

KACB010019062022



**IN THE COURT OF THE I-ADDL. DISTRICT & SESSIONS
JUDGE AT CHIKKABALLAPURA**

Dated this the 29th day of November, 2023

: PRESENT :

Sri. SHIVAPRASAD K.B., *B. Com.,,L.L.B.,*
I-Addl. District & Sessions Judge,
Chikkaballapura.

REGULAR APPEAL No.35/2022

- Appellants:**
1. Syed Arafath Hyder
S/o Mir Sadiq Ali,
aged about 54 years,
R/at Alipur village,
Thondebhavi Hobli,
Gowribidanur Taluk,
 2. Mohammed Jaffer,
S/o Hyder Hussain,
aged about 55 years,
R/at Proprietor of Kathwali Tiles,
Near Bus Stand,
Alipur Village,
Gowribidanur Taluk

(Respondent No.1 and 2 in
O.S.No.56/2020)

**(Rep. by Sri. Yakub Shariff
Advocate)**

-V/s-

Respondent:

Bank of Baroda,
 Head Office at Baroda Bhavan,
 R.C. Duff Road, Alkapuri,
 Baroda 390 007, Gujarat State
 Branch of Gowribidanur Town
 Represented by its Present
 Manager Sri. Rakesh
 S/o B. Ramaiah,
 aged about 33 years,
 Senior Manager,
 Working as Branch Manager,
 Alipur Branch
 Gowribidanur Town
 Chikkaballapur District

(Absent)

Date and nature of the decree or order appealed against :	The Judgment & decree in O.S.No.56/2020 dated 26.07.2021 passed by learned Senior Civil Judge and JMFC., at Gowribidanur
Date of the institution of the Appeal	10.10.2022
Date on which the Judgment pronounced	29.11.2023
Duration of the Appeal	Year/s Month/s Day/s 01 01 19

(SHIVAPRASAD K.B.)
 I-Addl. District & Sessions Judge,
 Chikkaballapura.

JUDGMENT

The appellants have preferred this appeal challenging the judgment and decree passed in O.S.No.56/2020 on the file of learned Senior Civil Judge and JMFC., Gowribidanur, whereby the suit for recovery of money filed by the respondent-bank decreed vide judgment and decree dated 26.07.2021.

2. The respondent-Bank is the plaintiff and the appellants are the defendant No.1 and 2 in the aforesaid suit in O.S.No.56/2020 on the file of learned Senior Civil Judge and JMFC., Gowribidanur. The parties herein, hereafter referred to as referred before the learned Senior Civil Judge and JMFC., Gowribidanur.

3. The facts leading to this appeal are;

i) The plaintiff has filed the suit in O.S.No.56/2020 for recovery of money against the defendant No.1 and 2. The plaintiff in his plaint averred that, the plaintiff is the banking institution and the defendant No.1 is borrower and defendant No.2 is the guarantor. The defendant No.1 a businessman, approached the plaintiff bank during the month of February 2015 for over draft facility for his business purpose. The plaintiff-bank sanctioned the overdraft facility and sanctioned overdraft loan of Rs.6,00,000/- and defendant No.1 executed the registered memorandum of entry and mortgaged the suit

schedule property as security to the said loan. He executed the demand promissory note agreeing to repay the over draft loan of Rs.6,00,000/- and also executed the Composite Hypothecation Agreement, Letter of continuing security in favour of the plaintiff bank. The defendant No.2 being the guarantor, also agreed for terms of the said loan over draft facility and executed the relevant documents. The defendants after borrowing the loan of Rs.6,00,000/- under Overdraft, they failed to repay the due towards the plaintiff bank. Therefore, the plaintiff bank caused the notice under Sec.13 of SARFASI Act, 2002 to the defendants. In spite of the notice, the defendants have not come forward to clear the loan dues. Thus, the plaintiff has filed the suit before the learned Senior Civil Judge and JMFC., Gowribidanur for recovery of money.

ii) The learned Senior Civil Judge and JMFC., Gowribidanur issued suit summons to the defendants and in spite of service of summons, they remained absent; and the defendant No.1 and 2 have been placed Ex-parte by the learned Senior Civil Judge and JMFC., Gowribidanur.

iii) In order to substantiate the case of plaintiff bank examined its Manager as PW.1. He produced the Ex.P.1 to P.6 documents in support of its case.

iv) After hearing the arguments of learned counsel for the plaintiff, the learned learned Senior Civil Judge decreed the suit of the plaintiff as per the judgment and decree dated 26.07.2021.

4. Being aggrieved by the said judgment and decree, the appellants/defendants preferred this appeal on the following grounds;

i) The suit filed by the plaintiff bank is not accordance with law and it included huge interest. The plaintiff bank failed to consider the existence of Covid-19 and the defendant No.1 is suffering from various health issues and without providing sufficient time, the plaintiff bank has filed the false suit to recover huge amount from the defendants.

ii) Under Sec.12-A of Commercial Courts Act, the trial Court has no jurisdiction to try the case and the jurisdiction lies with the Commercial Court only. The suit instituted before the trial court is in violation of mandatory provisions under Sec.12-A of Commercial Courts Act. Hence, the impugned judgment is illegal and without jurisdiction.

Among other formal grounds, the appellants prayed to set aside the impugned judgment and decree and remand the matter to the trial Court for fresh disposal

5. In spite of service of notice, the respondent/plaintiff- bank remained absent.

6. This Court secured the Trial Court records.

7. During inquiry on IA No.1 application under Sec.5 of Limitation Act, the appellant examined and he produced medical documents at Ex.A.1 to 12.

8. Heard the learned counsel for the appellants on the appeal as well as I.A.No.1 application under Sec.5 of Limitation Act. The learned counsel for the appellants relied upon the decision in Civil Appeal No.---/2022 (arising out of SLP (C) No.14696/2011) (M/s Patil Automation Private Limited and others vs. Rakheja Engineers Private Limited), dated 17.08.2022.

9. Upon hearing the learned counsel for the appellants/defendants, and perusal of the trial court records, the following points arises for my consideration:

1. Whether the appellants/defendants made out sufficient cause to condone the delay of 410 days in preferring this appeal?
 2. Whether the appellants proved that the impugned judgment and decree dated 26.07.2021 passed in O.S.No.56/2020 by learned Senior Civil Judge and JMFC., Gowribidanur is illegal and calls for interference by this Court?
 3. What order?
10. My answers to the above said points are:

Point No.1: In the Negative,

Point No.2: Does not survive for consideration.

Point No.3: As per final order,
for the following;

REASONS

POINT NO.1 :

11. The appellants/defendants preferred this appeal challenging the judgment and decree dated 26.07.2021 passed by learned Senior Civil Judge and JMFC., Gowribidanur in O.S.No.56/2020 filed by the plaintiff bank for recovery of money.

12. According to plaintiff bank, the defendant No.1 has availed the over draft facility and borrowed over draft loan of Rs.6,00,000/- and mortgaged the suit property as security. Further, he executed the relevant documents agreeing to repay the said loan as per the terms and conditions agreed between them. The defendant No.2 is the guarantor agreed for the same and he also executed necessary documents. However, the defendants have not repaid the over draft loan as agreed, in spite of the notice. Therefore, the plaintiff bank has instituted the suit for recovery of a sum of Rs.8,18,723.18 along with the 10.07% per annum interest compounded yearly from the date of suit till the date of realization of the entire loan amount. After the trial and arguments, the learned Senior Civil Judge decreed the suit by the judgment and decree dated 26.07.2021, which is called in question in this appeal.

13. The appellants/defendants remained absent before the learned Senior Civil Judge and they placed ex-parte. They preferred this appeal on 10.10.2022 challenging the aforesaid judgment and decree dated 26.07.2021 and there is delay of 410 days in preferring this appeal. Hence, the appellants/defendants filed application under Sec.5 of Limitation Act, on I.A.No.1 to condone the delay in preferring the appeal. During enquiry on I.A.No.1, the appellant No.1 examined himself as a witness and produced 12 documents.

14. The learned counsel for the appellants/defendants argued that the impugned judgment and decree has been passed by the learned Senior Civil Judge is without jurisdiction as the dispute raised by the plaintiff-bank is a commercial dispute and Commercial Court alone has the jurisdiction to decide the issue regarding the commercial dispute. He further contended that the suit summons is not served and there was no opportunity to appear before the learned Senior Civil Judge. The appellant No.1 was bed-ridden and service of summons is doubtful. He further argued that the delay occurred in preferring the appeal is due to ill-health of appellant No.1. The appellants were not aware of the disposal of the suit and therefore, there is delay in preferring the appeal and prayed to condone the delay and set aside the impugned judgment and decree.

15. On perusal of the Trial Court records, the learned Senior Civil Judge re-issued the summons to the defendants on 07.01.2021 in the suit and after due service, the defendant No.1 and 2 placed ex-parte in the suit. The records reveal that the suit summons issued to the defendant No.1 and 2 duly served on 20.01.2021 and returned suit summons bears the signature of defendant No.1 and 2. So it appears the process issued against the defendant No.1 and 2 is duly served and as the defendant No.1 and 2 remained absent, the learned Senior Civil Judge placed them ex-parte.

16. On perusal of the annexed affidavit to the IA No.1 application under Sec.5 of Limitation Act and affidavit evidence filed during the inquiry on said IA No.1, the defendant No.1/appellant No.1 stated that the plaintiff bank has taken steps to the wrong address and obtained ex-parte judgment. On perusal of the suit summons, the address in the plaint, the address shown in the suit summons, the address shown in this appeal memorandum are same. Thus, the plaintiff bank has taken steps to the wrong address of defendant No.1 and 2 holds any water and there is no material to show that the suit summons issued to the defendant No.1 and 2, have not been served on them as contended by the learned counsel for the appellants.

17. The learned counsel for the appellants during the course of arguments contended that the defendant No.1 was bedridden and service of summons is doubtful, and due to ill-health the appeal could not be presented in time. During enquiry on I.A.No.1, the defendants produced the medical documents at Ex.A.1 to 12 relating to appellant No.1/defendant No.1 and it appears that those produced medical documents came into existence during the pendency of this appeal. He has not produced any medical records pertaining to previous medical treatments. There is no material to show that the appellant No.1 was bedridden due to ill-health, during the service of suit summons and during the pendency of the suit before the trial Court or till filing of the appeal.

18. No doubt, while considering the condonation of delay, the court has to take the liberal approach and should not decide in pedantic manner. However, in the present case, the appellant took the contention that suit summons issued to wrong address and illness of the appellant no.1 till filing of the appeal and those contentions are not substantiated. The appellants/defendants aware of the pendency of suit, slept over their rights for long time and preferred the present appeal with unsubstantiated reasons after long delay of 410 days. Thus, there is no sufficient cause shown to condone the delay in preferring the appeal. In the absence of sufficient cause to condone the delay of

410 days, the application filed under Sec.5 of Limitation Act deserves to be dismissed. Hence, I hold the point No.1 is in the **negative**.

Point No.2:

19. As discussed in point no.1, there is no sufficient cause to condone the delay in preferring the appeal, and hence, considering the matter on merits of the case does not survive for consideration. Hence, I hold the point No.2 accordingly.

POINT NO.3:-

20. In view of discussion on above points, I proceed to pass the following:

ORDER

The I.A.No.1-Application filed by the Appellants/defendant No.1 and 2 under Sec.5 of Limitation Act is **dismissed**.

Consequently, the appeal filed by the appellants/defendant No.1 and 2 under Order-41 Rule-1 r/w Sec.96 of C.P.C. does not survive for consideration and accordingly, appeal is **dismissed**.

Office is directed to return the trial Court records along with the copy of this judgment.

Parties to bear their own costs.

(Dictated to Stenographer directly on computer, computerized by him, script corrected and then signed and pronounced by me in the open Court, on this the 29th day of November, 2023.)

sD/-

(SHIVAPRASAD K.B.)

I-Addl. District & Sessions Judge,
Chikkaballapura.