

(2003) 03 J&K CK 0008
In the Jammu And Kashmir High Court
Case No : C. Rev. No. 141 of 2001

Mohammad Shafi Bhat

APPELLANT

Vs

Mohd. Iqbal Mir and Others

RESPONDENT

Date of Decision : 31-03-2003

Acts Referred:

Jammu and Kashmir Civil Procedure Code, 1977 — Order 41 Rule 3A(2), 96

Citation : (2003) 2 JKJ 328

Hon'ble Judges : Yash Paul Nargotra, J

Bench : Single Bench

Advocate : M.A. Qayoom, for the Appellant; M.H. Attar, for the Respondent

Final Decision : Allowed

Judgement

Y.P. Nargotra, J.—The petitioner Mohamad Shafi Bhat instituted a suit for declaration and injunction against the respondent No. 2 Mst

Raja in the Court of Sub-Judge Anantnag seeking there by restraintment against her from interfering into his possession over the land measuring one

kanal and seven marlas compromising in survey No. 484 and Shamilat land attached there to measuring fifteen marlas covered by survey No. 92

situated at Aul-bagh Nowgam Anantnag, which according to the plaintiff he had purchased by oral sale from the defendant and had obtained the

possession thereof which was being interfered by the defendant. The suit was compromised and pursuant there to compromise decree came to be

passed in favour of the plaintiff on 19.8.1997 by the Ld. Sub-Judge Anantnag.

2. Against the said compromise decree the respondent No. 1 Mohamad Iqbal Mir sought to file an appeal before the court of Ld. District Judge

Anantnag. For filing appeal he also filed an application seeking leave of the court for filing the said appeal against the said compromise decree as he

was not a party in the original suit in which the compromise decree sought to be appealed against had been passed. As the appeal was time barred, he also moved an application seeking condonation of delay. Ld. District Judge by his order dated 20th of October 2000 without any notice to the respondents granted the leave to the respondent No. 1 for filing the appeal and consequently appeal filed by the respondent No. 1 was admitted for hearing. By the same order Ld. District Judge on the application of the appellant directed the parties to maintain status quo with respect to the subject-matter of the decree subject however to notice to the other side and till the filing of the objections the operation of the decree dated 19th August 1997 was also stayed.

3. It is significant to note that application of the appellant seeking condonation of delay had not been decided before entertaining the appeal of the appellant by the Ld. District Judge. The petitioner who was respondent in the appeal at the outset raised a preliminary objection about the maintainability of the appeal. He submitted before the Ld. District Judge that without deciding the application of the appellants seeking condonation of delay the appeal could not be entertained under law and, therefore, firstly application for condonation of delay should be decided and till then the appeal should lie over. Ld. District Judge allowed the submission of the petitioner and by his order dated 5th April 2000 recalled the order dated 20th October 2000 and decided to take up the application of the appellant for condonation of delay for disposal before admission of the appeal to hearing. Consequently the appellant was directed to lead evidence in support of his application. The parties led evidence for and against the condonation of delay. Ld. District Judge then took up the application for hearing and after hearing the parties came to the conclusion that filing of the application for condonation of delay by the appellant was not at all required and even if the same had been filed it was unnecessary and as such the Ld. District Judge consigned the application to record without returning any finding as to whether the delay deserved to be condoned or not and thereafter admitted the appeal for regular hearing. For holding so Ld. District Judge advanced the following reasoning:

I have given due consideration to the argument advanced by the LC for the appellant. In para 1 of the plaintiff is emphatically averred that he was

the owner of the suit land because his adverse possession ripened into title and even in the compromise deed dt 19.8.97 similar recital has been

made. LC for the contesting respondent No. 1 was not able to give any convincing reasoning to repeal the argument advanced by the opposite party.

Since the appeal is yet to be heard on merits, it may not be proper for the court to dwell on this point at length lest the appeal may get prejudged.

But for the purposes of the instant application prima facie there appears to be substance in the submission of LC for the appellant. Section 19(3) of

the Agrarian Reforms Act unambiguously provides that cases involving question of adverse possession shall be determined exclusively by the

collector, and further Sub-clause (5) of the said provision read with Section 25 of the said Act clearly excludes the jurisdiction of the civil court in

matters enumerated in Sub-clause (3) which also includes disputes involving question of adverse possession. In a recent decision of our own High

Court reported as 1999 SLJ 524. It has been reported that Section 25 creates a bar jurisdiction to Civil Courts in respect of disputes including

where a party pleads adverse possession against the recorded owner.

4. In the observations made by their Lordships of the Supreme Court in the decision AIR 1994 SC 340 their Lordships have held as under:--

It is a fundamental principle that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be whenever and wherever

it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is

pecuniary or territorial, or whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very

authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties.

This view has been consistently followed by the various High Courts in the country. Since the defect of jurisdiction strikes at the very authority of

the court in passing decree, such a defect cannot even be cured by consent of the parties as seems to have been done in the instant case by the

parties in the suit. Further more from the dictum of the Supreme Court (supra) it is well settled that a decree passed by a court without jurisdiction

is a nullity and that same can be challenged at any stage even at the stage of

execution and even in collateral proceedings notwithstanding period of limitation provided in the limitation Act. It was obliquely argued by LC for the respondent No. 1 that as this point has not been specifically pleaded in the appeal or the application. LC for the appellant is debarred from making this submission. This argument does not, however, appeal to the court because point of law which goes to the very root of the matter effecting the jurisdiction and renders the decree a nullity can be raised even without pleading in the memorandum of appeal. Since the court is prima facie satisfied that the impugned decree has been passed without jurisdiction and was nullity in the eye of law, the appellant could challenge its validity and time notwithstanding the period of limitation prescribed for filing of appeal.

5. This order of Ld. District Judge is thus subject-matter of challenge in this revision. The contention of the Ld. counsel is that the appellant who is respondent No, 1 in the present revision sought to file an appeal against a compromise decree dated 19th August 1997 passed by the Ld. Sub-Judge Anantnag in a suit filed by the petitioner against the respondent No. 2. The appellant/respondent No. 1 was not a party in the suit. He could therefore maintain the appeal only after obtaining leave of the court and this leave could be granted only when he would have satisfied the appellate court that he was the person who is actually aggrieved of the Judgement and decree passed in the suit in which he was a party. The principles of natural justice required that on the question of granting of leave the parties to the suit were also provided opportunity of being heard and thereby showing that the appellant was not a necessary party and nor he could be aggrieved of the Judgement and decree passed. Thus apart the appeal being a statutory right could be exercised by filing appeal within the statutory period provided by limitation Act and in case the appeal was not filed within a statutory period than it was incumbent upon the appellant to seek condonation of delay in presentation of the appeal by showing sufficient cause for which he could not file the appeal within the statutory period. LC for the petitioner further contends that finding of the Ld. appellate court that there was no necessity seeking the condonation of delay as no statutory period stood provided for filing such appeal, is erroneous and, therefore, deserves to be set aside. He has further argued that appeal against a

compromise decree is not maintainable under the provisions of

Order 23, Rule 3-A and, therefore, even the appellant could not have maintained the appeal and therefore there could be no question of granting

of leave to the appellant to file the appeal. As even the respondent No. 2 who was a party to the appeal herself could not have filed the appeal. On

the other hand the contention of LC for the respondent is that compromise decree was without jurisdiction and therefore was nullity and as such

the same could be challenged in appeal at any time and more-so when right of the appeal in respect of the suit property had come under cloud.

6. I have considered the respective contention of the parties. Ld. trial Court appears to have been swayed by the judgment reported in AIR 1994

SC 340 referred in the impugned order. In my view the reliance placed thereon was mis-placed. In the judgment right to oppose the decree which

is a nullity being without jurisdiction in any proceedings in which it is sought to be enforced against a party has been recognized. It does not deal

with the question as to whether the appeal against any such decree is subject to the law of limitation. In the present case the compromise decree

against which the appeal was sought to be filed was not being enforced before any forum against the appellant. The appellant was only seeking to

file an appeal against the said decree on the plea that he was the person who was actually aggrieved by the judgement and decree passed in the

suit in which he was not a party. The civil Ist appeal is governed by Section 96 of the Civil Procedure Code. Section 96 read as follows:

96. Appeals from original decree (1) Save where otherwise expressly provided in the body of this Code or by other law for the time being in

force, an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorised to hear appeals from the

decisions of such court.

(2) An appeal may be from an original decree passed ex-parte.

(3) No appeal shall lie from a decree passed by the court with the consent of parties.

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognisable by courts of small causes, when the amount

of value of the subject-matter of the original suit does not exceed three thousand rupees.

7. From the bare reading of this section it clearly transpires that right to appeal has been granted to a person who is aggrieved of the judgment and decree of a civil court. The section does not make any distinction between a person who is party to the proceedings in which the judgment and decree sought to be appealed against has been passed and the person who is not a party in such proceedings. The only condition which is required to be satisfied for becoming entitled to file the appeal, is that such person must be aggrieved of the judgment and decree against which he seeks to file an appeal. It is settled principle of law that an appeal is not a common law remedy but the statutory right and gets vested only when a statute grants it. The procedure for filing and deciding appeals has been prescribed in Order 41 of Civil Procedure Code. Order 41 Rule 3-A Sub-clause (2) makes it obligatory upon a court to first decide the question of limitation and only then an appeal can be admitted to hearing. Therefore, the appeal even if filed by a person who is not a party to the proceedings but who seeks to file the appeal on the ground of being aggrieved by a judgment and decree of a Civil Court is also subject to the law of Limitation. Article 152 of first schedule and IIInd division of Limitation Act prescribes ninety days period starting from the date of decree or order to be the period for filing appeals to the Court of District Judge and if the appeal is not filed within the said period of limitation then delay which may be caused in filing the appeal can be sought to be condoned, by making an application supported by affidavit setting forth the facts on which the appellant relied to satisfy the court that he had sufficient cause for not preferring the appeal within such period as has been provided in Order 41 Rule 3-A Sub-rule (1).

8. In the present case the appellant did make an application but the Ld. appellate court has declined to decide that application on the erroneous assumption that appeal was not subject to any period of limitation. The Ld. Trial court, therefore is found to have failed to exercise jurisdiction vested in it by law. The impugned order of the Ld. District Judge therefore deserves to be set aside. It is only after the period of delay is condoned the question whether appellant is entitled to maintain the appeal or not can be gone into. In this view of the matter the impugned order dated 13th of November 2001 passed by Ld. District Judge Anantnag is set aside and it is directed that the application of the condonation of delay shall be

re-heard and disposed of by the Ld. District Judge Anantnag. If after the disposal of the said delay caused in filing the appeal comes to be

condoned then the question of leave of appeal shall be addressed to and it shall be decided after hearing both the parties. The observations made

in the impugned order regarding validity or otherwise of the decree sought to be challenged in appeal shall be ignored by the Ld. District Judge

because this question will assume importance only when the appeal comes to be heard on merits.

9. With these observations the Revision petition of the petitioner is allowed and the parties are directed to appear before the appellate court on

26.4.2003.