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Court : Jammu and Kashmir

Decided On : May-21-1992

Judge : B.A. Khan, J.

Acts : [Evidence Act, 1872](#) - Section 102; ;[Limitation Act, 1963](#) - Section 3

Appeal No. : C. Rev. Petition No. 173 of 1989

Appellant : Triro

Respondent : Dev Raj and ors.

Advocate for Def. : D.C. Raina, Adv.

Advocate for Pet/Ap. : L.K. Sharma, Adv.

Disposition : Petition allowed

Judgement :

ORDER

B.A. Khan, J.

1. There is much ado about nothing. The controversy centres round the recasting of a preliminary issue in a suit, instituted by respondents challenging a Tarrieeq-nama dated April 30,1959, executed in favour of petitioner defendant, by virtue of which land measuring 5 kanals and 14 marles situate at village Gura-Mundian

Tehsil Hiranagar, has been settled. The issue pertains to the period of limitation and it has been framed by the trial court in the following manner:--

'Whether the suit is time-barred? OPD'.

Petitioner-defendant is aggrieved of this and wants the issue to be framed as follows :--

'Whether the suit is within time? OPP'.

and prays that burden of proof be placed on plaintiffs.

2. Therefore, all that requires to be decided is whether the issue should be as framed by the trial court or in the form as suggested by the petitioner?

3. The petitioner is more concerned about the onus of proof placed on him and says that it has caused a grave prejudice to him. His case is that on his own showing plaintiffs had admitted the belated filing of suit and had also applied for condonation of delay. Therefore, it was for them to prove that the suit was within time and the trial court should have framed the issue accordingly.

4. During hearing, Mr. D.C. Raina, LC for Respondents, raised a preliminary objection that this revision was not competent in the face of proviso to Section 115 of CPC, which provides that High Court shall not vary or reverse any order made or/ and order deciding an issue except where the order would occasion a failure of justice.

5. In reply, Mr. Sharma submitted that placing of a wrong burden of proof on a party amounted to failure of justice and, thus, would furnish a ground for revision. He relied upon AIR 3 969 J & K 50, AIR 1983 Patna 35 and AIR 1981 HP 18 in support of his contention.

6. The controversy regarding maintainability of the revision petition, to my mind, should be of no material consequence if it can be held that trial court had wrongly framed the issue or had wrongly placed burden of proof on the party. Therefore, sidetracking this aspect, it requires to be seen whether or not the issue had been framed wrongly.

7. It is plaintiffs own case that they had acquired knowledge of the execution of Tamleeq-nama late leading to delay in filing the suit. In para No. 5 of the plaint, it is stated as under:--

'That the plaintiffs have no knowledge of the said Tamlik nama. They only came to know about it few days back when the defendant No. 1 challenged the title possession of the plaintiffs immediately rushed to the Patwari for record and after getting copies, the suit is filed without delay. A separate application for condonation of delay is also filed and the suit may be treated in time.'

Given regard to the averment aforesaid, there can hardly be any doubt that plaintiffs were conscious of their belated action and it was for them to show that the suit was within time notwithstanding defendant's assertion in written statement that it was barred by time This is so for the reason that Section 3 of the Limitation Act makes it obligatory on the court to dismiss a suit barred by time, although limitation is not set up in a defence. The suit would entail dismissal even if the bar of limitation was not pleaded by defendants. It could be saved only on plaintiffs showing that it is within time.

8. Even when the burden of proof is on plaintiff who asserts a right, having regard to the circumstances of each case, the onus may also shift to the defendant. But that is not to say that no duty is cast upon the plaintiff even to show that he acquired knowledge of the defendant's action very late. Placing the entire burden on the defendant in such a situation would be contrary to the tenor of the provisions of limitation Act arid also rules of Evidence.

9. I am, therefore, of the opinion that in the facts and circumstances of the case, it should have fallen upon plaintiffs to show that their suit was within time, even when the defendant had pleaded bar of limitation in his written statement. That being so, the trial court should have framed the issue in the following manner:--

'Whether or not the suit was within time?

OPP'

I accordingly hold that trial court had fallen in error in framing the issue, which is directed to be recast in the manner suggested. The trial court shall thereafter proceed in accordance with law. This revision petition is accordingly allowed. Record be returned.

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