P L D 2025 Balochistan 140

Before Gul Hassan Tareen, J

The SECRETARY B&R DEPARTMENT, GOVERNMENT OF BALOCHISTAN CIVIL SECRETARIAT, QUETTA and others---Petitioners

Versus

Sardar SIKANDAR HAYAT KHAN JOGEZAI---Respondent

Civil Revision Petition No. 456 of 2020, decided on 9th October, 2024.

(a) Civil Procedure Code (V of 1908)---

----S. 115, O. XXIII, Rr. 2 & 3---Limitation Act (IX of 1908), Ss. 5, 29(2) & First Sched., Art. 162-A---Suit for recovery of money---Limitation---Permission to file fresh suit---Petitioner/Government assailed judgment and decree passed by two Courts below in favour of respondent/plaintiff---Petitioner/Government sought condonation of delay and contended that second suit filed by respondent/plaintiff was barred by limitation---Validity---Period of 90 days for filing of revision has been prescribed under Art. 162-A in First Schedule to Limitation Act, 1908---Bar prescribed by S. 29(2) of Limitation Act, 1908 does not apply to civil revision---Lower Appellate Court passed judgment and decree on 20-02-2020 and civil revision petition was governed by newly inserted Art. 162-A in Limitation Act, 1908, at the time of its filing---In province of Balochistan, provision of S. 5 of Limitation Act, 1908, was applicable to civil revision petitions filed under S. 115, C.P.C. for condonation of delay in filing petitions---Petitioners/Government obtained certified copy of judgment and decree on 11-11-2020, but the petition was filed on 30-11-2020---Delay of nineteen days was not explained---High Court declined to condone delay caused in filing of revision petition---Limitation of ninety days under Art. 162-A of First Schedule to Limitation Act, 1908 is relevant only when civil revision petition is filed by party to proceedings---Such impediment is non-existent when Court itself exercises jurisdiction under S. 115(1), C.P.C.---First suit which had been withdrawn was not to be considered and time spent on such suit was not to be deducted for the purpose of limitation even when permission to institute a fresh suit had been granted---Respondent/defendant was allowed to institute a fresh suit subject to all just and legal exceptions---Time spent in prosecution of first suit could not be excluded under O. XXIII, R. 2, C.P.C. for the purpose of limitation---High Court in exercise of suo motu revisional jurisdiction set aside judgment and decrees passed in favour of respondent/plaintiff by Trial Court and Lower Appellate Court---Revision was allowed, in circumstances.

(b) Limitation Act (IX of 1908)---

----S. 3---Limitation---Scope---Provision of S. 3 of Limitation Act, 1908 is mandatory and question of limitation is a statutory provision which cannot be waived---It is not left to the parties to take or not to take an objection that suit is outside the time limit fixed by First Schedule to Limitation Act, 1908---Court must dismiss suit if it has been instituted after period of limitation prescribed for the same by First Schedule to Limitation Act, 1908.

Saifullah Sanjrani, Assistant Advocate General for Petitioners.

Syed Ayaz Zahoor for Respondent.

Date of hearing: 8th October, 2024.

JUDGMENT

GUL HASSAN TAREEN, J.---This civil revision petition challenges the concurrent judgment/order and decrees of the Subordinate Courts, whereby respondent's civil suit for recovery of Rs.12,61,695/- was concurrently decreed.

2. Briefly, respondent instituted Civil Suit 89/2015 for declaration and recovery of Rs.12,61,695/- along with interest and damages against the petitioners. In his plaint,

respondent pleaded that he is owner of the Jogezai Filling Station situated at Loralai Dera Road. There was a contract between him and the petitioners for fueling the vehicles and machinery of the Building and Roads Department, Loralai ('B&R'). The B&R department had obliged itself for discharging the liability of the price of the fuels being supplied by the respondent. The petitioners 2 and 3 had committed default and failed to pay or tender the price of the fuels so supplied. He had obtained a financial facility from a financial institution namely Muslim Commercial Bank, Loralai and because of default in payment of the availed facility, the financial institution had enhanced the mark up and he suffered, financial loss as well as, mental pain. Vide reminders dated 02 May 2007, 25 May 2007 and 13 June 2007, petitioner 2 was reminded for the discharge of said financial liability, however, petitioners 2 and 3 failed to pay his due amount. On 26 June 2007, he sent legal notice to the petitioner 2 but despite service of notice, petitioners failed to discharge the said financial liability. Respondent also pleaded that he instituted a civil suit which was decreed ex parte. Against the ex parte decree, petitioners preferred an appeal before the High Court of Balochistan, Quetta. Appeal was partly allowed and matter was remanded back to the Trial Court. In post remand proceedings, on 08 September 2014, the Trial Court dismissed the suit. He made an application for restoration of the suit which too was dismissed on 27 March 2015 and both orders were assailed by filing Regular First Appeal 37 of 2015 before the High Court. In the RFA, he was allowed to institute a fresh suit on the strength of same cause of action.

In prayer clause, petitioners sought declaration that he is entitled to recover Rs.12,61,695/- with mark up of the MCB along with damages and costs of proceedings.

3. On service of summons, petitioners submitted a common contesting written statement. On such pleadings, the learned Trial Judge had framed the following issues:

"1. Whether the plaintiff is owner of Jogezai Petrol pump and there was contract between the plaintiff and defendants?

2. Whether the plaintiff regularly fueling the oil to the vehicles and other machinery of the defendant and the defendant was defaulter of the petrol pump of the plaintiff of Rs.12,61,695/-?

3. Whether the suit of the plaintiff is barred by time under the Limitation Act?

4. Whether the defendant illegally made the payment to plaintiff through cheque/letter dated 28-06-2012 and he returned the same in government account?

5. Whether any agreement was executed between the parties?

6. Whether the plaintiff is entitled for the relief claimed for?

7. Relief?"

4. After recording evidence, the learned Trial Judge vide judgment and decree dated 08 June 2017 decreed the suit along with mark up @ prevailing market rate. On filing appeal, the judgment of the Trial Court was upheld by the learned District Judge, Loralai vide impugned order and decree dated 20 February 2020.

5. Mr. Saifullah Sanjrani, learned A.A.G. representing the petitioners contended that suit instituted by the petitioner was barred by limitation and on this material proposition of law, the learned Trial Judge had framed an issue. However, respondent had failed to prove that his suit is within time. He further contended that respondent pleaded that he had entered into a contract with the petitioners in respect of the supply of fuels to the petitioners' vehicles, however, the contract was not established. He further contended that the burden of proof of the pleaded contract was on the respondent under Article 117, the Qanun-e-Shahadat Order, 1984 ('QSO') notwithstanding he failed to discharge the burden of proof of the pleaded contract. In addition, he contended that respondent couldn't bring on record any receipt for proof of the supply of fuels by his filling station to the vehicles of the petitioners' department, thus the learned Trial Judge was not justified to decree the respondent's civil suit. He placed reliance on the judgment reported as Qahaim v. Amar Khan (2022 CLC 335) and Sabzal Khan v. Muhammad Akbar (2020 CLC 142).

6. In respect of belated filing of this civil revision petition, the learned AAG contended that there is no limitation for filing civil revision petition. Contended in alternate, that time

was spent in official correspondences, as such, the revision petition couldn't be filed on time. He placed reliance on the judgment reported as Walayat Hussain Shah v. Manga (1990 CLC 191).

7. Syed Ayaz Zahoor, learned counsel for the respondent contended that this Court had allowed the respondent, to institute a fresh suit thus, his suit was not barred by the law of limitation. He contended that respondent had proved his pleaded claim through the oral as well as the documentary evidence and, the representative of petitioners in his cross-examination admitted the pleaded liability on the part of the petitioners. Further contended that concurrent findings recorded by the Subordinate Courts do not suffer from any error of law and of jurisdiction, therefore, same cannot be interfered with by this Court in the limited revisional jurisdiction. He placed reliance on the case laws, reported as Farzana Zia v. Saadia Andaleeb (2024 SCMR 916) and Fozia Mazhar v. Additional District Judge (PLD 2024 Supreme Court 771). In conclusion, contended that instant civil revision petition is barred by unexplained delay of more than six months and on this sole ground, same is liable to be dismissed.

8. Heard. Record gone through.

9. The Appellate Court had announced the impugned order and decree on 20 February 2020. Petitioners made application for supply of the certified copy of order and decree on 10 November 2020 which was supplied on 11 November 2020. Petitioners preferred this civil revision petition on 30 November 2020. Under section 115(1), second proviso, limitation for filing civil revision petition was ninety days of the decision of the Subordinate Court. In the Province of Balochistan, the said proviso has been substituted by a proviso vide Code of Civil Procedure (Balochistan Amendment) Act, 2019 (Act XIII of 2019) dated 16 December 2019. On substitution of the said second proviso, vide the Limitation (Balochistan Amendment) Act, 2019, ('Act, 2019') Article 162-A was inserted in the First Schedule, the Limitation Act 1908 ('Act 1908'). According to the Article 162-A, limitation for filing civil revision petition is ninety days. Time from which period begins to run is the date of decision sought to be revised according to the third column of Article 162-A, the Act 2019. Special limitation prescribed by the second proviso of section 115(1) the C.P.C, has been repealed by the Act, 2019. The period of ninety days has now been prescribed by the Article 162-A in the First Schedule, the Act 1908, thus the bar prescribed by section 29(2), the Act, 1908 would not apply to the civil revision petition. As the Appellate Court had passed the impugned order and decree on 20 February 2020, thus this civil revision petition was governed by the said newly inserted Article 162-A, the Act, 2019 at the time of its filing, therefore, in the Province of Balochistan, the provisions of section 5, the Act, 1908 shall apply to the civil revision petitions filed under section 115, the C.P.C. for condonation of delay in filing the petitions.

10. As hereinabove observed, petitioners had made application for obtaining certified copy of the impugned order and decree dated 20 February 2020 on 10 November 2020 which was supplied on 11 November 2020, consequently, this civil revision petition filed on 30 November 2020 was barred by limitation of six months and 07 days under Article 162-A, the Act, 2019. Petitioners have made an application under section 5, the Act, 1908 for condonation of delay caused in filing this civil revision petition. According to the contents of application, due to Courts' vacation and pandemic Covid 19, the office of the Advocate General was not aware of the impugned order and decree. The AG office came to know of the order and decree when it received notice of the execution proceedings. It has been pleaded that due to Covide-19 and the subsequent lock down, petitioners were unable to procure the necessary sanction from the Law Department as such, couldn't file petition before this Court with the stipulated statutory period. The application made under section 5, the Act, 1908 is not supported by, an affidavit and, any other document for proof of the facts that have been pleaded in the application. Petitioners were represented before the Appellate Court by a District Attorney, however, copy of the impugned order and decree was not applied for. Delay caused in filing this petition is because of the negligence of petitioners. Liability should be fixed on the delinquent officer. Hence, delay caused in filing this civil revision petition is unexplained. Petitioners have failed to establish sufficient cause which prevented them from filing instant civil revision petition within ninety days as prescribed by Article 162-A. Petitioners had obtained certified copy of the impugned order and decree on 11 November 2020, even then, the petition was filed on 30 November 2020. The delay of

nineteen days is also unexplained. Hence, the application made for condonation of such inordinate and unexplained delay is dismissed.

The Chief Secretary, Government of Balochistan is directed to inquire into the matter and should fix liability on the officer/s who were responsible for the belated filing of this petition.

11. Though, application made by the petitioners for condonation of delay is dismissed, nevertheless this Court can interfere in revision and may make such order in the case as it thinks fit. High Court can entertain civil revision petition even beyond the prescribed period of ninety days. Under section 115, the C.P.C, this Court may at any time call for the record of any case from a Subordinate Court in order to determine whether the Subordinate Court has exercised jurisdiction in the light of section 115(1) (a to c), the C.P.C. The perusal of 162-A, (inserted through Act, 2019) indicates that limitation of ninety days is relevant only when civil revision petition is filed by party to the proceedings, however, such impediment is non existent when Court itself exercises the jurisdiction under section 115(1), the C.P.C. In the case reported as Province of Punjab v. Muhammad Farooq (PLD 2010 Supreme Court 582), the Apex Court has held as follows:

> "5. As the job of a Court is to do ultimate justice, it can look into the matter itself despite the fact that some application filed by a party might be barred by time. Any such application can be considered by the Court as a mere information. What we intend to bring home is that if merits of the case demand that the challenged order be set aside, a High Court should not avoid hearing under section 115(1), C.P.C. for which no limitation is provided, merely because the application is filed by some body who is bound by limitation. This Court in Riaz Hussain's case 2003 SCMR 181 has observed in principle that "mere technicalities unless suffering any surmountable hurdle should not be allowed to defeat the ends of justice and the logic of words should yield to the logic of realities".
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> 6. Law of limitation, we believe, is a substantive law of the land and hence should not in every case be considered as a mere technicality, yet, we firmly believe that under section 115, C.P.C. having been split into two parts, the stringent implication of law of limitation can easily be avoid by the Court taking suo motu action under subsection (1) of section 115, C.P. C. in cases where merit so demands."

This Court is competent to take suo motu action in its revisional jurisdiction and there is no limitation for taking cognizance of an error of law committed by the Subordinate Courts. The Act, 1908 and the C.P.C do not place clog on the jurisdiction conferred on this Court by section 115, the C.P.C.

Though, the Subordinate Courts have not rendered any findings on the issue of limitation, however, as evidence upon the record is sufficient to pronounce the judgment, thus, instead of remanding back the matter to the Subordinate Court for re-writing of judgment, this Court can pronounce the judgment. (Order XLI, Rule 24, the C.P.C.).

12. In this case, the impugned judgments of the Subordinate Courts suffer from the errors of, the law of limitation and, non reading of material evidence on the record. In their common written statement, petitioners had raised objection of limitation. The learned Trial Judge had framed issue No.3 on the proposition of limitation. Issue No.3 is reproduced hereunder:

> "Whether the suit of plaintiff is barred by time under the Limitation Act? "

13. Record reveals that the learned Trial Judge while writing the judgment had modified all the issues under Order XIV, Rule 5, the C.P.C. While amending and modifying the issues, the learned Trial Judge had struck out the issue of limitation despite of the fact that petitioners had raised a specific objection in this regard. The learned Trial Judge had struck out the issue of limitation without rendering any reasons therefor in his judgment. Under section 3, the Act, 1908, 'every suit instituted after the period of limitation prescribed therefor by the First Schedule shall be dismissed, although limitation has not been set up as a defence.' Provision of section 3 is mandatory. Question of limitation being a statutory provision cannot be waived. It is not left to the parties to take or not to take the objection that the suit is outside the time limit fixed by First Schedule, the Act, 1908 and the Court must dismiss the suit if it has been instituted after the period of limitation prescribed therefor by

the said Schedule.

14. In the suit, both parties had led their respective evidences on the unmodified issues, therefore, the learned Trial Judge should not have struck out the issue of limitation at the time of writing final judgment. The learned Trial Judge had overlooked section 3 of the Act, 1908.

15. In the first round, respondent's suit was dismissed by the learned Trial Judge, however, on filing RFA 37/2015, this Court vide order dated 13 October 2015 dismissed the appeal as not being pressed. Yet, respondent was allowed to institute fresh suit on the strength of same cause of action, however, subject to all just and legal exceptions. Respondent instituted the fresh suit in November 2015. The burden of proof of the limitation was on the respondent. The PW-1 in his examination in chief stated that petitioners are liable for payment of Rs.12,61,695/- since 2007. Petitioners through attorney appeared on oath and in his examination in chief stated that Rs.12,61,695/- is outstanding against the petitioners since 2007. Cause of action was accrued to the respondent for recovery of said amount in 2007, therefore, fresh suit instituted in November 2015 for recovery of time barred debt was barred by limitation under Article 52, First Schedule, the Act, 1908. Article 52 prescribes three years time limitation for recovery of the price which begins to run from the date of the delivery of the goods. Respondent had instituted suit after expiration of the period prescribed by the Article 52, yet, he had not pleaded exemption from this law in his pliant in the light of Order VII, Rule 6, the C.P.C. As respondent himself, and his PW-1, stated that amount was due in 2007, thus suit instituted by the respondent in November 2015 was barred by limitation of about five years. Respondent had withdrawn his former suit with permission to file a fresh one vide order dated 13 October 2015 passed by this Court in R.F.A. 37/2015. Under Order XXIII, Rule 2, the C.P.C, 'in any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.' First suit which had been withdrawn is not to be considered and the time spent on such suit is not to be deducted for the purpose of limitation even when permission to institute a fresh suit had been granted. In the instant matter, respondent was allowed to institute a fresh suit subject to all just and legal exceptions. Under Order XXIII, Rule 2, time spent in prosecution of the first suit shall not be excluded for the purpose of limitation. Suit instituted by the petitioner was barred by limitation, however, the learned Trial Judge had struck out the issue of limitation and the judgment for doing so is totally silent. This error of law attracts the suo motu jurisdiction of this Court under section 115(1), the C.P.C. The Appellate Court should have taken note of this error of law committed by the Trial Court, however, the Appellate Court endorsed the error of law vide order and decree assailed in this civil revision petition.

16. On merits, the respondent failed to prove the contract he had pleaded in para 1 of the plaint. He had pleaded that there was a contract between him and the petitioners for fueling the vehicles and machinery of the B&R Department, Loralai. Respondent had not pleaded the particulars of the contract, whether it was expressed or implied. Petitioners in their common written statement denied the existence of the said pleaded contract. The burden of proof of the contract was on the respondent but he failed to prove any express or implied contract between him and the petitioners with regard to the fueling of vehicles of the B&R Department. In his cross-examination, respondent stated that, 'no written contract was executed between him and the department rather the vehicles would take the fuel upon showing the receipts issued by the XEN (Ans.16).' Without proof of the contract and in absence of contract, a party cannot be held liable for a liability. Respondent himself stated that petitioners would take the fuel against the receipts issued by the XEN. However, he couldn't produce any such receipt. In his cross-examination, respondent admitted it correct that, 'he is not in possession of the receipts issued by the XEN, voluntarily stated that he had annexed those receipts with the bill and sent to the XEN.' (Ans.17). Petitioners in their common written statement had denied the pleaded liability, however, respondent failed to establish that petitioners were liable for the payment of Rs. 12,61,695/-.

17. In the light of the foregoing discussion, respondent had failed to prove that his suit is within time and he had entered into a contract with the petitioners with regard to the supply of fuels to the petitioners' vehicle and machinery. He also failed to bring on record any receipt issued by or on behalf of the petitioners against which respondent had supplied the fuels. These facts have been overlooked by the learned Trial Judge as well as by the Appellate Judge. Resultantly, in exercise of suo motu revisional jurisdiction, I set-aside judgment and decree dated 08 June 2017 passed by the learned Senior Civil Judge Loralai in Civil Suit 89/2015 and order and decree dated 20 February 2020 of the learned District Judge Loralai in Civil Appeal 25/2019.

Resultantly, Civil Suit 89/2015 instituted by the respondent stands dismissed. No order as to costs.

Office is directed to transmit copy of this judgment to the Chief Secretary, Government of Balochistan for information and compliance of direction at para 10 of this judgment.

MH/120/Bal. Order accordingly.