
(1996) 07 KL CK 0070
In the High Court Of Kerala
Case No : C.M.A.A. No. 157/95

Mathew, K.U.

APPELLANT

Vs

The State of Kerala and Others

RESPONDENT

Date of Decision : 23-07-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 1, Order 33 Rule 2, Order 33 Rule 3, Order 33 Rule 5, Order 44 Rule 1
Kerala Court Fees and Suits Valuation Act, 1959 — Section 22, 35(1)

Citation : (1996) 2 CivCC 396

Hon'ble Judges : P.K. Balasubramaniyan, J;K.A. Abdul Gafoor, J

Bench : Division Bench

Advocate : O. Balanarayanan, for the Appellant; Government Pleader for 1st Respondent, V.B. Unniraj, for 2nd Respondent and V. Giri, for 7th Respondent, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Balasubramanyan, J.—This appeal is by the Plaintiff. He filed a suit for settlement of accounts and for damages. The relief of accounting was valued at Rs. 15,000 and the nominal damages was estimated as Rs. 1,000 and Court fee was paid u/s 35(1) and Section 22 of the Kerala Court Fees and Suits Valuation Act. The second Defendant Kerala Financial Corporation filed a written statement disputing the plaint claim. The 8th Defendant who was impleaded subsequently as a purchaser in revenue auction of some property belonging to Western Ghats Industrial Development Corporation of which the Plaintiff and Defendants 5 to 7 were said to be partners, also filed a written statement.

2. On 11th October 1994 the Plaintiff made two applications. I.A. 1041 of 1994 was made seeking an amendment of the plaint to incorporate a claim for recovery of damages to the tune of Rs. 2,62,542.80 with interest thereon and to set aside the sale of 2.50 acres of land belonging to the Plaintiff and blocked in R.S. 260/3B of Vemom Amsom. In view of these additional prayers the Plaintiff

wanted to amend the valuation portion of the plaint to include the claim for damages of Rs. 2,62,542 and valued the relief of setting aside the sale at Rs. 2,65,000. Valuation for the purpose of jurisdiction and Court fee including the original valuation of Rs. 15,000 for the relief of accounting was thus proposed to be enhanced to Rs. 5,42,512.80. Court fee payable thereon was to be Rs. 41,420. Giving credit to the Court fee already paid on the plaint namely Rs. 1,580, the balance Court fee payable by the Plaintiff as per the proposed amendment was Rs. 39,840. The other application I.A. 1066 of 1994 was filed under Order 33, Rule 1 of the CPC seeking permission to prosecute the suit as an indigent person if the amendment of the plaint prayed for were to be allowed. Both the applications were opposed. On 28th March 1995 the application for amendment of the plaint I.A. 1041 of 1994 was allowed. The application I.A. 1066 of 1994 for permission to further prosecute the suit as an indigent person was disallowed finding that the relief claimed by the Plaintiff in the plaint as amended was one for and on behalf of a firm of which he was a partner and since it was not shown that all the partners of the firm are indigent persons, the Plaintiff could not be given permission under Order 33, Rule 1 of the Code of Civil Procedure. It was also found that the Plaintiff while making the application under Order 33, Rule 1 of the Code had not set out in full the assets held by him either in his individual capacity or as a partner of the firm and in view of the failure to disclose the properties, he was disentitled to the permission sought for. This is challenged before us by the Plaintiff.

3. In *M/s Grand Buoy Enterprises v. National Insurance Co. Ltd.* 1994 (2) KLT 697 it has now been held that when a firm is the Plaintiff and a request for permission under Order 33, of the Code is made the requirement is that the partners of the firm should be shown as indigent persons. If on the facts of the case the conclusion of the trial Court that the suit is pursued by the Plaintiff for and on behalf of the firm is justified, obviously the conclusion that the Plaintiff has not shown that all the partners of the firm are indigent persons and consequently the Plaintiff cannot pursue the present suit as an indigent person is perfectly justified. Though the Plaintiff has asserted in the plaint that the other partners who are Defendants 5 to 7 have retired from the partnership and the Plaintiff is the sole proprietor of the firm and that the other partners had executed an agreement leaving the entire assets and liabilities to the Plaintiff as the sole proprietor of the firm, a reading of the plaint would clearly show that the relief claimed by the Plaintiff is a relief that is due to the firm by the alleged inaction or improper action of the second Defendant Kerala Financial Corporation and consequently the conclusion of the trial Court that the suit is on behalf of the firm and it is necessary for the Plaintiff to show that all the partners are indigent is perfectly justified. In that situation in the light of the decision in *Grand Buoy Enterprises* 1994 (2) KLT 697, referred to above, the rejection of the application made by the Plaintiff is justified.

4. We also find substance in the second aspect relied on by the trial Court. The trial Court has in its order referred to the decision of the Madras High Court in

P.V. Chandrasekharan and Others Vs. Thirumalai Chit Funds and Others, and in Navadu Nuka Raju Vs. Rajani China Appanna and Others, to take the position that nondisclosure of property by a person who is seeking permission to sue as an indigent person is sufficient to disentitle him from getting the permission. In Navadu Nuka Raju Vs. Rajani China Appanna and Others, it was held that failure to make a full and complete disclosure of one's movable and immovable property asserts would disentitle a person to get permission for suing as an indigent person. The motive for such non-disclosure was immaterial and even if the non-disclosed property was not sufficient to pay the Court fee, it would not alter the situation. The decisions of the Madras High Court were relied on in support of this proposition. In P.V. Chandrasekharan and Others Vs. Thirumalai Chit Funds and Others, quoting from the decision in Chellammal Vs. Muthulakshmi Ammal, to the effect:

Under Order 33, Rule 2 read with Order 33, Rule 5(a) and Order 44, Rule 1 it is the bounden duty of the Petitioner applying for leave to sue or appeal as a pauper to make a full and accurate verified statement of his or her properties. Utmost good faith is required of the Petitioner in the matter of disclosure of his or her assets and any intentional departure from good faith whatever the motive may be must result in the dismissal of the petition. Accordingly where the Petitioner obtained leave to appeal in forma pauperism by practicing fraud on the Court by not disclosing all his assets, the leave must be refused.

and referring to the subsequent decisions of that Court the Madras High Court held that the failure to disclose all the assets by a Petitioner applying under Order 33, Rule 1 of the CPC would result in the application for permission being rejected.

5. Learned Counsel for the Appellant relying on the decision in K. Vazhunnavar v. V. Vazhunnavar 1963 KLT 457 and the decision in Kunju Raman v. United India Fire and General insurance Company 1976 KLT 620 contended that the failure to disclose a particular asset or property in the application for permission to sue as an indigent person by itself is not fatal to an application for permission to sue as an indigent person. He pointed out that the decision of the Madras High Court in Chellammal Vs. Muthulakshmi Ammal, as reported in P.V. Chandrasekharan and Others Vs. Thirumalai Chit Funds and Others, was not accepted by Mr. Justice Raghavan (as he then was) in Vazhunnavar's case 1963 KLT 457 and that the subsequent decisions of the Madras High Court have been relied on to lay down that the ground of suppression of assets must be confined to cases where the suppression is deliberate and not bona fide. His Lordship also referred to the decision of the Calcutta High Court in Madan Mohan Lal Kapani Vs. Jhalman Singh and Others, in support of that proposition. In Kunju Raman's case 1976 KLT 620 His Lordship Justice G. Viswanatha Iyer after making a survey of the various authorities referred to therein came to the conclusion that a mere non-inclusion of some assets which if included would not have established that the applicant is not a pauper should not entail a rejection of the application. If any

such item is subsequently disclosed in the course of the proceedings, its value should also be taken into account and a finding recorded whether the applicant is a pauper or not only under Rule 5(b) of Order 33 of the Code.

6. Order 33, Rule 5 deals with rejection of an application for permission to sue as an indigent person. Clause (a) thereof says that the application shall be rejected where it is not framed and presented in the manner prescribed by Rules 2 and 3. Sub-rule (b) calls for rejection where the applicant is not an indigent person. Order 33, Rule 2 clearly provides that every application for permission to sue as an indigent person shall contain the particulars required in regard to plaintiffs 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 prescribed for the signing and verification of pleadings. In other words what Rule 2 contemplates is a scheduling of any movable or immovable property (emphasis supplied) belonging to the applicant with the estimated value thereof. When an applicant does not disclose an asset held by him in his application, whatever be the reason, on the wording of Rule 2, of Order 33 of the Code it is clear that the application is liable to be rejected in terms of Order 33, Rule 5(a) of the Code. In *Vazhunnaveer's* case 1963 KLT 451. His Lordship Justice Raghavan (as he then was) made an exception only in cases where a bona fide omission to include an asset was made by an applicant. May be occasionally cases may arise where either due to inadvertence or for reasons beyond his control, an applicant might omit to include an item of property in his application for permission to sue as an indigent person. If before the final disposal of the application the applicant takes steps to include the said item also in the schedule to the application and satisfies the Court that the original omission was bona fide, it may be possible to take the view that at the time the application is taken up for disposal the same had been framed in the manner prescribed by Rule 2 of Order 33 of the Code. With respect we are inclined to think that the proposition as stated in *Kunji Ramdan's* case 1976 KLT 620 cannot be accepted in the broad form in which it is stated. The postulate that the rejection could only be under Order 33, Rule 5(b) of the Code in a case where there is a non-disclosure in the application made by an applicant, with respect, cannot be accepted. When Rule 2 of Order 33 calls for setting out the entire assets of an applicant for permission to sue as an indigent person, there is no justification for watering down the said requirement except probably in the exceptional circumstance of a bona fide omission as referred to by His Lordship Justice Raghavan (as he then was) in *Vazhunnaveer's* case 1963 KLT 457. The Supreme Court has clarified in the decision in *Shri M.L. Sethi Vs. Shri R.P. Kapur*, that an immunity from a litigation unless the requisite Court fee is paid by the Plaintiff is a valuable right for the Defendant. When a Plaintiff seeks the taking away of that immunity on the scheme provided by Order 33, of the Code, is there any justification for whittling down the requirement set out in Order 33, Rule 2 of the Code of Civil Procedure? We think not. Under the scheme of Order 33, of the Code, a Plaintiff is exempted from paying the Court fee that is

payable by any other litigant who comes to Court for relief at the time of institution of the suit on the ground that he is not in a position to pay the Court fee. If a Plaintiff seeks such a special privilege to pursue his litigation, is there any reason not to insist on his strictly complying with the requirement of Order 33 of the Code and coming to Court with clean hands? According to us, there is no justification for removing the immunity available to the Defendant in a suit and to grant a right to the Plaintiff to prosecute the suit without payment of the Court fee unless the Plaintiff comes to Court with clean hands, making a disclosure of all his assets. The word "any movable or immovable property" used in Order 33, Rule 2 according to us ought to be given its natural meaning and on the scheme of the Code, it is clear that failure to comply with any of the requirements of Order 33, Rule 2 or Rule 3, should entail the rejection of the permission sought for by a Plaintiff. In fact, Mr. T.K. Joseph, J, in *Abdul Khader Rowther v. Appu* 1963 KLT 13 adopted the view that any deliberate omission to include all the assets in the schedule should entail the dismissal of the application. We are therefore satisfied that in so far as Kunju Raman's case 1976 KLT 620 postulated that even in the case of an omission to include an asset by an applicant and its discovery later, the rejection of the application could only be under Order 33, Rule 5(b) of the Code, cannot be taken as correct. With respect, we are of the view that the rejection could be under Order 33, Rule 5(a) of the Code in such a situation and a rejection under Order 33, Rule 5(a) of the Code can be warded off by an applicant for permission to sue as an indigent person, only by establishing that it was a bona fide omission on his part to include the asset and only after getting the application for permission amended to accord with the requirement of Order 33, Rule 2 of the Code.

8. We would like to advert to Anr. aspect, at this stage. In *K. Vazhunnavar's* case 1963 KLT 457 Raghavan, J. (as he then was) has suggested that it should appear to the Court that the omission was deliberate and mala fide before an application for permission can be rejected for non-disclosure of all his assets by the applicant who seeks to sue as an indigent person, as if the burden to show mala fides is on the Defendant opposing the application. We think with respect, that the boot is on the other leg and it is for the applicant to prove to the satisfaction of the Court that the omission on his part was not deliberate and it was a bona fide one. An application for permission to sue as an indigent person must be made with utmost bona fides and on an omission being discovered at the instance of the State or the Defendant in the suit, it is for the applicant to establish that his omission to include is bona fide. It is really a case where he is caught out on an omission. If it is deliberate, he must take its consequences. It is in that context that it becomes necessary for him to explain his omission and to show that it was not deliberate or that there was no lack of bona fides on his part in making such an omission. The adoption of a different approach would encourage dishonesty and in the applicant taking a chance on the non-discovery of the omitted asset and on being discovered, taking shelter under a plea that the omission to include is not shown to be mala fide by the other side. We are

therefore of the view that the statement of the law as contained in Vazhunnavar's case 1963 KLT 457 on the approach to be adopted also requires to be modified.

9. In the case on hand, there cannot be any difficulty in holding that the Appellant has not disclosed various items of properties which were held by him. Even the additional evidence sought to be adduced by him before this Court by way of C.M.P. 738 of 1996, discloses that he had right over various items of properties (we are referring to the communication from the Tahsildar to the Appellant dated 31st March 1993 produced by the Appellant as document No. 3) and he had not included any of them in the schedule to his application for permission to sue as an indigent person. In any event, it can be seen that the firm on whose behalf the Appellant is pursuing the litigation, clearly owned various items of properties including a large extent of 18 acres in R.S. 294/pt of Thrissileri Village which was also proposed to be attached under the Revenue Recovery Act. The argument of learned Counsel for the Appellant that an extent of 2.5 acres with a building thereon which he admits he is having, was not scheduled only because it was subjected to an attachment at the instance of the second Defendant and such an item is not liable to be included, does not appeal to us. In our view, the Appellant had the obligation to schedule the said extent of property as well, in his application for permission to sue as an indigent person though he might have adopted the stand that it could not be taken note of, while considering his capacity to raise funds for paying the Court fee. The fact that the asset has been attached by the creditor who is a party to the suit or by any other creditor does not entitle an applicant under Order 33, Rule 1 of the Code, not to include that item in the schedule which he is obliged to attach to the application for permission to sue as an indigent person.

Thus, we find that the Court below was perfectly justified in refusing permission to the Appellant to prosecute the amended suit as an indigent person. We confirm the order of the Court below and dismiss this appeal.

We grant the Appellant a time of one month from this day to pay the requisite Court fee.