

(2015) 07 KAR CK 0333

In the Karnataka High Court

Case No : Writ Petition Nos. 56441 and 56850 of 2014(GM-CPC)

B.R. Mallikarjuna

APPELLANT

Vs

D. Geetha

RESPONDENT

Date of Decision : 30-07-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1(d), Order 9 Rule 13, 115
Constitution of India, 1950 — Article 227
Limitation Act, 1963 — Section 5

Citation : (2016) 1 KarLJ 520

Hon'ble Judges : A.V. Chandrashekara, J

Bench : Single Bench

Advocate : Padmanabha V. Mahale, Senior Advocate for N. Lokesh, for the Appellant; B.M. Siddappa, Advocates for the Respondent

Final Decision : Allowed

Judgement

A.V. Chandrashekara, J—Heard the learned counsel appearing for the parties.

2. The present petitions filed under Article 227 of the Constitution of India are directed against the orders passed by the Additional District Judge, Chitradurga, in Miscellaneous Appeal, MA 17/2013 filed under Order 43 Rule 1(d) of CPC. The petitioner herein was the appellant in the said Miscellaneous appeal. The respondent herein was the respondent in the said case.

3. The facts leading to the filing of this petitions under Article 227 of the Constitution of India are as follows:--

"Smt. Geetha was the plaintiff in the Original Suit bearing No. 61/2002 filed before the Court of I Additional Senior Civil Judge at Chitradurga. It was filed for the relief of specific performance of the contract based on an agreement of sale said to have been executed by this petitioner on 21-3-1997 agreeing to sell the entire suit schedule property measuring 8 acres for Rs. 1,15,000/-. The defendant is stated to have received a sum of Rs. 1,00,000/- as consideration

under the agreement of sale on 21.3.1997 itself. The remaining amount of Rs. 15,000/-, being the balance of consideration, according to the plaintiff was to be received by the defendant on the date of executing sale-deed. Petitioner is stated to have given extension of time on two years by endorsing the same as the agreement of sale. Since the defendant did not perform his part of the contract, the plaintiff got issued a notice and later-on filed a suit for the relief of specific performance of the contract."

4. Summons had been issued to the defendant to secure his presence. According to the trial court, the summons sent to the defendant through the Registered post was returned by the postman with an endorsement "refused". Therefore, the trial Court treated it as a deemed service and proceeded to record the evidence of the plaintiff Smt. Geetha who is examined as P.W. 1 and she has got marked as many as 8 documents. Ultimately the suit is decreed as prayed for directing the plaintiff to receive balance consideration of Rs. 15,000/- and to execute a registered sale deed.

5. The defendant, according to the plaintiff, is a permanent resident of Chitradurga and was residing in the Bellary town as on the date of filing of the suit. The Execution Petition in No. 411/2010 was filed before the I Additional Senior Civil Judge at Chitradurga and on receipt of the execution notice only, the defendant came to know of the decree drawn by the Court against him in O.S. No. 61/2002. Hence, the defendant- petitioner herein chose to file an application in terms of Order 9 Rule 13 of CPC before the Court and the same was numbered as Miscellaneous Petition No. 33/2011. In paragraph-4 of the said petition filed under Order 9 Rule 13 of CPC, the petitioner has averred that he was shocked to know about the decree obtained by the plaintiff only after receiving notice in Execution Petition No. 411/2010 and immediately applied for certified copies of the Judgment & decree on 24-5-2011 and obtained the same on 31-5-2011. It is his case that he has never executed any agreement of sale nor received any money from the plaintiff. According to him, he has strong grounds to contest the case on merits and if delay is not condoned and the Petition is not allowed he would be put to irreparable loss and hardship. The said petition came to be filed on 24-8-2011.

6. The said Petition was objected to, by the plaintiff by filing objections. Since there was delay in filing the Petition under Order 9 Rule 13 of CPC, an application was also filed under Section 5 of the Limitation Act seeking condonation of delay. Hearing arguments on the application filed under Section 5 of the Limitation Act, the learned Judge of the trial Court has chosen to dismiss the said application and consequently the Petition filed under Order 9 Rule 13 came to be dismissed as time barred as against which an appeal was filed in terms of Order 43 Rule 1(d) of CPC before the District Court at Chitradurga. The said appeal was withdrawn and was transferred to the Court of I Additional District Court at Chitradurga. The learned Judge of the first appellate Court has affirmed the order of the trial Court and has refused to condone the delay in filing appeal under

Order 43 Rule 1(d) of CPC. The learned Judge of the first appellate Court gave an opportunity to the petitioner to lead evidence in regard to condonation of delay. The petitioner himself is examined as P.W. 1 and as many as 13 documents have been got marked. It is these orders which are called in question by filing Petitions under Article 227 of the Constitution of India.

7. Heard the learned counsel appearing for the parties.

8. The learned Senior counsel representing the petitioner Sri Padmanabha V. Mahale, has argued that the trial court as well as the first appellate Court have adopted wrong approach to the real state of affairs and that they have not considered the materials placed on record in right perspective keeping in mind that the delay should be liberally construed. He has vehemently argued that while considering the aspect of condonation of delay, the Court is expected to keep in mind the merits of the case. It is argued that great injustice has been caused to the petitioner in the light of the wrong approach adopted by the trial court. He has further argued that neither the trial court nor the first appellate Court have made any discussion about the decisions relied upon by the petitioner.

9. Per contra, the learned counsel representing the respondent-plaintiff Sri B.M. Siddappa, representing the respondent has vehemently argued that this Petition under Article 227 of the Constitution of India is not at all maintainable and if there is any remedy to the petitioner, it is only by filing a Petition under Section 115 of CPC before this Court and not in any manner. He has further argued that both the Courts have given concurrent finding about the due service of summons to the defendant through Registered post based on the endorsement made by the postman and there is no reason to believe such an endorsement which has presumptive value. He has further argued that the petitioner has not only failed to explain the delay of 7 years in filing the Petition under Order 9 Rule 13 but also further delay of 6 months in filing an appeal in terms of Order 43 Rule 1(d) of CPC. He has further argued that the contents of the affidavit filed by the petitioner while filing the main Petition as also for the delay are contrary to the evidence adduced.

10. He has relied upon a decision of the Hon"ble Apex Court in regard to the condonation of delay in the case of B. Madhuri Goud Vs. B. Damodar Reddy, (2012) 7 SCALE 230 : (2012) 12 SCC 693 . He has relied upon the two decisions of the Hon"ble Apex Court in regard to the applicability or otherwise of Article 227 of the Constitution of India to the facts of the case and also the decision in the case of Surya Dev Rai Vs. Ram Chander Rai and Others, AIR 2003 SC 3044 : (2003) 4 CTC 48 : (2003) 6 SCALE 133 : (2003) 6 SCC 675 : (2003) 2 SCR 290 Supp : (2003) WritLR 722 : (2003) AIRSCW 3872 : (2003) 6 Supreme 390 and in the case of Bal Gopal Maheshwari and Others Vs. Sanjeev Kumar Gupta, (2013) 9 AD 325 : (2013) 2 RCR(Rent) 408 : (2013) 11 SCALE 1 : (2013) 8 SCC 719 . He has relied upon these decisions to contend that no perversity is found in the approach adopted by the trial court and therefore the said approach cannot be interfered with under the supervisory jurisdiction vested in this Court under

Article 227 of the Constitution of India. He has further argued that the present Petitions are not maintainable since the order impugned is not an interlocutory order passed during the pendency of the original suit or civil proceedings.

11. In order to satisfy about the manner of service of summons, the entire records of O.S. No. 61/2002 have been called for. The order sheet dated 16-6-2003 maintained in O.S. 61/2002 discloses that the summons had been issued to the defendant petitioner herein through registered post and it was returned with an endorsement "refused". Therefore, the learned Judge of the trial court has passed the order on 16-6-2003 which is as follows:--

"Defendant called out. It is reported that defendant refused to take postal cover. It is deemed to be served. Hence, the defendant is placed ex-parte. Call for plaintiffs evidence by 22-7."

In the records sent by the trial court the papers connected with the summons are not to be found. The records would disclose that the summons have been destroyed after the lapse of 3 years from the date of the Judgment. Therefore no effort is made by the trial court as to whether the summons were available for perusal while considering the Petition under Order 9 Rule 13 of CPC. What is observed by the trial court is as follows:--

"In this regard on perusal of Ex. P-1, the certified copy of the order sheet produced by the petitioner goes to show that on 16-6-2003 the court has passed an order that the respondent, that the is petitioner herein has refused to take notice. Therefore He has been placed ex-parte. To disprove the said fact the petitioner has not produced any document to show that the RPAD sent through the court has not been served on him. The order passed by this Court on 16-6-2003 cannot be considered lightly in order to lead any rebuttal evidence. Further, even though the petitioner claims that he has taken certified copy of the records in O.S. No. 61/2002 on 3-1-2011, but he has filed the present Petition for setting aside the ex-parte Judgment & decree dated 24-8-2014, after 3 months he has filed the present Petition. He ought to have filed the Petition within 30 days from the date of passing the ex-parte order or from the date of the knowledge".

12. Further, the learned Judge has held that the delay of each and every day has to be explained with bona fide sufficient cause and the petitioner has to prove that the said delay has to be considered by giving cogent and corroborative evidence. But he has failed to show sufficient cause for not filing the present Petition within a reasonable time.

13. In order to lead any rebuttal evidence as opined by the learned Judge of the trial court while dealing with Order 9 Rule 13 of CPC, the petitioner has to rely upon the documents of the Court. When Miscellaneous Petition under Order 9 Rule 13 was filed, the summons had already been destroyed and therefore it was not practically possible for the petitioner to demonstrate that he had been not served with any summons. One has to take into account that the plaintiff's first

address is his permanent address at Chitradurga and the second address was the address in which he lived at that point of time in Bellary town. We do not know whether the Court had issued summons to the 1st address at Chitradurga or to the second address at Bellary. Hence benefit of doubt should necessarily go to the petitioner.

14. What is argued before the Court is whether the delay of each day has to be explained. This aspect has been dealt with by the Hon''ble Apex Court in the case of Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, AIR 1987 SC 1353 : (1987) 13 ECC 27 : (1988) 19 ECR 565 : (1987) 28 ELT 185 : (1987) 167 ITR 471 : (1987) 1 JT 537 : (1987) 1 LLJ 500 : (1987) 1 SCALE 413 : (1987) 2 SCC 107 : (1987) 2 SCR 387 : (1987) 66 STC 228 : (1987) 2 UJ 29 . Six broad guidelines have been laid down in the said case of the Hon''ble Apex Court at page 1354 which is as follows:--

"1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day''s delay must be explained" does not mean that a pedantic approach should be made. Why not every hour''s delay, every second''s delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or an account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

15. The said decision has been subsequently relied upon by the Hon''ble Apex Court in the case of G. Ramegowda, Major and Ors Vs. Special Land Acquisition Officer, Bangalore, AIR 1988 SC 897 : (1988) 1 JT 524 : (1988) 1 SCALE 479 : (1988) 2 SCC 142 : (1988) 3 SCR 198 : (1988) 1 UJ 666 . What is further reiterated in Ramegowda''s case is that the expression "sufficient cause" as found in Section 5 must receive a liberal construction so as to advance substantial justice and generally delays in preferring appeals are required to be condoned in the interest of justice whether there is no gross negligence or deliberate inaction or lack of bona fides is imputable to the party seeking condonation of delay. This specific observation of the Hon''ble Apex Court is at

paragraph-7.

16. Per contra, the learned counsel representing respondent-plaintiff Sri B.M. Siddappa, has relied upon the decision in the case of B. Madhuri Goud Vs. B. Damodar Reddy, (2012) 7 SCALE 230 : (2012) 12 SCC 693 . The words "sufficient cause" has already been considered in the said decision. The Limitation Act, 1963 has not been enacted with the object of destroying the rights of the parties but to ensure that they approach the Court for vindication of their rights without unreasonable delay. The idea underlying the concept of limitation, is that every remedy should remain alive only till the expiry of the period fixed by the legislature. According to the Hon"ble Apex Court in Madhuri Goud's case it is further held that at the same time, the Courts are empowered to condone the delay provided that sufficient cause is shown by applicant for not availing the remedy within the prescribed time of period of limitation.

17. Dealing with the aspect of sufficient case the Hon"ble Apex Court in the case of Union of India (UOI) Vs. Ram Charan and Others, AIR 1964 SC 215 : (1964) 3 SCR 467 has held that the same will have to be construed liberally so as to advance cause of justice.

18. The learned counsel Sri B.M. Siddappa, has relied upon the decisions in the case of Bal Gopal Maheshwari and Others Vs. Sanjeev Kumar Gupta, (2013) 9 AD 325 : (2013) 2 RCR(Rent) 408 : (2013) 11 SCALE 1 : (2013) 8 SCC 719 and in the case of Surya Dev Rai Vs. Ram Chander Rai and Others, AIR 2003 SC 3044 : (2003) 4 CTC 48 : (2003) 6 SCALE 133 : (2003) 6 SCC 675 : (2003) 2 SCR 290 Supp : (2003) WritLR 722 : (2003) AIRSCW 3872 : (2003) 6 Supreme 390 to contend that the present Petition is not maintainable under Article 227 of the Constitution of India and only the Petition is maintainable under Section 115 of the Code of Civil Procedure.

19. The test to be applied is as to whether the order passed by the trial court as affirmed by the appellate court is really one which is finally disposed off. The order so passed by the trial court or the first appellate court does not have effect of finally disposing off the suit or other proceedings. In the light of amendment to Section 115 of CPC with effect from 1-7-2002 only the Petition under Article 227 of the Constitution is maintainable and therefore the two decisions relied upon by the learned counsel Sri B.M. Siddappa are not applicable to the facts of the present case.

20. When the application is filed under Section 5 of the Limitation Act and when the party wants the delay to be condoned, normally an opportunity has to be given by the trial court to lead evidence. To that effect limited enquiry should have been held. The order passed in Misc. Petition No. 33/2011 does not disclose that the learned Judge had given an opportunity to the petitioner to lead evidence in regard to the condonation of delay. The proceedings have been disposed off merely on the basis of the arguments advanced.

21 The assertion of the petitioner is that he is blind and he has two daughters

and has not executed any agreement of sale and that he came to know of this delay only when he received the notice from the Executing Court. He can substantiate his assertion only through evidence and not otherwise. Therefore, the approach adopted by the trial court in not giving opportunity to the petitioner to lead evidence will have to be taken note of, especially, while dealing with a Petition under Article 227 of the Constitution of India when the approach adopted by the trial court is incorrect and improper and hence it needs to be rectified in terms of the supervisory jurisdiction vested in this Court under Article 227 of the Constitution of India.

22. Whether the subsequent opportunity given to the petitioner, by the appellate court can cure the defect in the execution. The enquiry conducted by the appellate court is order to consider the condonation of delay in filing the appeal and not in filing the petition under Order 9 Rule 13 of CPC.

23. Even otherwise, the learned counsel appearing for the appellant therein had relied upon two decisions in regard to condonation of delay. The decisions referred to at paragraph 8 at page 7 of the impugned order passed in MA 17/2013 is as follows:--

"1) Naubat Ram Sharma Vs. Additional District Judge II, Moradabad and Others, AIR 1987 SC 1352

2) AIR 1997 SC 134 Urban Improvement Trust, vs. Poonam Chand - Dated 3.2.1997."

Whenever decisions are referred to by the Advocates, it is incumbent upon the Court to consider the decisions referred to and court is expected to consider them with reference to the facts of the case to see as to whether the decisions are applicable to the facts of the case or distinguishable. No such attempt has been made by the first appellate Court.

24. What is observed by the first appellate Court in paragraph-9 is that he has appreciated evidence placed by the petitioner in the light of the decisions cited above; but unfortunately there is no reference about the law laid down by the Hon"ble Apex Court or reiterated by the Apex Court or High Court. This cannot be considered as appreciation of facts in the light of the principles enunciated or reiterated in those decisions.

25. What is held by the Hon"ble Apex Court in the case of Mahesh Yadav and Another Vs. Rajeshwar Singh and Others, AIR 2009 SC 1064 : (2009) 1 CTC 638 : (2008) 16 SCALE 162 : (2009) 2 SCC 205 : (2009) AIRSCW 218 is that a Judicial Officer is expected to give reasons while passing the judicial order. This observation has been made while discussing the provisions of Order 9 Rule 13 of CPC.

26. Merits of the case could also be considered while considering the Petition filed under Order 9 Rule 13 of CPC in order to know whether the petitioner has a meritorious case to condone the delay. Admittedly, the agreement of sale is

dated 21-3-1997. Even if the endorsement dated 16-3-1999 were to be accepted as true, the suit came to be filed, just few days prior to the expiry of 3 years from the date of the endorsement. The suit came to be filed almost 5 years after the alleged agreement of sale was executed by the petitioner. The question of laches and delay, in a suit for specific performance, are vital. The learned Judges have not at all considered those aspects. Suffice to state that both the Courts have adopted a wrong approach to the real state of affairs and they have not decided the application in right perspective. In this view of the matter, the Petitions have to be allowed and the matter has to be remitted back to the trial court to consider the matter afresh. Hence, the following order is passed:--

ORDER

The petitions are allowed. The matter is remitted back to the trial court to dispose off the Petitions by recording the evidence of the petitioner and to dispose off the same at the earliest.

Parties shall appear before the trial court on 3.9.2015 without fail and the court to dispose off the case within two months thereafter.

Send a copy of this order to the trial court at the earliest along with LCR.