

(2006) 06 KAR CK 0037
In the Karnataka High Court
Case No : Writ Petition No. 21262 of 2002

Sri K. Sham Bhat

APPELLANT

Vs

Sri Seetharama Bhat, Advocate and Others

RESPONDENT

Date of Decision : 05-06-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 54
Constitution of India, 1950 — Article 226, 227
Karnataka Appellate Tribunal Regulations, 1979 — Regulation 28 (b)

Citation : (2006) 3 KCCR 160 SN

Hon'ble Judges : V.G. Sabhahit, J

Bench : Single Bench

Advocate : Krishna Bhat, for the Appellant; K. Srihari, for R-1 and R-5 and R. Kumar, GP for R-6, R-2 to R-4, for the Respondent

Final Decision : Allowed

Judgement

V.G. Sabhahit, J.—This writ petition is taken up for final hearing with the consent of the learned Counsel appearing for the parties.

2. This writ petition is filed under Articles 226 and 227 of the Constitution of India against the order passed by the Karnataka Appellate Tribunal, Bangalore, dated 19th March 2002 in Misc. Petition No. 13 of 2001, wherein the application filed by the petitioner for setting aside the order on merits dated 18th April 2001 made in Appeal No. 453 of 1988 and to hear the appeal on merits.

3. It is averred in the writ petition that the petitioner had filed appeal No. 453 of 1988 on the file of the Karnataka Appellate Tribunal, Bangalore, challenging the order passed by the Deputy Commissioner dated 5th July 1988 in a proceeding relating to partition u/s 54 of the Code of Civil Procedure. The appeal was posted for final hearing on 7th April 2001 at Bangalore Camp of Karnataka Appellate Tribunal. It is averred, the date of hearing was not informed to the petitioner and the appeal was dismissed on merits without hearing the petitioner on 18th April 2001. The petitioner made an application for setting aside the ex parte order

under Regulation 28(b) of the Karnataka Appellate Tribunals Regulations. There was a delay of 48 days in filing the application. The Appellate Tribunal by order dated 19th March 2002 dismissed the miscellaneous petition No. 13 of 2001. Being aggrieved by the same, this writ petition is filed.

4. I have heard the learned Counsel for the petitioner, learned Counsel for the respondents-1 and 5 and the learned High Court Government Pleader for 6th respondent. Learned Counsel for the petitioner submitted that the petitioner had no notice of the appeal being posted before Mangalore Camp on 18th April 2001 and sufficient cause had been made out for condoning the delay in filing the appeal and sufficient cause also had been made out to recall the order dated 18th April 2001 passed by the Appellate Tribunal and as the said order was passed without notice to the petitioner and the Appellate Tribunal was not at all justified in dismissing the application as barred by time.

5. Being aggrieved by the said order, this writ petition is filed. It is clear from the perusal of the material on record that admittedly, the learned Counsel appearing for appellant in the appeal as also the petitioner herein who was the appellant in Appeal No. 453 of 1988 were not present when the appeal was taken up for hearing on 18th April 2001. The Appellate Tribunal has proceeded to decide the appeal on merits in the absence of the counsel appearing for the appellant and the contesting respondents. Misc. Petition No. 13 of 2001 was filed for recalling the said order passed in appeal on 18th April 2001 and since there was a delay of 48 days in filing the restoration application, the delay was sought to be condoned. Having regard to the cause shown in the application for condoning the delay, it is clear that the Appellate Tribunal was not at all justified that no sufficient cause was made out for condoning the delay in filing the Misc. Petition No. 13 of 2001 and wherefore, the order passed by the Karnataka Appellate Tribunal dismissing the petition as barred by time and no ground is made out for condonation of delay is liable to be set aside. It is clear from the material on record that the reason assigned by the Appellate Tribunal for dismissing the petition on merits is also liable to be set aside as it is well settled that when the appellant or his counsel is not present before the Court, the only course open to the Tribunal or the Court is to dismiss the appeal for non-prosecution and the same cannot be considered on merits as the appellant would have an opportunity of making an application for restoration of the appeal. It is clear from the order passed on 18th April 2001 that on the said date, when the matter was taken up for hearing at Mangalore Camp, the counsel for the appellant and respondents-1 to 5 were not present. Under the circumstances, the only order that could be passed by the Appellate Tribunal was to dismiss the appeal for non-prosecution. No order on merits could be passed and therefore, it is clear that the application filed by the petitioner on merits in Misc. Petition No. 13 of 2001 is entitled to be allowed and accordingly, I pass the following order:

(i) The writ petition is allowed.

(ii) The order passed by the Karnataka Appellate Tribunal dated 19th March 2002

in Misc. Petition No. 13 of 2001 dismissing the petition is set aside and the said petition is allowed.

(iii) The order dated 18th April 2001 passed by the Karnataka Appellate Tribunal in Appeal No. 453 of 1988 at Mangalore Camp is set aside and the said appeal is directed to be heard by the Appellate Tribunal and disposed of on merits in accordance with law after notifying the parties.