
(1981) 07 SHI CK 0001
In the High Court Of Himachal Pradesh
Case No : F.A.O. No. 118 of 1980

Gehru	Vs	APPELLANT
Charan Das Dogra		RESPONDENT

Date of Decision : 27-07-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 1

Citation : AIR 1982 HP 23 : (1981) ShimLC 422

Hon'ble Judges : Vyas Dev Misra, C.J.;Vyom Prakash Gupta, J

Bench : Division Bench

Advocate : S.S. Mittal, for the Appellant; Inder Singh, General and A.K. Goel, for the Respondent

Final Decision : Allowed

Judgement

V.D. Misra, C.J.—This appeal is directed against the order of a learned single Judge holding that the appellant is not an indigent person and must pay the necessary court-fee.

2. The appellant is stated to be a deal and dumb person and incapable of protecting his interests when suing by reason of mental infirmity. The appellant's wife Shrimati Devku filed a suit in forma pauperis on the ground that the appellant was not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint. It was averred that the defendant (respondent before us), who is a practising Advocate, filed an application on behalf of a lady representing herself to be Kimtu, daughter of the appellant, for permission to sell or lease the property described in the plaint, This application was stated to have been made u/s 8 of the Hindu Minority and Guardianship Act before the District Judge Kulu on 22nd May, 1975. The learned Judge allowed the application on 31st May, 1975. On the basis of this order the defendant got a sale deed executed in his favour on 6th June, 1975 from the said Shrimati Kimtu, The ostensible consideration for the sale of this land was Rs. 48,000/-. A special power of attorney was obtained in favour of one Lotam Dass from Shrimati Kimtu

authorising the former to represent the latter at the time of the attestation of the mutation before the revenue officer. The mutation was duly got sanctioned. Shrimati Devku came to know about the fraud played by the defendant. She challenged the order of the District Judge, Kulu, in Civil Revision No. 37 of 1975 and this Court by an order dated 31st Oct., 1979 quashed the order of the District Judge dated 31-5-1975. But the defendant refused to hand back the property. Another allegation made is that the defendant in 1971 in collusion with the appellant's previous wife Shrimati Sobhi got the land belonging to the appellant transferred to himself.

3. At the very outset we may record that Mr. Arun Kumar Goel, learned counsel for the defendant-respondent, has seriously contended that the appellant is not a person having any mental infirmity. How this lies in the mouth of the defendant who, as a counsel, moved an application on behalf of said Kimtu u/s 8 of the Hindu Minority, and Guardianship Act and got the land transferred to himself, is not for us to say, Suffice it to note that this is not the matter in issue before us. Moreover, we find that in the reply filed by the defendant there is not even a whisper that the appellant is not suffering from mental infirmity. And we would leave the matter at that.

4. It is unfortunate indeed that in our socialistic democratic republic justice is still being sold. We are still carrying on with the old colonial traditions. The doors of the temple of justice are closed to a person unless he has got sufficient money. The money is needed not only to pay the heavy court-fee but also for the payment of getting legal assistance and meeting other sundry expenditure. Temples of justice should be open to all and sundry just like a temple of God, But the States, instead of trying to ensure free and speedy justice, are always out to increase the court-fee. In some of the States it has become a source of revenue also. It is strange indeed that the State as a Socialistic Republic is out to mint money out of the miseries of the litigants. It is true that a provision like Order 33 Rule 1 has been on the statute book for the last about 100 years to enable the poor to sue in forma pauperis. But then if was never more than an eyewash, Where a person has just enough money to meet the court-fee, then he must pay the court-fee, become literally a pauper, and then enter the gate of justice. In other words he has practically to strip himself naked before praying for justice. Even after paying the court-fee he has still to pay at least for summoning his witnesses and meet other sundry expenses provided ha succeeds in getting a tree legal aid of sorts. And in the instant case the defendant, who is a practising lawyer and against whom serious allegations of fraud in depriving the appellant of his valuable property have been made, is doing his best to throw the appellant out of the court of justice on the very threshold.

5. Expln.-I to Rule 1 of Order 33 of the Civil P. C. defines in indigent person as one who "is not possessed of sufficient means (other than property exempt from attachment in execution of a decree and the subject matter of the suit) to enable him to pay the fee prescribed by law to the plaint in such suit," We are not

concerned with the rest of the rule. By now it is well settled that "possession of sufficient means" does not mean possession of sufficient property, It is possible that one may be possessed of sufficient property but still may not be possessed of sufficient means. It will depend on the nature of the property, It will also depend whether the person concerned can easily come in possession of sufficient means. All this varies from case to case.

6. Where a plaintiff is suffering from any legal disability with the result that the suit is brought by a next friend, it is still the "sufficient means" of the plaintiff which have to be taken into consideration. Before such a plaintiff can be said to be "possessed of sufficient means", it has to be seen whether the next friend is on a position to easily raise sufficient money from the property of the plaintiff in order to pay the court-fee, Now before the next friend is in a position to do so it may be necessary to have a guardian appointed. After the appointment of the guardian it will be for the guardian to decide whether it is in the interest of the ward to finance the litigation. If the guardian decides that it is not so then the next friend naturally cannot pay the court-fee and it cannot be held that the plaintiff is possessed of sufficient means. Even where this hurdle is crossed successfully the second hurdle remains. It is to get the permission of the court to raise moneys on the property belonging to the plain tiff or to spend the plaintiff's money on the litigation. The court may come a conclusion that litigation is not for the interest of the plaintiff. The, next friend will not thus be in a position to pay the court-fee.

7. In Janakykutty v. Varghese 1969 K LT 953, the court was concerned with a plaintiff who was a minor and was challenging the alienation of his property. It was found that the minor had shares in some properties. The court rules that assuming that the share of the minor if validly transferred may fetch enough money to pay the court-fee, the real question is not whether the assets of the minor are considerable but whether the minor can raise resources therewith. It observed.

"It is conceivable that a minor may have considerable properties and even cash but if the guardian who alone can alienate the property and raise money thereon or who is in control of the cash and can give it to the minor declines to co-operate with the minor and refuses either to transfer the property as guardian or part with the cash for conducting the litigation, the minor is, for all practical purposes, a pauper. It is no good saying that the minor is wealthy if he or his next friend cannot actually command cash. Therefore, the ability of the minor to get at means to pay the court-fee (means in this context, obviously means money because court-fee will be accepted in money and not in property) is what we are concerned with. The next friend of the minor in the present petitions is admittedly not the legal guardian The remote suggestion that the next friend may move the court and get a guardian appointed under the Guardians and Wards Act and persuade that guardian to move the Court to permit alienation of property to raise resources and then start litigation is in most cases

too round about a route to reach the monetary destination and cannot be treated as equivalent to possession of sufficient means within the meaning of Order 33 Rule 1 C. P. C."

8. In *Katam Virupakshiah and Others Vs. Matam Sivalingaiah and Others*, the plaintiffs were minors and were members of a joint family which owned considerable property. It was ruled that it was fallacious to assume that a person who is entitled to a share in joint family property of considerable value would always be able to raise comparatively smaller amounts on its security. It was observed that the petitioners were minors and their next friend was not competent in law to offer their undivided share in the joint family property.

9. In *V. Krishna Bhat Vs. Ravishankar and Others*, the learned single Judge followed the aforementioned judgment of the Andhra Pradesh High Court

10. In the case before us it has been found by the learned single Judge that appellant Gehru, according to Fard Jamabandi Ex. R-1, along with Shrimati Kali, wife of Kundan Lal, owns and possesses 2 bighas 16 biswas of land. It has further been found that the share of the appellant Gehru is 3/5 and so he is owner in possession of 1 bigha 12 biswas of land. Finding the market value of the land at Rs. 16,000/- per bigha, the value of this land was assessed at more than Rs. 20,000/-, and so the appellant was held to be in a position to pay the court-fee. The contention that it was not practicable for the appellant to raise the money was dismissed with the observations :--

"Even if it be assumed that the applicant is mentally incapacitated from contracting or transferring the property, this fact in my view is hardly material inasmuch as the law provides proper methods by the adoption of which the property of a person of unsound mind can be converted into money. The applicant, therefore, must be held to be a person who is in possession of sufficient means to pay the requisite court-fee."

11. Unfortunately the attention of the learned single Judge was not directed to the various hurdles which the appellant must cross, and cross them successfully, before he would be in a position to convert his property into cash to pay the court-fee. With all respect to the learned single Judge we cannot agree that mere possession of considerable property by a person of unsound mind means that the person is in a position to convert his property into money and pay the court-fee,

12. An argument of despair was also advanced by the learned counsel for the respondent. It was this. The appellant has suppressed the fact that he owned this property. Now it is not each and every failure to mention a property under Order 33 Rule 2 which amounts to the suppression of the fact. It should be shown that there was a mala fide intention in not mentioning the property. In the instant case the suit has been brought through Shrimati Devku, the next friend of the appellant. The defendant in his reply avers that she has nothing to do with appellant Gehru. If that be true then Shrimati Devku's failure to mention this property does not amount to mala fides. We find that it was suggested to

Shrimati Devku in cross examination that the appellant owned 2 bighas 16 biswas of land jointly with Shrimati Kali and in that land the appellant owned 2/3 share. Shrimati Devku was not in a position to contradict this fact and showed ignorance about it. This shows that there was no suppression of the fact. It was a bona fide mistake. It is for this reason that the learned single Judge did not make it a ground for disentitling the appellant to sue in forma pauperis.

13. The result is that the appeal succeeds and appellant is allowed to sue in forma pauperis. The appellant will be entitled to recover the costs of this appeal from the respondent No. 1.