

(2000) 01 KAR CK 0062

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 1017 of 1991

Smt. T. Jayamma

APPELLANT

Vs

The Bangalore University and Others

RESPONDENT

Date of Decision : 24-01-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 1
Hindu Succession Act, 1956 — Section 8

Citation : (2000) 2 CivCC 646 : (2000) ILR (Kar) 1528 : (2000) 3 KarLJ 107 :
(2000) 2 KCCR 1205

Hon'ble Judges : B.K. Sangalad, J

Bench : Single Bench

Advocate : Sri S.G. Bhat, for the Appellant; Sri M.N. Seshadri, Sri A.C. Rajashekar and Sri C.G. Gopalaswamy and Sri D.B. Shivakumar, A.G.A., for the Respondent

Judgement

1. Being aggrieved by the order dated 6th November, 1990 passed in P. Mis. No. 495 of 1988 on the file of the Additional City Civil Judge, Bangalore rejecting the permission to sue as an indigent person.

2. The ranks of the parties shall be followed as in the lower Court. The petitioner filed the suit for recovery of damages of Rs. 9 lakhs. Since she was not in a position to pay the Court fee, she filed an application under Order 33, Rule 1 of the CPC. The son of the petitioner by name Udayaravi was a student who appeared in the first year examination conducted in September-October 1985 by respondent 1-University. His result was not announced due to the negligence of respondents 2 and 3. Therefore Udayaravi committed suicide on 12th March, 1986. The petitioner has now filed the suit to recover the damages on account of the fact that her son committed suicide. Inter alia she also filed an application to declare her as an indigent person and enable her to prosecute the suit.

3. For petitioner P.W. 1-Jayamma is examined. The respondents have chosen to examine her husband.

4. Mr. S.G. Bhat, learned Counsel for the petitioner submits that the lower Court has not properly appreciated the evidence on the record. His sole contention is that merely the husband of the petitioner is a retired Government employee and is owning some property especially a house in Bangalore, it should not be construed that the petitioner is capable of paying the Court fee by raising the funds. He also relied upon the following decisions:

1. Radhakrishna Nayak v Kunhappa Nayak and Others, 2. Indrasan Vs. Lucknow Nagar Mahapalika and Others, , 3. A. Prabhakaran Nair Vs. K.P. Neelakantan Pillai, , 4. Bhubaneswar Misra and Others Vs. Sakuntala Devi and Others, , 5. Santhos Kumar and Others Vs. Verghese George and Others, .

5. The observation in para 10 of the judgment is that her husband was Under Secretary to the Government of Karnataka, and had drawn the commutation amount. But the evidence of R.W. 1 is that he spent the said amount for the marriage of his daughter in the year 1983 itself. Further he admits that he is residing in his own house, It is on the record that he has got 8 acres of dry land and 4 acres of wet land at Arohalli Pandavapura Taluk and there is a site measuring 30" x 50" and also he has constructed a house of 6 to 7 squares. He has let out that portion which is earning Rs. 500/- to 600/- per month. He is also paying property tax of Rs. 360/-. Further he admits that the property is worth of Rs. 1 lakh in addition to having jewellery worth Rs. 1,000/-. On the basis of this evidence the learned Judge has come to the conclusion relying upon similar decisions that the petitioner is capable of paying the Court fee.

6. According to Mr. S.G. Bhat, learned Counsel for the petitioner the amount that has to be recovered by way of damages is to the tune of 9 lakhs, as such Court fee of Rs. 90,000/- has to be paid. His strong point is that since the boy died, the only class 1 heir according to Section 8 of the Hindu Succession Act, it is only the mother. The class 1 heirs naturally exclude class 2 heirs. The father of the boy comes under Class 2 heirs. Further it is submitted that no property is standing in the name of the petitioner. Merely her husband is having some property does not mean that she should be compelled to raise the funds by re coursing to one or the other means. In the ordinary course it is but natural to submit that since the husband is having some property, he should assist his wife to make the payment of Court fee. Many contingencies might arise. The father might not be interested in the litigation that mother wants to pursue; he may be reluctant to part with his property to enable his wife to pay the Court fee. The whole purpose will be defeated if the petitioner is not permitted to prosecute the suit. In my opinion the mother should be in such a position as to raise the funds by her own capacity. If some property stands in her name, it is a different thing. Now she cannot ask the other persons either to sell or to make any other arrangements and assist her to pay the Court fee. I think if such position is appreciated, it is the helping her to secure the justice. No doubt, in the event of her success, she has to pay the Court fee. Now without any means whether she can be compelled to pay the Court fee?

7. Mr. S.G. Bhat, learned Counsel for the petitioner relies upon the decision in the case of Radhakriska Nayak, supra, wherein it is stated as follows:

"It appears to me that what is really necessary is that the plaintiff in question should either possess property or have such control over property as is sufficient to enable him to command credit and raise sufficient money to pay the Court fee. In *Munipapiya v Munimarappa*, it has been pointed out that for purposes of Rule 1, 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".

8. In my opinion this observation is clearly applicable to the case on hand. In the case on hand, it is not on the record that the petitioner has got actual control or possession of the property. No doubt after the death of her husband, she may be entitled to some portion of the property but, as on the date of filing of the application she had nothing. In the case of *Indrasan*, supra, it is held as follows:

"Plaintiff's pauperism -- Determination -- The fact that his sons are in affluent condition, irrelevant -- Their income or assets not to be taken into account".

In the cited case the sons were in the affluent condition. The Court has held that it is irrelevant if the sons are in affluent condition. Their income or assets cannot be taken into account. If the same analogy is extended in this case also, the husband is no doubt a retired Government servant. He has got some property including the house property worth Rs. 1,00,000/-. That is not the criteria to hold that she has got sufficient means to pay the Court fee. In the case of *Prabhakaran Nair*, supra, it is held as follows:

"The benefit of Order 33, CPC is conferred on persons without "sufficient means" and not without any means at all. Pauperism is not a prerequisite for the leave. What is contemplated is not possession of property but sufficient means. Capacity to raise money and not actual possession of property alone is what the Court has to look into. What is intended is not capacity to raise funds by any means whatsoever by begging, borrowing or stealing or by any other hook or crook, but by normal and available lawful means. It is not an essentiality that one should deprive himself of the sole means of livelihood or alienate all his assets to seek justice in penury. This itself is the object of exclusion of property exempt from attachment in execution of a decree and the subject-matter of the suit from "sufficient means". A debt that has yet to be realised or an asset which is not within the immediate reach of the plaintiff to be converted into cash for payment of Court fee cannot be taken into account in calculating sufficient means".

9. In this case it is manifestly clear that it is the capacity to raise money and not actual possession of the property alone is the criteria. What is intended is not the capacity to raise funds by any means viz., by begging, borrowing, stealing or by hook or crook. The petitioner should have lawful means to raise the funds. In case of *Maheshwatiben and Others Vs. State of Gujarat and Others*, , it is held as

follows:

" "Sufficient means" -- Application to file suit as indigent person -- Financial condition of applicant alone is to be seen -- Financial condition of guardian or other relative is totally irrelevant".

10. In another decision Bhubaneswar Misra's case, supra, it is held as follows:

"The Trial Court has rejected the plaintiff's prayer to prosecute the suit in forma pauperis mostly as defendant 4 possessed sufficient agricultural lands about 3 years prior to the institution of the suit and at that time he had sold about 8 to 10 acres of land out of the same and was running a shop at Bhubaneswar. Order 33, Rule 1, CPC enjoins an enquiry into the financial condition of the person or persons who apply to sue in forma pauperis. Order 33, CPC defines a "pauper" as a person who is not possessed of sufficient means to enable him to pay the fee prescribed by law for the suit filed by him or where no such fee is prescribed when he is not entitled to pay property worth Rs. 100/- other than his necessary wearing apparel and the subject-matter of the suit. In this case the plaintiffs have to pay the Court fee prescribed by law if their application to sue as paupers is not allowed. That being so, it was for the Court to enquire if the plaintiffs were possessed of the means to pay the Court fee for the suit filed by them and not the means possessed by the husband of plaintiff 1. Moreover, in this case the husband of plaintiff 1 had been arrayed as defendant 4 in the suit and it is specifically alleged against him that he has deserted them and has been disposing of his properties at random. Merely because the husband was possessing some property and that too more than 3 years back, it cannot be said in this case that the plaintiffs are now possessed of sufficient means to pay the Court fee. In a case of this nature it is to be ascertained if the plaintiffs have the capacity to pay the Court fee out of any property in their possession and for that one has to see if the plaintiffs have the capacity to raise money to pay the Court fees out of the properties in their possession".

11. When all these decisions are gone through, it makes clear that the petitioner should have sufficient and lawful means to raise the funds and not resorting to any course namely beg, borrow, steal or by hook or crook methods. In view of these decisions, I think the observation of the learned Judge is required to be altered. In the case on hand it is the mother who is interested to prosecute the suit for recovery of damages to the tune of 9 lakhs. Above all she is the class 1 heir having no means and does not possess any means to pay the Court fee. Hence her application has to be allowed. In the light of these observations, the following order is passed:

In the result, the petition is allowed. The impugned order is set aside. Her application under Order 33, Rule 1 is allowed.