
(2012) 02 KL CK 0028

In the High Court Of Kerala

Case No : Unnumbered R.F.A. (Indigent) No. of 2012

Kadeeja Umma

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 28-02-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 1A, Order 33 Rule 3, Order 33 Rule 4, Order 44 Rule 1, Order 44 Rule 3

Citation : AIR 2012 Ker 174 : (2012) 2 KarLJ 214 : (2012) 2 KLJ 214

Hon'ble Judges : V. Ramkumar, J;K. Harilal, J

Bench : Division Bench

Advocate : T. Krishnanunni; S.A. Saju ; T. Sivadasan; K.C. Kiran and Meena A, for the Appellant;

Judgement

V. Ramkumar, J.—In this petition filed under Order XLIV Rule 3 (1) read with Sec. 151 C.P.C. the petitioner seeks permission to file the proposed first appeal as an indigent person. The Registry noted a defect to the effect that the petition as well as the proposed appeal should be presented by the party-in-person and not by the Advocate. To the said defect the Advocate appearing for the petitioner submitted a reply contending inter alia as follows:-

The petitioner who was the plaintiff in the court below was permitted to file the suit as an indigent person. Since the petitioner has not ceased to be an indigent person even after the date of the decree appealed from and also since the petitioner has filed an affidavit to that effect as envisaged by Rule 3(1) of Order XLIV C.P.C. no further enquiry in respect of the question as to whether or not the petitioner is an indigent person is necessary in view of Rule 3(1) above.

2. Thereupon the matter was referred by the Registry to the Bench for judicial consideration of the above defect.

3. Re-iterating the above stand, Advocate Sri. T. Sivadasan appearing for the petitioner made the following submissions before us:-

The petitioner who is the proposed appellant was the plaintiff in the suit filed before the Court below. She was permitted to institute the suit as an indigent person by the court below. She has filed an affidavit in terms Order XLIV Rule 3 C.P.C. The said affidavit has to be treated with all solemnity which the law attributes to the same. If so, by virtue of the provision in Order XLIV Rule 3 C.P.C. no further enquiry in respect of the question as to whether the petitioner is an indigent person is necessary. It is only in cases where an enquiry is contemplated, need the applicant engage an authorised agent other than an Advocate. Here, no enquiry into the indigence of the petitioner is necessary. The petitioner can, therefore, present the indigent appeal through her Advocate. The view taken in *Moideenkoya v. Sarojini*-ILR 2002 (1) K 166 by a Division Bench of this Court to the effect that an Advocate cannot be an authorised agent within the meaning of Order XXXIII Rule 3 C.P.C. for presenting an indigent appeal on behalf of his client, requires reconsideration. The need for engaging an agent who is competent to answer the questions that may be put to him regarding the indigence of the applicant will arise only when an enquiry regarding the indigence of the applicant is necessary. In a case, as the present, where the said enquiry is statutorily dispensed with, the presentation of the indigent appeal can as well be by the Advocate on behalf of the applicant.

4. We are afraid that we find ourselves unable to agree with the above submissions. Rule 1 of Order XLIV C.P.C. reads as follows:-

1. Who may appeal (as an indigent person) - Any person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as an indigent person, subject, in all matters, including the presentation of such application; to the provisions relating to suits by indigent persons in so far as provisions are applicable.

The above provision only enables a person entitled to prefer an appeal and who is unable to pay the requisite court fee to present an application seeking permission to appeal as an indigent person. With regard to all other procedural aspects regarding such application for permission the provisions relating to suits are made applicable. The provisions relating to suits are contained in Order XXXIII C.P.C. The provisions in Order XXXIII so far as they are relevant here are as follows:-

1-A, Inquiry, into the means of an indigent person :- Every inquiry into the question whether or not a person is an indigent person shall be made, in the first instance, by the chief ministerial officer of the Court, unless the Court otherwise directs, and the Court may adopt the report of such officer as its own finding or may itself make an inquiry into the question.

2. Contents of application:- Every application for permission to sue as an indigent person shall contain the particulars required in regard to claims in suits; a schedule of any movable or immovable property belonging to the applicant with

the estimated value thereof, shall be annexed thereto, and it shall be signed and verified in the manner presented for the signing and verification of pleadings.

3. Presentation of application:- Notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorised agent who can answer all material questions relating the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person;

Provided that, where there are more plaintiffs than one, it shall be sufficient if the application is presented by one of the plaintiffs.

4. Examination of applicant (1) 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.

2) If presented by agent, Court may order applicant to be examined by commission:-Where the application is presented by any agent, the Court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken.

5. Rejection of application:- The Court shall reject an application for permission to sue as an indigent person.

a) where it is not framed and presented in the manner prescribed by rules. 2 and 3 or

b) where the applicant is not an indigent person or

c) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as an indigent person.

Provided that no application shall be rejected if, even after the value of the property disposed of by the applicant is taken into account, the applicant would be entitled to sue as an indigent person; or

d) where his allegations do not show a cause of action, or

e) where he has entered into any agreement with reference to the subject-matter of the proposed under which any other person has obtained an interest in such subject matter, or

f) where the allegations made by the applicant in the application show that the suit would be barred by any law for the time being in force, or

g) where any other person has entered into an agreement with him to finance the litigation.

The Scheme of Order XXXIII C.P.C. will show that a person who is desirous of instituting a suit in forma pauperis has to present the application in person as provided under Rule 3 thereof. By virtue of Rule 1 of Order XLIV C.P.C. the above provision is applicable in the case of an appeal by an indigent person also. In view of Rule 3 of Order XXXIII C.P.C. read with Rule 1 of Order XLIV the application for permission to appeal as an indigent person also should be presented to the Court by the applicant in person unless he is exempted from appearing in Court. Sections 132 and 133 of C.P.C. contain exemption for certain category of women and other dignitaries from personal appearance in Courts. In the case of such persons the application for permission to sue as an indigent person can be presented by an authorised agent who can answer all material questions relating to the application. Such an authorised person is also liable to be examined in the same manner as the applicant himself. An Advocate cannot be such an authorised person for obvious reasons. By virtue of Rule 1A of Order XXXIII the enquiry into the means of the applicant has to be made in the first instance by the Chief Ministerial Officer of the Court. It is open to the Court to adopt the report of such Chief Ministerial officer as its own finding or to conduct an enquiry by itself by examining the applicant or his agent, as the case may be, under Rule 4 of Order XXXIII.

We now proceed to consider the impact of Rule III of Order XLIV C.P.C. The said Rule reads as follows:-

3. Inquiry as to whether applicant is an indigent person:- (1) Where an applicant, referred to in rule 1, was allowed to sue or appeal as an indigent person in the Court from whose decree the appeal is preferred, no further inquiry in respect of the question whether or not he is an indigent person shall be necessary if the applicant has made an affidavit stating that he has not ceased to be an indigent persons since the date of the decree appealed from; but if the Government Pleader or the respondent disputes the truth of the statement made in such affidavit, an inquiry into the question aforesaid shall be held by the Appellant Court, or, under the orders of the Appellate Court, by an officer of that Court.

(2) Where the applicant, referred to in rule 11, is alleged to have become an indigent person since the date of the decree appealed from, the inquiry into the question whether or not he is an indigent person shall be made by the Appellate Court or, under the orders of the Appellate Court, by an officer of that Court unless the Appellate Court considers it necessary in the circumstances of the case that the inquiry should be held by the Court from whose decision the appeal is preferred. ("Rule 11" referred to in sub-rule (2) above may be a mistake for "rule 1")

Thus, Rule 3 of Order XLIV C.P.C. does not automatically dispense with an enquiry regarding the indigence of a proposed appellant the moment he files an affidavit to the effect that he was permitted by the Court below to sue or appeal as an indigent person and he has not ceased to be an indigent person since the

date of the decree appealed from. In a case where such an affidavit is filed, the appellate Court may order that no further enquiry regarding the indigence of the applicant is necessary. Instead, it is open to the appellate Court to order that notwithstanding such affidavit an enquiry is felt necessary. Even under Rule 3 of Order XLIV C.P.C. if the Government Pleader or the respondent disputes the truth of the averments in the affidavit, an enquiry is mandatory. But the presentation of the petitioner, both under Rule 3 of Order XXXIII and under Rule 1 of Order XLIV C.P.C, is to take place before the enquiry regarding the indigence of the applicant is conducted. At the time when the application to sue as an indigent person or application to appeal as an indigent person is filed, it is not possible either for the applicant or for the Chief Ministerial Officer of the Court or even the Court to predict that it may not be necessary to conduct an enquiry regarding the indigence of the applicant. Hence, it is not permissible for the proposed appellant while presenting the application to appeal as an indigent person to anticipate that in view of the affidavit filed by him conforming to Rule 3 of Order XLIV C.P.C., an enquiry into his indigence will be dispensed with. If so, the presentation of the application to appeal as an indigent person has to be in person and not through an Advocate. In this view of the matter, we are not inclined to accept the submission made on behalf of the applicant that the presentation of the application can be by the applicants' Advocate.

Nor are we persuaded to reconsider Moideenkoya's Case. The application has to be presented by the applicant himself or herself in person. The applicant here has no case that she is exempted from appearing in Court. Even if she is so exempted, the authorised agent whom the law allows to present the application cannot be an Advocate but a person who can answer all material questions relating the application. We, therefore, uphold the objection raised by the Registry. The petitioner is given two weeks' time to present the application in person.