

(2008) 09 J&K CK 0001
In the Jammu And Kashmir High Court

J and K State Board of School Education	APPELLANT
Vs	
Pervaiz A. Koul.	RESPONDENT

Date of Decision : 24-09-2008

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : (2008) 3 JKJ 405

Hon'ble Judges : Sunil Hali, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sunil Hali, J.—Present revision petition is directed against the order passed by 2nd Additional Munsiff Srinagar on an application seeking condonation of delay for setting aside an ex-parte decree. A civil suit came to be filed by the respondent in the year 1992, for correcting his date of birth from 9.3.59 to 12.2.62. It is alleged in the plaint that the date of birth recorded by BOSE was wrong. The petitioners/plaintiffs date of birth was 12.2.62. This plea of the plaintiff is based on a certificate of birth issued by Municipal Authorities in October 1991. It is also contended that the date of birth of the petitioner and of his elder brother was same that is 9.3.59, whereas two brothers were born on two different dates. It is also averred in the plaint that the school authorities had wrongly recorded the date of birth of the plaintiff as 9.3.59 instead of 12.2.62. The plaintiff had objected this at that point of time, incorrect date of birth was recorded. The plaintiff has stated that cause of action as accrued to him some time back without disclosing the date and the time. He is also stated that he could not pursue the matter as he remained busy in his educational

career.

2. The defendant was served through registered AD Cover on 29.12.92, but failed to appear before the court despite service. An ex-parte

proceedings were initiated on 15.2.93. The petitioner defendant appeared through his counsel and filed an application on 7.9.94. for setting aside

ex-parte decree. This application was not pursued by the learned Counsel for the petitioner. This application also came to be dismissed. The

petitioner had engaged one Agha Humayun as its counsel. It is averred that the fees was paid to the said counsel and he was provided with all the

information regarding the case. The said advocate remained irregular in the proceedings of the case, and it is because of his negligence that the ex-

parte proceedings were initiated. The applicant board engaged another lawyer Shri Pervaiz A. Qazi to defend the case. He was also provided with

all the material to defend the case and was paid the fees to conduct the said case. Since both the advocates failed to appear the ex-parte decree

came to be passed on 20.11.96. The petitioner filed an application for setting aside ex-parte decree alongwith an application for seeking

condonation of delay in filing the aforementioned application. It was averred in the application that due to the negligence of the counsel for

petitioners the ex-parte decree has been passed. It is further stated that the counsel for the petitioners who were given all the record and paid their

counsel fees were negligent and did not inform the petitioners. That this application seeking condonation of delay came to be decided by the trial

court on 15.5.06. Consequently application for setting aside ex-parte decree was also dismissed. It is against this order revision petition has been

filed.

3. I have heard learned Counsel for the parties and peruse the record. The petitioner has stated that due to the negligence of the counsel who were

engaged to defend the case this ex-parte decree has been passed. The petitioner has further stated that the counsel did not inform the petitioner, as

a result of which the ex-parte decree has been passed. The plaint reveals that basis of the suit are frivolous and concocted. The grounds taken in

the plaint does not disclose as to when the cause of action as accrued to the plaintiff respondent. The plaint merely states that the cause of action

has accrued to the plaintiff sometime back without disclosing the date, time and

year. It is also admitted by the plaintiff that he was aware that the BOSE authorities had wrongly recorded the date of birth of the plaintiff respondent as 1959 instead of 1962 and the said knowledge was available to the plaintiff according to the plaint on the date when the date of birth was recorded by school authorities. According to the learned Counsel for the petitioner, these are some of the very important issues which are required to be contested by the defendant in the suit.

4. I have heard the learned Counsel and peruse the record. There is no dispute that the petitioner board remained complacent in the matter of defending the suit. Notice had been served to the board who have been casual and careless in pursuing the matter. No doubt after the service of the notice board engaged one Agha Humayun who according to the board officials was given all the material and paid his fees. Despite this, he did not appear. Another counsel Pervaiz A. Qazi was engaged and was provided all the material in the case and paid his fees. He also was casual and negligent and did not pursue the matter. As a result of which the ex-parte decree came to be passed against the petitioners. This conduct of the advocate's ex-facie tantamount to professional misconduct. At the same time the board has not shown any eagerness to pursue the matter as they have remained complacent in respect of the proceedings.

5. In examining the import of Section 5 of "Limitation Act", it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree holder to treat decree as binding between the parties and this legal right which has accrued to the decree holder by lapse of time should not be light heartedly disturbed. The other considerations which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the court to condone the delay only to advance the cause of justice.

6. Section 5 gives court a discretion to be exercised in the way in which judicial power and judicial discretion ought to be exercised. The word sufficient cause should receive a liberal consideration so as to advance substantial justice.

7. There is no doubt left in the mind of the court that the petitioners have been negligent in pursuing their matter even though such a negligence is

attributed to the counsel they had engaged, but at the same time this Court cannot shut its eyes towards the nature of the suit been filed by the plaintiff before the trial court. Correction of date of birth necessarily implies extension in service and this cannot be rectified or corrected unless there is substantial material on the basis of which such a correction is sought. Scanning through the contents of the plaint, there are issues which are required to be contested and which have wide ramification in case it goes uncontested. In my opinion one has to harmonize the exercise of judicial power with judicial discretion. It has to be done for advancing the cause of justice. In the present case basis of the suit is that school had wrongly recorded the date of birth of the plaintiff as 9.3.59 instead of 12.2.62. Plaintiff does not disclose as to when the cause of action accrued to the plaintiff. It also does not disclose when had it come to the knowledge of the plaintiff that his date of birth was wrongly shown. These are some of the issues which are required to be contested and allowing it to go uncontested will have far reaching consequences.

8. I, therefore, set aside the order of the trial court and allow this petition as a consequence thereof the ex-parte decree shall stand set aside and

the defendant petitioner will be permitted to file his written statement and contest the suit.

9. By therefore setting aside the order of the trial court and by allowing this revision petition the ex-parte decree shall stand set aside and the

defendant petitioner shall be permitted to file his written statement and contest the suit. The trial court is expected to dispose the suit within a period

of one year. This is done subject to the payment of Rs. 5000/- as cost to be paid to the respondent plaintiff before. I was pained to see the

conduct of the advocate's been engaged by the petitioner. It is observed by the courts that many cases are lost by the state and such authorities,

because of the negligence of the counsel. Such a trend has to be arrested and in case any negligence is attributable to the counsel the same requires

to be enquired by authorities concerned. The petitioners at liberty to seek refund of the fees from the counsel who have been engaged and make an

appropriate application against such counsel for their alleged misconduct before the appropriate authority.