
(2005) 03 MP CK 0033
In the Madhya Pradesh High Court
Case No : Writ Petition No. 5259 of 2004

Shantishukla

APPELLANT

Vs

Shanti Bai and another

RESPONDENT

Date of Decision : 10-03-2005

Acts Referred:

Citation : (2005) 2 MPLJ 114

Hon'ble Judges : K.K. Lahoti, J

Bench : Single Bench

Advocate : M.L. Jaiswal, with Ms. Vandana Shrivastava, for the Appellant;
Arvind Chouksey, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Lahoti, J.

The petitioner has challenged the order dated 24-11-2004 passed by Second Additional District Judge, Sagar in Civil Original Suit No. 11-A/2003, by which the Court has directed that the issues Nos. 8 and 9 in respect of non-joinder of necessary party and of limitation be decided after recording of the evidence. The trial Court recorded that both the issues relate to counter claim filed by the defendants and the defendants want to adduce evidence on both the issues. As the defendants want to adduce evidence on the issues, these issues cannot be decided as preliminary issues and directed as above.

Learned Counsel appearing for petitioner challenged the aforesaid order that in view of the admitted facts in respect of question of limitation it was not necessary for the trial Court to defer the decision on the preliminary issue No. 9. The issue of limitation can be decided only on the pleadings of the parties. The counter-claim filed by the defendants in respect of declaration of sale deed dated 28-3-2000 was itself barred by limitation as the said counter-claim was filed on 1-8-2003, which was beyond the limitation of three years and it was not necessary for the trial Court to defer the matter for recording evidence. It is

submitted that the order passed by the trial Court in respect of issue No. 9 be set aside and the matter be remitted back to the trial Court to decide the issue No. 9 after hearing the parties.

Learned Counsel for respondents supported the order that the aforesaid issues cannot be decided as a preliminary issue as the defendants became aware in respect of the sale deed after 22-4-2003 on filing of the suit. Before it she was having no knowledge and this issue cannot be decided by hearing arguments and without recording evidence.

To the aforesaid contention Learned Counsel for petitioner submitted that in the counter-claim the defendants have not pleaded the fact that the defendants became aware in respect of the sale deed after filing of the suit. From the perusal of para 13 of the counter-claim it is apparent that the defendants were in the knowledge of the sale deed since the date of execution of sale deed. Apart from this the sale deed was executed by Janakrani in favour of plaintiff, which was in the knowledge of defendants.

The short question involved in this petition is whether the issue of limitation can be decided as a preliminary issue without recording evidence?

The question of limitation if depends of proof of facts and evidence is required, then the issues cannot be decided as preliminary issues. The Division Bench of this Court in Narendra Kumar and another vs. Firm Ram Narain and another, 1977 (11) MPWN 113 considering this question held thus :-

The suit was dismissed only on decision of issue of limitation i.e. issue No. 13. It appears that the allegations of fact made in the plaint were disputed in the written-statement and a number of issues were drawn up. It also appears from the judgment itself that issue of limitation also was such which could not be decided without going into the facts of the case; but it appears that the counsel appearing for the defendants made a concession by saying that for purpose of decision on the question of limitation it may be assumed that the facts alleged in the plaint are admitted although both the Learned Counsel appearing before the Court clearly state that the defendants did not withdraw the written statement challenging many of the facts alleged in the plaint nor give any written statement admitting the facts pertaining to the issue of limitation. But on an assumption the learned Court below went on to decide the question of limitation. Such a course, in the opinion of this Court, was not proper as the facts remained in dispute and if the Court would have held that the suit is within limitation it was bound to go into all the questions which were disputed, even such questions as would have affected the decision on the question of limitation also. Apparently therefore the question of limitation was not a pure question of law but depended on various questions of fact which were in dispute between the parties. In such a situation, the only course open to the learned Court below was to proceed with the trial on all the issues and decide them in accordance with law. Case remanded. Appeal allowed.

Again in Kanchhedi vs. Smt, Nanhibahu, 1993 (1) MPWN 8 this Court considering the similar question held thus :-

The only point raised before this Court by the appellant is that the suit could not proceed being barred by limitation under Article 58 of the Limitation Act. As such, the first appellate Court erred in law in setting aside the judgment and decree passed by the trial Court by remanding the case for the trial of the suit. From the suit allegations, it is clear that the suit, as framed by the plaintiff, is a suit for partition. The declaration is only a consequence of the suit. The plaintiff/respondent stated in para 3 of her plaint that she was entitled to half share in the family property owned by her husband Mohanlal which fell to the plaintiff and the defendant both after the death of Mohanlal and was, as such, entitled to its half share. Her right in the property, according to the suit allegations was never denied. It was only the half share which was refused by the defendant to be given to her. The plaintiff/respondent has claimed the partition with the prayer that she be declared entitled to half share of the disputed property. The cause of action as shown by the plaintiff arose in the month of July, 1982 when, after serving a legal notice, she was denied her right and the suit was filed on 31-8-1982. Therefore, the suit could not even be said to be barred under Article 58 of the Limitation Act. The learned first appellate Court has rightly found the suit to be within limitation and I do not find any illegality or perversity in the order of remand passed by the learned lower appellate Court. The issue as framed about the limitation requires evidence and further the averments of the parties are not covered by the issues as framed by the trial Court. Therefore, the trial Court has rightly been directed to frame additional issues on the averments of the parties and to decide the suit after recording evidence of both the parties.

In this case it is not in dispute that by counter claim defendants are seeking relief in respect of sale deed dated 28-3-2000. Though at present it is not pleaded but argued by the respondents that the sale deed was not in the knowledge of defendants and for the first time it came into the knowledge of the defendants after filing of the suit. Apart from this the said question can only be decided after recording evidence.

In the aforesaid circumstances, the trial Court has not committed any error in rejecting the prayer of petitioner to decide issue No. 9 as preliminary issue and has rightly deferred the decision on the issue to be decided along with other issues after recording evidence. The order passed by the trial Court is in accordance with law and I do not find any jurisdictional error warranting interference by this Court.

This petition has no merit and is dismissed with no order as to costs.