

(2007) 01 KAR CK 0045
In the Karnataka High Court
Case No : Writ Petition No. 16879 of 2005

Smt. Shobharaj, Samrat Sarovar and Smt. M. Shantabai	APPELLANT
Vs	
Sri. Chandrappa Dhobi and Others	RESPONDENT

Date of Decision : 23-01-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 3, Order 9 Rule 9, 151

Citation : (2007) 2 KCCR 1343

Hon'ble Judges : H.N. Nagamohan Das, J

Bench : Single Bench

Advocate : Venkatesh, for R.B. Deshpande, for the Appellant; G.S. Anaguya, for the Respondent

Judgement

H.N. Nagamohan Das, J.—In this writ petition the petitioners have prayed for a writ in the nature of certiorari to quash the order dated 28.02.2005 in Misc. No. 81/2002 passed by the Civil Judge (Senior Division) at Raichur allowing LA. No. 7 filed u/s 151 CPC and consequently dismissing Misc. No. 81/2002 as not maintainable.

2. Petitioners filed O.S. No. 48/1993 against the respondents for a decree of declaration of title and permanent injunction. This suit came to be dismissed for non-prosecution on 23.07.2001. Aggrieved by this order of dismissal the petitioners filed Misc. No. 81/2002 under Order 9 Rule 9 CPC. In Misc. 81/2002 the respondents filed LA. No. 7 u/s 151 CPC for dismissal of miscellaneous petition as not maintainable. The trial Court after hearing both the parties passed the impugned order allowing LA. No. 7 and consequently dismissing the miscellaneous petition. Hence, this petition.

3. Heard arguments on both the side and perused the entire writ papers.

4. It is necessary to notice the relevant provisions in CPC for the purpose of this case. Order 17 Rule 3 CPC reads as under:

Court may proceed notwithstanding either party fails to produce evidence, etc.

Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the farther progress of the suit, for which time has been allowed, [then court may, notwithstanding such default,-

(a) if the parties are present, proceed to decide the suit forthwith; or

(b) if the parties are, or any of them is, absent, proceed under Rule 2]

5. A reading of Order 17 Rule 3 CPC specifies that a suit may be decided under two circumstances; firstly, when parties are present before the Court and failed to proceed with the matter and secondly, when the parties remained absent before the Court and failed to proceed with the matter. Order 17 Rule 3 (b) specifies that the suit is to be decided in accordance with Sub-rule (2) of Order 17 and the same reads as under:

2. Procedure if parties fail to appear on day fixed. Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other orders as it thinks fit.

6. A reading of Sub-rule 2 of Order 17 specifies, that when the parties fail to appear on the day fixed for hearing, the Court may proceed to dispose the suit in one of the modes under Order IX CPC. Order IX Rule 8 CPC specifies, that where the plaintiff does not appear on the date of hearing the Court shall make an order dismissing the suit, unless the defendant admits the claim of plaintiff. The Court shall pass a decree against the defendant to the extent of admitted claim. Order IX Rule 9 CPC precludes the plaintiff from filing a fresh suit on the same cause of action where there is an order of dismissal under Rule 8 of Order IX CPC. But the plaintiffs may apply for an order to set aside the order of dismissal of suit.

7. Keeping in mind the above legal position the fact situation in the instant case is to be examined. Before the trial Court O.S. No. 48/1993 was set down for petitioner's evidence on 23.07.2001. On that day the petitioner remained absent before the trial Court and failed to adduce evidence. The trial Court dismissed the suit for default of petitioner. Therefore the dismissal of suit falls under Order 17 Rule 3(b) CPC. Rule 3(b) of Order 17 specifies to proceed under Rule 2 of Order 17. Rule 2 further specifies to dispose the suit in any of the modes under Order 9 CPC. Rule 8 of Order 9 CPC specifies to dismiss the suit where plaintiff does not appear when the suit is called for hearing. In the instant case the suit was set down for evidence of petitioner on 23.07.2003 and he remained absent and failed to proceed with the matter. Hence, the order of dismissal of O.S. No. 48/1993 is a dismissal under Rule 8 of Order 9 CPC. Then a miscellaneous petition to set aside the order of dismissal under Order 9 Rule 9 CPC is maintainable. The trial Court committed an error in passing the impugned order dismissing Misc. No. 81/2002 as not maintainable.

8. Smt. Anasuya, learned Counsel for respondents submit, that the matter is pending since long time and a direction may be issued to the trial Court to dispose Misc. No. 81/2002 within a particular time frame. There is some force in the submission made by the learned Counsel for respondent.

9. For the reasons stated above, the following;

ORDER

I. Writ petition is allowed.

II. The impugned order dated 28.02.2005 in Misc. No. 81/2002 passed by the Civil Judge (Senior Division) at Raichur allowing I.A. No. 7 filed u/s 151 CPC and consequently dismissing Misc. No. 81/2002 is hereby quashed. LA. No. 7 filed by the respondents is hereby rejected and Misc. 81/2002 is restored.

III. The matter is remanded to the trial Court for disposal of Misc. No. 81/2002 in accordance with law as expeditiously as possible and in any event not later than three months from the date of receipt of copy of this order. Ordered accordingly.