

(2017) 12 KAR CK 0014

In the Karnataka High Court

Case No : 54525-54526 of 2017 (GM-CPC)

**SHRI K. SWARUPKUMAR REDDY?S/O K.RAMALINGA REDDY Vs SMT.
VIJAYA VENKATESH**

Date of Decision : 06-12-2017

Acts Referred:

Code of Civil Procedure, 1908, Section 151, Order 18Rule 17 - Saving of Inherent powers of Court

Citation : (2017) 12 KAR CK 0014

Hon'ble Judges : B Veerappa

Bench : SINGLE BENCH

Advocate : VISWANATHA SETTY V, HANEEF M H

Judgement

1. The petitioner who is defendant No.5 has filed the present writ petition against the order dated 27.11.2017 on IAs.7 and 8 made in OS No.727/2008 dismissing the applications filed under Section 151 of the Code of Civil Procedure, 1908 and under Order 18 Rule 17 of the Code of Civil Procedure, 1908.
2. The first respondent who is the plaintiff before the Trial Court filed the suit for specific performance to enforce the agreement dated 10.02.2007 and also for direction to the defendant Nos.1 to 4 to deliver the vacant possession of the schedule property and further to declare that the sale deed dated 01.09.2007 executed by defendant Nos.1 to 4 in favour of defendant No.5 is void ab-initio and not binding on the plaintiff and direct defendant No.5 to quit and hand over the vacant

possession of the suit property to the plaintiff and for permanent injunction contending that defendant No.1 who is the owner of property has approached the plaintiff and offered to sell his agricultural land and accordingly, defendant No.1 executed the agreement of sale dated 10.02.2007 in favour of the plaintiff before the witnesses for sale consideration of Rs.31,46,875/- and has received Rs.3,00,000./- as advance on the date of agreement and agreed to execute the sale deed within 21 days from the production of documents from defendant No.1. It is further contended that in spite of repeated demands made, defendant No.1 did not execute the sale deed. Therefore, plaintiff was constrained to issue legal notice and filed the suit for the relief's sought for.

3. The defendant No.1 filed the written statement and denied the execution of agreement and contended that he never executed the same. The same written statement was adopted by defendant Nos.2 to 4. The defendant No.5 did not file any written statement.

4. After completion of evidence of both the sides, when the matter was posted for arguments, at that stage, the present applications came to be filed by defendant No.5 under Section 151 of the Code of Civil Procedure, 1908 to re-open the case from the stage of arguments to evidence i.e., to cross examine the witnesses and another application filed under Order 18 Rule 17 read with Section 151 of Code of Civil Procedure, 1908 to recall the order dated 14.07.2016 from the stage of arguments and permit defendant No.5 to cross examine PWs.1 and 2 and contended that after receipt of summons from the Trial Court, he has filed vakalath on 11.08.2011 and as he had no knowledge of legal aspects, he did not contact his counsel. In the first week of

August, 2016, when he contacted the counsel he came to know that his previous counsel on record has not filed the written statement and not cross examined PWs.1 and 2 on behalf of defendant No.5 etc., Therefore, he sought to allow the applications.

5. The said applications was resisted by the plaintiff contending that the applications were filed belatedly and the very same advocate who is appearing for defendant No.5 has extensively cross examined the witnesses of plaintiff. Therefore, there was no necessity to allow the applications and sought for dismissal of the applications.

6. The Trial Court considering the applications and objections, by an impugned order dated 27.11.2017 dismissed both the applications. Hence, the present petition is filed.

7. I have heard the learned Counsel for both the parties to the lis.

8. Sri Viswanatha Setty .V, learned Counsel for the petitioner-defendant No.5 contends that the suit is filed by the plaintiff for specific performance against the defendants. Defendant Nos.1 to 4 have alienated the property during the pendency of the suit and he is in possession and enjoyment of the property. He submits that because of the mistake committed by the counsel in not filing the written statement, the parties should not suffer. Therefore, an opportunity should be given to the petitioner to cross examine PWs.1 and 2 on the next date of hearing i.e., 13.12.2017. If an opportunity is given, defendant No.5 will cross examine PWs.1 and 2 on the same day and proceed with the trial. Therefore, he submits that the writ petition may be allowed by quashing the impugned order.

9. Per contra, Sri Haneef M.H., learned Counsel for the

respondents sought to justify the impugned order and vehemently contended that though the suit was filed in the year 2008, defendant No.5 has not filed the written statement. In spite of giving opportunity, he has not availed the same to cross examine PWs.1 and 2. Therefore, the Trial Court is justified in dismissing the applications. Therefore, he sought for dismissal of the writ petitions.

10. Having heard the learned Counsel for the parties, it is not in dispute that the respondent No.1 who is the plaintiff before the Trial Court filed the suit for specific performance against defendant Nos.1 to 4 and also for declaration that the sale deed executed by the defendants is not binding on the plaintiff who sought for possession from defendant No.5. It is also not in dispute that after completion of evidence of both sides, the matter was posted for arguments. At that stage, the present applications are filed mainly on the ground that the counsel engaged by defendant No.5 has not filed written statement and not cross examined PWs.1 and 2 and because of the mistake committed by the Counsel, parties should not suffer. Ultimately if any order is to be passed, it should not affect the right of the parties.

11. The case was filed in the year 2008 and now we are in the year 2017. The applications are filed at the stage of arguments. The fact remains that right of the parties are involved in respect of the immovable property. Mere granting of one more opportunity on any of the date fixed by this Court to cross examine PWs.1 and 2 by defendant No.5- the present petitioner will not in any way prejudice to the case of plaintiff. Though the matter is of the year 2008, when the rights of the parties are involved in respect of immovable property, the right

of the property cannot be decided on technicality. When substantial justice and technical considerations are pitted against each other cause of substantial justice deserves to be preferred for the other side cannot be claimed to have a vested rights in injustice being done because of a non deliberate delay. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

12. In the present case, though the counsel for defendant No.5 filed power on behalf of the petitioner long back, unfortunately, he has not filed the written statement. Though it is the duty of the counsel to defend and appear before the Trial Court to cross examine PWs.1 and 2, the same has not been done. Because of the mistake committed by the Counsel for defendant No.5, the parties should not be suffered. Therefore, this Court is of the considered opinion that an opportunity has to be given to the petitioner to cross examine PWs.1 and 2 subject to imposing of cost.

13. For the reasons stated above, the writ petitions are allowed. The impugned order dated 27.11.2017 on IAs.7 and 8 filed under Section 151 of Code of Civil Procedure and under Order 18 Rule 17 of the Code of Civil Procedure are quashed. IAs.7 and 8 are allowed subject to payment of cost of Rs.10,000/- payable by defendant No.5 to the plaintiff on the next date of hearing and further subject to condition that on 13.12.2017, the defendant No.5 shall cross examine PWs.1 and 2 before the Trial Court. After completion of the cross examination, he shall proceed with the arguments, if time enables or on the date fixed by the learned Trial Judge. He shall not seek any further adjournment.

Taking into consideration the matter is of the year 2008,
the Trial Court is directed to expedite the suit itself subject to co-
operation of the parties.