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Court : Jammu and Kashmir

Decided On : May-18-2007

Reported in : AIR2008J& K5,2007(2)JKJ529

Judge : Bashir A. Kirmani, J.

Appellant : Ahmad Reshi

Respondent : State and ors.

Disposition : Petition allowed

Judgement :

Bashir A. Kirmani, J.

1. On 3.6.1996 the respondent herein instituted suit No. 23/1995 before Munsiff, Tangmarg against petitioner herein seeking declaration that they were owners in possession of land measuring 5 kanals and 8 marlas situated in village Bonagam of Tehsil Tangmarg under survey Nos. 926,944,927, and 895 in equal shares which is shown to have been admitted by petitioner-defendant on the same date and his statement in support of admission recorded on 20.06.1995 alongwith that of his counsel, whereupon the trial court passed a declaratory decree as sought on 20.06.1997 itself. This decree appears to have been challenged by petitioner herein in the same court through a civil suit on 12.04.1997 for declaration of aforesaid decree as ineffective upon his proprietary and possessory rights

regarding aforesaid land to the exclusion of respondent-defendants. One of the grounds pleaded was that aforesaid decree had been obtained by fraud and deception as he never presented any pleading nor given in statement in the aforesaid suit. During course of proceedings thereupon while defendants evidence was being recorded the petitioner filed an application for sending the file civil suit No. 23 of 1995 wherein collusive decree was passed, to FSL for examination of his thumb impression on the admission statement and power of attorney attributed to him, which after seeking objections from other side was rejected by learned trial Judge on 27.09.2006 for the reason that that plaintiff did not ask for it, while his evidence was being recorded.

2. Aggrieved thereby the petitioner has instituted this revision petition to impugn the aforesaid order of learned trial judge on grounds that it has been passed in violation of the principles of justice and equity and by declining indulgence the learned trial judge failed in properly exercising jurisdiction vested in him. During course of submissions while petitioners counsel has reiterated the contents of revision petition respondents counsel has stated that impugned order was well found in facts of the case and legally the petitioner could not have been permitted to seek expert opinion at a belated stage of the suit which if done would further prolong the litigation.

3. I have heard learned Counsel and considered the matter. Perusal of issues framed in the matter reveals that issue No. 1 and 5 pertain to veracity and legality of the decree of 1995 as aforesaid challenged in the pending suit which ex-facie suggests that every factual feature including the allegation of fraud and deception attributed to the admission statement and power of attorney by petitioner clearly mentioned in issue No. 1 would require to be proved by substantive evidence so as to enable clear and cogent finding thereupon. Perusal of the admission statement and power of attorney disowned by petitioner reveals that they carry a thumb impression at the bottom attributed to petitioner who flatly denies the same. One fails to understand as to how genuineness or fakery of the thumb impression can be proved otherwise than by having the same compared with an admitted thumb impression of the petitioner herein. Needless to say that amount of oral evidence from here or there would establish the genuineness or fallacy of

petitioners allegation that he did not put the thumb impression. As a matter of fact proposed examination by FSL expert is the only reliable mode of getting substantial evidence on that aspect, which as such would have to be the first thing to be done in the matter. Viewed thus learned trial Judge's refusal to have the same done does not appear to be proper, not only because by doing so he has rendered it impossible to have authoritative evidence on the issue pending before him but also because in absence of such evidence the litigation between the parties is bound to become an unending chain during course whereof certainly at some stage the Forensic examination of challenged thumb impression would have to be done. That petitioner did not ask for it while his evidence was being recorded appears to be a hyper technical view directly defeating substance of the issue without helping either the proceedings or any of the parties. Still then the scope of asking for it appears to be available to petitioner during exercise of his right to lead evidence in rebuttal to that of respondents on issues onus whereof is on them and as such the door to have the Forensic examination of thumb impression done does not appear to be finally closed upon the petitioner.

4. In view of what has been stated above the revision petition is allowed and learned trial Judge directed to have the Forensic comparison of petitioners challenged thumb impression on the admission statement and power of attorney existing on civil suit No. 23 of 1995 and decreed on 20.06.1995 done with the petitioners admitted thumb impression after obtaining the same in accordance with prescribed procedure. While doing so, however, the proceedings currently going on need not be stopped.

5. The revision petition stands accordingly disposed of. Parties through their counsel are directed to appear before the court below on 18th June, 2007.