

(2019) 07 J&K CK 0017
In the Jammu And Kashmir High Court
Case No : COD No. 31 Of 2016

Mohammad Maqbool Sheikh & Ors

APPELLANT

Vs

Salam Teli & Ors

RESPONDENT

Date of Decision : 12-07-2019

Acts Referred:

Code of Civil Procedure, 1908 — Section 107
Jammu And Kashmir Agrarian Reforms Act 1976 — Section 19, 25
Constitution Of Jammu And Kashmir, 1956 — Section 104

Citation : (2019) 07 J&K CK 0017

Hon'ble Judges : Rashid Ali Dar, J

Bench : Single Bench

Advocate : Rouf Parray, Hilal Ahmad Wani

Judgement

Rashid Ali Dar, J

1. By the medium of instant application, the applicants/appellants have sought condonation of delay in filing the appeal against the order passed by

learned Principal District Judge, Budgam, dated 09.07.2015 in the appeal titled

Ab. Salam Teli and others Vs. Mohammad Maqbool Sheikh andn

others.

2. From the perusal of the records it appears that the applicants/appellants had filed a suit for declaration, possession and permanent injunction in

respect of land measuring 2 kanal 10 marlas under Survey No.1338 situated at Wathora Tehsil Chadoora which was allowed in terms of judgment and

decree dated 15.07.2014. Against the said judgment and decree, the defendants (respondent herein) filed civil 1st appeal before the Court of Principal

District Judge, Budgam, which was allowed pursuant to judgement dated 09.07.2015, impugned herein.

3. I have heard learned counsel for the parties and have also gone through the application, in terms of which the delay is sought to be

condoned I attest to the accuracy and integrity of this document in filing the appeal, along with the objections filed by respondents to the application.

Although the applicants/appellants have contended that there were good reasons for condoning the delay in view of the grounds taken in the

application, same is being refuted by the other-side while pleading that the ground put forth is vague and, prima facie, smacks of absence of good faith

as required for a party in seeking condonation of delay.

4. On perusal of the judgment, which is sought to be upset in terms of memo of appeal, it comes to fore that the only point on which the judgment and

decree of the learned Court below has been upset, is the absence of jurisdiction with the learned trial court. On the basis of respective pleadings of the

parties, as many as six issues had been framed by the learned trial court, which are reproduced here-under:

(1) Whether the land measuring 02 kanals 10 marlas was purchased by Rehman Sheikh (father of the plaintiffs) by virtue of sale deed dated

29.11.1963 and was in his possession and after his death is in the possession of plaintiffs? (OPP)

(2) Whether the defendants have forcibly and fraudulently taken possession of the said land under the garb of mutation orders U/S 4 & 7 of Agrarian

Reforms Act, which mutation orders were set aside and the case remanded back to the Tehsildar concerned for appropriate action and orders?(OPP)

(3) Whether the defendants are in illegal possession of the suit land and have no right to continue with the possession thereof?(OPP)

(4) Whether the defendants are lawful owners of the land and, therefore, have right to continue to be in possession of the same?(OPD)

(5) Whether the suit is not maintainable in view of Section 19 and 25 of Agrarian Reforms Act?(OPD)

(6) To what reliefs parties are entitled to?

5. Finding has been recorded on five issues i.e. Issue No.1 to 4 and 6. The jurisdictional issue had been determined prior to the passing of judgment on

10.12.2012 and is being noted in trial court judgment impugned before the appellate court. The pertinent observations of the trial court in this regard

are as under:

â??This issue has been decided vide order dated 10-12-2012, with finding that this court has jurisdiction to try the present suit.

6. It is thus evident that the learned trial court had found no force in the contention raised by the defendants (respondents herein) regarding

applicability of the provisions of Agrarian Reforms Act and the absence of jurisdiction and so issue had been decided against the defendants. How the

appellate court, in such circumstances, has reversed the judgment and decree passed by the learned trial court, is not being explained in terms of the

impugned judgment.

7. The learned appellate court, in the impugned judgment, after giving narration of grounds taken in the memo of appeal has proceeded as under:

â??The Id. Counsel for appellants while arguing the matter strenuously contendedâ?|â?|â?|..â?|equal opportunity to lead evidence in defense of their

contentions by trial courtâ??

On the other hand Ld. Counsel for respondentsâ?|â?|â?|â?|..â?|there is no infirmity.

The learned appellate court has concluded its opinion for setting aside the judgment and decree as:

â??Accordingly, appeal is allowed and judgment/decreed dated 15.07/2014 passed by Ld. Sub-Judge Chadoora is hereby set aside and the suit of the

plaintiffs/respondents is also dismissed in terms of powers under section 107 of CPC vested in in this court on the ground that the suit of the

plaintiff/respondents is hit by section 25, 19 of Agrarian Reforms Act. The appeal is accordingly, disposed of and shall be consigned to records after

its due compilation.â??

9. Section 107 of the Code of Civil Procedure, as has been relied on by the learned appellate court, may be apt to be quoted herein:

â??S.107. Powers of Appellate Court.â?"(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have powerâ?

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.â??

10. Prima facie, it can be gathered as to how the learned appellate court has fall back upon Section 107 for adjudging the judgment and decree illegally on an issue on which finding had been recorded by the learned trial court more than two years before passing of final judgment and decree and which had attained finality.

11. Having regard to the duty caste upon this Court as a â??Court of Recordsâ?, I am of the opinion that the jurisdiction under Section 104 of the Constitution of J&K is required to be exercised to examine the relevant aspect of the case. Accordingly, the instant application along with memo of appeal is treated as petition under Section 104 of the Constitution of J&K. Registry is directed to diarize the instant application along with memo of appeal as petition under Section 104 of the State Constitution and be listed accordingly. Meanwhile, call for record of both appellate court as well as trial court.