

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE SUNIL THOMAS

TUESDAY, THE 21ST DAY OF JULY 2015/30TH ASHADHA, 1937

FAO.No. 98 of 2015 ()

(AGAINST THE ORDER/JUDGMENT IN OP 4/2012 of PRL.S.C., THALASSERY DATED
27-02-2015)

APPELLANT(S)/PETITIONERS:

1. VELUTHAPARAMBATH VASANTHA,W/O.VASU,AGED 49,
PUTHANPARAMBATH HOUSE, PUTHUR AMSOM, CHENDAYAD DESOM,
P.O.CHENDAYAD, PANOOR VIA.

2. P.P.BHAVISHA,D/O.VASU,
AGED 23 YEARS, -DO-

3. P.P.BINSY,D/O.VASU,
AGED 21 YEARS, -DO-

4. P.P.DHANESH,S/O.VASU,
AGED 18 YEAS, -DO-

BY ADVS.SRI.K.V.PAVITHRAN
SRI.JAYANANDAN MADAYI PUTHIYAVEETIL
SRI.P.SAJU

RESPONDENT(S)/RESPONDENT:

1. PURTHALATHKUNIYIL ALAKKADAN CHATHU,S/O.KRISHNAN,
DEEPALAYAM, PUTHUR AMSOM, THALASSERY TALUK,
CHENDAYAD AMSOM.670 101

2. STATE OF KERALA,REPRESENTED BY DISTRICT COLLECTOR.
KANNUR DISTRICT, P.O.KANNUR.670001

R1 BY ADV. SRI.P.B.SAHASRANAMAN

R1 BY ADV. SRI.T.S.HARIKUMAR

R1 BY ADV. SRI.K.JAGADEESH

R2 GOVERNMENT PLEADER:ADV.SRI.P.P.PADMALAYAN

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
21-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

CR

**THOTTATHIL B. RADHAKRISHNAN &
SUNIL THOMAS, JJ.**

F.A.O. No. 98 of 2015

Dated this the 21st day of July, 2015

JUDGMENT

Sunil Thomas, J.

Appellants are aggrieved by the rejection of O.P.No.4/2012 of the Principal Sub Court, Thalassery, filed under Order XXXIII Rule 1 CPC seeking leave of the court, to sue as indigent persons.

2. The predecessor of the appellants/petitioners, had earlier filed a suit against the respondent herein. Due to that enmity, the respondent allegedly committed murder of the predecessor on 18/3/2010 at about 6.30.a.m., using a dangerous weapon. Thereafter, the heirs of the deceased filed the present proceedings before the court below, seeking compensation of a sum of Rupees Twenty Lakhs from the respondent. The court fee payable was Rs.1,78,400/-. Claiming that the petitioners were not possessed of sufficient means to

pay the court fee, the present O.P. was filed. The respondent appeared and filed a counter affidavit. The District Collector reported that the petitioners were not in possession of any properties within Kannur District. On the basis of the report of the Government, the counter affidavit and the materials on record, the court below held that the petitioners were possessed of sufficient means to pay the court fee and consequently rejected their application.

3. The above order is impugned in this appeal. Heard both sides and examined the records.

4. According to the petitioners, the first petitioner who was the wife of the deceased, was working as an autorickshaw driver and the petitioners 2 to 4 were students. They owned 59 cents of land in Chendayad desom and also had joint possession of 1.75 acres with the sister of their predecessor. It was stated that the properties were planted with coconut and cashew trees and the annual income was Rs.20,000/- per year. Hence, they sought leave to sue as indigent persons.

5. The court below, on an evaluation of the materials placed, held that the petitioners were admittedly in possession of

landed properties which were planted with coconut and cashew trees. The market value of the properties were not furnished. The court below further held that the second petitioner was now working as a Software Engineer at Kozhikode and the 3rd petitioner as a mason. It was held that they can at least mortgage a portion of the properties to raise the court fee payable. It was also held that the decisions cited by the petitioners were not applicable to the facts and circumstances of the case.

6. It is pertinent to note that the materials on record showed that the head of the family was the victim of a crime. It was admitted case of the petitioners that they owned 59 cents of land and had half share over 1.75 acres of land. They had also disclosed the income from the properties. The view of the court was that they could have mortgaged a portion of the properties, to raise the court fee. It appears that evidence was let in to show that, as on the date of evidence, the son of the first petitioner had completed his study and obtained a job. However, the details of his income were not on record.

7. Before the court below, various decisions were placed to

support the case of the petitioner. In **Sumathikutty Amma Kamalamma and others v. Narayani Panikkathy Karthiyayani and others** (1972 KLT 783), which is one of the earliest decisions on this point, it was held that the mere fact that the petitioner is stated to have some interest in immovable property by itself, should not be taken to mean that he has the means to pay the prescribed court fee. The real test is whether the petitioner is in a position in the ordinary course to convert his possessions, if any, into liquid cash without undue hardship and delay for paying the requisite court fee. It was further held that the court has also a duty to ensure that in no genuine case, the cause of the litigant should fail, if the enquiry reveals that in the ordinary course, he is not in a position to raise requisite amount to pay court fee. The court below also referred to the decisions reported in **Basil Thomas v. Joseph** (2013 (2) KLJ 664) and **Paulose @ Paulo v. Elias K.Varghese and another** (2012 (1) KLJ 807). In **Paulose's case**, it was held that the law does not expect the petitioner to make a distress sale of his only property and to pay the court fee and thereafter live in penury or abject poverty. It was reiterated that the benefit under the

Code is conferred on persons without “sufficient means” and not without any means at all. What is contemplated is not the actual possession of property, but sufficient means. Even though sufficient means is not the capacity to raise sufficient funds, there must be a liberal approach in construing what capacity is. In **Basil Thomas** case, a Bench of this Court (to which on one of us was a party) reiterated that the availability of assets or wealth does not necessarily mean that a person will have the sufficient means to pay the court fee. It was opined that there is no rigid formula which confines the relief under Order XXXIII to only persons who were essentially striving on poverty line.

8. The Hon'ble Supreme Court had occasion to deal with the above topic in a decision which was not placed before the court below. In **Mathai M.Paikeday v. C.K.Antony** [(2011) 13 SCC 174], it was held that expression 'sufficient means' contemplates the ability or capacity of a person in the ordinary course to raise money by available lawful means to pay the court fee. In **Jayaraj K.K. v.Kalyani** (2010 (3) KLJ 853), it was held that the plaintiff, after remitting 1/10th fee payable at the time of institution of the suit, is still entitled to claim indigency, due to

an honest belief that he would be able to pay the court fee at a later point of time. In **A.Prabhakaran Nair v. K.P.Neelakantan Pillai** (1987 (2) KLT 376), it was held that possession of sufficient means refers to possession of sufficient realizable property. The property that is yet to be realised or an asset which is not within the immediate reach of the plaintiff to be converted into cash for payment of court fee cannot be taken into account in calculating sufficient means .

9. Underlying principle in all the above cases is that the possession of immovable property does not by itself indicate that the one has sufficient means to pay the court fee. The above decisions also emphasise the duty of the courts to construe the provisions in a liberal, pragmatic way and without sacrificing the social justice element and the Constitutional demands. It was held that the benefit of statute is conferred on persons without sufficient means and not without any means at all. The view taken by the courts in all the above decisions consistently exhibits the anxiety of the courts to ensure that every litigant, though not poor, but does not possess sufficient means to seek his redressal of grievance, shall not be deprived of the right to

access to justice. Article 39A of the Constitution of India directs the State to ensure this solemn object. The scheme of the statute also gives sufficient indication of its anxiety to ensure access to justice to the poor and needy.

10. Reference to Order XXXIII of Code of Civil Procedure indicate that it is eminently pro litigant, and has a strong socio economic content. Order XXXIII provides a self contained scheme to facilitate access to justice to the poor. It contemplates a mechanism to weed out unnecessary applications at the threshold, by conducting an enquiry into the means of the petitioner under Rule 1A, to be done by the Chief Ministerial Officer of the Court, unless the Court otherwise directs. It further provides for examination of the applicant or his agent under Rule 4 and after conducting sufficient enquiry, to allow or to reject the application under Rule 5. Thereafter, a further procedure is contemplated under Rule 6 for receiving evidence regarding the indigency with notice to the Government Pleader and opposite parties. This detailed two tier mechanism provided under the Act with its inbuilt safeguards is intended to ensure that only genuine, bona fide and legitimate persons seek

indigency.

11. Even after permitting the person to institute a suit as an indigent person under Rule 9 the court continues to retain the power to withdraw at any time, the permission to sue as indigent person. Rules 10,11, 11A and 14 provides for recovery of costs and the court fee. where the plaintiff succeeds, loses or abandon the case. A Perusal of the above provisions show that an indigent person is not completely exempted from payment of court fee and the liability to pay court fee at initial stage is only deferred to a later stage, to be recovered in accordance with the outcome of the litigation. (Ref. **R.V.Dev v.Government of Kerala** [(2007) 5 SCC 698])

12. The spirit of the Statute, which is in tune with Article 39A of the Constitution, is also evident from Rule 9A, which permits the court to assign a pleader to an unrepresented indigent person. Rule 18 empowers the Government to provide for free legal services to indigent persons. Rule 17 provides that even an indigent person raising set off or counter claim, is entitled to claim indigency. In Mathai M.Paikaday's case (supra), the Hon'ble Court referred to the earlier judgment in **A.A.Haja**

Muniuddin v. Indian Railways [(1992) 4 SCC 736} wherein it was held that access to justice cannot be denied to an individual merely because, he does not have the means to pay the prescribed fee. **In Union Bank of India v. Khader International Construction** [(2001) 5 SCC 22] it was held that Order XXXIII is a benevolent provision intended to help poor litigants. It is pertinent to note that even original heading of Order as 'suits by paupers' was substituted by Act 104 of 1976 on a reasoning that the expression pauper was in appropriate and did not convey the real intention of the statute.

13. Constitutional mandate under Article 39A and Order XXXIII, as explained in the various decisions referred above, impose a solemn duty on the courts not only to ensure that access to justice is not denied to the poor and needy, but also to ensure that they have access to justice. The various provisions incorporated in the Order XXXIII are intended to act as tools for advancing justice to the poor and not to act as spokes in their tread towards justice.

14. The concept of “not possessed of sufficient means” is essentially a negative factor to be established by the claimant

and hence can only be proved by him by adducing positive evidence of his assets, needs and expenditure and to convince the Court that with the available resources, he is unable to set apart sufficient funds to pay court fee. The duty of the Court is only to decide, on the basis of materials furnished, whether reasonable grounds have been made out to believe such claim. This is all the more so, because of the social reality that the economic situation, availability of resources, and expenditure of a person depend on various factors, including the size of the family, the number of dependents, other pressing necessities, priorities in life, the cost of living index, status in the society, etc. and hence, the person claiming indigency himself would be the best judge to evaluate his priorities in life, which cannot be substituted by the views of the Court unless the court finds it thoroughly unreasonable. Since the right to life under Article 21 of the Constitution of India takes in right to dignified life, each person is entitled to make necessary provision for a reasonable life of himself and family, apart from the bare necessities of food, shelter and clothing. The courts should not use the golden scale to weigh the income and expenditure of a

person and decide how best he could have utilized his means, reduce the expenditure and could have saved money for paying court fees. In this regard, the observation of the court below that, even utilising the money from the available source for payment of court fee, will not in any way affect the decent living of the petitioners and that will not lead them to poverty is mispleaded.

15. In spite of several decisions mandating that the litigants are not expected to sell their property, unfortunately, the court below arrived at the wrong conclusion that, they could have mortgaged the property and raised the loan. Further, Paulose case (supra) was distinguished on a factual premise that, in that case the extent of land involved was only one and half cents. The constitutional mandate, the laudable object of Order XXXIII and spirit of all the decisions referred to above, uniformly calls for a liberal approach while considering applications for indigency.

16. In the light of the above findings, order of the court below is not sustainable and is liable to be set aside. In the result, the appeal is allowed and the impugned order is set

aside. O.P.No.No.4/2012 stands allowed and the petitioners are permitted to sue as indigent.

The appeal is allowed as above.

Sd/-

THOTTATHIL B.RADHAKRISHNAN
Judge

Sd/-

SUNIL THOMAS
Judge

dpk

/true copy/ PS to Judge.

