

Sitaram and Another Vs. the Assistant Commissioner, Jamakhandi and Others

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Court : Karnataka

Decided On : Feb-08-1995

Reported in : AIR1996Kant141; ILR1995KAR1446

Judge : H.N. Tilhari, J.

Acts : [Limitation Act, 1963](#) - Sections 5

Appeal No. : Writ Petn. No. 1989-90 of 1995

Appellant : Sitaram and Another

Respondent : The Assistant Commissioner, Jamakhandi and Others

Advocate for Def. : S.V. Tilgul, Adv. and ;Smt. Meena Kumari, Govt. Pleader

Advocate for Pet/Ap. : Smt. Sona Vakund for M.B. Nargund, Adv.

Judgement :

ORDER

1. Heard Smt. Sona. learned Counsel for the petitioners, Sri S. V. Tilgul, learned counsel for the cavcator, respondent and Smt. Meena Kumari, the learned High Court Govt. Pleader.

2. This petition is directed against the judgment and order dated 24-12-94 passed by the Assistant Commissioner, Jamkhandi Sub-Division, Bijapur in No. RTS AP 35-36/90, whereby the learned Commissioner has cancelled the mutation entry Nos. 15226 and 15227 of R.S. No. 297:1-- 2 : 2 and R.S. No. 181 : 2. In brief the grievance of the petitioner as mentioned in the writ petition as well as the arguments made by the petitioners counsel, Smt, Sona, that the Appellate Authority has acted illegally and without jurisdiction as the appeal had been filed long after the making of the mutation entries in question. The learned counsel, Smt. Sona, pointed out that there had been delay of almost eight years. She further submitted that the learned Assistant Commissioner acted illegally in condoning the delay by not applying his mind to the objections which had been filed by the petitioners in the matter of condonation of delay i.e. to the application for condonation of delay and the affidavit thereto. The learned Counsel invited my attention to the allegations at paragraph-6 of the writ petition :

'The petitioners submit that respondent No. 2 and respondent No. 3 colluding with each other have preferred the appeals before the 1st respondent on 28-5-90 challenging the mutation entries No. 35226 and 15227 made in favour of the petitioners by filing formal applications for condonation of delay. The affidavits filed along with the application for condonation of delay are produced herewith and marked as Annexure 'A' and Annexure 'B'. The respondents have filed the formal affidavits' for which the petitioners have filed their detailed objections.'

3. These allegations made in paragraph-6 of the writ petition have not been controverted or denied in the statement of objections filed on behalf of respondents Nos. 2 and 3. It is well settled principle of law as settled by the Supreme Court in very many cases including the case of Smt. Nascem Bano v. State of U.P. reported in : (1994)ILLJ84SC . that if the averments made in the writ petition have not been controverted by filing counter affidavit, then High Court has to proceed on the basis of the averments made in the writ petition taking them to have been admitted by the respondents. The material portion of the Supreme Court decision reads as under: (para 11)

'Since no dispute was raised on behalf of respondents Nos. 1 to 4 in their reply to the averments made by the appellant in the writ petition that 40% of the total number of posts had not been filled by promotion inasmuch as the said averments had not been controverted, the High Court should have proceeded on the basis that the said averments had been admitted by respondents.'

4. This Court in writ petition No. 37791/93 decided on 31-8-94 following the above Supreme Court decision as well as the two Division Bench decisions of the Allahabad High Court namely, *Juggi Lal Kamla Pat v. Ram Janki Gupta* reported in : AIR1962 All407 and 1984 ALJ 547 (sic) has taken the view that if averments are made in the writ petition on the affidavit and the said averments have not been controverted and are not shown to be untrue, there is no other way except to take that those averments are admitted and are true and correct. Applying the above principles of law, I am constrained to hold and find that objections to the application and affidavit of condonation of delay moved by the respondents had been filed by the petitioners as has been asserted and alleged in the writ petition.

5. A perusal of the order of the Assistant Commissioner, which is the subject matter of challenge in this writ petition, reveals that Assistant Commissioner has not applied his mind at all 10 the objections filed by the petitioners in reply to the allegations made in the matter of condonation of delay by the respondents. It is also well settled principle of law that if finding of fact has been arrived at without applying the mind, then that finding of fact is nothing but a finding vitiated by substantial error of law. The question of condonation of delay is dependent upon the establishment of sufficient causes or explanation for the delay. No doubt, it may be said that it is a finding of fact but it is a finding on question of fact upon which the exercise of jurisdiction to condone delay depends and it is a condition precedent for the exercise of jurisdiction under Section 5 of the Limitation Act. Such finding of fact has got to be recorded after considering all the materials placed in connection thereto. But once the authority records the finding without applying its mind to the relevant material on record and particularly to such as the objections filed by the petitioners, it is in my opinion the finding, as mentioned earlier suffers from error of law and the appellate authority on the basis of erroneous finding has usurped and exercised jurisdiction to condone the delay and

to entertain the appeal and further passed the order allowing the appeal, which may be slated to be otherwise time barred.

6. For the present, without going on the merits of the case regarding the correctness, its legality or otherwise which is the subject for consideration in the two suits referred to in the writ petition, I think it proper that the impugned order passed by the Asst. Commissioner dt. 24-12-94 be quashed. Once the order is quashed, the appeal will remain pending with application for condonation of delay and in that case, the parties can move the Assistant Commissioner to consider the application for condonation of delay fresh after taking into consideration the entire material on record with respect thereto.

7. Thus considering, the writ petition is hereby allowed and a writ of certiorari is being issued quashing the order dated 24-12-94 passed in No. RTS. AP-35-36/90 copy, of which is enclosed as Annexure-C to the writ petition. A further direction be issued to the Assistant Commissioner that the parties appear before him along with the copy of the order passed by this Court. The Assistant Commissioner shall consider afresh the question of condonation of delay after taking into consideration the material on record.

8. The writ petition is allowed with costs;

Smt. Meena Kumari, learned High Court Govt. Pleader is permitted to file Memo of appearance well within time.

9. Petition allowed.