(1969) 07 KL CK 0018

High Court Of Kerala

Case No: CRP 25 and 27 of 1969

Janakykutty		APPELLANT
	Vs	
Varghese		RESPONDENT

Date of Decision: July 2, 1969

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 33 Rule 1
- Hindu Minority and Guardianship Act, 1956 - Section 11

Citation: (1969) KLJ 728

Hon'ble Judges: V.R. Krishna Iyer, J

Bench: Single Bench

Advocate: V. Sankara Menon and K. Sudeesh, for the Appellant; M.P. Abraham, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

V.R. Krishna Iyer, J.

The petitions for permission to sue in forma pauperis were dismissed and have given rise to the above two revision petitions. The question is common in both the cases and the petitioner is the same in both. And so, I am disposing them of by a single judgment. Who is a pauper, within the meaning of Order 33 Rule 1 C.P.C.? I have often felt that this pejorative expression "pauper" ill fits a statute in a republic where the overwhelming majority are absolutely poor and the scales of court fee are abnormally high. English has not been so pauperised as to be unable to find a more becoming word to describe one who has no ability to pay court fee for a suit.

2. The petitioner is minor and has brought two suits through a next friend, her uncle, to set aside two alienations by her mother, the 3rd defendant, in favour of the 1st defendant in each case. The property is claimed by the minor plaintiff as heir to her father, Sankaran Nair, but I am not concerned with the merits of the claim as the

question raised in these revision petition is merely as to whether the petitioner is entitled to take advantage of the provisions of Order 33 Rule 1 C.P.C.

3. In Explanation I to O.33 R. 1 the words "other than the subject matter of the suit" have been deleted in Kerala with the result that when estimating the means of the petitioner it is permissible to include the subject matter of the suit for what it is worth. Indeed, the argument of the counsel for the respondent is that the minor has sufficient means to pay court fee without reckoning the subject matter of the suit and certainly will be able to pay the requisite court-fee if the subject matter of the suit is also included. This part of the argument is specious, because a minor bringing a suit to set aside an alienation executed by her legal guardian where possession also has been made over to the transferee cannot raise any money on the subject matter of the suit as no one in his senses will be willing to buy a type of litigation with a usually poor prognosis.

4. The more serious question, however, is whether the minor petitioner has properties to raise enough money to pay court-fee. It is admitted that the minor has fractional interest in a few items of properties enumerated in the pauper application. It is also seen that the 1st counter petitioner, examined as D.W.1., offered to purchase one out of the three admitted items for Rs. 1300/- which would be more than sufficient for the payment of the court-fee in both the suits together. The lower Court was impressed by this offer and observed.

I do not think that this is a mala fide offer. I am satisfied from the facts and circumstances that the petitioner has the means to pay the court-fee.

what those other facts and circumstances are, are not disclosed in the judgment. On a close examination of the facts we find that the minor has a share as co-heir in the father''s properties, three in number. Apparently, the properties are valuable and we may assume that the share of the minor if validly transferred may fetch enough money to pay the court-fee. But the real question is not whether the assets of the minor are considerable but whether the minor can raise resources therewith. In this context we have to adopt a pragmatic rather than a theoretical approach. Mulla observes in C.P.C. Vol. 2 Page 1396 13th Edn. "What is contemplated is not possession of property but sufficient means that is, capacity to raise money to pay court-fees and it is incumbent on the Court to come to a finding on that point..." Can the ownership of property by traded for ready cash? The Madras High Court adopting the above test, observed:

It is not to my mind so much a question whether they have this power in the abstract but whether in the concrete circumstances of this case they can succeed in raising anything substantial by exercising it.

Again, in another decision Ramesan J. agree with the above observation and said that evidence would be necessary to decide whether money could be raised on the properties (A.I.R. 1934 Mad 562). Thus, the capacity to raise money is the crux of the

matter and this turns firstly on the convertibility of the property into cash readily and secondly on the legally competent agency to dispose of property for this purpose. We are concerned with the latter aspect in the present case. It is conceivable that a minor may have considerable properties--and even cash but if the guardian who alone can alienate the property and raise money thereon or who is in control of the cash and can give it to the minor declines to co-operate with the minor and refuses either to transfer the property as guardian or part with the cash for conducting the litigation, the minor is, for all practical purposes, a pauper. It is no good saying that the minor is wealthy if he or his next friend cannot actually command cash. Therefore, the ability of the minor to get at means to pay the court-fee (means in this context, obviously means money because court-fee will be accepted in money and not in property) is what we are concerned with. The next friend of the minor in the present petitions is admittedly not the legal guardian. The mother who is the legal guardian has been arrayed as the 3rd defendant. According to the revision petitioner only the mother can alienate the properties of the minor and, so long as she does not co-operate, the minor daughter continues a pauper, particularly because the next friend has no authority to act on behalf on the minor. The remote suggestion that the next friend may move the Court and get a guardian appointed under the Guardian and Wards Act and persuade that guardian to move the Court to permit alienation of property to raise resources and then start litigation is in most cases too round about a route to reach the monetary destination and cannot be treated as equivalent to possession of sufficient means within the meaning of Order 33 Rule 1 C.P.C. It may be that where the Court is satisfied that the legal guardian and the next friend of the minor are acting in collusion and trying to avoid payment of court-fee by a mock fight the Court may see through the game and hold that at the back of the litigation is the legal guardian and that he is keeping away from his role as next friend by way of stratagem. In such cases the Court may decline to believe that the minor who is otherwise wealthy is a pauper. Such extreme cases of make-believe Pauperism must not pass muster in a Court. But there may be honest cases where the legal guardian may refuse to spend money or transfer the property for the conduct of a litigation either because he thinks the prospects too bleak to invest money thereon.

5. In the present case the offer of the 1st defendant to pay Rs. 1400/- for any one of the properties of the minor cannot be taken too seriously. It involves many ifs. There must be a real necessity to alienate which depends on the bona fides of and benefit from the litigation. The legal guardian must agree to act on behalf of the minor. Only if these conditions are satisfied, the 1st defendant may agree to pay Rs. 1300/-. That is very different from saying that there is an immediate offer to buy the property of the minor for Rs. 1300/- on the execution of a document by the minor''s next friend. I do not think, therefore, that the Court should have been carried away by what may be just a stunt. Since no other factor has been mentioned by the trial Court to justify refusal of the facility of suing as pauper, I am constrained to set

aside the order in both the cases. But that is not the end of the story because the Court has got to re-investigate pauperism in the manner indicated or rather the absence of sufficient means for the petitioner to pay court-fee. The view taken by me that a minor who does not have a guardian to act on his behalf cannot be said to be possessed of means to pay court-fee even if he own properties is supported by a ruling of the Andhra Pradesh High Court reported in Katam Virupakshiah and Others Vs. Matam Sivalingaiah and Others, . The learned Judge has highlighted the point that the de facto guardian of the minor petitioner may not be legally competent u/s 11 of the Hindu Minority and Guardianship Act 1956 to offer the minor''s share as security or to alienate it for raising funds. In such a case, according to the learned Judge, the applicant cannot be said to be capable of raising resources to pay court-fee. There are observations in the judgment of Krishnamoorthi Iyer, J. in a C.R.P. which lend some support to this view. A bizarre by - product of this legal position would be that minors in many cases will escape the obligation to pay court-fee when suits are brought on their behalf by next friends who are not their legal guardians even though the minor''s estate may be prosperous. But the incompetence of an infant to enter into a contract by himself and disability of the next friends other than legal guardians to alienate the infant''s estate and the restrictions by the law even on legal guardians borrowing or alienating so as to bind the minor are at the root of the problem. With trepidity I take the view, I have indicated and I direct the lower Court to ascertain afresh whether there is inability for the minor to find the funds to pay the court-fee. Subject to the above observations I allow the Civil Revision Petition, but in the circumstances without costs.