

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 22nd July, 2013

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RFA NO.284/2011

NAND KISHORE SHARMA

..... Appellant

Through: Mr. Rajesh Tyagi, Adv.

Versus

**DELHI SOCIETY FOR PREVENTION OF
CRUELTY TO ANIMALS & ANR**

..... Respondents

Through: Ms. Sonia Arora with Mr. Varun
Gupta, Advs.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

CM No.9968/2011 (for exemption).

1. Allowed, subject to just exceptions.
2. The application is disposed of.

CM No.9967/2011 (of the appellant to appeal as an indigent person).

3. The appellant has preferred this appeal against the judgment and decree dated 29th January, 2011 of the learned Addl. District Judge-13 (Central), Delhi of dismissal of his suit for recovery of Rs.19,70,000/- from the respondent no.1 and its Chairman impleaded as respondent no.2. The

appeal is accompanied with an application under Order 33 Rule 3 of the CPC for permission to appeal as an indigent person stating that the appellant/applicant had been retired compulsorily from his job with the respondent no.1 way back in December, 2004 and since then is without job and all monetary resources at the disposal of the appellant/applicant have dried up since then and the appellant/applicant is left with no monies, valuables, securities or properties, even to sustain his family.

4. The appeal and the application came up before this Court first on 20th May, 2011 when the appeal was ordered to be listed after disposal of this application and on this application the appellant/applicant was directed to file an affidavit of disclosure in terms of the said order. Such affidavit was filed and vide subsequent order, notice of this application was issued to the respondents as well as to the Collector.

5. A report dated 27th October, 2011 has been filed by the SDM/Collector of Stamp, Gandhi Nagar Sub-Division, District East within whose jurisdiction the appellant/applicant resides, to the effect that field enquiries were got conducted about the financial status of the appellant/applicant and that it had been reported that the appellant/applicant

is unemployed and residing in the house owned by his wife and having a bank account in SBI, Tis Hazari having a credit balance of Rs.2/- therein as on 25th April, 2011 and that the appellant/applicant is dependent on the income of his son.

6. It was however the contention of the counsel for the respondents on 30th November, 2011 that an amount of Rs.1,53,084/- was lying in the Provident Fund account of the appellant/applicant and the appellant/applicant could not claim to be an indigent person.

7. Accordingly, the Registrar of this Court was directed to conduct an enquiry as per Order 33 of the CPC with regard to indigency pleaded by the appellant/applicant, including with reference to the report of the SDM but with a further observation that the said report be not treated as conclusive.

8. During the pendency of enquiry before the Registrar, the counsel for the respondents on 5th October, 2012 informed that an application for indigency filed by the appellant/applicant in the suit from which this appeal arises had been rejected and in terms of Order 33 Rule 15, this application for indigency in the appeal is not maintainable.

9. In the course of inquiry aforesaid before the Registrar, the statement of the counsel for the appellant/applicant to the effect that he had not raised any professional bill on the appellant/applicant and the bill will be raised at the end of the appeal and to the effect that the said counsel was also doing one LPA on behalf of the appellant/applicant and that he had received Rs.20,000/- in cash as professional fee from the appellant/applicant in the said LPA in the year 2012, was also recorded. The appellant/applicant vide his subsequent statement dated 22nd April, 2013 clarified that he had paid the said fees out of the costs imposed by the Court in the LPA.

10. The Registrar has vide order dated 22nd May, 2013 reported that “prima facie, the appellant/applicant appears to be an indigent person”.

11. The said report is for consideration today before this Court.

12. The only opposition of the counsel for the respondents to the application is of the same being not maintainable under Order 33 Rule 15 of the CPC which is as under:-

“An order refusing to allow the applicant to sue as an indigent person shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right;”

Reliance is placed on *Ranchod Morar Vs. Bezanji Edulji* 1894 ILR 20 Bom. 87.

13. Per contra, the counsel for the appellant/applicant has relied on *Ratnamala Dasi Vs. Kamakshya Nath Sen* (LVII) 1920 Indian Cases 9 (Calcutta) and has further contended, a) that Order 33 Rule 15 would not apply as even if the appellant/applicant may have been found to be not indigent at the time of institution of the suit, there is no bar to finding him to be indigent at the time of institution of the appeal after several years, as in this case; b) that the report of the SDM and the Registrar of this Court to the effect that he is indigent should be accepted; c) that the order dated 28th May, 2007 of the Trial Court dismissing his application to sue as an indigent person and directing him to pay the Court Fees and which was paid by the appellant/applicant was for the reason of the appellant/applicant having not produced his passbook and an adverse inference therefrom having been drawn against him but in the enquiry before the Registrar the said passbook was produced and thus the appellant/applicant should not be deprived of the benefit of Order 33 and should not be compelled to pay the Court Fees on the appeal. It was further stated that if this Court does not agree with the appellant/applicant, the appellant/applicant has no means to pay the Court

Fees and no purpose will be served in giving an opportunity to the appellant/applicant therefor.

14. Though neither counsel has referred to, notice may be taken of Order XLIV of the CPC dealing with ‘Appeals by Indigent Persons’ and Rules 1 to 3 whereunder are as under:

- “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 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 1, the Court may, while rejecting the application, allow the applicant to pay the requisite Court-fee, 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.”*

15. I may at the outset state that it matters not for what reason the appellant / applicant was refused permission to institute the suit from which this appeal arises as an indigent person, whether on account of the failure of

appellant/applicant to produce the documents which he was expected and directed to produce or otherwise. All that is relevant is that there exists an order refusing to allow the appellant/applicant to institute the suit from which this appeal arises as an indigent person.

16. In my opinion, two questions arise for adjudication. Firstly, whether the appeal is “in respect of the same right to sue” within the meaning of Rule 15 supra and secondly, whether the possibility of a person though held to be not indigent on the date of the institution of the suit, owing to subsequent events in the hiatus between the date of institution of the suit and the date of institution of the appeal having become indigent, can be a reason for a fresh inquiry in appeal.

17. The Supreme Court as far back as in *Smt. Dayawati Vs. Inderjit* AIR 1966 SC 1423 faced with a problem whether a suit could be said to be pending on a date when only an appeal from the judgment in the suit was pending, framed a further question, whether the word ‘suit’ includes an appeal from the judgment in the suit and held that an appeal is merely a right of entering a superior Court or invoking its aid and interposition to redress the error of the Court below. Quoting Lord Westbury in *Attorney General*

Vs. Sillem 63 I.A. 47, it was further held that an appeal only reviews and corrects a proceedings in a cause already constituted but does not create a cause; an appeal is a continuation of a suit and a part of the cause and cannot have an independent existence. Thus a law made applicable to pending suits was held applicable even where appeals from the judgment in suit were pending.

18. Again in ***Nair Service Society Ltd. Vs. Rev. Fr. K.C. Alexander*** AIR 1968 SC 1165, it was held to be a fixed principle of law that a suit must be tried on the original cause of action and that this principle governs not only the trial of suits but also appeals. It was reiterated that an appeal is a continuation of the suit. Reference in this regard may also be made to ***Darshan Singh Vs. Ram Pal Singh*** AIR 1991 SC 1654 (holding that appeal is a continuation of a suit and is only a re-hearing of it), ***Mithilesh Kumari Vs. Prem Behari Khare*** (1989) 2 SCC 95 (though overruled on another aspect but laying down that a person is sued not only when the plaint is filed against him but is also sued when the suit remains pending against him and word 'sued' covers the entire proceedings in an action) and ***Rachakonda Narayana Vs. Ponthala Parvathamma*** (2001) 8 SCC 173 (also laying down that an appeal is a continuation of the suit and when an appellate Court hears

an appeal, the whole matter is at large and the appellate Court can go into any question relating to rights of parties which a Trial Court was entitled to dispose of provided the plaintiff possesses that right on the date of filing the suit).

19. In view of the aforesaid unequivocal position in law, the contention of the counsel for the appellant / applicant that the cause of action for an appeal is the order or judgment in the suit and is thus different from the cause of action in a suit, cannot be accepted.

20. In view of right to sue extending to appeals also, the conclusion that an order refusing to allow the applicant to sue as an indigent person shall be a bar under Order 33 Rule 15 to any subsequent application of like nature by the same applicant in the appeal also, is inescapable.

21. What remains to be seen is whether Order 44 makes any difference to the said position.

22. Rule 1 of Order 44 makes the provisions of Order 33 (in relation to suits) applicable to appeals also “in so far as those provisions are applicable”. Rule 15 of Order 33 as aforesaid bars a subsequent application

in respect of the ‘same right to sue’. The right to sue in an appeal being the same as the right to sue in the suit, there is nothing in Order 44 to make the said bar inapplicable to the appeals.

23. Rule 3 (1) of Order 44 does away with the inquiry into indigency at the appellate stage in the case of an appellant who was allowed to sue as an indigent, by requiring such person to only file an affidavit stating that he has not ceased to be an indigent person since the date of the decree appealed against. Sub-Rule (2) thereof provides for an inquiry by the Appellate Court into indigency of a person who though had not sued as an indigent, is owing to subsequent event in the hiatus between the institution of the suit and institution of the appeal, has become an indigent.

24. There is however no provision to appeal as an indigent for a person who had been refused permission to sue as an indigent. The only inference can be that the legislature did not feel the need to provide therefor owing to such a situation being taken care of by Order 33 Rule 15 supra.

25. The legislature while creating the bar under Order 33 Rule 15 has used the words “in respect of the same right to sue” and which are words as aforesaid of wide amplitude. It is not as if the legislature was not aware or not

conscious of the possibility of change in circumstances in the hiatus between the date of institution of the suit and the date of filing of the appeal. The legislature as aforesaid was fully conscious of the same and has provided for only two contingencies in Rule 3 of Order 44. The omission of the only other contingency i.e. of the plaintiff though refused permission to institute the suit as an indigent having in the hiatus between the date of institution of the suit and the date of institution of the appeal having become indigent, is capable of only one inference, that an appeal being in respect of the same right to sue as the suit, the bar of Order 33, Rule 15 applies.

26. The judgment of the Division Bench of the Calcutta High Court relied upon by the counsel for the appellant/applicant is found to be of no application. In that case an application to sue in *forma pauperis* to recover maintenance from the husband was refused on the ground mentioned in Order 33 Rule 5 (d) of the CPC i.e. that the allegations in the plaint did not find the plaintiff to be having a cause of action; more than two years thereafter, another application to sue in *forma pauperis* to recover maintenance was filed. Such an application was held to be not barred by Order 33 Rule 15 holding that the right to sue for maintenance for the period subsequent to the date when the previous application was filed could

not be said to be the same as the right to sue in the earlier plaint and which was in any case held to be without cause of action.

27. Same is the position with respect to the judgment of the Division Bench of the Bombay High Court cited by the counsel for the respondent. The same was a case of whether the right to sue for the relief of redemption of a mortgage as an heir of the father was the same as the right to sue for redemption of the same mortgage as coparcener of the Hindu Undivided Family of which the grandfather was the Karta and the effect of non-payment of costs of the dismissal of the earlier application; the same also thus has no application to the present case.

28. I therefore hold that a plaintiff whose application to sue as an indigent person has been refused on the ground that he has not proved his indigency, and who thereafter pays Court Fees and pursues the suit, is barred from in an appeal against the judgment of dismissal of the said suit from applying for appealing as an indigent person.

29. Notice may also be taken of the fact that it is not even the case of the appellant/applicant in his application that owing to any subsequent events in the hiatus between the institution of the suit (when he was held to have not

proved his indigency) and the date of institution of the appeal or any other change in circumstances, he is now an indigent person. Rather the application is filed pleading his indigency since prior to the institution of the suit and which indigency as aforesaid has been disbelieved and he was not allowed to sue as an indigent. Rather, the appellant / applicant totally failed to disclose, neither in this application nor in the appeal, the fact of permission to sue as an indigent person having earlier been denied to him.

30. The appellant / applicant is thus not entitled to appeal as an indigent person. The appellant/applicant having already stated that he does not wish to pay the Court Fees, the occasion for granting him any opportunity therefor does not arise.

31. The application is accordingly dismissed. Resultantly, the memorandum of appeal is rejected for the reason of the requisite Court Fees thereon having not been affixed.

No costs.

JULY 22, 2013
'pp/gsr'.

RAJIV SAHAI ENDLAW, J