

(1994) 11 J&K CK 0002
In the Jammu And Kashmir High Court
Case No : CSA No. 17/90

Jammu and Kashmir State Board of School Education	APPELLANT
Vs	
Mohd.Sharief	RESPONDENT

Date of Decision : 08-11-1994

Acts Referred:

Jammu and Kashmir Limitation Act, 1995 — Article 167, 3

Citation : (1995) SriLJ 158

Hon'ble Judges : V.K.Gupta, J

Bench : Single Bench

Advocate : Parmod Kohli, D.S.Thakur, B.S.Bali , Advocates appearing for the Parties

Judgement

1. This appeal is being decided on the limited substantial question of law formulated in para(g) of the memorandum of appeal relating to the limitation aspect of the suit filed by the respondent and the interpretation to be given to Article 67 to the Schedule of Limitation Act and section 3 of Limitation Act. The question of law formulated may be reproduced as under:
(g). Whether the suit for declaration based entirely on the ground of mistake is governed by Art. 67 of the Limitation Act and consequently the present suit was barred by limitation".
2. The other questions formulated need not to be determined by us because the appeal is being disposed of only on the aforesaid question of law.
3. The brief facts giving rise to the filing of this appeal by the Jammu and Kashmir State Board of School Education are as under.
4. The respondent filed a suit for declaration to the effect that his date of birth be declared to be 12.9.1995 {Bikrami} corresponding to 24.12.1939 A.D. and that accordingly mandatory injunction be issued directing

the defendant in the suit (appellant herein) to make necessary correction in the record of the plaintiff so as to give him the benefit of the changed date of birth. The plaintiff's case before the trial court was that he was a permanent resident of Jammu and Kashmir and was born on 12.9.1995 Bikrami corresponding to 24.12; 1939 A.D. He was admitted in Government Primary School, Chandak, now Government, High School. After completing his primary education from the then Primary School, Chandak, the plaintiff took admission in the Government High School, Poonch, Now Government Higher Secondary School, Poonch. When the plaintiff got admission in the Government High School, Poonch, the date of birth of the plaintiff was recorded as 12.9.1995 (Bikrami). In the year 1959 the plaintiff had to appear in the Matriculation Examination which was to be conducted by the then Jammu and Kashmir University (appellant herein as successor to the then Jammu and Kashmir University). The application form for entry in the Examination was filled by the School Authorities in which the date of birth of plaintiff was recorded as 12.9.1995. The plaintiff appeared in the Matriculation Examination as a regular candidate under Roll No. 1844 in the year 1959 and passed the said examination. After completing his Matriculation, the plaintiff joined the Government service in the Revenue Department of Jammu and Kashmir State as Patwari and by dint of his hard work, he rose to the present position of Tehsildar Agrarian Reforms.

5. What comes now is perhaps the most important part of the facts of the present case. In para5 of the plaint, he has mentioned that in the year 1981, all the employees serving in the Jammu and Kashmir State were asked by the concerned departments to submit their original record regarding the date of birth for verification of the same as recorded in the Service Book. The plaintiff when obtained the relevant record found that the date of birth of the plaintiff was recorded as 12.9.1995 (Bikrimi) but when the same was converted into Christian era, the concerned authorities had recorded the same as 24.12.1936 instead of 24.12.1939. It shall be advantageous to reproduce the whole of para5 of the plaint which reads thus:

(5). That in the year 1981 all the employees serving in the State of Jammu and Kashmir were asked by the concerned departments to submit their

original record regarding the date of birth for verification of the same as recorded in the Service Book. The plaintiff when obtained the relevant

record found that the date of birth of the plaintiff was recorded as 12.9.1995 Bikrami but when the same was converted into Christian era the

concerned authorities had recorded the same as 24.12.1936 instead of 24.12.1939. This conversion appeared to have been inadvertently and

wrongly made in the service record of the plaintiff as well as in the Matriculation Certificate of the plaintiff issued by the then Jammu and Kashmir

University. The record of the then Jammu and Kashmir University has since been taken over by the defendant and the defendant is only competent

to make such correct, [SIC] as such the plaintiff applied to the defendant for making correction/rectification of his date of birth as recorded in the

Christian Era. The plaintiff since the year 1981 till date had been approaching the defendant for the rectification of the mistake but the defendant

had been avoiding the same. Ultimately the plaintiff served a notice through his advocate, Shri Permod Kohli, Advocate, on 6.2.1985 to the

defendant. The notice was received by the defendant but the defendant vide its order dated 6.6.1985 had refused to make necessary correction in

the date of birth on the false plea that the Board has rejected the request of the plaintiff being timebarred. The letter in original is annexed hereto as

Annexure P2. The said letter of rejection of the request of the plaintiff is illegal, arbitrary, without any basis and against all the canons of justice

6. It appears that the trial court proceeded *ex parte* against the defendant in the suit on the basis of some report about the service of summons upon

the defendant. During the course of trial, some evidence came to be produced before the trial court, but interestingly none of it related to either

production of record from the Board's office of School Education nor was the Matriculation Certificate produced in the trial court nor did the

plaintiff make any attempt to summon any relevant form, much less the form alleged to have been filled up in the year 1959 from the Board's office

nor was any attempt made to establish before the trial court that such record was either not traceable or was not available. Be that as it may.

On the basis of available evidence the trial court passed the decree in favour of the plaintiff in the terms indicated in the plaint itself. The decree as

noticed above was passed *ex parte* against the defendant. Because the evidence recorded by the trial court is wholly irrelevant for the purpose of

present 'appeal, I need not discuss any part of it.

7. Because the decree was passed *ex parte* against the defendant, it preferred a time barred appeal before the 1st. Appellate Court, 2nd Additional

District Judge, Jammu. For the reasons stated in the judgment of the lower appellate court, the appeal was dismissed as time barred because the

lower appellate court did not agree with the contentions of the appellant that it had sufficient cause warranting the condonation of delay in filing the

appeal. It is under these circumstances that the appellant has preferred civil second appeal in this court.

Section 3 of the Limitation Act reads thus:

3. Dismissal of suits, etc., instituted, etc. after period of limitation :Subject to the provisions contained in sections 4 to 25 (inclusive), every suit

instituted, appeal preferred, and application made, after the period of limitation prescribed therefor by the first Schedule shall be dismissed,

although limitation has not been set up as a defence.

Explanation: A suit is instituted in ordinary cases, when the plaint is presented to the proper officer; in the case of pauper, when his application for

leave to sue as a pauper is made; and, 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

8. Article 67 of the Schedule to Limitation Act relating to the grant of relief on the ground of mistake prescribes three years period of Limitation

and the time from which the period begins to run is relatable to the discovery of the mistake by the plaintiff. If there is any dispute regarding the

applicability of Article 67, no one can dispute that the residuary article, i.e. Article 181 shall in any case be squarely applicable which also

prescribes three years as period of limitation for such like suits.

9. The entire case of plaintiff is based upon an edifice built in para5 of the plaint in which it has been stated that the plaintiff discovered the mistake

in the year 1981, when he came to learn that the date of birth was wrongly recorded in the relevant service record. To appreciate the averments

made in para5 of the plaint, one cannot ignore the averments made in para11 of the plaint which directly relate to the accrual of cause of action to

the plaintiff. Para11 may thus be reproduced as under:

(H). That the cause of action accrued to the plaintiff firstly when the wrong entry was made in the Matriculation Certificate and the Service book

of the plaintiff and in the year 1981 when the plaintiff came to know of the wrong entry and finally in the month of June, 1985 when the defendant

issued Annexure P2 with a plea that the request of the plaintiff was time barred and as such rejected the same"".

10. It is, therefore, the admitted case of plaintiff that he discovered the mistake in the relevant record regarding his date of birth in the year 1981.

By setting up this case, the plaintiff appears to be unaware of the difficulty facing him because he has not explained as to how and in what manner

did he escape discovering the mistake in the Matriculation Certificate about the date of birth having been recorded as 24.12.1936. Plaintiff has not

at any place in the plaint averred that he was not aware of such recording in the Matriculation Certificate which was admittedly issued in the year

1959, which also was admittedly the basis of his entering into government service. The plaintiff has also not setup any case as to whether at any

stage subsequent to 1959 did the Matriculation Certificate came to be lost or misplaced or that the plaintiff did not have an opportunity to have a

look at it for so long as almost 22 years. If therefore, the Matriculation certificate issued in 1959 was all along in possession of the plaintiff, it can

safely be presumed that for this entire period, right from 1959, the plaintiff had full knowledge about his date of birth having been recorded as

24.12.1936 in the Matriculation certificate and yet, for totally unexplained reasons, he did not raise his little finger till 1981, when for the first time

he appeared to have made some attempt in the direction of changing his date of birth. If, therefore, one reads the averments in para5 and Para11

of the plaint together, one is totally convinced that the cause of action, on the facts admittedly averred by the plaintiff in the plaint accrued to him in

1959 when the matriculation certificate was issued and therefore, on that basis limitation to file any suit for change in the date of birth of the plaintiff

should have started from 1959 itself, relatable to the period of limitation prescribed for filing the suit. Even though plaintiff appears to have

deliberately used a vague expression, viz, ""relevant record"" in para5 of the plaint, one tends to take a view that by ""relevant record"", the plaintiff

must have meant matriculation certificate. There is no other meaning which can be attached to this expression especially when the plaintiff did not

provide any details about any communication sent by the government allegedly in 1981 nor did he place any document on record to suggest that he

in fact ever received any communication from the government. To my mind it appears that somewhere around early eighties, the plaintiff developed

a temptation to take a chance in his attempt to get his date of birth changed so that he could serve for a longer period of three years. The attempt

had succeeded in the two lower courts below, but unfortunately for him, he has not been able to achieve the desired result in this court.

11. Mr. Kohli learned counsel appearing for the respondent plaintiff has strongly urged that the limitation is a mixed question of fact and law. He

also urged and very vehemently, that in civil second appeals, this court should not reappreciate or reappraise the evidence led in the case. His third

submission is that the court should not consider the question of limitation at all because the appellant has raised it for the very first time in the civil

2nd Appeal. In support of these three submissions, he has relied upon the following judgments:

1. (1990) 4 SCC 15
2. AIR 1990 SC 1973
3. (1989) 3 SCC 287
4. (1993) SCC Suppl. 1
5. 1990 KLJ 63
6. 1990 KLJ 101

12. First of all I have to clearly observe that all these judgments are wholly distinguishable and none of them is applicable to the issue involved in

this case. In so far as the contentions regarding the appreciating, reappreciating or reappraising the evidence or the facts are concerned, I have

already indicated that I am not going to even discuss the evidence recorded during the trial by the trial court because I am dismissing the suit only

on the question of limitation and on no other question. In so far as Mr. Kohli's twin submission regarding the limitation not having been set up as a

ground by the appellant and it being a mixed question of fact and law, I can simply deal with it by observing that in terms of clear mandate

prescribed in section 3 of Limitation Act, every suit if time barred has to be dismissed even if limitation is not set up as a defence by the parties to

the suit. That apart, as the chronology of events reproduced earlier in the judgment indicates the appellant did not have any possible opportunity to set up the limitation as a defence to the suit because the decree was passed *ex parte* against the appellant and it is only in the written statements filed by the defendants in the suits that all pleas, including those relating to limitation etc. controverting the averments by the plaintiff are raised. All these things apart, this court cannot act as a silent or mute spectator to a stark factual reality, when on the very face of plaint, the suit is patently time barred. A very strange attempt was made to argue that the limitation being a mixed question of fact and law should be left open and that the court should not touch such questions in civil second appeals. The expression ""mixed question of fact and law"" is basically a misnomer in a case when the facts by themselves unambiguously pleaded, averred and admitted by a party in its own pleadings, (plaint in this case) lead the court to draw the only available conclusion that, applying these facts, the suit is time barred. I am not disputing any fact while disposing of this appeal as pleaded by the plaintiff in the plaint. I am disposing of this appeal on the very basis of these admitted facts. I am neither controverting the facts nor importing any facts either from the source of appellant or from any other source. A reference to the averments in the plaint as reflected in paras 5 and 11 clearly establishes that it is on the basis of facts averred by the plaintiff, that the suit is being disposed of. Where then is the question of their being any mixed question of fact or law?

13, Based on the aforesaid discussion I hold that the suit filed by the plaintiff, viewed from any angle was patently time barred. The trial court should have considered the question of limitation even without there being any defence set up by the defendant, especially when it was dealing with the suit *ex parte*. A graver error appears to have been committed by the 1st. Appellate court in ignoring the facts involved in the case and dismissing the first appeal of appellant as time barred.

I had an option of remanding the suit to the trial court for retrial because the decree was passed *ex parte*. In normal circumstances, remand to the trial court might have been a desired course of action, but in the present case, because I have held the suit to be patently time barred on the basis of averred, pleaded and admitted facts by the plaintiff himself, remanding the suit

to the trial court for retrial remanding the suit to the trial court for

retrial shall be an exercise in futility because the plaintiff cannot improve upon his case in the trial court from what he has pleaded in the plaint and

even if the suit is remanded, ultimately by the trial court also, it has to be dismissed as time barred.

14. The appeal accordingly is allowed. The decree and judgment impugned in the appeal is set aside and the suit of plaintiff is dismissed. No costs.