

(2015) 01 KAR CK 0429

In the Karnataka High Court

Case No : Writ Petition No. 26409/2014 (GM-CPC)

Acharya Pathasala Educational Trust

APPELLANT

Vs

A.R. Acharya and Others

RESPONDENT

Date of Decision : 31-01-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151, 92
Limitation Act, 1963 — Section 5

Citation : (2015) 01 KAR CK 0429

Hon'ble Judges : B. Manohar, J.

Bench : Single Bench

Advocate : B.S. Satyanand, for the Appellant; Kamaleshwara Poojary, Advocate for Swarnakamal, Assts. Adv., Advocates for the Respondent

Final Decision : Dismissed

Judgement

B. Manohar, J.—Petitioner is the respondent in Misc. No. 19/2013 on the file of the XXXVII Additional City Civil and Sessions Judge, Bangalore City. Being aggrieved by the order dated 3.5.2014 allowing I.A. No. 1 filed by respondent No. 1 condoning the delay in filing the Misc. No. 19/2013 for restoration of OS No. 8093/2010 and permitting him to prosecute the petition, the petitioner has filed this writ petition.

2. FACTS OF THE CASE AS FOLLOWS:

"Respondents No. 1 and 2 filed OS No. 8093/2010 seeking for passing of a judgment and decree in the nature of declaration, declaring that the enrollment of new members during period of 2008-2009 in the category of Ajeeva Sadasya, admitted and accepted by defendants No. 1 and 2 on 30.12.2008 and 1.1.2009 are illegal and null and void. It is also sought for declaration that the office bearers election held on 9.8.2008 is null and void as against to the direction issued by this Court in MFA No. 4970/2006 and connected matters and also against to the bye law of the APSE Trust particularly bye-law Rule 18(a)(2) of the Trust and further sought for a direction to hold an enquiry with regard to the

accounts. The said suit was filed after obtaining the permission under Section 92 read with Section 151 of CPC by order dated 9.11.2010 passed in Misc. No. 218/2010 on the file of the Principal City Civil and Sessions Judge, Bangalore. 3. In the suit, the plaintiffs filed I.A. No. I under Order 39 Rules 1 and 2 of CPC requesting the Court to restrain the defendants from accepting the resolution of enrolment of new members of Trust dated 30.8.2008 till the disposal of suit and I.A. No. II under Order 39 Rules 1 and 2 of CPC requesting the Court to direct the defendants to produce the accounts of the suit schedule property for the period of 2008 pending disposal of the suit. The Trial Court after considering the matter in detail by its order dated 5.3.2011 dismissed both the applications. Being aggrieved by the same, the plaintiffs preferred MFA No. 3128/2011 before this Court challenging the order dated 5.3.2011 passed in OS No. 8093/2010. When the matter stood thus, the plaintiffs/respondents No. 1 and 2 herein filed a memo dated 29.6.2011 in OS No. 8093/2010 stating that the matter has been settled out of Court and the defendants have agreed to consider the rights of the plaintiffs as permanent members of APSE Trust in the category of Abhimanyus with all rights and privileges as provided under the bye-laws of APSE Trust.

4. The Trial Court, on the basis of the said memo filed by the plaintiffs, dismissed the suit by order dated 29.6.2011. In view of the dismissal of the suit, a memo was filed in MFA No. 3128/2011 informing about the dismissal of the suit. On basis of the said memo, the MFA was dismissed as the same does not survive for consideration. Thereafter, respondents No. 1 and 2 herein filed Misc. No. 19/2013 under Sections 151 of CPC alongwith I.A. No. 1 under Section 5 of Limitation Act seeking to condone the delay in filing an application for restoration of OS No. 8093/2010, the defendants objected for the same. The Trial Court by the order impugned allowed the petition condoning the delay in filing Misc. petition; set aside the order dated 29.6.2011 and restored the original suit from the stage of dismissal and permitted the plaintiffs to prosecute the suit. In support of the applications, Sri A.R. Acharya son of N Anantha Achar, Trustee (Abhimani) filed an affidavit stating that on the assurance given by the defendants, that the plaintiffs will be permitted to participate in the Board meeting and they would withdraw the notice dated 08.03.2006, they withdrew O.S. No. 8093/2010 filed against the defendant trust. However, after withdrawal of the suit, they have not come forward to withdraw the said letter and not made them permanent members. On the other hand, the President of the Trust by a letter dated 22.10.2012 informed that the matter has to be taken up only in the Board Meeting in respect of the dispute regarding legal matters. In view of that plaintiff have filed Miscellaneous petition seeking for restoration of suit filed by them. There was some delay in filing the miscellaneous petition and sought for condoning the delay.

5. The contesting respondents in miscellaneous petition filed their detailed objections to the said application inter alia contending that the reasons assigned by the petitioners therein do not constitute sufficient cause to condone the delay. They denied averments made in paras-3 and 5 of the affidavit and all are

subsequent events. The petitioners in the miscellaneous petition have to explain each days delay. The suit was withdrawn on 29.6.2011 whereas the miscellaneous petition was filed on 2.11.2013. There was inordinate delay of more than one year six months. Hence, the inordinate delay in filing the miscellaneous petition cannot be condoned. Apart from that, the miscellaneous petition itself is not maintainable. When such being the case, the question of condoning the delay in filing the miscellaneous petition does not arise and sought for dismissal of the application as well as miscellaneous petition.

6. The Trial Court after considering the matter in detail gave an opportunity to the parties to lead evidence, Petitioner No. 1 in miscellaneous petition has given his evidence explaining under what circumstances, they have withdrawn the suit filed by them. On the other hand, the defendants have not examined any witnesses. On the basis of pleadings of the parties, the Trial Court framed the following points:

"1. Whether the applicant/petitioners proves that, condoning the delay in filing this petition for considering the petition filed for restoration of OS No. 8093/2010 is necessary?

2. What order?"

7. On the basis of the above points, the Trial Court considered the pleadings of the parties and the evidence let in. In the evidence, the petitioners therein stated under what circumstances and what made them to withdraw the suit filed by them and also produced some documents in support of their case. On behalf of the defendants, no witness was examined. The Trial Court taking into consideration all these aspects of the matter allowed I.A. No. 1 condoning the delay in filing the miscellaneous petition. Being aggrieved by the said order, the defendants 1 and 2 have filed this writ petition.

8. Sri. B.S. Satyanand, learned counsel appearing for the petitioners contended that the order passed by the Trial Court is contrary to law. The plaintiffs have not explained the inordinate delay of more than 1 1/2 years in filing the Miscellaneous Petition. The reasons assigned in paragraphs 4 and 5 of the accompanying affidavit do not constitute sufficient cause for condoning the inordinate delay. In paragraphs 5 and 6, they have stated some subsequent events said to have been taken place. That is not relevant for condoning inordinate delay. He also relied upon a decisions of the Hon"ble Supreme Court reported in State of Uttar Pradesh Vs. Brahm Datt Sharma and Another, ; Lanka Venkateswarlu (D) by L.Rs. Vs. State of A.P. and Others, ; and Ramji Gupta and Another Vs. Gopi Krishan Agrawal (D) and Others, to contend that the inordinate delay in filing the Miscellaneous Petition cannot be condoned for mere asking that the court must apply their mind to reopen the settled issue though the court has got inherent power under Section 151 of CPC. That inherent power must be exercised in a fair manner. In the instant case, no cogent reason has been given for inordinate delay of more than 1 1/2 years. The subsequent

events cannot be a ground to condone the inordinate delay. Hence, sought for allowing the writ petition by setting aside the order impugned.

9. On the other hand, Sri. Kamaleshwara Poojary for M/s. Swarnakamal Associates, learned counsel appearing for respondents 1 and 2 argued in support of the order passed by the Trial Court and contended that invoking Section 92 of CPC, they had obtained permission of the court to institute a suit. The suit has been filed for many reliefs. An application was also filed for temporary injunction. When the matter was pending in MFA No. 3128/2011, the defendants had assured that they will consider their grievances and they will be made permanent members and withdraw the letter dated 08-03-2006; they also stated that they will be treated as Abhimani members and will be given 5 membership each. Apart from that the resolutions were also passed on 06-06-2011 and 28-7-2011. On the basis of those resolutions, believing that the defendants will ventilate their grievances, the plaintiffs filed a memo seeking for withdrawal of their suit. In the memo, it was clearly mentioned that the suit has been withdrawn on the basis of the assurances given by the defendants. After withdrawal of the suit and also dismissal of MFA No. 3128/2011 on the basis of the memo, the defendants have gone back from their words. In view of that, the plaintiffs were forced to file Miscellaneous Petition along with an application for condonation of delay. The reasons for condonation of delay have been assigned in paragraphs 4, 5 and 6 of the application. The Trial Court taking into consideration all these aspects of the matter framed necessary issues regarding condonation of delay. The plaintiffs have lead evidence producing necessary documents. The Trial Court condoned the delay in filing the miscellaneous petition. There is no infirmity or irregularity in the order passed by the Trial Court. In support of his contention, he relied upon the judgment reported in Jet Ply Wood Private Ltd. and Another Vs. Madhukar Nowlakha and Others, . The order passed by the Trial Court does not call for interference by this court and hence sought for dismissal of the writ petition.

10. I have carefully considered the arguments addressed by the learned counsel for the parties, perused the order impugned and voluminous documents produced by the parties.

11. The records clearly disclose that initially the plaintiffs had filed O.S. No. 1893/2010 for various reliefs against the defendants 1 and 2. Before filing the said suit against the Trust, a petition was filed under Section 92 read with Section 151 of CPC and obtained permission of the court to file the suit against the Trust. In the suit, various allegations are made. Applications I.A. Nos. 1 and 2 were also filed seeking for temporary injunction. The Trial Court initially rejected I.A. Nos. 1 and 2, against that order, the plaintiffs filed MFA No. 3128/2011 before this Court. When the matter was pending before this Court, on the assurances given by defendants 1 and 2, the plaintiffs filed a memo on 29-6-2011 stating that in view of the assurances given by defendants 1 and 2, they are withdrawing the suit. On the basis of the said memo, the Trial Court

dismissed the suit. MFA No. 3128/2011 was also dismissed as not pressed.

12. The specific allegations of the plaintiffs is that though defendants 1 and 2 had given assurance that they will ventilate their grievances and they will be made permanent members, and withdraw the letter dated 08-03-2006, and that effect, a resolution was also passed on 06-06-2011 and 28-07-2011, no further steps have been taken and the matter is being dragged on. In view of that, the plaintiffs were forced to file Miscellaneous Petition seeking for setting aside the order dated 29-6-2011 made in O.S. No. 1893/2010 and sought for restoration of the original suit from the date of dismissal. Along with the said Miscellaneous Petition, an application under Section 5 of the Limitation Act was also filed. The contesting defendants to the suit filed objections to the application for condonation of delay. The Trial Court framed necessary issues with regard to limitation is concerned. The first plaintiff got examined as P.W. 1 and produced various documents in support of their contentions.

13. The Trial Court taking into consideration all these aspects of the matter condoned the delay in filing the Miscellaneous Petition. However, the Miscellaneous Petition is still pending consideration. Whether the Miscellaneous Petition is maintainable or not is to be decided by the Trial Court. What is challenged in this writ petition is only condonation of delay in filing the Miscellaneous Petition. The Trial Court after considering all the documents produced by the parties, condoned the delay. I find no infirmity or irregularity in the order passed by the Trial Court condoning the delay. The Hon"ble Supreme Court in a judgment reported in Jet Ply Wood Private Ltd. and Another Vs. Madhukar Nowlakha and Others, clearly held that order of withdrawal of the suit obtained after giving some assurance, the aggrieved person can maintain a petition under Section 151 of CPC. In such cases, inherent power of the court can come to its aid to act *ex debito justitiae* for doing real and substantial justice between the parties. Paragraphs 24 and 25 of the judgment reads as under:

"24. From the order of the Learned Civil Judge (Senior Division) 9th Court at Alipore, it is clear that he had no intention of granting any leave for filing of a fresh suit on the same cause of action while allowing the plaintiff to withdraw his suit. That does not, however, mean that by passing such an order the learned court divested itself of its inherent power to recall its said order, which fact is also evident from the order itself which indicates that the Court did not find any scope to exercise its inherent powers under Section 151 of the Code of Civil Procedure for recalling the order passed by it earlier. In the circumstances set out in the order of 24th September, 2004, the learned trial court felt that no case had been made out to recall the order which had been made at the instance of the plaintiff himself it was, therefore, not a question of lack of jurisdiction but the conscious decision of the Court not to exercise such jurisdiction in favour of the plaintiff

25. The aforesaid position was reiterated by the learned Single Judge of the High Court in his order dated 4th February, 2005, though the language used by him is

not entirely convincing. However, the position was clarified by the learned Judge in his subsequent order dated 14th March, 2005, in which reference has been made to a bench decision of the Calcutta High Court in the case of Rameswar Sarkar (supra) which, in our view, correctly explains the law with regard to the inherent powers of the Court to do justice between the parties. There is no doubt in our minds that in the absence of a specific provision in the Code of Civil Procedure providing for the filing of an application for recalling of an order permitting withdrawal of a suit, the provisions of Section 151 of the Civil Procedure Code can be resorted to in the interest of justice. The principle is well established that when the Code of Civil Procedure is silent regarding a procedural aspect, the inherent power of the court can come to its aid to act *ex debito justitiae* for doing real and substantial justice between the parties. This Court had occasion to observe in the case of Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, , as follows:

"It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them." 14. In view of the authoritative pronouncement of the Hon"ble Supreme Court, I find no infirmity or irregularity in the order passed by the Trial Court condoning the delay in filing the Miscellaneous Petition. The Miscellaneous Petition is still pending consideration. The petitioner is at liberty to address arguments on merits of the miscellaneous petition. The petitioner has not made out a case to interfere with the order passed by the Trial Court. Accordingly, the writ petition is dismissed. The Trial Court is directed to consider the miscellaneous petition on merits, in accordance with law.