

(2017) 06 KAR CK 0026
In the Karnataka High Court
Case No : 5939 of 2013

LEELADEVI

APPELLANT

Vs

NARAYAN S/O. GUNDU JADHAV

RESPONDENT

Date of Decision : 02-06-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Section 151](#), [Section 107](#), [Order 18 Rule 17A](#), [Order 41 Rule 23](#), [Order 41 Rule 23A](#)

Citation : (2017) 06 KAR CK 0026

Hon'ble Judges : Sreenivas Harish Kumar

Bench : SINGLE BENCH

Advocate : MRUTYUNJAY TATA BANGI, SANGRAM S KULKARNI, P.V.SAMBARGI, BASAVARAJ BYAKOD

Judgement

1. The appellants" are the legal representatives of the original defendant in O.S. No. 216/2005, on the file of the Principal Senior Civil Judge, Belagavi. The respondent being the plaintiff in the said suit sought specific performance of the agreement dated 21.4.2002 executed by the original defendant. Suffice it to state that in the suit, the plaintiff himself adduced evidence as PW1. Defendants" counsel cross-examined him. Thereafter, the plaintiff examined another witness, Sadanand Patil as PW2 and the defendants" counsel did not cross-examine him; even the legal representatives of the defendant (referred to as "defendants" hereafter for convenience) who were brought on record remained absent, and they did not lead evidence from their side also. After the suit was reserved for judgment, the defendants got filed applications for re-opening of the case and recalling PW2 for cross-examination. The trial Judge dismissed these applications and decreed the suit by his judgment and decree dated 18.11.2010.

2. The defendants preferred an appeal RA No. 4/2011 to the District Court, Belagavi. In this appeal, in addition to challenging the trial Court"s decree on merits of the case, they mainly questioned the legality of rejection of their

applications filed for re-opening of the case and recalling PW2 for cross-examination. The II Additional District Judge who decided the Appeal, though held that the procedure adopted by the trial Court Judge to reject the said applications without calling for objections from plaintiff was not correct, declined to interfere with the trial Court's judgment as according to him, the trial Court did give sufficient opportunity to the defendants to cross-examine PW2 and adduce their evidence and that they failed to avail the opportunity given to them. He dismissed the first appeal. Aggrieved by this judgment, the defendants are here before this Court in Second Appeal.

3. This second appeal was admitted for consideration of the following substantial question of law :- "Whether the First Appellate Court has committed an error in law in not remanding the case in accordance with Order 41 Rule 23 and 23A CPC to the Trial Court having noticed the circumstances under which the defendants" counsel could not cross examine PW-2 and further that the defendants could not adduce evidence?"

4. The trial Court rejected the applications outrightly for the reason that such applications are not maintainable once the case was posted for judgment after conclusion of arguments. The first Appellate Court held that the procedure followed by the trial Court for rejecting the applications was wrong; the applications should have been decided by the trial Court after calling for objections from the plaintiff. But, this observation of the first Appellate Court did not result in appeal being allowed and case remanded to the trial Court, for the Appellate Court having had a look at the various dates of proceeding before the trial Court came to the conclusion that the defendants' counsel had no health problem on 25.8.2010 and 7.9.2010, the dates when the case was set down for cross-examination of PW2, that as per the medical certificate, the counsel was treated as an outpatient from 10.9.2010 to 30.10.2010 and the ailment he had was hypertension and diabetes which disorder was not so serious unless it crossed certain limits. The first Appellate Court also noticed that the defendants also did not produce any medical report or lab report to show that the condition of the counsel was so serious. The very fact that he was treated as an outpatient showed that he was not at all seriously ill. Besides these, as regards the conduct of the first appellant, i.e, Smt. Leeladevi, the first Appellate Court commented that she was also a resident of Lathur where her counsel was said to have taken treatment and, therefore, it was highly impossible to believe that each other could not have met. The first Appellate Court also observed that there was absolutely no reason for not making alternative arrangement if really her counsel was not well. These are the reasons that the first Appellate Court has ascribed for not showing indulgence in favour of defendants. Resultantly the first Appeal stood dismissed.

5. The learned counsel for the defendants/appellants in this Second Appeal argued that both the Courts below grossly erred in denying reasonable opportunity to the defendants to cross-examine PW2 and adduce evidence from

their side. The trial Court rejected the applications even without giving any reason and the first Appellate Court which held that the trial Court's procedure was wrong, dismissed the appeal. The first Appellate Court should have appreciated the bona fide reasons given by the defendants for being unable to cross-examine PW2 and adduce evidence. Denial of opportunity and the trial Court's hurriedness in disposal of suit resulted in miscarriage of justice. The learned counsel argued that the proper procedure would have been to remand the case to the trial Court according to Order 41 Rule 23A of the Code of Civil Procedure (for short hereafter referred to as "the Code"). He referred to Section 107 of the Code to argue that the power of remand under Section 107 of the Code was wider than Order 41 Rule 23 and 23A of the Code. It was also his argument that the circumstances made out by defendants did warrant remand of the case to the trial Court on certain terms as to costs. To gather support for his argument, he placed reliance on two judgments of the Supreme Court ? (1) K.K.Velusamy vs N.Palanisamy [2011 AIR SCW 2296] and (2) M/s Bagai Construction vs M/s Gupta Building Material Store [2013 AIR SCW 1564].

6. The learned counsel for the respondent/plaintiff argued that the defendants were not entitled to any more opportunity to be given for leading evidence. Their intention was to drag on the suit. This was the reason for not crossexamining PW2 and failing to adduce defendants' evidence. It was not as though the trial Court did not give reasonable opportunity to defendants; In fact, the trial Court adjourned the case several times to enable the defendants to lead evidence. The trial Court was right in rejecting the applications filed by the defendants. The first Appellate Court, by observing the conduct of the defendants, has rightly held that they were not entitled to any more opportunity. When both the Courts below have taken this view, it cannot be interfered with in this Second Appeal. Therefore, he argued for dismissal of the Appeal.

7. Before examining whether both the Courts below were justified in denying an opportunity to the defendants, the legal position as regards recalling of the witness needs to be considered. Having regard to the fact that the trial of the suits as well as other proceedings was to be expedited, amendments were brought to the Code. One of the effects of amendment is omission of Order 18 Rule 17A. Only Order 18 Rule 17 has remained in the Code, and the scope of this Rule is limited. Where Order 18 Rule 17 cannot be applied, Section 151 CPC can be invoked only in appropriate cases. The clear observation of the Supreme Court in the case of Velusamy (supra) is as follows : -

8. Order 18 Rule 17 of the Code enables the court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power to recall any witness under Order 18 Rule 17 can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit requesting the court to exercise the said power. The power is discretionary and should be used sparingly in appropriate cases to enable the court to clarify any

doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. [Vide Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate - 2009 (4) SCC 410]. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18, Rule 17 is primarily a provision enabling the court to clarify any issue or doubt, by recalling any witness either suo motu, or at the request of any party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.

9. There is no specific provision in the Code enabling the parties to re- open the evidence for the purpose of further examination-in-chief or cross-examination. Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the Code to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. In the absence of any provision providing for re-opening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power under section 151 of the Code, subject to its limitations, can be invoked in appropriate cases to re- open the evidence and/or recall witnesses for further examination. This inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the court to put such question to elicit any clarifications. 8. Therefore, it is clear that wherever Order 18 Rule 17 of the Code is not applicable, inherent power under Section 151 of the Code can be invoked subject to limitation. Whether such an application can be made once the case is posted for judgment is also a question that crops up as any party intending to prolong the proceedings may resort to making applications of these types after the case is posted for judgment. A Division Bench of this Court in the case of RABIYA BIKASSIM M vs THE COUNTRY WIDE CONSUMER FINANCIAL SERVICE LIMITED [ILR 2004 KAR 2215] has held as below :- "9. On consideration, we are of the opinion that once the matter has been finally heard and posted for judgment, as held by the Supreme Court in ARJUN SINGH's case (supra) nothing is required to be done by the Court except to pronounce the judgment, and therefore the decision in LAXMINARAYAN ENTERPRISES case is not helpful. Admittedly, Clause (4) of Order 18 Rule 2, of CPC has been deleted and therefore the respondent-plaintiff cannot take advantage of LAXMINARAYAN's case in the facts of the given case. Even if we assume it for the sake of argument without accepting, in view of the amendment in CPC, as we find, the law relating to procedure in suits and civil proceedings are governed by CPC. The CPC has been amended from time to time. Recently also, in order to cut short the delays at various levels in disposal of civil cases, CPC was amended by the Amendment Act of 1999 with

effect from 1.7.2002. In the facts of the given case, sufficient opportunity was given to the plaintiff to complete his evidence, but he has not availed the opportunity at appropriate time and thereafter his evidence was closed. The case was fixed for defendant's evidence and ultimately the case was heard and reserved for judgment on 20.6.2001. In our view, if the matter is reserved for pronouncement of judgment, such an application is not maintainable as otherwise it will defeat the very object of amendment in speedy disposal of the cases". 9. The Supreme Court in K.K.Velusamy, has observed very clearly that convention of not entertaining any application once the case is reserved for judgment is a sound rule, but it is not a straitjacket formula. What the Supreme court has held in this context is extracted here :_ "13. The learned counsel for respondent contended that once arguments are commenced, there could be no re-opening of evidence or recalling of any witness. This contention is raised by extending the convention that once arguments are concluded and the case is reserved for judgment, the court will not entertain any interlocutory application for any kind of relief. The need for the court to act in a manner to achieve the ends of justice (subject to the need to comply with the law) does not end when arguments are heard and judgment is reserved. If there is abuse of the process of the court, or if interests of justice require the court to do something or take note of something, the discretion to do those things does not disappear merely because the arguments are heard, either fully or partly. The convention that no application should be entertained once the trial or hearing is concluded and the case is reserved for judgment is a sound rule, but not a straitjacket formula. There can always be exceptions in exceptional or extra-ordinary circumstances, to meet the ends of justice and to prevent abuse of process of court, subject to the limitation recognized with reference to exercise of power under section 151 of the Code. Be that as it may. In this case, the applications were made before the conclusion of the arguments".

10. Again in the case of Bagai Constructions (supra) the Hon"ble Supreme Court had an occasion to examine similar position. K.K.Velusamy's case was also considered and ultimate conclusion of the Supreme Court on facts is as follows :- "12. During the entire trial, those documents have remained in exclusive possession of the plaintiff, still plaintiff has not placed those bills on record. It further shows that final arguments were heard on number of times and judgment was reserved and only thereafter, in order to improve its case, the plaintiff came forward with such an application to avoid the final judgment against it. Such course is not permissible even with the aid of Section 151 CPC".

11. Therefore, it is clear that even after a case is reserved for judgment, the case can be reopened for consideration of an application, but the Court should exercise that power very sparingly, provided sufficient and valid grounds are made out for not invoking Court's jurisdiction before conclusion of arguments. It is quite common that a party, who is in advantageous position having obtained an interim order or who derives benefit in one way or the other due to delay or has a weak case does not allow a suit to be decided. He resorts to all types of

tactics to keep the proceedings pending. So once the Court notices this kind of a situation, they must not be lenient. If by reading of an application, it is possible to make out that the applications are made only with a view to protracting or procrastinating the proceedings by abusing the process of Court and law, such applications can be outrightly rejected even without calling for objections. Inviting objections from the opponent party arises only if the reasons given in the affidavit give rise to prima facie satisfaction of their truthfulness.

12. Now, as regards remand powers of the Court under Order 41 Rule 23 and 23A of the Code, it has to be stated that there is no scope for remand except under the circumstances mentioned in Rules 23 and 23A of the Code. Remand under Rule 23 can be resorted to when a suit is decided on a preliminary point, for instance maintainability of the suit, jurisdiction, rejection of plaint under Order 7 Rule 11 of the Code and alike situations. Rule 23A takes into its fold circumstances other than mentioned in Rule 23, where re-trial is necessary. Ex-parte judgments or judgments in uncontested cases do come under Rule 23A when such judgments are challenged under Section 96 of the Code. The argument of the learned counsel for the appellant that Section 107 of the Code has a wider amplitude than Order 41 Rule 23 and 23A cannot be accepted. In fact, Section 107 itself makes it very clear that any power exercisable is subject to such conditions and limitations as may be prescribed. Section 2(16) of the Code defines "prescribe" as prescribed by rules. Therefore, any remand power that the Appellate Court has under Section 107 of the Code should be under circumstances either coming under Rule 23 or 23A. Even if application under Order 41 Rule 27 of the Code is allowed, remand is not usually contemplated, for the next procedure to be followed is stated in Rule 28.

13. Harking back to the facts of this case, they disclose very clearly that after cross-examination of PW1, PW2 was examined in-chief on 25.8.2010. On this date the defendants' counsel was absent before the Court. Therefore, cross-examination of PW2 was adjourned to 7.9.2010. On this adjourned date, PW2 was present but the defendants' and their counsel were absent. Again the Court adjourned the case for the purpose of cross-examination of PW2 to 21.9.2010 on cost of Rs.100/-. PW2 was present for the purpose of cross-examination on 21.9.2010, but there was no representation from the defendants' side and cost was also not paid. For this reason, cross-examination of PW2 was taken as "nil", plaintiff's side evidence was closed and the case was posted for defendants' evidence on 19.10.2010. On that date also the defendants' were absent and their counsel was also absent. Hence, defendants' side evidence was closed and the case was posted for arguments on 3.11.2010, on which date also the defendants' were present. It was on 4.11.2010 that the trial Court heard the arguments and posted the case for judgment by 18.11.2010. The applications for re-opening of the case were filed on 9.11.2010, i.e., after the trial Court posted the case for judgment.

14. These dates disclose very clearly that the trial Court did in fact grant

sufficient time to the defendants to cross-examine PW2 and lead evidence from their side.

15. It is the further observation of the first Appellate Court, which appears to be correct also, that the defendants' counsel was not keeping good health from 10.9.2010 to 30.10.2010. That means when PW2 was examined for the first time on 25.8.2010 and then case was adjourned to 7.9.2010, counsel was supposed to be well. No reason is given as to why the counsel did not appear before the Court at least on 25.8.2010 and 7.9.2010. As has been observed by the first Appellate Court, the counsel was treated as an outpatient for hypertension and diabetes at a hospital at Lathur where one of the appellants, namely Leeladevi is also residing. It is not known why at least one of the appellants did not make any effort to make alternative arrangement for the smooth conduct of their case when their counsel was not keeping good health. This conduct of the appellants would only disclose that the reasons that they gave before the trial Court for reopening of the case were highly unbelievable. The first Appellate Court also observed that the appellants could have got filed an affidavit from their previous counsel in support of their case. For all these reasons, if the first Appellate Court doubted bona fides in the conduct of the appellants and dismissed the Appeal without remanding the case to the trial Court, I do not find any illegality in it. It is not as though appellants were not at all given any opportunity while the evidence was being recorded in the trial Court. They did not avail the reasonable opportunity given to them. From their conduct if the appellants disintitiled themselves to claim any indulgence by the trial Court, it is they who are responsible. The circumstances as can be made out from these developments did not warrant remand of the case to the trial Court by the first Appellate Court. Hence, the substantial question of law needs to be answered in the negative and consequently this appeal has to be dismissed with costs. Ordered accordingly.