

HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

Case: C. Rev. No. 143/2008
CMA No. 160/2008

Date of decision: 30.08.2012

Bashir v. Khurshed Bibi and ors.

Coram:

Hon'ble Mr. Justice Muzaffar Hussain Attar, Judge

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| 1. Whether approved for Law Journal? | Yes |
| 2. Whether approved for publication in Press? | |
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Appearing counsel:

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| For petitioner(s) : | Mr. M. L. Sharma, Advocate |
| For respondent(s): | Mr. K. B. Gupta, Advocate |

(Oral)

1. A Civil Original Suit for partition of the property with regard to House No. 349 situated at Mohalla Dalpatian, Jammu was instituted by the respondents before the Court of learned District Judge, Jammu against the present petitioner and two others. The suit was transferred for its trial to the learned Additional District Judge, Jammu. On 12.03.2008, learned trial Judge passed a preliminary decree for partition of the suit property. Mr. A. G. Sheikh, Advocate was appointed as Commissioner to cause partition on spot after summoning the parties and following the due procedure of the law. It was also directed that before the preliminary decree is drawn, the plaintiffs shall make good deficiency in the court fee by next

date. Suit was ordered to be listed on 16.03.2008. On that date, time was extended to make good the deficiency of the court fee. The suit was ordered to be listed on 31.03.2008, on which date, for not making good deficiency in the court fee, learned trial Judge rejected the plaint under Order VII Rule 11 of the Code of Civil Procedure (CPC). Respondents-plaintiffs, thereafter filed an application under Section 149 r/w Section 151 of CPC, praying therein, that the suit be restored to its original number and respondent be permitted to pay the requisite court fee. The said application was resisted by the petitioner. Learned trial Judge vide order dated 31.10.2008 allowed the application of the respondents and ordered for restoration of the suit to its original number, subject to payment of Costs of Rs. 1000/- Respondents were directed to pay deficit court fee on the next date of hearing.

2. Petitioner, being aggrieved of the said order, has challenged the same in this revision petition.
3. Learned counsel for the petitioner submitted that plaint, which was rejected under Order VII Rule 11 of the CPC, constitutes a decree in terms of Section 2(2) of Code of Civil Procedure, Svt. 1977 **(for Short**

“Code”). Learned counsel submitted that since the decree was drawn up in pursuance to the order of rejection of the plaint, respondents, if aggrieved thereof, had to challenge the same by filing an appeal, as provided by Section 96 of Code read with Order XLI of Code. Learned counsel submitted that after the plaint was rejected, the application could not be entertained by the learned trial court as the learned trial court was *functus officio* of the matter. Learned counsel, in support of his contention, referred to and relied upon the judgment of Hon’ble Supreme Court in case titled “Narpat Singh v. Rajasthan Financial Corporation” reported in **2007 (II) S.L.J 475**; “Abdul Rashid Rather v. Gh. Ahmad Rather” reported in **2011 (1) S.L.J. 341** and “K. N. Mohanan v. N. V. Nalinakshan” reported in **2004 (1) Civil & Rent Judicial Reports (Kerala High Court)** and submitted that this revision petition deserves to be allowed and the impugned order be accordingly set aside.

4. Learned counsel for the respondents submitted that since the respondents for valid reasons were prevented from paying the deficit court fee, an application was filed seeking restoration of the suit

and permission to deposit the deficit court fee. Learned counsel submitted that the trial court has power to pass the order, which is impugned, in this revision petition. Learned counsel, in support of his contention, referred to and relied upon case titled “Maharashtra State Electricity Board v. Niranjana Alloys Steels Pvt. Ltd.” reported in **AIR 2007 (NOC) 1353 (BOM.)**. Learned counsel prayed for dismissal of revision petition.

5. The payment of court fee in the suits is determined by the Court Fee Act/Suit Variation Act. The Court fee is being charged for the benefit of the State. The payment/non payment of the Court fee, in any manner, does not affect any of the right of the defendants in civil original suit. The Court, in order to ensure that provisions of Court Fee Act are adhered to, has been given power under Order VII Rules 11 (b) and (c) to reject the plaint. Rejection of plaint in the aforementioned manner does not infringe any of the rights of the defendants. The power is conferred on court only to ensure that requisite court fee/stamp duty is paid. Courts of law in the matter of advancing the cause of justice have not to fall prey to technicalities. The inherent

powers of civil courts cannot be circumscribed to render them illusory.

6. The civil court has power to reject a plaint at any stage of trial in the manner and circumstances delineated in clause (a) to (c) of Order VII Rule 11 of the Code. Different clauses of Order VII Rule 11 of the Code carve out different reasons for ordering rejection of plaint. In all such circumstances, when plaint is rejected, which rejection in view of mandate contained in Section 2(2) of the Code constitutes a decree, the appeal as provided by Section 96 of the Code may not be the only remedy to get the order of rejection of plaint corrected. The remedy of appeal is not the exclusive remedy. Rejecting plaint for non payment of court fee may not in all circumstances constitute a question of law, which would be corrected only by appellate court. The issue can be looked at from different angles. If the court asks the plaintiff to pay deficit court fee, and the plaintiff joins issue on it, and while settling the same court determines and returns finding on question of law, then, in such circumstances, if plaint is rejected, the appeal will be only course to get it finally determined. But if plaint is rejected without

determining serious legal issues, and the plaintiff explains the reasons for his inability to pay court fees and volunteers to pay it, then less expensive and more convenient mode to take a view and redress the grievance will be to invoke the inherent powers of the same court.

7. The contention of the learned counsel for the petitioner that in terms of Order 2 (2) of CPC, when a plaint is rejected under Order VII Rule 11, it becomes a decree and the aggrieved person can challenge the same by filing appeal in terms of Section 96 of the Code, is correct. Since the Statute has defined the rejection of the plaint as a decree, the aggrieved person can challenge the same by filing an appeal in accordance with the mandate contained in Section 96 thereof. It is, however, required to be seen whether in the cases of like nature only remedy available to the plaintiff is filing of the appeal alone. Normally, appeal is filed on legal issues or legal grounds and in the civil first appeal even the facts are being looked into by the appellate court. In this case, respondents when they filed application seeking restoration of the suit to its original number and also prayed for payment of

deficit court fee, they had not raised any legal ground or issue, but had only spelt out the reasons for non payment of the deficit court fee in their application which, inter alia, are; that applicant No. 1-Khursheed Bibi was ill from 01.03.2008 to 14.04.2008; applicant No. 2, the son of the deceased Abdul Gani, is a patient of psychiatric disease and still under treatment of the doctor for the more than two years and the relevant evidence was annexed with the said application; applicant No. 3 is a handicapped/paraplegic person. Necessary evidence in this regard was also annexed with the said application. Applicant no. 4 has filed an affidavit, stating therein, that his mother-in-law is 80 years old and he has to stay back to look after her. No legal issue was projected for being determined in this case. The respondents in their application seeking restoration of the suit and time for payment of deficit court fee pleaded the aforementioned causes, which prevented them from paying the deficit court fee. This, in all circumstances, may not constitute a ground for filing the appeal under Section 96 of the Code. The plaint was rejected on technical ground for non-payment of deficit court

fee. Learned trial court had power to recall its order, if, on facts, it was satisfied that party(s) failed to pay the deficit court fee for valid reasons. The trial court passed preliminary decree and determined the rights of the parties, it could not be defeated on technical ground for non payment of deficit court fee. Trial court had power to entertain the application of the respondents and after entering into satisfaction that the same is bonafide and genuine, learned trial Judge could allow the same. The trial court has passed reasoned order and there is no scope for interfering with the same.

8. The application seeking restoration of the suit and time for paying the deficit court fee, was not an application to seek any interim relief in a matter which was already concluded and finally disposed of. It was an application seeking restoration of the suit, which application, in law, is held to be maintainable. Furthermore, the judgment of this Court in Abdul Rashid's case (supra) has been handed down in different fact situation. In that case instead of filing appeal, revision petition was filed and this court held that in presence of specific provision for filing of appeal, revision ought not to have been filed. This

judgment is not applicable on facts to the case on hand. View is taken in K. N. Mohanan's case by the Kerala High Court that application under Section 151 C.P.C. can be allowed to be treated as review petition, but still the application filed for restoration of suit and payment of deficit court fee was rejected. In that case, the application was filed under Order IX Rule 4 of the Code, which was held to be not maintainable.

9. In view of the reasons recorded in this order, with respects, view of Kerala High Court in K. N. Mohanan's case is not subscribed to.
10. In this case, there is yet another reason for not accepting the contention of petitioner of availability of right of appeal, inasmuch as, it was directed by trial court that before preliminary decree is drawn, the plaintiff shall make good deficiency in court fee. Admittedly, deficit court fee was not paid. Thus, legally no decree was in existence. The plaintiff could not avail of the remedy of appeal in accordance with mandate of Section 96 of the Code.
11. For the reasons recorded in this order, this petition, being merit-less, is dismissed. Respondents-plaintiffs are directed to deposit the deficit court fee

within a period of one week from the date, record is received by the learned trial court. It is made clear that, in case, deficit court fee is not paid, without any just and lawful reason, within one week, and in case, time is not extended by learned trial court, plaint shall be deemed to have been rejected.

12. Record be sent back to the learned trial court.

(Muzaffar Hussain Attar)
Judge

JAMMU
30.08.2012
Paramjeet