

(2002) 08 SHI CK 0011

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 275 of 2002

H.P.S.E.B. and Others

APPELLANT

Vs

Bimla Devi and Another

RESPONDENT

Date of Decision : 26-08-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 10, Order 33 Rule 8, Order 44 Rule 1, Order 44 Rule 1(2), 115

Citation : (2003) 1 ShimLC 280

Hon'ble Judges : R.L. Khurana, J

Bench : Single Bench

Advocate : Prakash Thakur, for the Appellant; R.K. Gautam and J.R. Poswal, for the Respondent

Final Decision : Allowed

Judgement

R.L. Khurana, J.—The present regular second appeal at the Instance of the Defendants directed against the judgment and decree dated 16.1.2002 of the learned Additional District Judge, Solan, modifying the judgment and decree dated 9.3.1998 of the learned Sub Judge 1st Class, Nalagarh in Civil Suit No. 66/1 of 1994 stands admitted on the following substantial question of law:

Whether the appeal before the first Appellate Court having been filed by the Respondents-Plaintiffs as indigent persons was competent in the absence of requisite leave having been obtained from the learned first Appellate Court?

2. Briefly stated, the facts giving rise to the present appeal are these. One Arjun Singh son of Ram Piara of village Majari, on 12.3.1993 at about 6 a.m. while proceeding from his village to village Mahandev on his cycle at village Dolowal came in contact with live overhead snapped electric wire lying on the road resulting into his instantaneous death. Alleging negligence on the part of the Defendants, the Plaintiffs-Respondents, who are the widow and mother respectively of the deceased filed a suit, as indigent persons under Order 33, Code of Civil Procedure, claiming damages/compensation, to the tune of Rs.

2,00,000/-.

3. The Defendants denied negligence on their part. It was pleaded that the wire got snapped on the night intervening 11/12.3.1993 due to heavy storm and that the accident took place for the reasons beyond their control. They also pleaded that the deceased was guilty of contributory negligence.

4. The learned trial court on 6.3.1998, on consideration of the material placed before it decreed the suit partly in favour of the Plaintiffs and granted a decree for a sum of Rs. 75,000/- with costs in their favour. The Plaintiffs were further allowed interest on the decretal amount at the rate of 12% per annum from the date of suit till the date of payment/realisation of the amount.

5. The Plaintiffs, who were dissatisfied with the partial decree in their favour went up in appeal before the learned Additional District Judge, Solan. The learned first Appellate Court vide the impugned Judgment and decree allowed the appeal and after modifying the judgment and decree of the learned trial court granted a decree for a sum of Rs. 2,00,000/- with costs and interest at the rate of 12% per annum from the date of suit in favour of the Plaintiffs.

6. Be it stated that the appeal before the learned first Appellate Court appears to have been filed by the Plaintiffs as indigent persons inasmuch as para 6 of the grounds of appeal reads:

That since the Appellants are paupers which is admittedly have been held so by the learned trial court, hence this appeal is being filed in the capacity of indigent persons.

7. Aggrieved by the judgment and decree of the learned first Appellate Court, the Defendants are before this Court by way of the present second appeal.

8. Order XLIV of the CPC deals with "appeals by indigent person". Rule 1 thereof provides:

Any person entitled to prefer an appeal, who is unable to pay the fee for the memorandum of appeal, may present an application as accompanied by a memorandum of appeal as an indigent person, subject, in all matters including the presentation of such application to the provisions relating to suits by indigent persons, insofar as those provisions are applicable.

[Emphasis supplied].

9. A bare reading of the above provisions shows that:

(i) an application has to be made alongwith the memorandum of appeal by the Applicant for leave to present the appeal as an indigent person; and

(ii) such application has to be considered by the appellate Court and the leave may either be allowed or refused;

(iii) while considering such application, the provisions contained in Order XXXIII,

Code of Civil Procedure, relating to suits by Indigent persons, would be applicable.

10. In the present case, no application for leave to prefer an appeal as indigent persons was made by the Plaintiffs before the learned first appellate Court. Nor the requisite Court fee was paid on the memorandum of appeal. The appeal was presented as indigent persons by the Plaintiffs without seeking leave on the premise as if no separate leave was required and that the leave granted to institute a suit as an indigent person under Order XXXIII, CPC would enure also for the purpose of appeal.

11. In *re Devata Talipulamma alias Mahalakshamma* by her husband and general power of attorney holder *Devata Kamaraju* AIR 1946 Madras 257, the Plaintiff herein was permitted to institute a suit as an indigent person under Order XXXIII, Code of Civil Procedure. Against same Order passed in the suit, he had preferred a revision petition before the Madras High Court. Requisite Court fee was paid by him on such revision petition. Subsequently, he applied for refund of Court fee paid by him on the ground that since he was adjudged an indigent person and was permitted to sue as such, no Court fee was payable by him. Repelling the contention, it was held by the Madras High Court:

...The scheme of the Code clearly shows that Order 33, was intended to relate only to proceedings in the court in which the suit was filed and that in respect of the proceedings subsequently instituted by way of appeal, there is Anr. provision made as to how parties should conduct those proceedings as paupers. I do not hence think I will be Justified in accepting the contentions of the Petitioner that he is entitled to pay no court fee on a petition filed for revision of the lower Court's Order u/s 115, by reason of the provisions of Order 33, Rule 8.

12. The Hon'ble Supreme Court in *Ram Sarup Vs. Union of India (UOI) and Others*, while dealing with the effect of deletion of Sub-rule 2 of Rule 1 of Order XLIV, Code of Civil Procedure, vide Amendment Act of 1976 has held that by the Amendment Act of 1976, Sub-rule (2) of Rule 1 is deleted. The result is that when an application made under Rule 1, Order XLIV comes up for hearing, the only question which has to be considered is whether the Applicant is an indigent person or not.

13. The above said ratio also indicates that when an appeal is sought to be filed by an Appellant as an indigent person, an application for leave has necessarily to be made under Order XLIV, Rule 1, Code of Civil Procedure.

14. The object and purpose of seeking a fresh leave under Rule 1, Order XLIV, Code of Civil Procedure, for filing an appeal as an indigent person is that since after the grant of leave under Order XXXIII, Code of Civil Procedure, for filing the suit as an indigent person, due to subsequent events the Applicant/Appellant might have ceased to remain an indigent person.

15. In the present case as stated above, neither any leave as contemplated

under Order XLIV, Rule 1, CPC was obtained nor requisite Court fee on the memorandum of appeal was paid, therefore, there was no properly constituted appeal before the learned first appellate Court. In the absence of requisite leave and non payment of requisite Court fee, the appeal preferred by the Plaintiffs before the first Appellate Court was not competent. The substantial question arising in the case is decided accordingly.

16. As a result, the present appeal is allowed. The impugned judgment and decree of the learned first appellate court are set aside since there was no properly constituted appeal. Parties are left to bear their own costs.

17. Before parting it may be stated that the learned trial Court while decreeing the suit partly in favour of the Plaintiffs ought to have issued necessary directions under Rule 10 of Order XXXIII, Code of Civil Procedure. In the present case, it is on the record that the Plaintiffs have already received the decretal amount as awarded to them by the learned trial Court alongwith the costs and interest. Therefore, the Plaintiffs are directed to deposit the Court fee payable on the plaint with the learned trial Court within four weeks from today, failing which the learned trial Court will proceed in the matter in accordance with law.