

(2016) 07 KL CK 0043
In the High Court Of Kerala
Case No : Z.C.M.C.P. No. 232 of 2012

Sudhakaran

APPELLANT

Vs

Secretary, Kerala State Electricity Board

RESPONDENT

Date of Decision : 18-07-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 3, Order 46 Rule 3(1)

Citation : (2016) 4 CivCC 20 : (2016) 4 KerLJ 526 : (2016) 3 KHC 897 : (2016) 3 KLT 322 : (2016) 4 RCRCivil 386

Hon'ble Judges : Thottathil B. Radhakrishnan, A.C.J., C.T. Ravikumar and Babu Mathew P. Joseph, JJ.

Bench : Full Bench

Advocate : C.P. Peethambaran, Advocate, for the Appellant; R. Padmaraj, Government Pleader, for the Respondent

Final Decision : Disposed Off

Judgement

Babu Mathew P. Joseph, J.—Does Rule 3 of Order XXXISI, C.P.C. applies to an application to which Rule 3 of Order XLIV, C.P.C. applies is the question that arises for consideration in this reference ?

2. The facts that are necessary for disposing of this reference are briefly stated as follows:

The applicants/appellants 1 to 3 were the plaintiffs 1 to 3 respectively in O.S. No. 232 of 2007 on the files of the Subordinate Court, Thalassery. The appellants 1 and 2 are husband and wife and the third appellant is their son. K. Sumesh, the elder son of the appellants 1 and 2 and the brother of the third appellant, died of electrocution on 30.07.2006. He was aged 18. The appellants sued the Kerala State Electricity Board and one of its officers for damages on account of the death of Sumesh. The suit was permitted to be instituted by the appellants as indigent persons. The appellants claimed Rs. 5,57,000/- (Rupees five lakh fifty seven thousand only) as damages. The court below awarded Rs. 2,25,000/- (Rupees two lakh twenty-five thousand only) as damages. Dissatisfied with the

quantum of damages awarded by the court below, the appellants have preferred this appeal, as indigent persons, under Order XLIV, C.P.C. The application for permission to appeal as indigent persons proceeds on the basis that the applicants have not acquired any property after passing the impugned decree and they have not ceased to be indigent persons since the date of the decree appealed from. This, in short, we understand from the affidavit filed by the first applicant for himself and for and on behalf of other applicants as well. The first applicant is a weaver by profession. Going by the averments made in the affidavit, it can reasonably be found that the applicants belong to a marginalized and economically challenged section of the society. That was why the court below permitted them to sue as indigent persons. The applicants hail from Pathiriyad in Kannur district. The third applicant is a student. The applicants 1 and 2 are not in a position to travel to this Court for filing the appeal. Therefore, the applicants prayed for permitting them to file the appeal through their learned counsel. The Registry has raised objection in registering the application as it was not presented by the applicants in person. The Registry placed reliance on the order dated 28.02.2012 passed by a Division Bench of this Court in *In Re Kadeeja Umma* 2012 (1) KLT 949 (unnumbered C.M.C.P. of 2012 in unnumbered R.F.A. (Indigent) of 2012). It was held in that order that even a plaintiff who was permitted to sue as an indigent person before the court below, has to present the application to appeal as an indigent person by himself in person. The Division Bench before whom the case on hand came up for consideration with the objection of the Registry, considered the matter in the light of constitutional as well as statutory provisions and case law and disagreed with the views expressed in *In Re Kadeeja Umma* and found that the said decision requires reconsideration. Therefore, the Division Bench adjourned the case to be considered by a Full Bench. Thus, the case came up for consideration before us.

3. Heard Sri. C.P. Peethambaran, learned counsel for the applicants/appellants and Sri. R. Padmaraj, learned Government Pleader. We have also heard Advocate Dr. K.B.S. Rajan, learned Amicus Curiae.

4. Order XLIV, C.P.C. deals with appeals by indigent persons. Rules 1 to 3 of Order XLIV, C.P.C. reads as follows:

"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 I, 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 the 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."

Rule 1 of Order XLIV, C.P.C. provides for an application for allowing to appeal as an indigent person. This Rule further says that such an application shall be subject, in all matters, including the presentation of such application, to the provisions relating to suit by indigent persons, in so far as those provisions are applicable. Order 33, C.P.C. deals with suits by indigent persons. Rule 3 Order 33, C.P.C. deals with the presentation of application for permission to sue as an indigent person which reads as follows:

"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."

Going by this Rule, an application should be presented to the court by the applicant in person unless he is exempted from appearing in court. If he is exempted from appearing in court, the application can be presented by an authorised agent who can answer all material questions relating to the application and who can be examined as provided therein. Since the presentation of an application for allowing to appeal as an indigent person is made subject to the provisions relating to suits by indigent persons as provided under Rule 1 of

Order XLIV, C.P.C., prima facie, it may be argued that such an application should be presented in person as provided in Rule 3 Order 33, C.P.C. Rule 1 of Order XLIV, C.P.C. specifically says that an application for allowing to appeal as an indigent person shall be 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. Therefore, unless the provisions, including the presentation of application, dealing with the suits by indigent persons are applicable, an application for allowing to appeal as an indigent person need not comply with the provisions in Rule 3 Order 32 I, C.P.C. with regard to the presentation of application. In such a case, the application need not be presented by the applicant in person.

5. We shall now consider whether the provisions in Rule 3 Order 33, C.P.C. are applicable to the case on hand or not in the light of the relevant statutory provisions. Rule 1 of Order XLIV, C.P.C. deals with any person entitled to prefer an appeal and who is unable to pay the court-fee. Such person may be plaintiff or defendant in the suit or may be appellant or respondent in the first appeal or even may be a third party entitled to appeal. Rule 1 of Order XLIV, C.P.C. does not confine to a plaintiff who was allowed to sue as an indigent person. The persons coming under this Rule also include those who have become indigent subsequent to the disposal of the suit or subsequent to the disposal of the first appeal. In the case on hand, the appellants belong to a class who were plaintiffs in the suit and allowed to sue as indigent persons by the court below. Such persons are specifically dealt with in Rule 3(1) of Order XLIV, C.P.C. An applicant who was allowed to sue or appeal as an indigent person in the court from whose decree the appeal is preferred is covered by this sub-rule. So, this provision deals with an applicant who was allowed to sue as an indigent person or allowed to appeal as an indigent person. In such a case, Rule 3(1) specifically stipulates that 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. In the case on hand, the applicants filed an affidavit stating that they have not ceased to be indigent persons since the date of the decree appealed from. Therefore, going by Rule 3(1) of Order X^t IV, C.P.C., no further inquiry in respect of the question whether or not the applicants are indigent persons is required.

6. The provision in Rule 3 Order 33, C.P.C. for presenting an application for permission to sue as an indigent person by the applicant in person is for certain purposes. Rule 4 Order 32 I, C.P.C. says that where the application is in proper form and duly presented, the court may examine the applicant or his agent when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant. As provided under Rule 3 Order 33, C.P.C., if an applicant is exempted from appearing in court, the application can be presented by an authorised agent who can answer all material questions relating to the application for permission to sue as an indigent person 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. In the case on hand, the court below, after conducting due enquiry, found that the appellants were entitled to sue as indigent persons and hence allowed them to sue as indigent persons. Therefore, as stipulated under Rule 3(1) of Order XLIV, C.P.C., no further inquiry in respect of the question whether or not the applicants are indigent persons shall be necessary as the applicants filed affidavit stating that they have not ceased to be indigent persons since the date of the decree appealed from.

7. Rule 3(1) of Order XLIV, C.P.C. deals with another situation as well. If the Government Pleader or the respondent disputes the truth of the statement made in the affidavit filed by the applicant, an inquiry into the question whether or not the applicant is an indigent person shall be held by the appellate court, or, under the orders of the appellate court, by an officer of the court. Therefore, unless the Government Pleader or the respondent disputes the truth of the statement in the affidavit, no such inquiry into the question whether or not the applicant is an indigent person is necessary. No such dispute is raised in this case and hence the question of conducting an inquiry into such question does not arise. Therefore, the applicants or any one of the applicants need not present the application in person. Rule 3(1) of Order XLIV, C.P.C. specifically deals with cases like the one on hand. In cases like this, the provisions in Rule 1 of Order XLIV, C.P.C. do not apply.

8. Sub-rule (2) of Rule 3 of Order XLIV, C.P.C. deals with an applicant alleged to have become an indigent person since the date of the decree appealed from. In such a case, 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. If 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, it can be ordered accordingly. Otherwise, the inquiry shall be conducted by the appellate court or, under the orders of the appellate court, by an officer of that court as said earlier.

9. Sub-rule (2) of Rule 3 of Order XLIV, C.P.C. deals with a situation where a party entitled to prefer an appeal becomes an indigent person since the date of the decree appealed from. As far as such a person is concerned, who is to conduct the inquiry into the question whether or not he is an indigent person is determined by the provision itself. It can be conducted by the appellate court or by an officer of that court or by the court from whose decision the appeal is preferred as provided in sub-rule (2).

10. Thus, sub-rule (1) of Rule 3 of Order XLIV, C.P.C. deals with an applicant who was allowed to sue or appeal as an indigent person in the court from whose decree the appeal is preferred and sub-rule (2) of Rule 3 deals with an applicant who has become indigent since the date of the decree appealed from. Both these provisions are dealing with applicants referred to in Rule 1 of Order XLIV, C.P.C. Incidentally, we may state that we found variation in the reproduction of the relevant statutory provision, namely, sub-rule (2) of Rule 3 of Order XLIV, C.P.C.

in different publications. Therefore, we have ascertained the real position from the Official Gazette in respect of Act 104 of 1976. Sub-rule (2) of Rule 3 of Order XLIV, C.P.C. opens by saying 'Where the applicant, referred to in Rule 11, is alleged It cannot be 'rule 11". There is no 'rule 11" in Order XLIV, C.P.C. A reference to Rules 2 and 3(1) of Order XLIV, C.P.C. clearly indicates that the term rule 11 " used in Rule 3(2) is only a mistake apparent on the face of the statutory provision as printed in the Gazette. It is explicit that the term 'rule 11" used in Rule 3(2) has to be read as 'rule 1 ". The clear intention and purpose of the statutory provision, namely, Rule 3(2) lead to the irresistible conclusion that it can be read only as 'rule 1". The doctrine of casus omissus can be applied to correct that apparent error and, applying that doctrine, we correct and read it as rule V.

11. Order XLIV, C.P.C. generally deals with appeals by indigent persons. Rule 1 of Order XLIV, C.P.C. deals with persons who may appeal as indigent persons. It takes in all such persons entitled to prefer appeals. Rule 2 of Order XLIV, C.P.C. deals with grant of time for payment of court-fee where an application for permission to appeal as indigent person is rejected. Sub-rule (1) of Rule 3 of Order XLIV, C.P.C. deals with persons who were already allowed to sue or appeal as indigent persons. Sub-rule (2) of Rule 3 of Order XLIV, C.P.C. deals with persons who have become indigent persons since the date of the decree appealed from. In the cases covered by sub-rules (1) and (2) of Rule 3 of Order XLIV, C.P.C., specific mechanisms are provided for dealing with those cases. The cases covered by sub-rules (1) and (2) are cases referred to in Rule 1 of Order XLIV, C.P.C. as stated in these sub rules. There may be different categories of persons who may apply for permission to appeal as indigent persons. Those who were already allowed to sue or appeal as indigent persons form one category. Those who become indigent persons subsequent to the date of the decree in the suit or appeal form another category. Those who were defendants in the suits or respondents in the appeals, who might be indigent persons during the stages of suit or appeal and continued to be indigent persons and want to file appeal as indigent persons form yet another category. Those who were not parties to the suit or appeal, but entitled to file appeal as third parties also form another category Rule 1 of Order XLIV, C.P.C. takes in all these categories. There is no substantial difference, in the matter of deciding the question of indigency, between persons who have become indigent persons since the date of the decree appealed from as dealt with in sub-rule (2) of Rule 3 of Order XLIV, C.P.C. and others who apply for permission to appeal as indigent persons. Both the categories want to appeal as indigent persons. Therefore, there need not be or cannot be any reasonable classification of persons who come under the category dealt with in sub-rule (2) of Rule 3 and other persons who apply for permission to appeal as indigent persons. If a classification is made between them which will only be illusory for all practical purposes. If that be so, the categories of persons mentioned in sub-rule (1) and in sub-rule (2) of Rule 3 take in all those persons who may apply for permission to appeal as indigent persons. The mechanisms

for dealing with all these persons are specified under sub-rules (1) and (2) of Rule 3. This being the true position, the condition stipulated in Rule 1 of Order XLIV, C.P.C. insisting the presentation of an application accompanied by a memorandum of appeal for allowing to appeal as an indigent person by the applicant/appellant in person is unnecessary and unenforceable as a rule of procedure. This view is strengthened by the fact that Rule 1 of Order XLIV, C.P.C. confines itself "in so far as those provisions are applicable". Therefore, in the light of the foregoing discussions, the application filed by the appellants in the case on hand through their learned counsel has to be entertained as a proper one. The objection raised by the Registry is liable to be overruled.

12. We shall now consider the said condition stipulated in Rule 1 of Order XLIV, C.P.C. in the light of constitutional provisions as well as judicial pronouncements. Access to justice is a constitutional goal as well as a right vested in each and every citizen of this great nation. In other words, "We, the people of India" are entitled to enjoy the right to access to justice irrespective of the fact whether a citizen is rich or poor. Political democracy, one of the major components of the basic structure of the Constitution of India, aims at achieving social democracy and social justice. These matters emerge from the Preamble to the Constitution, various Articles especially Articles 14 and 21 in Part III of the Constitution and Article 39A in Part IV of the Constitution.

13. India is a Sovereign Socialist Secular Democratic Republic. The term "socialist" was inserted in the Constitution by the 42nd amendment to the Constitution with effect from 03.01.1977. The Constitution Bench of the Honourable Supreme Court explained the meaning of the term "socialist" in the Preamble to the Constitution in *D.S. Nakara v. Union of India* (AIR 1983 SC 130). The Honourable Court said that the principal aim of a socialist State is to eliminate inequality in income and status and standards of life. The basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from cradle to grave. The socialism appearing in the Preamble, in general, is aimed at achieving an egalitarian order in the society removing the disparities prevailing among the people of this country in the matter of justice - social, economic and political and equality - of status and of opportunity. The equality clause enshrined in Article 14 of the Constitution rejects any arbitrariness or unreasonableness in the matter of access to justice. Access to justice is part of right to life guaranteed under Article 21 of the Constitution. Equal justice and free legal aid is a constitutional goal under Article 39A. The Honourable Supreme Court in *State of Haryana v. Darshana Devi* (1979 KLT 269 (SC) : (1979) 2 SCC 236) said that equal justice to the indigent is the mandate under the Magna Carta of our Republic, expressed in Article 14 and stressed in Article 39A of the Constitution. Also said that access to court is an aspect of social justice. The Honourable Court also observed that the poor shall not be priced out of the Justice market by insistence on court-fee and refusal to apply the exemptive provisions of Order 33, C.P.C.

14. The Honourable Supreme Court in *Air India Statutory Corpn. v. United Labour Union* ((1997) 9 SCC 377) observed as follows:

".....Preamble, Fundamental Rights (Part III) and Directive Principles (Part IV) - trinity setting out the conscience of the Constitution deriving from the source "We, the people", a charter to establish an egalitarian social order in which social and economic justice with dignity of person and equality of status and opportunity, are assured to every citizen in a socialist, democratic Bharat Republic. The Constitution, the Supreme law heralds to achieve the above goals under the rule of law.....".

It was also observed in this ruling as follows:

".....Article 39-A furnishes beacon light that justice be done on the basis of equal opportunity and no one be denied justice by reason of economic or other disabilities. Courts are Sentinel on the rights of the people, in particular the poor. The judicial function of a court, therefore, in interpreting the Constitution and the provisions of the Act, requires to build up continuity of socio-economic empowerment to the poor to sustain equality of opportunity and status and the law should constantly meet the needs and aspiration of the society in establishing the egalitarian social order.....".

The Legal Services Authorities Act, 1987, was enacted by the Parliament for achieving the goals enshrined in Article 39A of the Constitution. This is "An Act to constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organise Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity." Section 2(1)(c) of the Act defines legal service as follows:

"Legal Service" includes the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter."

Section 12(a) to (h) narrates different categories of persons who are entitled to legal services in order to file or defend a case. Section 13 deals with the entitlement for legal services. Subsection 2 of this Section reads as follows:

"(2) An affidavit made by a person as to his income may be regarded as sufficient for making him eligible to the entitlement of legal services under this Act unless the concerned Authority has reason to disbelieve such affidavit."

Therefore, the procedure adopted for extending the legal services under the Legal Services Authorities Act, 1987, is simple and affordable to the poor masses of this country. This is done following the mandate of the Constitution as already noted. The provisions contained in the Code of Civil Procedure for exempting from payment of court-fee are also intended to help the weaker sections of the society to have access to justice. Therefore, those provisions shall not be

interpreted as stumbling blocks dissuading or preventing the poor masses of this country from approaching the law courts for redressal of their grievances or establishing their rights. The Honourable Supreme Court in *People's Union for Democratic Rights v. Union of India* ((1982) 3 SCC 235) observed as follows:

".....It is true that there are large arrears pending in the courts but, that cannot be any reason for denying access to justice to the poor and weaker sections of the community. No State has a right to tell its citizens that because a large number of cases of the rich and the well-to-do are pending in our courts, we will not help the poor to come to the courts for seeking justice until the staggering load of cases of people who can afford, is disposed of. The time has now come when the courts must become the courts for the poor and struggling masses of this country....."

15. Rule 1 of Order XLIV, C.P.C remains in the style of a general provision regulating the applications for permission to appeal as indigent persons. As already found, in the light of the specific provisions contained in sub-rules (1) and (2) of Rule 3 of Order XLIV, insisting the presentation of an application accompanied by a memorandum of appeal for allowing to appeal as an indigent person by the applicant/appellant in person is unnecessary and unenforceable as a rule of procedure. If such a procedure is insisted, practically, it may stand as stumbling blocks preventing or dissuading the weaker sections of the people, for whom exemption from payment of court-fee is permitted, from approaching the law courts in due course. This will be equivalent to negation of the right to access to justice enshrined in the Constitution of India. If Rule 1 of Order XLIV is enforced requiring the personal presence of the applicant/appellant for presenting the application to appeal as an indigent person, it will violate the mandatory provisions in the Preamble to the Constitution, Fundamental Rights guaranteed under Articles 14 and 21 of the Constitution and the provisions in Article 39A of the Constitution. Therefore, Rule 1 of Order XLIV, C.P.C. to the extent it insists the presentation of an application for allowing to appeal as an indigent person by the applicant/appellant in person is unnecessary and cannot be enforced as a rule of procedure. Hence, it is liable to be declared so.

16. The decision of the Division Bench of this Court in *In Re Kadeeja Umma* holding that the application for permission to appeal as indigent person has to be presented in person by the applicant/appellant is not good law and hence liable to be overruled. A Learned single Judge of this Court in *Jose v. Varkey* (1985 KLT 1071) and a Division Bench of this Court in *Moideen Koya v. Sarojini* (2002 (1) KLT 114) also held that the application for permission to appeal as indigent person has to be presented in person by the applicant/appellant. *Moideen Koya v. Sarojini* (supra) was referred to in *In Re Kadeeja Umma*. These two decisions are also liable to be overruled. The cases of different categories of persons who may file applications for permission to appeal as indigent persons will, definitely, be taken care of by sub-rules (1) and (2) of Rule 3 of Order XLIV, C.P.C. as already held by us. Therefore, for different reasons stated in this order, the reference has

to be answered overruling the objection raised by the Registry for not registering the application filed by the appellants, through their learned counsel, for permitting them to appeal as indigent persons.

17. In the result, Rule 1 of Order XLIV, C.P.C. to the extent it insists that an application accompanied by a memorandum of appeal for allowing to appeal as an indigent person has to be presented by the applicants/appellants in person is declared as unnecessary and unenforceable as a rule of procedure. The decisions in Jose v. Varkey (1985 KLT 1071), Moideen Koya v. Sarojini (2002 (1) KLT 114) and in In Re Kadeeja Umma, holding that the application for permission to appeal as indigent person has to be presented in person by the applicant/appellant, are overruled. The objection raised by the Registry of this Court for not registering the application of the applicants/appellants is also overruled. The Registry is direct to register the application filed by the applicants/appellants, through their learned counsel, for permitting them to appeal as indigent persons. Thereafter, the matter may be posted before the appropriate Bench of this Court as per the roster, for consideration.

18. The reference is answered and disposed of as above. We place on record our appreciation for the valuable services rendered by Advocate Dr. K.B.S. Rajan, learned Amicus Curiae.