
(2005) 06 KAR CK 0047
In the Karnataka High Court
Case No : Misc. First Appeal No. 1176 of 2005

Devaraju H C and Another

APPELLANT

Vs

The Special LAO

RESPONDENT

Date of Decision : 21-06-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1K
Limitation Act, 1963 — Section 5

Citation : (2005) ILR (Kar) 5528 : (2006) 5 KarLJ 407

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Judgement

Anand Byrareddy, J.—The office has raised an objection that the appellant has challenged the order passed on an application filed under Section. 5 of the Limitation Act, 1963 before the trial Court, seeking condonation of delay in filing an application to bring the Legal representatives of the deceased applicant on record before the trial Court and for setting aside the abatement.

2. Since the applications was filed under Section. 5 of the Limitation Act, 1963 which was rejected in the first instance and since the other applications were not considered on merits and were rejected as a consequence, the office has raised an objection that the appellant would have to file a revision petition, if at all, and he could not have filed the present appeal.

3. this Court while dealing with an identical situation in a case reported in Sharanappa v. Hafeezuddin Ansari and Ors. 1982 (2) KLJ 29 His Lordship Justice Swami as he then was, has held thus at paras 6 and 7 :

6. "In my opinion, the aforesaid contentions are devoid of merit and cannot at all be accepted. All the three applications relate to one matter namely, to bring the Legal representatives of the deceased plaintiff on record. The other two applications were required to be filed because the application to bring the Legal representatives of the deceased on record was not made in time. Whatever might be the reason for rejecting the application filed for setting aside the

abatement by the Court of first instance, the appellate Court was competent and it was required to go into the question as to whether there was a sufficient cause for the delay in making an application to bring the legal representatives of the deceased plaintiff on record. It was contended that as the application to set aside the abatement was rejected as a consequence of rejection of the application to condone the delay, and as such the application for setting aside the abatement was not decided on merits, therefore, it was contended that as the order passed by the Court of first instance rejecting the application filed for condonation of delay was not an appealable order, it was not at all open for the appellate Court while deciding the appeal preferred against the order refusing to set aside the abatement to go into the question as to whether it was a case for condonation of delay in filing the L.R. application. It is not possible to accept this contention. In fact, Order 22 Rule (2) Code of Civil Procedure, itself provides that if it is proved that the applicant was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement of dismissal of the suit upon such terms as to costs or otherwise as it thinks fit. Further, the provisions of Section 5 of the Limitation Act, have also been made applicable to such an application. The consequence of setting aside the abatement is to allow the legal representatives of the deceased to come on record. Therefore, the appellate Court while considering the appeal preferred under Order 43, Rule 1(k) Code of Civil Procedure, against an order refusing to set aside the abatement or dismissal of the suit is competent to go into the question as to whether sufficient cause is shown by the applicant for the delay in making an application to bring the legal representatives of the deceased on record and also for the delay in making an application for setting aside the abatement. this Court, in *Alphonso Nazarath v. Kavier Dias* ((1970) 2 Mys. L.J. 553) has held that an application u/s 5 of the Limitation Act, is not necessary for condoning the delay in making an application for setting aside the abatement.

(7) this Court, in the case of *The State of Karnataka Vs. R.Y. Hulkoti*, , while considering the appeal preferred against the order refusing to set aside the abatement; has considered the question as to whether sufficient cause has been shown for condoning the delay in filing the application to bring the legal representatives of the deceased on record and has allowed the appeal on coming to the conclusion that sufficient cause has been shown for the delay in filing the application to bring the legal representatives of the deceased on record."

4. In view of this authoritative Judgment which is again with direct reference to the challenge in appeal against an order on an application seeking for condonation of delay accompanied by applications for bringing the L.Rs of the deceased and for setting aside the abatement. The present appeal is maintainable.

Office objection is over ruled. Post the matter for orders.