

HIGH COURT OF CHHATTISGARH, BILASPURWrit Petition (Art.227) No.399 of 2018

Tikaram Kashyap S/o Late Shri Bhaiyyaram Kashyap, Aged about 62 years, R/o M.I.G. (S) – 118, Kabir Nagar, Phase-2, Tiranga Chowk, Raipur, District- Raipur (CG) – 492 099

---- Petitioner

Versus

1. State of Chhattisgarh, Through – Collector, Mantralaya, Naya Raipur, District-Raipur (CG)
2. Shailendra Kumar Shrivastava, Aged about 64 years, S/o Late Shri Parmeshwar Prasad Shrivastava, R/o M.D.D. 136, Phase-2, Kabirnagar, Raipur (CG)

---- Respondents

For Petitioner	:	Mr.Akash Pandey, Advocate
For Respondent No.1/State	:	Mr.Matin Siddiqui, Dy.A.G.
For Respondent No.2	:	Mr.Anand Kumar Gupta, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

02/09/2019

1. The petitioner is defendant before the trial Court, who takes exception to the impugned order dated 13.2.2018 passed by the Additional District Raipur, by which respondent No.2/plaintiff has been permitted to sue as an indigent person in a suit filed by him for specific performance of contract by granting an application under Order 33, Rules 1 & 2 of the CPC and to specifically enforce the contract dated 23.2.2008.
2. Mr.Akash Pandey, learned counsel for the petitioner/defendant, would submit that the trial Court is absolutely unjustified in granting the application filed by the plaintiff under Order 33, Rules 1 & 2 of the CPC without notice to the petitioner/defendant permitting him to sue as an indigent person, which runs contrary and is in teeth of the

provisions contained in Order 33, Rules 6 & 7 of the CPC and principle of law laid down by the Supreme Court in the matter of Shri M.L. Sethi v. Shri R.P. Kapur¹, therefore, the impugned order be set aside and the matter be remanded back to the trial Court for providing an opportunity to file reply and to contest that application as per law.

3. On the other hand, Mr. Anand Kumar Gupta, learned counsel for respondent No.2/plaintiff, would support the impugned order and submit that the matter of court fee is between the State and the plaintiff and the defendant has no say in considering that application. Therefore, the trial Court is absolutely justified in granting the application without notice to the defendant, as such, the writ petition deserves to be dismissed.
4. I have heard learned counsel for the parties, considered their submissions thoughtfully and went through the records with utmost circumspection.
5. In the instant case, respondent No.2/plaintiff filed a suit for specific performance of contract with an application under Order 33, Rules 1 & 2 of the CPC for permitting him to sue as an indigent person, which was inquired into by the trial Court, in which the trial Court took 7 months time in concluding the alleged enquiry ex-parte without notice to the defendants and ultimately, by order dated 13.2.2018 firstly allowed that application permitting the plaintiff to sue as an indigent person and thereafter directed for issuance of summons to the defendant in main suit for specific performance of contract.

1 AIR 1972 SC 2379

6. The question for consideration would be, whether the trial Court is justified in granting an application under Order 33, Rules 1 & 2 of the CPC permitting to sue him as an indigent person without notice and hearing particularly to the petitioner/defendant in indigency application ?
7. The application filed under Order 33, Rules 1 & 2 of the CPC for permission to sue as an indigent person has to be inquired into under Order 33, Rules 6 & 7 of the CPC by making an enquiry into the means of the plaintiff. The object of this provision is to enable a person, who is ridden by property, or not possessed of sufficient means to pay court fee, to seek justice. These provisions exempt such indigent person from paying requisite court fee at the first instance and allows him to institute suit or prosecute appeal in forma pauperis.
8. Order 33, Rules 6 & 7 of the CPC provides as under:-

“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 days' clear notice shall be given to the opposite party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his [indigency], and for hearing any evidence which may be adduced in disproof thereof.

7. Procedure at hearing.- (1) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make [a full record of their evidence].

[(1-A) The examination of the witnesses under sub-rule (1) shall be confined to the matters specified in clause (b), clause (c) and clause (e) of Rule 5 but the examination of the applicant or his agent may relate to any of the matters specified in Rule 5]

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the

evidence (if any) taken by the Court [under Rule 6 or under this rule], the applicant is or is not subject to any of the prohibition specified in Rule 5.

(3) The Court shall then either allow or refuse to allow the applicant to sue as [an indigent person].”

9. A careful perusal of the aforesaid provision would show that enquiry in indigency application has to be made and notice has to be given at least clear 30 days to the opposite party and the Government pleader and thereafter evidence has to be recorded and procedure has been detailed in Rule 7 of Order 33 of the CPC.

10. The Supreme Court in the matter of **M.L. Sethi** (supra) has held that Order 33 Rule 6 confers the right of the opposite party to participate in the enquiry into the pauperism and adduce evidence to establish that the applicant is not a pauper. It was observed as under:-

“7.....Under O. 33, Rule 9, it is open to the Court on the application of the defendant to dispauper the plaintiff on the grounds specified therein, one of them being that his means are such that he ought not to continue to sue as a pauper. An immunity from a litigation unless the requisite court fee is paid by the plaintiff is a valuable right for the defendant. And does it not follow as a corollary that the proceedings to establish that the applicant-plaintiff is a pauper, which will take away that immunity, is a proceeding in which the defendant is vitally interested? To what purpose does Order 33, Rule 6 confer the right on the opposite party to participate in the enquiry into the paupersim and adduce evidence to establish that the applicant is not a pauper unless the opposite party is interested in the question and entitled to avail himself of all the normal procedure to establish it? We can think of no reason why if the procedure for discovery is applicable to proceeding under Order 33, the appellant should not be entitled to avail himself of it.”

11. Reverting to the facts of the present case in the light of principle of law laid down in **M.L. Sethi** (supra), it is quite vivid that the learned trial Court though took more than 7 months in adjudicating the

indigency application, yet followed the procedure prescribed in Order 33, Rules 6 & 7 of the CPC for considering the plaintiff to sue as an indigent person in its full breach and not in its compliance by overlooking the statutory provisions contained in Order 33, Rules 6 & 7 of the CPC and thereby committed an illegality by granting the application in violation of the above-stated imperative provision warranting its axing.

12. For the foregoing reasons, the impugned order is liable to be and is hereby set aside. The matter is remitted to the trial Court for deciding the application under Order 33, Rules 1 & 2 of the CPC afresh after hearing the defendants as provided under Order 33 Rules 6 & 7 of the CPC after making an enquiry and thereafter the application will be decided within 45 days from the date of receipt of copy of this order.
13. The writ petition is allowed to the extent indicated hereinabove. No cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

B/-