Krishna Bhatta Vs. Ananta Bhatta

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Court : Kerala

Decided On : Sep-22-1960

Reported in : AIR1961Ker309

Judge : M. Madhavan Nair, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 44, Rules 1 and 2

Appeal No. : C.M.P. No. 1431 of 1957

Appellant : Krishna Bhatta

Respondent : Ananta Bhatta

Advocate for Def. : T.S. Venkiteswara Iyer and; R.C. Plappilly, Advs. for 11th Respondents

Advocate for Pet/Ap. : C.K. Viswanatha Iyer, Adv.;Govt. Pleader

Disposition : Application allowed

Judgement :
ORDER

M. Madhavan Nair, J.

1. This is an application by the plaintiff, who had been allowed to institute the suit in forma pauperis, for further leave to appeal as pauper, from the decree

dismissing his suit. Notice on this application was ordered by a learned Judge of this court on 23-6-1959; and the respondent and the Government Pleader have entered appearance in response thereto. The question now is whether, at this stage, the respondent is to be allowed to contend that the decree is not contrary to law or to some usage having the force of law and is not otherwise erroneous or unjust and therefore the application should be refused.

2. Order 44, Rule 1, C. P. C. provides :

'(1) Any person, entitled to prefer an appeal who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as a pauper, subject in all matters, including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable.

(2) The appellate court after fixing a day for hearing the applicant or his pleader and hearing him accordingly if he appears on that day and upon a perusal of the application and of the judge merit and decree appealed from, shall reject the application, unless, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.'

The Sub-rule (2) was newly introduced by Act LXVI of 1956. Formerly in its place there was a proviso which reads as follows :

'Provided that the Court shall reject the application unless, upon a perusal; thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust'.

A comparison of the old and new provisions shows that the only change introduced by the amendment is that the court, before rejecting the application for leave, should also hear the applicant or his pleader if he appears on the day fixed for hearing him. In other respects, the old and new provisions are identical.

3. Sub-clause (2) makes it the duty of the court to peruse the application and the judgment and decree appealed from and to hear the applicant or his pleader if he

appears on the day fixed for hearing him, and to reject the application if it does not see reason to think that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. In other words, unless the court, on a perusal of the application and of the judgment and decree appealed from and hearing the applicant or his pleader, sees reason to think that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust, it is bound to reject the application.

So the very issuance of notice after hearing the applicant's counsel tantamounts to a record that the conditions requisite for the issue of notice were present in the instant case, namely, that the court saw reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. It is not open to the court to reconsider the matter at ,1 subsequent stage and say that the decree is correct and just and therefore no notice ought to have been issued on the application or that the application should have been rejected at the first stage.

It is significant that at the stage of ordering notice the court is only to peruse the application and the judgment and decree appealed from and to near the applicant or his pleader. Even the rest of the record of the case ought not to be looked into; nor is the respondent to be heard on the matter. The expression 'after fixing a day for tearing the applicant or his pleader and hearing him accordingly if he appears on that day' shows that only the applicant or his pleader is to be heard. In Order XVIII, the expression used is 'hearing of the suit'; but the expression in Order XLIV. Rule 1. is not liearing the application', but 'hearing the applicant or his pleader'. The particularity of the expression here indicates that the respondent has no locus standi to oppose the application when the same is being considered under Rule 1 of Order XLIV, C. P. C. Even if the respondent is present, he is not to be called upon to show that the decree is correct and just.

4. The next stage in the consideration of the application, is the enquiry into the paupersim ofthe applicant. At this stage, an 'enquiry' is contemplated; an enquiry always connotes an opportunity being given for both sides to represent their views and, to offer their evidence. For this purpose, a notice of the application has to be

issued to the respondent; and that is provided for in Appendix G, Form No. 11. It is significant that this Form calls upon the respondent 'to show cause why the applicant should not be allowed to appeal as a pauper''. It is only a consideration of the status of the applicant that is contemplated in this notice. The expression in the notice is not 'to show cause why the application should not be allowed' but only 'to show cause why the applicant should not be allowed to appeal as a pauper'.

5. Further, this enquiry into pauperism of the applicant is not to be had in the case of every application for leave to appeal as a pauper. The proviso to Rule 2 of Order XLIV enacts :

'If the applicant was allowed to sue or appeal as a pauper in the court from whose decree the appeal is preferred, no further inquiry in respect of his pauperism shall be necessary if the appellate court (after notice to the Government Header) sees no cause to direct such enquiry'.

It follows that in several cases of applications for leave to appeal, there need not be any inquiry into the pauperism of the applicant. If no enquiry is to be held, no notice need be issued to the respondent before granting leave to appeal as pauper. If respondent is not entitled to notice of the proceedings, it is clear that he is not entitled to oppose the application either. If in cases where notice has been given, to the respondent he is allowed to challenge the application on the merits of the decree, it will bring about an anomaly that in one set of cases the respondent has got a right to be heard before leave is granted, and in the other set he has no such right, the difference depending on the mere fact that the applicant has or has not been previously found to be a pauper.

6. It is also pertinent to notice that Order XLIV does not expressly provide for a notice to the respondent on an application for leave to appeal as a pauper, A notice is only implied in the expression 'inquiry' in Rule 2. No argument can therefore be built on the expressions in Form No. 11 of Appendix G to the Code. The Form can only refer to cases where notice is given with reference to the sections or the rules in the Code, and cannot itself be allowed to control or extend the provisions in those sections and Rules.

7. I am aware of the fact that the matter has been held contrarywise in the Full Bench rulings reported in Tilak Mahto v. Akhil Kishore AIR 1931 Patna 183, Mt. Powdhari y. Mt. Ram Sanwari, AIR 1934 All 1004, Habshi Mian Ilmas Khwaja Sara v. Nawab Mehcli Hasan Khan, AIR 1937 Oudh 222 and also in the Single Judge's ruling in Suryanarayanamurty v. Nagachendramowli, AIR 1936 Mad 842. With great respect to the learned Judges who gave those rulings, I beg to differ from the dicta expressed in them and prefer to follow the views of the Division Benches reported in Somasundaram Chettiar v. ArunachalamChettiar, AIR 1932 Mad 523 and Panchu Bala Dasi v. Nikhil Rajan Pal, AIR 1953 Cal 530.

I am further fortified in my view by the fact that, even when the Order XLIV, C. P. C. was amended by the Act LXVI of 1956, the Legislature has not accepted the views of the above-said Full Benches and incorporated their dicta in the enunciation of Sub-rule (2) of Rule 1 of Order XLIV in the place of the old proviso to that Rule. I hold that the respondent, appearing in response to a notice given on an application for leave to appeal as a pauper is not entitled to contend that the decree is correct and just and therefore the applicant should be refused leave to appeal as a pauper, but can contest only the pauperism of the applicant.

8. The applicant in this case had been permitted to institute the suit as a pauper; and the Government Pleader has reported that he is still possessed of no means to pay the court-fee for the appeal. The respondent has nothing to say on the pauperism of the applicant. In the circumstances, the application is allowed and the applicant is granted leave to appeal as a pauper.