
(1991) 05 SHI CK 0001
In the High Court Of Himachal Pradesh
Case No : F.A.O. No. 27 of 1991

Smt. Kalpana Rana

APPELLANT

Vs

State of H.P.

RESPONDENT

Date of Decision : 13-05-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 1, Order 33 Rule 1A, Order 33 Rule 4, Order 33 Rule 5, Order 33 Rule 6

Citation : (1991) 05 SHI CK 0001

Hon'ble Judges : Davinder Gupta, J;D.P. Sood, J

Bench : Division Bench

Judgement

Devinder Gupta, J.—This appeal is against the order passed on 26th October, 1990 by the Additional District Judge, (II) Kangra at Dharamsala declining permission to the appellant to sue as an indigent person.

2. On 4th of April, 1990, the appellant presented an application in the court of the Senior Subordinate Judge, Kangra at Dharamsala seeking permission to sue the respondent as an indigent person. On the same day when her statement was recorded by the court under Rule 4 of Order XXXIII of the CPC (Act No. 5 of 1908), (hereinafter referred to as the Code), she stated that she was not possessed of sufficient means to enable her to pay the fee prescribed by law for the plaint in the suit and she had only movable property inclusive of wearing apparels worth not more than Rs. 950/ -. On 6th April 1990, a notice was directed to be issued to the Collector for submitting his report. The application was thereafter sent by the Senior Subordinate Judge to the Court of the District Judge, Kangra at Dharamsala, who transferred the same to the Court of the Addl. District Judge (II), Kangra, for disposal, in accordance with law, which court hereinafter has been referred to as the trial court. As report of the Collector had not been received, therefore, an Order was made directing reminder to be issued to the Collector to submit his report. The report was received on 26th October, 1990. As per the report, appellant's income per annum was Rs. 9000/- and her husband had property worth Rs. 19,142/ -. On perusal of the report, the trial

court passed the impugned order rejecting the application and refusing permission to sue as an indigent person. As a consequence, the appellant was asked to make good the deficiency in court fee. It is this order which is under challenge.

3. On hearing of parties and going through the record, we find that the trial court has failed to follow the procedure prescribed under the law and has passed the impugned order in a mechanical manner without the application of mind.

4. The first point which is to be determined on presentation of application for leave to sue as an indigent person is whether the applicant was an indigent person on the date of presentation of the application? As per Rule 1A of Order XXXIII of the Code every inquiry into such questions is required to be made in the first instance by the Chief Ministerial Officer of the Court unless the court otherwise directs. When application is found to have been duly presented Rule 4, Order XXXIII of the Code empowers the court to examine the applicant not only on the question of his being an indigent person, but also with reference to the merits of his claim in order to ascertain as to whether the allegations made in the application to disclose a cause of action. Rule 5 provides that an application for permission to sue as an indigent person shall be rejected in the events enumerated in the Rule. In case the court does not propose to reject the application on the grounds enumerated in Rule 5, then the application has to be heard and decided on merits as per the procedure prescribed in Rules 6 and 7 of Order XXXIII of the Code, i.e., after issuing atleast 10 days clear notice to the opposite party and Government pleader.

5. A date has to be fixed for recording of evidence of the applicant, opposite party and on behalf of the Government. The examination of witnesses required to be confined to the matter specified in Clauses (b), (c) and (e) of Rule 5 only but the examination of the applicant or his agent may relate to any of the matter specified in Rule 5. It is only after evidence of the parties has been recorded and arguments heard that the court may allow or refuse to allow the applicant to sue as an indigent person.

6. As noticed above, in the instant case, after the court had decided not to reject the application under Rule 5, Order XXXIII of the Code, instead of notice being issued to the respondent opposite party and the Government Pleader, report of the Collector was called and on receipt of the report, without affording an opportunity to the appellant to rebut the report and without affording an opportunity of being heard, it simply rejected the application by refusing to allow here to sue as an indigent person. From perusal of the order and record, it appears that the trial court simply failed to notice the amendments carried out in the Code by the CPC Amendment Act, 1976 (Act No. 104 of 1976). The trial court not only committed this procedural irregularity but acted with materials illegality in blindly following the report of the Collector according to which the appellant was having annual income of Rs. 6036/- from pension and Rs. 3000/- by way of earning from manual labour. Besides this, it was stated that she had

property worth Rs. 19142.00 of her husband. Neither in the report, nor in the impugned order it was mentioned that she was possessed of sufficient means to enable her to pay the amount of court fee payable for the plaint in the suit. In the absence of such a finding, the trial court could not have refused her permission to sue as an indigent person. Explanation I to Rule 1 of Order XXXIII of the Code used the word "possessed of sufficient" means. The court has to inquire into the capacity to raise money and not actual possession. Explanations I, II and III were substituted for the earlier explanation by the amendment Act of 1976 and the expression indigent person has been substituted for the word pauper. The possession of the sufficient means refers to the possession of sufficient realizable property, which will enable the applicant to pay the necessary court fee. The possession of hard cash or possession of some property alone is not sufficient to make a person of sufficient means within the meaning of Rule 1 of Order XXXIII. Mere finding that the appellant's annual income is Rs. 9036/ - and she is possessed of her husband's property worth Rs. 19,142/ - without further finding as to whether she had dominion there upon and was entitled there to and such property was sufficient enough to enable her to pay the court fee on plaint was not sufficient to warrant rejection of the application.

7. As the trial court while refusing the applicant's application for permission to sue as indigent person has not followed the procedure prescribed under the law, we set aside the impugned order and allowed the appeal and further direct that the matter be heard afresh in accordance with law after notice to the respondent as well as the Government pleader and after allowing proper opportunity to the applicant to adduce evidence in proof of her indigency and opportunity to the respondent(s) and Government pleader to lead evidence in disproof thereof and then to dispose of the application as required under Rule 7, Order XXXIII of the Code. The parties are directed to appear before the Addl. District Judge, (II), Kangra at Dharamsala, on June 14, 1991.

8. The parties are to bear their respective costs.