

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

C.R. No. 6520 of 2016

Date of Decision:- 28.02.2017

Phoolwati

....Petitioner

vs.

Gulzaro Devi

....Respondent

CORAM:- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. Inderjeet Singh, Advocate,
for the petitioner.

Mr. Bhag Singh, Advocate,
for the respondent.

DAYA CHAUDHARY, J.

The present revision petition has been filed under Article 227 of the Constitution of India for setting aside impugned orders dated 21.4.2016 and 10.5.2016 (Annexures P-4 and P-5) passed by learned Additional District Judge, Ambala whereby the application for seeking permission to file appeal as pauper has been dismissed.

Briefly the facts of the case are that plaintiff-respondent filed a suit for specific performance of agreement to sell on the basis of agreement to sell dated 31.5.2004 for 10 Marlas of land claiming that out of total sale consideration of ₹ 3 lacs, an amount of ₹ 2,50,000/- was paid as earnest money. The petitioner was having only 5 marlas of land as per revenue record and there was no occasion for her to enter into an agreement to sell regarding 10 marlas of land.

During pendency of the aforesaid suit, one Surinder Kumar filed a suit for specific performance of agreement to sell on 8.10.2004 against petitioner on the basis of agreement to sell dated 24.12.2003. Petitioner-defendant is an old widow lady suffering from many old age ailments, facing litigation without any source of income. To meet out her day to day as well as litigation expenses, she sold 4 Marlas of land including constructed area on 19.7.2007 to one Chander Kanta. Suit of respondent-plaintiff was decreed on 8.11.2013 only to the extent of refund of ₹ 2, 50,000/- with 6% interest. Defendant-respondent filed appeal challenging judgment and decree before the Lower Appellate Court along with an application for seeking permission to file appeal as an indigent person. A report was called by the Lower Appellate Court from Collector, Ambala, to know the status of the petitioner wherein the petitioner was stated to be a very poor lady, living in a rented house, having no children and requiring help. Still, the application seeking permission to file appeal as a pauper was dismissed and thereafter appeal was also dismissed as the petitioner could not deposit ad-valorem court fee. In the present revision petition, orders dated 21.4.2016 and 10.5.2016 passed by the learned Additional District Judge, Ambala have been challenged.

Learned counsel for the petitioner submits that the report of the Collector has not been taken into consideration while deciding the application seeking permission to pursue the appeal as an indigent person and subsequently appeal was also dismissed for not depositing the ad-valorem court fee. Learned counsel also submits that as per Order 33 Rule 1 CPC, the ability or capacity of a person in the ordinary course to raise

money by available lawful means to pay court fee is to be considered. The financial condition of the petitioner was clearly mentioned in the report of the Collector but same has not been taken into consideration by the Lower appellate Court. Learned counsel also submits that it has been held in various judgments of this Court as well as of Hon'ble the Apex Court in the case of **A.A. Haja Muniuddian vs. Indian Railways, (1992) 4 SCC 736**, that "Access to justice cannot be denied to an individual merely because he/she does not have the means to pay the prescribed fee." Moreover, no prejudice is going to be caused to the plaintiff-respondent in case the petition is allowed and she is permitted to pursue her appeal as a pauper.

Heard arguments of learned counsel for the petitioner and have also perused the impugned orders.

The facts relating to filing of suit, filing of appeal being aggrieved by judgment and decree passed by the trial Court, and application seeking permission to pursue the appeal as pauper by the present petitioner are not disputed.

Admittedly, the petitioner filed appeal against judgment and decree dated 18.11.2013 passed by the learned Additional Civil Judge, Sr. Division, Naraingarh as suit filed by the respondent-plaintiff was decreed to the extent of refund of earnest money of ₹ 2,50,000/- along with interest @ 6% per annum from the date of filing of the suit till actual realization as alternative relief. Along with the appeal, an application was also filed by the petitioner for seeking permission to file the appeal as a pauper as she was not having any means to furnish court fee. Reply of said application was filed by the respondent. It was mentioned in the reply to the application

that the petitioner has received earnest money in the suit for specific performance and had also recently sold her property so she was having sufficient means to furnish the Court fee. By accepting the objections made by respondent-plaintiff in reply to the application, the claim of the petitioner made in the application was declined while dismissing the same vide order dated 21.5.2016.

On perusal of impugned order dated 21.5.2016, it is clear that simply it has been mentioned there that the petitioner has received earnest money from plaintiff-respondent and she is having several properties to sell and, as such, cannot be considered as pauper in the appeal. Even the appeal filed by the petitioner against judgment and decree dated 18.11.2013 passed by the trial Court was also dismissed vide order dated 10.5.2016 on the ground that despite availing sufficient opportunities, the Court fee was not affixed. Order 33 of CPC deals with suits by indigent persons whereas Order 44 thereof deals with appeals by indigent persons.

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."

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."

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.

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."

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."

In R.V. Dev v. Chief Secretary, Government of Kerala, (2007) 5 SCC 698, Hon'ble the Apex 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."

In A.A. Haja Muniuddian's case (supra), 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."

In Union Bank of India v. Khader International Construction, (2001) 5 SCC 22, Hon'ble the Apex 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."

In terms of explanation 1 to Rule 1 Order 33 of the CPC, an indigent person 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.

Under both the circumstances, 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. 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 possessing of sufficient means or indigent to pay requisite court fee. Meaning thereby the expression "sufficient means" in Order 33 Rule 1 of the Civil Procedure Code contemplates the ability or capacity of a person in the ordinary course to raise money by available lawful means to pay court fee. In a Division Bench judgment of Andhra Pradesh High Court in the case of **Sanjeevayya Nagar Co-operative House Building Society vs. S. Malla Reddy alias Parvathalu and others**, 2006(1) CivCC 8, it has been held therein that where important questions are involved in the suit, Court is to adopt liberal approach in granting permission to sue in forma pauperis. The liberal approach does not mean to grant permission for the mere asking. Totality of facts and circumstances is to be taken into consideration while arriving at any conclusions in this regard.

In the present case, while dismissing the application moved by the petitioner neither the report of the Collector has been taken into consideration nor the provisions of Order 33 Rule 1 CPC have been considered. As per report sent by Tehsildar, Naraingarh, the petitioner has been shown to be very poor having no house to live in and residing in a rented accommodation but still the same has not been taken into

consideration. The order passed by the Lower Appellate Court is without any application of mind and without going through the relevant provisions applicable to the case of the petitioner.

Accordingly, this revision petition is allowed and impugned orders dated 21.4.2016 and 10.5.2016 (Annexures P-4 and P-5) are hereby set aside. The case is remanded to the learned Additional District Judge, Ambala, with a direction to reconsider the case of the petitioner keeping in view the observations and law position as discussed above.

February 28, 2017
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(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned

Yes

Whether reportable

No