

**Sm. Mala Devi Vs. Priyamoni Devi**

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**SooperKanoon Citation :** [sooperkanoon.com/526043](http://sooperkanoon.com/526043)

**Court :** Orissa

**Decided On :** Nov-06-1952

**Reported in :** AIR1953Ori87

**Judge :** Panigrahi and ;Mohapatra, JJ.

**Acts :** [Code of Civil Procedure \(CPC\) , 1908](#) - Order 33 Rule 1

**Appeal No. :** Civil Revn. Petn. No. 81 of 1952

**Appellant :** Sm. Mala Devi

**Respondent :** Priyamoni Devi

**Advocate for Def. :** S. Misra and ;K.M. Swain, Adv.

**Advocate for Pet/Ap. :** R.C. Mohanti, Adv.

**Disposition :** Revision allowed

**Judgement :**

ORDER

**Panigrahi, J.**

1. This is a petition under Section 115, Civil P. C. seeking to have an order of the learned Subordinate Judge, Cuttack in Misc. Case No. 133 of 1951, set aside. The petitioner filed a suit against her sister for setting aside a partition deed brought

about on 19-7-51 dividing the properties left by their father who had died sometime prior to that date leaving his widow, the mother of the present parties, as his then surviving heir. The plaintiff's mother died in June 1950 and the partition deed which is impugned in the suit was executed on 19-7-51 at the house of the plaintiff's father where defendant 1 is said to be living with her husband. According to the deed of partition the plaintiff has been given one acre and odd of land in village Mantripada and 14 acres and odd of land in Mayurbhanj district, whereas opposite party 1 gets 61 acres and odd of lands at Mantripada. The plaintiff filed a petition to allow her sue *In forma pauperis* on the ground that she was not 'possessed of sufficient means' other than the property in dispute, within the meaning of Order 33 Rule 1, Civil P. C. The learned subordinate Judge held that the plaintiff's share in the suit property would be worth at least Rs. 3500/- and as the court-fee payable was Rs. 1967/- she should have made an attempt to raise funds for paying court-fee by alienating the lands. He further held that the plaintiff's husband, who was examined as P. W. 1 said that he was not going to alienate the lands allotted to the plaintiff under the deed of partition, and it was clear, therefore, that the petitioner could have raised money from the lands in which she claimed her share and that she was unwilling to raise money by alienating those properties. On this view, the learned Subordinate Judge declined to treat her as a pauper, within the meaning of Order 33 Rule 1, Civil P. C.

2. The Explanation to Order 33, Rule 1, Civil P. C., reads as follows:

'A person is a 'pauper' when he is not, possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing-apparel and the subject-matter of the suit.

The Explanation consists of two parts. The first part says that if a person is not possessed of sufficient means to enable him to pay the fee prescribed by law he is to be regarded as a pauper. The second part says that if no such fee is prescribed and the petitioner has not, property worth Rs. 100/-, other than the subject-matter of the suit, then he will be deemed to be a pauper. It will be noticed that the subject-matter of the suit is to be excluded from consideration, in

determining whether the person is a pauper or not, only in the second case, namely where no court-fee is prescribed and where the petitioner is not entitled to property worth Rs. 100/- other than his wearing-apparel. The first part of the Explanation does not expressly exclude the value of the subject-matter of the dispute being taken into consideration in determining whether the man is possessed of sufficient means. That this is the proper interpretation to be put upon the first part of the Explanation is clear from the reported cases placed before use see for instance -- 'Mithailal v. Jagan', AIR 1937 All 74, in that case Their Lordships observed as follows:

'It is, therefore, not possible to hold that in cases coming under the first category the subject-matter of the suit must always and of necessity be excluded from consideration. Whether it should or should not be excluded is a matter for the consideration of the Court which has to decide the question whether the plaintiff is or is not possessed of sufficient means to enable him to pay the fee.'

This view has been uniformly followed by the Patna High Court. Our attention was drawn to the cases reported in: -- 'Mst. Zainatul Nissa Bibi v. Mst. Indrakun-nissa', 7 Cut LT 28; -- 'Dhananjoi v. Rajkeshwar', AIR 1947 Pat 34 and -- 'Bibi Khudai v. Mst. Bhagalan', AIR 1950 Pat 364. All these cases lay down that it is open to the Court to take into consideration the subject-matter of the suit, and determine, having regard to all the circumstances of the case, whether the petitioner can be declared to be 'possessed of sufficient means' to enable him to pay court-fee.

3. The expression 'possessed of sufficient means' has also been the subject-matter of judicial interpretation.

'Possess' does not necessarily mean mere physical possession. If a person has dominion or control over property which he can easily reach such as shares, or cash in a Bank, it cannot certainly be said that he is not 'possessed' of it. But where a person merely lays claim to the possession of certain immoveable property and his right to such property remains inchoate such as a right to a chose-in-action it would be preposterous to suggest that he is 'possessed of means' to enable him to pay court-fee. 'Possessed of sufficient means' would indicate remaining in actual possession of pecuniary resources, either in money or

in securities which could be easily converted into money so as to enable him to pay the court-fee. Accordingly, it includes such cases as possession of cash or readily uncashable securities, but it does not include, for instance, the hypothetical ability of the applicant to convert a claim to immoveable property into money by finding a prospective purchaser by hypothecating it or otherwise. In the latter cases the Court is bound to consider whether having regard to the claim made, and the nature of the interest claimed, the applicant could have raised money on the security of property which itself is the subject-matter of the suit. There may be cases where a claim to immoveable property is so obvious that anybody could lend money on the security of such property. There may also be cases where the property, however valuable, may not fetch a purchaser or a creditor, because it may prove risky to invest money on the property before the right is finally decided. The Court is, therefore, bound to take into consideration all these circumstances and see whether, on the facts of the particular case the plaintiff can be held capable of paying court-fee on his plaint, on the basis of the property in suit. It is not mere ability in the abstract, but the ability to raise money in the circumstance of the particular case in order to meet the requisite fee, that, will be taken into consideration, in determining whether the plaintiff is 'possessed of sufficient means'.

4. In the present case the learned ordinate Judge appears to have ignored these considerations and has come to the conclusion arrived at by him, for the reason that the property which is the subject-matter of the suit. Is itself valuable and is of higher value than the amount of court-fee required to be paid, and that the plaintiff could and should have found a creditor to lend her this amount. In taking this view he was in error, and we are constrained to interfere in revision as we are satisfied that he has failed to exercise the jurisdiction that was vested in him. In the circumstances of the case, the plaintiff should have been held incapable of raising money on the security of the subject-matter of dispute and admittedly she is not possessed of any other means sufficient to enable her to pay the court-fee on her plaint.

5. We would accordingly allow this revision with costs, set aside the judgment of the learned Subordinate Judge and permit the plaintiff to sue as a pauper. Hearing

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**Mohapatra, J.**

6. I agree.

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