision necessitated the reference to the larger Bench. In view of our aforesaid discussion, we are, with utmost respect, unable to agree with the view taken in that decision. The learned Judge, on the basis of the judgment of the Supreme Court in *Major S. S. Khanna's* case, and a Full Bench judgment of this Court in *M/s. Sadhu Ram Bali Ram*

(5) A.I.R. 1970 S.C. 406.

Harvinder Kaur etc. v. Godha Ram, etc. (P. C. Jain, J.)

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and another v. *M/s. Ghansham Dass Madan Lal and others* (6), arrived at the conclusion that the order rejecting the application of the defendant for examining two witnesses residing in Bombay on commission falls within the expression "case decided".

(10) As has already been observed in the earlier part of the judgment, *Major S. S. Khanna's* case stands explained by their Lordships of the Supreme Court in *Baldevdas Shivilal's case*, and in view of the test laid down therein, the order of the Court should result into adjudication of some right or obligation of the parties in controversy during the course of a suit or other proceeding. The order declining to issue a commission of the type mentioned in *M/s. Goverdhan Das Gopi Nath's* case does not satisfy that test. It may further be observed that the facts of *M/s. Sadhu Ram Bali Ram's* case were different as in that case the onus of an issue had been wrongly placed and while deciding that question it was held that such an order would be revisable.

(11) In view of the aforesaid discussion, we hold that no revision would lie against an order passed under Order 26, rule 9, and the view taken in *M/s. Mohinder Kumar Rajinder Parkash; Dalmir Singh alias Dalmira and Mangal Singh and another v. Piara Lal* (7), cases lays down the correct law.

(12) Before parting with the judgment, it may, however, be made clear that it cannot as a general rule be laid down that in no case a revision would lie against an interlocutory order passed under any other provision of Order 26, and that it would be on the facts of each case that it will have to be found out whether the interlocutory order, against which a revision is sought to be filed, has adjudicated for the purposes of the suit some right or obligation of the parties in controversy or not.

(13) For the reasons recorded above, this revision petition fails and is dismissed, but in the circumstances of the case, we make no order as to costs. The parties, through their learned counsel, have been directed to appear before the trial Court on November 7, 1978.

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N. K. S.

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(6) A.I.R. 1975 Pb. & Haryana 174.

(7) 1971 P.L.R. 531.