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Court : Karnataka

Decided On : Feb-11-2015

Judge : A.V. Chandrashekara

Appeal No. : M.S.A.No. 11 of 2014

Appellant : Khaleel and Another

Respondent : Eramma and Others

Advocate for Pet/Ap. : Sri. M. Sidd

Judgement :

(Prayer: This MSA is filed u/Order 43 Rule 1(u) r/w Sec 104 of CPC, against the Judgement and Decree dated 20.2.2014 passed in R.A.34/2013 on the file of Principal District and Sessions Judge, Chitradurga, allowing the appeal and setting aside the Judgement and Decree dt 24.12.2005 in O.S.No.145/2004 on the file of I Additional Senior Civil Judge, Chitradurga, remanding the suit to the trial court.)

1. Heard the learned counsel for the appellants. Perused the order dated 20.1.2014 passed by the Prl. District and Sessions Judge, Chitradurga in R.A.No.34/13.

2. The appellants herein are the plaintiffs in original suit bearing O.S.No.145/2004 pending on the file I Additional Senior Civil Judge, Chitradurga. The respondents are the defendants in the said suit.

3. The parties will be referred to as per their ranking before the trial court.

4. The plaintiffs chose to file a suit for the main relief to the effect that they are absolute owners and for consequential reliefs of possession and permanent injunction in respect of the suit schedule property. The defendants did not appear and hence the trial court placed them *ex parte*.

5. As a result of the same, one of the plaintiffs was examined as PW.1 and the suit came to be decreed. The defendants chose to file petition in Civil Mis.No.8/06 under Order 9 Rule 13 of CPC before I Additional Senior Civil Judge, Chitradurga, requesting the Court to set aside the judgment passed in O.S.145/2004 on 24.12.2005 on the ground that it was an *ex parte* order. The same came to be dismissed as time barred as against which, the defendants chose to file appeal in M.A.No.15/12 under Order IX Rule 13 CPC before the Principal District and Sessions Judge, Chitradurga, which also came to be dismissed. Later on, the defendants filed regular appeal in R.A.No.34/13 under Section 96 read with Order LXI Rule 1 and 23 of CPC before the Prl. District and Sessions Judge, Chitradurga. There was a delay of 2677 days in filing the appeal and it was supported by an application under Section 5 of the Limitation Act.

6. The said application was seriously objected by the plaintiffs. No enquiry was held in regard to the condonation of delay and ultimately the delay has been condoned. After condoning the delay, the matter has been remanded to the trial court by the First Appellate Court holding that the defendants must be given an opportunity to file written statement and that the defendants can prosecute the case. Cost is also imposed while remaining the appeal. It is this order which is called in question amongst various other grounds as set out in the appeal memo.

7. The learned counsel for the appellants Sri. B.M. Siddappa has vehemently argued that the First Appellate Court could not have condoned the huge delay of 2677 days without there being any sufficient cause. In this regard, he has placed reliance upon the latest decision of the Apex Court rendered in the case of H. Dohil Constructions Company Private Limited Vs. Nahar Exports Limited and another reported in 2015 (1) SCC 680 and another decision of the Supreme Court rendered in the case of Esha Bhattacharjee Vs. Managing Committee of

Raghunathpur Nafar Academy and others reported in (2013) 12 SCC 649.

He has further argued that the defendants cannot question the *exparte* judgment on the same ground as urged in the petition filed under Order 9 Rule 13 of CPC as they would be estopped from pleading the same once again in the First Appellate Court. In this regard, he has placed reliance upon the decision rendered in the case of Bhanu Kumar Jain Vs. Archana Kumar and another reported in 2005 AIR SCW 270.

What is argued before this Court by Sri. B.M. Siddappa is that the learned Judge has taken into consideration Section 14 of the Limitation Act and that he was not competent to consider the exclusion of time in order to condone such huge delay.

8. This Court is unable to accept the contention of Sri. M. Siddappa, learned counsel for the appellants since the defendants have an opportunity either to file a petition under Order 9 Rule 13 of CPC or regular appeal under Section 96 of CPC provided, the said judgment is *exparte* judgment.

9. In the present case, the defendants chose to avail the remedy available under Order 9 Rule 13 of CPC. In the light of the petition being dismissed, an appeal as provided under Order 43 of CPC was availed by them and they were unsuccessful even in the said miscellaneous appeal. Then they chose to file a Regular appeal under Section 96 of CPC before the District Court, Chitradurga. Of course, there was a delay of 2677 days. Section 14 of the Limitation Act speaks about the exclusion of time and Section 5 of the Limitation Act speaks about condonation of delay. The defendants were pursuing their remedy before proper forum against an *exparte* judgment and subsequently before the First Appellate Court to which an appeal is provided under Section 43 of CPC. Therefore the time so spent by the defendants cannot be construed as the one to come within the purview of Section 14 of the Limitation Act but one under Section 5 of the Limitation Act.

10. Since the defendants were pursuing a proper remedy available to them under Law before a proper forum, the time so spent has been liberally condoned by the First Appellate Court, and whether the First Appellate Court is justified in condoning the delay is questioned in this appeal.

11. The learned counsel for the appellants has relied on the latest decision of the Apex Court rendered in the case of H. Dohil referred to supra. As per the facts of the said case, there was inordinate delay in refiling the appeal before the High Court. The application filed for condonation of delay lacked bonafides and there was gross negligence on the part of the appellants before High Court who were respondents before the Appellate Court. As a result of the same, prejudice was caused to the respondents before the High Court. Bhanu Kumar Jains case has been followed subsequently in the case of Mahesh Yadav and Another Vs. Rajeshwar Singh and Others reported in 2009(2) SCC 205. Paragraph 28 of Bhanu Kumar Jains case is relevant and the same is extracted below:

28. It is true that although there may not be a statutory bar to avail two remedies simultaneously and an appeal as also an application for setting aside the ex-parte decree can be filed; one after the other; on the ground of public policy the right of appeal conferred upon a suitor under a provision of statute cannot be taken away if the same is not in derogation or contrary to any other statutory provisions.

12. Decision in the case of Esha Bhattacharjee referred to supra has been relied on to contend that the cause shown in the appeal filed under Section 96 CPC does not come within the concept of sufficient cause and therefore the First Appellate Court is not justified in condoning the sufficient delay. In the decision of Esha Bhattacharjee reliance is placed upon an earlier decision of the Apex Court rendered in the case of Collector(LA) Vs. Katiji reported in (1987) 2 SCC 107. Several guidelines have been laid down in the case of Katiji in regard to the approach to be adopted regarding condonation of delay. It is specifically held that the Court should not adopt a pedantic approach while dealing with the application for condonation of delay in such cases. It is further held that ordinarily a litigant does not stand to benefit by lodging an appeal late and refusal to condone delay can result in a meritorious matter being thrown out at the very threshold and the cause of justice being defeated.

13. In the present case, the appellants were pursuing remedy under Order 9 and 13 of CPC and under Order 43 of CPC. The time so spent by them in prosecuting the remedy under Order 9 Rule 13 of CPC has been liberally construed and more

so in the light of the fact that the trial court has simply passed a decree without giving valid reasons to the documents relied on by the plaintiffs and the oral evidence tendered.

14. The learned Judge of the First Appellate Court has made a detailed discussion as to how the trial court has missed the important facts while by evaluating the oral and documentary evidence placed on record at para 18 of the impugned judgment. The learned Judge has come to the conclusion that the plaintiffs could not have granted the relief of permanent injunction when the main relief is for declaration of title and consequential reliefs of possession.

15. The learned Judge of the First Appellate Court has held that the trial court has simply stated that there is absolutely no reason to disbelieve the oral testimony of the witnesses examined on behalf of the plaintiffs or doubt the genuineness of the documents produced as per Exs.P.1 to P.16. The learned Judge has looked into the LCR and has held that there is no discussion whether these documents establish the title and possession of the plaintiffs. The learned Judge has assigned cogent and convincing reasons as to how the trial court has not applied its mind to the evidence placed on record.

16. In this view of the matter, the approach adopted by the First Appellate Court in condoning the delay of 2677 days in filing the appeal is perfectly justified. Though the delay is huge, the trial judge has imposed cost to be paid by the defendants and thus the approach adopted by the First Appellate Court is proper and it is based on the peculiar facts and circumstances of the case.

17. The learned counsel for the appellants has relied on the decision of the Honble Apex Court rendered in the case of Bhanu Kumar Jain referred to supra to contend that when once a petition filed under Order 9 Rule 13 of CPC is dismissed the same ground cannot be urged in an appeal under Order 43 Rule 1 of CPC since it would be estopped by accord as per Section 116 of CPC. Therefore it is necessary to look into as to whether the same grounds urged in the petition filed under Order 9 Rule 13 of CPC are once again urged in the regular appeal filed under Section 96 of CPC.

18. After going through the impugned judgment, it is evident that the learned Judge has not set aside the judgment of the trial court on the ground that the defendants had placed sufficient cause for their non-appearance before the trial Court. The First Appellate Court has set aside the order passed by the trial court mainly on the ground of non application of mind by the learned Judge of the trial court to the evidence placed on record.

19. Therefore, disposal of the appeal filed under Section 96 of CPC in R.A.No.34/12 is not based on the ground raised earlier in petition under Order 9 Rule 13 of CPC but on different grounds. Viewed from any angle, the approach adopted by the First Appellate Court is perfectly justified. No perversity or illegality is found in the said order. Apart from that, the order of remand so made is an open remand. In fact, the appellant should feel happy that the matter has been remitted. If for any reason the learned Judge of the First Appellate Court had held that the plaintiffs have not at all made out any case for the reliefs of declaration of title and possession, they would have been put to lot of difficulty and hardship. On the other hand, the plaintiffs have been given a liberty to lead substantial evidence in support of their claim and at the same time, the defendants have also been given an opportunity to file written statement in a suit involving rights of the parties relating to immovable properties. In this view of the matter, the appeal requires to be dismissed as unfit of admission. Hence, I pass the following:

ORDER

The appeal is dismissed as unfit for admission Parties to bear their own costs. Since the suit is of the year 2004, the parties and learned counsel to co-operate with the trial Judge in disposing of the suit at the earliest, preferably before the end of the year 2015.

Parties to appear before the trial court on 31.3.2015 without fail.

Registry to send a copy of this judgment to the trial court immediately.

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