

HIGH COURT OF KERALA

BENCH : HONOURABLE MR. JUSTICE G.GIRISH

Date of Decision: April 30, 2024

AGAINST THE ORDER DATED 22.12.2023 IN I.A.NO.1315 OF 2017 IN
OS NO.69 OF 2015 OF ASSISTANT SESSIONS COURT/I ADDITIONAL
SUB COURT, THIRUVANANTHAPURAM

SAILAJA ALIAS SHAILAJA ...APPELLANT/PETITIONER/PLAINTIFF

VERSUS

**SHRI A.DURAIRAJ ...RESPONDENT/COUNTER
PETITIONER/DEFENDANT**

Legislation:

Order XXXIII of the Code of Civil Procedure

Section 4A of the Kerala Court Fees and Suit Valuation Act

Order XXXIII Rules 2, 3, 4, 5, 5(c), and 7 of the Code of Civil Procedure

Subject: Appeal against the rejection of an application seeking permission to sue as an indigent person, involving procedural irregularities and the sale of property prior to filing.

Headnotes:

Procedural Irregularities – Application to sue as an indigent person rejected due to non-compliance with Order XXXIII, Rules 2 and 3 of the CPC at the initial stage of litigation – Subsequent application (I.A.No.1315 of 2017) filed two years after the original suit was claimed to address deficiencies, but failed due to lack of initial compliance – Trial court found significant procedural

deviations at initial filing, affecting the integrity of the suit filed as an indigent person. [Paras 2, 6, 8, 9]

Sale of Property – Disqualification under Order XXXIII Rule 5© – Appellant sold property through a power of attorney 28 days before filing the suit, which disqualified her from suing as an indigent due to perceived manipulation of financial status to meet indigency criteria – Arguments that the power of attorney sales were not intended to manipulate legal status for suing as an indigent were not accepted based on the evidence of timing and non-disclosure of these sales at initial filing. [Paras 8, 9, 10]

Conclusion of Court – Appeal dismissed due to procedural missteps and strategic financial disposals by the appellant that contravened the principles governing litigation by indigent persons – Judgment underscores strict adherence to procedural rules for indigent suits and scrutiny of financial dealings preceding such filings. [Para 11]

Referred Cases: None.

Representing Advocates:

For the Appellant: Aswini Sankar R.S., K. Ramakumar (Sr.), T. Ramprasad Unni, S.M. Prasanth, T.H. Aravind, Shehin S.

For the Respondent: G.P. Shinod, Govind Padmanabhan, Ajit G Anjarlekar, Atul Mathews, Gayathri S.B.

JUDGMENT

The plaintiff in O.S.No.69 of 2015 of the First Additional Sub Court, Thiruvananthapuram, has filed this appeal against the order dated 22.12.2023 of the said court, rejecting I.A.No.1315 of 2017 filed under Order XXXIII of the Code of Civil Procedure, seeking permission to sue as an indigent person.

2. The suit was originally filed before the Vacation Court, Thiruvananthapuram on 08.05.2015 for realisation of an amount of Rs.4.3

Crores from the respondent. Though the second relief prayed for in the said suit was to permit the plaintiff (appellant herein) to sue as an indigent person, there was no petition submitted by the plaintiff in '*forma pauperis*' as required under Order XXXIII Rule 2 of the Code of Civil Procedure. The Vacation Court, Thiruvananthapuram admitted the above suit to files without any order under Order XXXIII Rule 7(3) of the Code of Civil Procedure, and made it over to the Sub Court, Thiruvananthapuram. The plaintiff had neither remitted 1/10 court fee as required under Section 4A of the Kerala Court Fees and Suit Valuation Act, and nor undergone the enquiry as required under Rule 4 and Rule 7 of Order XXXIII Code of Civil Procedure. After the elapse of about two years, the appellant filed I.A.No.1315 of 2017, seeking permission to sue as an indigent person. In the above application, the learned First Additional Sub Judge, Thiruvananthapuram earlier passed an order on 06.02.2023, permitting the appellant to proceed with the suit as an indigent person. The above order did not contain any indication about the enquiry conducted under Rule 4 and Rule 7 of Order XXXIII of the Code of Civil Procedure. The respondent challenged the above order before this Court by filing O.P(C)No.1308 of 2023. As per the judgment dated 12.10.2023, this Court allowed the above original petition and set aside the order of the learned Additional Sub Judge, with a consequential direction to the Sub Court, Thiruvananthapuram to reconsider I.A.No.1315 of 2017, after affording necessary opportunities to both sides, and to dispose of the said application, within a period of one month from the date of receipt of a copy of that judgment. Thereafter, the learned First Additional Sub Judge, Thiruvananthapuram went on with the necessary enquiry, in which the appellant was examined as PW1. The appellant did not adduce any documentary evidence. From the part of the respondent, no oral evidence was adduced, but Exts.B1 series to B3 series were marked as documents. As per the impugned order dated 22.12.2023 in I.A.No.1315 of 2017, the learned First Additional Sub Judge, Thiruvananthapuram declined permission to the appellant to sue as an indigent person, and rejected the application under Order XXXIII Rule 5 of the Code of Civil Procedure. It is the above order which is under challenge in this appeal.

3. The point to be decided is whether there are sufficient grounds to interfere with the impugned order of the First Additional Sub Court, Thiruvananthapuram, declining permission to the appellant to sue as an indigent person.

4. Heard the learned Senior Counsel, Adv.Sri.K.Ramakumar, who appeared for the appellant under instructions from Adv.Mr.T.Ramprasad Unni, and also Adv.Sri.Govind Padmanabhan, who appeared for the respondent.

5. The Trial Court declined permission to the appellant to sue as an indigent person for three reasons. Firstly, the learned Additional Sub Judge found that the appellant had instituted the suit in violation of Order XXXIII Rule 2 of the Code of Civil Procedure, which required the applicant to incorporate a schedule of any movable or immovable property belonging to him in the application to sue as an indigent person. Secondly, the learned Additional Sub Judge found that the appellant did not comply with Order XXXIII Rule 3 of the Code of Civil Procedure, which required her to present the application in person unless she is exempted from appearing in Court. Thirdly, it was observed by the Trial Court that the appellant had sold her landed property for an amount of Rs.63,55,000/- within two months prior to the institution of the plaint, and thus suffered the disqualification under Order XXXIII Rule 5(c) of the Code of Civil Procedure.

6. As regards the first reason, the learned Senior counsel for the appellant would contend that the application for permission to sue as an indigent person, submitted by the appellant, is I.A.No.1315 of 2017, which contains sufficient indications in paragraph No.2 of the affidavit supporting the said application about the list of movable and immovable properties and its estimated value. Thus, it is pointed out that the requirement of Order XXXIII Rule 2 of the Code of Civil Procedure has been complied in letter and spirit by the appellant. The argument advanced by the learned Senior Counsel in the above regard, cannot be accepted, since it is seen that at the time of institution of this suit before the Vacation Court, Thiruvananthapuram, the plaintiff (appellant) neither preferred any application as required under Order XXXIII Rule 2 of the Code of Civil Procedure and nor furnished the details of the movable and immovable properties and its estimated value. It is true that there is nothing which prevents the appellant (plaintiff) from instituting the suit in the usual course by making payment of 1/10 court fee as required by Section 4A of the Kerala Court Fees and Suit Valuation Act, and later on, after two years, moving an application under Order XXXIII Rule 2 of Code of Civil Procedure, seeking permission to sue as an indigent person. But the case on hand is not one of that nature. Here the appellant (plaintiff) instituted the suit before the Vacation Court, Thiruvananthapuram, without making payment of 1/10 court fee, under the pretext that it was one filed under Order XXXIII Rule 2 of Code of Civil Procedure. However, the plaintiff did not fulfil the

requirements of the above provision, as per which she had to annex a schedule of any movable or immovable property belonging to her with its estimated value. It is after the elapse of about two years, that the appellant (plaintiff) has filed I.A.No.1315 of 2017, seeking permission to sue as an indigent person, but without annexing a separate schedule showing the movable or immovable property with its estimated value, held by her. Even if the indication in paragraph No.2 of the affidavit filed by the appellant in support of I.A.No.1315 of 2017 is taken as substantial compliance of the requirements of Order XXXIII Rule 2 of Code of Civil Procedure, still it would no way help the appellant in getting over the defect since it is seen that there was no such details furnished at the time of institution of the plaint before the Vacation Court, Thiruvananthapuram on 08.05.2015, as if, it is one under '*forma pauperis*'. Therefore, the argument advanced by the learned Senior Counsel about the substantial compliance of Order XXXIII Rule 2 of Code of Civil Procedure in I.A.No.1315 of 2017, cannot be accepted.

7. As regards the second reason mentioned by the Trial Court in the impugned order, the learned Senior Counsel would argue that the appellant herself had appeared before the Sheristadar of the District Court, Thiruvananthapuram and tendered statement at the time of institution of the suit on 08.05.2015. Thus, it is contended that there is no infraction of Order XXXIII Rule 3 of the Code of Civil Procedure, as stated in the impugned order. It appears that there is merit in the argument of the learned counsel for the appellant in the above regard, since it is seen from the impugned order that the Trial Court came to a conclusion about the nonsubmission of the application in person by the appellant, due to the sole reason that the name of her counsel figured in that application.

8. As regards the third reason stated by the Trial Court in the impugned order for rejecting the application of the appellant, the learned Senior Counsel for the appellant would contend that there was no disposal of landed properties by the appellant within a period of two months prior to the filing of I.A.No.1315 of 2017 before the Additional Sub Court, Thiruvananthapuram on 11.04.2017, and hence, the disqualification envisaged under Order XXXIII Rule 5(c) of the Code of Civil Procedure, has no applicability in the facts and circumstances of this case. Here also, it is not possible to accept the argument of the learned Senior Counsel in view of the conduct of the appellant (plaintiff), who resorted to a subterfuge of the whole procedures, when the suit was originally filed before the Vacation Court, Thiruvananthapuram on 08.05.2015, and thereafter came up with the

present application to sue as an indigent person after the elapse of two years, taking advantage of the above time-lag to contend that the disposal of landed properties by the appellant through her power of attorney holder on 10.04.2015, will not come under the prohibition in Order XXXIII Rule 5(c) of the Code of Civil Procedure. The Trial Court has observed in the impugned order that Exts.B1 to B3 sale deeds with Exts.B1(a) to B3(a) translations would reveal that the appellant had sold her landed properties on 10.04.2015, i.e., within 28 days prior to the institution of the plaint on 08.05.2015. The learned Senior Counsel for the appellant harped upon the point that, when the date of filing of I.A.No.1315 of 2017 on 11.04.2017, is reckoned as the date of filing of an application to sue as an indigent person, the embargo under Order XXXIII Rule 5(c) of Code of Civil Procedure, will not come into play. It is not possible to accept the argument of the learned Senior Counsel in the above regard due to the reason which I have already referred hereinabove about the conduct of the appellant instituting the suit before the Vacation Court, Thiruvananthapuram under the pretext that it is one filed under Order XXXIII Rule 2 of Code of Civil Procedure, flouting the whole procedures, and waiting for a period of about two years for filing an application to sue as an indigent person, so as to override the legal embargo contained in Order XXXIII Rule 5(c) of Code of Civil Procedure.

9. The learned Senior Counsel for the appellant would further argue that even if the date of institution of the suit on 08.05.2015 is reckoned as the date of filing of application to sue as an indigent person, still it is not possible to say that the disposal of landed properties by the power of attorney holder of the appellant on 10.04.2015, was in violation of Order XXXIII Rule 5(c) of Code of Civil Procedure, since she had executed the above power of attorney long back in the year 2012, relinquishing her whole rights over the properties, which the power of attorney holder was authorized to sell. It is not possible to accept the above argument of the learned Senior Counsel for the appellant since the execution of power of attorney by the Principal authorizing his agent to sell his immovable properties, cannot be construed as a transfer of right or interest of the Principal over those immovable properties in favour of his agent. The execution of a power of attorney deed can only be taken as an authorization empowering the agent to perform those acts mentioned in the deed for and on behalf of the Principal. When the agent acts in accordance with the authorization in the power of attorney deed, the transactions in the above regard have to be taken as done by the Principal himself. Therefore, the execution of Exts.B1 to B3 sale deeds by the power

of attorney holder of the appellant on 10.04.2015, is as good as the execution of the above sale deeds personally by the appellant herself. Thus, the above transaction made by the appellant on 10.04.2015, is clearly hit by Order XXXIII Rule 5(c) of the Code of Civil Procedure.

10. Lastly, it is argued by the learned Senior Counsel that, only those disposal of property which could be termed as 'fraudulent' or done with the intention to apply for permission to sue as an indigent person, would come within the purview of Order XXXIII Rule 5(c) of the Code of Civil Procedure. According to the learned Senior Counsel, there is nothing brought-forth in the instant case to conclude that the transfers effected on 10.04.2015 by the power of attorney holder of the appellant, were made fraudulently or with intention to apply for permission to sue as an indigent person. There is absolutely no merit in the above argument in the light of the conduct of the appellant, which I have referred in paragraph No.8, hereinabove. It is apparent from the conduct of the appellant that right from the very beginning of the institution of the suit on 08.05.2015 before the Vacation Court, Thiruvananthapuram, without remitting 1/10 court fee, under the pretext that it is one filed in '*forma pauperis*', without following the requirements of Order XXXIII Rule 2 of the Code of Civil Procedure, and waiting for a period of about two years for filing I.A.No.1315 of 2017 seeking permission to sue as an indigent person, the appellant appears to have approached the Court, without disclosing the true facts. It is pertinent to note that neither in the plaint filed by the appellant on 08.05.2015, nor in I.A.No.1315 of 2017 filed on 11.04.2017, had the appellant stated about the disposal of landed properties by her power of attorney holder on 10.04.2015. If the transactions so done on 10.04.2015 were actually as stated by the appellant, she could have very well disclosed those aspects in the plaint filed on 08.05.2015 or in the present application (I.A.No.1315 of 2017) filed on 11.04.2017. Having not opted for the above course of fairness, it is not possible to accept the argument of the learned Senior Counsel that the sale of landed properties by the power of attorney holder of the appellant on 10.04.2015, cannot be classified as a 'fraudulent' act or an act intended for the purpose of filing the suit as an indigent person.

11. As a conclusion to the above discussion, I find no reason to interfere with the impugned order of the learned Additional Sub Judge, declining leave to institute the suit as an indigent person, and rejecting I.A.No.1315 of 2017 under Order XXXIII Rule 5 of the Code of Civil Procedure. In the result, the appeal is hereby dismissed.

© All Rights Reserved @ LAWYER E NEWS

*Disclaimer: Always compare with the original copy of judgment from the official website.