
(1970) 01 BOM CK 0024
In the Bombay High Court
Case No : M. C. A. No. 147 of 1965

Smt. Menkabai

APPELLANT

Vs

Manohar and others

RESPONDENT

Date of Decision : 09-01-1970

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 1, 10, 100, 101, 102

Citation : (1970) MhLj 927

Hon'ble Judges : D. B. Padhye, J;B. N. Deshmukh, J

Bench : Division Bench

Advocate : J. N. Chandurkar, for the Appellant; A. S. Bobde and M. L. Vaidya, For opponent No. 1, G. B. Gandhe, For opponent 8 to 23, 26 to 30, 32, 34 to 37, 39, 41, 44, 46 to 49, M. M. Qazi, Asstt. Govt. Pleader, For State Opponents 2 to 7, 24, 25, 31, 33, 38, 40, 42, 43 and 45 were not represented, for the Respondent

Final Decision : Dismissed

Judgement

D. B. Padhye, J.—The present applicant Menkabai had filed a suit for partition against her step-sons and their alienees. That suit was dismissed. In the suit she was permitted to sue as a pauper. The property in suit was valued for purposes of jurisdiction at Rs. 19,767/-. The suit was contested by the defendants contending that there was already a prior partition by which the plaintiff got certain property and she was not entitled to claim a partition afresh. The defence prevailed and the suit was dismissed. Against the dismissal of her suit, the present applicant has filed the application for permission to file the appeal in forma pauperis. Rule on this application was issued.

2. Under the proviso to rule 2 of Order 44, Civil Procedure Code, if the applicant was allowed to sue as a pauper in the Court from whose decree the appeal is preferred, no further enquiry in respect of his pauperism shall be necessary, unless the appellate Court sees cause to direct such enquiry. The property which is alleged to have been given in the prior partition to the applicant was also a

subject-matter of the suit, where the plaintiff-applicant was contending that she had a certain share in all the property belonging to the joint family including that property. Besides this property in suit, the applicant had no other means to pay the court-fees and if the property involved in the suit is not to be taken into consideration, the applicant will be entitled ordinarily under the proviso to rule 2 of Order 44 of the CPC to prefer this appeal in forma pauperis. The learned counsel for the respondent No. 1 has, however, raised a contention that the subject-matter of the suit has also to be taken into consideration for the purposes of determining whether the applicant is a pauper or not if such subject-matter is capable of raising funds for payment of the requisite court-fees.

3. The rules regarding the presentation of appeals in forma pauperis are the same as in Order 33 of the CPC in so far as those provisions are applicable. Order 33 of the Code of Civil Procedure, permits a suit to be instituted by a pauper subject to the provisions contained therein. Those would also be applicable to the filing of the appeals by paupers. In rule 1 of Order 33, an explanation has been given to describe as to who is a pauper. The explanation reads :

"Explanation. - A person is a "pauper" when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred Rupee other than his necessary wearing apparel and the subject-matter of the suit.""

This explanation is to be found in the original Code as is passed by the Legislature. This High Court, however, in exercise of its powers u/s 122 of the Code of Civil Procedure, added the following words to the said explanation on 9-2-1925. These words are :

"In determining whether he is possessed of sufficient means the subject-matter of the suit shall be excluded."

There is also another change in the said explanation, namely, the words "one hundred rupees"" have been substituted by the words "five hundred rupees"", but with which we are not at the moment concerned. The further change in this rule has been made on 30th of September 1966 to be effective from 1st November 1966 and the explanation now reads as under:

"Explanation. - A person shall be deemed to be a pauper if he is not possessed of means exceeding five hundred rupees in value, or where he is possessed of means exceeding five hundred rupees in value, the same are not sufficient to enable him; to pay fees prescribed by law. for the plaint.

For the purpose of this explanation the means which a person is possessed of shall be deemed not to include his necessary wearing apparel and the subject-matter of the suit."

4. The learned counsel for the respondent No. 1 has challenged the power of this

Court u/s 122 of the CPC to amend the explanation to rule I of Order 33 of the CPC in the manner it has been done as stated above. According to the respondents, the subject-matter of the suit has to be taken into consideration for the purposes of determining whether a person is a pauper or not as contemplated by the original explanation to rule 1 of Order 33 of the Code of Civil Procedure. It is contended that the amendment which has been made by the High Court to this explanation is beyond its powers conferred on it by section 122 of the Code.

5. Section 122 of the CPC is in Part X and deals with rules. Section 121 provides that the rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this part. Section 122 then defines the powers of the High Court to make, annul or alter or add to the rules, It reads as under :

Section 122, High Courts (not being the Court of a Judicial Commissioner) may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul after or add to all or any of the rules in the First Schedule"

The provisions sections 123 and 124 give the manner in which the rules can be made of the rules can be amended. These rules then are to be approved by the Government of the State and after the approval they have to be published in the Official Gazette and only on such publication they take effect from the date specified therein. Section 128 provides that the rules can be made to provide for any matters relating to the procedure of Civil Courts with a rider that such rules shall not be inconsistent with the provisions in the body of the Code and also provides without prejudice to the generality of the powers conferred by subsection (1) particularly matters in respect of which rules could be made by the High Courts u/s 122 of the Code of Civil Procedure.

6. The learned counsel contends that the powers of the High Courts u/s 122 of the CPC are not sweeping powers so as to annul every rule or to alter or add to every rule of the Code of Civil Procedure. It is urged that even as to the rules in the First Schedule of the Civil Procedure Code, the High Courts can deal only with such matter as deals with its own procedure or the procedure of the Civil Courts subject to their superintendence and only to that limited extent the rules can be made to regulate their own procedure and the procedure of the civil Courts subject to their superintendence or by such rules, annul, alter or add to the rules in the First Schedule. On the other hand, it is contended on behalf of the applicant and the State that powers conferred on the High Courts u/s 122, of the CPC are powers of very wide amplitude and the High Courts can remove any rule from the First Schedule or alter it or add to the rules in any matter they like subject, however that the rules made by the High Courts should not be inconsistent with the provisions in the body of the Code or to the provisions of other laws. Such a view has been taken by some of the High Courts in this

country and it has been held that the power is not limited only to the procedural matters so far as the rules in the First Schedule are concerned and rules can be made or the existing rules can be amended in any manner subject to the limitation stated above. By the Full Bench of the Allahabad High Court in Chandra Bhushan Misra Vs. Smt. Jayatri Devi, , such a view has been taken. Mr. Justice Pathak, who delivered the majority judgment in dealing with this matter has observed in paragraph 47 of the judgment thus :

"Now, what is of significance is that the sections of the Act, namely the "body of the Code, can be altered by legislation only. Legislation may be effected by Parliament or by State Legislature. The sections cannot be altered or amended by the High Courts, in that sense the "body of the Code" consists of provisions which are fundamental and least easily amenable to amendment than the rules contained in the First Schedule. The sections enjoy a certain status and a related decree of permanency denied to the rules contained in the First Schedule which can be annulled, altered or added to by rules made by the High Courts u/s 122- The power to annul, modify or add to the rules contained in the First Schedule has been conferred upon the High Court for the purpose of answering local needs and adopting the First Schedule to effectively serve that purpose."

It was later on observed that :

"By section 129 the High Courts were empowered to make rules annulling, altering or adding to the rules in the First Schedule, and in order that the rules framed by the High Courts should have the same force and effect as the rules which they removed, amended or supplemented the Legislature enacted section 127. It provided that the rules framed by the High Courts would have the same force and effect as if they had been contained in the First Schedule, They would have the same force although they were framed by the ; High Courts and not by the Legislature. In other words, they would have the same status in law as the rules contained in the First Schedule, They would also have the "same effect, namely, that as regards legal consequences they would be at parity with the rules " contained in the First Schedule. Thus, it might fairly be inferred that in regard to their force and effect the rules framed by the High Courts are assimilated into the First Schedule."

7. A Division Bench of the Allahabad High Court in Prakash Chandra Vs. Ram Swarup, has also taken a very wide view of the provisions of section 122 of the CPC and has laid down that section 122 is categorical and of wide amplitude. It was further held that the provision clearly empowers a High Court to annul, alter or add to all or any of the rules contained in the First Schedule and the power is not confined to rules strictly of the nature of procedure but extends to each and every rule falling in the First Schedule. It is, however, not necessary in this case to go into this wider question.

8. The CPC of 1908, is an Act to consolidate and" amend the laws relating to the procedure of the Courts of Civil judicature and the preamble of the Code states

that it has been enacted as it was expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature. This Code was enacted mainly for the purposes of regulating the procedure of the Courts in dealing with the matters coming before them and the First Schedule which contains the rules have been styled by the framers of the Code as rules of procedure. The Code has been divided into two parts, one consisting of sections 1 to 158 and the other consisting of the Orders 1 to 51 which are divided into rules. The part consisting of the sections is generally referred to as the body of the Code and the other part is referred to as rules as will be apparent from the provisions of sections 121 and 128 of the Code of Civil Procedure. The body of the Code gives several substantive rights to the litigants and those substantive rights which have been given by the Legislature could only be taken away by the Legislature and there is no provision like section 122 authorising the High Courts to take away any of those rights granted in the body of the Code or to annul or alter or add to them, but so far as the rules in the First Schedule are concerned, a specific provision has been made in section 122 empowering the High Courts to make their own rules for their own procedure and also for the purposes of the Civil Courts subject to their superintendence as well as a power has been given to the High Courts to annul, alter or add to all or any of the rules given in the First Schedule of the Civil Procedure Code.

9. The learned counsel for the respondent No. 1 has contended that all the rules in the First Schedule are not rules of procedure, but some of them "also create substantive rights and the rule-making power of the High Courts u/s 122 does not extend to make changes in the substantive rights given by such rules and the authority of the High Courts extends only to such rules or parts of rules which relate only to the procedure and as are necessary for regulating their own procedure. In this connection, a distinction has to be made with respect to the jurisdiction and the mode of its exercise. The body of the Code which consists of the sections creates jurisdiction while the rules contained in the First Schedule give the mode of exercise of that jurisdiction, as has been observed by the Division Bench of this Court in *Sheshgirdas Shanbhag Vs. Sunderrao*, . Essentially, therefore, the rules in the First Schedule relate to matters of procedure. But it is contended that though most of the rules may relate to matters of procedure, not all of them do so and there are several rules which in fact create a substantive right or a jurisdiction as it may be called. In this case, we are concerned with Order 33 of the CPC which deals with the suits or appeals by paupers and it is not necessary to go into the wider question whether the High Courts in exercise of that power u/s 122 of the CPC could annul, alter or add to each and every rule contained in the First Schedule, and we shall confine ourselves only to the rules contained in Order 33 of the CPC and particularly, to the addition which has been made by this Court to the explanation to rule 1 of Order 33 of the Code of Civil Procedure.

10 Even assuming that the power u/s 122 is limited to matters of procedure, as contended by the learned counsel for the respondent No. 1, Rule 1 of Order 33

and the explanation appended to it, are in our view, only a matter of procedure and not a substantive right as is sought to be canvassed. What is a matter of procedure is very aptly defined by Lush L. J. in *Rayser v. Minors* (1882) 7 Q B D 329, to mean "the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right." This case has been considered in the Full Bench decision by the Rangoon High Court in AIR 1937 419 (Rangoon). It was a case where the question arose whether Order 21, Rule 90, proviso (b) as it existed prior to 27th January 1937 was ultra vires or not. Rule I of Order 33 Code of Civil Procedure, permits any suit to be instituted by a person without payment of court-fees subject to the provisions contained in O. 33 and the explanation to Rule 1 defines who is a pauper. The right given to a person to sue is a right which may be said to create jurisdiction but who shall be permitted to sue as a pauper without payment of court-fees and how the status of that person is to be determined and what should be the conditions which should determine "the status of such a person, cannot be said to be matters which create jurisdiction, but would be only matters relating to procedure. Whether a person should, be allowed to sue as a pauper or not may depend upon several circumstances. It may depend upon the geographical area in which he resides. It may depend upon the affluence of the place in which that person resides and the standards may vary from place to place. In one place, a person having assets of not more than Rs. 100 may be held to be a pauper; in another place, a person holding property upto an amount of Rs. 600 or Rs. 1000 may be held to be a pauper. It would depend upon the conditions prevailing in a particular place. By determining such an amount the right to bring a matter to the Court is not taken away and it does not affect the jurisdiction of the Court. By permitting a person to sue as a pauper, the explanation to Rule I of O. 33 only provides as to the persons to whom a concession for not paying the requisite court-fees on the plaint at the time of filing of the suit is to be given and his right to file a suit is not in any way taken away. Similarly,, whether the, subject-matter of the suit should be taken into consideration in determining whether a person is a pauper or not, is also not a matter which relates to the jurisdiction. If a person has a cause of action and if he has got a claim which can be brought before a Court of law, that right is not taken away, but only a facility is given to an indigent person who is not in a position to pay the necessary court-fees relieving him of the burden to pay the same at the initial stage and if he succeeds in the Suit, that court-fee is to be recovered from the opponent against whom the decree is given or if the pauper plaintiff fails, then in that case the amount of the court-fees is to be recovered from him. Different conditions prevail in different parts of the country, and a High Court is in a better position to know the conditions prevailing in the area under its jurisdiction and it seems to be for this reason that the Legislature has left it to each High Court to determine for itself as to the manner, in which the rules for its procedure "should be framed. In matters like this,, the High Court can best judge as to the persons who should be allowed to take advantage of the provision for filing suits as paupers and under what conditions. That is essentially a matter relating to procedure which is to be

followed by the High Court in permitting a person to file a suit without fee payment of any court-fees. The Legislature has power to say that a litigant coming to Court for redress shall or shall not pay court-fees. It can fix any amount as court-fees on any proceeding. There is no right in a person to say that though court-fees are prescribed for any proceeding, he will not pay the fees. There is also no right in the opponent to say that the plaintiff must pay the court-fees before proceeding with a matter if the Legislature ; does not require any fetus to be paid in respect of a particular type of persons. It is not that the Court-fees are exempted for all the Mine. It is only the manner in which the court-fee is to be paid which is different in the case of persons suing as paupers. Whereas with respect to persons who are not paupers, the requisite court-fee has to be paid at the initial stage at the time of presentation of the plaint or appeal, in case of paupers the payment of court-fee is deferred till the time of the decision in which the necessary order for recovery of the Court-fee from the one or the other is made. This is, therefore, only regulating the procedure of the Court as to whether the court-fee is to be realised at the initial stage or at the end and does not disturb anybody's rights or does not affect the jurisdiction of the Court to entertain or deal with the matter before it.

11. The question regarding the amendment made by this, Court to the explanation to Rule 1 of Order 33 of the CPC came up for consideration before the Gujarat High Court in two cases, out of which one is the, decision of a single Judge and the other is of the Division Bench. In *Parshotam Parbhudas v. Bai Moti* 1963 Guj. L. R. 204 the learned single Judge has taken the view that the addition to the explanation to Rule 1 of Order 33,; Civil Procedure Code, that, "In determining whether he is possessed of sufficient means the subject-matter of the suit shall be excluded" by the Bombay High Court on 9th February 1925, is outside the scope of section 122 of the Civil Procedure Code, He has taken the view that the power to annul, alter or add to all or any of the rules in the First Schedule can be exercised by the High Court only when it proceeds to make rules regulating its own procedure or the procedure of the Civil Courts. In dealing with the matter, the learned single Judge has observed that in making addition to the explanation to Rule 1 of Order 33, the High Court did not set out to make rules regulating its own procedure or the procedure of the Civil Courts subject to its superintendence, and therefore, the addition was outside the scope of section 122.

12. There is, however, another decision of the Division Bench of the same High Court in *Rasulmiya Mohmed Ummr v. Vora Sakurbhai Mohmed* 1966 Guj. L R 656, taking the view that the aforesaid addition to the explanation to Rule 1 of Order 33 of the CPC is within the scope of section, 122 of the Code and is, not ultra vires and the Division Bench further held that the scope of section 122 of the CPC is wide enough to imply that every rules in the First Schedule can be annulled, altered or added to by the High Court, the same being a rule relating to procedure and having regard to the clear "wordings of section 122, there can hardly be any doubt about the power of the High Court to annul, alter or add to

all or any of the rules contained in the First Schedule. As we have said, it is not necessary to go into this, larger question since we are of the view that the explanation to Rule 1 of Order 33 to which an addition has been made by this Court u/s 122 of the CPC is a matter relating to the procedure of this Court and is not a substantive right, as contended on behalf of the respondent. Since the master relates to the procedure to be followed by the Court in the matter of dispensing with the payment of the court-fees at the initial stage (sic) addition (sic) has been made by this Court, can be made in exercise of the powers conferred on this Court u/s 122 of the CPC even though the powers may be taken as limited to matters of procedure only, as contended on behalf of the respondents. We are not called upon in this particular case to define the amplitude of the powers u/s 122 and we have, therefore, refrained from considering whether the power u/s 122 extends to annul each and every rule or alter or add to each and every rule of the First Schedule if it is so necessary, as has been held by the Division Bench of the High Court of Gujarat and the Full Bench of the Allahabad High Court.

13. In the view we have taken, the subject-matter of the suit has to be excluded from consideration in determining whether the applicant before us is a pauper or not and whether he is entitled to file an appeal in forma pauperis. The applicant was permitted to sue as a pauper in the lower Court and it has not been shown that her circumstances have in any way changed from those prevailing at the time of the suit. We, therefore, think that the applicant should be permitted to prosecute this appeal in forma pauperis. The application be registered as an appeal and it will be proceeded with as an appeal. Since the question raised on behalf of the respondents was not free from difficulty and needed consideration, we make no order as to costs. The appeal is admitted. Messrs M. L. Vaidya and G. B. Gandhe, advocates take notice on merits for the respondents whom they represent in these proceedings. So far as the other respondents who are not represented here, the notices be issued.