

(2008) 01 KAR CK 0030
In the Karnataka High Court
Case No : C.R.P. No. 929 of 2004

Veerabhadrappe Shettar (since dead by LRs. Shantawwa
Shettar and Others) and Sujata Awaradi

APPELLANT

Vs

The Chairman, Vyvasaya Seva Sahakari Sangh and Others

RESPONDENT

Date of Decision : 17-01-2008

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : (2009) 4 CivCC 105 : (2008) 4 KarLJ 736

Hon'ble Judges : N.K. Patil, J

Bench : Single Bench

Advocate : M.B. Naragund and Sona Vakkund, for the Appellant; G.S. Bhat, for Respondents 1, 4 and 6, for the Respondent

Judgement

N.K. Patil, J.—The petitioners, being aggrieved by the order dated 28.2.2004, passed in Misc. Appeal No. 13/1998, by the Principal Civil Judge (Sr. Dn), Jamkhandi, dismissing the appeal and confirming the order dated 3.4.1998, passed in Civil Misc. No. 10\\1994, by the Civil Judge (Jr. Dn), Bilagi, and allow the revision petition by restoring O.S No. 9/1993 on its file and permit the plaintiffs/petitioners to adduce further evidence in the interest of justice and equity, have presented the instant Civil Revision Petition.

2. The grievance of the petitioners herein-plaintiffs in the instant Civil Revision petition is that, petitioners have filed a petition under Order 9 Rule 9 of CPC praying to set aside the order dated 10.2.1994 passed in O.S. No 9/1993 stating that, the said suit was dismissed for non prosecution and prayed for restoration of the said suit in the interest of justice and equity and sought permission to proceed with the said suit by restoring the same on its original file in Civil Misc. No. 10/1994 before the Civil Judge (Jr. Dn), Bilagi. Along with the said petition, petitioners have filed an application u/s 5 of Limitation Act, for condonation of delay of 36 days in filing the said petition. The said application had come up for consideration before the Trial Court on 3rd April 1998. The Trial Court, after

considering the petition, objections filed by respondents herein and the pleadings of the parties and after considering the oral evidence of PW1 and the documentary evidence at Exs. P1 and P2, has raised the points for consideration which reads thus:

1. Whether petitioners have shown sufficient cause to condone the delay of 36 days in filing this petition and I.A. No. 1 deserves to be allowed at this stage?
2. Whether petitioners further prove that they have been prevented by sufficient cause from appearing in the suit O.S. No. 9/1993 on 10.2.1994 before the Court?
3. What order?

The Trial Court, after hearing the parties and after considering the relevant materials available on file, oral and documentary evidence and the conduct of the petitioners-plaintiffs, has answered Point No. 1 in the negative against the petitioners and Point No. 2 that petitioners have failed to prove sufficient cause. In allowing the I.A. No. 1 hence, there is no need to consider point No. 2 and finally rejected the application filed by petitioners and consequently, the petition filed under order 9 Rule 9 of CPC in Civil Misc. No. 19/1994 was also dismissed as barred by law of limitation.

3. The only valid reasons given by the Trial Court for dismissing the application filed by petitioners for condonation of delay is that, there is inconsistency in the evidence adduced by first petitioner and he has not produced any documentary evidence to substantiate the statement made in the affidavit for condoning the delay in filing the application for recalling the order of dismissal of the suit for non prosecution in para-13 of the order and consequently dismissed the Civil Misc. 10/1994. Assailing the correctness of the order passed by the Trial Court dated 3rd April 1998, petitioners herein have filed Miscellaneous Appeal before the Principal Civil Judge (Sr. Dn) Jamkhandi in No. 13/1998. The said Miscellaneous Appeal had come up for consideration before the Lower Appellate Court on 28th February 2004. The Lower Appellate Court, after hearing the learned Counsel appearing for both the parties and after going through the order passed by the Trial Court has raised three points for its consideration which reads thus:

1. Whether the Trial Court committed any error in appreciating the oral as well as documentary evidence while dismissing the Civil Misc. No. 10/1994 under Order 9 Rule 9 CPC?
2. Whether the Trial Court committed any error in appreciating the documentary evidence like Ex. P2?
3. What order?

The Lower Appellate Court after considering the oral and documentary evidence and other materials available on file, including the order passed by the Trial Court has answered Point Nos. 1 and 2 in the negative and finally dismissed the said

appeal. Being aggrieved by the impugned orders passed by both the Courts below, petitioners herein felt necessitated to present the instant Civil Revision Petition seeking appropriate relief as stated supra.

4. I have heard learned Counsel appearing for petitioners and learned Counsel appearing for respondents at considerable length of time.

5. After careful perusal of the impugned orders passed by both the Courts below, it is manifest on the face of the orders that, both the Courts below have committed grave error, much less material irregularity in passing the impugned orders without going into the case made out by petitioners. The Trial Court has taken into consideration the inconsistency in the oral evidence given by first petitioner as PW1 and the statement made by him in the affidavit filed along with the application. The First petitioner has stated in the affidavit that, he could not file an application for recalling the order dated 10.2.1994 in O.S. No. 9/1993 which has been dismissed for non prosecution, within time, on the ground that, he was suffering from illness. But, he has adduced in his oral evidence as PW1 that, he was suffering from Osteoarthritis and lever problem and he has produced Ex. P2-Certificate issued by Medical Officer, PHC Gatagali and he has not produced any documents for having taken treatment Miraj hospital for his lever problem. The Trial Court has not accepted the oral evidence of PW1, on the ground that, the statement made by him is inconsistent and there are two contrary version in the pleadings and oral evidence and stated that, if, first petitioner has taken treatment at Mirage Hospital he ought to have produced any certificate to substantiate his deposition when he has given his oral evidence. But he has failed to produce any documentary evidence to prove the stand taken by him. Therefore, the Trial Court has disbelieved the evidence adduced by first petitioner. The Trial Court after taking into consideration the stand taken by respondents in their objections that, there is a delay of 36 days and the same was not satisfactorily explained by petitioners and specifically pointing out that, petitioners have to explain each day's delay satisfactorily and disbelieving the evidence of the first petitioner and taking into consideration the other materials available on file and after discussing the same in para-13 of the order and by assigning cogent reasons in para-14 has rejected the application and consequently dismissed the petition filed under Order 9 Rule 9 of CPC. The order passed by the Trial Court has been confirmed by the Lower Appellate Court, holding that there is no unreasonableness or perversity in the order passed by the Trial Court. Further, the Lower Appellate Court has observed that, the first petitioner has adduced his oral evidence in the original suit pending adjudication and the matter was at the stage of cross examination and on that day the matter was dismissed for non-prosecution. The reliance placed by petitioners has not been accepted by the Lower Appellate Court stating that the said law laid down by the Apex Court is not applicable by assigning cogent reasons in paras-7 and 8 of the order and dismissed the Miscellaneous Appeal filed by petitioners.

6. It is significant to notes that, both the Courts below have committed the same

error and mis carriage of justice in not considering the purpose for which the suit has been filed and registered by the petitioners that too, when petitioners are fighting litigation from the year 1992 against the respondents and succeeded before the Division Bench of this Court and Apex Court, wherein all these respondents were the parties to the proceeding in Writ Appeal Nos. 415-16/2000 disposed of on 17th April 2002. The said order passed by the Division Bench has been confirmed and the schedule property involved in the proceedings before this Court and the Apex Court is one and the same, an evident from cross verification plaint copy which has been made available to the Court by learned Counsel appearing for petitioners. The stand taken by respondents in their objections that there is inconsistency in the oral evidence given by the first petitioner and the affidavit filed by him and therefore, the same cannot be accepted and there is a delay of 36 days in filing the appeal, has been accepted by the Trial Court without touching the root cause of the dispute between the parties and the purpose for which the suit has been filed by petitioners redressing their grievance and dismissed the application filed by petitioners and consequently dismissed the petition. The said order passed by the Trial Court has been confirmed by the Lower Appellate Court. The reasoning given by both the Courts below shows that, they have not exercised their discretion properly. When the matter is at the stage of cross examination of the plaintiffs-petitioners herein and applied its mind and gone through the order and verified the plaint averments and the written statement filed by respondents, the Trial Court ought not to have proceeded and rejected the application filed by petitioners for recalling the order on hyper technical ground and the Lower Appellate Court ought not to have confirmed the same. It is duty cast on the Courts below to take a pragmatic approach in the matter and to see that, when the matter was dismissed for non-prosecution the other side should not take any undue advantage of the same and on hyper technical ground that the petitioners have not explained the delay satisfactorily. As far as the delay is concerned, time and again the Apex Court and this Court has laid down well settled preposition of law in catena of judgments that, the facts and circumstances of each case should be looked into by the Courts at the time of considering the delay. After careful evaluation of the orders passed by both the Courts below and after careful perusal of the Judgment of the Division Bench of this Court as referred above and the submission made by learned Counsel appearing for petitioners, it emerges that dispute has started between the parties since 1992 and when respondents could not succeed, they went upto the Apex Court assailing the correctness of the sale deed executed by the respondents in favour of petitioners, but they could not succeed and thereafter also, they have not left it and petitioners have filed a suit for declaration and permanent injunction as early as in the year 1993 and due to bifurcation of Bijapur district into Bijapur and Bagalkot, the jurisdiction of the Courts have been changed and the matter came within the jurisdiction of Bilagi Court and from 1994 petitioners are prosecuting the case through their counsel and if the petitioners are not diligent in redressing their grievance, the suit filed by petitioners ought to have dismissed earlier in

1994 itself. Due to unavoidable circumstances and in view of explanation given by petitioners, the Courts ought to have applied their mind and verified the root cause of the dispute between the parties. It is a fact that Both the Courts below after considering the relevant materials available file and with reference to the oral evidence of the first petitioner, have recorded concurrent finding of fact and have not accepted the explanation offered by first petitioner for explaining the delay, except stating that, first petitioner has taken inconsistent stand in his oral evidence and in the affidavit filed along with the application. That is not the only fact to be looked into by the Courts while dismissing the matter on hyper technical grounds. The Trial Court might have seen the prayers sought for by petitioners, the stand taken by respondents, the fact that the parties are redressing their grievance and it might have taken a pragmatic approach and lenient view and gone through the merits of the matter and might have allowed the application by imposing some reasonable costs to the petitioners and restored the suit on merits. If such an approach is taken by the Trial Court in the interest of justice and to safeguard the interest of both the parties it would be appreciated. Taking all these factors into consideration, I am of the considered view that, the impugned orders passed by both the Courts below cannot be sustained and they are liable to be set aside by imposing some reasonable cost payable by the petitioners, it would meet the ends of justice.

7. learned Counsel appearing for respondents has submitted that, the conduct of the petitioners is not acceptable nor appreciable and first petitioner has taken inconsistent stand in his oral evidence and in the affidavit filed for explaining the delay of 36 days has been rightly accepted by the Trial Court and dismissed the said suit and by exercising revisional power u/s 115 of C.P.C. this Court cannot interfere with the concurrent finding of fact recorded by both the Courts below after appreciation of the oral and documentary evidence nor the petitioners have made out any good grounds to interfere in the impugned orders passed by both the Courts below. To substantiate his submission, he placed reliance on the judgments of the Supreme Court reported in 1991 Supp (2) Supreme Court Cases 270 Management of Kalpataru Vidya Samasthe (R) and Another Vs. S.B. Gupta and Another, (Kalpataru Vidya Samsthe (R) and Anr. v. S.B Gupta and Anr.) and 2001 (4) KCCR 262 (Praveen Kumar and Ors. v. Suresh Chand and Ors.) and submitted that, the Apex Court has held in the aforesaid judgements that "the High Court cannot re- appreciate the evidence and set aside the concurrent findings recorded by Courts below by taking a different view and interference with findings of fact only justified if perverse or if there was non appreciation or non-consideration of the material evidence on record". There is no dispute or quarrel regarding the well settled law laid down by the Apex Court in the aforesaid judgments. But in the instant case, it is significant to note that, oral evidence has been adduced by petitioners to substantiate his case for condonation of delay in filing the application for recalling the order dated 10.2.1994 and the respondents have not adduced any oral evidence to substantiate their stand and only on the basis of the materials available, affidavit

filed and on the oral evidence adduced by the first petitioner, the matter has been disposed of. The manner in which the matter has been considered and disposed of by the Trial Court and confirmed by the Lower Appellate Court, on hyper technical views cannot be accepted. Therefore, the reliance placed by learned Counsel appearing for respondents cannot be made applicable to the facts and circumstances of the case in hand. Hence, the reliance placed by teamed counsel appearing for respondents has got no assistance to substantiate his submission, including the orders passed by both the Courts below.

8. In the light of the facts and circumstances of the case as stated above, the instant Civil Revision petition filed by petitioners is allowed.

The impugned order dated 3rd April 1998 passed on I.A. No. 1 in Civil Miscellaneous No. 10/1994 by the Civil Judge (Jr. Da) Bilagi and order dated 28th February 2004 passed in Miscellaneous Appeal No. 13/1998 by the learned Civil Judge (Sr. Dvn.) Jamkhandi are hereby set aside.

Matter stands remitted back to the Trial Court for reconsidering the application filed by petitioners afresh and take appropriate decision, in accordance with law, after affording opportunity to the petitioners as well as the respondents and proceed further and dispose of the same, expeditiously keeping in mind that, the matter is pending adjudication between the parties from decades subject to condition that, these petitioners shall pay the cost of Rs. 2,500/- to the respondents

The costs of Rs. 2,500/- shall be deposited by the petitioners within two weeks from the date of receipt of a copy of this order before the Trial Court.

Further, the Trial Court is directed to pay the said costs to the respondents.

9. With these observations, the instant Civil Revision petition filed by petitioners stands disposed of.