

**(2006) 02 P&H CK 0117**

**In the Punjab And Haryana At Chandigarh**

**Case No :** Civil Miscellaneous No. 12697-CII of 2004 and C.R. No. 3335 of 2004 (O and M)

Mrs. Premi Devi

APPELLANT

Vs

State of Haryana and Others

RESPONDENT

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**Date of Decision :** 16-02-2006

**Acts Referred:**

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

**Citation :** AIR 2006 P&H 151 : (2006) 2 CivCC 417 : (2006) 142 PLR 876 : (2006) 2 RCR(Civil) 195

**Hon'ble Judges :** Satish Kumar Mittal, J

**Bench :** Single Bench

**Advocate :** Vijay Singh Kajla, for the Appellant; Jitendra Chauhan, D.A.G., for the Respondent

**Final Decision :** Allowed

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**Judgement**

Satish Kumar Mittal, J.—For the reasons stated in the application, delay of 109 days in re-filing the petition is condoned.

The question for consideration in this petition is: Whether an application under Order 44 Rule 1 C.P.C. for permitting the appellant to file appeal as an indigent person can be entertained and considered if it is filed subsequently and was not filed alongwith the memorandum of appeal?

2. In this case, the petitioner filed a suit for recovery of Rs. 5 lacs with interest as damages against the respondents on the ground that she was sterilized in the Government Hospital, Kurukshetra in the year 1993. It has been stated that the said suit was filed by the petitioner as an indigent person. After recording evidence by both the parties, her suit was dismissed by the trial court, while holding that there was no negligence on the part of the Doctor, who performed operation upon the petitioner and she is not entitled to get any compensation or damages.

3. Against the said judgment and decree, the petitioner filed an appeal before, the first appellate court without there being any application under Order 44 Rule 1 C.P.C. for permitting her to file an appeal as an indigent person. When the appeal was taken up for hearing and when it was pointed out that the appeal was being filed without there being proper court fee, the petitioner filed an application seeking permission to file the appeal as indigent person. The first appellate court dismissed the said application while observing that since the application was filed subsequently by the petitioner, which should have been accompanied with the memorandum of appeal, therefore, the same is not maintainable. It has been further observed that normally, when an application for permission to file the appeal as an indigent person is rejected, time has to be granted to the appellant to pay the requisite court fee, but in the instant case, the appeal was initially instituted without application for permission to file the appeal as indigent person and the appeal was filed without paying requisite court fee and even without any application seeking time to pay the requisite court fee, therefore, the appeal has been rejected for want of court fee. Against that order, the present petition has been filed.

4. I have heard the arguments of learned Counsel for the parties and have gone through the impugned order.

5. In my opinion, the first appellate court has committed grave illegality while rejecting the appeal on the aforesaid ground. Order 44 of the CPC which provides for filing of appeal by indigent person, reads as under:-

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 those provisions are applicable.

2. Grant of time for payment of Court-fee.- Where an application is rejected under Rule 1, the Court may, while rejecting the application, allow the applicant to pay the requisite Court-fee, within such time as may be fixed by the Court or extended by it from time to time; and upon such payment, the memorandum of appeal in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance.

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 person 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 Appellate

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.

A bare reading of Rule 1 indicates that 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. In this regard, the provisions contained in Order 33 Rule 1 C.P.C. shall be applicable. Rule 2 provides that if an application under rule I is rejected, the Court will allow the appellant to pay the requisite court fee within time as may be fixed by the Court. On such payment, the memorandum of appeal shall have the same force and effect as if such fee had been paid in the first instance. Rule 3 provides that where an applicant is allowed to sue as an indigent person in the trial court from whose decree the appeal is preferred, no further inquiry in respect of the question whether or not he is an indigent person is necessary if the applicant gives an affidavit stating that he has not ceased to be an indigent person 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 said question shall be held by the Appellate Court.

6. In the instant case, undisputedly, the petitioner was permitted to file the suit as an indigent person, therefore, while filing the appeal against the judgment and decree passed in the said suit, she was only required to file an affidavit stating therein that she has not ceased to be an indigent person since the date of the decree appealed from. Admittedly, initially when the appeal was filed, no such application/affidavit was filed by the petitioner alongwith the memorandum of appeal. However, such application was filed subsequently. The learned first appellate court has rejected the said application only on the ground that Rule 1 of Order 44 C.P.C. requires that the application for entertaining the appeal as filed by indigent person must be accompanied with the memorandum of appeal and the instant appeal was filed without any such application, therefore, the same cannot be entertained subsequently. In my opinion, the approach of the first appellate court is contrary to the intend and purpose of the provision. A similar question pertaining to filing of memorandum of appeal without application for condonation of delay under Order 41 Rule 3A C.P.C. came up for consideration before the Hon'ble Apex Court in *State of M.P. and Another Vs. Pradeep Kumar and Another*, . In that case, the second appeal was filed before the High Court without an application for condonation of delay. Subsequently, to cure the defect, an application for condonation of delay was filed, which was

rejected by the High Court on the sole ground that the delayed appeal was presented without accompanying an application for condonation of delay and the subsequent application for condonation of delay was not liable to be entertained. While setting aside the order of the High Court, the Hon"ble Apex Court observed as under:-

10. What is the consequence if such an appeal is not accompanied by an application mentioned in Sub-rule (1) of Rule 3-A? It must be noted that the Code indicates in the immediately preceding Rule that the consequence of not complying with the requirements in Rule 1 would include rejection of the memorandum of appeal. Even so, another option is given to the court by the said Rule and that is to return the memorandum of appeal to the appellant for amending it within a specified time or then and there. It is to be noted that there is no such rule "prescribing for rejection of memorandum of appeal in a case where the appeal is not accompanied by an application for condoning the delay. If the memorandum of appeal is filed in such appeal without an accompanying application to condone delay the consequence cannot be fatal. The Court can regard in such a case that there was no valid presentation of the appeal. In turn, it means that if the appellant subsequently files an application to condone the delay before the appeal is rejected the same should be taken up alongwith the already filed memorandum of appeal. Only then the court can treat the appeal as lawfully presented. There is nothing wrong if the court returns the memorandum of appeal (which was not accompanied by an application explaining the delay) as defective. Such defect can be cured by the party concerned and present the appeal without further delay.

11. No doubt Sub-rule (1) of Rule 3-A has used the word "shall". It was contended that employment of the word "shall" would clearly indicate that the requirement is peremptory in tone. But The peremptoriness does not foreclose a chance for the appellant to rectify the mistake, either on his own or being pointed out by the court. The word "shall" in the context need be interpreted as an obligation cast on the appellant. Why should a more restrictive interpretation be placed on the Sub-rule ? The Rule cannot be interpreted very harshly and make the non-compliance punitive to an appellant. It can happen that due to some mistake or lapse an appellant may omit to file the application (explaining the delay) alongwith the appeal.

12. It is true that the pristine maxim *vigilantibus non dormientibus jura subveniunt* (law assists those who are vigilant and not those who sleep over their rights). But even a vigilant litigant is prone to commit mistakes. As the aphorism "to err is human" is more a practical notion of human behaviour than an abstract philosophy, the unintentional lapse on the part of litigant should not normally cause the doors of the judicature permanently closed before him. The effort of the court should not be one of finding means to pull down the shutters of adjudicatory jurisdiction before a party who seeks justice, on account of any mistake committed by him, but to see whether it is possible to entertain his

grievance if it is genuine.

Order 44 only provides that any person, who is unable to pay the fee required for the memorandum of appeal, prefers an appeal, he may present an application accompanied by a memorandum of appeal to allow him to file the appeal as an indigent person and in case, the Court does not grant him permission and rejects his application, then the appellant is to be given an opportunity to pay the court fee, within such time, as may be fixed by the Court. So, merely because an appeal is not accompanied by an application under Order 44 Rule 1 C.P.C., the appeal is not liable to be rejected straight away for want of proper court fee and the appellant is liable to be provided one opportunity to make good the deficiency of court fee. If an application is filed subsequently, when the appellant comes to know about the same, such application can also be entertained and if the appellant satisfies the Court regarding his indigency, the appeal can be entertained. In the instant case, the first appellate court has not only committed illegality while observing that the subsequent application filed by the petitioner was not maintainable, but also while rejecting the appeal on the ground that the petitioner was not entitled for an opportunity to make good the deficiency of court fee. In view of Rule 2, the appellate court was required to give an opportunity to the petitioner to make good the deficiency of the court fee, in case she failed to satisfy the court regarding her indigency. Further, in this case, the first appellate court has totally ignored the fact that the petitioner was permitted to file the suit as an indigent person and at the time of filing the appeal against the judgment and decree passed by the trial court, she was only required to submit an affidavit stating that she has not ceased to be an indigent person since the date of the decree appealed from.

7. Thus, in view of the above, the instant petition is allowed and the impugned order passed by the first appellate court is hereby set aside, being not sustainable. The appellate court is directed to entertain the application of the petitioner seeking permission to file the appeal as an indigent person and decide the same in accordance with law.