**JAMMU AND KASHMIR HIGH COURT**

Kishan Singh

Vs.

Mohd. Shafi

Civil Original Suit No. 26 of 1963

(J.N. Bhat, J.)

18.10.1963

**JUDGMENT**

**J.N. Bhat, J.**

1. In this suit which is under Order 37 of the Civil Procedure Code there are three defendants: Mohd. Shafi, Trdoki Nath and Hirday Nath. The defendants, Hoiday Nath and Triloki Nath applied on 9-9-63 for leave to defend the suit. This application is supported by an affidavit. The first defendant, Mohd, Shafi, presented a similar application supported by an affidavit on 19-9-63. Along with this application he put in another application for extension of time. The defendant Mobd. Shafi was served on 16-8-63, Hirday Nath on 13-8-63 and Triloki Nath defendant was served on 10-8-63. The grounds taken in the applications for defending the suit are numerous. It is stated that the pronote in question is without consideration, that there has been no proper presentation of the pronote, that there has been, no contract of paying interest and that there is no sum outstanding against the defendants, so on and so forth.

2. I have heard the arguments of the learned counsel with respect to these applications for grant of leave to defend the suit. The guiding principle for either granting or refusing leave to defend the suit under Order 37 of the Civil Procedure Code is that the affidavit which accompanies a petition for leave to defend must disclose a defense, that is a triable issue or a plea which is at least plausible, no matter whether the defense is legal or equitable, even though it may not ultimately turn to be a good defense. In this case there are a number of points raised which can be the subject matter of different issues between the parties; therefore leave to defend the suit has to be granted.

3. There is difficulty in the case of Mohd. Shafi who has not applied for leave to defend the suit within the statutory period of thirty days from the date of service. Mr. Bhan contends that in his case leave should not be granted and that his application should be refused without a final order this way or that being passed in the suit. I have considered the arguments advanced by both the counsel on this point. There is a difficulty in accepting the arguments advanced by Mr. Bhan. The pronote is jointly executed by all the three defendants and the defence is again a common one. If I refuse permission to Mohd. Shafi to defend the suit, then under the provisions of Order

37 Rule 2 of the Civil Procedure Code I have to accept the allegations in the plaint as admitted and the plaintiff shall be entitled to a decree for the principal sum due and interest and costs and future interest. It would be a contradiction in terms if after leave has been granted to two other defendants to contest the suit and ultimately, for the sake of argument be it said at least, that the suit of the plaintiff does not succeed, it shall stand decreed against the third defendant on the same material on record.

4. The application under Section 5 of the Limitation Act presented by Mohd. Shafi is misconceived. Section 5 of the Limitation Act has not been made applicable to such petitions in this State, though some other High Courts, for instance the High Courts of Lahore and Bombay, have extended Section 5 of the Act to such applications. It is high time that the legislature of the State extend the provisions of Section 5 to such petitions.

5. I have come across two authorities of the Madras High Court reported as *S. Murahari Rao v. K. Bapayya*[1], and *Srinivasan v. Bhakthavatsulu Naidu*[2], In the former decision Mack, J. held that the court has jurisdiction to condone delay and give leave even if the application for leave to defend has not been made within the prescribed period of limitation. He further held that

> "it is not necessary that every procedural order of a court should be supported by a specific statutory provision, and when there is neither provision nor prohibition it has t0 be guided by ordinary principles of common sense, justice, equity and good conscience."

6. Similarly Govinda Menon, J. in AIR 1953 Madras 909 has laid down that a court has power in a proper case before the passing of decree, to grant leave to defend the suit even though the defendant has not applied for leave within the prescribed period of the service of summons upon him.

7. But these two authorities were not considered good law in *Shab Mohamed Khan v. H.N. Wood-fall*[3] in which case a Division Bench of that Court consisting of Rajamannar, C.J. and Somasundaram, J. held that a court has no power to condone the delay in filing the application under Order 37 Rule 3 Civil Procedure Code as Section 5 of the Limitation Act has not been made applicable to it. Section 3 of the Limitation Act is mandatory, and when the application is filed beyond the time prescribed by Article 159 it must be dismissed. In *James Manickam v. Jaya Narayan Daga*[4], Chandra Reddi, J. also took the same view as has been taken by the Division Bench In AIR 1955 Madras 637 (Supra).

8. The Division Bench authority of the Madras High Court, AIR 1955 Madras 637 (Supra) is based on a reading of Section 5 and Article 159 of the Limitation Act. On a deeper analysis of the provisions of Order 37 of the Civil Procedure Code , 'this authority appears to be not only harsh and too technical but ignores the other provisions of Order 37 Rule 4 of this Order (which ?) empowers a court under special

[1] AIR 1949 Mad 742
[2] AIR 1953 Mad 909
[3] AIR 1955 Mad 637
[4] AIR 1953 Mad 767

circumstances to set aside a decree passed by the court under the provisions of this Order, and further empowers, it to grant leave to the defendant to appear and defend the suit. A case can be envisaged wherein there exist special circumstances within the meaning of this rule which would satisfy a Judge to set aside the decree and allow the defendant to defend the suit

under the provisions of R. 4. But if AIR 1955 Madras 637 (Supra) is followed strictly, it means that the same set of special circumstances when brought to the notice of the Court under the provisions of Rule 2 are to be rejected, because the application for leave to defend is not presented within the period of limitation prescribed therefor. The Judge being, therefore, powerless, has to pass a decree as envisaged by Order 37 Rule 2. After passing the decree on the same set of facts, he can set aside the decree and grant the defendant leave to defend the suit. This would look not only anomalous, but I should even go to the length of saying ridiculous, and would result only in duplication of work and waste of time of the court and the parties. If the court has power to allow the defendant to get a decree set aside in the special circumstances disclosed by him to the satisfaction of the court under Rule 4 and be permitted to defend the suit, this power should be considered inherent in the court while disposing of his application for leave to defend under the provisions of R. 2. Otherwise the court has first to ignore the special circumstances, pass a decree, and then on the basis of the same circumstances set aside the decree and allow the defendant to defend the suit. It is a cardinal principle of interpretation of statutes that when two provisions of a statute appear conflicting with each other they should be so interpreted so that they harmonise. (See *Rajkrushna Bose v. Binod Kanungo*[5], In another authority of the Supreme Court reported as *Babulal Bhuramal v. Nandram Shivram*[6], their Lordships have laid down that

> "If it is possible to avoid a conflict between the provisions of different Sections of the same Act on a proper construction thereof, then it is the duty of a court to so construe them that they are in harmony with each other."

Similarly it is well settled that if two constructions are possible, the court must adopt that which will implement and which ensures the smooth and harmonious working of the Act or the rule and discard that which will stultify the apparent intention, and therefore, eschew the other which leads to absurdity or gives rise to practical inconvenience or makes well established provisions of existing law nugatory. *Yugal Kishore Sinha v. B.N. Rahtogi*[7],

9. In *Shankarrao Madhavrao v. K.C. Sen*[8], it was held :

> "It is well established principle of interpretation that as far as possible the various provisions of a statute must be so read as not to bring them in conflict with each other. That does not mean that reconciliation must be effected. But the various* provisions must be so read, if at all it is possible to do so, that they do not conflict with each other."

10. Similarly is the principle well established that in interpreting statutes absurdity is to be avoided. In *State of Bombay v. Bai Moti*[9], it was laid down :

[5] AIR 1954 SC 202 [7] AIR 1958 Pat 154 [9] AIR 1958 Bom 18
[6] AIR 1958 SC 677 [8] AIR 1956 Bom 79

> "When the words in a statute are plain, the words must be given their natural and ordinary meaning. In construing a statute, words should not be added to the statute. But there is also another rule of interpretation that the legislature in enacting a Section does not use superfluous words and that every endeavour should be made to reconcile and to avoid any absurdity in the interpretation of the section."

11. In *Bhole Main v. S.M. Islam*[10], their Lordships laid down that it is an accepted principle of construction that all parts of a section must be construed together and the interpretation given must be harmonious and consistent.

12. Similarly when construing the different provisions of an enactment, the enactment as a whole should be considered. (Vide *Gulzara Singh Nanta Singh v. Smt. Tej Kaur*[11],).

13. *Lord Herschell in Colquhoun v. Brooks*[12], observed :

> "It is beyond dispute ..... that we are entitled and indeed hound when construing the terms of any provisions found in a statute to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to show that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act."

14. In another case *Cox v. Hakes*[13], the same learned Judge held :

> "It cannot, I think, be denied that, for the purpose of construing any enactment, it is right to look! not only at the provision immediately under construction, but on any others found in connection with it, which may throw light upon it and afford an indication that general words employed in it were' not intended to be applied without some limitation.")

15. In the light of these observations when we interpret the provisions of Order 37 we have to so interpret them as would lead to a harmonious construction of the entire order and avoid results which would result in absurdities and make one provision of the Act conflict with the other.

16. In any view therefore, as already stated, the special circumstances which would entitle me to set aside a decree under the provisions of Rule 4 would at the same time empower me to give leave to defend the suit, even if the application is beyond time if the special circumstances mentioned by the petitioner are convincing.

17. In this case, for instance, the contention raised for extension of time is that the petitioner Mohd. Shafi got injured in a recent fire breakout at Bandipura and was confined to bed. Therefore he could not present the proper application and affidavit in court within time. The factual aspect of the affidavit has not been contested by the

[10] AIR 1958 Pat 48 [12](1889) 14 AC 493 at p. 506
[11] AIR 1961 Pun 288 [13](1890) 15 AC 506 at p. 529

learned counsel for the plaintiff which means for the sake of disposal of this petition I must accept the contention as given in the application and affidavit for extension of time as correct. The facts would be special circumstances which would, in my opinion, entitle the petitioner Mohd. Shafi to leave to defend the suit whether before or after the decree, that would be immaterial. If the Madras authority has to be followed, in that case I shall have first to pass a decree against Mohd. Shafi and then set it aside on the same grounds on which I am supposed to reject it under Article 159 of the Limitation Act. In this view of the matter I would prefer the

view of Mack and Govinda Menon, JJ. to the view of the Division Bench of the Madras High Court in AIR 1955 Madras 637.

18. In this case there is another fact which has to be considered and has an important bearing on the question whether leave should be granted to Mohd. Shafi. On the same facts, in the same suit and on the same grounds leave has to be granted to the two other defendants and it would be self-contradictory, as already stated in an earlier portion of this judgment, to allow one set of defendants to contest the suit and to get it possibly dismissed also and yet pass a decree against the third defendant on the same material. I, therefore, accept the application of all the three defendants and grant them leave to defend the suit. They will present their written statements on a date to be fixed by the office.
Application allowed.