(2019) 04 UK CK 0020

In the Uttarakhand High Court

Case No : Writ Petition No. 101 (M/S) Of 2015

Arvind Kumar APPELLANT

Vs

Ashwani Kumar & Others RESPONDENT

Date of Decision : 02-04-2019

Acts Referred:

Limitation Act, 1963 — Section 3, 3(1), 5, 17
Code Of Civil Procedure, 1908 — Section 17, Order 7 Rule 6, Order 23 Rule 1, Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1, Order 43 Rule 2, Order 43 Rule 1(r)
Constitution Of India, 1950 — Article 226, 227

Citation : (2019) 04 UK CK 0020

Hon'ble Judges : Lok Pal Singh, J

Bench : Single Bench

Advocate : Pramod Bailwal, Raj Kumar Singh

Final Decision : Dismissed

Judgement

Lok Pal Singh, J.

1. By means of present writ petition, moved under Article 227 of the Constitution of India, the petitioner is seeking writ in the nature of certiorari for quashing the orders dated 10.07.2014 and 19.11.2014 (contained as Annexure nos. 3 and 5 to the writ petition) and also to condone the delay in filing the Suit no. 9 of 2013, Arvind Kumar vs Ashwani and others.

2) Brief facts of the case are that the petitioner / plaintiff instituted a suit no. 09 of 2010, Arvind Kumar vs Ashwani Kumar and others, in the court of Civil Judge (Jr. Div.), Roorkee, Haridwar, for cancellation of sale deed dated 19.05.1986, executed by Naresh Chand (respondent no. 3) father of the petitioner in favour of respondents / defendant nos. 1 and 2. The suit was instituted on 29.01.2010. Along with the suit, the petitioner / plaintiff filed application under Section 5 of the Limitation Act for condoning the delay in filing the suit. Learned trial court by order dated 10.07.2014 recorded the finding that the plaintiff / petitioner has filed the suit with the averments that he was not aware of the sale deed and he

came to know for the first time on 04.01.2010 that in place of his father sale deed has been executed in favour of the respondents / defendant nos. 1 and 2. It was also averred that defendant nos. 1 and 2 are mafia persons and they succeeded to get the sale deed executed in their favour in the name of the father (respondent no. 2) of the plaintiff / petitioner. Plaintiff had prayed that since the knowledge of execution of sale deed dated 19.05.1986 came into the notice of petitioner / plaintiff for the first time on 04.01.2010, therefore, the suit be treated within time by giving the benefit of Section 5 of the Limitation Act. Learned trial court rejected the application holding that the provisions of Section 5 of the Limitation Act will not apply in institution of suit, which has become time barred. Feeling aggrieved, the petitioner / plaintiff preferred civil revision before learned Addl. District Judge, Roorkee. Learned revisional court by order dated 19.11.2014, affirmed the order dated 10.07.2014 passed by the trial court and dismissed the revision. Still feeling aggrieved, the petitioner has preferred this writ petition under Article 227 of the Constitution of India.

3) I have heard leaned counsel for the parties and perused the material available on record.

4) Learned counsel for the petitioner would submit that delay condonation application was filed in a precautionary manner. In fact, the suit filed by the petitioner / plaintiff was well within time as it was filed within three years from the date of knowledge when the plaintiff came to know that a forged sale deed has been executed in favour of respondent nos. 1 and 2. Learned counsel would further submit that at the time of admission of the writ petition, co-ordinate Bench of this Court has observed while placing reliance on the proviso of Order 7 Rule 6 of CPC that the trial court should have considered the provisions contained in Section 17 of the Limitation Act read with Order 7 Rule 6 CPC and the plaint should have been treated within time, and if by mistake an application for condonation of delay has been filed, the same should not be taken into consideration.

5) Learned counsel for the petitioner would further submit that in view of Section 17 of the Limitation Act as the sale deed is obtained by fraud, and the suit has been filed within a period of three years from the date of knowledge, therefore, in view of the provisions contained in Section 17 read with Order 7 Rule 6 of CPC, the court below should have treated the suit instituted by the petitioner / plaintiff well within time and if, by mistake, an application for condonation of delay was filed, the same ought to have been considered only as it has been filed ignorantly by the petitioner.

6) The provisions contained in Section 3 are extracted here-in-below:

3. Bar of limitation.-(1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.

(2) For the purposes of this Act- (2) For the purposes of this Act-"

(a) a suit is instituted- (a) a suit is instituted-"

(i) in an ordinary case, when the plaint is presented to the proper officer; (i) in an ordinary case, when the plaint is presented to the proper officer;"

(ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and (ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and"

(iii) in the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator; (iii) in the case of a claim against a company which is being wound up by the court, when the claimant first sends in his claim to the official liquidator;"

(b) any claim by way of a set off or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted- (b) any claim by way of a set off or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted-"

(i) in the case of a set off, on the same date as the suit in which the set off is pleaded; (i) in the case of a set off, on the same date as the suit in which the set off is pleaded;"

(ii) in the case of a counter claim, on the date on which the counter claim is made in court; (ii) in the case of a counter claim, on the date on which the counter claim is made in court;"

(c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that court.

7) Section 17 of the Limitation Act is reproduced here-in-below:

17. Effect of fraud or mistake.-

(1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,-

(a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or

(b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or

(c) the suit or application is for relief from the consequences of a mistake; or

(d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him, the period of limitation shall not begin to run until plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production: Provided that nothing in this section shall enable any suit to be instituted or application to be made to recover or enforce any charge against, or set aside any transaction affecting, any property which-

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know, or have reason to believe, that any fraud had been committed, or

(ii) in the case of mistake, has been purchased for valuable consideration subsequently to the transaction in which the mistake was made, by a person who did not know, or have reason to believe, that the mistake had been made, or

(iii) in the case of a concealed document, has been purchased for valuable consideration by a person who was not a party to the concealment and, did not at the time of purchase know, or have reason to believe, that the document had been concealed.

(2) Where a judgment-debtor has, by fraud or force, prevented the execution of a decree or order within the period of limitation, the court may, on the application of the judgment-creditor made after the expiry of the said period extend the period for execution of the decree or order: Provided that such application is made within one year from the date of the discovery of the fraud or the cessation of force, as the case may be.

8) The Proviso to Order 7 Rule 6 of the Code of Civil Procedure is excerpted as under:

"Particulars to be contained in plaint. - The plaint shall contain the following particulars :-

(a) the name of the Court in which the suit is brought;

(b) the name, description and place of residence of the plaintiff;

(c) the name, description and place of residence of the defendant, so far as they can be ascertained;

(d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;

(e) the facts constituting the cause of action and when it arose;

(f) the facts showing that the Court has jurisdiction;

(g) the relief which the plaintiff claims;

(h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and

(i) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits.

6. Grounds of exemption from limitation law. -Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed:

[Provided that the Court may permit the plaintiff to claim exemption from the law of limitation on any ground not set out in the plaint, if such ground is not inconsistent with the grounds set out in the plaint."

6) Provisions contained in Section 3 of the Limitation Act stipulates bar of limitation. Sub-Section (1) of Section 3 of the Limitation Act provides that every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence.

7) Section 5 of the Limitation Act provided for extension of prescribed period in certain cases in regard to any appeal or any application.

8) A conjoint reading of Section 3 and 5 of the Limitation Act would make it clear that the provisions of Section 5 of the Act are not applicable to the institution of suit. Rather, it applies on an appeal or an application pending. In view of Section 17 of the Limitation Act, a suit for cancellation of sale deed is to be filed within the date of its execution or, in case, the sale deed is obtained by playing fraud and it was not in the knowledge of the plaintiff, the plaintiff may institute the suit within three years from the date of the knowledge of the sale deed.

9) In the present case, admittedly, the petitioner is not a party to the sale deed. The claim of the petitioner is that his father (respondent no. 3) executed a sale deed dated 19.05.1986 in favour of respondent nos. 1 and 2. The petitioner / plaintiff has inherent rights over the property in dispute being ancestral property, therefore, when he came to know that respondent nos. 1 and 2 have succeeded in getting the sale deed executed in their favour by playing fraud on respondent no. 3 (father of the petitioner) or getting the sale deed impersonated, the cause of action arose to the petitioner/plaintiff to institute the suit.

10) Admittedly, the petitioner / plaintiff is not the recorded owner of the property in dispute. The sale deed dated 19.05.1986 is a registered document executed by respondent no. 3. Respondent no. 3 has never filed suit for cancellation of sale deed alleging that respondent nos. 1 and 2 by playing fraud upon him or by impersonation have succeeded in getting the sale deed executed in their favour. The best person to say that the sale deed executed in favour of respondent nos. 1 and 2 is based on fraud is the respondent no. 3 and not the petitioner / plaintiff.

11) The provisions contained in Section 17 and Order 7 Rule 6 of CPC are not applicable in the present case as the defendants / respondents nos. 1 and 2 have not played fraud upon the petitioner / plaintiff. Since the provisions of Section 5 in view of Section 3 of the Limitation Act does not apply in institution of a suit, the learned trial court rightly rejected the application for condonation of delay and rightly affirmed by the revisional court.

12) Findings in this regard recorded by the learned Appellate Court are based on

the material evidence available on record. Petitioner could not show any illegality or perversity in the impugned order passed by the courts below. This Court in exercise of its jurisdiction under Article 227 of the Constitution of India cannot act like an appellate court. Petitioner also failed to show any miscarriage of justice cause to him.

13) The jurisdiction under Article 227 of the Constitution of India is a limited jurisdiction. The Court can only interfere when the petitioner is able to successfully prove that miscarriage of justice has been done to them, while passing the impugned order.

14) Their Lordships of the Hon'ble Apex Court in the case of Anil Kumar Singh vs Vijay Pal Singh (2018) 12 SCC 584 has held as under:

"28. As mentioned above, the High Court should have seen that the scope of writ petition was confined to examine the question as to whether the Trial Court and Revision Court were justified in allowing the application filed by the plaintiff under Order XXIII Rule 1 of the Code and to decide this question, the High Court should have confined its inquiry to examine as to whether the requirements of Order XXIII Rule 1 were complied with or not but not beyond it.

29. There was, therefore, no justification on the part of the High Court to have travelled in the issues relating to the grant of injunction in relation to the suit land and give direction to the appellant (plaintiff) to place respondent no. 1 in possession of the suit land.

30. The High Court should have seen that the issue of grant of injunction was not the subject matter of the writ petition and, therefore, it had nothing to do with the question of withdrawal of the suit and secondly, the withdrawal of a suit was governed by Order XXIII Rule 1 of the Code whereas the injunction was governed by Order XXXIX Rules 1 and 2 of the Code. Both operate in different spheres. That apart, the defendant did not challenge the ex-parte grant of injunction order in appeal under Order XLIII Rule 1(r) and nor contested it before the Trial Court. It was only in these two forums, the issue of injunction could be considered by the Courts, but not in present proceedings which, as mentioned above, were confined only to the question of withdrawal of suit and nothing else."

15) The Hon'ble Apex Court in the case of Radhey Shayam and another vs Chhabi Nath and others (2015) 5 SCC 423 considering the nine-Judge Bench judgment in Naresh Shridhar Mirajkar vs State of Maharashtra AIR 1967 SC 1, has held that the remedy under Article 226 / 227 of the Constitution of India is not an appealable remedy and can be used only in a very exceptional cases when manifest miscarriage of justice has been occasioned and where there is some perversity in the order passed by the court.

16) In view of the facts and circumstances enumerated above, I do not find any perversity and illegality in the orders impugned. The writ petition fails and is dismissed. No order as to costs.