

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 16.04.2018

Delivered on : 23.10.2018

CORAM

THE HONOURABLE Mrs.JUSTICE S.RAMATHILAGAM

C.M.A.No.1838 of 2011

1. T.O.Thangavel
2. T.O.Selvaraj
3. T.Thenmozhi

... Appellants

Versus

1. Dr.V.Subramaniam
 2. Parimala
 3. Karthikeyan
 4. N.Kanagam
 5. T.N.Rajendran
- Respondents

...

Appeal filed under Order XLI Rule 1(aa) of CPC, against the fair and decree order dated 25.3.2011 made in P.O.P.No.78 of 2008 in O.S.No. of 2008 on the file of the learned Principal District Court, Namakkal.

For Appellants : Mr. V.R.Rajasekaran

For Respondents: Mr.P.Kaviri Nadan for
Mr.N.Manoharan

JUDGMENT

This Civil Miscellaneous Appeal has been preferred against the Order dated 25.3.2011 made in P.O.P.No.78 of 2008 in O.S.No. of

2008 by the learned Principal District Court, Namakkal, in and by which, the prayer sought for by the appellants to declare them as indigent persons, has been declined.

2. A petition under Order 33 Rule 2 and 7 and Order 7 Rules 1 to 14 of CPC has been moved by the appellants herein before the Court below, seeking to declare them as indigent persons and permission to sue as indigent persons. According to the appellants, they filed a suit against the respondents, seeking to declare their title over the suit B schedule properties, to declare the sale deed dated 4.9.2006 as void and unenforceable, to declare the sale deed dated 29.9.08 as void and unenforceable and to grant permanent injunction restraining the respondents/defendants and their from in any way interfering with their peaceful possession and enjoyment of B schedule properties. It is stated that plaintiffs availed loans for the purpose of running business and construction of marriage hall and also availed loan for a sum of Rs.34,00,000/- from Karnataka Bank Limited, Salem by giving security of suit B schedule properties, which was settled in favour of 3rd plaintiff. It is also stated that the petitioners 1 and 2 used to borrow money from 1st respondent/defendant to the tune of Rs.2,00,000/- and 3,00,000/- and repay the same. In 2004, the petitioners borrowed a sum of Rs.12,00,000/- from 1st respondent/defendant and in lieu thereof,

they executed sale deeds and in the meantime, Karnataka Bank Ltd., initiated proceedings under SARFAESI Act for recovery of the loan amount and that time, the 1st respondent/defendant came forward to pay the dues payable to Karnataka Bank Ltd., and in the said transaction, without any sale consideration, the petitioners executed two sale deeds in favor of the respondents/defendants. According to the petitioners, the said two sale deeds are void and unenforceable. In such circumstances, the petitioners filed a suit for the reliefs as stated above and since they are having no means to pay Court fee, they filed a petition, seeking to sue as indigent persons.

3. Despite notice to the respondents, there was no representation on behalf of the respondents and the Court below set them as ex parte and proceeded based on the materials available on record.

4. On consideration of evidence and the materials placed on record, the Court below, having taken note of the the fact that the petitioners are residing in the suit B schedule properties and that they borrowed loans from various persons including the respondents and Karnataka Bank Ltd., for lakhs together, come to the conclusion that the petitioners cannot be declared as persons of

no means and accordingly dismissed the petition. Questioning the same, the present appeal has been preferred by the petitioners.

5. Before proceeding to decide the issue involved in this appeal, it would be relevant to refer to certain provisions of the CPC, which are reproduced as under:-

"1A. Inquiry into the means of an indigent person.-- Every inquiry into the question whether or not a person is an indigent person shall be made, in the first instance, by the chief ministerial officer of the Court, unless the Court otherwise directs, and the Court may adopt the report of such officer as its own finding or may itself make an inquiry into the question.

2. Contents of application.-- Every application for permission to sue as an indigent person shall contain the particulars required in regard to plaintiffs in suits; a schedule of any movable or immovable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto; and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings.

3. Presentation of application.-- Notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant, in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person:

Provided that, where there are more plaintiffs than one, it shall be sufficient if the application is presented by one of the plaintiffs.

4. xxx xxx xxx xxx

5. Rejection of application.-- The Court shall reject an application for permission to sue as an indigent person--

(a) where it is not framed and presented in the manner prescribed by rules 2 and 3, or

(b) where the applicant is not an indigent person, or

(c) where he has, within two months next before the presentation of the application disposed of any property fraudulently or in order to be able to apply for permission to sue as an indigent person:

Provided that no application shall be rejected if, even after the value of the property disposed of by the applicant is taken into account, the applicant would be entitled to sue as an indigent person, or

(d) where his allegations do not show a cause of action, or

(e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter, or

(f) where the allegations made by the applicant in the application show that the suit would be barred by any law for the time being in force, or

(g) where any other person has entered into an agreement with him to finance the litigation.

6. Notice of day for receiving evidence of applicant's indigency.-- Where the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall fix a day (of which at least ten day's clear notice shall be given to the opposite party and the Government Pleader) for receiving such evidence as the application may adduce in proof of his indigency, and for hearing any evidence which may be adduced in disproof thereof."

6. According to Order 33 Rule 3 of the CPC, the application for suing as an indigent person has to be presented in person unless he is exempted from appearance in the Court. In the present case, admittedly, the application to sue as an indigent person was not presented by the plaintiff in person, rather it was presented by her advocate. Therefore, if the application or the suit as an indigent person is not presented in person by the plaintiff, until and unless exempted, then the application has to be dismissed because the said defect cannot be rectified even by amendment of the original application because Order 33 Rule 5(a) provides that if the application is not framed and presented in the manner prescribed under Rules 2 and 3, the said application deserves to be rejected.

7. In the present case, admittedly, the petitioners have not presented in person the application to sue as indigent persons before the Court below, rather it was presented by their advocate. In fact, even before this Court, the appeal was also presented through their advocate and not the petitioners in person.

8. In **"M.Pakeday versus C.K.Antony"** reported in 2011 (5) Supreme 341, the Hon'ble Supreme Court has held as follows:

"19. Moreover, the factors such as person's employment status and total income including

retirement benefits in the form of pension, ownership of realisable unencumbered assets, and person's total indebtedness and financial assistance received from the family members 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."

9. Therefore, 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. 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.

10. It is pertinent to note that in the present case, admittedly, the petitioners used to borrow loans from various persons including the respondents/defendants and also Karnataka Bank Ltd., that too lakhs together and they were running business of rice mill and also constructed a marriage hall. In fact, even in the suit, they have categorically mentioned that the suit B schedule properties were in their possession and sought for permanent injunction to restrain the respondents/defendants from interfering with their peaceful possession and enjoyment over the suit B schedule properties. In fact, one of the petitioners who was examined as PW.1 has deposed that as on date of application, they have not alienated any property. Further, they have not produced any report either from the concerned Tahsildar or any Revenue authorities to show that no immovable properties were in their names. Further, the petitioners have not established as to how they became penniless while they were doing transactions with lakhs of rupees by availing loans and doing business. Therefore, in view of all these factors, this Court is of the view that the petitioners cannot be declared as indigent persons in order to permit them to sue the suit as indigent persons. In view of this, this Court does not find any scope to interfere with the order passed by the Court below.

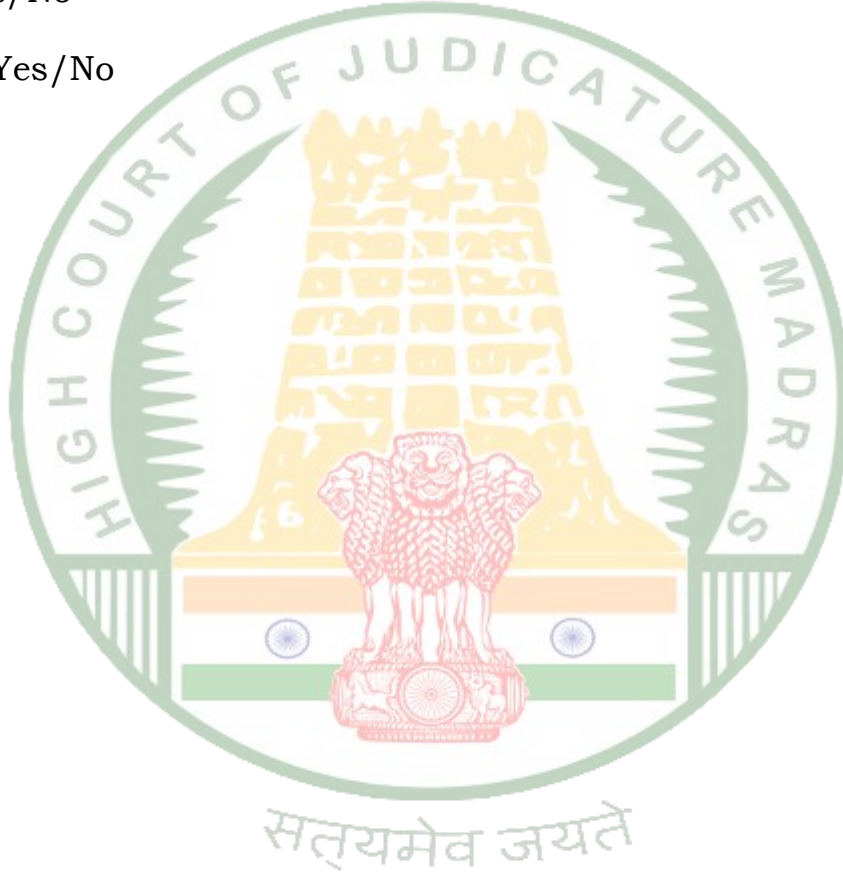
11. Accordingly, the Civil Miscellaneous Appeal is dismissed as devoid of merits. No costs.

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Index: Yes/No

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S.RAMATHILAGAM,J

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**Pre delivery judgment in
C.M.A.No.1838 of 2011**

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