

Jogendra Narayan Ray Vs. Durga Charan Guha Thakurta

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Court : Kolkata

Decided On : Nov-25-1918

Reported in : AIR1919Cal385,(1919)ILR46Cal651

Judge : Chatterjea and ;Newbould, JJ.

Appellant : Jogendra Narayan Ray

Respondent : Durga Charan Guha Thakurta

Judgement :

Chatterjea and Newbould, JJ.

1. This is a Rule calling upon the opposite party to show cause why an order of the Subordinate Judge of Barisal dismissing an application for leave to sue as a pauper should not be set aside.

2. The petitioner applied in the Court below for leave to sue in forma pauperis for recovery of certain debattar property. The learned Subordinate Judge found that he was a pauper, but dismissed the application on the ground that upon the evidence adduced by the plaintiff, the suit was barred by limitation. The Court below says that the evidence adduced by the petitioner shows that since 1286 B.S. neither the petitioner nor his father has ever been in possession of the property. No such statement was made by the plaintiff himself either in his plaint or in his examination before the Court, and the learned Subordinate Judge, therefore,

has evidently come to that conclusion upon certain statements made by some witnesses (on behalf of the plaintiff petitioner) who had been summoned for a different purpose; namely, for the purpose of proving that the plaintiff was a pauper.

3. The question is whether the Court below was right in taking evidence on the point in an enquiry into the pauperism of the petitioner.

4. Order XXXIII of the Civil Procedure Code lays down the procedure for hearing an application for leave to sue as a pauper. Rule 3 lays down what the contents of the application should be. Rule 4 provides that where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant or his agent, when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant. Rule 5 lays down the grounds upon which the Court shall reject an application for permission to sue as a pauper, and one claim. If the application is to be decided merely upon a consideration of the statements made in the plaint, it would be wholly unnecessary to examine the applicant on the merits of his claim.

5. We think, therefore, that the Court may not only consider the statements made in the plaint but also the statements made in his examination by the applicant before the Court, in determining whether his allegations do not show a cause of action as laid down in Clause (d) of Rule 5 of Order XXXIII. But we think the Court cannot examine other witnesses for deciding the question of limitation or any question other than the pauperism of the applicant.

6. Turning to the decided cases on the point we find that in the case of Gunga Dass Adhikaree (1870) 14 W.R. 281 where the Court below had disallowed the application on the ground that a will under which the applicant claimed had already been construed by the High Court in a previous suit against him, and that he had therefore no rights to sue, this Court (L.S. Jackson and D.N. Mitter JJ.) held that it was competent to the Court to take into consideration the construction of the will on which the applicant relied. The learned Judges observed that where the grounds stated in Section 304 appear, the Court is bound to refuse an application to sue as a pauper, but if the Court does not see reason to refuse the application,

the Court is at liberty to fix a day for hearing evidence to be adduced on either side upon the question of pauperism, and upon such further hearing if the opposite party should bring to the notice of the Court any grounds upon which the Court would be bound to refuse the application, it would be at the discretion of the Court upon being so informed to refuse leave.

7. On the other hand, in the case of Parkash Ojha v. Dusruth Ojha (1876) 25 W.R. 74 it was held that where a Subordinate Judge had decided the question of limitation not upon the examination of the petitioner but upon that of other witnesses summoned for a different purpose, he exceeded his jurisdiction.

8. In an earlier case on the Original Side of this Court, the defendant proposed to show by examination of the plaintiff that on the facts stated in the petition, there was no cause of action. Macpherson J. allowed the plaintiff to be examined with a view to show that on her own evidence, she had no cause of action. She was accordingly examined but her evidence did not show that she had no cause of action. It was then proposed to show it by calling other witnesses but Macpherson J. refused to allow this. The case of Gunga Dass Adhikaree (1870) 14 W.R. 281 appears to have been cited in argument on behalf of the defendant [see Tarramoney Dabee v. Hurro Mohan Chatterjee (1873) 11 B.L.R. App. 23.]

9. The decisions in the cases Debo Das v. Mohunt Ram Charn Dass Chella (1898) 2 C.W.N. 474 and Gopal Chandra Neogy v. Biyoo Mistry (1903) 8 C.W.N. 70 affirm the proposition that it is not open to a Court, at a preliminary stage, to enter into the merits of the suit.

10. If the learned Judges meant to lay down that the Court cannot go into the merits of the claim so far as they appear from the allegations in the plaint, and the statements made by the applicant in his examination, it would be opposed to the express provisions of Sections 406 and 409 of the Code. But we do not think that that was meant, because the learned Judges observed 'if the Subordinate Judge had confined his enquiry to the allegation as made in the plaint, and if he said that these allegations do not show a right to sue, it is extremely doubtful whether this Court could interfere with his order'. It does not appear that the applicant was examined in those cases. In the first, the Court below had decided the question of

the rights of the parties, and not whether the allegations showed a right to sue, and in the second, the Court below dismissed the application upon a construction of a will. The learned Judges (Ghose and Pratt JJ.) held that the Court could not construe the will at that stage.

11. In the Madras High Court in one of the earlier cases, *Koka Ranganayaka Ammal v. Koka Venkata chellapati Nayudu* (1985) I.L.R. 4 Mad. 323, Turner, C.J. and Kindersley J. held that the Code does not authorise the rejection of an application for leave to sue in forma pauperis for want of merits, when the applicant is found to be a pauper and his allegations disclose a right to sue, and that when an application for leave to sue in forma pauperis is made, the Court should not go into evidence as to the merits of the claim. A different view, however, was taken in a later case [*Vijendra Tirtha Swami v. Sudhindra Tirtha Swami* (1895) I.L.R. 19 Mad. 197.], where Subramania Ayyar J. held that the Court below had not acted illegally in taking evidence and going into lire questions whether the plaintiff's claim was *res judicata* and whether it was barred by limitation.

12. In *Amirtham v. Alwar Manikkam* (1903) I.L.R. 27 Mad. 37, Sir Arnold White C.J. held that under Section 407 the applicant must make out that he has a subsisting cause of action of enforcement. In that case the Court below fl the application on the ground that the applies of the plaint did not appear to have a right to sue, though this was done at the hearing under Section 409. in another case in the same volume [*Sankararama Ayyar v. Subramania Ayyar* (1902) I.L.R. 27 Mad. 120.] White C.J. held that the Court is not bound to give leave if the allgations made by the petitioner are such that, if true, they would show a good cause of action. In a still later case, a Full Bench of that Court held that 'the investigation contemplated under Section 409 of the Civil Procedure Code where a day is fixed for hearing an application for leave to sue in forma pauperis, must be confined to the question of the applicant's pauperism. No evidence as to the merits of the case can be gone into in such an investigation' [see *Rathnam Pillai v. Pappa Pillai* (1902) 3 Mad. L.J. 292]. This was followed in the case of *Snnkararamier v. Subramania Aiyar*, in which the learned Judges (Subramania Ayyar and Boddam JJ.) held that the evidence referred to in Section 409 of the Civil Procedure Code is confined to evidence in proof or disproof of the pauperism of the applicant, and

does not include evidence as to the merits of the case, and the decision of White C.J. in *Sankararama Ayyar v. Subramamia Ayyar* (1902) I.L.R. 27 Mad. 120 was overruled. In the latest Madras case, *Govindasami Pillay v. The Municipal Council, Kumbakonam* (4), it has been held that Order XXXIII, Rule 5(d) applies only to cases where the allegations of the petitioner do not show a cause of action, and that this should appear clearly upon the face of the petition. In that case, the applicant does not appear to have been examined.

13. Some stress was laid on behalf of the opposite party on a passage in the judgment of a Full Bench of the Allahabad High Court in the case of *Chandra Singh v. Raja Ram* (1885) I.L.R. 7 All. 661 in which the learned Judges held that the terms of Section 407(c) must not be read as limiting the Court's discretion to merely ascertaining whether the right to sue arose within its jurisdiction, but have a more extended meaning, namely, 'that an applicant must make out that he had a good subsisting cause of action capable of enforcement in Court and calling for an answer and not barred by the law of limitation or any other law.' But we do not think that it was intended to lay down that evidence is to be gone into on such points, as the learned Judges in an earlier passage said that it was competent for the Subordinate Judge to reject the applicant's petition on the ground that, as from his petition and his examination his cause of action was shown to have arisen beyond the period of limitation allowed by law for instituting the suit, his allegations did not show a right to sue. The passage quoted from the judgment of the Full Bench was followed with approval in a later Allahabad case, *Kamrakh Nath v. Sundar Nath* (1898) I.L.R. 20. All. 299, where it was held that the Court was not confined merely to the allegations contained in the plaint but that it was open to the Court to examine the applicant and take the statements in his examination in determining whether the applicant had a cause of action. The same passage was also quoted with approval by Jardine J. in *Dalari v. Vallabhdas Pragji* (1888) I.L.R. 13. Bom. 126. In that case it appears the action was not maintainable upon the allegations made in the plaint itself.

14. The latest case in our Court is that of *Nawdb Bahadur of Moorshedabad v Harish Chandra Acharjee* (1910) 13 C.L.J. 593 in which Mookerjee and Sharfuddlin JJ., after referring to the cases on the point held that before an

application for leave to sue in forma pauperis is granted, it is the duty of the Court to satisfy itself that the allegations of the petitioner do show a cause of action, and that the allegations are not only those made in the plaint but also those made in the examination of the applicant before the Court. We have already expressed our opinion that the Court may not only look into the allegations made in the plaint but also into the statements made in the examination of the applicant. The evidence, however, to be taken under Rule 7 is confined to the evidence which may be adduced by the applicant in proof of his pauperism, and any evidence which may be adduced in disproof thereof as laid down in Rule 6.

15. We are accordingly of opinion that the Court, in an enquiry under Order XXXIII of the Code, cannot take evidence (except the evidence of the applicant himself) on the merits of the claim. The learned Subordinate Judge having decided the question of limitation, not upon the allegations made in the plaint nor upon the statements made by the applicant in his examination, but upon conclusions based upon an examination of the witnesses who were summoned for the purpose of proving the pauperism of the applicant, his order must be set aside.

16. The result is that the Rule is made absolute. The case will go back to the Court below in order that the petitioner may be allowed to proceed with the suit as a pauper, as the lower Court has already come to the finding that he is a pauper.

17. The petitioner will be entitled to costs.