

(1998) 02 BOM CK 0071

Bombay High Court

Case No: Notice of Motion No. 589 of 1998 in Suit No. 714 of 1992

Venkatesh Iyer

APPELLANT

Vs

Bombay Hospital Trust and
others

RESPONDENT

Date of Decision: Feb. 27, 1998

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 33 Rule 1, Order 33 Rule 9, Order 39 Rule 1, Order 39 Rule 2, 60

Citation: AIR 1998 Bom 185 : (1998) 2 BomCR 798

Hon'ble Judges: Pratibha Upasani, J

Bench: Single Bench

Advocate: Mihir Desai and Ms. Adenwala, for the Appellant; Ketan Parikh and Gautam Mehta, instructed by Kanga and Co., D.V. Merchant and Snehal Shah, instructed by Dhru and Co., for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Dr. Pratibha Upasani, J.

This Notice of Motion is taken out by defendant Nos. 1 and 2 praying that the plaintiff be disappeared under the provisions of Order XXXIII, Rule 9 of the Code of Civil Procedure, 1908.

2. The suit is filed by the plaintiff Venkatesh Iyer for declaration that the defendants/any one of them, their servants/officers etc. are guilty of treating the plaintiff with negligence, and seeking a decree for a sum of Rs. 47 lakhs as and by way of damages in accordance with the particulars of claim at Exhibit II to the petition with interest. Prayer for punitive damages also is made by the plaintiff.

3. The plaintiff had sought permission to sue the defendants in forma pauperis as per the provisions of Order XXXIII, Rule 1 of the Code of Civil Procedure, 1908. Proceedings accordingly were conducted before the Prothonotary and Senior

Master as per Chapter XIII of the Rules of High Court of Judicature, Bombay on the Original Side read with Order XXXIII, Rule 1 of the Code of Civil Procedure. In these proceedings, the plaintiff was examined on oath, in which he stated that he was not possessed of sufficient means and therefore, he was applying for leave to sue as an indigent person.

4. The plaintiff has stated on oath that he did not have any source of income, that he was getting Rs. 400/- per month from the Cancer Patients' Aid Society, Bombay, but was required to spend more than Rs. 1,500/- per month for his maintenance and medical treatment. He had further stated that he did not have or own any property either moveable or immovable. He had mentioned about a Savings Bank Account No. 5815 with the United Western Bank Limited, Borivli (West) Branch, Bombay, which showed credit balance of Rs. 269.45 paise as on 20th February, 1992. He further stated that the Schedule of Property annexed to the pauper petition was correct.

5. Defendant Nos. 1 and 2 did not participate in those proceedings before the Prothonotary and Senior Master. Defendant No. 3, however, cross-examined the plaintiff.

6. The learned Prothonotary and Senior Master by his order dated 4th March, 1992, after perusing the petition and the evidence of the petitioner given before him in support of his application for leave to sue as an indigent person, granted the necessary leave and the Pauper Petition No. 16 of 1991 was converted into a suit and was admitted on that day. The office was directed to number the suit accordingly, which came to be numbered as Suit No. 714 of 1992.

7. Recording of evidence in this suit commenced from 22nd July, 1997. Plaintiff examined himself on oath and also examined four medical experts as his witnesses. Thereafter, he closed his case, making a statement to that effect on 16-2-1998. It is at this stage, that the present application is made by defendant Nos. 1 and 2 under Order XXXIII, Rule 9 of the Code of Civil Procedure, praying that the plaintiff be disappeared, and that, he be directed to pay the Court Fees which he was required to pay at the time when he filed the suit in the year 1992. Defendant No. 3 has not taken out any separate Motion praying for de-pauperising the plaintiff. However Mr. Merchant, appearing for defendant No. 3, has supported the application in toto and has not only adopted the arguments of Mr. Ketan Parikh appearing for defendant Nos. 1 & 2, but also made additional submissions praying that the plaintiff be de-papered and that, he be directed to pay the Court Fees as per the requirement of law.

8. The sum and substance of the affidavit-in-support of the present Notice of Motion is that during the course of cross-examination of the plaintiff, the plaintiff has made several admissions with regard to the income of the plaintiff, which go to prove that he had sufficient means to pay the Court Fees when the suit came to be filed.

Reference is made to plaintiff's deposition at various pages of the Notes of Evidence to substantiate this application. Attention of the Court is drawn to the plaintiff's deposition at page 114 para 107 where the plaintiff had stated on oath that he was giving some private tuitions and was earning meagre income, that he was getting Rs. 400 per month, that he was teaching School-going children of VI and VII Standards. It is also pointed out that prior to 1985, plaintiff was working in Hotel Sun & Sand at the Reception Desk as a receptionist, though it was a very short stint. Defendants have further highlighted plaintiff's deposition at pages 115 to 120. In paragraphs 107, 108 and 109 the plaintiff, during the course of his cross-examination, has come out with some of the admissions about his teaching in the Institution by name "Teaching Centre" which is being run at his residence. It is also admitted by him that, possibly once or twice, some handbills were printed for advertising this "Teaching Centre". He has also admitted that there is no record or Account Book pertaining to this "Teaching Centre", and that, the fees are received in cash as well as by cheques and that, the cheques are received blank sometimes, and that sometimes his brother Sainath puts his name, and sometimes when plaintiff needs money, his name is put. It is also admitted that when the cheque is not blank, the cheque is either in his brother's name or in his name. It is also admitted by him that when fees are received in cash, they are deposited most probably in his brother's account, and sometimes in his account also. The account number is given by him as Account No. 1394 in South India Co-operative Bank, Borivli. He has also admitted that the money deposited in his Bank account, is used by him alone. He showed ignorance as to how much income was generated by his brother by way of these tuitions. Mention was also made about one Mr. Kulkarni, one Mr. Jain and Mr. Stanly, who come and teach the students at the plaintiff's residence. It was stated by the plaintiff that these were the additional persons who helped the plaintiff and his brother.

9. When query was made by defendants' Advocates about the income derived from his teaching classes, the plaintiff pleaded ignorance, stating that only his brother was handling all this, and he was not aware whether any Income Tax return was being filed. He, however admitted in para 107 on page No. 118 that it was true that he had not disclosed this income anywhere in the petition. The reason given by him for not disclosing was that it was a meagre income and the expenses which he was constrained to incur towards his treatment were very high.

10. Mr. Ketan Parikh, appearing for defendant Nos. 1 and 2, so also, Mr. Merchant, appearing for defendant No. 3, vehemently argued that the fact that some outsiders like Mr. Kulkarni, Mr. Jain and Mr. Stanly were coming to teach the students at the plaintiff's residence, goes to show that it was a professionally run teaching institution, that the real income received from the said institution was not disclosed, and that plaintiff was getting money from this source, which he had not disclosed when the suit was filed. Attention of the Court was also drawn by defendants' advocates to the statement made by the plaintiff in para 109 on page, 120 of the

Notes of Evidence, wherein plaintiff has stated that in the month of August, 1997, his brother gave him cheque worth Rupees Six to Seven Thousand for depositing in the Bank. It is also emphasized by defendants' Advocates that this income was and is being suppressed by the plaintiff and the statement made by the plaintiff that after 1991, his brother was the one who was mainly responsible for running the classes, was totally false. It is submitted by them that plaintiff's brother Sainath was working as a Purchase Manager in Cable Corporation of India, and was earning Rs. 7,000/- per month, who comes late in the evening, allegedly started running the classes as per the statement made by the plaintiff in the year 1991 just because the plaintiff wanted to file this suit forma pauperis, and wanted to show falsely that it was not he, but his brother who was running these classes.

11. Mr. Ketan Parikh, appearing for defendant Nos. 1 and 2, and Mr. Merchant, appearing for defendant No. 3, both drew my attention to paragraph 31 on page 18 of the petition. The averments in this paragraph are as follows:

"The plaintiff has no independent source of earning, nor does he have any savings or inherited property. Plaintiff does not own any immovable property nor does he own any shares, fixed deposits, debentures or any other securities. Plaintiff is not earning nor does he have the physical fitness to earn. The total property of the plaintiff is less than Rs. 1,000/-."

Defendants' Advocates submitted that these averments in the plaint are totally false. They drew my attention to the plaintiff's deposition in para 53 on page 40 of the Notes of Evidence, which reads as follows:

"At the time of my father's death (in May, 1980), he left following assets; the house where we at present stay, which is a villa type house, moderate Bank balance, which was drained because of my medical expenses and some gold which also had to be sold to meet my medical expenses. My father owned the house. The area of the house is approximately 500 square feet..... I do not know the value of the gold which my father had left at the time of his demise, nor do I know quantity or weight of the gold. I have to ask my mother. I also cannot say whether any gold was left which was not sold for my treatment. I will verify the records to ascertain the Bank balance and also to know how much gold was sold for my treatment and whether any gold is still there which was not sold."

On the next adjourned date, however, the plaintiff stated that he tried to trace some records to ascertain the Bank balance which his father had left at the time of his death, however, he could not lay his hands upon any record. He further stated that he learnt that about 10 tolas of gold was sold for the purpose of his medical treatment, but that, he was not able to ascertain whether any gold was still left from his father's estate. He then reiterated that he was getting only a sum of Rs. 400 per month from the Cancer Patients' Aid Society, and was not having any source of income. In the very next sentence, however, he admitted that he had shares of

some companies in his name, jointly with his brother, the approximate value of which can be about Rs. 12,000/-.

12. Defendants' Advocates Mr. Parikh and Mr. Merchant emphatically brought out the discrepancy in the plaintiff's deposition in para 59 of the Notes of Evidence and para 31 of the plaint, where a categorical statement on oath is made by the plaintiff that he did not own any shares or Immovable property or that, he did not have any savings or inherited property. It is pointed out by defendants' Advocates that admittedly, after the death of the plaintiff's father in the year 1980, the plaintiff has inherited 1/5th share in the assets of his late father, along with his two brothers, one sister and mother, and that, these assets consisted of Immovable property namely the residential house at Borivli, the undisposed quantity of gold, and the undisclosed amount of savings. It is also pointed out that in para 31 of the plaint, a categorical false statement is made about the plaintiff not having any shares while in the cross-examination, he has confessed of having shares worth Rs. 12,000/- approximately.

13. My attention is also drawn to internal page No. 7 of Exhibit D-3/3 collectively. These are the case papers of Tata Memorial Hospital, on which the plaintiff himself is relying. Page No. 7 is the original document from Tata Memorial Hospital. Questions were put to the plaintiff during the course of cross-examination by Mr. Parikh, appearing for defendant Nos. 1 and 2, about this document. This evidence is appearing in para 176 on page 195 of the Notes of Evidence. In this paragraph, the plaintiff admitted that the questions were put to him and his family members, while filling up this document, but that, he did not remember who answered these questions. He also stated that he did not remember whether the form was read out to him before the signature was put on it. When page 7 of Exhibit D-3/3 (collectively) was shown to the plaintiff, which categorically mentions plaintiff's income as Rs. 1,100/-, the plaintiff stated that he could not say why his brother mentioned Rs. 1,100/-, and further added that that must be his (his brother's) income. He also stated further that he could not say what was the income of his brother in November, 1985 i.e. when page 7 of Exhibit D-3/3 (collectively) was filled up. He, however had to admit that rest of the particulars in this form were about him and not about his brother.

14. On the background of these admissions coming from the plaintiff himself with respect to his assets consisting of Immovable property, gold, savings, shares and income from the tuition classes, it was forcefully argued by defendants' advocates that the plaintiff has played a fraud upon the Court in not only suppressing these facts in his plaint and his evidence before the learned Prothonotary and Senior Master while applying for leave to file the suit as forma pauperis, but that, he has positively lied and suppressed material facts with respect to these items by stating that he did not inherit Immovable property, that he did not own any Immovable property, and did not have any shares, etc. It is submitted by defendants'

Advocates, pointing out various sentences from plaintiff's deposition that whenever any question was put to the plaintiff about his income, he pleaded ignorance stating that all these affairs were handled by his brother Sainath and that, he was not aware about this. This was especially the case when any question was put with respect to the income getting from the "Teaching Centre". According to them, all questions with respect to the Teaching Centre were avoided by the plaintiff, simply stating that only his brother Sainath knew about this. It was also pointed out that Court had specifically made enquiry whether plaintiff was going to examine Sainath or not, and the answer was given that Sainath would be examined by the plaintiff. Defendants' Advocates submitted that the plaintiff suddenly declared that the plaintiff was closing his case, and that, he was not examining any more witness, not even Sainath. It was submitted that on this background, when all the questions were avoided by plaintiff by simply making a statement that Sainath was the one who would be able to give replies to these questions, he had suddenly closed the doors for getting specific and precise information about the income generating from the "Teaching Centre" by declaring that he was not going to examine Sainath. It was pleaded that on this background, adverse inference be drawn against the plaintiff.

15. I find substance in the arguments advanced by defendants' Advocates. Plaintiff's Advocate Mr. Mihir Desai did try to argue in vein that when the proceedings were being conducted before the Prothonotary and Senior Master, defendant Nos. 1 and 2 did not even bother to remain present, and that, they are trying to de-pauperise the plaintiff by raising this point at this stage. Mr. Desai for plaintiff also relied upon [Smt. Balwant Kaur Vs. Jagdish Mitter and Others](#), wherein it was held that "sufficient means" as contemplated by Rule 1 of Order XXXIII of the CPC meant means which could enable the plaintiff to have sufficient liquid cash available for paying the Court Fee or property which could be easily convertible into cash. I wonder how this authority will help the plaintiff in proving his point. In the above mentioned case, suit was filed by the plaintiff for partition of the property and that property was the subject matter of the suit. The plaintiff was not even in possession of the suit premises to which she was claiming title. On this background, it was held by the Punjab High Court that it was exceedingly difficult to hold that such property could lawfully and justly be taken into account in considering whether she was possessed of "sufficient means" within the meaning of Order XXXIII, Rule 1, and that, the petitioner's capacity to raise the money was the real test and not mere possession of some property.

16. In fact, when plaintiff is admittedly having 1/5th share in the Immovable property, he cannot be said to be helpless to raise money on the basis of that 1/5th share which he certainly and admittedly has.

17. Some other authorities were also referred by Mr. Mihir Desai for plaintiff, which are not worth mentioning.

18. In the affidavit-in-reply to the Notice of Motion taken out by defendant Nos. 1 and 2, the plaintiff has reiterated about the meagre income which he is getting and the expenses which he has to incur towards his medical treatment. However, in para 5 on page 4 of his affidavit-in-reply, plaintiff has admitted that he has shares of some companies of the total value of about Rs. 12,000/-. It is not clarified by the plaintiff even in this affidavit-in-reply as to when these shares were purchased by him, whether they were purchased by him before the suit was filed or during the pendency of this suit, nay at what stage the shares were purchased by him which he admittedly owns. The opportunity was available to the plaintiff to explain this grey area of which he has not taken advantage for reasons best known to him, but from which adverse inference can be certainly drawn.

19. Defendants' Advocates have relied upon AIR 1928 Lah 278, *Lalchand v. Mt. Pisto*, wherein meaning of the word "means" is explained as follows:

"The use of the word "means" shows that it is intended to cover and include all forms of realizable assets which can be converted into cash and as such can be used for financing the litigation."

20. Defendants' Advocates have also relied upon the Supreme Court judgment [S.P. Chengalvaraya Naidu \(dead\) by L.Rs. Vs. Jagannath \(dead\) by L.Rs. and others](#), . This was a case where the person obtaining preliminary decree for partition in respect of certain property had, before filing suit, after purchasing the property benami for his employer in Court auction, had relinquished his rights in it by executing release deed in favour of employer. The non-production and non-mentioning of the release deed at the trial tantamounted to playing fraud on the Court vitiating the decree. The Supreme Court, under these circumstances, came down heavily upon that person and held as follows:

"The courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. It can be said without hesitation that a person whose case is based on falsehood has no right to approach the Court. He can be summarily thrown out at any stage of the litigation. A litigant, who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the Court as well as on the opposite party."

Observing thus, the Supreme Court in this case set-aside the decree, holding that it was vitiated by fraud. Relying upon this judgement of the Supreme Court, Advocate Mr. Merchant and Advocate Mr. Parikh argued that the plaintiff had inherited property of his father, he had some quantity of gold, which had come to his share, he held shares worth Rs. 12,000/- but that all this was withheld by him and not disclosed by him in para 31 of the plaint, and in the Schedule of Properties, which is Ex.LL to the plaint, and that, in fact, all these facts were categorically denied and

that, by suppressing these vital facts and by withholding these vital information, the plaintiff has played fraud upon the Court, whereby he gained and succeeded in avoiding payment of the Court Fees and the loss was caused to the Exchequer. It was further argued that during the course of cross-examination, the plaintiff got exposed and all these facts have come on record including his income from the Teaching Centre. It is therefore, prayed by the defendants that such a plaintiff should not be allowed to go on with the suit without making him pay the Court Fees as per the provisions of the Court Fees Act, by de-pauperising him.

21. Mr. Desai for plaintiff, argued that once the Prothonotary and Senior Master had given a finding in plaintiff's favour, and when once he was permitted to file a pauper petition, it was not a stage when his decision should be interfered with. I reject this argument of Mr. Desai. Order XXXIII, Rule 1 of the CPC is the stage which lays down provisions when suit may be instituted in forma pauperis. Rule 9, however, speaks of "withdrawal of permission to sue as an indigent person". The very use of the word "withdrawal" emphasizes that the permission to sue as forma pauperis can be subsequently withdrawn by the Court on the application of the defendants or of the Government Pleader under conditions mentioned in Rule 9 of Order XXXIII of Code of Civil Procedure. The said rule can be reproduced below for the sake of convenience:

"9. Withdrawal of permission to sue as an indigent person- The Court may, on the application of the defendant, or of the Government Pleader, of which seven days" clear notice in writing has been given to the plaintiff, order that the permission granted to the plaintiff to sue as an indigent person be withdrawn-

- (a) if he is guilty of vexatious or improper conduct in the course of the suit;
- (b) if it appears that his means are such that he ought not to continue to sue as an indigent person;
- (c) if he has entered into any agreement with reference to the subject-matter of the suit under which any other person has obtained an interest in such subject-matter."

Incorporation of Rule 9 in Order XXXIII itself envisages that under conditions specified therein, permission granted to the plaintiff to sue as forma pauperis can be withdrawn at a later stage. Order XXXIII, Rule 1 envisages the initial stage while Order XXXIII, Rule 9 envisages a later stage.

22. In the present case at hand, from the above discussion, it is clear that the plaintiff has indeed not disclosed in para 31 of the plaint, and in the Schedule Ex. LL annexed to the plaint, the true state of affairs whereby he was exempted from paying Court Fees which causes loss to the Exchequer. This conduct can certainly be said to be improper within the meaning of Order XXXIII, Rule 9(a). If averments in para 31 of the plaint are kept in juxtaposition with his statements elicited by defendants' Advocates during the course of his cross-examination, the improper

conduct of the plaintiff becomes quite evident. He has made statements on oath in para 31 of the plaint, he has made statements on oath during the initial proceedings before the Prothonotary and Senior Master, wherein he has denied the existence of any shares, his share in the Immovable property, his share in the gold, etc. In the Court, however, during the course of cross-examination, some of the admissions have come on record which go contrary to what he has stated on oath in para 31 of the plaint, so also, in his evidence on oath before the Prothonotary and Senior Master. All this also goes to show that his means at the time of filing the suit were certainly more than Rs. 500/- per month as per the Bombay Amendment of Order XXXIII, Rule 1 of the Code of Civil Procedure, which is as follows:

"(2) BOMBAY, DADRA and NAGAR HAVELI:

In Order 33, Rule 1, for the existing Explanation below Rule 1, substitute the following Explanation:

Explanation:---A person shall be deemed to be a pauper if he is not possessed of means exceeding five hundred rupees in value, or, where he is possessed of means exceeding five hundred rupees in value, the same are not sufficient to enable him to pay fees prescribed by law for the plaint.

For the purposes of this Explanation the means which a person is possessed of shall be deemed not to include his necessary wearing apparel and the subject-matter of the suit."

23. It is also argued by the plaintiff's Advocate Mr. Mihir Desai that the expenses which the plaintiff has to incur for purchasing his colostomy bags, for purchasing the dressing materials and towards his general treatment are very high and that has to be taken into consideration. It is difficult to accept this submission of Mr. Desai. If one interprets the word "indigent person" as defined in Order XXXIII, Rule 1 read with Explanation 1 of the Bombay Amendment, a person is an indigent person, if;

"(a) he is not possessed of sufficient means (other than property exempted from attachment in the execution of the 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)"

Therefore, what has to be excluded from the term "sufficient means" is the property which is exempted from attachment in execution of a decree u/s 60 of the Code of Civil Procedure, and the subject-matter of the suit. Nothing else has to be considered. A person cannot be heard to say that because his expenses are more, his "means" have become less thereby, or that his means have become less because he spent more money. Therefore, the plaintiff could not be called an indigent person within the meaning of Rule 1, Order XXXIII of Code of Civil Procedure.

24. In *Lalchand v. Mt. Pisto*, reported in AIR 1928 Lah 278, meaning of the word "means" is explained as follows:

"The use of the word "means" shows that it is intended to cover and include all forms of realizable assets which can be converted into cash and as such can be used for financing the litigation."

25. The plaintiff did possess all such realizable assets which could be converted into cash and could be used for financing the litigation. If all this material which has now come on record would have been available during the course of proceedings before the Prothonotary and Senior Master or if the plaintiff had disclosed all this in his plaint, certainly, leave to sue as *forma pauperis* would not have been granted to him at all.

26. Defendants' Advocates have vehemently argued that by suppressing this material from the Court plaintiff has displayed improper conduct within the meaning of sub-clause, (a) of Rule 9 of Order XXXIII of the CPC and that he has played fraud upon the Court. In my opinion, technically, there is nothing to disagree with the submissions of the defendants' Advocates Mr. Parikh and Mr. Merchant. It has to be concluded that the conduct of the plaintiff was certainly improper in not coming out clean as far as assets were concerned. He should have come clean about his means and should have paid the required Court Fees. Hence, the following order:

ORDER

27. Notice of Motion is made absolute in terms of prayer Clause (a), which reads as follows:

"(a) That the plaintiff is disappeared under the provisions of Order XXXIII, Rule 9 of the Civil Procedure Code, 1908."

28. The plaintiff is directed to pay the Court Fees which he was required to pay at the time of filing the suit as per the provisions of the Court Fees Act, within two weeks from today.

29. Notice of Motion disposed of accordingly with no order as to costs.

30. Matter stands adjourned to 19th March, 1998.

31. Motion allowed.