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SUSHIL THOMAS ABRAHAM

v.

M/S. SKYLINE BUILD. THR. ITS PARTNER & ORS.

(Civil Appeal No. 117 of 2019)

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JANUARY 07, 2019

**[ABHAY MANOHAR SAPRE AND INDU MALHOTRA, JJ.]**

*Code of Civil Procedure, 1908:*

C *O. XXXIII, r.11 r/w O.XLIV, r.3(2) – Suit u/O. XXXIII r.1 seeking permission to institute suit as an indigent person – Permission refused – Thereafter suit dismissed – Plaintiff filed appeal before High Court u/O.XLIV, r.1 again seeking permission to file the appeal as an indigent person – High Court declined the permission on the ground that he was not allowed to institute the suit u/O. XXXIII, r.1 as an indigent person – On appeal, held: Dismissal of application made*  
D *u/O. XXXIII, r.1 by the trial court in earlier round of litigation is not a bar against the plaintiff to file an application/appeal u/O.XLIV, r.1 – Rules 3(1) and 3(2) of O.XLIV contemplate holding of inquiry again into the question at the appellate stage as to the status of the appellant as indigent person since the date of the decree, which*  
E *has been appealed from – High Court did not hold such inquiry – Case is remanded to appellate court for holding an inquiry as contemplated u/r.3(2) of O.XLIV.*

**Allowing the appeal, the Court**

F **HELD: 1. In view of the scheme of Orders XXXIII and XLIV CPC and the facts of the present case, the case of the appellant (plaintiff) falls in Order XXXIII Rule 11 read with Order XLIV Rule 3(2) CPC. [Para 28][80-F]**

G **2. Though the appellant (plaintiff) was not allowed by the Trial Court/High Court in the earlier round of litigation to institute a suit as an indigent person under Order XXXIII Rule 1 of CPC, yet he was entitled to file an application/appeal under Order XLIV Rule 1 of CPC and seek permission from the Appellate Court to allow him to file an appeal as an indigent person. [Para 29][80-G]**

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**3. Dismissal of application made under Order XXXIII Rule 1 of CPC by the Trial Court in the earlier round of litigation is not a bar against the plaintiff to file an application/appeal under Order XLIV Rule 1 before the Appellate Court. The grant and rejection of such prayer by the Trial Court is confined only up to the disposal of the suit. This is clear from the reading of Rule 3(1) and 3(2) of Order XLIV, which contemplate holding of inquiry again into the question at the appellate stage as to whether the applicant is an indigent person or not since the date from the decree appealed from. [Para 30][80-H; 81-A-B]**

**4. Once the plaintiff files an appeal under Order XLIV, his case is governed by the provisions of Order XLIV. The applicant to whom the permission was granted or declined by the trial court is entitled to apply before the appellate court to allow him to continue with the status or grant the status so as to enable him to prosecute the appeal as an indigent person. This is subject to applicant filing an affidavit as required under Order XLIV Rule 3(1) where the status is granted to him by the trial court. If the averments in his affidavit are controverted by the State, an inquiry into the status of the applicant as to whether he is an indigent person since the date of decree appealed from is mandatory at the appellate stage as contemplated under Order XLIV Rule 3(1). [Paras 31, 32][81-C-D]**

**5. Clause (2) of Order XLIV Rule 3 of CPC, deals with the cases where the applicant was declined the status of an indigent person by the trial court in the suit. In such case, the applicant is entitled to say that he is or has become an indigent person since the date of decree appealed from and, therefore, entitled to prosecute the appeal as an indigent person. In such case also, an inquiry is required to be held to decide his status. [Para 33][81-E]**

**6. The High Court did not hold any inquiry as contemplated under Order XLIV Rule 3(2) of the Code and dismissed the appellant's application made under Order XLIV Rule 1 mainly on the ground that since the appellant was declined permission to institute the suit as an indigent person by the Trial Court in the earlier round and such rejection having been upheld by the High Court in appeal, he cannot be permitted to file an application/**

A **appeal under Order XLIV Rule 1 as an indigent person in appeal. This reasoning of the High Court is not in conformity with the Order XXXIII read with Order XLIV and hence cannot be upheld. [Para 34][81-F-H]**

B **7. The case is remanded to the Appellate Court for holding an inquiry as contemplated under Order XLIV Rule 3 (2) of CPC or by the Trial Court, if directed by the Appellate Court to the concerned Trial Court to do so and depending upon the case made out by the applicant/appellant in the inquiry, the Appellate Court will pass appropriate orders accordingly. [Para 35][82-A-B]**

C **8. Since the appellant (plaintiff) was not allowed to file suit as an indigent person by the trial court and the said order became final, he was required to pay the *ad valorem* court fees on the plaint to enable the trial court to decide the suit on merits. The Court will, therefore, verify as to whether the plaintiff paid the said *ad valorem* court fee in the trial court or not. If it is found that he has not yet paid the said court fees, then the same be recovered from the appellant (plaintiff) in accordance with the procedure provided under Order XXXIII CPC. [Para 38] [82-D-E]**

E **CIVIL APPELLATE JURISDICTION: Civil Appeal No. 117 of 2019.**

From the Judgment and Order dated 10.03.2014 of the High Court of Kerala at Ernakulam in CMC (P) No. 78 of 2011 in R.F.A. No. of 2011

F **C. N. Sreekumar, Prakash Ranjan Nayak, Amit Sharma, Ms. Malavika B. Pillai, Advs. for the Appellant.**

Anil Kaushik, Abhishek Mishra, Akash Bhardwaj, Ms. Shilpa Singh, Advs. for the Respondents.

G **The Judgment of the Court was delivered by**

**ABHAY MANOHAR SAPRE, J.** 1. Leave granted.

H **2. This appeal is directed against the final judgment and order dated 10.03.2014 passed by the High Court of Kerala at Ernakulam in CMC No.78/2011 in RFA No..../2011 whereby the Division Bench of the High Court dismissed the CMC petition filed by the appellant herein.**

3. The facts of the case lie in a narrow compass as would be clear from their narration *infra* so also the controversy which is involved in this appeal is a short one. A

4. The appellant is the plaintiff and the respondents are the defendants in the civil suit out of which this appeal arises.

5. The appellant filed a civil suit against the respondents in the Court of 1<sup>st</sup> Additional Sub-Judge, Thiruvananthapuram being OP (indigent) No. 38/96 for recovery of Rs.74,66,107/-. This suit was filed under Order 33 Rule 1 of the Code of Civil Procedure, 1908 (hereinafter referred to as “the Code”). The appellant alleged that he is unable to pay *ad valorem* court fees of Rs.3,96,610/- which was payable by him on the claim made in the suit and therefore he be granted permission to institute the suit as an indigent person. B C

6. The respondents (defendants) contested the claim by filing written statement and denied the appellant’s claim including his prayer to declare him as an “indigent person”. D

7. According to the respondents, the appellant was in a position to pay the *ad valorem* court fees of Rs.3,96,610/- on the plaint because he had sufficient means to pay the *ad valorem* court fees. The respondents contended that the appellant was, therefore, not entitled to claim the status of an “indigent person” within the meaning of Order 33 Rule 1 Explanation I (a) & (b) of the Code for filing a suit under Order 33 of the Code. E

8. The Trial Court by order dated 19.08.1998 rejected the prayer made by the appellant (plaintiff) for filing a suit as an “indigent person” under Order 33 Rule 1 of the Code. In other words, the Trial Court held that the appellant failed to make out a case that he is an “indigent person” and, therefore, he cannot be allowed to file a suit as an “indigent person” under Order 33 Rule 1 of the Code. F

9. The plaintiff (appellant herein) felt aggrieved and filed appeal against the aforementioned order of the Trial Court in the High Court being CMA No.248 of 1998. By order dated 22.02.2000, the High Court dismissed the appeal and upheld the order of the Trial Court. The High Court granted the plaintiff one month time to pay the requisite *ad valorem* court fees on the plaint. G

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A           10. The plaintiff then converted his suit in the Original Suit (OS No.227/2000). He also filed another Civil Suit (OS No.921/95) seeking therein the declaration and injunction against the defendants in relation to the subject matter of the first suit. Both the suits were clubbed together for trial. By judgment and decree dated 12.04.2011, the Trial Court dismissed the suits.

B           11. The plaintiff (appellant) felt aggrieved and filed an application accompanied by the memorandum of appeal before the High Court of Kerala under Order 44 Rule 1 of the Code. The appellant alleged in the application that his financial condition is further deteriorated from what it was earlier when he had filed a civil suit and, therefore, he is unable to pay the *ad valorem* court fees on the memorandum of appeal.

C           12. The plaintiff (appellant), therefore, prayed that he be allowed to file the first appeal against the decree of the trial court as an “indigent person” under Order 44 Rule 1 of the Code without payment of *ad valorem* court fees payable on the memorandum of appeal.

D           13. By impugned order, the High Court rejected the application. The High Court in substance held that in the light of the earlier rejection of the appellant’s (plaintiff’s) prayer to file a suit as an “indigent person” under Order 33 Rule 1 of the Code by the Trial Court and the same having been upheld by the High Court in the appeal, the plaintiff is not entitled to file an application/appeal under Order 44 Rule 1 of the Code against the decree of the trial court.

E           14. In other words, it was held that the plaintiff (appellant) has to file a regular first appeal under Section 96 of the Code against the decree of the trial court on payment of *ad valorem* court fees on the memorandum of appeal payable in accordance with the provisions of the Court Fees Act.

F           15. It is against this order of the High Court, the plaintiff felt aggrieved and filed the present appeal by way of special leave in this Court.

G           16. So the short question, which arises for consideration in this appeal, is whether the High Court was justified in dismissing the plaintiff’s appeal and rejecting the prayer made by the plaintiff to allow him to file an appeal under Order 44 Rule 1 of the Code as an “indigent person”.

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17. Heard Mr. C.N. Sreekumar, learned counsel for the appellant and Mr. Anil Kaushik, learned counsel for the respondents. A

18. Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the appeal, set aside the impugned order and remand the case to the High Court for deciding the appeal afresh as directed hereinbelow. B

19. On perusal of Order 33 of the Code, we find that the plaintiff is entitled to file a suit as an “indigent person” under Order 33 of the Code provided he is able to prove that he is not possessed of sufficient means to pay the requisite court fees prescribed by law for the plaint in the suit filed by him. C

20. The question as to whether the plaintiff is possessed of sufficient means to pay the requisite court fees for the plaint in the suit as per the provisions of Court Fees Act is required to be decided by holding an inquiry as prescribed under Rules 4 to 7 of Order 33 of the Code by the trial court. D

21. While examining this question, the Court cannot take into consideration the two properties. First-the property, which is exempted from the attachment in execution of a decree and the second-which is subject matter of the suit. In other words, the aforementioned two properties cannot be regarded as “possessed” by the person concerned for determining his financial capacity to pay the requisite court fees on his claim in the suit. E

22. Similarly, if the person concerned acquires any property after presentation of the application for grant of permission to sue as indigent person but before the decision is given on his application, such acquired property has to be taken into consideration for deciding the question as to whether he is an indigent person or not. F

23. Order 33 Rule 7(3) empowers the court to either allow or refuse to allow the applicant to sue as an indigent person. Rule 9 empowers the court to withdraw the permission granted under Rule 7(3) at the stance of defendant or State counsel if any of the grounds set out in clauses (a) to (c) is made out. Order 33 Rule 11 as amended by the State of Kerala *inter alia* provides that when the plaintiff is dispaupered, the Court may order the plaintiff to pay the requisite court fees within a time fixed by the Court. G

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A        24. Order 44 of the Code applies to appeals. By virtue of Order 44 Rule 1 of the Code, the provisions of Order 33 are made applicable to such appeals.

B        25. Order 44 Rule 3 (1) of the Code prescribes the procedure in relation to the inquiry which is required to be held to decide the question as to whether the applicant, who has filed the application/appeal under Order 44, can be declared as an indigent person or not. The Rule says that where the applicant is already allowed by the Trial Court to sue as an indigent person then in such circumstances, no further inquiry in respect of the question as to whether he is an indigent person or not is necessary provided such person files an affidavit stating therein that he has not  
C        ceased to be an indigent person since the date of decree appealed from.

26. However, if the government lawyer disputes the statement of the applicant made in the affidavit, then the inquiry into the question as to whether he is an indigent person or not shall be held by the Appellate Court or Officer of the Court.

D        27. Order 44 Rule 3(2) of the Code provides that where the applicant referred to in Order 33 Rule 11 is alleged to have become indigent person since the date of the decree appealed from then the Appellate Court shall hold an inquiry into the question as to whether the applicant has become an indigent person or not since the date of decree  
E        appealed from. The Appellate Court in its discretion can also direct the Trial Court which passed the decree appealed from to hold an inquiry on such question.

28. Having examined the scheme of Orders 33 and 44 of the Code and the facts of this case, we find that the case of the appellant (plaintiff) falls in Order 33 Rule 11 read with Order 44 Rule 3(2) of the Code.

29. Though the appellant (plaintiff) was not allowed by the Trial Court/High Court in the earlier round of litigation to institute a suit as an indigent person under Order 33 Rule 1 of the Code, yet in our considered  
G        opinion, he was entitled to file an application/appeal under Order 44 Rule 1 of the Code and seek permission from the Appellate Court to allow him to file an appeal as an indigent person.

30. In our view, the dismissal of application made under Order 33 Rule 1 of the Code by the Trial Court in the earlier round of litigation is

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not a bar against the plaintiff to file an application/appeal under Order 44 Rule 1 of the Code before the Appellate Court. The grant and rejection of such prayer by the Trial Court is confined only up to the disposal of the suit. This is clear from the reading of Rule 3(1) and 3(2) of Order 44, which contemplate holding of inquiry again into the question at the appellate stage as to whether the applicant is an indigent person or not since the date from the decree appealed from. A  
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31. Once the plaintiff files an appeal under Order 44 of the Code, his case is governed by the provisions of Order 44. The applicant to whom the permission was granted or declined by the trial court is entitled to apply before the appellate court to allow him to continue with the status or grant the status so as to enable him to prosecute the appeal as an indigent person C

32. This is subject to applicant filing an affidavit as required under Order 44 Rule 3(1) where the status is granted to him by the trial court. If the averments in his affidavit are controverted by the State, an inquiry into the status of the applicant as to whether he is an indigent person since the date of decree appealed from is mandatory at the appellate stage as contemplated under Order 44 Rule 3(1). D

33. So far as Clause (2) of Order 44 Rule 3 of the Code is concerned, it deals with the cases where the applicant was declined the status of an indigent person by the trial court in the suit. In such case, the applicant is entitled to say that he is or has become an indigent person since the date of decree appealed from and, therefore, entitled to prosecute the appeal as an indigent person. In such case also, an inquiry is required to be held to decide his status. E

34. We cannot, therefore, concur with the view taken by the High Court because the High Court did not hold any inquiry as contemplated under Order 44 Rule 3(2) of the Code and dismissed the appellant's application made under Order 44 Rule 1 of the Code mainly on the ground that since the appellant was declined permission to institute the suit as an indigent person by the Trial Court in the earlier round and such rejection having been upheld by the High Court in appeal, he cannot be permitted to file an application/appeal under Order 44 Rule 1 of the Code as an indigent person in appeal. In our view, this reasoning of the High Court is not in conformity with the Order 33 read with Order 44 and hence cannot be upheld in the light of our discussion made above. F  
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A        35. In view of the foregoing discussion, the appeal succeeds and is accordingly allowed. The impugned order is set aside. The case is remanded to the Appellate Court for holding an inquiry as contemplated under Order 44 Rule 3 (2) of the Code or by the Trial Court, if directed by the Appellate Court to the concerned Trial Court to do so and depending upon the case made out by the applicant/appellant in the inquiry, B        the Appellate Court will pass appropriate orders accordingly.

          36. In other words, if the appellant is able to prove in the inquiry with the aid of evidence that he is or has become an indigent person since the date of decree appealed from and is therefore unable to pay the *ad valorem* court fees on memorandum of appeal, his application C        will be allowed else dismissed.

          37. Let the Appellate Court decide the aforesaid question preferably within six months and then proceed to decide the appeal accordingly in accordance with law.

D        38. Before parting, we may observe that since the appellant (plaintiff) was not allowed to file suit as an indigent person by the trial court and the said order became final, he was required to pay the *ad valorem* court fees on the plaint to enable the trial court to decide the suit on merits. The Court will, therefore, verify as to whether the plaintiff E        paid the said *ad valorem* court fee in the trial court or not. If it is found that he has not yet paid the said court fees, then the same be recovered from the appellant (plaintiff) in accordance with the procedure provided under Order 33 of the Code.