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Gopalakrishna Pillai Vs. Narayanan

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Court : Kerala

Decided On : Jul-01-1958

Reported in : AIR1959Ker406

Judge : Varadaraja Iyengar, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 149 and 151 - Order 7, Rules 11 and 13; Malabar Law

Appeal No. : Civil Revn. Petn. No. 176 of 1956 (E)

Appellant : Gopalakrishna Pillai

Respondent : Narayanan

Advocate for Def. : P.N. Sankaranarayana Pillai and; P.S. Venkiteswara Iyer, Advs.

Advocate for Pet/Ap. : V.G. Sanjaranarayana Pillai, Adv.

Disposition : Revision dismissed

Judgement :
ORDER

Varadaraja Iyengar, J.

1. This revision is by the plaintiffs 1 to 3 against an order of the court below refusing to restore their plaint which had been rejected for default of payment of deficit court-fees.

2. The plaintiffs 1 to 3 were junior members in a Nair sub-tarwad consisting of themselves and defendants 1 to 3. They laid this suit on 29th March 1125 in forma pauperis (i) for declaration that a deed of partition of 1107 and executed during their minority by the adult members was not binding on the sub-tarwad, (ii) for setting aside various alienations executed by the adult members in favour of defendants 4 to 10 on the strength of the partition deed, and (iii) to recover the properties on behalf of the sub-tarwad with mesne profits. During the course of the suit, the plaintiffs were able to compromise with most of the alienees, hut this brought on a petition by the 4th defendant dated 9-10-1953 to dispauper them.

The plainiffs agreed to pay the court-fees but by 23-11-1953 they paid only Rs. 25 out of the total of Rs. 240 due. The court therefore dismissed the suit on 7-12-1953. On 6-1-1954 the plaintiffs filed their application herein to restore the suit on payment of Rs. 55/- and seeking to reduce the plaint valuation for the purpose. The court however directed payment in full and en default of the plaintiffs to comply dismissed the application to restore on 23-9-1954. Subsequently the plaintiffs paid the balance of Rs. 160 and got the restoration application of 6-1-1954 restored. On the application being again taken up, the 4th defendant objected to its maintainability. This objection the court below upheld and hence this revision.

3. In arriving at its decision as above, the court below proceeded on the basis that the dismissal of the suit herein on 7-12-1953 amounted to the rejection of plaint under Order 7, Rule 11 (c), C.P.C. and consequently the application for restoration filed by the plaintiff could be allowed if at all, only in the exercise of the inherent jurisdiction of the court and that again, only when a fresh plaint under p. 7, Rule 13 C.P.C. would not be barred by limitation if instituted on the dale of the application. And as the plaintiffs application of 6-1-1954 did not satisfy this latter test the court below felt itself bound to reject it. Learned counsel for the plaintiffs complains that the test laid down by the court below as above is too narrow and that in any event

it has not been properly applied in the case.

4. Now the question whether a plaint rejected under Order 7, Rule 11(c) C.P.C. can be restored to file and whether it could be so done as to deprive the defendant of his right to plead limitation has been the subject of acute controversy in the courts. For example, the Patna High Court has consistently taken this view that Section 151 cannot at all apply in the matter. Thus in Rameshvardhari Singh v. Sadhu Saran, AIR 1923 Pat 354, Das, C.J., with whom Kulwant Sahay, J., agreed observed:

'The order rejecting the plaint under Order 7, Rule 11(c) of the Code, operated as a decree, and Order 20, Rule 3 provides:

That a judgment once signed shall not afterwards be altered or added to save as provided by Section 152 or on review.' There can be no doubt, in my opinion, that once an order of the Court is perfected, there is absolutely no power in that Court under its inherent jurisdiction either to alter or add to that order save as provided by Section 152 or on review.'

The doubt was raised subsequently in Bibi Aliqunnissa v. Md. Shafique, AIR 1950 Pat 358, whether the rule as so laid down should be extended in a case of second appeal which had been dismissed for default of payment of court-fee due on the plaint and the memorandum of appeal in the lower appellate court and the view was? expressed that AIR 1923 Pat 354 was only a case where a plaint was dismissed for default In paying the deficit court-fee on the plaint itself. However in the later Full Bench case of Radhanath v. Bacha Lal, (S) AIR 1955 Pat 370, the position was made quite clear that an application under Section 151 C.P.C. was not competent even in the case contemplated by AIR 1950 Pad 358. The learned Judges of the Full Bench held that the proper remedy of the plaintiff was by way of an application for review under Order 47, Rule 1 C.P.C. on payment of proper court-fee on such application. this view has been affirmed in the latest case in that Court in Ram Das v. Ganga Das, AIR 1956 Pat 20.

5. The Allahabad High Court has taken a more liberal view. Thus in Bachan Singh v. Dasarath Singh, AIR 1935 All 985 it was held:

'That the court could treat such restoration application as a fresh plaint under Order 7, Rule 19 and it can allow the old court-fee paid on the rejected plaint to be computed towards the court-fee on the fresh plaint, under Section 149, and under is inherent powers derived under Section 151, C. P. C.'

In that case the suit would not have been barred if it had been filed on the date of the restoration application. In the latest case in that court Hubraj Singh v. Mt. Rama Dasi Kuer, AIR 1954 All 719, the entire case-law was reviewed and the learned Judges held that the Court had inherent power to restore the suit if good cause was shown. No definite opinion was expressed by the learned Judges as to whether such a power could be exercised even if a fresh plaint that might be filed under Order 7, Rule 13 would be barred by limitation. There was no question of such bar in that case.

However they repelled the argument that in spite of the restoration order, the suit must be deemed to have been instituted on the date of the application and not on the original date of institution of the suit and relied for the purpose on Section 149 C.P.C. The question whether even if the plaint is barred on the date of the restoration application inherent jurisdiction could be so exercised would seem to nave come up for consideration in the Allahabad High Court itself in an unreported case of 1937 referred to in AIR 1954 All 719 just cited and decided by Sulaiman, C.J., and Harries, J. The learned Judges found no difficulty in the exercise of inherent jurisdiction even in such case.

6. The Calcutta and Hyderabad High Courts were however quite clear that the jurisdiction under Section 151 should not be exercised so as to deprive a defendant of the right obtained by him by virtue of the law of limitation. See Saratchandra v. Mrityunjay. AIR 1935 Cal 336(2) and Mahomed Yunus v. Sugha Begum, (S) AIR 1955 Hyd 156. The principle was emphasised in these cases that

'in exercising its powers under that section, the Court has to keep in view not only the interest of the applicant but also that of the other party who may be affected by this order.'

7. Reference may also be made to a case in the Travancore High Court, John v. Kuriyan, 26 Trav LJ 932, which held that the inherent jurisdiction could be invoked on the ground that application for review could not be maintained. The learned Judge observed:

'The inherent power vested in a court can be refused to be exercised only when there is any other effective remedy given to the party aggrieved, under the provisions of the Code. The effect of interpreting Order 45, Rule 1, C.P.C. (corresponding to Order 47, Rule 1 Indian) in the manner propounded by the Privy Council in Chhaju Ram v. Neki, AIR 1922 PC 112 will lead to the result that a plaintiff whose plaint is rejected for failure to pay the deficit court-fee therein cannot successfully have the order or dismissal set aside by way or review, except probably in cases where his failure to pay such deficit court-fee was due to a mistake or error committed by him in making the valuation for his suit. In other cases, he has no right to come by way of review, on the strength of the Privy Council ruling. It cannot be that the Code renders no remedy to aggrieved parties in such cases.'

8. No authority of this Court was brought to my notice. But it seems to me that without prejudice to either party and for the furtherance of substantial justice, the principle accepted by the Allahabad, Calcutta and Hyderabad High Courts can well be adopted. That is to say, where the plaint is rejected under Order 7, Rule 11 and the plaintiff subsequently files an application under Section 151 C.P.C. with a deposit of the deficit court-fee, for restoration of the plaint, there is nothing to debar the court from treating the application as a fresh plaint under Order 7. Rule 13(sic) the old court-fee paid on the rejected plaint can be computed' towards the court-fee on the fresh plaint under Section 149 C.P.C. This is practically the rule which the court below thought might properly be applied to this case but in the actual circumstances found it not possible to do so.

9. In the plaint, the ages of the 1st plaintiff and 2nd plaintiff were put down as 20 and 19 respectively and 3rd plaintiff was shown, to be a minor, so by the time the restoration application was filed, the 1st plaintiff and 2nd plaintiff were more than 21 years old and a suit by them would be barred. A suit without them would also

be barred by the principle of the rule that where no suit was instituted in time by an available member who was sui juris, the loss of the cause of action is the loss of the entire tarwad and no subsequent suit could be brought by anybody else. See Narayanan Potti v. Sekharan. 1950 TCLR 467: (AIR 1950 Trav-Co. 57) (FB) and Radhakrishna Menon v. Chandrasekhara Menon, 1955 Ker LT 681: AIR 1956 Trav-Co 78). There was therefore nothing improper in the dismissal by the court below of the restoration application filed by the plaintiffs herein.

Learned counsel attempted to say that the negligence or laches of the first two plaintiffs in not applying earlier, might not bind the 3rd plaintiff and as he had not completed 21 on 'he date of the application, restoration should have been order-ed. But no such argument was raised in the court below and even otherwise it is not enough to get over 'one opportunity rule' above stated. See Krishnan v. Geevarghese, 30 Trav LJ 872, where it was laid down that if in the absence of fraud and collusion the junior members failed to take advantage of the opportunity they should be deemed to have raised the objection and failed.

10. The revision is therefore groundless andit is dismissed with costs.

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