

(2011) 03 KAR CK 0171
In the Karnataka High Court
Case No : C.R.P. No. 347 of 2010

K. Nagesh Raikar since dead by his L.Rs. (Neela Bai,
Chandrashekar Raikar and Prashanth Raiker)

APPELLANT

Vs

Smt. Lakshmi Devi and Amith Financiers (R)

RESPONDENT

Date of Decision : 15-03-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 3A, 100, 115, 96
Limitation Act, 1963 — Section 3, 5

Citation : (2011) ILR (Kar) 2238 : (2011) 4 KarLJ 176 : (2011) 2 KCCR 1637

Hon'ble Judges : Jawad Rahim, J

Bench : Single Bench

Advocate : R.G. Devadhar, for the Appellant; K. Chandrashekar, for R1, for the Respondent

Judgement

Jawad Rahim, J.—This revision u/s 115, CPC is directed against the order dated 18.11.2010 in R.A. 89/09 dismissing the application filed u/s 5 of the Limitation Act and also the appeal.

2. The petition has come up for admission after notice to the Respondents.

3. Learned Counsel for the Respondents has raised a preliminary objection regarding maintainability of the revision.

4. Heard.

5. From what is urged by the learned Counsel on both sides and the observations made in the impugned order, it is seen legal heirs of K. Nagesh preferred an appeal u/s 96, CPC questioning the judgment and decree in O.S. 131/03 dated 24.6.2008 on the file of Civil Judge (Senior Divn.) & CJM, Shimoga, decreeing the suit in favor of the Respondents-Lakshmidewi and others. The appeal was presented belatedly after 319 days and to seek condonation of delay, an application under Order XLI Rule 3A, CPC read with Section 5 of the Limitation Act was filed.

6. Necessarily notice was issued to the Respondents-Plaintiffs who entered appearance and resisted the appeal on several grounds. The learned appellate judge took up the application in the first instance for consideration and held the circumstances urged in support of the application did not reveal any cause regarding delay but were in the nature of defense which the Appellants could have put forward- that is- Nagesh Raikar who was one of the Defendants and described as a partner had retired from the partnership firm in 1992 itself and was thus not liable to the suit claim. He wanted to produce retirement deed which he could not and therefore the decree passed against him was not tenable.

7. The learned judge noticed the circumstances explained did not constitute sufficient cause to condone the delay and thus opined the appeal was belated. By the impugned order, the interlocutory application for condonation of delay was dismissed and consequently the appeal. Questioning the same, this revision is filed.

8. The contention in support of the revision is that the appeal has been dismissed consequent to dismissal of the application seeking condonation of delay and therefore, the impugned order is one passed on the interlocutory application and not on merits. If the application was allowed, the appeal would have been heard on its merit and disposed of. He submits this revision is therefore competent against such order.

9. Per contra, learned Counsel for the Respondents would contend dismissal of the appeal either on merit or on any other ground amounts to dismissal of the appeal and not on the LA. He seeks citation support to his contention relying on the decision of the apex court in the case of Shyam Sundar Sarma. v. Pannalal Jaiswal and Ors. 2005 (1) KCCR 7. My attention is drawn to paragraphs 10, 11 and the conclusion of the apex court in paragraph 15 to bring home the point that the doctrine of merger applies and dismissal of the appeal amounts to confirmation of the decree of the trial court. Therefore, against such order passed by the appellate court, remedy to the Petitioners would be a second appeal.

10. The contentions of both sides have received my serious consideration.

11. It is not in dispute the application filed under Order XLI Rule 3A, CPC read with Section 5 of the limitation Act was filed in an appeal file, undoubtedly, u/s 96, CPC In the first instance the application was heard and finding no merit, it was dismissed, consequently the appeal was also dismissed. In the decision cited, the apex court had to examine as to whether the application under Order IX Rule 13, CPC would be maintainable if an appeal is filed by the same person before the appellate court. Several case laws on the point are relied including rendition of a judgment by the Privy Council. This was to decide whether the embargo by Rule 3A operates and if so, when.

12. The question is, whether the appeal accompanying the application for condonation of delay is an appeal in the eye of law. In a circumstance where the

application for condonation of delay in filing the appeal is dismissed and consequently the appeal is dismissed as time barred in view of Section 3 of the Limitation Act, the apex court relied on the decision in the case of Nagendra Nath Dey v. Suresh Chandra Dey 1959 Ind App 283 (PC) wherein it is held:

There is no definition of appeal in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an appellate court, asking it to set aside or revise the decision of a subordinate court, is an appeal within the ordinary acceptance of the term and that it is no less an appeal because it is irregular and incompetent.

Relying on the said decision, the apex court had rendered another decision in the case of Mela Ram and Sons Vs. The Commissioner of Income Tax Punjab, wherein it was held "An appeal presented out of time is an appeal and an order dismissing it as time-barred is one passed in the appeal/ Relying on the decision of the Privy Council, it further held...although the Appellate Assistant Commissioner did not hear the appeal on merits and held that the appeal was barred by limitation, his order was u/s 31 and the effect of that order was to confirm of assessment which had been made by the Income Tax Officer."

13. Similar is the view taken in the case of Sheodan Singh Vs. Smt. Daryao Kunwar, by learned four Judges of the apex court and they answered the question as follows:

We are therefore of the opinion that where a decision is given on merits by the trial court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground like limitation or default, it must be held such dismissal when it confirms the decision of the trial court on merits, itself amounts to appeal being heard and finally decided on merits, whatever may be the ground for dismissal of the appeal.

14. In view of the consistent view in these decisions, though the appeal may have been dismissed on preliminary grounds like limitation, default, etc., it is an order passed in appeal. The consequence flowing there from is, it will go out of the ambit of Section 115, Code of CPC as there is a statutory remedy of second appeal engrafted in Section 100, CPC I shall have no difficulty in affirmatively holding that when a statutory remedy of second appeal is available u/s 100, Code of Civil Procedure, revision u/s 115, CPC is not competent. It is on the settled principle that statutory remedy ousts revisional jurisdiction of this Court which is discretionary, sometimes to be exercised suo moto or sometimes on an application. But there is no right of revision to a litigant unlike in a statutory remedy of appeal.

15. In the result, the revision u/s 115, CPC is held to be incompetent as the impugned order is an order no doubt passed on the application filed under Order XLI Rule 3(a) read with Section 5, Limitation Act, but consequent to that order, the appeal itself has been dismissed. The order is, therefore, held to be an order in the appeal and remedy would be second appeal permissible u/s 100, CPC With

these observations, the revision is disposed of.

16. learned Counsel for the Petitioner submits he may be reserved liberty to prefer second appeal for which purpose he seeks the order passed by the trial court be stayed to enable him to avail statutory remedy. Learned Counsel for the Respondents did oppose this request, but was very fair in his submission that if the Petitioner wants to exercise statutory remedy, he may not have anything to say.

17. The submissions of both counsel are placed on record. The order of the trial court is stayed for a period of four weeks. If a request is made, certified copies may be returned to the Petitioners.