P L D 2001 Supreme Court 149

Present: Muhammad Bashir Jehangiri, Deedar Hussain Shah and Javed Iqbal, JJ

DILAWAR JAN---Appellant

versus

GUL REHMAN and 5 others---Respondents

Civil Appeal No. 122 of 1995, decided on 18th October, 2000.

(On appeal from the judgment of the Peshawar High Court, Peshawar, dated 11-5-1994 passed in W.P. No.68 of 1994).

Waris Khan, Advocate Supreme Court and Nur Ahmad Khan, Advocate-on-Record (absent) for Appellant.

Mian Younas Shah, Senior Advocate Supreme Court and Jan Muhammad Khan, Advocate-on-Record (absent) for Respondents Nos. 1 and 2.

Respondents Nos. 3 to 6 : Ex parte.

Date of hearing: 18th October, 2000.

JUDGMENT

JAVED IQBAL, J.---This appeal by leave of the Court is directed against judgment dated 11-5-1994 passed by a learned Division Bench of Peshawar High Court, Peshawar, accepting the Constitutional petition preferred on behalf of Gul Rehman (respondent) and the orders of learned trial and revisional forums were set aside.

2. Leave to appeal was granted on 14-2-1995 which is reproduced hereinbelow to appreciate the legal and factual aspects of the controversy to the effect that "the petitioner had filed a suit under Riwaj challenging the exchange of the suit property. The brother of the petitioner namely, Amani Mulk respondent No.3 exchanged his land with respondent No.2 by Exchange Deed dated 25-4-1961. The petitioner contested the suit claiming that it was a benami sale in favour of Gul Rehman respondent No. 1. On 26-7-1962 respondent No. l declared that he had not purchased it and further gave undertaking that if ' in future it was proved that he has purchased the land then the suit-land will be in the ownership of the petitioner and he would also be fined". Respondent No.2 sold the same land to one Fazalur Rehman on 26-9-1981. Respondent No.1 filed a suit claiming

that the disputed land was in his ownership. It seems that a compromise decree was obtained on 9-5-1983. The petitioner on coming to know of the alleged collusive decree and compromise deed filed a pre-emption suit on 15-5-1983. Respondents Nos. l and 2 jointly' filed written statement and stated that the Exchange Deed dated 25-4-1961 was in fact benami sale in favour of Gul Rehman i.e. respondent No. 1. The matter was referred to Jirga which returned a majority award on 23-3-1983 in favour of the petitioner. Accordingly decree was passed in his favour on 9-3-1986. In appeal filed by respondents Nos. 1 and 2 the decree was set aside. The petitioner then challenged it in,, revision petition which was accepted and the decree was restored. Respondents Nos.1 and 2 filed Constitutional petition in the High Court, which was allowed as aforestated by the impugned judgment. The learned counsel for the petitioner contended that the High Court has exceeded its Constitutional jurisdiction in dismissing the suit by setting aside the finding of fact and entering into disputed question of fact. It was further contended that while entering into the disputed question of fact, the evidence has been completely misread and misinterpreted. Leave is granted".

3. It is mainly contended by Mr. Waris Khan, learned Advocate Supreme Court on behalf of the appellant that the learned High Court has travelled beyond its scope by striking down the orders of the competent forums under Provincially Administered Tribal Areas Civil Procedure (Special Provisions) Regulation, 1975 (Regulation 11 of 1975) which resulted in serious miscarriage of justice as the legal and factual aspects of the controversy have not been examined in its true perspective and the evidence which has come on record has been misread, misinterpreted and misquoted. It is urged with vehemence that appellant has proved by adducing cogent and concrete evidence that exchange deed bearing No.285 dated 25-4-1961 was in fact a benami sale in favour of Gul Rehman (respondent No. 1). It is argued that the compromise deed and judgment/decree dated 9-5-1983 are indicative of the fact that a sale was executed under the garb of exchange which aspect of the matter escaped notice. It is next contended that the suit of appellant was - within time as the cause of action accrued in favour of appellant on 9-5-1983.

4. Mian Younas Shah, learned Senior Advocate Supreme Court appeared on behalf of Gul Rehman (respondent) and vehemently controverted the viewpoint as canvassed on behalf of appellant by arguing that no illegality whatsoever has been committed by learned High Court and after evaluating and scrutinizing the entire evidence with diligent application of mind conclusion has been drawn which is strictly in accordance with law and settled norms of justice. It is next contended that no proper pre-emption suit whatsoever was filed by the appellant but on the contrary an

application was moved to Sipah Salar having absolutely no concern with the dispute. It is pointed, out that pre-emption suit was filed in the year 1983 which should have been filed within a period of one month under 'Riwaj' which was never considered either by the learned trial or revisional Courts and a serious illegality has been committed by ignoring it which was correctly rectified by the learned High Court.

5. We have carefully examined the respective contentions as agitated on behalf of the parties in the light of relevant provisions of law and record of the case. The impugned judgment has been perused carefully and the entire evidence thrashed out. It transpires from an indepth scrutiny of the record that it prevailed upon learned trial and appellate forums while dilating upon the question of limitation in a cursory manner that the land in question was sold in 1983 in favour of one Fazal Rehman who was never impleaded as a party and besides that the factum of subsequent sale could not be proved and Thus 9th May, 1983 cannot be considered as started point for limitation no evidence worth the name could be led showing that what was the consideration for alleged sale and thus the question of pre-emption does not arise. It is worth-mentioning that the controversy came into being due to a transaction which was subsequently got registered pertaining to the exchange of land in dispute in the year 1961 which was the opportune moment for the appellant to file a proper suit for pre-emption by invoking the jurisdiction of forum concerned but on the contrary an application simpliciter was moved to some unconcerned executive authority i.e. Sipah Salar that too after an inordinate delay of one year as the land in dispute was exchanged vide exchange registered deed dated 25-4-1961 and application was moved to Sipah Salar on 23-5-1962 which should have been submitted to Tehsildar. The said application reflects that it was moved on the basis of suspicion and it was never mentioned in a categoric manner that the land in question was sold. The appellant has not vigilantly and vigorously pursued his case. The factum of delay escaped notice from the learned trial and appellate forums which has resulted in grave miscarriage of justice. Admittedly the period of limitation for filing suit under prevalent 'Riwaj' was one month which has not been denied by the learned Advocate Supreme Court for the appellant. In this regard we are fortified by the dictum laid down in case Khalil-urRehman v. Talizar Khan PLD 1992 SC 442. The operative portion whereof is reproduced hereinbelow for ready reference:--

"As the history of the relevant legislation shows, Regulation II of 1975 has prescribed that the Limitation Act and the provisions of N.-W.F.P. Pre-emption Act were applicable; but while enacting section 4(2) of the original Regulation 11 of 1975 it was directed that a suit could not be referred to the Jirga if it was barred by

the Limitation Act. Thus to an extent importance was being given to the imitation Act, but it would not be necessary in this behalf also to hold that the N.-W.F.P. Pre-emption Act was no more applicable as was intended by section 3 of Regulation II of 1975. It is not necessary to examine any further that aspect of the matter, because, section 4(2) of Regulation II of 1975 as amended by Regulation IV of 1976 does not present any unsurmountable difficulty in assuming that the Statute Law of Limitation; whether contained in the Limitation Act or in the N.-W.F.P. Pre-emption Act, stood excluded in so far as suits for pre-emption were concerned.

No doubt in the non obstante clause of section 4(2), only the Limitation Act is mentioned and the N.-W.F.P. Pre-emption Act with reference to the provisions regarding limitation contained therein has not been specifically excluded. But the matter would not end here. If the substantial part of section 4(2) is read independently it means that the law of limitation as contained in Rewaj, custom or usage having the force of law, had been applied directly with such a command that a case could not be referred to the Jirga at all if a civil suit in respect thereof would be time-barred under the Rewaj dispensation."

The question of limitation was also discussed in case Abdul Murad Khan v. Noshaba 1992 SCMR 1828. The relevant portion whereof runs as follows:--

"The decision on question of limitation must be made before other disputed questions because if it is concluded that the suit is time-barred, the Court is not compelled to give its decision on the other issues and in case of P.A.T.A., it is to be decided before the reference to the Jirga.

The question of limitation is a mixed question of law and fact and recording of evidence thereon sometimes is essential for the proper adjudication thereof. Subsection (2) of section 4 of Provincially Administered. Tribal Areas Civil Procedure (Special Provisions) Regulation No.II of 1975 provides that a case shall not be referred to a Tribunal if a civil suit in respect thereof would be barred under any Riwaj, custom or usage having the force of law. There is no positive provision in the Regulation itself that whenever a question of limitation is raised, the Deputy Commissioner is requited to frame issue thereon, record evidence and decide the question before reference of the matter to the Tribunal, but, since under subsection (2) of section 4, he can only refer the matter to the Tribunal if the same is not time-barred, he in the normal course has to give his verdicts after hearing the parties and allowing them an opportunity to lead evidence on their respective allegations. "

A similar proposition was discussed in case Amir Abdullah v. Tota 1989 CLC 1294 and it was held as under:---

"3. Since the question of limitation was involved in the proceedings before the learned E.A.C. respondent No.4, he should have decided the question of limitation himself as provided in subsection (2) of section 4 of the Regulation. He could only refer the matter to the Jirga if he had come to the conclusion that the suit was within time but if he had come to the conclusion that the suit was time-barred under any Rivaj, custom or usage having the force of law then he could not refer the suit to the Jirga. Obviously the learned E.A.C. proceeded without any lawful authority and reference by him to-the Jirga was without jurisdiction.. In the appeal as well, although the learned Additional Commissioner stated in his order dated `15-8-1985 that the point of limitation had been raised, yet he did not take that point into consideration and maintained the order of the learned E.A.C. The appellate powers of the Commissioner are exercised by him under section 11 of the Regulation which empowers the Commissioner to exercise all or any of the powers conferred on an Appellate Court by the Code of Civil Procedure. As such it was open to the learned Additional Commissioner to take into consideration the objection about limitation raised by the appellants before him in their written statement and he could, by accepting the appeal set aside the order of the E.A.C. and could have remanded the case to him first to decide the point of limitation before making any reference to the Jirga. However, the learned Additional Commissioner did not take this point into consideration although he has mentioned in his order that the question of limitation was raised in the written statement.

4. On the contrary the impugned order of the learned Additional Secretary Home would show that he had given all considerations in his impugned judgment to the point of limitation and it appears that this was one of the considerations which prevailed with him for the acceptance of the revision petition and dismissal of the suit of the petitioner herein. However, two points are apparent from the order of the learned Additional Secretary Home; firstly, that he did not give an opportunity to the petitioner of being heard on the point of limitation; and secondly, when he came to the conclusion that the suit was time-barred, he should have remanded the case back to the learned E.A.C. to decide the question of limitation as laid down in subsection (2) of section 4 of the Regulation by accepting the revision and setting aside the orders of both the learned Additional commissioner and the learned E. A. C."

The abovementioned view also finds support from case Khuna Gul v. Said Farid PLD 1983 SC 209; Central Exchange Bank Ltd. v. Ch. Dilawar Ali Khan and others PLD 1965 Lah. 628;

Mst. Allah Rakhi v. Shah Muhammad Abdur Rahim and others AIR 1934 PC 77.

6. We are not persuaded to agree with the prime contention of Mr. M. Waris Khan, learned Advocate Supreme Court that the learned High Court has transgressed its limits by striking down the order of the competent forum in exercise of jurisdiction as conferred upon it under Article 199 of the Constitution of the Islamic Republic of Pakistan for the simple reason that "it is an omnibus article under which relief can be granted to the citizens of the country against infringement of any provision of law or of the Constitution". The reason is that beyond a certain point of lack of care and understanding in respect of facts, negligence and misunderstanding become questions of law and jurisdiction, because no authority is expected to exercise jurisdiction in such a manner as to make it a farce. In this regard reference can be made to case M.K. Khakwani v. Commissioner, Multan Division (1982 CLC 361). We are conscious of the fact that the learned High Court in exercise of Constitutional jurisdiction cannot sit as a Court of appeal but where order passed by Court, suffers from any jurisdictional defect or violates any , provision of law, invocation of Constitutional jurisdiction would be justified and if the error is so glaring and patent that it may not be acceptable that in such an eventuality the High Courts have interfered when finding is based on insufficient evidence, misreading of evidence, non-consideration of material evidence, erroneous assumption of fact, patent errors of law, consideration of inadmissible evidence, excess or abuse of jurisdiction, arbitrary exercise of power and where unreasonable view on evidence has been taken, In this regard reliance can be placed on PLD 1978 Quetta 17 + (PLJ 1978 Quetta 72(DB). "It is by now settled law that the High Courts in exercise of their Constitutional jurisdiction do not normally interfere with the finding on fact but if the decisions are based in disregard of the provisions of law, or, are based on misreading or insufficient or inadmissible evidence the superior Courts have interfered with such decisions and findings in order to advance the cause of justice. Reference may be made to (i) Nasreen Fatima v. Principal, Bolan Medical College PLD 1978 Quetta 17, (ii) Imtiaz Bashir v. Special High Powered Committee PLD 1978 Quetta 131, (iii) Haleema Bai v. Settlement Commissioner 1987 MLD 3215. (Ali Nawaz v. Member, Board of Revenue PLD 1989 Kar. 237). The said view also finds support from the following authorities:--

(i) Saeeda Fatima v. Abdul Hamid PLD 1983 SC 258;

(ii) Gulzar Ahmad v. State PLD 1985 Lah. 353;

(iii) Ahmeden Bibi v. Rustam Ali PLD 1989 Lah. 531

(iv) Abdul Aziz v. Bashir Ahmad 1989 CLC 103

7. There is no cavil to the proposition that failure on the part of a statutory functionary or a Court to make a visible effort with diligent application of mind to adjective assertion or to strive in search of truth for dispensing justice would tantamount to failure to exercise jurisdiction in the eye of law. As mentioned hereinabove the trial and revisional forums have not scrutinized the evidence with diligent application of mind and besides that no attention whatsoever was paid to the question of limitation having a substantial bearing on the case and accordingly the learned High Court was justified in exercising the jurisdiction as conferred upon it under Article 199 of the Constitution of the Islamic Republic of Pakistan. The respondent had in fact acquired the land by virtue of exchange and deed whereof was got registered in the year 1961, which in our considered opinion, cannot be made a base for pre-emption after lapse of about three decades without lawful justification which is badly lacking. As mentioned hereinabove the record indicates that the land in question was sold to one Fazal Rehman vide sale deed dated 14-2-1983 but no immediate action whatsoever was taken by the appellant for the redressal of his grievances. It is an admitted feature of the case that on account of a compromise between the parties the said sale was abandoned on 9-5-1983 but the appellant remained mum and behaved like a silent spectator within intervening period i.e. 14-2-1983 to 9-5-1983 whereas in pre-emption cases each day has its own significance and delay is to be meticulously explained. The undertaking pressed time and again given by Gul Rehman having no sanctity of law, in our view, by no stretch of imagination can be made a base for the right of pre-emption which was exercised on 16-5-1983. In the case in hand the time during which the appellant could pre-empt had expired under 'Riwaj' which was admittedly prevailing and having the force of law and consequently the provisions as contained in the Limitation Act, 1908, cannot be pressed into service so as to resuscitate and revitalise the cause of action which had become barred due to ' Riwaj' .

8. In the light of foregoing discussion we are of the considered opinion that the suit of pre-emption was never filed in time and moreso, the factum of sale could not be proved by adducing worthy of credence evidence. The impugned judgment being free from any illegality or infirmity does not call for any interference and accordingly the appeal being devoid of merit is dismissed.

Q.M.H./M.A.K./D-13/S

Appeal dismissed.