IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM:NAGALAND:MEGHALAYA:MANIPUR:
TRIPURA: MIZORAM & ARUNACHAL PRADESH)
SHILLONG BENCH

Civil Revision Petition No. 18(SH) of 2010.

Shri Sehekaya Lyngdoh,
s/o Late U Sambu Roy
Prop of M/s Esskay Enterprise,
Phlangmawprah,
Langrin Syiemship with office at
Mawlai Nongkwar
Shillong-17. : Petitioner

Vs

1. Shri Planly Ryngkew
s/o Late M Myrthong
R/o Phutumiep
Phalangdiloin,
Langrin Syiemship,
District-West Khasi Hills,
Meghalaya.

2. Shri Westarly Dkhar,
s/o Shri Brin Lyngdoh
Phalangdiloin,
Langrin Syiemship,
District-West Khasi Hills,
Meghalaya.

3. Shri Mestonath Lyngdoh
S/o Late Sitralin Thongni
Phalangdiloin
Langrin Syiemship,
District-West Khasi Hills,
Meghalaya.

4. Shri TG Nonglang
S/o Shri Phrolington Lyngkhoi
Wahkaji, Phalangdiloin, Langrin
Syiemship, District-West
Khasi Hills, Meghalaya. : Respondents

B E F O R E
THE HON'BLE MR JUSTICE T VAIPHEI

For the petitioner : Mr B Bhattacharjee,
Mr R Jha,
Mr K Kharmawphlang
Ms M Jha,
Mr G Marak, Advocates.

For the respondents	: Mr HS Thangkhiew, Sr Adv, Mr L Khyriem, Mr P Nongbri, Mr N Mozika, Advs.
Date of hearing	: 15.03.2012
Date of judgment and order	: 27-04-2012

JUDGMENT AND ORDER

After hearing Mr. H.S. Thangkhiew, the learned counsel for the petitioner and Mr. B. Bhattacharjee, the learned counsel for he respondents, the first question which falls for consideration in this revision petition is whether an appeal lies against the ex-parte order of temporary injunction issued by the Subordinate District Council Court, Shillong.

2. The facts leading to the filing of this revision, shorn of unnecessary details, may be noticed at once. The petitioner is the proprietor of a firm under the name and style of M/s Esskay Enterprise with its office at Mawlai Nongkwar, Shillong, which is engaged in the business of extracting and supplying coal and limestone, was registered for export and import of minerals. It is the case of the petitioner that on 26-10-1989, the Syiem of Langrin with the approval of the Darbar executed a Lease Deed in favour of the petitioner for the purpose of mining and quarrying of minerals especially coal over six acres of land situated "Lawlyngngam Tilla" within the boundary described in the Schedule to the lease deed, for a period of thirty years. According to the petitioner, since the date of execution of the said lease deed, he has been continuously extracting coal and other minerals from the leased

land without any interference from any quarter. The Syiem of Langrin by his order dated 12-5-1992 also debarred any person from interfering with the mining work of the petitioner carried on by him within the leased land. However, on 3-10-1995, some persons trespassed into the leased land and illegally tried to extract coal and other minerals therefrom. This prompted the petitioner to institute Title Suit No. 19 of 1995 before the Sub-District Council Court, Shillong against those trespassers a decree of declaration of his title to the suit land/leased land and simultaneously applied for issue of temporary injunction in his favour. The Sub-District Court in Misc. Case No. 17 of 1995 issued the order dated 13-12-1995 granting temporary injunction as prayed for. The temporary injunction was subsequently made absolute by the same court in its order dated 13-6-1996 after hearing both the parties by holding that the lease deed in question had the approval of both the Syiem and the Darbar. The appeal preferred by some of the defendants from the order dated 13-6-1996 was, however, dismissed by the learned Additional District Judge, District Council Court, Shillong in his judgment dated 19-4-1999. As no further appeal or revision was preferred from the judgment dated 19-4-1999, according to the petitioner, the same has attained finality. It is the further case of the petitioner that the said Title Suit No. 19 of 1995 was finally disposed of by the Subordinate District Council Court in its judgment and order dated 20-9-2007 by holding that the suit land as per the boundaries given in the Schedule to the lease deed dated 26-10-1989 was leased out to him and that he was in possession of the same. The trial court also restrained those defendants, their agents and workmen from entering the suit land during the subsistence of the lease deed. A

decree was accordingly drawn up in favour of the petitioner whereupon Execution Case No. 2 of 2007 was filed by the petitioner.

3. It is also the case of the petitioner that on 12-9-2009, the respondent Nos. 1 to 4 herein and their labourers forcibly entered the suit land and removed 200 truck loads of coal therefrom despite the requests made by him to quit the suit land, who, however, threatened him and harassed his workers. This compelled the petitioner to institute Title Suit No. 16 of 2009 before the Sub-District Council Court, Shillong against the respondents and their men. Simultaneously, an application was filed by him for granting an ad interim injunction against the respondents. The trial court in Misc Case No. 16 of 2009 passed the order dated 30-9-2009 granting the ad-interim injunction restraining the respondents or their agents from entering the suit land and requiring them to show cause as to why the interim injunction should not be made absolute on the fixed date. The respondents, however, did not show cause and rushed to appellate court by way of an appeal, which was registered as Misc. Civil Appeal No. 4 of 2009. Their contention before the appellate court was that they were the managers of one Smt. S.K. Sokhlet and entered the suit land on the strength of the lease deed dated 5-11-1987 executed by the Syiem of Langrin in favour of the said S.K. Sokhlet: a sketch map showing the boundaries of the land allegedly so leased out to them was annexed to the memo of appeal. It was also the case of the respondents that the said S.K. Sokhlet had also filed Title Suit No. 24 of 2003 along Misc. Case No. 18 of 2003 before the Subordinate District Council Court, Shillong, who, by the order dated 21-11-2003 granted an ad-

interim junction against the petitioner herein. The appeal filed by the petitioner before the District Council Court, Shillong was dismissed on 8-7-2008. It was accordingly contended by the respondents that since no further appeal was preferred by the petitioner against the injunction order, the order dated 21-11-2003 had attained finality and that Title Suit No. 24 of 2003, which is still pending in the Subordinate District Council Court, Shillong, is in respect of the same subject-matter of the suit filed by the petitioner. The petitioner, however, disputes that the suit land in the suit filed by him and the suit land in Title Suit No. 24 of 2003 is one and the same. It is the further case of the petitioner that when Misc. Civil Appeal No. 4 of 2009 came up for consideration on 29-10-2009, the learned Additional Judge stayed the order dated 30-9-2009 passed by the trial court issuing the ad-interim injunction and instead directed both the parties to maintain the status quo over the suit land as on that date. After hearing both the parties, the learned Additional Judge, District Council Court, Shillong passed the impugned judgment setting aside the ad-interim injunction issued by the trial court by holding that as the petitioner did not give specific boundaries of the suit land, no blanket injunction could have been granted by the trial court and that the respondents, who are managers of the said S.K. Sokhlet, had a prima facie case, had the balance of convenience, and irreparable loss would be caused to them if they were restrained from working on the suit land. Aggrieved by this, this revision is now filed by the petitioner.

4. At the outset, Mr. B. Bhattacharjee, the learned counsel for the petitioner, vehemently submits that the learned Additional Judge of the

District Council Court, Shillong, who is the appellate authority, has no jurisdiction to entertain the appeal filed by the respondents against the ex-parte order of ad-interim injunction so long as they have not exhausted the remedy of showing cause against the ex-parte interim order provided for under Order 39, Rule 3-A of the Code of Civil Procedure, 1905. Alternatively, he contends that the respondents cannot by-pass an alternative statutory remedy as held by the Apex Court in ***A. Venkatasubbiah Naidu v. S. Chellappan, (2000) 7 SCC 695*** when it is nobody's case that the trial court failed to dispose of the application for ad-interim injunction within thirty days from the date of granting the ex-parte injunction as mandated by Order 39, Rule 3-A of the Code. Thus, according to the learned senior counsel, the appellate court has exceeded its jurisdiction in entertaining a non-maintainable appeal such as the one filed by the respondents, and impugned order passed without any inherent jurisdiction is a nullity and cannot be sustained in law. Per contra, Mr. H.S. Thangkhiew, the learned senior counsel for the respondents, supports the impugned judgment by making the following contentions, namely, (*i*) the question of non-maintainability of the appeal was neither raised by the petitioner before the appellate court nor is it pleaded in this revision petition; he is thus barred from raising this issue at this belated stage; (*ii*) the plea that the appellate court could not consider the documents filed by the respondents/appellants therein before it had been filed in the trial court, was never raised before the appellate court; such a plea is also not raised in this revision petition; (*iii*) the appellate court could certainly take into account the documents filed by the respondents/appellants in connection with the appeal filed by them

under Order 43, Rule 1*(r)* of the Code for the limited purpose of examining as to whether the appellants had made out a prima facie case, the existence of balance of convenience in favour of either of the parties, the likelihood of causing irreparable damage if no interim injunction was issued in favour of the party applying for the same: no improper jurisdiction was exercised by the appellate court in passing the impugned judgment warranting the interference of this Court and (*iv*) moreover, the Courts under the District Council are not bound to follow the strict rules of the Code and, as such, the appellate court was within its jurisdiction to entertain the appeal, consider the new documents filed by the respondents and was not hampered by the technicalities of complex law such as the Code. In support of his various contentions, he refers to the following decisions:- (*i*) ***Food Corporation of India v. Yadav Engineer, (1982) 2 SCC 499; (ii) Akmal Ali v. State of Assam, AIR 1984 Gau 86 (iii) Innovative Pharma Surgicals v. Pigeon Medical Devices, AIR 2004 AP 310 and (iv) State of Nagaland v. Ranta Singh, AIR 1967 SC 212***. He, therefore, strenuously urges this Court to dismiss the revision petition.

5. The first point for consideration in this revision is thus whether an appeal under Order 43, Rule 1(r) of the Code lies against an ex-parte ad-interim injunction passed by a trial court under Order 39, Rule 1 read with the proviso to Rule (3) of the Code. Order 39, Rule 1 provides that when the defendant threatens to dispose the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the court may grant a temporary injunction to restrain such an act or make other order for the purpose of preventing the dispossession

of the plaintiff or for the purpose of preventing the causing of injury to the plaintiff in relation to property in dispute. Then, Order 39, Rule 2 enables the court to grant temporary injunctions to restrain a defendant from committing the breach of contract or other injury of any kind. Then there is Order 39, Rule 3, which permits the court to pass an ex-parte interim injunction if it appears to the court that the object of granting the injunction would be defeated by delay. In ***Nahmal v. Makhanlal, AIR 1953 Pat 255***, it was held, with due respect, rightly so, that the word 'injunction' in Rules 3, 4 and 5 of Order 39 must be construed as meaning also an order in the nature of an injunction which the court is competent to pass under Order 39, Rule 1. Then, Order 39, Rule 3-A provides that such an application must be disposed of within thirty days. This rule is in the following terms:

> **"Rule 3A. Court to dispose of application for injunction within thirty days— Where an injunction has been granted without giving notice to the opposite party, the Court shall make an endeavour to finally dispose of the application within thirty days from the date on which the injunction was granted; and where it is unable to do so, it shall record its reasons for such inability**.

Where an ex-parte order of injunction is passed, and the party affected applies under Order 39, Rule 4 it is the duty of the court to decide the objection raised against the passing of the order of injunction. Such injunction order passed under Rule 3 can be set aside on an application of the defendant under this rule, if he shows cause why the injunction should not be issued. Rule 4 of Order 39 may as well be reproduced below:

> **"Rule 4. Order for injunction may be discharged, varied or set aside—Any order for injunction may be discharged, or varied, or set aside by the court, on application made thereto by any party dissatisfied with such order:**

Provided that if in an application for temporary injunction or in any affidavit suppressing such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interest of justice:

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being heard, the order shall not be discharged, varied or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has caused undue hardship to that party."

Order 43, Rule 1 of the Code deals with appeal from orders, which may also be reproduced below:

"Rule 1. Appeals from orders—An appeal shall lie from the following orders under theprovisions of section 104, namely:-

* * *

(r) an order under rule 1, rule 2 or rule (2-A), rule 4 or rule 10 of Order XXXIX;

* * *

A combined reading of the provisions of Order 39, Rules 3-A and 4 of the Code on the one hand and Order 43, Rule 1(r) of the Code does not expressly contemplate an appeal from the ex-parte order of temporary injunction but expressly provides for the remedy of applying for discharging, varying or setting aside such an ex-parte order on the application made in this behalf by any party dissatisfied with such order. In other words, a party dissatisfied with an ex-parte order of injunction has the statutory remedy of moving the court which passed such an order for discharging, varying or setting aside the same. Normally, a litigant is not permitted to by-pass a remedy provided for by a statute: this is exactly what is provided for under Order 39, Rule 4

of the Code. However, in ***A. Venkatasubbiah Naidu v. S. Chellapan, (2000) 7 SCC 695***, the Apex Court was seized with the question as to whether, notwithstanding the absence of an appellate provision to this effect, an appeal shall nevertheless lie from an ex-parte order of injunction. The decision of the Apex Court is found at paragraph 21 of the judgment, which is in the following terms:

> *"21. It is the acknowledged position of law that no party can be forced to suffer for the inaction of the court or its omissions to act according to the procedure established by law. Under the normal circumstances the aggrieved party can prefer an appeal only against an order passed under Rules 1, 2, 2A, 4 or 10 of Order 39 of the Code in terms of Order 43 Rule 1 of the code. He cannot approach the appellate or revisional court during the pendency of the application for grant or vacation of temporary injunction. In such circumstances the party which does not get justice due to the inaction of the court in following the mandate of law must have a remedy. So we are of the view that in a case where the mandate of Order 39 Rule 3-A of the Code is flouted, the aggrieved party, shall be entitled to the right of appeal notwithstanding the pendency of the application for grant or vacation of a temporary injunction, against the order remaining in force. In such appeal, if preferred, the appellate court shall be obliged to entertain the appeal and further to take note of the omission of the subordinate court in complying with the provisions of Rule 3-A. In appropriate cases the appellate court, apart from granting or vacating the order of such injunction, may suggest suitable action against the erring judicial officer, including recommendation to take steps for making adverse entry in his ACRs. Failure to decide the application or vacate the ex parte temporary injunction shall, for the purpose of the appeal, be deemed to be the final order passed on the application of temporary injunction, on the date of expiry of thirty days mentioned in the Rule."*

Relying on the aforesaid decision of the Apex Court, the Andhra Pradesh High in ***Innovative Pharma Surgicals v. Pigeon Medical Devices Pvt. Ltd., AIR 2004 AP 310***, succinctly explained the legal position in the following manner:

> *"17. From a reading of the said judgment, it appears to our mind that it is only an extraordinary circumstance under which the aggrieved party can prefer an appeal against an interim injunction order. But, as a matter of course, the aggrieved person cannot approach the appellate or revisional Court during the pendency of the application for grant or vacation of temporary injunction. It was a*

case where an application to vacate an ad interim injunction was filed and as the said application to vacate the same, was not disposed of within the stipulated time under the provisions of Order 39, Rule 3-A, CPC the parties therein approached the Appellate Court and in that context, the Supreme Court has held that an appeal is maintainable. But, however, it impliedly cautioned that in the normal course, the aggrieved party cannot approach the appellate or revisional Court during the pendency of the application for grant or vacation of temporary injunction. It is only when there is inaction on the part of the Courts in following the mandate (sic) provisions, then only the aggrieved party can approach the Appellate Court.

"18. So it is clear that though an appeal is maintainable, such an appeal should be filed only in an extraordinary circumstance under which the party is able to explain as to why he prefers an appeal in the High Court instead of choosing to file a petition to vacate the ad interim injunction. Even in case of an appeal against an ad interim injunction, the appellate Court will not be bound to apply its mind to all the contentions, which the Original Court is bound to consider on the case shown by the party affected by ad interim order."

With due respect, the view taken by the Andhra High Court in the foregoing decision, in my opinion, reflects the correct proposition of law. Any other interpretation will be inconsistent with the established practice and procedure of courts that an alternative statutory remedy should be exhausted before invoking the discretionary jurisdiction of a superior court. In the instant case, the admitted position of the parties is that when the application for temporary injunction was still pending before the trial court and the show cause from the respondents was yet to be filed, the latter chose to approach the appellate court: there had not been any inaction on the part of the trial court to dispose of the application for temporary injunction, much less, non-disposal thereof within thirty days from the date on which the ex-parte injunction was granted. Nor did the respondents show any extraordinary circumstance before the appellate court for by-passing the statutory provision. Therefore, I am of the view that the appellate court has improperly exercised its jurisdiction by invoking its discretionary jurisdiction when

it interfered with the normal proceedings of the trial court by passing the impugned judgment. It is, however, contended by Mr. H.S. Thangkhiew, the learned senior counsel for the respondents, that in the District Council Courts including its subordinate courts, the provisions of the Code are not followed in letter but only in spirit, and the bar imposed by the Court against an appeal from the ex-parte order of injunction as construed by the Apex Court and the Andhra Pradesh High Court in ***A. Venkatasubiak case (supra)*** and ***Innovative Pharma Surgicals (supra)*** respectively cannot be made applicable to the decision rendered in the proceedings before the District Council Court and courts subordinate to it. He seeks support for his contentions from the decision of the Apex court in ***State of Nagaland v. Ratan Singh, AIR 1967 SC 212***.

6. I have given my anxious consideration to the contention raised by the learned senior counsel. What is worthy of notice in the instant case is that both the parties were adequately represented by their respective counsel, whether in this Court or the courts below. Under the circumstances, we cannot lose sight of the context in which the Apex Court made the observation in ***Ratan Singh*** case (supra) that the spirit of the Criminal Code of Procedure had been asked to be applied so that justice may not fail because of some technicality. The settled law is that a judgment of a court of law cannot be read like Euclid's theorem and must be read in the context in which the observation is made. Paragraph 30 of the judgment must be read in its entirely to understand the correct legal position laid down by the Apex Court and is accordingly reproduced herein below:

"(30) Laws of this kind are made with an eye of simplicity. People in backward tracts cannot be expected to make themselves aware of the technicalities of a complex Code. What is important is that they should be able to present their defence effectively unhampered by the technicalities of complex laws. Throughout the past century the Criminal Procedure code has excluded from this area because it would be too difficult for the local people to understand. Instead the spirit of the Criminal Procedure Code has been asked to be applied so that justice may not fail because of some technicality. The argument that this is law is not correct. Written law is nothing more than a control of discretion. The more there is of law the less there is of discretion. In this area it is considered necessary that discretion should have greater play than technical rules and the provision that the spirit of the Code should apply is a law conceived in the best interest of the people. The discretion of the Presiding Officer is not subjected to rigid control because of the unsatisfactory state of defences which would be offered and which might fail if they did not comply with some technical rule. The removal of technicalities, in our opinion, leads to the advancement of the cause of justice in these backward tracts. On the other hand, the imposition of the code of Criminal Procedure would retard justice, as indeed the Governors-General, the Governor and the other heads of local Government have always thought. We think, therefore, that Art. 21 does not render the Rules of 1937 ineffective."

(Underlined for emphasis)

7. As already noticed, both the parties were effectively and adequately represented before the appellate court or the trial court by their respective counsel, who cannot said to be unaware of the complexities of the Code of Civil Procedure. Fortunately, no plea is made by the respondents that they have been substantially prejudiced or hampered by the technicalities of complex laws such as the Code of Civil Procedure, which ordinarily bars an appeal from an ex-parte order of injunction. The contention of the learned senior counsel is that as only the spirit of the Code of Civil Procedure is followed in Courts constituted under the Sixth Schedule, the respondents could not be barred from preferring an appeal against the ex-parte order of injunction passed by the trial court. Though the argument appears to be attractive at the first blush, it does not stand closer scrutiny on deeper consideration. In the first place, when it is nobody's case that

the parties were unrepresented and were prosecuting the case by themselves without the assistance of legal experts, there can be no bar in applying the letter of the Code of Civil Procedure in a forensic battle fought between parties well and adequately represented by their respective counsel. On the contrary, the application of the letter of the Code of Civil Procedure even in a District Council Courts and Courts subordinate to them constituted under the Sixth Schedule will ensure fairness, certainty, predictability and consistency in the procedure adopted by them. However, if both the parties are not assisted by legal experts, depending upon the facts and circumstances of the case as they develop in the course of trial, such Courts, in order to ensure that neither of the parties are hampered by the complexities and technicalities of the Code of Civil Procedure may consider the question as to whether there should be strict application of the Code or not. No doubt, such discretion is expected to be exercised by the Court judiciously and not arbitrarily or whimsically: judicial discretion like any discretionary power is to be exercised in a reasonable manner. In the instant case, I have a sneaking suspicion that both the parties were indulging in forum hunting to obtain favourable order at the expense of the other. I say no more in this behalf. The case must go back to the trial court for consideration of the application for temporary application filed by the petitioner.

8. The result of the foregoing discussion is that this revision petition succeeds. The judgment and order dated 9-3-2010 passed by the learned Additional Judge, District Council Court, Shillong in Misc. Civil Appeal No. 4 of 2009 is hereby set aside. The case is remanded to the trial court for consideration of the application of temporary injunction

filed by the petitioner together with the written objection/show cause filed or to be filed, if so advised, by the respondents. Needless to say, the trial court shall give adequate opportunity of hearing to both the parties and shall dispose of the application expeditiously and at any rate within a period of three months from the date of receiving this judgment. Pending disposal of the application for temporary injunction, the interim order of status quo shall continue on the suit land. No costs.

JUDGE

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