
(1991) 03 KAR CK 0042
In the Karnataka High Court
Case No : CRP No. 4460/1990

Mahadevappa and Others

APPELLANT

Vs

Mallappa and Others

RESPONDENT

Date of Decision : 18-03-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 3A(3)

Citation : (1991) 2 KarLJ 468

Hon'ble Judges : M. P. Chandrakantaraj Urs, J

Judgement

1. This revision under Section 115 C.P.C. is directed against the order dated 24-7-1990 of the I Additional District Judge. Dharwar(Hubli) on I.A.I. in R.A. No. 31/1989. The appellant (first respondent herein) preferred the appeal against the preliminary decree granted to the plaintiffs in O.S. No. 215/1980. The appeal was presented belatedly. However, it was accompanied by I.A.I for stay of the decree under appeal as well as I.A.II for condonation of delay in presenting the appeal. After notices to the successful plaintiffs, who were respondents before the learned District Judge, the order came to be passed on I.A.I granting stay of the decree without deciding the question of condonation of delay in presenting the appeal.

2. As in apparent, the appeal is there. Sri Jayakumar S. Patil, learned counsel appearing for the appellant/first respondent has submitted that the practice in the subordinate Courts has been to consider the application for condonation of delay under Section 5 of the Limitation Act along with the hearing of the appeal and it was in that circumstance that the learned Additional District Judge came to pass the order on I.A.I while keeping I.A.II pending to be decided along with the appeal.

3. Per contra, the learned counsel for the revision petitioners has strenuously urged that under Order XLI, Rule 3-A, C.P.C., it is mandatory that the Court decides the question of delay in presenting the appeal before it proceeds any further unless it is not disposed of in accordance with Rule 11 or Order 41, C.P.C.

4. Sub-rule (3) of Rule 3-A of Order XLI, C.P.C. reads as follows:

"Where an application has been made under sub-rule (1), the Court shall not make an order for the stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under Rule 11, decide to hear the appeal".

In other words, unless the Court follows the procedure laid down in Rule 11, it cannot pass any order unless the application under sub-rule (1) of Rule 3-A is disposed of. The view expressed by majority of the High Court in India appears that it will not be competent for the Court to proceed to grant stay of the decree under appeal in the circumstances set-out in Rule 3-A and that prohibition is mandatory.

5. Whatever may be the practice of the Courts which have appellate jurisdiction, the provision of law governing the procedure in regard to appeals filed belatedly beyond the period prescribed under the Limitation Act, should be given full play or action. It cannot be circumvented by postponing the consideration of condonation application to a later stage. That would defeat the very purpose of the amendment inserted by the 1976 Amendment Act. In effect, the belated appeal is no appeal at all unless the delay in filing the appeal is condoned. It is only then the Court assumes jurisdiction as an appellate Court to deal with the merits of the case.

6. Therefore, having regard to the plain language and the bar contained in sub-rule (3) of Rule 3-A of Order XLI, C.P.C. the learned District Judge at Hubli was clearly in error in proceeding to stay the decree under appeal without disposing of the application for condonation of delay.

7. In the result, I must held that the learned District Judge has acted without jurisdiction and therefore the order passed by him calls for interference. It is set aside with a direction that I.A.I may be considered afresh only after I.A.II the application for condonation of delay is disposed of.

8. In the circumstances of the case, there will be no order as to costs.

9. This order is made at the stage of admission after notices to respondents and after hearing the learned counsel for the parties.