

(1964) 03 KL CK 0008
In the High Court Of Kerala
Case No : C.R.P. No. 329 of 1963

Ouseph	Vs	APPELLANT
Ammukutty Amma and Another		RESPONDENT

Date of Decision : 04-03-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 5, Order 33 Rule 6, Order 33 Rule 7, Order 33 Rule 7(1), Order 33 Rule 7(3)

Citation : (1964) KLJ 839

Hon'ble Judges : C.A. Vaidialingam, J

Bench : Single Bench

Advocate : P.N. Sankaranarayana Pillai, for the Appellant; P. Sreedhara Menon, for the Respondent

Final Decision : Allowed

Judgement

Vaidialingam J

1. In this revision petition, Mr. P.N. Sankaranarayana Pillai, learned counsel for the 1st counter-petitioner in Pauper Petition No. 5 of 1951 on the file of the Court of the Munsiff of Thodupuzha, challenges the order of the learned District Judge of Ernakulam, reversing the order of the learned Munsiff, passed on 5th February 1962. The two respondents to this revision petition, sought leave to institute the suit in question as pauper. The two plaintiffs are brother and sister; and their case was that they are not possessed of sufficient means to enable them to pay the necessary court fee on the plaint.

2. It is not really necessary for me to go into the various allegations made in the plaint, challenging certain transactions, because they do not arise for consideration at this stage.

3. The plea of the plaintiffs that they are not possessed of sufficient assets to pay the court fee, was strenuously contested by the present revision petitioner, on the ground that the plaintiffs are possessed of sufficient means. In particular, it

was also alleged that both the plaintiffs, namely sister and brother, have inherited certain properties of their father in equal shares and that the 1st plaintiff herself has parted with her half share in the properties, namely 541/4 cents, which she got from her father. Therefore, it appears to have been urged that the 2nd plaintiff is entitled to the other half share in the father's properties, namely 541/4 cents, and therefore it cannot certainly be stated that the plaintiffs are persons, who are not possessed of sufficient means to enable them to pay the necessary court fee on the plaint.

4. The learned Munsiff accepted the contentions of the present revision petitioner, and rejected the plea of the plaintiff's that they are not possessed of sufficient means to enable them to pay the court fee on the plaint. On the other hand, the learned Munsiff has referred to the evidence given by the sister who is figuring as the 1st plaintiff in the suit, and is of the view that she is either avoiding all direct questions, or professing ignorance about various matters. But, ultimately, the learned Munsiff draws an inference from her evidence to the effect that both herself and the 2nd plaintiff, her brother, have inherited, in equal shares, certain properties of their father, that the 1st plaintiff has conveyed her share of 541/4 cents, and therefore the 2nd plaintiff is entitled to the other 541/4 cents, which will enable him to pay the necessary court fee on the plaint. No doubt, there is a reference to the evidence of C.P.W.1, the Village Officer, who also speaks to the properties standing originally in the name of the plaintiff's father. Ultimately, the trial court takes the view that the plaintiffs have not made out any grounds to permit them to institute the suit as pauper, and holds that inasmuch as the plaintiffs must be considered to be in possession of sufficient means to enable them to pay the necessary court fee, they are to pay the court fee within the time mentioned in the order.

5. The said order of the learned Munsiff, rejecting the application filed by the plaintiffs to institute the suit as pauper was challenged by the plaintiffs in appeal before the learned District Judge of Ernakulam, in C.M.A. No. 11 of 1962. Before the learned District Judge, the petitioner in this revision petition raised two objections " (1) the trial court has not rejected the plaintiff's application to sue as a pauper, on any of the grounds mentioned in clauses (d) or (d-1) of Order XXXIII, rule 5, C.P.C., and so no appeal lies under order XLIII, rule 1 (nn), C.P.C., and (2) there are no grounds made out by the plaintiffs, for interfering with the order of the trial court, holding that the plaintiffs are possessed of sufficient means to enable them to pay the necessary court fee. This stand taken by the revision petitioner, was controverted by the plaintiffs before the learned District Judge. It must be stated at this stage, that the trial court dismissed the application of the plaintiffs on the ground that they are possessed of sufficient means. Therefore, the rejection is on the ground mentioned in clause (b) of rule Order XXXIII rule 5 of Order XXXIII.

6. Order XLIII, rule 1 (nn) is as follows:

1. Appeals from orders.--An appeal shall lie from the following orders under the

provisions of section 104, namely.--

(nn) an order under rule 5 or rule 7 of Order XXXIII rejecting an application for permission to sue as a pauper on the ground specified in clause (d) or clause (d-1) of rule 5 aforesaid;

7. So far as the first question, namely regarding the maintainability of an appeal under Order XLIII, rule 1 (nn) is concerned, the learned District Judge is of the view that though at first sight the objection raised by the present revision petitioner may appear to have some merit, ultimately the learned Judge is of the view that under rule 7 of Order XXXIII, no such grounds referred to in clauses (d) and (d-1) of rule 5, are stated, and that there is no scope for invoking such grounds when passing an order under rule 7. He further held that the order under attack before him, being one passed under rule 7 of Order XXXIII, was appealable under Order XLIII, rule 1 (nn), C.P.C. Having held that the appeal itself was maintainable, the learned District Judge considers, on merits, the attack leveled by the plaintiffs as against the order of the trial court, holding that they are possessed of sufficient means to enable them to pay the court fee. And, so far as that aspect is concerned, the learned District Judge is of the view that the trial court has proceeded on the basis that the 2nd plaintiff, minor, has 541/4 cents of property. But the learned Judge is of opinion that the 2nd plaintiff cannot be considered to have any property at all. It is also the view of the learned Judge that only if partition is effected, it may be that the 2nd plaintiff may become entitled to 541/4 cents of property, and inasmuch as neither of the plaintiffs is directly in possession or enjoyment of any property, they are not in a position to command any money, and therefore they are entitled to be allowed to institute the suit as a pauper. Ultimately, on both these grounds, the learned District Judge reversed the order of the trial court, refusing to permit the plaintiffs to institute the suit as a pauper.

8. It is the said order of the learned District Judge in C.M.A. No. 11 of 1962, reversing the order of the trial court, that is under attack before me in this revision petition, by Mr. P.N. Sankaranarayana Pillai, learned counsel on behalf of the revision petitioner. The learned counsel urged that the scheme of Order XXXIII, C.P.C., read with rules 5, 6 and 7 of that Order, will clearly show that there are two stages, when an application for permission to institute a suit in forma pauperis can be declined, namely at an earlier stage under rule 5 on any of the grounds stated therein, or after issuing notice to the other parties and after hearing them and rejecting it under rule 7 (3). The learned counsel urged that under Order XLIII, rule 1 (nn), it is only an order rejecting an application for instituting a suit as a pauper, on the grounds mentioned either in clause (d) or clause (d-1) of rule 5 of Order XXXIII, whether passed under rule 5 or rule 7 (3) of Order XXXIII, that is made appealable. Therefore, the learned counsel urged that the view of the learned District Judge, that under Order XLIII, rule 1 (nn), notwithstanding the fact that the rejection in this case by the trial court was not on any of the grounds mentioned in clause (d) or clause (d-1) of rule 5 of Order

XXXIII, nevertheless an appeal will lie under Order XLIII, rule 1 (nn) is erroneous. The learned counsel also urged that even on facts, the approach made by the learned District Judge is absolutely erroneous. According to the learned counsel, the evidence in the case clearly discloses that both the sister and brother, namely plaintiffs 1 and 2 respectively, have inherited in equal shares the property of their father; and the 1st plaintiff has admitted in her evidence that she has disposed of her half share in the property, namely 541/4 cents, and has realised the money. Though she has not answered the question put to her regarding the right of her brother, the 2nd plaintiff, the only inference possible, and which has been rightly drawn, according to the learned counsel, by the learned Munsiff, is that the 2nd plaintiff is entitled to the other half share, and if that share is available to them, the parties could raise the necessary money for payment of the court fee. According to the learned counsel, that finding of the trial court should not have been interfered with by the learned appellate Judge.

9. Mr. P. Sreedhara Menon learned counsel for the plaintiffs-respondents, urged that the interpretation of the learned District Judge, holding that an appeal will lie under Order XLIII, rule 1 (nn) notwithstanding the fact that the rejection of the application by the trial court was not on any of the grounds referred to in clause (d) or clause (d-1) of rule 5 of Order XXXIII, is perfectly correct. The learned counsel also urged that the present order of the trial court is one passed, not under rule 5 of Order XXXIII, but is an order passed under rule 7 (3) of Order XXXIII after issuing notice to the respondents and hearing them; and there is no restriction, according to the learned counsel, to be seen in passing an order under rule 7(3) of Order XXXIII as to the particular ground on which alone the application is to be rejected. Therefore, the learned counsel urged that in this case, inasmuch as the order is under Order XXXIII, rule 7 (3), rejecting the plaintiff's application to institute the suit as a pauper, an appeal was perfectly maintainable under Order XLIII, rule 1 (nn), and the view of the learned District Judge was therefore perfectly correct. The learned counsel, on the merits, urged that the view of the trial court that his clients, and, at any rate, the 2nd plaintiff, are still possessed of the other half share of the property inherited from their father and that the said share is available for the purpose of raising the necessary funds for paying the court fee, is absolutely erroneous. On the other hand, according to the learned counsel, the view of the learned District Judge that the plaintiffs are not possessed of any property, and if at all, only in a partition the 2nd plaintiff may get as his share 541/4 cents, is quite correct, and therefore the order of the learned Judge does not require any interference at the hands of this Court. Alternatively, Mr. Sreedhara Menon, learned counsel for the respondents, urged that if this Court comes to the conclusion that the appeal filed by his clients before the learned District Judge and the disposal of that appeal by the District Judge in favour of his clients are considered to be without jurisdiction; then this Court may exercise its power suo motu u/s 115 C.P.C., and find out whether the order of the trial court can be sustained or not. As a precedent to this the learned counsel quite naturally relied upon a decision of

mine, reported in *Ramunni v Govindan* (1957 K.L.J. 804), where, no doubt, under the particular circumstances of that case, notwithstanding the fact that I held that an order passed on appeal was void and illegal, I exercised my powers suo motu and investigated the question as to whether the order of the trial court itself was legal or not. No doubt, ultimately, after going into the question, I declined to interfere with the order of the trial court in that case.

10. The main question in this case will be as to whether the view of the learned appellate Judge that the appeal filed by the plaintiffs, against the order of the trial court, is maintainable under Order XLIII, rule 1 (nn), is correct. So far as that is concerned, having due regard to the scheme of Order XXXIII, rules 5, 6, and 7, read with Order XLIII, rule 1 (nn), in my view, the contention of Mr. Sankaranarayana Pillai, learned counsel for the revision petitioner, that the appeal was incompetent, must be accepted. No doubt, I am free to confess that the wording of Order XLIII, rule 1 (nn) is not very happy. A reading of that clause may give the impression that an order under rule 5 of Order XXXIII, rejecting an application for permission to sue as a pauper on any of the grounds mentioned in sub-clause (d) or (d-1) of rule 5, can be the subject of the appeal. And the clause, namely rule 1 (nn) of Order XLIII, may also give the impression that it is only when an application is rejected under rule 7 (3) of Order XXXIII on one or other of the grounds referred to in clause (d) or clause (d-1) of rule 5 of Order XXXIII, such an order is appealable; and if the rejection is on other grounds, there is no right of appeal.

11. In my view, the more reasonable interpretation to be placed on clause (nn) of rule 1 of Order XLIII of the CPC is that, in order to enable a plaintiff, whose application to sue as a pauper has been rejected, whether the rejection is at the preliminary stage under rule 5, or after the issue of notice under rule 6, and following the procedure under rule 7, and then finally rejecting the application under rule 7 (3), to file an appeal the rejection must have been either on the ground that the plaintiff's allegations do not show a cause of action as provided in clause (d), or on the ground that the suit appears to be barred by any law, as provided in clause (d-1), of rule 5. If the rejection of the plaintiff's application for leave to institute a suit as a pauper, is on any other grounds not covered by clause (d) or clause (d-1) of rule 5, whether the rejection is at the preliminary stage dealt with by rule 5, or after hearing the parties under rule 7, the plaintiff is not entitled to file an appeal as against such an order of rejection.

12. If the reasoning of the learned District Judge that there is no reference in rule 7 to the grounds mentioned either in clause (d) or clause (d-1) of rule 5, and hence an order rejecting an application under rule 7 (3) is appealable under Order XLIII, rule 1 (nn), is accepted, then the position in law will be that a rejection on any ground whatsoever, after hearing the parties under rule 7, will be appealable. Again, if the view of the learned District Judge, that as the order under attack before him was made under rule 7 of Order XXXIII and therefore it is appealable, is accepted, then also the position will be that not only a rejection

of an application to sue as a pauper, but also an order allowing an application to sue as a pauper, will both be appealable under Order XLIII, rule 1(nn). In my opinion, the view of the learned District Judge regarding both these aspects cannot certainly be accepted, because that will be ignoring the clear provisions of Order XLIII, rule 1 (nn).

13. No doubt, Mr. Sreedhara Menon, learned counsel for the respondents, urged that Order XXXIII, rule 7 is self sufficient and there is no limitation at all placed thereon as the grounds under which refusal to allow an application can be made under Order XXXIII, rule 7 (3). I am not inclined to accept this contention of the learned counsel for the respondents, because that will be ignoring the provisions of Order XXXIII, rule 6. Under Order XXXIII, rule 6, it is provided that if the court does not reject an application on any of the grounds mentioned in rule 5, i.e., even at the initial stage, it shall fix a day, of which at least ten days", clear notice shall be given to the opposite party and to the Government Pleader, for receiving such evidence as the applicant may adduce "to prove that the application is not subject to any of the prohibitions in rule 5", and it is also open to the other parties, to whom notice has been issued, to establish the contrary, namely that the application filed by the plaintiff comes under one or other of the prohibitions mentioned in rule 5. Then rule 7 of Order XXXIII deals with the procedure to be adopted at hearing. Ultimately, it is seen that the final order to be passed, after notice, as provided under sub-rule (3) of rule 7 of Order XXXIII, is one allowing or refusing to allow an applicant to sue as a pauper. It is rather significant to note that against an order allowing the plaintiff to institute the suit as a pauper, though it is passed under Order XXXIII, rule 7 (3), no right of appeal is given at all to the opposite party, who has been elaborately heard in pursuance of the notice issued under rule 6 of Order XXXIII and after following the procedure indicated in rule 7 (1) of Order XXXIII. Therefore, Order XLIII, rule 1 (nn) is limited in its scope, and the principle is well established that a right of appeal must be specifically conferred by statute.

14. There can be no controversy that without issuing notice to the other parties, it is open to the court to reject an application, if it is satisfied about one or other of the grounds mentioned in rule 5. But it is specifically provided in rule 6 that if the court does not reject the application at the preliminary stage, on any of the grounds referred to in clauses (a) to (e) of rule 5, it shall give notice to the opposite party and to the Government Pleader. From that rule itself, it will be seen that the purpose of giving notice is for receiving the evidence that the applicant may adduce to prove that the application is not subject to any of the prohibitions in rule 5 and for hearing any evidence which may be adduced to the contrary. It is significant that the object of issuing notice is again to enable the court to be satisfied that the application filed by a pauper does not come within any of the prohibitions mentioned in clauses (a) to (e) of rule 5; and it is really regarding the existence or otherwise of one or other of the grounds referred to in rule 5 that the opposite party is also given an opportunity to satisfy the court. The plaintiff may satisfy the court that his application does not come within any

of the prohibitions mentioned in rule 5, and it is open to the opposite party to let in evidence regarding the existence of one or other of the prohibitions mentioned in rule 5.

15. It is in the light of rule 6, that the nature of the inquiry and the final order that is to be passed under rule 7 have to be appreciated. Sub-rule (1) provides for examining witnesses produced by any party, and sub-rule (2) provides for hearing arguments that the parties desire to offer. But there again, sub-rule (2) also makes it very clear that it is for the purpose of showing that on the fact of the application and the evidence taken the plaint is or is not subject "to any of the prohibitions specified in rule 5". This sub-rule again indicates that the whole object Of the inquiry is to find out whether the application is to be rejected on one or other of the grounds specified in rule 5. Then comes sub-rule (3) of rule 7, which gives jurisdiction to the court either to allow or refuse to allow the applicant to sue as a pauper. Having due regard to the provisions of rule 6, and sub-rules (1) and (2) of rule 7, it follows that the refusal to allow the applicant to sue as a pauper, if the court decides like that, and which will be the order passed under sub-rule (3) of rule 7, must be only on the ground that the application is subject to one or other of the prohibitions referred to in clauses (a) to (e) of rule 5. The learned District Judge has merely adverted to the final order that is passed under sub-rule (3) of rule 7, which sub-rule does not certainly say that the rejection should be only on the grounds referred to in clause (d) or clause (d-1) of rule 5. I have indicated the scheme of rules 5, 6 and 7; and therefore it follows that the refusal under rule 7 (3) can be and must be only on one or other of the grounds referred to in clauses (a) to (e) of rule 5. If that is so, a perusal of Order XLIII, rule 1 (nn) clearly shows that in order to give a right of appeal to a plaintiff, whose application has been rejected, that rejection must be on one or other of the grounds referred to in clause (d) or clause (d-1) of rule 5. If the application is rejected on any of the other grounds mentioned in rule 5, no right of appeal is provided. Therefore, it is not possible for me to accept the view of the learned District Judge that an order passed under rule 7 (3), refusing to allow an applicant to sue as a pauper on any ground whatsoever, is appealable under Order XLIII, rule 1 (nn).

16. In this case, the rejection of the plaintiffs' application under rule 7 (3), is on the ground that they are possessed of sufficient means, and it must be considered to be a rejection for the ground mentioned in clause (b) of rule 5. The rejection is not on any of the grounds mentioned in clause (d) or clause (d-1) of rule 5. Therefore, it follows that the plaintiffs had no right of appeal against the order passed by the trial court; and it further follows that the entertaining of the appeal filed by the plaintiffs and its disposal in favour of the plaintiffs by the learned District Judge, are both illegal and void, and, therefore, the order of the learned District Judge has to be completely ignored as one passed without jurisdiction.

17. Even on merits. I do not agree with the view expressed by the learned

District Judge in his order, because he has taken a very erroneous view on the evidence adduced in the case. And especially because Mr. Sreedhara Menon, learned counsel for the respondents in this revision petition, requested this Court to consider the legality of the order of the trial court, in fairness to the contentions raised by the learned counsel, I permitted him to canvass before me the order of the trial court. The learned counsel placed before me the evidence that was available before the learned Munsiff, before he passed the order declining the respondent's application to institute the suit as pauper.

18. After going through the evidence adduced in the case, especially that of the 1st plaintiff, it is clear that the conclusions arrived at by the trial court, namely that both the 1st plaintiff and the 2nd plaintiff inherited in equal shares certain properties of their father, that the 1st plaintiff has parted with her half share, viz., 541/4 cents, long before the litigation and that the other half share belonging to the 2nd plaintiff, viz., 541/4 cents, is certainly available to the plaintiffs to pay the court fee on the plaint, are correct. No doubt, the learned counsel for the respondents urged that the trial court has not investigated the further question, which is necessary under the circumstances, namely as to whether the half share, still stated to be owned by the 2nd plaintiff, is worth the amount, to enable the plaintiffs to pay the necessary court fee. So far as that is concerned, I do not think it is a matter which appears to have been pressed before the trial court. On the other hand, Mr. P.N. Sankaranarayana Pillai, learned counsel for the revision petitioner, pointed out that the 1st plaintiff herself has admitted that her half share of 541/4 cents, obtained from her father, was sold away by her for about Rs. 500/- on 10th March 1960. Evidently, in view of this evidence, the trial court is of the view that at any rate, the same value will be obtained in respect of the other half share that is owned by the 2nd plaintiff. The court fee payable in this case will be only about Rs. 273/-

19. Though the revision petition can be allowed even on the short ground that the appeal filed by the plaintiffs before the lower appellate court was without jurisdiction and the order of the learned appellate Judge is void and one passed without jurisdiction, I have gone into the grievance of the respondents regarding the correctness of the trial court's order; and I am satisfied that the trial court's order does not require any interference at all at the hands of this Court. On this ground, the revision petition is allowed, and the order of the learned District Judge under attack is set aside and that of the trial court restored. The parties will bear their own costs. The plaintiffs-respondents will have, for purposes of payment of the court fee, two weeks from the date of reopening of the trial court after the mid-summer recess of 1964.