
(1971) 05 OHC CK 0010
In the Orissa High Court
Case No : Civil Revision No. 20 of 1971

Ananda Prakash Dey and Others

APPELLANT

Vs

Sova Ray and Others

RESPONDENT

Date of Decision : 10-05-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 15, Order 33 Rule 7(3)

Citation : AIR 1972 Ori 14

Hon'ble Judges : G.K. Misra, C.J

Bench : Single Bench

Advocate : H.G. Panda, for the Appellant; S.N. Sinha and L.K. Dasgupta, for the Respondent

Final Decision : Dismissed

Judgement

G.K. Misra, C.J.—One Kananbala died in 1956. She had three sons Brajagopal who died in 1965, Goshtagopal (defendant No. 9). and Nitvagopal who pre-deceased her in 1953. Sova (plaintiff No. 1 -- opposite party No. 11 and Krishna (plaintiff No. 2 -- opposite party No. 2) are the daughters of Nityagopal. Defendants 1 to 4 and 8 are the sons and daughters of Braiagopal. some of the heirs of Braiagopal filed T. S. No. 63 of 1965 in the court of the Subordinate Judge, Baripada, for partition claiming half share in the properties left by Kananbala. Plaintiffs were defendants 2 and 3 in that suit. Opposite party No. 1 was set ex parte and opposite party No. 2 who was a minor then was represented by a court guardian. On 21st of December, 1966 a preliminary decree for partition was passed whereby eight annas interest was decreed in favour of the heirs of Brajagopal. Plaintiffs filed M. J. C. No. 101 of 1967, an application in forma pauperis. on 27-11-1967 for a declaration that the decree in T. S. No. 63 of 1965 is void and not binding on them. They claimed one third interest in the properties left by Kananbala. On 22nd of April 1968 opposite parties 1 and 2 (petitioners in the pauper application) filed a petition praying for converting the application in forma pauperis into a suit on payment of court-fee.

On 29-4-1968 the learned Subordinate Judge passed the following order:

"xxxxx The petition filed by the petitioners on 22-4-68 is put up today. Let the petitioners file requisite court-fees by 18-6-68. The pauper Misc. Case is rejected for non-prosecution with cost of Rs. 10/- to O.Ps."

(underline is given by me). Later, on the same day, the learned Subordinate Judge passed another order to the effect--

"As per order in Misc. Case No. 101 of 1967 the petition of the plaintiffs-petitioner for permission to sue in forma pauperis has been registered as a plaint. Plaintiffs to file ad valorem court-fee worth Rs. 2369.25 paise by 18-6-68."

On 18-6-68 the requisite court-fee was paid. Orders Nos. 24 to 121 were passed in between 18-6-1968 and 6-1-71 covering various subjects including appointment of receiver. No objection was arised at any time that the suit was liable to be dismissed as the cost of Rs. 10/-directed to be paid by opposite parties 1 and 2 by order dated 29-4-1968 had not been paid. The suit was opened on 6-1-1971 for hearing and was adjourned to 7-1-71 for further hearing. On that day the advocate for defendants 1 and 2 (petitioners 1 and 2) filed an application that the suit was liable to be dismissed for non-payment of cost of Rs. 10/- as was directed by order dated 29-4-1968 under Order 33. Rule 15, C. P. C. and wanted the court to dispose of the same before the suit was heard on merit. The learned Subordinate Judge dismissed that application on 8-1-1971. The Civil revision has been filed against that order.

2. The question for consideration is whether the suit is liable to be dismissed for non-payment of cost of Rs. 10/-as directed by the court on 29-4-1968.

3. Order 33. Rule 15. C. P- C. runs thus:

"An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the State Government and by the opposite party in opposing his application for leave to sue as a pauper."

4. Mr. Panda contends that the order dated 29-4-1968 was passed in presence of opposite parties 1 and 2 and though the pauper misc. case was rejected for non-prosecution it shall be deemed to be an admission on the part of the opposite parties 1 and 2 that there is no merit in the case and hence the dismissal of the pauper application in those circumstances is really a dismissal on merits so as to bring into operation the bar of Order 33. Rule 15 C. P. C. Reliance was placed by him on Nimar Pandey Vs. Jagdish Pandey and Others, . That decision undoubtedly supports Mr. Panda's contention.

A reference to Order 33. Rules 5, 6 and 7 would make the position clear. Under Rule 5 the Court shall reject an application for permission to sue as a pauper on

grounds mentioned therein. If the Court sees no reason to reject the application on any of the grounds stated in Rule 5, under Rule 6 it shall fix a day for receiving such evidence as the applicant may adduce in proof of his pauperism and for hearing any evidence which may be adduced in disproof thereof. Before evidence is called for, notice shall have to be given to the opposite party and the Government Pleader. Rule 7 prescribes the procedure for hearing. After taking evidence and hearing argument the Court shall either allow or refuse to allow the applicant to sue as a pauper under Rule 7 (3).

Order 33, Rule 15 refers to refusal to allow the applicant to sue as a pauper as envisaged in Rule 7 (3) after hearing of evidence on merits. It has no application to cases where a petitioner asking for permission to sue in forma pauperis changes his mind for some reason or other and gives up the pauper application by non-prosecution and prays the Court to give time for payment of court-fee to convert the pauper application into a suit. For various reasons a petitioner to sue in forma pauperis may not pursue his application. It may be that he subsequently arranges money for payment of court-fee and does not want to waste time, energy and money by fighting the pauper application. It may equally be that he subsequently gets certain properties wherefrom the required Court-fee can be paid or it may also be that the pauper application has no merit or that he was subsequently advised and it was useless to further pursue it. Whatever be the reason influencing the mind of the applicant for non-prosecution of the pauper application the fact remains that there is no decision of the Court on merits as required under Order 33, Rule 7. When the party does not want to prosecute a litigation the Court has no other option but to allow the prayer without application of its mind whether the petition has merit or not. On the aforesaid analysis, I say, with respect, that the view taken in *Nimar Pandey Vs. Jagdish Pandey and Others*, on this point is not correct. Order 33, Rule 15 has no application to the present case. On this ground alone the revision petition is liable to be dismissed.

5. In *Devendar Kumar Bharti Vs. Mahanta Raghuraj Bharti and Others*, their Lordships held that Order 33, Rule 15 can only apply to a case where an application for leave to sue in forma pauperis has been dismissed and an order for costs has already been passed. But where an application is still pending and at that stage the Court grants time u/s 149, Rule 15 cannot be made applicable. No exception can be taken to the aforesaid principle.

S. 149. C. P. C. lays down that where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

The order dated 29-4-1968 which has already been extracted would show that

before the pauper misc. case was rejected for non-prosecution with cost of Rs. 10/- to the opposite parties the petitioners were granted time by the court till 18-6-68 to file the requisite court-fee. Thus time was extended for payment of court-fee u/s 149, C. P. C. by the court before the pauper application was rejected for non-prosecution. The aforesaid Full Bench decision applies with full force to this case and on this ground also the suit cannot be dismissed for nonpayment of cost of Rs. 10/-.

6. The learned Advocates for the parties placed reliance on *Mt. Jinatun Nisa Bibi and Another Vs. Mt. Idrakun Nisa and Others*, ; *Ramashrey Roy and Others Vs. Pashupati Kumar Pathak and Others*, ; *Vijay Pratap Singh Vs. Dukh Haran Nath Singh and Another*, ; *Mst. Latif-Un-Nissa and Others Vs. Mst. Khair-Un-Nissa and Another*, and *Kalap Nath Singh and Another Vs. Shyama Nand and Others*, . These cases have no direct bearing on the question in issue and I consider it unnecessary to discuss those cases in detail.

7. There was some controversy at the Bar whether payment of cost is a condition precedent to the conversion of the pauper application into a plaint in the same proceeding or when a subsequent suit is filed. The language of Order 33. Rule 15 makes it clear that it would apply to a subsequent suit. The refusal to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue. Thus the language used in the first part of Rule 15 unmistakably shows that there would be two pauper applications in respect of the same right to sue and if the first one is refused a second application of the same nature is not maintainable. The same construction would be given to the second part of Rule 15 which would mean that if costs had been directed to be paid while refusing the pauper application, a second suit cannot be filed without paying the costs ordered on that application.

In this case the plaintiffs have not paid the costs in the very proceeding whereby the pauper application was permitted to be converted into a suit on payment of requisite court-fee. Nonpayment of costs therefore cannot nonsuit the plaintiffs.

8. In *Abdul Rahman Syed Lal Vs. Aminabi Syed Lal*, . their Lordships held that under Order 33 Rule 15 payment of the costs of a pauper application directed to be paid is not a condition precedent to the institution of an ordinary suit and can be waived. The costs, however, must be paid and if they are not paid, and the matter is brought to the notice of the Court and the payment is not waived, the Court should reject the plaint on presentation, or subsequently stay the suit pending their payment but the Court is not bound to dismiss the suit.

As has already been stated by me, from 18-6-1968 till 6-1-71 for a period of more than two and a half years, defendants 1 and 2 did not raise their little finger that the suit was not maintainable for non-payment of costs. In fact, on 6-1-71 the trial began and the case was opened. For the first time on 7-1-1971 they raised the objection that the suit was liable to be dismissed for non-payment of costs. In the facts and circumstances of this case there cannot be

any escape from the conclusion that payment of costs had been waived even assuming that it constituted a condition precedent. The provision under Order 33, Rule 15 regarding payment of costs does not affect the jurisdiction of the court and where defendants 1 and 2 lay by they cannot be permitted to turn round long after to say that the suit was liable to be dismissed for non-payment of costs. This does not however mean that the plaintiffs are not to pay the costs. They would be directed by the Subordinate Judge to pay the costs.

9. The learned Subordinate Judge in a well-discussed judgment rightly rejected the prayer of defendants 1 and 2 for dismissing the suit. They took up this objection at a very late stage and during the hearing of the suit whereby the trial had to be deferred causing harassment to opposite parties 1 and 2. They are liable to be saddled with heavy costs for resorting to a frivolous plea at a belated stage with the dominant object of protracting the litigation.

10. On the aforesaid analysis, the civil revision has no merit. It is accordingly dismissed with costs to opposite parties 1 and 2, Hearing fee of Rs. 200/-.