Shri M. L. Sethi

Vs

Shri R. P. Kapur

Civil Appeal No. 665(N) of 1972

(P. Jagmohan Reddy, K. K. Mathew JJ)

19.07.1972

JUDGMENT

MATHEW, J. -

1. This appeal, by special leave, is from the order of the High Court of Allahabad allowing an application for revision of orders passed by the Civil Judge, Saharanpur, directing discovery of documents by the respondent and dismissing an application by him for permission to sue in forma pauperis.

2. The respondent filed a suit in forma poperies on April 29, 1962, against the appellant and his wife for recovery of damages to the tune of Rs. 7,48,000/- for malicious prosecution. Notice of the petition to sue in forma poperies was given to the State Government and the appellant under Order 33, Rule 6 of the Civil Procedure Code. Both the Government and the appellant filed objections stating that the respondent is not a pauper. The appellant thereafter filed an application for discovery of documents from the respondent for proving that the respondent is not a pauper. The Court passed an order on February 23, 1970, directing the respondent to discover on affidavit, the documents relating to the bank accounts of the respondent, namely, pass books, cheque books, counterfoils, etc., from March 1, 1963, to the date of filing the affidavit of discovery, as also the documents in respect of the properties held by him and the personal accounts maintained by him. The respondent was to file the affidavit of discovery on March 8, 1970. It was specifically stated that no extension of time will be allowed for filing the affidavit and that the discovery should be made within the time. The respondent did not file the affidavit in pursuance to the order. On March 31, 1970, he moved an application stating that he wants to file a revision against the order, dated February 23, 1970, before the High Court and that two months' time may be allowed for the purpose. The Court rejected the application for time on April 4, 1970, on the ground that the application for permission to sue in forma pauperis was pending for the last seven years and that the respondent had ample time for filing the revision if he was diligent in the matter. The respondent's counsel then moved another application on the same day stating that the respondent wants to adduce evidence and that since he had not come to Court in the expectation that his earlier application, dated March 31, 1970, for adjournment would be allowed, the case may be adjourned. This application was also rejected by the Court. And as counsel for the respondent reported into instruction and as there was no evidence to show that the respondent was pumped, the Court dismissed the application for permission to sue in forma pauperis and directed the respondent to pay the court-fee within 15 days.

3. The respondent challenged the order directing discovery of documents passed on February 23, 1970, and that dismissing his application for permission to sue in forma pauperis passed on April 4, 1970, in revision before the High Court.

4. The High Court held that since the proceedings under Rules 6 and 7 of Order 33 are summary in character, the "sophisticated procedure" for discovery should not have been resorted to by the appellant, that the documents of which discovery was sought were not specified in the application of the appellant and, therefore, the application for discovery was bad, that the enquiry under Rules 6 and 7 of Order 33 was primarily a matter between the respondent and the State Government and that the Trial Court should not have adopted the procedure for discovery and inspection at the instance of a private party like the appellant. The Court further held that the Trial Court acted with material irregularity as it did not consider the question of the necessity for discovery of the documents or the relevance of the documents of which discovery was sought and also for the reason that, in ordering discover of the documents relating to personal accounts, and pass books, it overlooked the right of the respondent to claim privilege. And as regards the order passed on April 4, 1970, dismissing the application for permission to sue in forma pauperis after rejecting the application for adjournment, the Court said that the Trial Court betrayed an anxiety to get rid of an application to add to the figures of its disposal. The Court, therefore, set aside the order for discovery as well as the order dismissing the application for permission to sue in forma pauperis.

5. The respondent submitted that the procedure for discovery of documents is not permissible in proceedings under Order 33 and that it is not salutary to adopt the procedure even if permissible. In Vijay Pratap Singh v. Dukh Haran Nath Singh and Another (1962 Supp 2 SCR 675; AIR 1962 SC 941 : (1964) 1 MLJ (SC) 79.), this Court has held that "the suit commences from the moment an application for permission to sue in forma pauperis as required by Order 33 is presented." If that be so, the provisions of Rule 12 of Order 11 relating to discovery would in terms apply to proceedings under Order 33. There is also no reason why, if the provisions of Order 1, Rule 10 relating to additions of parties, of Order 9 dealing with appearance of parties consequence of non-appearance, and of Order 39 relating to temporary injunctions would apply to proceeding under Order 33, the provisions in Order 11 dealing with discovery of documents should not apply to such proceedings. In England, discovery is ordered in any 'cause' or 'matter' in the Supreme Court to which the rule of the Supreme Court apply. And "cause" includes any action, suit or other original proceeding between a plaintiff and defendant. Generally speaking, discovery is granted there in all proceedings except purely criminal proceedings, and civil proceedings where the action is brought to establish a forfeiture of enforce a penalty (Halsbury's Laws of England, Vol. 12, p. 2.). There is no reason to hold, if costs be saved, that it is not salutary to resort to the procedure in proceedings under Order 33.

6. We think that the High Court was wrong in holding that since the application for discovery did not specify the documents sought to be discovered, the lower Court acted illegal in the exercise of its jurisdiction in ordering discovery. Generally speaking, a party is entitled to inspection of all documents which do not themselves constitute exclusively the other party's evidence of his case or title. If a party wants inspection of documents in the possession of the opposite party, he cannot inspect them unless the other party produce them. The party wanting inspection must, therefore, call upon the opposite party to produce the document. And how can a party do this unless he knows what documents are in the possession or power of the opposite party ? In other words, unless, the party seeking discovery knows what are the documents in the possession or custody of the opposite party which would throw light upon the question in controversy, how is it possible for him to ask for discovery of specific of documents ? Order 11, Rule 12 provides :

> "12. Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question

therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit : Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs."

7. When the Court makes an order for discovery under rule, the opposite party is bound to make an affidavit of documents and if he fails to do so, he will be subject to the penalties specified in Rule 21 of Order 11. An affidavit of documents shall set forth all the documents which are, or have been in his possession to power relating to the matter in question in the proceeding. And as to the documents which are not, but have been in his possession or power, he must state what has become of them and in whose possession they are, in order that the opposite party may be enabled to get production from the persons who have possession of them (see Form No. 5 in Appendix C of the Civil Procedure Code). After he has disclosed the documents by affidavit, he may be required to produce for inspection such of the documents as he is in possession of and as are relevant.

8. The High Court was equally wrong in thinking that in passing the order for discovery, the Trial Court acted illegally in the exercise of its jurisdiction as it deprived the respondents of his right to claim privilege for non-production of his pass book and personal accounts, because the stage for claiming privilege had not yet been reached. That would be reached only when the affidavit of discovery is made. Order 11, Rule 13 provides that every affidavit of documents specify which of the documents therein set forth the party objects to produce for inspection of the opposite party together with the grounds of objection.

9. Nor do we think that the High Court was right in holding that the documents ordered to be discovered were not relevant to the inquiry. The documents sought to be discovered need not be admissible in evidence in the enquiry or proceedings. It is sufficient if the documents would be relevant for the purpose of throwing light on the matter in controversy. Every document which will throw any light on the case is a document relating to a matter in dispute in the proceedings, through it might not be admissible in evidence. In other words, a document might be inadmissible in evidence yet it may contain information which may either directly or indirectly enable the party seeking discovery either to advance his case or damage the adversary's case or which may lead to a trial of enquiry which may have either of these two consequences. The word 'document' in this context includes anything that is written or printed, no matter what the material may be upon which the writing or printing is inserted or imprinted. We think that the documents of which the discovery was sought, would throw light on the means of the respondent to pay court-fee and hence relevant.

10. We venture to think that the High Court was labouring under a mistake when it said that the enquiry into the question whether the respondent was a pauper was exclusively a matter between him and the State Government and that the appellant was not interested in establishing that the respondent was not a pauper. Order 33, Rule 6 provides that if the Court does not reject the application under Rule 5, the Court shall fix a day of which at least 10 days' notice shall be given to the opposite party and the Government pleader for receiving such evidence as the applicant may adduce in proof of pauperism and for hearing any evidence in disproof thereof. Under Order 33, Rule 9, it is open to the Court on the application of the defendant to dispauper the plaintiff on the grounds specified therein, one of them being that his means are such that he ought not to continue to sue as a pauper. An immunity from a litigation unless the requisite court-fee is paid by the plaintiff is a valuable right for the defendant. And does it not follow as a corollary that the proceedings to

establish that the applicant-plaintiff is a pauper, which will take away that immunity, is a proceedings in which the defendant is vitally interested ? To what purpose does Order 33, Rule 6 confer the right on the opposite party to participate in the enquiry into the pauperism and adduce evidence to establish that the applicant is not a pauper unless the opposite party is interested in the question and entitled to avail himself of all the normal procedure to establish it ? We can think of no reason why if the procedure for discovery is applicable to proceeding under Order 33, the appellant should not be entitled to avail himself of it.

11. We also do not think that there is any point in the criticism of the High Court that the order for discovery was vague. The first item in the order was in respect of the documents relating to the bank accounts of the respondent from March 1, 1963, to the date of the affidavit. The second item related to documents in respect of the immovable properties held by him during the same period and the third item was in respect of documents relating to the personal accounts maintained by him for the same period. The order was as specific as it could be.

12. Counsel for the appellant contended that even if the order for discovery of documents was bad in law, the High Court was not justified in interfering with it. And as regards the order, dated April 4, 1970, dismissing the application for permission to sue in forma pauperis after rejecting the application for time, he said, the High Court was really interfering with the discretion of the trial Court in the matter of adjournment. The jurisdiction of the High Court under Section 115 of the C.P.C. is a limited one. As long ago as 1884, in Rajah Amir Hassan Khan v. Sheo Baksh Singh ((1884) LR 11 IA 237.), the Privy Council made the following observation on Section 622 of the former Code of Civil Procedure, which was replaced by Section 115 of the Code of 1908 :

> "The question then is, did the judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

In Balakrishna Udayar v. Vasudeva Aiyar ((1917) LR 44 IA 261, 267.), the Board observed :

> "It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

In N. S. Venkatagiri Ayyangar v. Hindu Religious Endowments Board, Madras ((1948-49) LR 76 IA 73.), the Judicial Committee said that Section 115 empowers the High Court to satisfy itself on three matters, (a) that the order of the subordinate court is within its jurisdiction; (b) that the case is one in which the court ought to exercise jurisdiction; and (c) that in exercising jurisdiction the court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. And if the High Court is satisfied on those three matters, it has no power to interfere because it differs from the conclusions of the subordinate court on questions of fact or law.

This Court in Manindra Land and Building Corporation Ltd. v. Bhutnath Banerjee and Others (AIR

1964 SC 1336 : (1964) 3 SCR 495 : (1965) 1 SCJ 109.) and Vora Abbasbhai Alimahommed v. Haji Gulamnabi Haji Safibhai (AIR 1964 SC 1841 : (1964) 5 SCR 157.) has held that a distinction must be drawn between the errors committed by subordinate courts in deciding questions of law which have relation to, or are concerned with, questions of jurisdiction of the said court, and errors of law which have no such relation or connection. In Pandurang Dhuni Chowgule v. Maruti Hari Jadhav ((1966) 1 SCR 102 : AIR 1966 SC 153 : (1966) 1 SCJ 1.), this court said :

"The provisions of Section 115 of the Code have been examined by judicial decisions on several occasions. While exercising its jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross they may be, or even errors of law, unless the said errors have relation the jurisdiction of the court to try the dispute itself. As clauses (a), (b) and (c) of Section 115 indicate, it is only in cases where the subordinate court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate courts which are related to questions of jurisdiction. It is well-settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code. But an erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that court, cannot be corrected by the High Court under Section 115."

The word "jurisdiction" is a verbal coat of many colours, Jurisdiction originally seems to have had the meaning which Lord Reid ascribed to it in Anisminic Ltd. v. Foreign Compensation Commission ((1969) 2 AC 147.), namely, the entitlement "to enter upon the enquiry in question". If there was an entitlement to enter upon an enquiry, into the question, then any subsequent error could only be regarded as an error within the jurisdiction. The best known formulation of this theory is that made by Lord Darman in R. v. Bolton ((1841) 1 QB 66.). He said that the question of jurisdiction is determinate at the commencement not at the conclusion of the enquiry. In Anisminic Ltd. case (supra), Lord Reid said :

> "But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry it has done or failed to do something in the course of the enquiry which is of such a nature that is decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in course of the enquiry comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account, I do not intend this list to be exhaustive."

In the same case, Lord Pearce said :

> "Lack of jurisdiction may arise in various ways. There may be an absence of those formalities for things which are conditions prevent to the tribunal having any

> jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or, in the intervening stage while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which the Parliament did direct. Any of these things would cause its purported decision to be a nullity."

The dicta of the majority of the House of Lords in the above case would show the extent to which 'lack' and 'excess' of jurisdiction have been assimilated or, in other words, the extent to which we have moved away from the traditional concept of "jurisdiction". The effect of the dicta in that case is to reduce the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point. The practical effect of the decision is that any error of law can be reckoned as jurisdictional. This comes perilously close to saying that there is jurisdiction if the decision is right in law but none if it is wrong. Almost any misconstruction of a statute can be represented as "basing their decision on a matter with which they have no right to deal", "imposing an unwarranted condition" or "addressing themselves to a wrong question". The majority opinion in the case leaves a Court or Tribunal with virtually no margin of legal error. Whether there is excess of jurisdiction or merely error within jurisdiction can be determined only by construing the empowering statute, which will give little guidance. It is really a question of how much latitude the court is prepared to allow. In the end it can only be a value judgment (see H.N.R. Wade, "Constitutional and Administrative Aspects of the Anisminic case", Law Quarterly Review, Vol. 85, 1969, p. 198). Why is it that a wrong decision on a question of limitation or res judicata was treated as a jurisdictional error and liable to be interfered with in revision ? It is a bit difficult to understand how an erroneous decision on a question of limitation or res judicata would oust the jurisdiction of the court in the primitive sense of the term and render the decision or a decree embodying the decision a nullity liable to collateral attack. The reason can only be that the error of law was considered was considered as vital by the court. And there is no yardstick to determine the magnitude of the error other than the opinion of the Court.

13. The Trial Court had jurisdiction to pass the order discovery. Even if lack of jurisdiction is assumed to result from every material error of law - even an error of law within the jurisdiction in the primitive sense of the term - we do not think the order was vitiated by any error of law. The rejection of the application for time and the consequent dismissal of the petition for permission to sue in forma pauperis can hardly explained. We are also not satisfied that the refusal to adjourn occasioned any failure of natural justice so as to render the order a nullity. Nor is there anything to show that in rejecting the application for time the court acted illegally or with material irregularity in the exercise of its jurisdiction.

14. We would, therefore, set aside the order of the High Court and allow the appeal but in the circumstances make no order as to costs. This order will not in any way affect the validity of the order passed by the High Court on August 26, 1971, directing the respondent to delete the name of the wife of the appellant from the array of parties.

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