

Mohanan Vs. Nalinakshan

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Court : Kerala

Decided On : Aug-14-2003

Reported in : 2003(3)KLT532

Judge : K.S. Radhakrishnan, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 2(2), 96 and 151 - Order 7, Rule 11 - Order 9, Rules 2, 3 and 4

Appeal No. : C.R.P. No. 2240 of 2001

Appellant : Mohanan

Respondent : Nalinakshan

Advocate for Def. : Sheji P. Abraham, Adv.

Advocate for Pet/Ap. : R. Surendran and; K. Lakshminarayanan, Advs.

Disposition : Revision petition allowed

Judgement :

ORDER

K.S. Radhakrishnan, J.

1. This revision is directed against the order passed in I.A. No. 2352 of 2000 in O.S. No. 116 of 1999 on the file of the Munsiff's Court, Thalassery which was

confirmed in C.M.A. No. 572 of 2001 on the file of the District Court, Thalassery.

2. I am sorry to note that both the Munsiff and the District Judge of Thalassery have decided the issue placed before them placing reliance on a decision of a learned single Judge of this Court in Varghese v. Devi Academy (1991 (1) KLT 440) which stood overruled by a Division Bench of this Court in Mable v. Dolores (2001 (2) KLT 612). The Division Bench rendered the judgment on 3.11.2000. Learned Munsiff passed the order on 10.4.2001 and the District Judge delivered the judgment on 22.6.2001. Judicial officers failed to take note of the fact that the decision they applied stood overruled by the Division Bench nor the counsel appearing before them pointed out that vital fact before the judicial officers. Litigants are put to considerable prejudice due to lack of upto date knowledge of case law on the point.

3. I may also refer to the facts and the legal issue involved in this case. O.S. No. 1 16 of 1999 was a suit instituted by the respondent herein for realisation of an amount of Rs. 61,361/-. Claim was made on the basis of dishonoured cheque alleged to have been issued by the defendant. Defendant filed written statement denying execution of the cheque and his liability. Learned Munsiff was pleased to frame issues and the suit was posted for payment of balance court fee on 27.11.2000. Balance court fee was not paid and no application for extension of time was also made. Hence learned Munsiff rejected the plaint 27.11.2000. Plaintiff then filed I.A. No. 2352 of 2000 for restoration of the suit under Order IX Rule 4 read with Section 151 of the Code of Civil Procedure. Defendant resisted the petition relying on the decision of a Division Bench of this Court in Mathunny Panicker v. Mariamma Kunjamma (1977 KLT 927). Objection raised by the defendant was accepted by the learned Munsiff and the Munsiff passed the following order:

'The defendant resists the application contending that a plaint which rejected for non payment of court fee cannot be restored. His contention is based on the ruling reported in 1977 KLT927. That ruling is not applicable to this case. What was ruled in that decision of the Division Bench was that suit rejected for non payment of sufficient court fee cannot be restored on an application under Order 9, Rule 9

C.P.C. Hence the application is under Section 151 C.P.C. and not an application under Order IX, Rule 3. In the ruling reported in 1999 (1) KLJ 320, it clearly by stated that restoration application under Section 151 CPC is valuable to restore the suit rejected for non payment of court fee. Applying that ruling, the application is allowed and the suit is restored by invoking inherent power under Section 151 C.P.C.'.

Matter was taken up in appeal by the defendant. Learned District Judge also examined the scope of the decision in Mathunny Panicker's case, supra (1977 KLT 927) and the decision in Varghese's case (1999 (1) KLT 440) and sustained the order of the learned Munsiff and held as follows:

'In case of rejection of plaint by reason of non payment of balance court fee subsequently ordered to be paid, if strictly the matter is construed which would definitely disclose that the remedy available under Section 151 CPC for restoration as decided in 1999(1) KLT 440 alone is available which appears to be more easy, more speedy, less cumbersome and more advantageous to both parties'.

Learned Judge also placed reliance on Section 4A of the Court Fees Act by Act 6 of 1991 and held that due to the said provision it cannot be said that Civil Procedure Code renders no remedies to the aggrieved party by invoking the inherent jurisdiction when the case was restored. By virtue of Section 4A it cannot be said that the Code of Civil Procedure renders no remedy by invoking inherent jurisdiction when the case was restored by which it was caused any prejudice. I find it difficult to sustain the reasoning of the learned Munsiff as well as the District Judge. This is a case where the plaint was rejected for non-payment of court fee. Decree passed under Order VII Rule 11(c) is a decree under Section 2(2) of the Code of Civil Procedure. Hence appealable under Section 96 of the Code. Plaintiff without filing an appeal, as already indicated, filed an application under Order IX Rule 4 read with Section 151 CPC. Order IX, Rule 4 would apply only when suit is dismissed under Rule 2 or Rule 3 of Order IX C.P.C. in the event of which plaintiff may apply for an order to set the dismissal aside. However, he has to satisfy the court that there was sufficient cause for such failure as is referred to in the rule. The Court then make an order setting aside the dismissal and appoint a day for

proceeding with the suit. I am of the view that in the instant case the application filed under Order IX Rule 4 by the plaintiff was not maintainable since plaint was rejected under Order VII Rule 11 CPC for non payment of balance court fee.

4. The further question to be considered is whether such an application is maintainable under Section 151 C.P.C. Learned Single Judge of this Court in Varghese's case, supra (1999 (1) KLT 440) held that Section 151 is applicable, but the said decision was overruled by the Division Bench in Mable's case, supra. I may also indicate that when the Division Bench rendered the decision on 3.11.2000 in Mable's case, earlier decision of the Division Bench in Mathunny Panicker v. Mariamma Kunjamma (1977 KLT 927) was not brought to the notice of the Division Bench. In Mathunny Panicker's case after holding that Order IX Rule 9 has no application in a case where the plaint has been rejected for non payment of court fee under Order VII Rule 11 C.P.C., held as follows:

'Hence while setting aside the order sought to be revised we remit the matter to the Court below with a direction that the petition I.A. No. 1745 of 1975 should be treated a petition for review of the order dated 18.11.1975 rejecting the plaint for non payment of court fee. The above direction is subject to the condition that the respondent herein - the plaintiff - should remit before the court below the deficit court fee payable on the said application on its being treated as a review application, within three weeks of the date of receipt of the records by the Court below'.

Evidently review petition can be filed only under Section 151 C.P.C. Although it is possible to hold that the learned Munsiff while reviewing I.A. No. 2352 of 2000 in fact exercised the powers under Section 151, I am of the view the direction given by the earlier Division Bench in Mathunny Panicker's case is more practical and less expensive for a litigant. Filing of review petition is less cumbersome and advantageous to the litigant. But judicial discipline compels me to follow the later decision of the Division Bench in Mable's case, supra. In such circumstances, I am inclined to set aside the order passed by the Courts below since those orders were passed placing reliance on a decision of the learned Single Judge of this Court which was overruled by a Division Bench in Mable 's case. Revision Petition is

accordingly allowed and the order passed by the learned Munsiff and the appellate order would stand set aside.

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