

Thomas Vs. Thomas and ors.

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Court : Kerala

Decided On : Jun-06-1990

Reported in : AIR1991Ker108

Judge : K.P. Balanarayana Marar, J.

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

Appeal No. : C.M.A. No. 187 of 1984

Appellant : Thomas

Respondent : Thomas and ors.

Advocate for Def. : V. Rama Shenoi,; R. Raja Shenoi and; R. Prasanth Kumar

Advocate for Pet/Ap. : Thomas Mathew Nellimoothil, Adv.

Disposition : Appeal allowed

Judgement :

1. The request of appellant for permission to sue as an indigent person was refused by the Court below for the reason that he had not disclosed all the properties to which he is entitled. That order is challenged in this appeal.

2, A simple mortgage was executed by appellant in favour of respondent on 9-5-1981 in respect of the property mentioned in the petition. He sought to set aside

the decree alleging that no amount was received by him on the strength of that document and that the document was got executed under threat and coercion. The schedule to the petition contains only the description of his wearing apparel and it is alleged that he is not entitled to any property, movable or immovable.

3. The Court below basing on the evidence of petitioner as P.W. 1 found that he had suppressed the fact of ownership over an area of 6 cents of land and the building thereon. For that reason the request of petitioner was rejected and he was directed to pay Court-fee. The property stated to have been suppressed is none other than the subject-matter of the suit.

4. Order 33, Rule 1, C.P.C. prescribes the provisions subject to which a suit may be instituted by an indigent person. Explanation I to that order which defines who an indigent person reads thus :

'(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.'

The other two explanations inserted by the amendment of 1976 are not relevant for deciding the dispute in this revision. While ascertaining whether a person is not possessed of sufficient means to enable him to pay Court-fee prescribed by law for the plaint in such suit, any property which is exempt from attachment in execution of a decree and the subject-matter of the suit are therefore to be excluded.

5. Rule 2 of Order 33 enjoins a duty on the applicant to mention in the petition all the particulars required in regard to plaints in suits. In particular the petition should contain a schedule of any movable or immovable property belonging to the applicant with the estimated value thereof. A petition for permission to sue as an indigent person which is not framed and presented in the manner, prescribed by

Rule 2 is liable to be rejected under Rule 5 of Order 33. The Court below was persuaded to reject the request of appellant for the reason that he had not disclosed the details of a property possessed by him. The question arises as to whether details are to be shown separately when they relate to the subject-matter of the suit. The further question whether that property, being the subject-matter of the suit, has to be excluded while ascertaining the means of the petitioner also arises in this revision.

6. Respondents have no case that petitioner is possessed of any property other than the subject-matter of the suit viz. a small piece of land having an area of 6 cents and the building thereon. A simple mortgage has been executed by the petitioner in favour of respondents in respect of that property. The suit itself is to get that mortgage declared as invalid as one executed under threat and coercion. It cannot therefore be said that there is a suppression on the part of petitioner in regard to that property. Respondents cannot also contend that there has been a suppression since they claim mortgage rights over the very same property on the strength of the mortgage deed challenged in the petition. The finding of the Court below that petitioner had not disclosed his entire assets is therefore erroneous and a material irregularity has been committed by the Court below in refusing for that reason.

7. Learned counsel for respondents would then point out that petitioner is possessed of the property which is the subject-matter of the mortgage and that he is in a position to raise funds to pay the requisite Court-fee. It is contended that the subject-matter of the suit is the mortgage right and that the value of the equity of redemption cannot be excluded while determining the question of sufficient means. Before considering the question whether the equity of redemption can be excluded or not, it is necessary to refer to the relevant provisions of the C.P.C. before and after the amendment of 1976.

8. The relevant provision of Order 33, Rule 1, C.P.C. before the amendment of the Code read thus:

'Subject to the following provisions, any suit may be instituted as a pauper.
Explanation : 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.'

This rule was substituted in Kerala by a notification published in Kerala Gazette dt. 9-6-1959. The explanation to Order 33, Rule 1 as substituted by the notification reads thus:

'A person is a 'pauper' when he is not possessed of sufficient means, other than the subject-matter of the suit, to enable him to pay the fee prescribed by law for the plaint in such suit.'

Considerable changes had been made by the Amendment Act of 1976. After the amendment Rule 1 and the Explanation thereto read as follows:

'Subject to the following provision, 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.'

9. The position therefore is that under the old C.P.C. as applied in Kerala after the notification referred above and after the amendment of the C.P.C. by the 1976 Amendment Act, the subject-matter of the suit has to be excluded completely while ascertaining the means of an indigent person. In addition, properties which are exempt from attachment in execution of a decree are also excluded by the amendment.

10. What is meant by 'subject-matter of the suit' is the aspect to be considered in this appeal. The Andhra Pradesh High Court had occasion to consider this aspect in *Syed Zaleel Zare v. P. Vankata Muralidhar*, AIR 1979 Andh Pra 107. It was held therein that the expression 'subject-matter of the suit' cannot be equated to the property itself. The contention in that suit was that the properties were worth Rs. 2 lakhs and that the subject-matter of the suit is only the tenancy right. The plaintiff's title was not disputed. It was contended therein that value of the suit property has to be taken into account in determining the capacity of the plaintiff to pay Court-fee. It was held that though the subject-matter of the suit has to be excluded in determining the question of sufficient means, the value of the house premises or the value of the premises is not liable to be excluded in determining the question. It was further held (at p. 110 of AIR):

'But as the subject-matter in the suit cannot be construed as comprehending the entire property, but only the right of tenancy, the suit premises cannot be taken as the subject-matter of the suit.'

The house property, not being the subject-matter of the suit, was found to be not liable to be excluded in determining whether the plaintiff is an indigent person. According to the learned counsel for respondents the equity of redemption is not the subject-matter of the suit and as such is not liable to be excluded. Attention is drawn to the decision in AIR 1941 Cal 659 *Subodh Chandra Nag v. K.L. Bank, Ltd.*, wherein it was held that in a suit to enforce a mortgage, the equity of redemption in the mortgagor cannot be regarded to be the subject-matter of the suit, and that for the purpose of deciding the question as to whether the mortgagor who appeals is a pauper or not, the value of the equity of redemption cannot be excluded by the Court from its consideration. It has to be remembered that this decision was rendered at a time when the subject-matter of the suit was not excluded while ascertaining the sufficient means of the indigent person. As observed by the Andhra Pradesh High Court in *Gade Sreeramulu v. Matta Adinarayana Rao*, AIR 1985 Andh Pra 62 much water carrying constitutional goals has flown under the bridges in the years followed. The decision of the Calcutta High Court (*supra*) was dissented from in the decision in AIR 1985 Andh Pra 62. It is observed therein that the object of Order 33, Rule 1 and Order 44, Rule 1 is to

enable the indigent person to lay an action in a Court to vindicate his rights and when he proves that he is not possessed of sufficient means to pay the requisite Court-fee, an enablement is provided by the Code permitting him to prosecute the proceedings without paying the Court-fee. The question whether the equity of redemption can be excluded or not came up for decision in that case and it was held that the equity of redemption in a suit for recovery of money on the basis of a mortgage is exempt from the subject-matter of the suit as contemplated under Explanation 1(a) of Rule 1 of Order 33, C.P.C. That was a case where the petitioner therein lent money to the respondents on executing a mortgage bond and for recovery thereof a suit was filed and a preliminary decree obtained. The mortgagors filed appeal as indigent persons and the question arose whether any material irregularity was committed by the appellate Court in permitting them to file the appeal as indigent persons. The decision applies on all fours to the present case also since the subject-matter of the litigation is the mortgage right claimed by respondents and appellant is left with the equity of redemption only. That cannot be taken into account for ascertaining his means.

11. The Madras High Court in *Palaniandi v. Logambal*, AIR 1986 Madras 279 has held that the subject-matter in a partition suit is the entirety of the property and not the disputed share alone. The possession of the property by one or the other of the persons or the receipt of income will have no bearing on the decision as to whether the person has sufficient means or not. The defendant in that case who sought to prefer an appeal in forma pauperis was having 1/4 share in the suit properties. It was held that in order to make the constitutional and statutory benefits meaningful and the legal remedy effectual, the words 'subject-matter of the suit' shall receive extended meaning and a liberal construction has to be adopted in construing those words.

12. Identical question arose for consideration before this Court in the decision in AIR 1962 Kerala 24 (*Krishna Bhatta v. Madhava Bhatta*). The plaintiff in that case was admittedly in possession of 1/3rd of the suit properties. The contention was that he has the means to pay Court-fee of that share which alone is the Court-fee payable in the suit. Madhavan Nair, J. referring to the explanation to Rule 1 of Order 33 applicable to Kerala held that the explanation seems to be imperative

that such share being the subject-matter of the suit should not be taken into account in assessing the means of the petitioner to pay Court-fee.

13. The subject-matter of the suit has therefore to be excluded while considering the means of the indigent person, The equity of redemption which the petitioner has over the property mentioned in the petition is also liable to be excluded. I am in respectful agreement with the view expressed in the decisions referred above. There has thus been no suppression of any property by the petitioner, nor is he in possession of sufficient means to pay Court-fee, The Court below has therefore committed a material irregularity in denying the relief to sue as an indigent person. The order is liable to be set aside.

In the result the appeal is allowed the order of the Court below is set aside and the request of appellant-petitioner to sue as an indigent person is granted. The Court below is directed to restore the O.P. to file and proceed with it in accordance with law.

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