

(2016) 03 J&K CK 0022

In the Jammu And Kashmir High Court

Case No : C. Rev. No.100 of 2009, MP No.104 of 2009 c/w C. Rev. No.101 of 2009, MP No.105 of 2009

Anil Sharma

APPELLANT

Vs

Darshan Lal

RESPONDENT

Date of Decision : 04-03-2016

Acts Referred:

Jammu and Kashmir Civil Procedure Code, 1977 — Order 22 Rule 4

Citation : (2016) 3 JKJ 327

Hon'ble Judges : Mr. Mohammad Yaqoob Mir, J.

Bench : Single Bench

Advocate : Mr. Subhash Makhnotra, Advocate, for the Respondent; Mr. Dinesh Verma, Advocate, for the Petitioner

Final Decision : Allowed

Judgement

Mr. Mohammad Yaqoob Mir, J.(Oral) - These Revision petitions are directed against the orders dated 05.06.2009 passed by the trial court

(Munsiff, Akhnoor) in two suits captioned:

(i) Durga Dass v. Anil Sharma and ors..

(ii) Durga Dass v. Krishan Lal and ors.

2. Two separate applications filed in the said two suits seeking dismissal of the suits on the count of having abated for want of substitution of legal

heirs of deceased (defendant No.4 therein).

3. For appreciating the controversy in its right perspective, it shall be advantageous to notice precisely the factual background which has given rise to the Lis and to the consequential orders impugned.

4. One-Parkasho Devi (defendant No.4 in both the two suits) had sold land

measuring 3 kanal and 14 marlas covered by Survey No.915 min

situated at Village Gurha Brahmana, Tehsil Akhnoor vide Sale Deed dated 28.03.2005 in favour of Anil Sharma and Sushil Sharma (defendants

No.1 and 2 in Suit No.1) who in turn on 01.07.2005 executed a Gift Deed for the same land in favour of their mother Smt. Vishno Devi

(defendant No.3).

5. Same deceased Parkasho Devi (defendant No.4) in Suit No.2 had sold land measuring 4 kanal covered by Survey No.915 min, khata No.160

min situated at Village Gurha Brahmana vide Sale Deed executed on 23.03.2005 in favour of Shri Krishan Lal who in turn gifted the same to his

two sons Shri Anil Verma and Shri Sushil Sharma (defendants 1 and 2).

6. Plaintiff (Durga Dass who is now deceased) claimed that Parkasho Devi deceased (defendant No.4) is the co-owner, therefore, he has a right

of prior purchase. On such basis has instituted two suits seeking Gift deed to be declared as 'null and void' and also right of prior purchase.

7. During pendency of the said two suits, defendant No.4-Parkasho Devi died. Death certificate has been placed on record as is clear from the

interim orders recorded by the trial Court on 23.05.2007 in both the two suits.

8. Shri Shiv Kumar S/o Durga Dass-plaintiff claimed to be an adopted son of Parkasho Devi and has filed written statement. Issues had been

framed. When preliminary issue was to be argued, the defendants 1 to 3 filed two separate applications in both the two suits praying for dismissal

of the suits as having abated. But learned trial Court has rejected the applications on the ground that Shri Shiv Kumar had filed written statement in

both the two suits and has been contesting. No one has raised objection. Dissatisfied with the order passed separately in both the suits dated

05.06.2009, instant revision petitions have been filed.

9. The contention of the petitioners-revisionists is that fact of death of defendant No.4-Parkasho Devi was brought to the notice of the court on

23.05.2007 when death certificate was placed on record revealing that the defendant No.4 has died on 26.02.2007.

10. Plaintiff was required to file an application for substitution under Order 22, Rule 4 within a period of six months the period prescribed under

Limitation Act. Default in filing any such application attracts Order 22, Rule 4 (Sub Rule 3) CPC which provides that, where within the time limit

by law, no application is made under Sub Rule 1, the suit shall abate as against the deceased defendant if interests are divisible and in case

indivisible then as a whole.

11. Learned Trial Court without looking into the Sub Rule 4 Order 22 CPC and ignoring non-filing of application for substitution observed that

Shri Shiv Kumar as legal representative has filed the written statement.

12. Perusal of the trial Court record reveals that on behalf of Shri Shiv Kumar, power of attorney has been filed by the advocate on 10.01.2008.

Same has been entertained even though Shri Shiv Kumar was not substituted as party in place of defendant No.4 then he has filed written

statement on 16.02.2008. The trial Court record further reveals that a photo-copy of the adoption deed, 'alleged to have been executed by

defendant No.4-Parkasho Devi showing Shri Shiv Kumar to have been adopted by her in the year 2003 has been placed on records.

13. Trial Court record further reveals that both the suits still are at infancy stage. The question is as to whether participation by Shri Shiv Kumar in

the suit proceedings with effect from 10.01.2008 when power of attorney has been filed on his behalf by the advocate, the operation of Sub Rule 3

of Rule 4 Order 22 will get diluted. Admittedly defendant No.4 has died on 26.02.2007. Death certificate has been placed on record on

23.05.2007, power of attorney of Shri Shiv Kumar claiming to be legal heir has been filed on 10.01.2008 and the written statement on

16.02.2008.

14. The participation of Shri Shiv Kumar from 10.01.2008 is after the prescribed period of six months. In case time is reckoned from the date of

death i.e. 26.02.2007 then six months time period would expire on 26.08.2007 and in case it is reckoned from the date, death certificate has been

produced and placed on record i.e. 23.05.2007. Period of six months would expire on 23.11.2007.

15. Learned trial Court has not bothered at least to read Order 22, Rule 4 , otherwise such issue would have been properly addressed.

16. Shri Shiv Kumar has claimed adoption on the strength of adoption deed, photo-copy of which has been placed on records. What could be the

evidentiary value of such document too has not been looked into. In fact, Shri Shiv Kumar being the son of plaintiff-Durga Dass, therefore way has

been paved for filing power of attorney (Vakalatnama) on 10.01.2008 and then written statement on 16.02.2008. The learned trial Court has

entertained the same ignoring the period prescribed for filing of applications by the plaintiff for substitution in terms of Order 22, Rule 4 CPC. In an

arbitrary manner, learned trial Court has hood-winked the issue and has dismissed the applications.

17. It is quite disturbing to notice that suits have been instituted on 14.07.2005 till the passing of the orders impugned, interim proceedings

recorded suggest lack of application of mind, as a result whereof, delay in progress of suits occasioned. Learned Presiding Officer is expected to

have complete control over the proceedings. Only then, there is scope for avoiding unnecessary delay in disposal of the suits.

18. Both the two Revision Petitions are allowed. The two orders dated 05.06.2009 passed separately in aforesaid two suits being unsustainable

are set aside. Trial Court to decide the applications afresh after hearing both the parties and pass appropriate orders after keeping in view the

observations made here in above. Learned counsel for the parties to ensure presence of the parties before the Trial Court on 14.03.2016. Record

of the two suits of the Trial Court be sent back along with copy of this order so as to reach there well before the time fixed.

19. Disposed of as above along with connected MPs.