

Ghulam Muhammad Dar and ors. Vs. Ghulam Nabi Dar and ors.

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Court : Jammu and Kashmir

Decided On : Jun-05-2003

Reported in : 2003(3)JKJ130

Judge : V.K. Jhanji, Acting C.J.

Acts : Jammu and Kashmir Code of Civil Procedure (CPC) , Svt. 1977 - Section 115 - Order 9, Rule 7

Appeal No. : C Rev. No. 148/1998

Appellant : Ghulam Muhammad Dar and ors.

Respondent : Ghulam Nabi Dar and ors.

Advocate for Pet/Ap. : Rehana, Adv.

Judgement :

V.K. Jhanji, ActingC.J.

1. This revision petition is directed against order dated 18th November, 1998, passed by the learned City Munsiff, Srinagar, dismissing the application of the petitioners for setting aside the ex-parte proceedings initiated against them vide court order dated 5th August, 1992.

2. Facts, in brief, are that respondent No. 1, namely Ghulam Nabi Dar, filed a suit for possession of land measuring 11 marlas covered by Khasra No. 216 against

the petitioners and respondents 2 to 8 herein in the court of City Munsiff, Srinagar. The petitioners were proceeded against ex-parte on 5th August, 1992. According to the petitioners, as soon as they came to know about the ex-parte proceedings, they filed an application through counsel for setting aside the same, but the application was dismissed by the learned trial court.

3. The application filed by the petitioners for setting aside the ex-parte proceedings has been dismissed by the trial court on two counts: firstly, that no sufficient case has been established by the petitioners for setting-aside the ex-parte proceedings; and secondly, that notices were directly served upon the petitioners and, in fact, they engaged a counsel to contest the case on their behalf. As such, the ground taken that they had no knowledge of the pendency of the suit was not entertainable. The petitioners, being aggrieved of the order of the learned trial court, dismissing the application, have come to this Court in revision against the said order.

4. Notice of this revision petition was given to the respondents. Earlier the respondents were being represented by Mr. S.U. Dar, Advocate, but today none has put in appearance on their behalf despite the case having been listed in the cause list and having been called thrice since morning.

5. The submission of learned counsel for the petitioners is that the petitioners had not been served and, even accepting the finding of the trial court that the petitioners were served and had engaged Shri Trakru, Advocate, as their counsel who had filed power of attorney on their behalf, the trial court has failed to take judicial notice of the fact that Shri Trakru, Advocate, being a Kashmir Pandit, had migrated from Kashmir Valley. Learned counsel submitted that Shri Trakru had not informed the petitioners that he is migrating from Kashmir and that they should make an alternate arrangement to defend the suit. Learned counsel further submitted that during the period between 1990 and 1995 the situation in the Valley was such that nobody would appear in the courts to pursue their cases and the same was the case with the petitioner.

6. I have heard the learned counsel for the petitioners at length and have carefully gone through the impugned order.

7. Shri Trakru, Advocate, engaged by the petitioners to defend their case was, admittedly, a Kashmiri Pandit and had migrated from Kashmir Valley some time between the years 1990/1992. This fact must have been known to the trial court and, in such circumstances, notice ought to have been issued to the petitioners to make an alternate arrangement for defending the case but, it appears that, the trial court, instead of issuing any such notice to the petitioner, passed order dated 5th August, 1992 setting the proceedings ex-parte against the petitioners.

8. The procedural law is to advance the cause of justice and not to circumvent it. Migration from the Valley around the years 1990-1992 was a general phenomenon, as a result the litigants, whose advocates migrated from the Valley, would not have been in a position to know whether their cases were being pursued or not, especially when they were not informed by the Advocate about his migration. In such circumstances, coupled with the fact that when the situation in the Valley was such that it was difficult for the people to move freely, negligence or lack of interest in the litigation pending against them could not be attributed to them. In such a scenario, notice to the petitioners herein to make alternate arrangement, for defending their case was imperative in the interests of justice. If, after issue and service of such notice, they would not have appeared, that would have furnished a sufficient justification for setting the proceedings ex-parte against them. These circumstances ought to have been considered by the trial court while dealing with the application for setting aside the ex-parte proceedings. That having not been done, the order under revision has to be set-aside and it is so ordered. The petitioners through their counsel are directed to appear before the trial court on 16th June, 2003 and, within one month of their appearance before the trial court, they shall file written-statement, failing which their defence shall be struck off. The witnesses examined by the plaintiff would be recalled at the cost of the petitioners for cross-examination by the petitioners, if they so desire. Registry to return the trial records forthwith.