
(1989) 02 MP CK 0021

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 69 of 1985

Nandkishore Mohanlal

APPELLANT

Vs

Jhunjhunwala and Co. and Others

RESPONDENT

Date of Decision : 22-02-1989

Acts Referred:

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

Citation : AIR 1990 MP 331 : (1990) 35 MPLJ 382 : (1990) MPLJ 382

Hon'ble Judges : P.C. Pathak, J

Bench : Single Bench

Advocate : H.B. Agarwal, for the Appellant; M.M. Sapre, for the Respondent

Final Decision : Allowed

Judgement

P.C. Pathak, J.

The order in this appeal shall also govern disposal of Misc. Appeal No. 1 of 1989 (Nandkishore Mohanlal v. Bissesarlal Gupta & Co. and 4 Ors.) Misc. Appeal No. 2 of 1989 (Nand Kishore Mohanlal v. Murlidhar Brijlal and 2 Ors.).

The appellant/plaintiff is a partnership firm registered under the Indian Partnership Act, 1932. In a suit for recovery of Rs. 1,05,965-70 against the respondents, since the firm was unable to pay requisite court-fee of Rs. 5405/-, it applied under Rule 1 of Order 33 of the CPC (hereinafter referred to as "the Code") to sue as an indigent person, which was registered as M. J. C. No. 2 of 1977.

In Misc. Appeal No. 1 of 1989, the suit filed by the same plaintiff for recovery of certain amount against another set of defendant was registered as M.J.C. No. 10 of 1978. Yet in another suit for recovery of money against the respondents in Misc. Appeal No. 2 of 1989 the ame plaintiff sought permission to sue as an indigent person. After recording evidence and receipt of a report from the Collector the trial Court permitted the plaintiff to issue as an indigent person. The suit was accordingly registered as C. S. No. 23-B of 1977.

On 5-2-1985, the respondents, in this appeal moved an application u/s 151 of the Code alleging that the High Court in Misc. Appeal No. 160 of 1979 held that the appellant is not an indigent person, and therefore, the application under Rule 1 of Order 33 of the Code be dismissed.

The learned trial court, by separate but identical orders, rejected the applications in the two cases and dispaupered the plaintiff in the suit. Hence, the plaintiff appellant has filed these appeals.

Learned counsel for the appellant submitted the finding that the plaintiff firm is not an indigent person in M. J. C. No. 2/78 in-volving a claim for recovery of Rs. 63,000/-, will not necessarily mean that the plaintiff cannot file other suits as an indigent person. Counsel for the respondents argued that the firm has filed several suits involving very high stakes and applied for stay of proceedings in all the three cases on the ground that the decision in Misc. Appeal No. 160 of 1979 will have a direct impact on the issue of indigency in the three cases. The decision in that case went against him. Therefore, now he is estopped from arguing that the decision in that appeal has no bearing in the remaining cases. The finding that the plaintiff firm failed to prove that it is an indigent person must govern the disposal of the applications in these cases also. Apart from this, it was also urged that a partnership firm is not a "person" within the meaning of Explanation I to Rule 1 of Order 33 of the Code. In support of this, learned counsel submitted that definition of "indigent person" as given in Explanations 1 to 111 before the Amendment in 1976, ran as under:

"A person is a "pauper" when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit."

Clause (b) of Explanation 1 inserted by Amendment Act of 1976. though now does not mention wearing apparel of the person provides that person would be considered an indigent person where no court-fee is prescribed for the plaint, if he is not entitled to property worth more than one thousand rupees other than the property exempt from attachment in execution of a decree, and the subject-matter of the suit. Proviso to Section 60 of the Code, which gives a list of properties exempt from attachment and sale in execution of decree, however mentions the necessary wearing apparel. A firm cannot wear apparels. Similarly, Rule 3 of Order 33 provides that the application shall be presented to the Court by the applicant in person. The plaintiff being a firm cannot present the application in person. He, therefore, argued that the word "person" means a living person and not a firm.

First question for decision is whether a firm is a "person" and can sue as an indigent person. In Mohd. Hafeez Khan Vs. State Transport Appellate Tribunal, Gwalior and Others, it was held that a partnership is merely an association of persons for carrying on the business of partnership and in law the firm name is a

compendious method of describing the partners, while in case of a company it stands as a separate juristic entity distinct from its shareholders. The legal fiction must not be carried too far and it is for some purposes that the law has extended a limited personality to a firm which is not a legal entity. The persons who are individually called partners are collectively called a firm and the name under which their business is carried on is called the firm name. Reliance was placed on *Bacha F. Guzdar Vs. Commissioner of Income Tax, Bombay*, and *Her Highness Maharani Mandalsa Devi and Others Vs. M. Ramnarain (P) Ltd. and Others*,

In *Shree Shankarji v. Godavaribai*, AIR 1935 Nag 209, the suit was filed by Shebait on behalf of idols along with an application for permission to sue in forma pauperis. It was held that the word "persons" in Order 33 has reference to all those who have a right to institute a suit under the Code of Civil Procedure. Order 33 applies to all prospective plaintiffs or persons in whom any right to relief exists within the meaning of Order). Rule 1 of the Code. In *Swaminathan v. Official Receiver*. AIR 1937 Mad 549 (FB), it was held that suits under CPC can be instituted not only by natural human beings but also by artificial persons such as a corporation or an idol and also by persons like executors, administrators, trustees and Official Receivers who represent the estate of another. Therefore, having regard to the scheme of the Code, the context and object of the enactment would not exclude an Official Receiver from the category of persons within the meaning of Order 33, Rule 1, Civil Procedure Code.

In *Kundan Sugar Mills, Amroha Vs. Indian Sugar Syndicate Ltd. and Others*, the Full Bench held that the word "person" in the Explanation to Rule 1, would include a company unless there is anything repugnant in the context of the provisions of Order 33. In this decision, argument that a limited company cannot possess wearing apparel and cannot present an application in person, and therefore, compliance of Rules 1 and 3 is not possible and consequently it must appear that a limited company is not covered by the expression "person" was closely examined. A Division Bench in *Shri Gurdwara Sahib Kothi Begowal and Another Vs. Harnam Singh and Others*, was required to examine whether Shri Gurdwara Sahib represented by Mahant could sue as pauper. The Court held that provisions of Order 33 are available not only to natural persons but also to other persons, juristic or otherwise who are capable of bringing a suit. The Bench took the notice of *Perumal Koundan and Others Vs. The Thirumalarayapuram Jananukoola Dhanasekara Sanka Nidhi Ltd.*, wherein it was held that a registered company or any other association may be unable to pay court-fee payable suppose that the Legislature did not intend Order 33 to apply to such cases specially when it is remembered that the effect would be to allow debtors to escape payment and defeat or defraud the creditors and shareholders of company. The Explanation to Rule 1, no doubt states that where no court-fee is prescribed, the petitioner should not be entitled to property more than Rs. 100/-, "other than his necessary wearing apparel". The explanation simply allows deduction of the value of wearing apparel and can only mean that if the applicant has necessary wearing apparel, he can deduct its value. The rule could not be

construed to mean that only persons who in law can possess wearing-apparel can sue as paupers. These observations were approved by the Supreme Court in *The Nagpur Electric Light and Power Co., Ltd. and Others Vs. K. Shreepathirao*,

In *E. I. Coal v. E. I. C. Co. Workers' Union*, AIR 1961 Patna 15, a Division Bench held that a registered trade union which is a body corporate within the meaning of Section 13 of the Trade Unions Act can institute a suit in forma pauperis. Similarly in *Jogesh Chandra Bera and Others Vs. Sri Iswar Braja Raj Jew Thakur*, held that a Deity as juristic person is capable of suing as pauper.

11 From the foregoing cases, it must be held that a firm is a "person" within the meaning of Rule 1 of Order 33 of the Code and is entitled to sue as an indigent person subject to fulfilment of other tests.

The next question is whether the Court below was right in rejecting the application for permission to sue as an indigent person merely on the ground that the appellant was held not to be an indigent person in another case. A test to determine pauperism of a person is (i) where a fee is prescribed by law for plaint in a suit a person who is not possessed of sufficient means to enable him to pay such fee was a pauper for the purposes of that suit. See AIR 1934 104 (Nagpur) and also *Fakruddin and Another Vs. Iqbal Ahmad and Another*, The later decision further held that if law lays down the fee payable on a plaint, it is a fee prescribed by law regardless of how it is calculated. Ad valorem fees payable on a plaint is as much a fee prescribed as fixed fee and that where no such fee is prescribed, person was not entitled to property worth Rs. 1,000/- other than the property exempt from attachment and the subject-matter of the suit. The question whether the person is possessed of sufficient means to pay fee prescribed by law may differ from case to case. Therefore, merely because the appellant/plaintiff was declared not to be an indigent person in one suit could not be made the basis for rejection of the applications in the aforesaid cases.

It was next argued that in order to ascertain whether the plaintiff firm is possessed of sufficient means, properties belonging to partners have to be taken into account to decide the question of indigency. In *(Nandkishore Mohanlal v. Shyam-sunder Vimalkumar, Misc. Appeal No. 160 of 1979 decided on 30-11-1982, Shri G. P. Singh, C. J., speaking on behalf of the division bench, held that when a suit is brought in the name of a firm, the suit is in substance a suit on behalf of all the partners constituting the firm, The assets of all the partners can, therefore, be taken into account for deciding an application under Order 33. Rule 1 of the Code. Learned Counsel for the appellant submitted that in *Shree Shankerji's case (AIR 1935 Nag 209) (supra)* the Court held that in an application under Order 33, Rule 1 by the Idols represented by their Shebaitis, the question whether Shebaitis have funds of their own is irrelevant and enquiry should be confined to ascertain whether the Idols are pauper within the meaning of Order 33 of the Code. Similarly in *S. G. Sahib's case. (AIR 1960 P & H 73) (supra)* it was held that in considering the question whether the plaintiff is a pauper, only assets of person, juristic or otherwise on whose behalf the suit is brought and*

not the personal property of the person acting in the representative capacity are to be taken into consideration. In AIR 1940 148 (Oudh) also it was held that when a plaintiff sues in a representative character such as mutawalli, trustee or a shebait, personal property of the plaintiff is not to be taken into consideration and only property of the wakf or trust in the hands of the plaintiff in the representative capacity should be taken into account to determine whether he has sufficient funds to pay court-fees prescribed by law. As against this in Vellingiri Naicken v. Beemiah Chettiar AIR 1949 Mad 714, it was held that a representative suit on behalf of the villagers for declaration of certain lands as communal lands is not maintainable by the plaintiffs who are paupers, when the persons whom they represent are possessed of means. Explanation III to Rule 1 of Order 33 of the Code has now been inserted by the Amendment Act of 1976 which provides that where the plaintiff sues in a representative capacity, the question whether he is an indigent person or not shall be determined with reference to the means possessed by him in such capacity. However in Nandkishore's case (supra), since Shri Singh, C. J. held that Explanation 111 has no application to the case, it is not essential for me to examine the question any further since the decision by the division bench, is binding on me. The trial court has also not made any enquiry as to sufficiency of means, by the plaintiff to pay court-fee. The Division Bench held that the enquiry has to be made with reference to the assets of the partners constituting the plaintiff firm.

In view of the foregoing discussions, the appeals are allowed. The impugned orders are set aside and the cases are remanded to the trial court to dispose of the applications under Rule 1 of Order 33 of the Code in accordance with law, with due advertence to the foregoing observations. There shall be no order as to costs.