
(1985) 10 KL CK 0024

In the High Court Of Kerala

Case No : C.M.P. No. 27607/85 and A.S. unnumbered of 1985

Molath Jose

APPELLANT

Vs

Kizhakkedath Varkey

RESPONDENT

Date of Decision : 17-10-1985

Acts Referred:

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

Citation : (1985) KLJ 883

Hon'ble Judges : K.S. Paripoornan, J

Bench : Single Bench

Advocate : Mathai M. Paikaday, for the Appellant;

Judgement

K.S. Paripoornan, J.

1. The above un-numbered appeal is filed by the plaintiff in O.S. 316 of 1981 of the II Addl. Sub Court, Kozhikode. In the Civil Miscellaneous petition the plaintiff (appellant) prays that he may be allowed to file the appeal in forma pauperis. The petition is filed under O. 44 R. 1 of the Code of Civil Procedure. Office has noted that the memorandum of appeal was presented by the Advocate. It is stated that under O. 44 R. 1 read with O. 33 C.P.C. the appeal should be presented by the appellant himself with a separate petition for permission to file the appeal as an indigent person. According to counsel, personal appearance is not necessary. So the matter was referred to the court. The sole question that arises for consideration is the scope and impact of O. 44 R. 1 read with O. 33 R. 3 of the C.P.C. They run as follows:

ORDER XLIV

(Appeals by Indigent Persons)

1. Who may appeal (as an indigent person--(1) 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:"

ORDER XXXIII

(Suits by Indigent Persons)

X X X

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 to 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.

Any person may be allowed to appeal as an indigent person. The provisions which relate to a suit filed by indigent person, are applicable in all matters including the presentation of such application in the case of appeals. Counsel Mr. Paikeday contended that under O. 44 R. 3, if a person was allowed to file a suit in forma pauperis, in an appeal filed by him, no further enquiry in respect of the question whether or not he is an indigent person shall be necessary. It is sufficient if he has filed an affidavit stating that he has not ceased to be an indigent person since the date of the decree appealed from. It is open to the Government Pleader or the respondent to dispute the statement, when an enquiry will be made and appropriate orders passed. The sole object requiring the indigent person himself to file the application is to find out whether he is really an indigent person. In view of O. 44 R. 3, that enquiry over again at the time of appeal is unnecessary. So the person who files the appeal as an indigent person need not himself file the application in the appellate court. Alternatively, counsel contended that C.M.P. No. 27607 of 1985 has been filed praying for exemption to the petitioner from appearance in court and to allow his authorised agent, the advocate to present the memorandum of appeal on behalf of the petitioner. The petition is maintainable under O. 33 R. 3 read with O. 44 R. 1. In view of the said prayer, it is unnecessary for the petitioner himself to file the memorandum of appeal in this court. Regarding the first contention that in view of O. 44 R. 3 the indigent person who has filed the appeal from the decree of the lower court, wherein he was allowed to sue as a pauper, need not himself present the application in the appellate court, cannot stand scrutiny. O. 44 R. 3 does not exempt the appellant from presenting the application in person. But the second or the alternative contention of the counsel is entitled to acceptance. Under O. 44 R. 1 read with O. 33 R. 3 the court can exempt the applicant from appearing in court, in which case the application may be presented by an authorised agent.

There is nothing to deter the Advocate himself being appointed as an authorised agent. The court has ample power under O. 33 R. 3 C.P.C., to exempt the applicant from appearing in court. In this case both the hands of the petitioner were dismembered and he is practically unable to work or move about, nor can he afford to make a travel from Kozhikode to Cochin. His present physical and financial condition are such that it is impossible for him to travel all the way from Calicut to file an application in person. I accept the averments contained in the affidavit of the petitioner dated 24-9-1985 and exempt him from appearing in court. I further allow the petitioner's prayer that the application may be presented by the authorised agent, Advocate Sri. Mathai M. Paikeday In this view of the matter, C.M.P. 27607 of 1985 is allowed. The Advocate, Mathai M. Paik. day, is permitted to present the application to file the appeal in forma pauperis, The combined effect of O. 44 R. 1 read with O. 33 R. 3 C.P.C. has been admirably brought out in the decision reported in Bagusethi Manikyam Vs. Bagusethi Ramamurty, . I fully concur with the said decision. The office note is accepted with the modifications contained in the order in C.M.P. 27607 of 1985.