
(1981) 09 KAR CK 0021
In the Karnataka High Court
Case No : CRP No. 1803/1981

Sharanappa

APPELLANT

Vs

Hafeezuddin Ansari and Others

RESPONDENT

Date of Decision : 16-09-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1(K)

Citation : (1982) 2 KarLJ 29

Hon'ble Judges : K. A. Swami, J

Judgement

1. This civil revision petition under S. 115 of CPC is directed against the order dated 31-3-1981 passed by the learned Addl. District Judge, Gulbarga in Mis. A. No. 50 of 1980 reversing the order dated 19th November 1979 passed by the learned Munsiff, Aland, in O.S. No. 50 of 1965 rejecting an application filed for setting aside the abatement.

2. The aforesaid suit was filed by one Sri Mohammed Sadruddin Ansari against the petitioner and respondents 2 and 6. It was stayed under S. 10 of the CPC, on the ground that another suit between the same parties filed, earlier to the present suit was pending in this Court in the form of R.S.A. No. 88 of 1971.

3. During the period when the suit has been stayed, the plaintiff died. An application to bring the legal representatives of the deceased plaintiff has been filed on 11-8-1978 long after the death of the plaintiff by the heirs of the deceased plaintiff, who are respondents 1, 3, 4 and 5 in this civil revision petition. Along with this application, two other applications have also been filed, one for condoning the delay in filing the application to bring the legal representatives of the deceased on record and another for setting aside the abatement. The trial Court has held that the explanation offered by the applicants is not convincing and it cannot be accepted Accordingly, it has rejected the application for condonation of delay consequently, it has also rejected the applications to bring the legal representatives on record and to set aside the abatement.

4. As the order refusing to set aside the abatement was an appealable order, an appeal under Order 43 of CPC was filed before the, Civil Judge, Gulbarga but the same was withdrawn by the District Court and was disposed of by the Addl. District Judge, Gulbarga. The learned appellate Judge has accepted the explanation offered by the applicants and has condoned the delay in filing the application to bring the legal representatives on record. Consequently, he has set aside the abatement and has allowed the application to bring the legal representatives of the deceased plaintiff on record.

5. In this civil revision petition, it was contended by Sri Shivaraj Patil, learned Counsel for the petitioner, as follows:

(i) that the application to set aside, the abatement was not decided on merits inasmuch as it was rejected because the application for condonation of delay was rejected and as the order passed on the application for condonation of delay was not an appealable order, it was not at all open for the appellate Court to go into the question as to whether it was a case for condoning the delay;

(ii) that even otherwise, the scope of the appeal was very much limited because the decision on the question of condonation of delay was a master resting within the judicial discretion of the Court of first instance as such the appellate Court ought not to have re-appreciated the entire material on record as if it were a court of first instance; unless it was of the opinion that the finding recorded by the Court of first instance was vitiated because of the fact that it was either unreasonable or capricious or vitiated for non-consideration of the material produced in the case. In other words, it was contended that the appeals preferred against the orders passed under Order 39 Rules 1, 2 and 4 of the Code of Civil Procedure would also apply to the appeal preferred against the order refusing to set aside the abatement.

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) CPC, 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 or dismissal of the suit upon such terms as to costs or otherwise as it thinks fit. Further, the provisions of S. 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), CPC, 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. Kavieer Dias*, (1970) 2 Mys.L.J. 553, has held that an application under 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 *State of Karnataka v. Kulkoti*, (1977) 1 Kar.L.J. 281, 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.

8. The second contention that in the appeal preferred against the order refusing to set aside the abatement, it is not permissible for the appellate Court to re-appreciate the evidence is also not tenable. Unlike the appeal preferred against an order refusing or granting a temporary injunction, an appeal preferred against the order refusing to set aside the abatement stands on a different footing inasmuch as an order refusing to set aside the abatement results in most cases in the dismissal of the suit or appeal as the case may be; or at least it brings to an end the suit or appeal as the case may be as against the deceased and his legal representatives. Further, no fresh suit is permissible in law to be brought on the same cause of action. The Explanation inserted by Central Act 104 of 1976 to R. 9 of Or. 22 of the Code of Civil Procedure, further provides that in any later suit a defence based on the facts which constituted the cause of action in the suit which had abated or had been dismissed, under Or. 22, is not barred. Whereas, such a result does not flow from the order granting or refusing temporary injunction. Further, such an interim order does not even affect the main suit. Therefore the appellate Court is required to consider all the aspects of the matter including the entire evidence produced in the case in order to find out whether there is a case for condoning the delay. The power of the appellate Court in such an appeal is not circumscribed by any limitation as it is in the case of an appeal against an order granting or refusing temporary injunction. Therefore, the appellate Court has not committed an error in condoning the delay and

consequently setting aside the abatement. Thus the 2nd contention also fails.

9. There is no dispute that the applicants are the legal representatives of the deceased plaintiff; therefore as a consequence of setting aside the abatement, the application to bring the legal representatives of the deceased on record has been rightly allowed by the appellate Court.

10. For the reasons stated above, the Civil revision petition fails and the same is dismissed.