

(2001) 11 KL CK 0023

In the High Court Of Kerala

Case No : C.M.P. No. 1004 of 2000 in C.M.C. of 2000 in A.S. of 2000

Moideen Koya

APPELLANT

Vs

Sarojini

RESPONDENT

Date of Decision : 20-11-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 1, Order 3 Rule 2, Order 33 Rule 2, Order 33 Rule 3, Order 6 Rule 14

Citation : (2002) 1 CivCC 485 : (2002) 1 ILR (Ker) 166

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

Bench : Division Bench

Advocate : C.P. Chandrasekharan, for the Appellant;

Judgement

P.K. Balasubramanyan, J.—This is a petition on behalf of the appellant for permission to re-present an appeal filed earlier and which was returned for curing of defects. The appeal was originally presented in this Court on 18.12.1999. The appeal was accompanied by a petition under Order XXXIII Rule 1 read with Order XLIV Rule 1 of the Code of Civil Procedure. The appeal and the application were not presented in compliance with requirement of Order XXXIII Rule 3 of the CPC in that the appeal and the application was not presented by the applicant in person nor was there any application for exempting the presentation by the application or the authorisation of an agent in that behalf who could answer all material questions relating to the application. The Registry while noting the various defects also rightly noticed the defect that the application for permission to appeal as an indigent person was not presented by the petitioner in person. The appeal and the application were returned for re-presentation after curing the defects.

2. On 3.1.2000 the Advocate who had filed the vakalath on behalf of the petitioner re-presented the appeal and the petition with an assertion that the defects were cure. The Registry noted that two of the defects subsided one of which was the failure of the applicant to present the application and the appeal in

person as enjoined by Order XXXIII Rule 3 of the Code of Civil Procedure. The papers were again returned. Thereupon counsel for the applicant again re-presented the application and the appeal with a petition C.M.P 1004 of 2000 praying that the Advocate may be allowed to re-present the application and the appeal on behalf of the applicant. The Registry noted that the appeal was sought to be filed as an appeal and though it was sought to be filed as an indigent appeal, it was not presented by the appellant in person. The appeal was presented by counsel along with a vakalath and a petition had been filed for permission and sent up the matter for orders of court.

3. Before us counsel for the petitioner contended that a learned Single Judge of this Court in *Jose v. Varkey* (1985 KLT 1071) under Order XLIV Rule 1 with Order XXXIII Rule 1 of the Code the court can exempt that applicant from appearing in court in which case the application may be presented by an authorised agent and there is nothing to deter the Advocate himself being appointed as an authorised agent and in the light of this decision the Advocate is entitled to originally present the appeal and also to represent the same after taking back the appeal, curing the defects and representing the same. We may notice here that in the present case the counsel has not filed any material to show that he has been appointed as an authorised agent by the applicant in terms of Order XXXIII Rule 3 of the Code other than the fact that the applicant had executed a vakalathnama in his favour which contains the usual authorisation. In *Jose v. Varkey* (1985 KLT 1071) relied on by counsel it is stated:

"Under Order 44, Rule 11 read with Order 33 Rule 3 the court can exempt the applicant the applicant from appearing in court in which case the application may be an authorised agent. There is nothing to deter the Advocate himself being appointed as an authorised agent. The court has ample power under Order 33 Rule 3 CPC to exempt the applicant from appearing in court".

The court thereafter took note of the facts of that case and accepting the averments contained in the affidavit filed by the petitioner exempted him from appearing in court and further allowed his prayer that the application may be presented by his authorised agent, the Advocate who was appearing for him in that case. On facts we have already noted that in the present case there is no specific authorisation of the Advocate in terms of Order XXXIII Rule 3 of the Code. Whether the Advocate can be authorised is a matter that requires to be considered at this stage.

4. In *Jose v. Varkey* (1985 KLT 1071) this Court referred to and relied on the decision of the Orissa High Court in *Bagusethi Manikyam Vs. Bagusethi Ramamurty*, On a scrutiny of that decision, it is seen that the argument that was raised in that case was that the exemption from appearance under Order XXXIII Rule 3 of the Code was confined to the persons exempted under Sections 132 and 133 of the Code from personal appearance in court and cannot be applied in any other case. That argument was, with respect, rightly overruled by the learned Judge who took the view that the interpretation to be placed on Order

XXXIII Rule 3 of the Code is not controlled by the provisions of Sections 132 and 133 of the Code. After referring to Order III Rules 1 and 2 and Order VI Rule 14 of the Code and after referring to the contentions of learned counsel that an Advocate cannot be an authorised agent within the meaning of Order XXXIII Rule 3 of the Code, the learned Judge referred to the vakalathnama filed in that case which authorised the Advocate to appear for the petitioner and to conduct and prosecute all proceedings that may be taken in respect of any application connected with the case and stated that recognised agents enumerated in Order XXXIII Rule 2 of the CPC did not take in Advocates within its purview. Then the court stated that recognised agents are different from authorised agents. The two expressions had been used separately in different rules. Authorised agents had not been defined in the Code. Consequently a person can be an authorised agent even though he may not be a recognised agent. The Advocate in that situation can be an authorised agent though he is not a recognised agent provided, the necessary authority from the petitioner had been obtained.

5. In *Shri M.L. Sethi Vs. Shri R.P. Kapur*, , the Supreme Court has held that:

"An immunity from a litigation unless the requisite Court fee is paid by the plaintiff is a valuable right for the defendant. It follows therefrom as a corollary that the proceedings to establish that the applicant-plaintiff is a pauper, it will take away that immunity, is a proceeding in which the defendant is vitally interested".

It is, therefore, clear that the requirements of Order XXXIII of the CPC should be strictly complied with before the plaintiff is allowed to sue as an indigent person, since the grant of such permission takes away the immunity available to the defendant. If one were to look at the scheme of Order XXXIII in this context, one finds that there is a specific mode of presentation of an application to sue as an indigent person prescribed by Order XXXIII Rule 3 of the Code. That rule says that:-

"notwithstanding anything 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 to the application".

Of course, the same procedure applies to the presentation of an appeal under Order XLIV of the Code, since Order XLIV Rule 1 specifically says that all matters including the presentation of an application for permission to appeal as an indigent person are governed by the provisions of Order XXXIII of the Code relating to suits. There is no case for the appellant that the appellant is exempted from appearing in court. In fact, no attempt was made by the appellant to claim exemption and the appeal, along with an application under Order XLIV Rule 1 read with Order XXXIII Rule 2 and 3 of the Code of Civil Procedure, was presented by counsel as if he was presenting an ordinary appeal and a petition along with it. On the facts of this case, there cannot be any

difficulty in holding that the original presentation of the appeal and the application for permission to appeal as an indigent person, not being presented by the appellant in person, was not a presentation at all. The Registry, rightly noticed that defect and returned the application on that ground. Then the appellant did not appear to re-present the appeal and the application. But, what was done was to re-present the appeal with a petition for allowing the counsel to re-present the appeal and receive the same as an indigent appeal.

6. The decision in *Smt. Dipo Vs. Wassan Singh and Others*, cannot be of any help to the appellant. That was a case where an appeal was presented as an indigent appeal before the District Court, but not by the party in person. The defect was not notice. The appeal was taken on file and admitted to file. It was thereafter at the hearing stage that the appeal was dismissed on the ground that the appeal had not been presented as an indigent appeal by the appellant himself. Their Lordships of the Supreme Court stated that that was not proper, since the appeal had already been entertained rules of procedure are to advance the cause of justice and not shortcircuit a decision on merits. In the case on hand, the objection was immediately taken by the registry and the appeal has not been numbered or taken on file. In that situation, it cannot be said that the objection cannot be taken by the Registry or upheld by this Court. We may notice here that in *Smt. Dipo Vs. Wassan Singh and Others*, the Supreme Court did not say that there is no need to comply with the requirements of Order XXXIII Rule 3 of the Code of Civil Procedure.

7. In the case on hand, there was also no authorisation specifically to counsel to present the appeal as an indigent appeal on behalf of the appellant. Infact, we are of the view that the authorised agent who can answer all material questions relating to the application and who may be examined in the same manner as the party represented by him, cannot include an Advocate who is merely appearing on instructions by the party and who is entitled to plead and act for the party.

8. In *Jose v. Varkey* (1985 KLT 1071), the facts disclose that there was a specific application by the appellant authorising his counsel to present the appeal and it was in that context that the learned Single Judge held that the application could be entertained. We have already indicated that in terms of Order XXXIII Rule 3 of the CPC and the requirements of that rule, and Advocate could act as an authorised agent and present an indigent appeal. In our view, and Advocate cannot himself be an agent within the meaning of Order XXXIII Rule 3 of the CPC for presenting an indigent appeal on behalf of his client since he will not be able to answer the questions that the Court may put to him in the context of Order XXXIII of the Code of Civil Procedure. We are, therefore, not in a position to agree with the view expressed by the learned Single Judge in *Jose v. Varkey* (1985 KLT 1071). That apart, on the facts of this case, there was no specific application initially filed, seeking to exempt the appellant from presenting the appeal in person or appointing his counsel as authorise agent in terms of Order XXXIII Rule 3 of the Code of Civil Procedure.

9. In the view we have taken as above, we do not think it necessary to refer in detail to the decisions in *Joge Singh v. Union of India* (1990 (1) KLT 46 (Case No. 55)), *Union Bank of India v. Khaders International Constructions Ltd.* (1992 (2) KLT 274) and *Grand Buoy Enterprises v. National Insurance Co. Ltd.* (1994 (2) KLT 697). The decision in *Union Bank of India v. Khader International Construction Ltd.* (1992 (2) KLT 274) does not have any direct bearing on the question involved in this case. We may incidently notice that the said decision of this Court has been approved by the Supreme Court in appeal in a recent decision to the effect that the word "person" on Order XXXIII Rule 3 of the CPC includes a juridical person also.

10. Since we are of the view that the original presentation of the appeal as an indigent appeal in this case was not regular or proper, the re-presentation of that appeal attempted by counsel as an indigent appeal cannot be accepted. We, therefore, hold that the appeal, if it has to be treated as an appeal filed by an indigent person, has to be presented in person by the party or an authorised agent who is in a position to answer all material questions relating to the application in terms of Order XXXIII Rule 3 of the Code Civil Procedure. Since in this case, we find no reason to exempt the appellant from appearing in Court and presenting the appeal in person, we direct the registry to return the appeal which can be taken back by counsel who had sought to re-present the appeal so that it could be presented by the appellant in person in terms of Order XLIV Rule 1 read with Order XXXIII Rule 3 of the CPC subject to any question of limitation arising.