Harendra Kumar Basu Vs. Contai Bus Syndicate Ltd. and ors.

Harendra Kumar Basu Vs. Contai Bus Syndicate Ltd. and ors.

SooperKanoon Citation : sooperkanoon.com/855842

Court : Kolkata

Decided On : Jun-20-1957

Reported in : AIR1958Cal182

Judge : Lahiri and ;B.K. Guha, JJ.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 33, Rules 7, 7(2), 7(3) and 15

Appeal No. : Civil Revn. Case No. 2791 of 1956

Appellant : Harendra Kumar Basu

Respondent : Contai Bus Syndicate Ltd. and ors.

Advocate for Def. : S.C. Janah and ;Arun Kumar Janah, Advs.

Advocate for Pet/Ap. : Basanta Kumar Panda, Adv.

Judgement :

Lahiri, J.

1. This is a Rule obtained by the applicant in, a proceeding for permission to sue in forma pauperis. The facts which are undisputed are these :

2. On the 24th September, 1954, the petitioner filed an application under Order 33, Rule 1 of the Civil Procedure Code which gave rise to Judicial Miscellaneous Case No. 83 of 1954 of the First Court of the Subordinate Judge, Midnapore. Notices of

the aforesaid application were Served upon the Government as well as upon the opposite parties. The opposite parties entered appearance on the 26th March, 1955 and the Government Pleader entered appearance on the 16th, of July 1955. On the 9th July, 1955, the applicant filed a list of witnesses and upon that the Court issued summonses on the applicant's witnesses and recorded an order to the effect that non-service of summons would not be a ground of further adjournment and for non-production of documents. The opposite party No. 1 also filed a petition for issuing summonses upon its witnesses and that prayer was allowed on the 10th September, 1955 and the Court again recorded an order that non-service of summons would not be a ground for further adjournment- The proceeding was fixed for peremptory hearing on the 17th September, 1955 on which date both the opposite party and the State filed hajiras. The petitioner, however, filed an application for shifting the date of peremptory hearing. Upon that prayer, the Court recorded the following order:

'Petitioner to pay adjournment cost of Rs. 8/- each to the two sets of contesting O. Ps. C. P. (condition precedent) to hearing. The case be adjourned for peremptory hearing to 19-11-1955.' On the 12th October, 1955, the applicant filed a fresh list of witnesses and upon that list the Court directed summonses to be issued and to be served by the party at his own risk. On the 19th November, 1955, the petitioner again filed an application for adjournment and upon this application, the Court passed the following order: 'This is the second prayer of its kind. Petitioner has not taken the steps for which adjournment was taken on the previous occasion. I shall be prepared to consider the prayer provided the said steps are taken and also the cost awarded is paid. Learned pleader for petitioner states he is not in a position to comply with the above order.

ORDER

The application be dismissed for default with costs.'

After the dismissal of the application filed by the petitioner on the 24th September, 1954, the petitioner filed another application on the 12th November, 1955. This application gave rise to Miscellaneous Case No. 96 of 1955 of the Court of the 1st Subordinate Judge, Midnapore. The learned Subordinate Judge has dismissed

this application on the ground that in view of the dismissal of the previous application on the 19th November, 1955, a fresh application was barred under the provisions of Order 33, Rule 15 of the Code of Civil Procedure.

3. Against this order the petitioner has obtained this Rule.

4. Mr. Panda appearing in support of the Rule has argued that an order 'refusing to allow' within the meaning of Order 33, Rule 15 must be a refusal to allow within the meaning of Order

33. Rule 7

(3) and a refusal to allow within the meaning of Order 33, Rule 7

(3) must be a refusal to allow on the merits after recording all the evidence that may be adduced by the parties. Now an application presented under Order 33, Rule 3 may be summarily 'rejected'' on any of the grounds mentioned in Rule 5 and if the Court does not summarily reject it under Rule 5 it may fix a day for receiving evidence in proof of pauperism after giving notice to the opposite party and the Government Pleader under Rule

6. Then Rule 7 provides that after making a memorandum of the substance of the evidence that may be adduced by the parties and hearing any argument that may be advanced on the question, whether the applicant is subject to any of the prohibitions in Rule 5 the Court shall either 'allow or refuse to allow' the applicant to sue as a pauper, The bar of Rule 15 is attracted when the Court has 'refused to allow' the application. The language of Rule 15 is the same as in Rule 7

(3) and is different from the language used in Rule 5 where the word used is 'rejected'. From this it is clear that the bar of Rule 15 applies only when the Court has refused to allow an application under Rule 7 (3). The question however that requires consideration in this case is whether the dismissal for default of the previous application attracts the bar of Rule

15. There can be no question that the enquiry in the present case reached the stage of Rule

7. Notices had been served on the opposite party and the Government Pleader both of whom had entered appearance and filed objections. The Court also issued summons to witnesses with a definite warning that no adjournment would be granted on the ground of non-service of summons. The application was peremptorily fixed for 17-9-1955 for recording evidence and on that date it was conditionally adjourned to 19-11-1955 on the prayer of the petitioner. The petitioner failed to fulfil the conditions with the result that the application was dismissed for default on 19-11-1955 on which date again the petitioner filed another application for adjournment. The order of dismissal that was passed on 19-11-1955 must be deemed to have taken effect from 17-9-1955 on account of the failure of the petitioner to carry out the conditions upon which adjournment was granted on that date. The order of dismissal in the present case appears to me to be equivalent to an order of refusal to allow within the meaning of Rule 7 (3). It is true that the Court did not examine witnesses as required by Rule 7

(1) and did not hear argument as required by Rule 7 (2), but that was because no witnesses were produced by the petitioner in spite of the definite warning of the Court and no argument was desired to be offered by the petitioner's pleader. The non-examination of witnesses and the omission to hear arguments, did not, in the circumstances of the present case prevent the Court from making an order of refusal to allow the application under Rule 7 (3). The expressions 'if any' in Sub-rule

(1) and 'may desire to offer' in Sub-rule

(2) of Rule 7 point to the conclusion that the Court has jurisdiction to make an order under Sub-rule

(3) of that rule even if no witnesses are produced and no argument is desired to be offered. For this reason I am unable to agree with the view taken by the Nagpur High Court in the case of Mst Chandrabhagabai v. Ramchandra, AIR 1947 Nag 14 (A) and other cases cited in that judgment to the effect that the bar of Rule 15 applies, only to a case where the application has been refused under Rule 7

(3) after an enquiry into merits. So far as this Court is concerned it was held by Suhrawardy and Duval JJ. in the case of Khundkar Ali Afzal v. Purna Chandra : AIR1924 Cal1039 , that if an application is dismissed for default after the enquiry has reached the stage of Rule 7, a fresh application would be barred under Rule

15. That is precisely the position in the instant case. In the case of Rajendra Nath v. Tushtamayee Dasee : AIR1933 Cal549 . Jack and Mitter JJ. held that if an application be dismissed for default for non-payment of process fees for service, of notice under Rule 6 the bar of Rule 15 will not apply because the enquiry did not reach the stage of Rule 7 and the case of Khundkar Ali Afzal (B), was distinguished on that ground. In the case of Atul Chandra v. Peary Mohon, 20 Cal WN 669: (AIR 1917 Cal

696) (D), cited by Mr. Janah, Holmwood and Mullick JJ. held that where an application had been refused under Rule 5 after recording evidence on both sides the bar of Rule 15 would apply. There are certain observations in the judgment which lend support to the contention that the bar of Rule 15 applies both to the rejection of an application under Rule 5 and to its refusal under Rule

7. But an examination of the facts of that case will show that the refusal in that case was really a refusal under Rule 7 because the order of refusal was passed after recording of evidence which is possible only under Rule

7. Sub-rule

(2) of Rule 7 indicates that the enquiry under Rule 7 must be on the question whether the applicant is subject to any of the prohibitions specified in Rule

5. The only difference between Rules 5 and 7 is that whereas an order of rejection under Rule 5 can be passed before recording evidence, an order under Rule 7 may be passed after recording evidence, if any, adduced by the parties. Atul Chandra's case (D), therefore is no authority for the proposition that Rule 15 applies to the rejection of an application under Rule 5.

5. On a careful consideration of all the authorities cited at the Bar I respectfully agree with the decision in the case of Khundkar Ali Afzal (B), the facts of which

substantially tally with the facts of the present case. Mr. Panda tried to induce us to hold that, that case was wrongly decided and he asked us to refer the present case to a Full Bench so that the view of this Court might be brought into line with the views of the Nagpur, Allahabad, Patna and Madras High Courts which were followed in AIR 1947 Nag 14 (A). I have already given the reasons why I cannot accept the view of the Nagpur High Court as correct.

6. The result is that the order passed by the subordinate Judge must be upheld and this Rule discharged without costs.

B.K. Guha, J.

7. I agree.