

Mathai M Paikeday vs C.K.Anthony on 11 July, 2011

Equivalent citations: AIR 2011 SUPREME COURT 3221, 2011 AIR SCW 4416, 2011 AIR CC 2593 (SC), 2011 (4) AIR KANT HCR 751, AIR 2011 SC (CIVIL) 1938, (2012) 113 CUT LT 164, (2011) 5 ALLMR 485 (SC), (2011) 3 KER LJ 11, (2011) 4 MAD LW 618, (2012) 90 ALL LR 694, (2011) 3 CURCC 132, (2011) 4 CIVILCOURTC 181, (2011) 3 KER LJ 25, (2011) 2 ORISSA LR 502, (2011) 3 RAJ LW 2513, 2011 (13) SCC 174, (2011) 3 CAL LJ 165, (2012) 115 REVDEC 435, (2011) 7 SCALE 718, (2011) 2 CLR 404 (SC), (2011) 6 ANDHLD 100, (2011) 7 MAD LJ 1052, (2011) 5 ALL WC 4900, 2011 (4) KCCR SN 432 (SC)

Bench: H.L. Dattu, G.S. Singhvi

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5493 OF 2011

(Arising out of S.L.P. (C) No. 9544 of 2009)

Mathai M. Paikeday

..... Appellant

versus

C.K. Antony

..... Re

With

CIVIL APPEAL NO.5494 OF 2011

(Arising out of S.L.P. (C) No. 22472 of 2009)

O R D E R

H.L. Dattu, J.

Delay condoned.

1) Leave granted.

2) These appeals, by special leave, are directed against the common

final order passed by the High Court of Kerala at Ernakulam in C.M.C.P. Nos. 53 and 60 of 2004 dated 11.08.2008, whereby the High Court has allowed the petitions and has permitted the respondent to prosecute the appeals as an indigent person.

3) The brief factual matrix relating to these appeals :- The appellant had filed two suits for recovery of money against the respondent, who is a retired Deputy Conservator of Forest drawing a pension of `10,500/-. These suits were decreed in favour of the appellant.

Being aggrieved, the respondent had preferred Regular First Appeals before the High Court of Kerala along with petitions to prosecute the said appeals as an indigent person under Order 44 Rule 1 of the Code of Civil Procedure, 1908. The High Court of Kerala, without holding any inquiry as contemplated under Order 33 Rule 1A of the Code of Civil Procedure, permitted the respondent to institute the said appeals as an indigent person, against which a special leave petition was preferred before this Court. This Court remanded the matter to the High Court for passing fresh orders after conducting an inquiry in accordance with Order 33 Rule 1A of the Code of Civil Procedure.

4) Subsequently, the High Court after conducting the inquiry into the means and financial capacity of the respondent, has permitted the respondent to prosecute Regular First Appeals as an indigent person vide its order dated 11.08.2008. Aggrieved by the same, the appellant is before us in these appeals.

5) The issue involved in the present appeals for our consideration is: Whether the respondent is an

indigent person as not possessed of sufficient means to pay the court fees and, consequently, entitled to avail the benefits under Order 44 of the Code of Civil Procedure.

6) Shri. Jawahar Lal Gupta, learned senior counsel, appears for the appellant and the respondent is represented by Shri. Subramonium Prasad, learned counsel.

7) The learned senior counsel Shri. Jawahar Lal Gupta submits that the respondent has admitted during the inquiry before the High Court that he is a retired Government employee and receives `10,500/- by way of pension and also receives money from his son who is employed in a foreign country. The learned senior counsel further submits that the respondent had failed to produce passbooks of his bank account in order to deny the fact of receiving money from his son. In other words, the failure of the respondent to produce bank accounts and passbooks amounts to suppression of the fact of receiving substantial amount of money from his son. The learned senior counsel further argues that the respondent is having sufficient means to pay court fees and is not entitled to prosecute the Regular First Appeals before the High Court as an indigent person in terms of Order 44 Rule 1 of the Code of Civil Procedure.

8) These arguments of the learned senior counsel for the appellants were refuted by Shri. Subramanion Prasad, the learned counsel for the respondent, who supported the impugned final order of the High Court.

9) Order 33 of the Code of Civil Procedure deals with suits by indigent persons whereas Order 44 thereof deals with appeals by indigent persons.

10) Order 33 Rule 1 of the Code of Civil Procedure provides for instituting of suits by indigent person, stating:

"1. Suits may be instituted by indigent person-- Subject to the following provisions, any suit may be instituted by an indigent person.

Explanation I.--A person is an indigent person,--

(a) if he is not possessed of sufficient means (other than property exempt from attachment in execution of a decree and the subject-matter of the suit) to enable him to pay the fee prescribed by law for the plaint in such suit, or

(b) where no such fee is prescribed, if he is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree, and the subject-matter of the suit.

Explanation II.--Any property which is acquired by a person after the presentation of his application for permission to sue as an indigent person, and before the decision of the application, shall be taken into account in considering the question whether or not the applicant is an indigent person.

Explanation III.--Where the plaintiff sues in a representative capacity, the question whether he is an indigent person shall be determined with reference to the means possessed by him in such capacity."

11) Order 44 of Code of Civil Procedure provides for instituting an appeal as an indigent person. The provision reads :-

"1. Who may appeal as an indigent person - 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 person, in so far as those provisions are applicable."

12) The object and purpose of Order 33 and Order 44 of the Code of Civil Procedure are to enable a person, who is ridden by poverty, or not possessed of sufficient means to pay court fee, to seek justice. Order 33 and Order 44 of the Code of Civil Procedure exempts such indigent person from paying requisite court fee at the first instance and allows him to institute suit or prosecute appeal in forma pauperis.

13) In A.A. Haja Muniuddin v. Indian Railways, (1992) 4 SCC 736, this Court has observed:

"5. ... Access to justice cannot be denied to an individual merely because he does not have the means to pay the prescribed fee."

14) In Union Bank of India v. Khader International Construction, (2001) 5 SCC 22, this Court has held:

"20. Order 33 CPC is an enabling provision which allows filing of a suit by an indigent person without paying the court fee at the initial stage. If the plaintiff ultimately succeeds in the suit, the court would calculate the amount of court fee which would have been paid by the plaintiff if he had not been permitted to sue as an indigent person and that amount would be recoverable by the State from any party ordered by the decree to pay the same. It is further provided that when the suit is dismissed, then also the State would take steps to recover the court fee payable by the plaintiff and this court fee shall be a first charge on the subject- matter of the suit. So there is only a provision for the deferred payment of the court fees and this benevolent provision is intended to help the poor litigants who are unable to pay the requisite court fee to file a suit because of their poverty. Explanation I to Rule 1 Order 33 states that an indigent person is one who is not possessed of sufficient amount (other than property exempt from attachment in execution of a decree and the subject-matter of the suit) to enable him to pay the fee prescribed by law for the plaint in such suit. It is further provided that where no such fee is prescribed, if such person is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree and the subject-matter of the suit he would be an

indigent person."

15) In *R.V. Dev v. Chief Secretary, Govt. of Kerala*, (2007) 5 SCC 698, this Court has held:

"8. Order 33 of the Code of Civil Procedure deals with suits by indigent persons whereas Order 44 thereof deals with appeals by indigent persons. When an application is filed by a person said to be indigent, certain factors for considering as to whether he is so within the meaning of the said provision are required to be taken into consideration therefor. A person who is permitted to sue as an indigent person is liable to pay the court fee which would have been paid by him if he was not permitted to sue in that capacity, if he fails in the suit at the trial or even without trial. Payment of court fee as the scheme suggests is merely deferred. It is not altogether wiped off."

16) The concept of indigent person has been discussed in *Corpus Juris Secundum* (20 C.J.S. Costs ' 93) as following:

" 93. What constitutes indigency: The right to sue in forma pauperis is restricted to indigent persons. A person may proceed as poor person only after a court is satisfied that he or she is unable to prosecute the suit and pay the costs and expenses. A person is indigent if the payment of fees would deprive one of basic living expenses, or if the person is in a state of impoverishment that substantially and effectively impairs or prevents the pursuit of a court remedy. However, a person need not be destitute. Factors considered when determining if a litigant is indigent are similar to those considered in criminal cases, and include the party's employment status and income, including income from government sources such as Social Security and unemployment benefits, the ownership of unencumbered assets, including real or personal property and money on deposit, the party's total indebtedness, and any financial assistance received from family or close friends. Not only personal liquid assets, but also alternative sources of money should be considered."

17) The eligibility of person to sue in forma pauperis has been considered in *American Jurisprudence* (20 Am. Jur. 2d Costs ' 100) as thus:

" 100. Eligibility to sue in forma pauperis; generally: The burden of establishing indigency is on the defendant claiming indigent status, who must demonstrate not that he or she is entirely destitute and without funds, but that payments for counsel would place an undue hardship on his or her ability to provide the basic necessities of life for himself or herself and his or her family. Factors particularly relevant to the determination of whether a party to a civil proceeding is indigent are: (1) the party's employment status and income, including income from government sources such as social security and unemployment benefits; (2) the ownership of any unencumbered assets, including real or personal property and monies on deposit; and finally (3) the

party's total indebtedness and any financial assistance received from family or close friends. Where two people are living together and functioning as a single economic unit, whether married, related, or otherwise, consideration of their combined financial assets may be warranted for the purposes of determining a party's indigency status in a civil proceeding."

18) To sum up, the indigent person, in terms of explanation I to Rule 1 of Order 33 of the Code of Civil Procedure, is one who is either not possessed of sufficient means to pay court fee when such fee is prescribed by law, or is not entitled to property worth one thousand rupees when such court fee is not prescribed. In both the cases, the property exempted from the attachment in execution of a decree and the subject-matter of the suit shall not be taken into account to calculate financial worth or ability of such indigent person. Moreover, the factors such as person's employment status and total income including retirement benefits in the form of pension, ownership of realizable unencumbered assets, and person's total indebtedness and financial assistance received from the family member or close friends can be taken into account in order to determine whether a person is possessed of sufficient means or indigent to pay requisite court fee. Therefore, the expression "sufficient means" in Order 33 Rule 1 of the Code of Civil Procedure contemplates the ability or capacity of a person in the ordinary course to raise money by available lawful means to pay court fee.

19) Admittedly the respondent is a retired Deputy Conservator of Forest, Government of Kerala and drawing a pension of `10,500/-. It was also stated by him in his deposition before the High Court on 03.01.2008 that his son is employed abroad and does not regularly send him money and in response to a suggestion, whether his bank account discloses the amount of money sent by his son, he does not deny the suggestion.

However, it is noteworthy to mention that respondent has never denied that his son sends him money. Furthermore, the respondent had failed to establish that the amount of money received from his son is not substantial or insufficient to pay court fee by not producing passbook of his bank account. In our considered opinion, non-production of bank account transaction details, amounts to suppression of the facts and in view of this, an adverse inference can be drawn against the respondent that he is receiving a substantial or sufficient amount of money from his son. Therefore, the amount of money received by the respondent from his son and by way of pension amounts to a sufficient means to pay court fee which disentitles him to be an indigent person under Order 33 Rule 1 and Order 44 Rule 1 of the Code of Civil Procedure.

20) In the light of above discussion and facts and circumstances of the present case, the respondent cannot be declared as an indigent person in order to prosecute Regular First Appeals before the High Court. Accordingly, the present appeals are allowed and the impugned final order of the High Court dated 11.08.2008 is set aside. However, the respondent is granted 45 days time from today to deposit the court fee if he desires to prosecute Regular First Appeals filed before the High Court.

Costs are made easy.

.....J. [G.S. SINGHVI]J. [H.L. DATTU] New Delhi, July 11, 2011