

**IN THE GAUHATI HIGH COURT**  
(THE HIGH COURT OF ASSAM, NAGALAND, MEGHALAYA, MANIPUR, TRIPURA,  
MIZORAM AND ARUNACHAL PRADESH)

**ITANAGAR PERMANENT BENCH**  
NAHARLAGUN

**CRP No. 05(AP) OF 2010**

**Smti. Sushila Malik**

Wife of Shri Harbir Singh Malik  
Police Colony, P.O. & P.S. – Namsai,  
District – Lohit, Arunachal Pradesh.

.....*Petitioner*

- *Versus* -

**Shri Chow Pichina Namchoom**

Son of Late Chow Kingtawn Namchoom Chongkham,  
District : Lohit, Arunachal Pradesh.

.....*Respondent*

Advocates for the petitioner :- Mr. K. Ete  
Mr. N. Ratan  
Mr. M. Kato  
Mr. G. Kato  
Mr. P. Agarwal

Advocates for the respondents :- Mr. Chow Withow Mantaw  
Mr. H. Lampu  
Mr. Chow Nipu Panyok

**PRESENT**  
**THE HON'BLE MR. JUSTICE P. K. MUSAHARY**

Date of hearing :- 26.08.2010  
Date of Judgment & order :- 20.09.2010

**JUDGMENT AND ORDER(CAV)**

Heard Mr. K. Ete, learned counsel for the petitioner. Also  
Mr. C. W. Mantaw, learned counsel for the sole respondent.

2. The facts leading to filing of present petition may be narrated first as under.

The petitioner is engaged in the business of supply of stones, chips, and other connected materials for construction purposes. A stone crushing unit was installed by the petitioner over a plot of land of the sole respondent at Chongkham for which an agreement was entered into. Two stone crushers were installed. In the course of time, certain differences arose between the parties for which the said unit has been closed down sometime in the month of November, 2009. The respondent restrained the petitioner from taking out her plant and machineries installed in the unit apart from selling out illegally the large quantity of materials and also contemplated to sell/dispose the plant and machineries which the petitioner claims to be exclusively her own. Under such circumstances, the petitioner approached the learned Addl. Deputy Commissioner, Namsai, by filing petitions dated 21.12.2009, 15.01.2010 and 18.01.2010 praying *inter alia*, for an appropriate order for allowing her to lift and remove all the plant and machineries, raw materials, etc.. The learned Addl. Deputy Commissioner after hearing both the parties and on consideration of all the relevant materials and records, passed an order dated 18.01.2010 in favour of the petitioner. The respondent filed an application against the said order on 19.01.2010 before the learned Addl. District Judge, FTC, Namsai, under Order 21 Rule 26 of Code of Civil Procedure, 1908. The learned Addl. District Judge, FTC, admitted the said application and stayed the order dated 18.01.2010 passed by the learned Addl. Deputy Commissioner vide order dated 19.01.2010. The petitioner then filed an application dated 21.01.2010 before the learned Deputy Commissioner-cum-District & Sessions Judge, Lohit District, for setting aside the stay order passed by the learned Addl. District & Sessions Judge, FTC, on 19.01.2010. The learned Deputy Commissioner-cum-District & Sessions Judge, did not entertain the said petition observing that the powers of Addl. District & Sessions Judge and District & Sessions Judge are equivalent and a revision/appeal against the order of learned Addl. District & Sessions Judge, would lie only before the High Court. In other words, the said application was not entertained for want of jurisdiction. However, by his order dated 28.01.2010, the learned Deputy Commissioner-cum-

12

ex-officio District & Sessions Judge, Lohit District, directed the Extra Assistant Commissioner/Circle Officer, Chongkham, to ensure compliance of the interim directions passed by the learned Addl. District & Sessions Judge, FTC. The petitioner then filed an application on 22.02.2010 before the learned Addl. District & Sessions Judge, FTC, for vacating the stay order dated 19.01.2010 but the same was rejected vide his order dated 22.01.2010.

**3.** By this petition, the petitioner has challenged the aforesaid orders dated 19.01.2010(Annexure-VII to the petition) and 22.02.2010(Annexure-IX to the petition) passed by the learned Addl. District & Sessions Judge, FTC, E/Zone, Namsai and also the order dated 18.01.2010 passed by the learned Addl. Deputy Commissioner (Annexure-V to the writ petition).

**4.** The main point urged by the petitioner is that the very provision under which the application under Order 21 Rule 26 of Code of Civil Procedure, 1908, was filed before the learned Addl. District & Sessions Judge, FTC, on 19.01.2010 by the respondent on which the impugned order dated 19.01.2010 was passed staying the order dated 18.01.2010 passed by the learned Addl. Deputy Commissioner, is absolutely inapplicable inasmuch as the court of learned Addl. District & Sessions Judge, FTC, is not an executing court to execute the order dated 18.01.2010 passed by the learned Addl. Deputy Commissioner. Moreover, it was rightly held by the learned Deputy Commissioner-cum-ex-officio District & Sessions Judge, in his order dated 28.01.2010 that the power of Addl. District & Sessions Judge, and District & Sessions Judge, are equivalent and a revision/appeal against the order of learned Addl. District & Sessions Judge, would lie only before the High Court. There is no scope for filing any application before the learned Addl. District & Sessions Judge, for vacating the stay order passed by the same court and therefore, while passing the impugned order dated 22.02.2010 directing the parties to file suit, committed grave error of law which is liable to be set aside and quashed.

12

5. The respondent denied the allegations and averments made in the petition. A preliminary objection has been raised that the necessary party i.e. son of the present petitioner who entered into an agreement and ran the business with the respondent, has not come forward to contest the case. The petitioner's son Sri Vipin Kr. Malik, who is serving as an Assistant Engineer in the PHED Hayuliang in Anjaw District, is the necessary party and he should have been arrayed as a necessary party petitioner instead of his mother who has filed the present petition. The instant petition, according to the respondent, is therefore, liable to be dismissed for non-joinder of necessary party. In this respect, the decision rendered in ***Executive Director, Hindustan Paper Corporation Ltd. & Ors. -vs- Ram Vash Bind & Ors.***, as reported in **1997(1) GLT 512** has been placed and relied upon.

6. In the factual aspect of the matter, it has been mainly contended that at the initial stage, the son of the present petitioner Sri Vipin Kr. Malik (hereinafter referred to as 'second party') approached the respondent with the proposal to run a joint business of stone chips on the plot of the respondent. As he knew the necessary party for the past several years, the respondent agreed to run the business on the basis of 50:50 partnership of the profit accruing from the business or in lieu thereof Rs. 50,000/- only *per mensem* as rent of the land used for running the said business. At the initial stage of running the business, the necessary party placed order for a stone crushing unit from VAS Sales, Kolkata and installed the said unit on the plot of land of the respondent for running the business of stone chips with the respondent in the name & style of *M/s Namchoom Stone Crushing Unit*. When the business was running sound, the respondent also wished to install one more stone crushing unit on the same plot of land and as such, on 01.09.2008, the respondent credited an amount of Rs. 90,000/- only into the account of VAS Sales, Kolkata. It was mutually agreed between the respondent and necessary party that the rest of the full and final amount towards the purchase of second stone crushing unit, would be adjusted from the profit money accrued out of running the first stone crushing unit and the total amount was finally paid to the said VAS Sales, Kolkata.

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It was also agreed upon that the second stone crushing unit would be owned by respondent after final termination of the business. The contention of the petitioner is that the necessary party i.e. son of the present petitioner, purchased the first stone crushing unit from his account while the second one was purchased by the respondent from his account and as such, the petitioner has a rightful claim to remove both the stone crushing units and other materials including the chips, etc., stored at the site of the plot of land belonging to the respondent.

**7.** The further contention of the respondent is that necessary party denied the respondent to pay him the rental towards the occupied land and also denied the share of the profits derived from the business as agreed between them at the initial stage of running the business. Since May, 2009, the said necessary party has been running the business by engaging some unknown armed persons. The respondent is entitled to payment of arrears from the petitioner to the tune of Rs. 12,00,000/- causing great financial loss to him.

**8.** On the legal aspect of the matter, it has been submitted by the learned counsel for the respondent that the order dated 18.01.2010 passed by the learned Additional Deputy Commissioner, Namsai, allowing the petitioner to remove the stone crushing unit with chips, etc., from the land of the respondent, was not passed on consideration of merit of the case and the learned court failed to consider that the matter is a civil dispute involving the question of facts, law and evidence and it was justified on the part of learned Additional Deputy Commissioner in passing such administrative order declaring the right, title and interest of the parties without complying with the provisions of law. Further, according to the respondent, at the time of passing the order dated 19.01.2010 by learned Addl. District & Sessions Judge, FTC, staying the aforesaid order dated 18.01.2010, the counsel for the petitioner who was present. He did not raise any objection to passing the aforesaid order and as such, the petitioner cannot now question the jurisdiction of learned Addl. District & Sessions Judge. The learned Addl. District & Sessions

Judge, rightly passed the impugned order dated 22.02.2010 directing the parties to file the suit in proper forum to settle and declare the right, title and interest of the parties in regard to stone crushing unit and other related issues.

9. I have carefully gone through the pleadings of the parties. There are claims and counter claims from both the parties regarding how they started the business, how they purchased the stone crushing units and the terms and conditions in running the business and also sharing the profits derived from the said business. There is no written agreement between the parties and the parties entered into a mutual agreement. The terms and conditions of oral agreement are also found to be differing. No documents have been filed and it appears that the learned courts below passed the orders without having a look on relevant records. There is no denial of the fact to the fact that necessary party Sri Vipin Kr. Malik, is a government employee. He appears to have taken active role in entering into business deal and running the same. His mother, due to her old age, has been shown as partner of the business but she did not take active role in running the business. On the other hand, the said necessary party cannot take active part in the business or indulge himself in active business, he being a government employee and thereupon attracting misconduct under the service rules. The point raised by the respondent that the necessary party has not been made a party petitioner and on that ground, the instant petition filed by the present petitioner(mother of necessary party), is liable to be dismissed at the threshold, cannot be rejected outrightly. Even assuming that Sri Vipin Kr. Malik is not a necessary party and accepting that his mother (present petitioner) is the necessary party, the claims and counter claims of the parties are to be decided on the basis of the documentary and oral evidence, moreso because there is no written agreement indicating the terms and conditions of the business between the parties. The facts of business agreement and the terms and conditions must be proved by the parties for settlement of or declaring the right, title and interest of the parties.

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**10.** The respondent has claimed an outstanding dues/arrears to the tune of Rs. 12,00,000/- from the petitioner and the said demand is to be proved by the respondent by adducing sufficient materials and evidence. The petitioner should be given a chance to disprove the same by adducing her evidence. It is an admitted position that the proceedings initiated by the parties before the learned courts below relate to obtaining order for removal of the stone crushing units and materials lying on the business site i.e. land of the respondent and staying the order allowing the petitioner to remove the said stone crushing unit and materials therefrom without any scope for determining the important issue like the right, title and interest of the parties. In my considered view, the orders so far passed by the learned courts below on different occasions are only in the nature of temporary relief(s) to the parties without determining or adjudicating upon the main issues.

**11.** There are cause of actions and triable issues for both the parties to determine the right, title and interest of the parties in respect of stone crushing units and other materials connected with the business run by the parties on mutual agreement. The issues involved could be determined only in a civil suit by a civil court. In my considered view, the learned Addl. District & Sessions Judge, FTC, while passing the impugned order dated 22.02.2010 (Annexure-XI to the petition) rightly directed the parties to file suit in proper forum as per procedure of law. The impugned order dated 22.02.2010 needs no interference by this court. The same is, therefore, upheld and the parties are directed to comply with the same. For the same reason, the impugned order dated 19.01.2010(Annexure-VII to the petition) also needs no interference by this court. This petition accordingly stands dismissed.

**12.** The parties are granted liberty to approach the appropriate civil court as directed by the learned Addl. District & Sessions Judge, FTC, Eastern Zone, Namsai, vide order dated 22.02.2010.

**13.** There shall be no order as to costs.



14. Send down the LCRs to the court below forthwith.

JUDGE

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