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(1984) KLJ 135

High Court Of Kerala

Case No: C.R.P. 2991 of 1982

Balakrishnan APPELLANT

Vs

Narayanan Nair RESPONDENT

Date of Decision: Nov. 10, 1983

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 33 Rule 6, Order 33 Rule 9, Order 7 Rule 11, Order 7 Rule 12, 115

Citation: (1984) KLJ 135

Hon'ble Judges: S.K. Kader, J

Bench: Single Bench

Advocate: N.K. Sreedharan, M.A.T. Pai, M.C. Gopi and N. Sreedharan, for the Appellant; P.G. Parameswara Panicker, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

S.K. Kader, J.
The two points that arise for decision in this revision by the defendant in O.S. 5 of 1976 on the file of the Sub Court, Irinjalakuda, seeking to revise an order passed on I.A. No. 1601 of 1981 permitting the respondent herein to sue as an indigent person are (1) Whether an application under Order 33 can be filed by a person after the institution of the suit. (2) Whether the failure to issue a notice to the Government Pleader as enjoined under Rule 6 of Order 33 is fatal to the application. The suit was instituted for declaration of title and recovery of possession of the property scheduled in the plaint. At the time when the suit was instituted the plaintiff paid the requisite court fee on the basis of valuation shown in the plaint. When the defendant - the petitioner herein - appeared in the suit, he raised an objection that the court fee paid was inadequate and was very low. An issue was raised in this regard as issue No. 5 "whether the valuation shown in the plaint was correct." The trial court issued a commission to assess the correct value of the plaint

schedule property for the purpose of court fee. The commissioner appointed in the case submitted a report stating that the income from the property in question is more than Rs. 8,000/- and the trial court directed the plaintiff to pay court fee on the basis of the valuation shown by the Commissioner. As the plaintiff was not in a position to pay any court fee, he filed an application under Order 33 of the CPC praying that he may be permitted to sue "informa pauperis." After conducting an enquiry and duly considering the evidence of the plaintiff and the defendant who were respectively examined as Pw. 1 and Rw. 1, the learned Subordinate Judge allowed the application. The plaintiff is admittedly a Peon in the Education Department. As stated earlier it is this order that is challenged on the above mentioned grounds.

2. There is nothing in Order 33 of the CPC which shows that an application under this order should be filed before the institution of the suit and should not be filed after the institution of the suit. Counsel for the petitioner was also not able to point out any rule prohibiting filing of an application under this order after the institution of the suit. The main argument of counsel for the petitioner is that the trial court after having directed the plaintiff to pay the deficit court fee should have rejected the plaint as contemplated under Order Rule 11 as the plaintiff failed to pay the court fee as directed by the court. It is true that Rule 11 of Order 7 says that the plaint shall be rejected in the cases referred to in clauses (a) to (d) therein. In clause (c), where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped and the plaintiff, on being required by the court to supply the requisite stamp paper within a time to be fixed by the court, fails to do so the plaint can be rejected. Rule 13 states that on the rejection of the plaint on any of the grounds mentioned in Rule 11, shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. If really the plaintiff is entitled to be declared or treated as indigent person under Order 33, there is no reason why he should be made to suffer the rejection of the plaint under Rule 12 of Order 7 and then make him to file a suit under Rule 13 along with a petition under Order 33. These Rules are intended to advance justice and prevent mis-carriage of justice. It is not fair or proper to deny substantial justice on purely technical ground or grounds. This apart, as stated earlier, there is nothing in any of the rules under Order 33 which either expressly or impliedly prohibiting the filing of an application under the said order after the institution of the suit. Under Rule 9 of Order 33, the defendant or the Government Pleader is at liberty to file an application and get an order that the plaintiff is a pauper. It is true that an enquiry on the question whether the plaintiff is a pauper is not exclusively a matter between the plaintiff and the State. But the question whether proper court fee is paid on the plaint is primarily a question between the plaintiff and the Vasu Vs. Chakki Mani, , Nemi Chand and Another Vs. The Edward Mills Co. Ltd. and Another, , Sri Ratnavaramaraja Vs. Smt. Vimla, and Hydrose v. Makkar (1983 KLT 166).

3. Counsel for the petitioner was not able to place any decision of this Court in support of his contentions. Counsel for the respondent relied on a decision of the Madras High Court in Bava Sahib Miyan Vs. Abdul Ghani Sahib and Others, . This is a decision exactly on

the point. There a plaint was filed on payment of court fee which was found insufficient by the trial court which ordered the plaintiff to pay the deficit court fee on a date fixed by it. On the last day of the date so fixed, the plaintiff filed an application to continue the suit as a pauper. The trial court rejected the application on the ground that the plaintiff not having paid the court fee as ordered the plaint stood rejected and there was no plaint to be continued. The application therein having filed at a time before the plaint could be rejected, a Division Bench of the Madras High Court held that it is open to a party who had filed a suit paying court fee to continue it as a pauper and it is open to the plaintiff to ask the court to continue his suit as pauper. Construing the relevant rule under Order 33 it was held that the relevant rule only means that the proper method is to institute a suit and that the plaintiff should have been a pauper at the time when the suit is filed. A Division Bench of the Madras High Court in Kolluri Subbarao Vs. Kolluri Venkataratnam and Others, allowed the plaintiff to continue the suit as informa pauperis even though the application was filed after the filing of the plaint with inadequate court fee. As regards the second point, the contention is factually wrong. Counsel for the respondent pointed out that notice was actually served on the Government Pleader and the grievance of the petitioner as disclosed from the ground taken in the memorandum of revision is that the Government Pleader did not file any report. Rule 6 of Order 33 enjoins that the court should issue notice on the Government Pleader. A Division Bench of the Hyderabad High Court in Siddappa v. Mahadevamma (AIR 1955 Hyd. 160) had occasion to consider the effect of failure to order notice under Rule 6 of Order 33. Considering this question it was held that the defendant was not in any manner injured by the order which was passed by the court under Order 33 Rule 6. There the defendant was present and inspite of his opposition, the order granting leave to the plaintiff to sue as a pauper was passed by which substantial justice had been done. It was further held that the order could not be disturbed in revision on mere technicalities of law that the notice was not issued to the Government Pleader. In this respect, it may also be noted that the jurisdiction of the High Court under S. 115 is a limited one. While considering the scope and extent of S. 115, the Supreme Court in Shri M.L. Sethi Vs. Shri R.P. Kapur, observed that S. 115 is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. S. 115 empowers the High Court to satisfy itself on these matters (1) that the order of the subordinate court is within its jurisdiction (2) that the case is one in which the court ought to exercise jurisdiction and" (3) that in exercising jurisdiction the court has not acted illegally, that is, in breach of some provision of law, or with material irregularity by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision and that if the High Court is satisfied on these three matters it has no power to interfere because it differs from the conclusion of the Subordinate Court on questions of fact or law.

On duly considering the points raised by the learned counsel for the revision petitioner in the light of the facts available and on the principles of law enunciated in the decisions adverted to above, this revision has to fail. The same is therefore hereby dismissed. No costs.