

(2014) 10 J&K CK 0022

In the Jammu And Kashmir High Court

Case No : O.W.P. (Petition u/s 104) No. 152 Of 2013

Shankar Dass

APPELLANT

Vs

Shivu

RESPONDENT

Date of Decision : 16-10-2014

Acts Referred:

Citation : (2014) 4 JKJ 586

Hon'ble Judges : Tashi Rabstan, J

Bench : Single Bench

Advocate : Ashwani Thakur, Advocates for the Appellant; Vikram Sharma,
Advocates for the Respondent

Judgement

Tashi Rabstan, J.—Through the medium of this petition, filed under Section 104 of the Constitution of Jammu & Kashmir, the petitioner-

plaintiff is seeking setting aside of order dated 03.08.2013 passed by the learned Sub-Judge Katra in the application filed by him in a suit, titled as

Shankar Dass v. Shivu, bearing File No. 09-A/Civil misc., whereby the learned trial Court dismissed the said application seeking striking off issues

No. 5 & 6 framed in the plaint. The facts essential for the disposal of this petition are that the plaintiff, petitioner herein, has filed a Civil Original

Suit before the learned trial court seeking declaration to the effect that he is owner-in-possession of one-half of the entire land of his father, Chuha

and uncle Kirpu falling in Khasra Nos. 97, 98 and 99, situate at Kundarorian, Tehsil and District Reasi. The basis of his claim is that his father

Chuha and uncle Kirpu were two real brothers.

Petitioners-plaintiff, respondent-defendant and one Teju were the sons of Chuha, whereas their uncle Kirpu died with no male issue. Teju, brother

of petitioner-plaintiff and respondent-defendant also died issueless. Thus, it is claimed that both petitioner-plaintiff and respondent-defendant being

the real brothers are the only legal heirs of their father Chuha and uncle Kirpu. So through the medium of civil original suit filed before the trial

court, petitioner-plaintiff is seeking a declaration to the effect that he is the owner of one half of the entire land of his father and uncle Kirpu.

2. Learned trial court vide order dated 30.04.2013 framed a total of nine issues, issues 5 & 6 are to the following effect:

5. Whether the suit land in Khasra Nos. 97, 98 and 99 at Kundrorian devolved upon the parties in equal shares ? OPP

6. Whether the defendant is adopted son of Sh. Kirpu? If so, what is its effect to the present suit? OPP.

3. Petitioner-plaintiff being of the view that issues 5 & 6 have wrongly been framed, filed an application before the trial court for striking off the

same. Petitioner-plaintiff pleaded that issues. No. 5 has negatively been framed, as the onus thereof ought to have been on respondent-defendant.

He further pleaded that issue No. 6 is an unnecessary issue as the respondent-defendant has already denied that he was not adopted by Kirpu.

4. After considering the pleadings and arguments put forth by the learned counsel appearing for the parties, the learned trial court dismissed the

application vide order dated 03.08.2013, impugned herein. Feeling aggrieved the petitioner-plaintiff has filed the instant petition.

5. It is contended that issue No. 5 has wrongly been framed and issue No. 6 does not arise from the pleadings of the parties. Learned counsel for

petitioner-plaintiff argued that it is the admitted case of the parties that they are the real brothers from a common ancestry and that in view of

admission on the part of respondent-defendant that he was not adopted by his uncle Kirpu, both plaintiff as well as defendant are entitled to half of

the suit property.

6. Petitioner-plaintiff has stated in paragraph-2 of the plaint that in both cases-whether the defendant was adopted by his uncle Kirpu or not, the

plaintiff as well as defendant both would be entitled to half of the suit property. If the defendant was adopted by his uncle Kirpu, then the defendant

has no right in the property of his natural father and he has to leave the same. And, if the defendant's claim of adoption is not upheld, even then the

position would remain the same, as both plaintiff and defendant would be equally entitled to the properties of their father Chuha and uncle Kirpu,

who died issueless, therefore, it was pleaded that the learned trial Court has erred in holding that ""still the route required to be taken to reach the

said decision is as important as the decision"". Learned counsel for petitioner-plaintiff thus argued that what is stated in paragraph-2 of the plaint is

only a suggestion and not an assertion of fact, issue No. 6 therefore, being unnecessary one has no signature in view of the admission made by

respondent-defendant that he was not adopted by Kirpu. He further argued that the trial court while framing the said issue has not properly dealt

with this aspect of the matter in its right perspective, more particularly when it is not the controversy between the parties as to whether the

defendant was adopted by Kirpu or not, therefore issue No. 6 being redundant deserves to be struck off.

7. Learned counsel appearing for respondent-defendant argued that in view of paragraph-2 of the plaint it is required to be decided as to whether

plaintiff would be entitled to half of the share in the property by virtue of defendant being an adopted son of Kirpu or is a legal heir of Chuha. He,

therefore, argued that both the aforesaid issues have rightly been framed by the learned trial court.

8. Heard learned counsel for the parties and perused the record.

9. Before dealing with the matter, it is appropriate to deal with the relevant provisions of The Evidence Act, Svt. 1977, Section 3 Sub-clause 3,

Sections 101, 102 and 103 thereof are reproduced hereunder.

3. Interpretation clause

(3) ""Facts in issue"".--The expression ""facts in issue"" means and includes, any fact from which, either by itself or in connection with other facts, the

existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceedings, necessarily follows.

Explanation.--Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact,

the fact to be asserted or denied in the answer to such issue is, a fact in issue.

101. Burden of proof

Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that

those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

102. On whom burden of proof lies

The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

103. Burden of proof as to particular fact

The Burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law

that the proof of that fact shall lie on any particular person.

10. Petitioner-plaintiff while filing the suit has not taken a specific stand regarding the status of respondent-defendant. It was not specifically been

stated in paragraph-2 of the plaint as to whether the respondent-defendant was adopted by Kirpu or not. Learned counsel representing the

petitioner-plaintiff argued that whatever is stated in paragraph-2 of the plaint is only a suggestion and not an assertion of fact. If that be so, how

would the trial court decide the case on mere suggestion in the absence of a specific stand taken by the petitioner-plaintiff, more particularly when

the respondent-defendant has also denied the assertions made in the said paragraph. The trial court would become crippled in deciding the case in

either way if the actual status of respondent-defendant in the suit property is not ascertained/decided. It is the petitioner-plaintiff who had filed the

suit and disputed the status of respondent-defendant in the suit property, therefore, in view of Section 102 of the Evidence Act the onus lies on the

plaintiff to prove what is the actual status of respondent-defendant in the suit property or whether he was adopted by his uncle Kirpu or not. The

same is the situation with regard to issue No. 5, as the respondent-defendant has specifically denied that the suit property was never devolved on

the parties in equal share. Again the onus to prove issue. No. 5 lies on petitioner-plaintiff in view of Section 102 read with Section 101 of the

Evidence Act.

11. The maintainability of the petition is put under cloud by its very own averments on the ground that Civil Procedure Code has undergone a sea

change with the amendment of 2009. The amendment has restricted the power of revisional court. Virtually, petition is in the nature of revision

petition and if such a practice is adopted and allowed that will render the aim and object of the amendment infructuous and meaningless. The order

impugned passed by the learned Sub Judge, Katra is neither appealable nor revisable under Section 115 of the CPC. Petitioner-plaintiff has thus

chosen to file this petition under Section 104 of the Constitution of J&K which corresponds to Article 227 of the Constitution of India.

12. Judicial pronouncement as to the object and scope of the power of the High Court under Article 227 of the Constitution (Section 104 of the

State Constitution) would leave little scope to interfere with the orders of the subordinate courts as a matter of routine. This power cannot be taken

as a right of another appeal to the aggrieved party. Nor the power can be invoked to point out an error of law or fact in the order or decision of a

subordinate court as has been sought by the petitioner in this case. This power cannot be used to make out that the decision of the subordinate

court would have been or must have been other than what it is.

The fact of this Court having vast powers under Articles 226 and 227 is undisputed, but care has to be taken when the same is warranted to be

exercised, because the powers under such Articles has to be utilized very cautiously, carefully, sparingly and in rarest of the rare cases.

13. The Apex Court in case titled Shalini Shyam Shetty and Another Vs. Rajendra Shankar Patil, has observed that there is tendency in High

Courts to entertain petition under Article 227 of the Constitution against the orders against which revision is barred in terms of amended Act of

CPC. It is apt to reproduce paragraph Nos. 80, 81 and 82 of the Judgment supra herein:--

80. We may also observe that in some High Courts there is tendency of entertaining petitions under Article 227 of the Constitution by terming

them as writ petitions. This is sought to be justified on an erroneous appreciation of the ratio in Surya Dev (supra) and in view of the recent

amendment to Section 115 of the Civil Procedure Code by Civil Procedure Code (Amendment) Act, 1999. It is urged that as a result of the

amendment, scope of Section 115 of CPC has been curtailed. In our view, even if the scope of Section 115, CPC is curtailed that has not resulted

in expanding High Court's power of superintendence. It is too well known to be reiterated that in exercising its jurisdiction, High Court must follow

the regime of law.

81. As a result of frequent interference by Hon'ble High Court either under Article 226 or 227 of the Constitution with pending civil and at times

criminal cases, the disposal of cases by the civil and criminal courts gets further impeded and thus causing serious problems in the administration of

justice.

82. This Court hopes and trusts that in exercising its power either under Article 226 or 227, Hon'ble High Court will follow the time honoured

principles discussed above. Those principles have been formulated by this Court for ends of Justice and the High Courts as the highest Courts of

Justice within their jurisdiction will adhere to them strictly.

14. The Apex Courts in a case titled Kokkanda B. Poondacha and Others Vs. K.D. Ganapathi and Another, , held that invoking of writ or

supervisory jurisdiction against interlocutory orders is permissible only when subordinate Court has acted without or in excess of jurisdiction and

not otherwise.

15. That if a party, which loses the case before the trial Court or before the appellate Court, is allowed to file writ petition and thereafter if such

writ petition is entertained without any check and balance that will amount to beating litigation and in breach of the purpose, aim and object of the

legislation which was made basis for amendment of the CPC.

16. The Apex Court in Shalini Shyam Shetty (supra) has surveyed judicial pronouncement as to the nature of power of superintendence and

control conferred on the High Court by the Constitution under Article 227 (Section 104 of the Constitution of J&K). While referring to

constitutional Bench's judgment in Waryam Singh and Another Vs. Amarnath and Another, , and Special Bench Judgement in Dalmia Jain Airways

Ltd. Vs. Sukumar Mukherjee, , it has been held that the power of superintendence conferred by Article 227 is to be exercised most sparingly and

only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. Also

while referring to another constitution Bench Judgement in State of Gujarat etc. Vs. Vakhtsinghji Sursinghji Vaghela and Others etc., , it has been

observed that the supervisory power under Article 227 is meant to keep the Subordinate Tribunal within the Limits of their authority and to ensure

that they obey law.

17. The Apex Court also held that if the litigating parties are private and not State functionaries, the writ is not maintainable and a distinction has

been made with respect to the powers of High Court under Article 226 and 227 of the Constitution of India. The Apex Court after analyzing the

aforesaid decisions has in paragraph 62 formulated the following principles on the exercise of High Courts power Article 227 of the Constitution

and the same is reproduced hereunder.

62. On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227

of the Constitution may be formulated:

(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court

under these two Articles is also different.

(b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is

substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been

discussed above.

(c) High Courts cannot, on the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the

orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or tribunal

subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restraint on the exercise

of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of its power of superintendence have been repeatedly laid down by this Court. In

this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in *Waryam Singh* (supra) and the

principles in *Waryam Singh* (supra) have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in *Waryam Singh* (supra), followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence

can interfere in order only to keep the tribunals and Courts subordinate to it, 'within the bounds of their authority.'

(f) In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a

patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic

principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than

the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure

of the Constitution by the constitution Bench of this Court in the case of L. Chandra Kumar Vs. Union of India and others, and therefore

abridgement by a Constitutional amendment is also very doubtful.

(j) It may be true that a Statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure

Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be

remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.

(k) The power is discretionary and has to be exercised on equitable principal. In an appropriate case, the power can be exercised Suo moto.

(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this Article

is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery

of justice in such a way as it does not bring it into, any disrepute. The power of interference under this Article is to be kept to the minimum to

ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public

confidence in the functioning of the tribunals and Courts subordinate to High Court.

(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed

for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of

individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline

pointed out above.

(o) An improper and a frequent exercise of this power will be counter-productive and will divest the extraordinary power of its strength and

vitality.

18. Parties in this case are private persons and not the State and, therefore, a question arises as to whether Writ Petition is maintainable between

two individuals/parties in their personal capacities to determine the inter se civil dispute? The answer is in negative.

19. It is beaten law of the land that Writ Petition is a remedy in public law, which can be filed by any person, but the main respondent should either

be the Government Agency or a State or its instrumentalities within the meaning of Article 12. Private persons cannot be said to be the State or

instrumentalities of the State and all the respondents in the writ petition cannot be private parties. Under Article 226 of the constitution of India,

High Court can issue writ against any person, but the persons must have some statutory or public function to perform. It is appropriate to

reproduce relevant paragraph 64 of the Judgement passed in case Shalini Shyam Shetty (supra) hereunder:--

64. It is well settled that a writ petition is a remedy in public law which may be filed by any person but the main respondent should be either

Government, Governmental agencies or a State or instrumentalities of a State within the meaning of Article 12. Private individuals cannot be

equated with State or instrumentalities of the State. All the respondents in a writ petition cannot be private parties. But private parties acting in

collusion with State can be respondents in a writ petition. Under the phraseology

of Article 226, High Court can issue writ to any person, but the person against whom writ will be issued must have some statutory or public duty to perform.

20. Moreover, the Apex Court in its latest judgement titled as Jacky Vs. Tiny @ Antony and Others, , has also held as under:--

17. A petition under Article 226 or Article 227 of Constitution of India can neither be entertained to decide the landlord-tenant dispute nor it is

maintainable against a private individual to determine an inter se dispute including the question whether one party harassing the other party. The

High Court under Article 227 has the jurisdiction to ensure that all subordinate courts as well as statutory or quasi-judicial tribunals, exercise the

powers vested in them within the bounds of their authority but it was not the case of the 1st respondents that the order passed by the Munsiff

Court was without any jurisdiction or was so exercised exceeding its Jurisdiction. If a suit is not maintainable, it was well within the Jurisdiction of

the High Court to decide the same in appropriate proceedings but in no case power under Articles 226 and 227 of Constitution of India can be

exercised to question a plaint.

21. It is not the case of petitioner-plaintiff that the trial Court has acted without or in excess of jurisdiction; nor is the State party herein, therefore,

the writ petition cannot stand the test laid down by the Apex Court in the judgments reproduced hereinbefore.

22. In view of above discussion, this petition is not maintainable. Accordingly, the petition filed by the petitioner-plaintiff is dismissed. Send down

the record along with a copy of this judgment.