

RAM SARUP

v.

UNION OF INDIA AND ORS.

October 6, 1983

[A. P. SEN AND E. S. VENKATARAMIAH, JJ.]

Code of Civil Procedure 1908—Order 44 Rule 1 & 2—Suit by indigent person dismissed—Appeal with an application under rule 1 filed in High Court for permission to appeal as an indigent person—Application under rule 1 disposed of by a one word order 'dismissed'—Application made for permission to pay Court fee and prosecute appeal—This application also dismissed, on ground earlier application dismissed on merits—Such order—Whether valid and justified.

The Code of Civil Procedure (Amendment) Act 1976 (Act No. 104 of 1976)—Order 44 Rule 1 & 2 C. P. C.—Amendment of—Explained.

The appellant filed a suit as an indigent person in the Subordinate Court questioning the validity of an order dismissing him from service. The said suit was dismissed after contest. He filed an appeal in the High Court as a pauper along with an application under Rule 1 of Order 44 Code of Civil Procedure requesting that he may be allowed to appeal as an indigent person. The application was dismissed by a Single Judge by a one word order, "dismissed". The appellant thereupon made an application praying for permission to pay the requisite court fee and to prosecute the appeal. That application was also dismissed by the same Judge on the ground that as the application for leave to appeal as an indigent person was dismissed on merits, and not on the ground that the applicant was not an indigent person, there was no question of granting time to the applicant to pay court fee.

Allowing the Appeal to this Court :

HELD : 1 (i) The Order of the High Court is, clearly, unsustainable. What was rejected in the instant case was the application under Rule 1 of Order 44 of the Code of Civil Procedure. The High Court should have therefore made an order as required by Rule 2 granting time to the appellant to pay the requisite court fee and permit him to prosecute the appeal. The High Court failed to do so even when an application was made for that purpose. [280 G-H]

(ii) The High Court has lost sight of the effect of the amendment of Rule 1 of Order 44 of the Code of Civil Procedure by the omission of the former sub-rule (2) of Rule 1. [280 D]

2. After the amendment of the Code of Civil Procedure by the Code of Civil Procedure (Amendment) Act 1976, (Act No. 104 of 1976) which came into force with effect from February 1, 1977 the rejection of the application

A made under Rule 1 of Order 44 of the Code of Civil Procedure can only mean that the Court is not satisfied about the claim of the applicant that he is an indigent person and nothing more. It does not, however, amount to a finding that the appeal is not a fit one for admission on merits. Otherwise Rule 2 of Order 44 which permits payment of court fee after the application under Rule 1 is rejected, would become meaningless. [277 G; 280 D-E]

B 3 (i) By the amendment made in the year 1976 sub-rule (2) of Rule 1 of Order 44 of the Code of Civil Procedure was deleted. The result is that when an application under Rule 1 of Order 44 of the Code of Civil Procedure comes up for hearing, the only question to be considered is whether the applicant is an indigent person or not. Any question relating to the merits of the case does not arise for consideration at that stage. If the application is granted, then the memorandum of appeal would have to be registered as an appeal and disposed of in accordance with law. When the appeal is posted for admission C the appellant has to satisfy the Court that the appeal merits admission. At that stage the appellant may draw the attention of the Court not merely to the judgment and decree appealed from but also to all the relevant records in the case to substantiate his claim that the appeal deserves to be admitted.

[279 G-H; 280 A-B]

D (ii) Rule 2 of Order 44 as it now stands requires that where an application is rejected under Rule 1 thereof, the Court may while rejecting the application, allow the applicant to pay the requisite court fee within such time as may be fixed by the Court or extended by it from time to time and upon such payment, the memorandum of appeal in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance. If the requisite court fee is paid the appeal has to be E registered and posted for admission. [280 B-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8690 of 1983.

F Appeal by Special Leave from the Judgment and Order dated the 3rd day of May, 1982 of the Delhi High Court in C.M. No. 650 of 1980.

M.B. Lal for the Appellant.

G *Dalveer Bhandari, R.N. Poddar and C.V. Subba Rao* for the Respondents:

The Judgment of the Court was delivered by

H VENKATARAMIAH, J. This appeal by special leave is filed against the order of the High Court of Delhi dated May 3, 1982 in C. M. No. 525 of 1981 (in C.M. (Pauper) No. 650 of 1980) by which the High Court refused permission to the appellant to prosecute an appeal which he had presented earlier as an indigen person, after

paying the court fee within such time as may be fixed by the Court as provided in Rule 2 of Order 44 of the Code of Civil Procedure, 1908. A

The facts of the case are these : The appellant filed a suit questioning the validity of an order dismissing him from the post of Senior Rakshak/Head Constable, Railway Protection Force, Delhi in the court of the Sub Judge Ist Class, Delhi as an indigent person. That suit was dismissed after contest. Against the decree passed in the suit, he filed an appeal before the High Court of Delhi in C.M. (Pauper) No. 650 of 1980 along with an application under Rule 1 of Order 44 of the Code of Civil Procedure requesting that he may be allowed to appeal as an indigent person. That application was dismissed by the learned Single Judge of the High Court by a one word order stating 'Dismissed' on May 14, 1981. The appellant thereupon made an application No. C. M. 525 of 1981 praying for permission to pay the requisite court fee and to prosecute the appeal. That application was also dismissed by the same learned Judge by the order dated May 3, 1982 in which he inter alia observed thus : B
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"The application for leave to appeal as an indigent person was dismissed on merits, and not on the ground that the applicant was not indigent person. I could not have dismissed it on the latter ground without holding an inquiry as to the of the applicant. Since that application was dismissed on merits, there was no question of granting time to the applicant to pay court fee". E

This appeal is directed against the above order. A reading of the aforesaid order shows that the learned Judge was of the view that he had dismissed the appeal itself on merits on May 14, 1981 when he dismissed the application for leave to appeal as an indigent person. The question which now arises for consideration is whether such an order can be passed at the stage at which it was passed after the amendment of the Code of Civil Procedure by the Code of Civil Procedure (Amendment) Act, 1976 (Act No. 104 of 1976) which came into force with effect from February 1, 1977. Prior to the above-said amendment, Order 44 of the Code of Civil Procedure contained two Rules. Rule 1 of order 44 of the Code of Civil Procedure which is material for purposes of this case read as follows : F
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"1. (1). Any person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of

A appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as a pauper, subject, in all matters, including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable.

B (2) The Appellate Court, after fixing a day for hearing the applicant or his pleader and hearing him accordingly if he appears on that day, and upon a perusal of the application and of the judgment and decree appealed from, shall reject the application, unless it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust".

C It is seen from the above provision (as it stood prior to its amendment) that an appellant who wished to file an appeal without payment of the requisite court fee had to file an application accompanied by the memorandum of appeal praying for permission to prosecute the appeal as an indigent person. On the presentation of such an application, the appellate court after fixing a day for hearing the application or his pleader and hearing him accordingly if he appears on that day and upon a perusal of the application and of the judgment and decree appealed from was obliged to reject the application unless it saw reason to think that the decree was contrary to law or to some usage having the force of law or was otherwise erroneous or unjust. Under Rule 2 of Order 44 of the Code of Civil Procedure as it stood prior to its amendment the inquiry into the pauperism of the applicant could be made either by the appellate court or under the orders of the appellate court by the court from whose decision the appeal had been preferred. No further inquiry on this question was, however, necessary if the applicant had been allowed to sue or appeal as a pauper in the court from whose decree the appeal was preferred, unless the appellate court saw cause to direct such inquiry. It is thus seen that under the law in force prior to the amendment by Act No. 104 of 1976 it was necessary for a person who wanted to file an appeal *in forma pauperis*, as it used to be called then, to establish not merely that he had no means to pay the requisite court fee but also that the decree appealed against was contrary to law or to some usage having the force of law or was otherwise erroneous or unjust and that the dismissal of an application to file an appeal *in forma pauperis* could be either on the ground that the applicant was not a pauper, or on the ground that the decree was not contrary to law or to some usage having the force

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of law or was otherwise erroneous or unjust, or both. It was, therefore, necessary for the Court to examine the case in merits also though for the limited purpose of sub-rule (2) of Rule 1 of Order 44 of the Code of Civil Procedure before either granting or rejecting an application to file an appeal *in forma pauperis*.

After the amendment of Order 44 of the Code of Civil Procedure by Act 104 of 1976, there are three Rules in it. Rules 1 and 2 thereof now read as follows :

"1. (1) 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.

2. Where an application is rejected under rule 1, the Court may, while rejecting the application, allow the applicant to pay the requisite court-fee, within such time as may be fixed by the Court or extended by it from time to time; and upon such payment, the memorandum of appeal in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance."

It is not necessary to set out Rule 3 which is only an improved version of the former Rule 2 here as it merely deals with the mode of holding an inquiry into the capacity of the applicant to pay the court fee.

By the above said amendment made in the year 1976 sub-rule (2) of Rule 1 of Order 44 of the Code of Civil Procedure is deleted. The result is that when an application made under Rule 1 of Order 44 of Civil Procedure Code comes up for hearing, the only question which has now to be considered is whether the applicant is an indigent person or not. Any question relating to the merits of the case does not arise for consideration at that stage. If the application is granted, then the memorandum of appeal would have to be registered as an appeal and disposed of in accordance with law. When the appeal is posted for admission the appellant has to satisfy the Court

A that the appeal merits admission. At that stage the appellant may
draw the attention of the Court not merely to the judgment and
decree appealed from but also to all the relevant records in the case
to substantiate his claim that the appeal deserves to be admitted.
B Rule 2 of Order 44 as it now stands requires that where an appli-
cation is rejected under Rule 1 thereof the Court may while rejecting
the application, allow the applicant to pay the requisite court fee
within such time as may be fixed by the Court or extended by it
from time to time and upon such payment, the memorandum of
C appeal in respect of which such fee is payable shall have the same
force and effect as if such fee had been paid in the first instance. If
the requisite court fee is paid the appeal has to be registered and
posted for admission.

D From the foregoing it appears that the High Court lost sight
of the effect of the amendment of Rule 1 of Order 44 of the Code
of Civil Procedure by the omission of the former sub-rule (2) of
Rule 1. A rejection of the application made under Rule 1 of Order
44 now can only mean that the Court is not satisfied about the claim
of the applicant that he is an indigent person and nothing more. It
does not, however, amount to a finding that the appeal is not a fit
one for admission on merits. Otherwise Rule 2 of Order 44 which
E permits payment of court fee after the application under Rule 1 is
rejected, would become meaningless.

F It is no doubt true that the learned Judge of the High Court
states that he had dismissed the appeal on merits when he said
'dismissed' on May 14, 1981, but the appellant contends that that
could not be the meaning to be attached to that Order having regard
to the law now in force. It is likely that having regard to the true
G legal position the appellant may not have placed at the time when the
application came up for consideration before the High Court all his
submissions which he would have made if the appeal had been
posted for admission. In this situation the possibility of the occasion-
ing of failure of justice cannot be ruled out. Since what was
rejected was the application under Rule 1 of Order 44 of the Code
of Civil Procedure the High Court should have made an order as
required by Rule 2 thereof granting time to the appellant to pay the
H requisite court fee and permitting him to prosecute the appeal. The
High Court failed to do so even when an application was made for
that purpose. The order of the High Court is clearly unsustainable.

We, therefore, set aside the order of the High Court passed on May 3, 1982 in C. M. No. 525 of 1981 and remand the case to it to pass an order granting time to the appellant to pay the court fee as required by Rule 2 of Order 44 of the Code of Civil Procedure and to dispose of the case in accordance with law without being influenced by the circumstance that it had been rejected earlier on merits as observed by the learned Single Judge.

Before concluding this judgment we wish to draw the attention of the High Court to the description of the applications filed before it under Order 44 of the Code of Civil Procedure. Action may be taken to delete the word 'pauper' from their description in view of the amendments made in 1976.

The appeal is accordingly allowed. No order as to costs.

N.V.K.

Appeal allowed.