(2001) 06 KAR CK 0034

In the Karnataka High Court

Case No : Civil Revision Petition No. 3030 of 2000

M.L. Balaram APPELLANT

Vs

Canara Bank, Overseas Branch, Bangalore and another RESPONDENT

Date of Decision : 22-06-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 1

Citation : (2001) 3 CivCC 480 : (2002) 2 CivCC 602 : (2001) ILR (Kar) 4796 : (2001) 4 KCCR 2597 : (2002) 4 RCR(Civil) 32

Hon'ble Judges : N. Kumar, J

Bench : Single Bench

Advocate : Sri B.K. Sampath Kumar, for the Appellant; Sri U. Ishwar Bhat and Sri Shivaswamy, High Court Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

The Court

1. The plaintiff has preferred this CRP against the order dated 29th August, 2000 passed by the Court below rejecting the application under Order 33, Rules 1 and 2 of the CPC and refusing to grant permission to sue as an indigent person.

2. The plaintiff''s case in brief are as hereunder:

The plaintiff-Sri M.L. Balaram has stated in paragraph 3 of the plaint that the plaintiff is a proprietary concern which was carrying on business in manufacture and export of ready-made garments to various countries. The plaintiff is represented by its proprietor Sri M.L. Balaram. The plaintiff had approached the defendant for several credit facilities to set up an industry and the defendant has granted the money. The defendant bank has failed to protect the interest of the plaintiff by taking adequate steps and on account of the negligent act on the part of the defendant the plaintiff suffered huge loss in the business and he could not comply with his obligations with the foreign buyers. As a result he has incurred a loss and therefore he has filed the present suit claiming damages of Rs.

6,63,17,801-00. He has invoked Order 33, Rules 1 and 2 of the CPC and has requested the Court to permit him to sue as an indigent person as he is unable to pay the necessary Court fee on that huge claim. In the application filed seeking permission to prosecute the suit as indigent person, he has stated that he has surrendered all his eligible means and assets in whatever manner so available to the defendant as security to the credit facilities availed by the plaintiff from the defendant bank. He has also stated at paragraph 7 that whatever assets the plaintiff owned are surrendered to the defendant bank as security and the defendant bank''s lien over the said properties still prevail. He also contends that he is totally dependent on his friends and relatives for his subsistence and he has no assets, either movable or immovable. He has no means to enable him to pay the Court fee on the plaint presented by him and he is an indigent person and he is not possessing property worth Rs. 1,000-00 and therefore he is entitled to be permitted to sue as an indigent person.

3. To the said application he has given two Schedules. Schedule ''A'' property reads as under;

Wearing apparels valued Rs. 200-00 and household utensils of the value of Rs. 450-00.

In the ''B'' Schedule, the list of movables is shown as "Nil". In the affidavit filed in support of the said application in paragraph 11 he has sworn to the fact that all his assets including the plant and machinery etc., have been mortgaged with the respondent-bank, as such he is not able to raise any funds for the purpose of payment of Court fee. The said application was opposed by the defendant bank by filing a detailed statement of objections.

4. In para 7 of the objections it is stated that the allegations made in para 7 are all false and the petitioner is to be put to strict proof of the same. The petitioner has not surrendered any assets personally belonging to him to the defendant bank. It is also stated that the plaintiff except offering the security of the stock in trade of his business concern, has not given any other security to the defendant bank. No assets either movable or immovable has been surrendered to the defendant as alleged by the plaintiff. At the time of availing credit facility only the immovable property offered by way of equitable mortgage to the credit facilities availed is that of the guarantor Sri Sainath who is none other than the father-in-law of the petitioner. The petitioner has concealed all his movable and immovable properties and did not bring them to the knowledge of the defendant bank. The petitioner has made assets running into crores of rupees and is pretending to be a pauper to defraud the defendant bank the huge amount due by him in the credit facilities availed by him. However, it is also stated that the petitioner has gold jewellery and apparels worth lakhs of rupees with himself and also owns household articles such as T.V., refrigerator, V.C.R., automobiles, telephones, sofas etc., worth lakhs of rupees. The petitioner also owns immovable properties in Bangalore as well as in other places in his name. The items shown in the Schedules ''A'' and ''B'' of the petition are all false and concocted.

5. The learned Trial Judge after the pleadings were completed held a trial on the question of plaintiff''s inability to pay the Court fee. The petitioner examined himself as P.W. 1. However, he did not produce any documents in support of his contention. The defendant bank examined its Manager as R.W. 1 and closed their side. Thereafter, on appreciation of the material placed on record, the Learned Trial Judge came to the conclusion that the plaintiff has not disclosed in the petition all the assets owned by him. Further, it also held that the petition filed under Order 33, Rules 1 and 2 of the CPC seeking permission to sue as an indigent person is not properly filed. As the plaintiff who seeks permission to sue as an indigent person has to disclose in the petition the properties available in the concern itself and not the apparels and utensils belonging to the person representing the firm and the plaintiff is not entitled to the permission sought for. It also has recorded a categorical finding that the amount borrowed by the plaintiff from the bank for setting up of an industry in the name and style of "Vishnu Export International" and as it is a proprietary concern and when the proprietor is seeking leave of the Court to prosecute himself as indigent person he ought to have disclosed all the business assets of the firm which has not been done by the plaintiff and therefore the Court below has rejected the permission sought for. Aggrieved by the said order, the present revision is filed.

5-A. Sri B.K. Sampath Kumar, learned Counsel appearing for the petitioner contends, the learned Trial Judge committed serious error in thinking that the plaintiff-B.L. Balaram and Vishnu Export International Concern are two independent concerns. Firstly, he contended the proprietary concern has no independent existence apart from the proprietor and when the proprietor has filed the suit he is expected to disclose only his assets. Secondly, he contended the firm to which the plaintiff was the proprietor owns movable properties which were acquired out of finance provided by the defendant bank and therefore the entire assets of the firm are hypothecated to the bank and therefore it is not possible for the plaintiff to raise any funds by sale of the said hypothecated movable properties and therefore non-mentioning of those hypothecated movable properties in the plaint is not fatal to the filing of the petition. He further submits that though there is a reference in the petition and the affidavit to the effect that there are movable properties belonging to the firm and as they are all hypothecated to the bank the plaintiff is unable to raise funds by sale of the machinery, and therefore in the Schedule to the petition, list of movable properties owned by the firm is not mentioned. As it is an accidental mistake non-mentioning of the said items in the Schedule is not fatal to the case of the petitioner.

6. In support of his contention he relied on the judgment of the Andhra Pradesh High Court in the case of Bommineni Laxmi Devamma v Bommineni Konappa, wherein it is held, omission to mention some property possessed by the applicant in the petition to sue as an indigent person is no ground for rejecting the same. He also relied on a judgment of the Patna High Court in the case of Ramdas Sahu v Ramchandra Sahu , to the effect, where an application for permission to sue as

forma pauperis otherwise in order, mere omission to include therein some property is not non-compliance with the provisions of Order 33, Rule 2 which must entail the rejection of the application under Rule 5, and permission should be granted for making an application for amendment of the original petition. He also relied on a decision of the Patna High Court in the case of Radhe Shyam Prasad Vs. Mostt. Shiv Dulari Devi, , wherein it has been held, omission to mention some items in the schedule properties not by themselves are fatal unless they are mala fide. What the Court is expected to consider is whether applicant can raise sufficient funds to pay Court fee by transfer of that property. He also relied on a judgment of this Court in the case of V. Krishna Bhat Vs. Ravishankar and Others, , to the effect that it is not every case of such omission is fatal but only omissions indicative of lack of bona fides or good faith on the part of the applicant that would be fatal and the party lacking in good faith is not entitled to the concession to sue in forma pauperis. He further relied on another passage where it has been held, for purpose of Rule 1 of Order 33 a person cannot be said to be possessed, of sufficient means unless he has actual control over a thing and unless he is in possession of it or can reduce it into his possession without having recourse to law. Therefore, he submitted, though in the Schedule to the petition the properties which are the subject-matter of hypothecation in favour of the bank are not mentioned it is a bona fide mistake and therefore mere non-mentioning the same in the Schedule is not fatal to the maintainability of the petition especially in view of the fact that the plaintiff is unable to raise funds by sale of the said movable properties as they are hypothecated to the bank, therefore he contends the order of the Trial Judge refusing to grant permission is illegal and is liable to be set aside.

7. Sri Ishwar Bhat, learned Counsel for the respondent-bank, contended that the petition filed by the petitioner lacks bona fides. In the Schedule to the petition he deliberately mentions the value of the apparels and the household articles that too giving their value as Rs. 200-00 and Rs. 450-00 and deliberately omits to mention movable properties which he owns and which he acquired for running the industry. The plaintiff has proceeded on the assumption that what he is expected to mention in the petition is only his personal belongings and not the properties which has been in his name and utilised by him for running industry. According to the learned Counsel, it is a case of deliberate omission to mention the assets which he owns. Therefore, the Court below rightly taking note of this mala fide intention on the part of the plaintiff in suppressing the movables which he owns has rightly rejected the application and therefore the said order does not call for any interference.

8. Before going to the rival contentions it is necessary to have a look at the relevant provisions under Order 33. Rule 1 of Order 33 deals with the persons who are entitled to institute a suit as an indigent person and Rule 1-A of Order 33 deals with inquiry regarding means of an indigent person. It is Rule 2 of Order 33 which deals with the contents of application which is relevant for the purpose of this case which reads as under:

"Every application for permission to sue as an indigent person shall contain the particulars required in regard to plaints in suits, a Schedule of any movable or immovable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto, and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings".

Rule 5 of Order 33 deals with rejection of the application which reads as under:

"The Court shall reject an application for permission to sue as an indigent person:

(a) where it is not framed and presented in the manner prescribed by Rules 2 and 3,

(b) where the applicant is not an indigent person,

(c)..." .

9. A perusal of the aforesaid rule makes it clear that every application for permission to sue as an indigent person shall contain the particulars required in regard to plaints in suits, a Schedule of any movable or immovable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto. The furnishing of a Schedule of any movable or immovable properties belonging to the applicant with the estimated value thereof and annexing the same is mandatory. Rule 5(a) of Order 33 of the CPC makes it clear when Rule 2 is not complied with the Court shall reject the application for permission to sue as an indigent person and no discretion is given to the Court in this regard.

10. In the instant case, a bare perusal of the petition filed by the plaintiff discloses that two Schedules are given. ''A'' Schedule is described as list of movables owned and possessed by the plaintiff and it is stated he owns only apparels worth Rs. 200-00 and household articles valued at Rs. 450-00 and ''B'' Schedule states list of movable properties and then it is stated "nil" meaning there are no immovables owned by the plaintiff. The material on record discloses that the plaintiff has set up an industry in the name and style Vishnu Export International which is a proprietary concern. As rightly contended by the learned Counsel for the plaintiff, a proprietary concern and proprietor of the said concern are not two independent legal entities and proprietary concern has no legal existence apart from the proprietor. They are one and the same. It is not in dispute that the plaintiff has borrowed money from the defendant bank for setting up an industry and he has set up an industry initially at Rajajinagar and on account of fire accident in the company he was forced to shift his industry to Kanakapura Road. It is his evidence that from 1993 till the business was closed on 30-9-1998 he has carried on business in several crores of rupees but his case is that all the money he earned in business was lost due to the negligence on the part of the bank. Nowhere in the evidence he has stated what happened to the entire industry which he was running and movable properties like machineries and other valuables belonging to him which were in the industry. Though the bank advanced the loan for setting up an industry in the name of Vishnu Export

International all the machineries purchased for the said business was in the name of the plaintiff. It is not his case that those properties does not exist, on the contrary it is asserted that as all the properties are hypothecated to the bank and he is unable to raise funds by sale of those articles. The defendant in his objection statement has in categorical terms stated that the plaintiff except offering the security of the stock in trade of his business concern has not given any other security to the defendant bank, no assets either movable or immovable has been surrendered to the bank as alleged by the defendants at the time of credit facility. Therefore, it is clear that the bank has taken a specific stand that except the stock in trade no other movables belonging to the plaintiff are hypothecated to the defendant bank. If the plaintiff wanted to claim exemption, he ought to have mentioned in the Schedule of the movable properties, all the plant and machinery which he owned and stand in his name and as the defendant is controverting his allegation he has to further prove that those items are hypothecated to the bank. On the contrary not only he does not mention any particulars of those movable properties but he does not give any evidence to demonstrate that all those properties are hypothecated to the bank. Therefore, the allegation of the plaintiff that all the movable properties with the aid of which he was running the industry are hypothecated to the bank has remained as a plea only. Absolutely, no evidence is forthcoming in that aspect. Viewed from that angle when it is admitted that the plaintiff owns machinery worth lakhs of rupees and when the defendant contends that they are not hypothecated to the bank it is a clear case of omission to mention those valuables which belonged to the plaintiff and therefore as contemplated under Rule 2 of Order 33, the Court has no option except to reject the application filed by the plaintiff on the ground of non-compliance of Rule 2 of Order 33. The argument of the learned Counsel for the petitioner that even if those items had been mentioned as they were hypothecated to the bank he could not have raised any funds, has no substance as the defendant has denied the hypothecation. With regard to the decision cited above, the Division Bench of the Andhra Pradesh High Court has categorically stated that sub-rule (a) of Rule 5 has nothing to do with the merits of the case. It deals with the format and presentation of the application. It enables the Court to reject the application at the threshold if it does not conform to the requirements prescribed under Rules 2 and 3. But it does not empower the rejection of the application on the ground that the particulars mentioned in the plaint are later found to be incorrect or for non-disclosure of the properties possessed by the applicant. In laying down the said law, the Division Bench was considering the case of a poor widow who had filed the suit for maintenance against her husband and it is in that context they have stated the purpose, the object, intendment and mission of Order 33 is to enable poor persons to approach Courts for redressal of their grievances, and that poverty should not come in the way of their getting justice from Courts. It is also evident from sub-rule (c) of Rule 5. The aforesaid judgment understood in that context has no application to the facts of this case because the plaintiff before the Court is an industrialist who has availed loans from a financial institution and has done business to the tune of crores of rupees and the evidence discloses that he has spent most of the time in foreign countries and such a person by any stretch of imagination cannot be termed to as poor person for whose benefit this provision is enacted.

11. So far as other judgments are concerned what they have stated is that after disclosure of the assets by the plaintiff in the plaint when it is pointed out few more items were not mentioned the Courts have said non-mentioning of one of the items in the list of items already mentioned is not fatal.

12. In this case, only two inconsequential items are mentioned in the list of movables and the entire plant and machinery owned by the plaintiff by use of which he had earned crores of rupees in business are deliberately omitted in the list of movables owned by the plaintiff. Therefore, it is not a case of non-mentioning of one or two items but a case of deliberate omission to mention the entire properties owned by the petitioner. The purpose of disclosure of the properties owned by the person who claims to be indigent person is to enable the Court to find out the bona fides of the case put forward by the plaintiff. That is why provision clearly states not only the plaintiff is expected to mention in the Schedule the properties which he owns but he also should give the estimated value thereof of those properties. It is only by looking into this estimated value the Court will be able to find out whether the plaintiff is able to raise necessary funds to come to a conclusion that the plaintiff is an indigent person or not.

13. In the instant case, the plaintiff has not given particulars of movables which are owned by him, he has not given the value of those items and he has also not given particulars of items which are hypothecated to the bank and which are not hypothecated to the bank. Under these circumstances, in my opinion the petition lacks bona fides. The omission is deliberate. Therefore, the Trial Court was fully justified in rejecting the prayer of the plaintiff to sue as an indigent person. The Court below committed no error in passing the impugned order which calls for interference.

14. Accordingly, CRP is dismissed.

