

(2007) 12 MAD CK 0019

In the Madras High Court

Case No : Civil Revision Petition (PD) No. 2139 of 2007 and M.P. No. 1 of 2007

S.R. Ramalingam

APPELLANT

Vs

R. Vivekanandan and Others

RESPONDENT

Date of Decision : 13-12-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Constitution of India, 1950 — Article 227

Tamil Nadu Court Fees and Suits Valuation Act, 1955 — Section 4

Citation : (2008) 1 LW 967 : (2008) 1 MLJ 180

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Advocate : P.T. Asha, for Sarvabhuman Associates, for the Appellant; M.M. Sundaresh, for R.1 and R.2 and V. Raghavachari, for R.3 to R.7, for the Respondent

Final Decision : Dismissed

Judgement

P. Jyothimani, J.—The plaintiff in O.S. No. 380 of 2001, who is the first defendant in O.S. No. 460 of 2002, both on the file of II

Additional District Munsif, Erode, is the revision petitioner.

2. The revision is directed against the order of the First Appellate Court, viz., the First Additional Subordinate Judge, Erode, passed in I.A. No.

760 of 2006 in A.S. No. 60 of 2006, by which the application filed by the petitioner under Order XLI Rule 3 and Section 151 of the Code of

Civil Procedure, to reject the appeal, was dismissed.

3. The petitioner has filed suit in O.S. No. 380 of 2001 for declaration that ""A"" schedule property is a common property and for mandatory

injunction against defendants 1 and 2 to restore ""A"" schedule property to its original position and also for permanent injunction against defendants 1

and 2 in respect of ""A"" schedule property. The defendants 1, 2, 7, 12, 13 along with other three persons have filed O.S. No. 460 of 2002 against

the revision petitioner and others for declaration of their title and for consequential injunction, including mandatory injunction against the revision

petitioner to close the doorway and pipeline opening out into the suit property and also for removal of the said pipeline.

4. Both the suits were tried together by the learned trial Judge. The suit filed by the petitioner in O.S. No. 380 of 2001 was decreed while the suit

filed by the defendants in the said suit in O.S. No. 460 of 2002 was dismissed. It was against the dismissal of suit in O.S. No. 460 of 2002, the

plaintiffs in the said suit have filed the first appeal in A.S. No. 60 of 2006, in which the revision petitioner was the first respondent. The revision

petitioner, pending the said appeal has filed I.A. No. 760 of 2006 under Order XLI Rule 3 CPC, to reject the appeal memorandum contending

inter alia that the appeal was filed by the respondents on 30.01.2006 without affixing the sufficient Court Fees on the memorandum of appeal,

especially when the amount of court fee paid by the respondents at the time of original filing of the appeal was only Rs. 10/- whereas the court fee

payable is Rs. 900/-. Therefore, the appeal papers were rightly returned for payment of deficit court fees and after six months when the defects

were complied with, there was not even an order obtained from the Court u/s 149 of CPC for condoning the delay in the payment of deficit court

fees. Subsequently, the appeal was numbered on 28.06.2006 on payment of remaining court fees and in the absence of petition to condone the

delay of six months in paying the large amount of deficit court fees, it should be presumed to have been filed only on 28.06.2006, by which time

the appeal is time barred. It was the further case of the petitioner that the 5th respondent Karuppanna Gounder died on 14.02.2004 itself, which is

much prior to the date of disposal of the suit and therefore, the suit got abated so far as the 5th appellant in A.S. No. 60 of 2006 and 5th plaintiff in

O.S. No. 460 of 2002 is concerned. However, without impleading all the legal representatives of the 5th respondent, the appeal was filed and

hence, it is on these two grounds, the application for rejection of the appeal was filed.

5. The learned First Appellate Judge, relying upon Section 149 CPC has rejected the application on the basis that when once the Court has

extended time for compliance and during the time granted by the Court if the deficit court fees has been paid, the same should be taken as permission granted by the Court for payment of deficit court fees and therefore, the same cannot be a ground for the purpose of rejecting the appeal. Further, the First Appellate Court has found that in fact the appeal was filed on 30.01.2006, which was returned by the Office of the court for payment of deficit court fees and after compliance, the same was represented on 25.04.2006 and after full compliance, it was again represented on 28.06.2006 and during the said period, the Court has given time for effecting compliance of deficit court fees. The Court has further found that against the common judgment, the plaintiffs in O.S. No. 460 of 2002 have filed appeal in A.S. No. 26 of 2006, wherein an interim application was filed in I.A. No. 143 of 2006, and the same parties have also filed another appeal in January, 2006 in which compliance was made and the same was numbered on 28.06.2006, and in that appeal, the petitioner has not chosen to raise any objection and therefore, holding that various judgments relied upon by the revision petitioner are not applicable to the facts of the case, the learned first appellate Judge dismissed the application.

6. Ms. P.T. Asha, learned Counsel appearing for the petitioner would submit that the respondents have filed the first appeal on 30.01.2006 by paying a minimum court fee of Re.10/-, whereas the court fees to be paid is Rs. 900/- and therefore, subsequently when the deficit court fees was paid, it was mandatory on the part of the respondents to file an application u/s 149 of Code of Civil Procedure, to obtain leave to pay the deficit court fees. In the absence of such application, the appeal is liable to be rejected. It is also her submission that even applying Order VII Rule 11 of CPC dealing with rejection of plaint, the deficit court fees should be paid only after obtaining necessary leave from the Court and the analogy applicable in respect of rejection of plaint is also applicable to the rejection of appeal under Order XLI Rule 3 of Code of Civil Procedure. To substantiate her contention, she would rely upon the following judgments of this Court, viz.,

- (i) 2007 (4) MLJ 433 P. Sakthivel v. Ponnusamy;
- (ii) K. Natarajan Vs. P.K. Rajasekaran, ;

(iii) P.M. Gopalasamy Vs. C. Senpagam, ;

(iv) V.N. Subramaniam Vs. A. Nawab John and Others, ; and

(v) 2005 (5) CTC 401 S.V. Arjunaraja v. P. Vasantha.

7. On the other hand, Mr. M.M. Sundaresh and Mr. V. Raghavacahari, learned Counsel appearing for the respondents would submit that

inasmuch as, admittedly, after filing of the appeal, the Court has returned the papers for compliance, viz., for payment of deficit court fees and

within the time granted by the Court the court fees has been paid and appeal papers represented, there is no question of filing an application u/s

149 of Code of Civil Procedure. It is also their contention that the petitioner has not chosen to raise such objection when another appeal in A.S.

No. 26 of 2006 was filed in the same manner against the very same common judgment passed by the trial Court.

8. I have heard the learned Counsel for the petitioner as well as respondents and perused the entire records.

9. On facts, it is not in dispute that the respondents have filed the appeal on 30.01.2006, which is well within the period of limitation. The dispute is

that at the time when the appeal was filed, originally, the respondents have not paid the required court fees, but, in fact, paid a meagre sum of Rs.

10/-. It is also not in dispute that the appeal papers were returned and subsequently they were represented on 25.04.2006 and again the papers

were returned and represented on 28.06.2006, which are all well within the time granted by the Court for compliance of the defects. It is also not

much in dispute that in respect of another appeal filed by the respondents in A.S. No. 26 of 2006 against the same common judgment, the appeal

was filed in the same manner and the petitioner has not chosen to raise any objection. It is true that merely because the petitioner has not raised

objection in the other appeal arising from and out of the same common judgment, the petitioner cannot be said to be barred from raising objection

in this appeal, if it is a legal issue, for there cannot be an estoppel against the statute.

10. The question to be considered in this case is as to whether it is mandatory on the part of the respondents to file an application u/s 149 of Code

of Civil Procedure. The judgments relied upon by the learned Counsel for the petitioner are all relating to filing of suits at the first instance. While

dealing with the issue of representation of plaint returned by the Court, on payment of deficit court fee without filing an application u/s 149 of Code

of Civil Procedure, this Court has held that the mere representation of papers is not sufficient and a specific application needs to be filed u/s 149 of

Code of Civil Procedure. Section 149 of CPC gives discretion to the Court to allow a party to pay any amount of court fees at any stage and

when such court fees is paid as per the direction of the Court, the court fees is deemed to have been paid at the first instance. The section states as

follows:

Section 149. Power to make up deficiency of court-fees:

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.

11. In K. Natarajan Vs. P.K. Rajasekaran, , a Division Bench of this Court while dealing with the power of the Court in extending time u/s 149 of

Code of Civil Procedure, has held that Section 149 of CPC is really in the form of Proviso to Section 4 of the Tamil Nadu Court Fees and Suits

Valuation Act, 1955. The Division Bench, while clarifying the legal position, has laid down the procedure to be followed by the civil Court, as

follows:

21. We deem it necessary to clarify the legal position and lay down the procedure to be followed as under:

(1) Section 149 of CPC is a proviso to Section 4 of the Tamil Nadu Court Fees and Suits Valuation Act, 1955.

(2) The word "document" employed in Section 149 of CPC would include plaint also.

(3) Whenever a plaint is received, the same shall be verified and if found to be not in order, the same shall be returned at least on the third day

(excluding the date of presentation so also the intervening holidays).

(4) If the suit is presented on the last date of limitation affixing less Court-fee, than the one mentioned in the details of valuation in the plaint, an

affidavit shall be filed by the plaintiff giving reasons for not paying the requisite Court-fee.

(5) In such cases, the Court shall before exercising its discretion and granting time to pay the deficit Court-fee, shall order notice to the defendants

and consider their objections, if any. However, such notice is not necessary in cases where the plaintiff has paid almost the entirety of the requisite

Court-fee and the Court is satisfied on affidavit by the party that the mistake happened due to some bona fide reasons such as calculation mistake

or the alike.

(6) The discretion referred to in Section 149 of CPC is a judicial discretion and the same has to be exercised in accordance with the well

established principles of law.

(7) But however, in cases where the time granted to pay the deficit Court-fee falls within the period of limitation, the defendant need not be heard.

(7A) In case where the plaint is presented well within the period of limitation with deficit Court-fee and the Court returns the plaint to rectify the

defect giving some time (2 or 3 weeks), which also falls within the period of limitation, but the plaint is re-presented paying deficit Court-fee after

the period of limitation, the Court is bound to hear the defendant, notwithstanding the fact that the plaintiff has paid substantial Court-fee (not

almost entirety) at the first instance, before condoning the delay in paying the deficit Court-fee.

(8) In cases where part of the time granted to pay the deficit Court-fee falls outside the period of limitation and the deficit Court-fee is paid within

the time of limitation (i.e., the plaint is re-presented with requisite Court-fee), the Court need not wait for the objections of the defendant and the

plaint can be straight away numbered.

(9) The Court should exercise its judicial discretion while considering as to whether time should be granted or not. Cases where the plaintiff

wrongly (bona fide mistake) valued under particular provisions of law under Court Fee Act or where he could not pay the required Court-fee for

the reasons beyond his control, due to some bona fide reasons, the Court shall condone the delay. Payment of substantial Court-fee is a

circumstance, which will go in favour of the claim of the plaintiff that a bona fide mistake has crept in.

But however, in cases where the plaintiff acted willfully to harass the defendant (like willful negligence in payment Court-fee, awaiting the result of some other litigation, expecting compromise, etc.).

(10) If the Court had exercised its discretion without issuing notice, then it is open to the defendant to file application u/s 151 of CPC for proper relief. It will be open to the defendant to file a revision under Article 227 of Constitution of India. That apart, objection can also be raised at the trial or even at the appellate stage, since the failure to exercise judicial discretion in a manner known to law (as laid down in various decisions of the Supreme Court) amounts to Court applying a wrong provision of law.

12. That was a case relating to the filing of a suit for recovery of an amount of Rs. 35,000/- and while filing the plaint the plaintiff paid a court-fee of Re. 1/- and the plaint was returned granting 15 days time to enable the plaintiff to affix the necessary court fees and the same was not represented in time and therefore, the issue of limitation was raised by the defendant. It was in those circumstances, by relying upon Section 4 of the Tamil Nadu Court-fees and Suits Valuation Act, 1955, the Division Bench has held that since the plaint is to be treated as a document, unless the fees prescribed is paid as per the valuation, the same cannot be filed. By referring the said Section 4 of the Tamil Nadu Court-Fees and Suits Valuation Act, 1955, along with the discretion of the Court u/s 149 of Code of Civil Procedure, the Division Bench has held that the discretion vested with the Court has to be exercised judiciously and also issued the above said guidelines.

13. In S.V. Arjunaraja v. P. Vasantha 2005 (5) CTC 401, while dealing with an application filed by the defendant under Order 7 Rule 11(c) of CPC to reject the plaint on the basis that the plaint was insufficiently stamped, it was held that in the absence of a specific application u/s 149 of CPC and order passed by the Court granting extension of time for payment of court-fee, the suit was liable to be rejected, by following the judgment of the Andhra Pradesh High Court in S.A. Khadeer v. G.V.R. Anjaneyulu 2003 (4) CLJ 917, wherein it was also held that the mechanical return of the plaint and representation cannot amount to extending the time for payment of deficit court-fees, in order to save the period of limitation if the court-fee paid after the period of limitation prescribed is

lapsed.

14. Again, in P.M. Gopalasamy Vs. C. Senpagam, and in V.N. Subramaniam Vs. A. Nawab John and Others, , this Court has dealt with the

suits filed without appropriate court fees and held that the application filed u/s 149 of CPC has to be dealt with judiciously, by relying upon various

judgments in that regard. At this juncture, it is relevant to point out that the Supreme Court in Buta Singh (Dead) by L. Rs. Vs. Union of India, has

held that Section 149 of CPC could be taken only when the party was not able to pay the court fee in the circumstances beyond control or under

unavoidable circumstances and the court would be justified in appropriate cases to exercise the discretionary powers u/s 149 of Code of Civil

Procedure. That was a case where an appeal was filed by the claimants under the land acquisition proceedings. After the arguments were heard

and judgment was reserved, but before the judgment was pronounced, an application was filed to pay more court fees and some applications were

filed after the pronouncement of the judgment seeking permission to pay deficit court fees towards enhanced compensation. It was in that context,

the Supreme Court has held that there was no bona fide on the part of the claimants in coming forward with an application u/s 149 of CPC for

extension of time for payment of court-fees.

15. While dealing with the power of the High Court u/s 115 of CPC exercising revisional jurisdiction, in Amirthavalli and Ors. v. Visalatchi Ammal

and Ors. 2002 (3) LW 687 K. Sampath, J. has held that when justice has been done by the court below, the jurisdiction u/s 115 should not be

exercised, by relying upon an earlier judgment in Chennichi Alias Parikkal Goundar Vs. D.A. Srinivasan Chettiar, . The learned Judge has, in fact,

reproduced the wordings found in the judgment in the above said case, which reads as under:

18. In Chennichi Alias Parikkal Goundar Vs. D.A. Srinivasan Chettiar, it has been held as follows:

The exercise of the revisional powers of the High Court u/s 115 of the Code of Civil Procedure, is purely discretionary. The High Court will not

take a technical view and necessarily interfere in every case, where an order is wrong and even improper, if such interference will produce hardship

or injustice. The revisional jurisdiction of the Court is intended to secure and

subserve the ends of justice and not to deny or defeat it. If

interference in a particular case will result in hardship or injustice to a party, the High court will be justified in refusing to interfere in the exercise of

its revisional jurisdiction, even if the order is found to be one without jurisdiction.

16. In a similar situation, Srinivasan, J. in *Gnanambal v. Perumal Pillai and Anr.* 1992 MLJ 60 has held that if, in the interest of justice, the Court

below has passed an order, the High Court can refuse to interfere u/s 115 of Code of Civil Procedure. The relevant portion of the judgment reads

as under:

8. In any event, I am of the view that on the facts of this case, justice has been rendered to the decree-holder. It is seen that the judgment debtor

has kept the decree-holder in abeyance for nearly 21 years by now and prevented him from executing the decree. In such circumstances, I refuse

to exercise my discretionary power u/s 115, C.P.C. a bench of this Court has held in *S.N. Kuha v. P.P.I. Vaithyanathan* 1988 T.L.N.J. 1, that if

the order of the court below is in the interest of Justice, this Court can refuse to interfere u/s 115, C.P.C. even if the court below had no

jurisdiction to pass such an order. Applying that principle I hold in this case that the order of the court below does not warrant any interference as

justice has been done to the decree-holder.

17. In *Mohammad Mahibulla and another Vs. Seth Chaman Lal (dead) by L.Rs. and others*, , the Supreme Court, while dealing with the

memorandum of appeal filed by a party not sufficiently stamped due to his negligence, which has resulted in the rejection of the appeal, has held

that before dismissing the appeal, an opportunity should have been given to the appellant by the Court to make good the balance court fee within a

time to be indicated, and if within the time stipulated the compliance was not made, it is open to the appellate Court to dismiss the appeal. In that

case, the Supreme Court has dealt with Section 149 of CPC also. The operative portion of the judgment is as follows:

5. Reading these two provisions together and keeping fairness of procedure in view, we are inclined to agree with the counsel for the appellant that

when the lower Appellate Court came to hold that the memorandum of appeal had not been sufficiently stamped, an opportunity should have been

given by the Court to the appellant to make good the balance Court-fee within a

time to be indicated and if there was failure to comply with the direction of the Court, the memorandum of appeal could have been dismissed. This opportunity having not been given, we are of the view that the dismissal of the appeal was not appropriate.

18. The present application filed by the revision petitioner is under Order XLI Rule 3 of Code of Civil Procedure, which relates to rejection or amendment of memorandum, which reads as under:

Order XLI Rule 3. Rejection or amendment of memorandum.-

(1) When the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.

(3) Where a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment.

19. On the other hand, Order VII Rule 11 CPC dealing with rejection of plaint runs as follows:

Order 7 Rule 11 CPC.

11. Rejection of Plaint.- The plaint shall be rejected in the following cases:

(a) Where it does not disclose a cause of action;

(b) Where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) Where the relief claimed is properly valued, but the plaint is written on the paper insufficiently stamped, and the plaintiff does not make good the deficiency within the time, if any, granted by the Court;

(d) Where the suit appears from the statement in the plaint to be barred by any law;

(e) Where it is not filed in duplicate.

(f) Where the plaintiff fails to comply with the provisions of Rule (9).

[Provided that the time fixed by the Court for correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the

Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation

or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause

grave injustice to the plaintiff.]

20. The cases which are relied upon by the learned Counsel for the petitioner are relating to the deficit court fee not paid on the plaint and

therefore, it can be a ground for rejecting the plaint under Order VII Rule 11 of Code of Civil Procedure, in the absence of an application filed u/s

149 of Code of Civil Procedure.

21. On the other hand, the rejection of the memorandum of appeal cannot be made on the same grounds available under Order VII Rule 11 of

Code of Civil Procedure. In fact, there is a provision enabling the appellate Court to condone the delay in filing appeal also. Such a power is not

available to the trial Court under Order VII of Code of Civil Procedure. In such circumstances, considering the fact that on the second

representation of appeal, the deficit court fees has been paid and the first appellate Court, taking into consideration that from the same common

judgment another appeal has been filed in A.S. No. 26 of 2006 and in the interest of justice, has come to the conclusion that the respondents must

be given an opportunity to present their appeal. The appellate Court has also taken note of the fact that within the time given by the Court, the

court fees has been paid. In these circumstances, while exercising jurisdiction u/s 115 of the Code of Civil Procedure, I am of the considered view

that in the interest of justice the appeal filed by the respondents must be taken on file, especially when another appeal arising from the same

common judgment of the trial Court has been taken to file which was filed in the same manner, which was not objected to by the revision petitioner

herein. By applying the judgment in Gnanambal v. Perumal Pillai and Anr. 1992 MLJ 60 and Chennichi Alias Parikkal Goundar Vs. D.A.

Srinivasan Chettiar, , I am of the considered view that the first appellate Court has rightly rejected the application filed by the revision petitioner

and therefore, it is not proper for this Court to interfere u/s 115 of Code of Civil Procedure. In view of the same, the revision fails and the same is

dismissed. No costs.

In view of dismissal of main revision, connected miscellaneous petition is closed.