

Suppl. List
Sr. No. 97

**HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR**

CM (M) No. 31/2020
c/wOWP No. 2107/2017

Mohammad Ashraf Tantray and others

.....Petitioner(s)

Through: Mr. I. Sofi, Advocate

Versus

Farooq Ahmad Dand and others

.....Respondent(s)

Through: Mr. Mir Majid Bashir, Adv.
Mr. Irshad Ahmad, Advocate

CORAM: HON'BLE MR. JUSTICE TASHI RABSTAN, JUDGE

JUDGEMENT

01. Petitioners, through the medium of instant petition, have invoked the writ jurisdiction of this Court under Article 227 of the Constitution of India for quashing the Order dated 31.12.2019 passed in the main suit as also Order dated 20.02.2020 passed in an application for setting aside the ex-parte proceedings arising out of suit titled *Farooq Ahmad Dand and Anr. Vs. Mohammad Ashraf Tantray and others*.

02. The case set up by the petitioners in this petition is that respondents/plaintiffs have filed a suit in the year 1997 before the learned Chief Judicial Magistrate, Handwara which was, vide Order dated 10th May, 2011, assigned to the court of Munsiff/JMIC, Handwara, (for short '*Trial Court*'). It is averred in the suit that father of petitioners 1&2 had allegedly sold the suit land measuring 2.10 Kanals to respondents herein/plaintiffs by virtue of Sale Deed dated 05.09.1985 and when he did not come to register the same, an appeal was filed before the court of Principal District Judge, Kupwara, who vide Order dated 25.02.1989 registered the Sale Deed in absence of father of petitioners 1 and 2. It is also averred that in the suit it is

projected that a permanent injunction was sought to be passed in favour of the respondents/plaintiffs against the petitioners/defendants declaring the plaintiffs as owners in possession of the suit land.

03. From the perusal of writ record, it appears that petitioners/defendants were represented by one Advocate, namely, Ghulam Hassan Wani, up to 2019 and thereafter, the petitioners/defendants did not choose to appear before the trial court. The record further reveals that the above named Advocate was suffering from serious ailment and was not in a position to appear before the trial court and the court vide Order dated 18.11.2019 issued notice to the petitioners/defendants for their appearance, owing to the fact that their counsel was not appearing due to illness. Accordingly, the matter was posted for 30.11.2019. On the said date, one, Mr. Nadeem Majeed, Advocate, caused his appearance and filed power of attorney on behalf of the petitioners/defendants and time was sought for getting status of the case bearing OWP No. 2107/2017, which was pending before this Court. The record further reveals that on 23.12.2019, when the matter was listed, the status with regard to OWP No. 2107/2017 was furnished, which reflected that the matter was adjourned and new date was fixed on 10.02.2020. After furnishing the status with regard to OWP No. 2107/2017, the court directed the counsel for the petitioners/defendants to file amended written statement because the application for amendment of plaint was already allowed by the trial court despite adjourning the case on several hearings. The amended written statement on behalf of the petitioners/defendants was not filed by their counsel. However, the learned counsel made a statement that he had no instructions from his clients. Ultimately, the trial court considered the statement and initiated ex-parte proceedings against the petitioners/defendants in the suit. The respondents/plaintiffs were, accordingly, directed to adduce evidence in ex-parte. On 21.01.2020, the respondent/plaintiff no. 1 appeared as his own witness and his statement came to be recorded. On 27.01.2020 statements of two more witnesses of the respondents/plaintiffs were recorded. The official witness, Patwari

concerned, appeared on 30.01.2020, whose statement was not recorded as the record pertaining to the suit property was not available with him and, accordingly, the statement of Patwari was deferred. On 03.02.2020, the concerned Patwari once again caused his appearance and his statement was recorded. On 08.02.2020, learned counsel for the respondents/plaintiffs stated that he did not wish to adduce further evidence and made a submission that the matter be considered finally. The record also reveals that Advocate, namely, Nadeem Majeed, has filed an application for setting aside the ex-parte proceedings, to which objections were filed by the other side.

04. It also appears from the writ file that respondents/plaintiffs had filed an application for amendment of the suit, which was allowed by Trial court, which, however, was challenged by petitioners/defendants before this Court. By Order dated 21.12.2017 this Court stayed the Trial Court order. It is submitted that when the Trial Court directed petitioners/defendants to get the status from this Court with regard to pendency of the writ petition i.e., OWP No. 2107/2017, but due to non-availability of the counsel for the petitioners/defendants before this Court, the petitioners/defendants were not in a position to apprise the learned trial court with regard to the status of the case. The learned trial court was not satisfied with the submission of counsel for the petitioners/defendants and initiated ex-parte proceedings against the respondents/plaintiffs. It is also stated that immediately after having knowledge about *ex parte* proceedings, petitioners filed an application for setting aside the ex-parte proceedings, which was dismissed vide Order dated 20.02.2020, which is impugned in this petition.

05. Heard learned counsel for parties and perused the record.

06. Learned counsel for the petitioners has, while cementing the case set up by petitioner in writ petition, has stated that impugned orders are illegal, for the Trial Court has passed impugned orders on the ground that case was not adjourned but was fixed for adducing evidence of respondents/plaintiffs. It is also averred that counsel for petitioners, as per interim order, appears to be without instructions as he could not

get instructions to file written statement to amended plaint. The Trial Court has passed *ex parte* order, which Trial court cannot pass against petitioners/defendants as their counsel was very much present and as per the court he could not get the instructions to file written statement. Therefore, the impugned orders are illegal and against the law. It is further submitted that rejection of application filed before Trial court on the observation that petitioners had not shown any good cause for setting aside the *ex-parte* proceedings is without application of mind. It is also submitted that the application filed by the respondents/plaintiffs for amendment of the suit stands allowed vide order dated 06.11.2017. It is this order which has been challenged before this Court by way of filing of writ petition bearing OWP No. 2107/2017 and this Court vide Order dated 21.12.2017 stayed the operation of the aforesaid order. It is also submitted that since the writ petition is pending till date and the petitioners were under this impression that they need not to file written statement to the amended suit, therefore, they have filed a reasoned application for setting aside of *ex-parte* proceedings.

07. On the other hand, learned counsel, appearing for the respondents/plaintiffs, have vehemently argued that the present petition is not maintainable because neither there is jurisdictional error in the impugned orders nor are those perverse as the same were based on the material available before the trial court. Learned counsel further submits that no case for invoking the supervisory jurisdiction of this Court under Article 227 of the Constitution of India has been disclosed in the petition nor it is made out. Learned counsel also submits that mere dissatisfaction of a party with a decision or order of a Court is no ground for invoking supervisory jurisdiction of the High Court, therefore, the supervisory jurisdiction of the High Court cannot be invoked for setting aside of order passed by the trial court and can be exercised only in a case where larger public interest is involved. In support of their submissions, learned counsel for respondents have relied on *Vijay Narayan Thatte and others v. State of Maharashtra*

and others (2009) 9 SCC 92; Asian Resurfacing of Road Agency Pvt. Ltd and another v. CBI and another (2018) 16 SCC 299; and Dimpy Enterprises v. LIC of India & others, AIR (J&K) 56.

08. Learned counsel for the petitioners, to rebut submissions of learned counsel for respondents, strenuously submits that even in a petition under Article 227 of the Constitution of India, this Court has the power to set aside the illegal order of the trial court by issuing a writ of Certiorari. He further submits that this Court has superintendence and control over all the courts for the time being subject to its appellate or revisional jurisdiction and all such courts shall be subordinate to this Court. Learned counsel further submits that it has the jurisdiction to call for the return from such courts under prescribed norms and rules regulating practice and proceedings of such courts. The power of superintendence is not confined to administrative superintendence only, but such power includes the power of judicial review also. This High Court under Article 227 of the Constitution of India has to ensure that the lower courts subordinate to it have done what they are required to do. This Court can interfere with subordinate courts in cases of erroneous assumptions or acting beyond its jurisdiction, refusal to exercise jurisdiction, commission of error of law apparent on record where its conclusions are perverse based on no evidence. Thus, the learned counsel for the petitioner submits that this Court can interfere by exercising the powers under Article 227 of the Constitution of India. To cement his submissions, he has placed reliance on *Sangram Singh v. Election Tribunal Kotah and another, AIR 1955 SC 425; Chuni Lal Chowdhry v. Bank of Baroda and others (1982) AIR J&K 93.*

09. Precisely, the case of the petitioners is that Trial court has failed to appreciate relevant aspects as well as legal provisions of the case, which are applicable to the situations as also impugned orders have been passed without application of mind.

10. Now, before deciding the controversy raised in the present petition, the question for consideration would be whether the present petition,

filed under Article 227 of the Constitution of India would be maintainable.

11. The answer is in negative for the reasons hereinafter.
12. First and foremost, petitioners have not questioned competence/jurisdiction of Trial Court. Petitioners have not averred in the petition that Trial Court has passed the order without or in excess of jurisdiction.
13. The maintainability of the petition is put under cloud by its very own averments on the ground that Civil Procedure Code has undergone a sea change with the Amendment of 2009. The amendment has restricted the powers of the revisional Court. Virtually, petition is in the nature of revision petition and if, such a practice is adopted and allowed that will render the aim and object of the amendment infructuous and meaningless. The fact of having vast powers with this Court under Articles 226 and 227 is undisputed, but care has to be taken when the same is warranted to be exercised, because the powers under such Articles have to be utilized very cautiously, carefully, sparingly and in rarest of the rare cases.
14. The Apex Court in **ShaliniShyam Shetty v. Rajendra Shankar Patil** reported as **2010 AIR SCW 6387** has observed that there is tendency in High Courts to entertain petitions under Article 227 of the Constitution against the orders against which revision is barred in terms of amended Act of CPC. It is apt to reproduce paragraph Nos. 80, 81 and 82 of the judgment supra herein:-

“80. We may also observe that in some High Courts there is tendency of entertaining petitions under Article 227 of the Constitution by terming them as writ petitions. This is sought to be justified on an erroneous appreciation of the ratio in *Surya Dev* (supra) and in view of the recent amendment to Section 115 of the Civil Procedure Code by Civil Procedure Code (Amendment) Act, 1999. It is urged that as a result of the amendment, scope of Section 115 of CPC has been curtailed. In our view, even if the scope of Section 115 CPC is curtailed that has not resulted in expanding High Court’s power of superintendence. It is too well known to be reiterated that in exercising its jurisdiction, High Court must follow the regime of law.

81. As a result of frequent interference by Hon'ble High Court either under Article 226 or 227 of the Constitution with pending civil and at times criminal cases, the disposal of cases by the civil and criminal courts gets further impeded and thus causing serious problems in the administration of justice.

82. This Court hopes and trusts that in exercising its power either under Article 226 or 227, Hon'ble High Court will follow the time honored principles discussed above. Those principles have been formulated by this Court for ends of justice and the High Courts as the highest Courts of justice within their jurisdiction will adhere to them strictly."

15. This Court also in **Abdul Rehman Dar and others v. Showkat Ali Bhat and others** reported in **2011 (IV) JKJ 334 (HC)**, and in case titled **Kuldip Singh and others v. Krishna Devi and others** passed by the Hon'ble Division Bench of this Court in **LPAOW No. 30/2013** dated 16.04.2013, while following the aforesaid judgments of the Apex Court, has laid down the same principle. The Apex Court in **Radhey Shyam and Anr. Vs. Chhabinath and Ors.** reported in AIR (2015) SCW 1849 has taken a view different from one that was taken in **Surya Dev Roy's** case concerning the jurisdiction under Article 227 of the Constitution of India.
16. If a party which loses the case before the trial Court or before the Appellate Court is allowed to file any petition and thereafter if such petition is entertained without any check and balance that will amount to beating litigation and in breach of the purpose, aim and object of the legislation which was made basis for amendment of the CPC.
17. The Apex Court in case **Shalini Shyam Shetty supra** also has held that if the litigating parties are private and not State functionaries, the writ is also not maintainable and a distinction has been made with respect to the powers of High Court under Article 226 and 227 of the Constitution of India. It is apt to reproduce paragraph No. 62 here as under:

"62. On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:

- (a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two Articles is also different.
- (b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of superintendence on the High Courts under Article 227 and have been discussed above.
- (c) High Courts cannot, on the drop of a hat, in exercise of its power interfere with the orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restraint on the exercise of this power by the High Court.
- (d) The parameters of interference by High Courts in exercise of its power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in *Waryam Singh (supra)* and the principles in *Waryam Singh (supra)* have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.
- (e) According to the ratio in *Waryam Singh (supra)*, followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts subordinate to it, 'within the bounds of their authority'.
- (f) In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.
- (g) Apart from the situations pointed in (e) and (f), High court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts subordinate to it where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.
- (h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words, the jurisdiction has to be very sparingly exercised.
- (i) High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in the case of **L. Chandra Kumar v. Union of India & others, reported in (1997) 3 SCC 261** and therefore abridgement by a Constitutional amendment is also very doubtful.
- (j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.

- (k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo moto.
- (l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.
- (m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunal and Courts subordinate to High Court.
- (n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.
- (o) An improper and a frequent exercise of this power will be counter-productive and will divest this extraordinary power of its strength and vitality”.

18. Judicial pronouncements as to the object and scope of the power of the High Courts under Article 227 of the Constitution would leave little scope to interfere with the orders of the subordinate courts as a matter of routine. This power cannot be taken as right of another appeal to the aggrieved party. Nor this power can be invoked to point out an error of law or fact in the order or judgment/decision of subordinate court as has been sought by the petitioner in this case. This power cannot be used to make out that the decision of the subordinate court could have been or must have been other than what it is.

19. The High Courts in exercise of its power under Article 227 of the Constitution should interfere with the trial court orders only to keep the Tribunals and courts subordinate to it, ‘within the bounds of their authority’ and to ensure that law is followed by such Tribunals and Courts by exercising jurisdiction which is vested in them and not declining to exercise the jurisdiction which is vested

in them. Apart from the above, High Court can interference in exercise of its power of superintendence when there has been a patent perversity in the Orders of the Tribunals and courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

20. Another important aspect of the matter that needs to be discoursed here is that the Supreme Court in the case of *Asian Resurfacing of Road Agency* (supra) has observed that situation of proceedings remaining pending for long on account of stay needs to be remedied inasmuch as remedy is required not only for corruption cases but for all civil and criminal cases, where on account of stay, civil and criminal cases are held up and at times proceedings are held up and at times proceedings are adjourned sine die on account of stay and even after stay is vacated, intimation is not received and proceedings are not taken up. In view of these observations, the Supreme Court has directed that in all pending cases where stay against proceedings of a civil or criminal trial is operating, the same will come to an end on expiry of six months unless in an exceptional case by a speaking order such stay is extended and the speaking order must show that the case was of such exceptional nature that continuing the stay was more important than having the trial finalized.
21. In the present case the trial court has passed a very reasoned order, even otherwise, the suit filed by the respondents/plaintiffs in the years 1997, is still pending before the trial court, as such, the trial court has rightly rejected the application for setting aside the *ex parte* proceedings.
22. In this backdrop, it is not the case of the petitioners that the trial court has acted without or in excess of jurisdiction. Therefore, this petition cannot stand the test laid down by the Apex Court in the judgments reproduced hereinbefore and the Judgments cited by learned counsel for the petitioners are distinguishable.

23. Viewed thus, this petition is not maintainable and the same is, accordingly, **dismissed** along with connected CM(s).

24. In view of the dismissal of this petition, OWP No. 2107/2017, shall also stand dismissed.

**(Tashi Rabstan)
Judge**

Srinagar
.03.2020
"Shamim Dar"