

Smt. Gomti Devi Vs. Hari Shanker

Smt. Gomti Devi Vs. Hari Shanker

SooperKanoon Citation : sooperkanoon.com/456874

Court : Allahabad

Decided On : Apr-27-1978

Reported in : AIR1978All402

Judge : S.D. Agrawal, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 149 - Order 33, Rule 7

Appeal No. : Second Appeal No. 240 of 1968

Appellant : Smt. Gomti Devi

Respondent : Hari Shanker

Advocate for Def. : S.P. Srivastava and ;Gopal Singh, Advs.

Advocate for Pet/Ap. : G.P. Bhargava and ;A.N. Bhargava, Advs.

Disposition : Appeal allowed

Judgement :

S.D. Agrawal, J.

1. This is a plaintiff's second appeal arising out of a suit filed by the plaintiff appellant against the defendant respondent under Order XXXIV, Rule 4, C. P. C. for enforcement of the mortgage deed dated 15th July 1950. The suit was filed in forma pauperis on 11th July 1963. During the hearing of the application under

Order XXXIII, Rule 7, C. P. C. and after one of the plaintiff's witnesses was examined on 20th February 1965 the plaintiff appellant gave a statement before the court that she was then in a position to pay the court-fee and two months' time be granted to her for the said purpose. On the same date the Civil and Sessions Judge, Mirzapur, before whom the said application was pending, passed the following order:

'The applicant is now prepared to pay court-fee. Application to sue as pauper is dismissed. Court-fee should be paid within two months.'

2. On 20th April 1965 the plaintiff appellant again moved an application for grant of fifteen days' further time to pay the court-fee. This application was allowed and therefore on 5th May 1965 the plaintiff appellant paid the requisite court-fee and the application was thereafter ordered to be registered as a suit on 8th May 1965.

3. The suit was contested by the defendant respondents on merits as well as on the ground that the suit was barred by time. It was stated that the court had no jurisdiction to extend the time for the payment of court-fee and as such the plaint would be deemed to have been filed only on 5th May 1965 when the court-fee was paid by the plaintiff appellant and if the date of the filing of suit is taken to be 5th May 1965 the suit was barred by limitation.

4. The trial court, after examining the entire oral and documentary evidence on record, upheld the case of the plaintiff appellant that a mortgage deed was executed by the defendant respondent in lieu of a loan taken by him. The trial court further held that it had the jurisdiction to extend the time for payment of court-fee and as such the plaint would be taken to have been filed on 11th July 1968 and as such the suit was not barred by limitation. In view of these findings the trial court decreed the appellant's suit for recovery of Rs. 9,300/- with interest pendente lite and future at the rate of four per cent per annum from the date of the suit on a sum of Rupees 5,000/-. The defendant respondent was allowed six months' time to make the payment failing which it was directed that a decree would be prepared under Order XXXIV, Rule 4, C. P. C.

5. Aggrieved by the judgment of the trial court civil appeal No. 15 of 1967 was filed by the respondent. The lower appellate court only considered one issue in appeal, viz. as to whether the suit was barred by time or not. The lower appellate court came to the conclusion that the trial court had no jurisdiction to grant further 15 days time subsequent to the dismissal of the application to sue in forma pauperis and as such the suit was barred by time. In view of the above finding the suit was dismissed and the appeal was allowed on 13th September 1967. Against the judgment of the lower appellate court the present appeal has been filed in this Court.

6. The only question to be considered in the present appeal is as to whether the court having initially granted time while dismissing the pauper application can further extend time under Section 149 of the Civil P. C. after the expiry of the time initially granted. Counsel for the appellant has contended before me that the instant case is a case of voluntary decision of the appellant to pay the court-fee and not a case of refusal by the court to the applicant to sue as a pauper under Order XXXIII, Rule 7, C. P. C. and as such principles applicable in the case of a refusal of an application under Order XXXIII, Rule 7, C. P. C. do not apply. His further contention is that since the provisions of Order XXXIII, Rule 7 did not apply the application should be taken as a plaint deficiently stamped and the court in such circumstances can exercise its powers under Section 149 of the Civil P. C. if it is so satisfied.

7. Counsel for the respondent has, however, argued that the court could grant time only once for payment of court-fee at the time when it rejects the application under Order XXXIII, Rule 7, C. P. C. and it has no jurisdiction to grant any further time as with the dismissal of the pauper application the court loses seisin of the case. He has relied upon the four Full Bench decisions of this Court in *Chunnamal v. Bhagwant Kishore* : AIR1936 All584 ; *Kalapnath Singh v. Shyama Nand* : AIR1955 All159 ; *Devendra Kumar Bharti v. Mahanta Raghuraj Bharti* : AIR1955 All154 and an unreported Full Bench decision in *Ram Nath v. Ram Swarup* (Civil Revn. No. 1005 of 1968 decided on 4th September 1970).

8. It is not necessary to go into the wider question as to whether in the instant case the order dismissing the application for pauperism comes under Order XXXIII, Rule 7, Sub-clause (3), C. P. C. or not as in my opinion even if the order is taken to have been passed under Order XXXIII, Rule 7, Sub-clause (3), C. P. C., as contended by the respondent, the court had the jurisdiction to extend the time for the payment of court-fee. The Privy Council in *Stuart Skinner alias Nawab Mirza v. William Orde* ((1879) ILR 2 All 241), as far back as in 1879, held that the Court had power to grant time for payment of court-fees as in the opinion of their Lordships of the Privy Council the application for permission to sue in forma pauperis consists of two parts, namely, one relating to the prayer to sue in forma pauperis and the other part relating to the essential ingredients constituting the plaint.

9. In *Chunnamal's case* (1936 All LJ 760) (FB) (supra) the Full Bench consisting of Sulaiman, C. J. Bennet and Allsop, JJ. took the view that where an application for permission to sue as a pauper is rejected under Order XXXIII, Rule 5, C. P. C. the court while rejecting the application can under Section 149, C. P. C. allow the applicant to, pay the court-fees and treat the application as a plaint. If, however, the court has refused to allow the application to sue as a pauper under Order XXXIII, Rule 7, Sub-clause (3) then the court while rejecting the application for permission to sue as a pauper cannot under Section 149, C. P. C. allow the applicant to pay the requisite court-fee and treat the application as a plaint,

10. The view in *Chunnamal's case* (1936 All LJ 760) (FB) was partly overruled in the Full Bench decision consisting of five Judges of this Court in *Kalapnath Singh's case* (1954 All LJ 749) (supra) and it was held that an order under Section 149, C. P. C. could be passed at the time of refusing to allow to sue as a pauper under Order XXXIII, Rule 7, C. P. C. It was, however, further held that an order under Section 149, C. P. C, could not be passed after an application under Order XXXIII had been finally disposed of. It was observed as follows:--

'There can be no doubt that an order under Section 149 can only be passed when there is a document still before the Court, and once the Court has lost seisin of the case and there is no document before it, it cannot grant time to pay the court-fee

under that section.'

11. In the next Full Bench case of Devendra Kumar Bharti v. M. Raghuraj Bharti (1954 All LJ 752) (supra) also it was held that where a court has finally disposed of an application for leave to sue in forma pauperis so that it has ceased to have seisin of the case, it cannot, by a subsequent order, grant time to the plaintiff to pay the court-fees.

12. In the Full Bench case of Ram Nath (Civil Revn. No. 1005 of 1968, D/-4-9-1970) (All) (supra) the question to be considered was as to whether a composite order passed by a court under Order XXXIII, Rule 7, C. P. C refusing to grant permission to the plaintiff to sue in forma pauperis but at the same time allowing him some time to pay the court-fee on the plaint becomes final as soon as it is signed and dated, or whether it should be deemed that the intention of the court was to keep the proceedings under Order XXXIII, Rule 7, pending and, therefore, they continue as pending. The question arose as to, whether a second application under Order XXXIII, Rule 1, C. P. C. was maintainable in view of Order XXXIII, Rule 15, C. P. C. when the earlier application under Order XXXIII, Rule 7, C. P. C. had been finally disposed of. The Full Bench held that where a composite order under Order XXXIII, Rule 7, C. P. C, refusing to grant permission to the applicant to sue as a pauper and under Section 149, C. P. C. allowing him some time to pay the court-fee on the plaint is passed, it does not have the effect of keeping the proceedings under Order XXXIII, Rule 7, C. P. C. pending and that such proceedings come to an end as soon as the composite order is signed and dated, The Full Bench further held:

'However, the jurisdiction exercised under Section 149, C. P. C. at a time when it could be exercised will have its effect but not so as to render the closed proceedings under Order 33, Rule 7, C. P. C. as pending proceedings under that provision of law.'

13. From the above Full Bench decision it is clear that the principle which was settled by this Court was that once the proceedings under Order XXXIII, Rule 7, C. P. C. had closed the court had ceased to have seisin over the matter and thereafter the said proceedings cannot be deemed to be pending. This Court,

therefore, took the view that the court had jurisdiction to, grant time for payment of court-fee under Section 149, Civil P. C., only at the time of dismissing the pauper application. None of the above cases had considered the question involved in the present appeal as to whether the court had the further jurisdiction to extend the time or not after the expiry of the time granted under Section 149, C. P. C. In Ram Nath's case (Civil Revn. No. 1005 of 1968, D/- 4-9-1970) (All) (supra) the Full Bench of this Court had further observed as follows:

'Further proceedings in pursuance of the order of the court requiring the plaintiff to pay the court-fees are not proceedings under Rule 7 of Order 33, C. P. C., but are the natural consequence of the order of the court passed under Section 149, C. P. C. at a stage when the court was still seized of the case, had the document (proposed plaint) before it, and could validly exercise jurisdiction under Section 149, C. P.C.'

14. If once the power under Section 149, C. P. C. is exercised by a court I do not see any reason why under the same section the court cannot grant a further extension of time as and when found necessary. If at the time of dismissing the pauper application the court has power under Section 149, C. P. C. it has the same power even after the dismissal of the pauper application. The jurisdiction which the court will exercise while granting further extension of time would be a jurisdiction conferred upon it under Section 149, C. P. C. and the fact as to whether the proceedings under Order XXXIII, Rule 7 came to an end does not in any manner affect the further jurisdiction of the court which it can exercise under Section 149, C. P. C,

15. I am unable to see as to why operation of Section 149, C. P. C. should be limited to the time when the pauper application is dismissed. If, as observed by the Privy Council In the case of Stuart Skinner (1879 ILR 2 All 241) (supra) the application for permission to sue in forma pauperis consists of two parts, namely, one relating to the prayer for being allowed to sue as a pauper and the other part relating to the essential ingredients constituting the plaint the fact that the pauper application is dismissed does not disentitle the court to have seisin of the matter in regard to the other part of the plaint. In my view, therefore, the court has

jurisdiction to extend the time initially granted while dismissing the pauper application.

16. This principle has now been accepted by the Parliament also by adding Order XXXIII, Rule 15-A by the Civil P. C. Amendment Act, 1976, wherein it has been clearly laid down that the court has the power to grant time to the applicant to pay the requisite court-fee from time to time and upon such payment the suit shall be deemed to have been instituted on the date on which the application for permission to sue as an indigent person was presented. In view of the above I find that the view taken by the lower appellate court is wholly erroneous in law. The court had the jurisdiction to grant further 15 days' time for payment of the court-fee. In this view of the matter the suit would not be barred by time.

17. The lower appellate court has decided the appeal only on the ground that the suit was barred by time. In the circumstances I allow the appeal with costs, set aside the judgment of the 1st Additional District Judge, Allahabad, dated 13th September 1967 and remand the case to the lower appellate court to readmit the appeal to its original number and proceed to determine the same on merits in accordance with law.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com