

(2003) 03 J&K CK 0031

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 32 of 2002

Jehlum Exporters Pvt. Ltd.

APPELLANT

Vs

Div. Manager Oriental Ins. Co.

RESPONDENT

Date of Decision : 25-03-2003

Acts Referred:

Jammu and Kashmir Civil Procedure Code, 1977 — Order 17 Rule 3, Order 9 Rule 13

Citation : (2003) 2 JKJ 50

Hon'ble Judges : Permod Kohli, J

Bench : Single Bench

Advocate : A.M. Khan, for the Appellant; N.H. Khuru, for the Respondent

Final Decision : Dismissed

Judgement

Permod Kohli, J.—Validity of orders passed by the civil court has been questioned through the medium of present writ petition by invoking

jurisdiction of this court under Article 226 of the Constitution of India.

2. Brief facts leading to the passing of the orders impugned in the petition are summarized as under :

3. Petitioner insured its go-down with the respondent Insurance Company. A burglary is said to have occurred on 11.09.1984 and a F.I.R. No.

284/1984 was registered with police station Safakadal. Insurance company is said to have appointed some surveyor. The respondent company,

however, repudiated the claim of the petitioner. Consequently, the petitioner filed a civil suit for recovery of a sum of Rs. 3,09,220.66. The suit

was instituted in High Court which was transferred to the court of 2nd Additional District-Judge, Srinagar. The defendant-Insurance Company,

after causing its appearance in the court, absented and the trial court initiated ex-parte proceedings and the ex-parte decree dated 12.6.1996 was

passed in favour of the petitioner and against the respondent-Insurance company. An application for setting aside ex-parte decree under Order 9

Rule 13 C.P.C., was filed by the Insurance Company before the trial court. Said application remained pending for considerable period and was

dismissed for default of appearance on behalf of the Insurance Company vide order dated 29.09.2001. In the meanwhile, the petitioner put the ex-

parte decree into execution and the executing court issued direction ordering attachment of some amount of the Insurance Company lying with the

Jammu and Kashmir Bank, Badamibagh. The order of attachment and subsequent direction keeping the decretal amount in the court became

subject matter of Revision Petition No. 12/1997. The Revision petition however came to be dismissed on 4.09.1997. While execution proceedings

were pending, respondent-Insurance company applied for restoration of application dismissed for default of appearance on 29.09.2001. This

restoration application was filed by the counsel for the Insurance Company on the same date. During the pendency of restoration application, trial

court passed order dated 23.10.2001 keeping the order dated 20.10.2001 passed by the execution Court in abeyance. The restoration

application was also allowed by the trial court vide order dated 29.12.2001. The petitioner instead of challenging the orders dated 23.10.2001

and 29.12.2001 by way of appeal/revision before the Competent forum, filed present writ petition on 28.01.2002, i.e., after a period of more than

one year.

4. Two important questions arise in the present petition.

(1) Whether the petitioner is entitled to invoke writ jurisdiction of this court to challenge the orders passed by the civil court in civil proceedings

pending before the trial court;

(2) Whether the application under Order 9 Rule 13 C.P.C. seeking setting aside of an ex-parte decree is competent.

5. The second question arose because the counsel for the petitioner has vehemently argued before me that the order dated 12.06.1996 whereby

an ex-parte decree has been passed by the trial court can only be assailed in appeal and petition under Order 9 Rule 13 C.P.C. for setting side the

ex-parte decree is not competent and the trial court has acted without jurisdiction by taking cognizance of the said petition under Order 9 Rule 13

C.P.C.

6. Learned counsel for the petitioner has argued that where the orders of the court below are without jurisdiction and efficacious remedy is not

available, writ jurisdiction of this court under Article 226 can be conveniently invoked. He has further submitted that order of restoration of

application dismissed for default of appearance as also the impugned order dated 23.10.2001 whereby the order of the executing court was kept

in abeyance, are not appealable orders as these orders do not constitute decree and are even not listed as appealable orders under Order 43

C.P.C. According to the learned counsel, the only remedy available to the petitioner was by way of Revision under Order 115 of C.P.C and since

the scope of revision is limited, the said remedy of revision cannot be said to be adequate and efficacious remedy under law. Therefore, the writ

petition is the appropriate and proper remedy under the facts and circumstances of the case.

7. Mr. Khuru, learned counsel for the respondent on the other hand has disputed this proposition and contended that the orders of civil court

cannot be challenged by invoking writ jurisdiction particularly when the writ petitioner had has an alternative remedy of filing revision petition before

this Court.

8. It is not disputed that the writ petitioner was entitled to invoke revisional jurisdiction of this court to challenge orders impugned in the writ

petition. The fact that writ petitioner's challenge against the impugned orders is that the same are without jurisdiction and incompetent, this question

can very well be agitated before the revisional court as the High Court in exercise of its revisional Jurisdiction is competent to consider the question

of legality material irregularity as also the exercise or non exercise of jurisdiction by the Subordinate courts. Petitioner having not invoked revisional

jurisdiction which in any case was the appropriate remedy available to him, present petition is not maintainable. Validity or correctness of an order

of the civil court can only be considered by a superior or court if a statutory remedy is provided under law. Right of revision is as good a right as

right of appeal. Powers of revision are virtually the powers of appeal with the superior court because it is the superior court which has been

authorized under law to rectify the errors of law or fact of Subordinate courts. All

powers of the superior court are virtually powers of the appeal, though the statute may define the extent of powers and the modes of the exercise thereof. Therefore, the contention of Mr. Khan, that the orders impugned being not appealable and only revisional power could be invoked which is not efficacious he has invoked the writ Jurisdiction cannot be accepted.

9. The Apex Court in various judgments has held that where alternative remedy that too a statutory one, is available, High Court should not invoke its writ Jurisdiction to rectify the errors, be that of law or facts.

10. In 2001 (2) SCC 160, the Apex Court has held that existence of alternative remedy does not effect the jurisdiction of writ court, but it would be a good ground for not entertaining the petition.

11. Mr. Khan, learned counsel for the Petitioner further submitted that the writ petition, having been admitted, cannot be dismissed at this stage.

He relies upon a judgment of the Apex Court reported in Ganpat Roy and Others Vs. Additional District Magistrate and Others, . In the case

before the Apex Court, the tenant had no statutory remedy available to him under the statute in question and the writ petition was held to be maintainable. It is not the position in the present case.

12. Even if it is assumed that the petitioner could invoke the writ jurisdiction of this court, since remedy of revision was available to him, the petition under Article 226 is not maintainable.

13. As far as order dated 23.10.2001 is concerned, same is interim in nature, the court has only kept in abeyance an earlier order pending

adjudication of petition under Order 9 Rule 13 C.P.C, the order does not decide the rights of the parties in any manner hence cannot be assailed at this stage.

14. Another reason for not exercising extraordinary jurisdiction of this court is that the orders impugned were passed in the year 2001 whereas the

present writ petition came to be filed after a lapse of one year. The petition cannot be allowed to take benefit of his own lapses. He having not

availed remedy of revision available to him under law, cannot be permitted to invoke extraordinary writ jurisdiction of this court after a lapse of one

year when the orders impugned in the petition have attained finality. The revision

petition is accordingly held not to be maintainable.

15. Coming to the second question, the contention of Mr. Khan is that the judgment and decree dated 12-06-1996 has been passed on merits and

the only remedy available to the judgment debtor was appeal. He has further submitted that the judgment dated 12.6.1996 has been passed in

exercise of jurisdiction/powers under Order 17 Rule 3 C.P.C., as the trial court has proceeded ex-parte not merely because the defendant was

absent but also the defendant had not complied its order. In order to appreciate the contention of the petitioner, it is relevant to refer to the

judgment of the trial court.

This is a suit for the recovery of Rs. 3,09,220.60 along with interest and costs. As the defendant did not appear to contest the suit, ex-parte

proceedings were initiated against him on 3.2.1996.

16. Perusal of the judgment demonstrate that the trial court initiated ex-parte proceeding against the defendant. Perusal of the judgment

demonstrate that the trial court initiated ex-parte proceedings against the defendant on account of its failure to appear before the court and

proceeded to decide the suit. The trial court did not exercise powers under Orders 17 Rule 3 C.P.C. for alleged non-compliance of any order of

the court. The order of the trial court proceeding ex-parte is squarely covered under Order 9 Rule 6 C.P.C. and one of the remedy available to the

respondent was under Order 9 Rule 13 C.P.C. Though an appeal was also competent against the ex-parte decree respondent having availed

remedy under Order 9 Rule 13 C.P.C., the same cannot be said to be without jurisdiction or incompetent. In any case the trial court has yet to

decide the petition under Order 9 Rule 13 C.P.C. which is still pending. The trial court has only restored the said application dismissed for default

of appearance for which restoration application was referred on the same date.

17. Learned counsel for the petitioner has raised another objection regarding competence of the counsel for the respondent-company, Mr. Khuru

to file the restoration application. According to him, restoration application was not accompanied with a power of attorney (wakalat nama) in his

favour authorizing him to file the restoration application.

18. I have considered the record of the trial court. Mr. Khuru had been appearing on behalf of Insurance Company and a power of attorney in his

favour is on the record of the trial court's file. His authority was never revoked by the client nor he himself withdrew from the case at any stage and

continue to represent the Insurance Company all along. Under these circumstances, it cannot be said that Mr. Khuru had no authority to file

restoration application. The trial court has considered this issue while passing impugned order dated 29.12.2001.

19. I do not find any infirmity in the impugned orders and on this count also the writ petition fails, which is accordingly dismissed with no order as

to costs.