
(2023) 03 J&K CK 0001

In the Jammu And Kashmir High Court

Case No : C2A No. 01 Of 2014, Civil Miscellaneous Petition No. 67 Of 2014

Bashir Ahmad Dar

APPELLANT

Vs

Shameema And Others

RESPONDENT

Date of Decision : 01-03-2023

Acts Referred:

Citation : (2023) 03 J&K CK 0001

Hon'ble Judges : Vinod Chatterji Koul, J

Bench : Single Bench

Advocate : G. A. Lone, Mujeeb Indrabi, P. S. Ahmad

Judgement

Vinod Chatterji Koul, J

1. This Civil Second Appeal has been filed against the judgment dated 21.11.2013, passed by District Judge, Kulgam (for short "First Appellate Court"), dismissing the application seeking condonation of delay and as a consequence of which dismissing the appeal as well holding it as time barred.

2. Appellant therein had challenged the said decree on the grounds:

a) that the Judgment being patently illegal cryptic erroneous and as such not sustainable in the eyes of law.

b) that the judgment has been passed in hot haste without application of mind and is in flagrant violation of the laws of land.

c) that the court although has framed the issues but has not recorded the findings on the issues as was required under law. d).that the subordinate court has based his judgment on oral evidence without seeking the evidence of Patwari concerned regarding latest revenue record.

d). that the sale deed has not been challenged in the lis, as such, decree passed by the court is outcome of suppression of material facts by the other side.

3. The brief facts of the case are that plaintiff-respondent no.1 herein filed a civil

suit titled as Shameema v. Salam Thokar and another before the court of Munsiff Damhal Hanji Pora, Kulgam (for short "Trial Court") on 14.11.2005, praying for grant of permanent injunction against defendants, including present appellant – who had been defendant no.2 therein, restraining them from alienating land measuring 14 Kanals 05 Marlas falling under survey No.201 min situated at village Chugalpora District Kulgam, as the dispute between the parties is that the partition of the land has not been done between the co-owners and suit land being undivided between the parties. The defendants in their written statement have claimed that the land has been partitioned between the co-sharers and no portion of it is undivided and furthermore defendant no.1 has already transferred a portion of land to defendant no.2 before institution of suit and formal sale deed to that effect has been executed way back on 26.11.2008, as the sale deed stands registered by the Sub Registrar on 06.12.2008. The possession of land also stands delivered, and as a consequence of which the injunction suit is liable to be dismissed.

4. The Trial Court framed the following issues for consideration:

1. Whether plaintiff has been married as Khan-Nisheen daughter and after the death of her father she is in possession of the suit land is enjoying usufruct out of it. OPP

2. Whether plaintiff and defendant No. 1 are the co-owners and co-sharers of and suit land has not been partitioned between them. OPP

3. Whether suit land is in joint possession of plaintiff and defendants and has not been partitioned by revenue officers. OPP

4. Whether the defendant No. 1 has already transferred the same land to defendant No. 2 and defendant No. 2 is in possession of the suit land. OPD

5. Whether defendant No. 1 has offered to plaintiff to purchase the suit land and after her refusal defendant No. 1 has transferred the same to defendant No. 1. OPD

6. Whether plaintiff has no cause of action to file the suit. OPD

5. After framing of issues, parties were directed to lead evidence but defendants remained absent and their counsel did not appear on their behalf, so ex parte proceedings were initiated against the defendants on 17.10.2008, and plaintiff/respondent no.1 was directed to lead evidence in ex parte.

6. The Trial court while deciding the matter on 29.12.2012, observed that the suit land was in joint possession of plaintiff and defendant No.1 and was unpartitioned. All the witnesses are stated to have deposed that plaintiff had been married as Khana-Nisheen daughter and was in possession of her fathers' inherited property and the suit land was in joint possession of plaintiff and defendant No.1 and defendant No.1 was bent upon to alienate the suit land to defendant No.2 – appellant herein, who was also causing interference in the suit

land.

7. The suit was decreed in ex parte in favour of the plaintiff, thereby defendant No.1 was permanently restrained from alienating the suit land to defendant No.2 or any other person till the suit land was partitioned by revenue authority and defendant No.2 was also permanently restrained not to cause any sort of interference in the suit land.

8. Against Trial Court judgement dated 29.12.2012, appellant preferred an Appeal before First Appellate Court. As there was delay in filing the appeal, an application for condoning delay was also preferred. Both were dismissed vide impugned judgement dated 21.11.2013.

9. Against the Trial court and First Appellate court, appellant has filed this Civil Second Appeal. This Court on 19.04.2017, has framed the following substantial questions of law:

1) Whether the seeker of condonation of delay was required to explain the period of his absence during the trial of the suit.

2) Whether the condonation of delay would promote substantial justice.

3) Whether in the peculiar facts and circumstances the decree for permanent injunction could be passed.

10. Heard learned counsel for the parties and perused the record on file.

11. The first substantial question of law is: "whether the seeker of condonation of delay was required to explain the period of his absence during the trial of the suit", is

12. Appellant-Bashir Ahmad Dar was aggrieved of ex parte decree dated 29.12.2012, so he filed an appeal. Since there was delay of 24 days in filing of appeal, he moved an application (File No.03/Civil Misc.), along with the appeal on 24.04.2013 seeking condoning of the delay in filing the appeal, on the grounds which for facility of reference are reproduced hereunder:

"1. That the suit captioned Shameema v/s Salam Thokar and anr was filed before the Ld. Munsiff D.H. Pora on 14.11.2005 and the applicant/appellant was arrayed as defendant no.2 in the said case.

2. That the appellant/applicant has purchased land measuring

15 marlas by way of registered sale deed registered on 06.12.2008, out of the suit land and obtained possession thereof from defendant no.1.

3. That although applicant had signed the vakalat nama in the case but the defendant no.1 has taken the full responsibility to prosecute the case and maintain regular contact with the counsel resultantly applicant on the assurance of the defendant no. 1 could not develop full contact with his counsel.

4. That in the month of December, 2012 applicant approached his counsel Mr. A. M. Fayaz who informed the applicant about the ex-parte proceedings initiated in the case against defendants but still assured the applicant of better results in favour of the defendants.

5. That in the last week of December, 2012, the applicant was informed that the file is lying with the presiding officer for writing judgment and since then applicant has been approaching the subordinate court to know the final result of the case but applicant was always told that the judgment in the case is still incomplete. It is on 17.04.2013, that the applicant was informed to apply for the certified copy of the judgment and get the same. Applicant applied for the copy and obtained the copy of the judgment on 18.04.2014.

6. That on 19.04.2013, the applicant could not due to holiday consult his counsel at Kulgam on 20.04.2013, due to lawyers strike applicant again could not seek legal guidance and was told by the counsel to meet on Monday i.e. on 22.04.2013. Applicant without any delay got the appeal drafted with the instant application for seeking condonation of delay and the same is submitted for the kind consideration of this court.

7. That the delay caused in filing this appeal has been sufficiently explained and it was due to non supply of the copy of judgment to the applicant that the appeal could not be presented well in time and as such the delay caused in the matter needs to be condoned in the interest of justice otherwise applicant would suffer irreparable loss.

.....

In the premises, it is therefore humbly prayed that the instant application may be allowed, delay caused in the matter may be condoned and the appeal accompanied with this application be registered and taken up for just consideration and disposed under law."

13. The reasons given in the application seeking condonation of delay for filing the appeal are that in the month of December 2012, when appellant approached his counsel he was informed that ex parte proceedings were initiated against him and thereafter he was informed that the file was lying with the Presiding Officer for writing of judgment and since then he had been approaching the Trial Court, but could not know about the final result of the case and he was told that judgment was still incomplete. Thereafter on 17.04.2013, he was informed by his counsel to apply for the certified copy of the judgment for which he applied on 18.04.2013.

14. The appeal was to be filed within a period of 90 days from the date of passing of the judgment dated 29.12.2012 and the limitation would have expired on 30.03.2013. Application seeking condonation of delay along with the appeal was filed by appellant on 24.04.2013. Thus, there was delay of 24 days. The appellant has given explanation in the application regarding delay.

15. The First Appellate court, while dealing with the application seeking condonation of delay, has observed that initially appellant had caused appearance before the Trial Court on 14.05.2012, and thereafter absented as a result whereof ex parte proceedings were initiated against him and that in the application appellant had not rendered any explanation to convince the court as regards the circumstances that prevented him from remaining absent after filing written statement on 14.05.2008, till filing of the appeal and thus failed to explain such inordinate delay.

First Appellate Court has also observed that appellant could not convince it as to why appellant had not made any effort to know about fate of the case in which he had filed written statement, continuously for a period of seven years and what made him to prefer an appeal against the ex parte decree.

First Appellate Court has taken into account the absence of appellant before the Trial court as according to First Appellate Court the appellant has not given sufficient reasons that prevented him to appear before Trial Court during pendency of the civil suit till it culminated in passing of ex parte decree.

First Appellate Court should have been alive to the position that an application seeking condonation of delay is to be decided while taking liberal view subject to explanation given by appellant more particularly when even there is not any inordinate delay. The appellant was to explain the delay which occasioned in not filing the appeal within the limitation period after passing of the decree and judgment. He was required to explain the period of delay. However, the First Appellate court has passed order impugned rejecting the application by holding that no sufficient cause has been shown by the appellant for his absence before the Trial court for the period ex parte proceedings were initiated against him till passing of the judgment.

The observation and finding of the First Appellate Court are erroneous as the law provides that delay is to be explained for the period beyond the period of limitation prescribed. The limitation in this case would run from the date of passing of the decree and not from any date prior to passing of the same. The applicant-petitioner, therefore, was required to explain that what occasioned after passing of the decree, which is explained in the application supported by an affidavit. The First Appellate Court instead of limiting consideration to that period has gone beyond the provisions and has taken into account the period of absence before the Trial court. The finding of the First Appellate Court thus being perverse, which gives rise to the first substantial question framed above, which is answered as under:

"The seeker of condonation of delay is not required to explain the period of his absence during the trial, what is required is the period of delay which runs as per the Limitation Act and in this case the period of limitation had started from the date of decree, therefore, any delay after explaining of such limitation was only to be explained by the appellant.

Thus, while deciding the substantial question of law, the impugned order of the Appellate court dated 21.11.2013 is set aside.

Rest of questions framed are not required to be considered.”

16. The application along with the appeal shall be remanded back to First Appellate court, who shall decide the application seeking condonation of delay in filing the appeal strictly in accordance with law.

17. Parties to appear before that First Appellate court on 18.03.2023.

18. Copy be sent down along with record.