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# Suits by Indigent Person: A Logic Study

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## ABSTRACT

*An indigent person is a person who either does not have sufficient means to pay the court fees when she/he is required to pay or is not entitled to property worth one thousand rupees when the court fees is not prescribed. In this paper author and co-author deals with a logic study and had added some provisions for such cause.*

## I. INTRODUCTION

Order 33 and order 44 of the criminal procedure code deals with the issues regarding an indigent person. Order 33 discuss about the suits which are filed by an indigent person while order 44 talks about the appeals made by an indigent person.<sup>3</sup> Under the orders, the first and the most basic question which is involved is whether the person in question is an indigent person or not. The word “person” as specified in the orders, includes both natural and judicial persons.<sup>4</sup>

According to the order 33, an indigent person, which is defined in explanation one to Rule 1, is a person who doesn't have sufficient means to pay the prescribed fees other than property exempted from attachment in execution of the decree. To be able to file the suit as an indigent person, the person has to file an application along with the suit, the acceptance or rejection of which depends on the discretion of the court.

Basically, an indigent person is a person who either does not have sufficient means to pay the court fees when she/he is required to pay or is not entitled to property worth one thousand rupees when the court fees is not prescribed. In both of these case, the property exempted from the attachment in execution of a decree and the subject matter of the suit is not be taken into account to ascertain the financial position of the indigent person. Factors such as the employment status of the person and total income including retirement benefits such as pension, ownership of assets which are yet to be realized, the indebtedness and any type assistance received from the family members or close friends, financially, can be taken into

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<sup>3</sup> R.V. Dev v. Chief Secretary, Govt. of Kerala, (2007) 5 SCC 698.

<sup>4</sup> M/s. Mamata Papers Pvt. Ltd. v State of Orissa and others, 2000 99 Compacts 294 Orissa.

consideration to decide whether the person has sufficient means or not, so that she/he can file suit as an indigent person or not. In the case of *Chayamani Tripathy and another v Dharmananda Panda*<sup>5</sup>, it has been held that “**term ‘not possessed of sufficient means’ to enable him to pay the fee prescribed is the requirement for permission to sue as indigent person.**”

The concept of indigency has also been discussed in **Corpus Juris Secundum** (20 C.J.S. Costs 93):

*The right to sue in forma pauperis is restricted to **indigent persons**. A **person** may proceed as poor **person** only after a court is satisfied that he or she is unable to prosecute the suit and pay the costs and expenses. A **person** is **indigent** if the payment of fees would deprive one of basic living expenses, or if the **person** is in a state of impoverishment that substantially and effectively impairs or prevents the pursuit of a court remedy. However, a **person** need not be destitute. Factors considered when determining if a litigant is **indigent** are similar to those considered in criminal cases, and include the party's employment status and income, including income from government sources such as Social Security and unemployment benefits, the ownership of unencumbered assets, including real or personal property and money on deposit, the party's total indebtedness, and any financial assistance received from family or close friends. Not only personal liquid assets, but also alternative sources of money should be considered.*”<sup>6</sup>

## **II. ORDER 33: SUITS BY INDIGENT PERSON**

### **(A) Scope and Object**

Mere reading of the provisions specified in the order gives us an idea that the basic objective of order 33 is to enable the persons with weak financial position, to avail justice by way of filing suits or appeals, without the burden of paying court fees. It is unfortunate indeed that in our democratic system, justice is still a dream for a large part of the population. There is difference between enacting a law and enforcing the law. Generally, in India, justice becomes available only to such persons who have sufficient money. The money is needed not only to pay hefty court-fees but also for the payment of getting legal assistance and meeting other sundry expenditures. The provisions providing the advantage to file a case without having sufficient means has been on the statute book for many years but it has only acted as eyewash.

In *State of Haryana v Darshana Debi*<sup>6</sup>, it has been held by the Supreme Court that the

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<sup>5</sup> AIR 1993 Ori 23

<sup>6</sup> Mathai M. Paikeday v C.K. Anthony, CIVIL APPEAL NO. 5493 OF 2011.

provisions of Order 33 apply to tribunals like the Motor Accident Claims Tribunals which have all the trappings of a civil court. The court must give the benefit of doubt of imposing the price to enter the court until the Supreme Court reviews the whole issue of levy of court fees. Whenever, an indigent person would approach the tribunal with the claim for the compensation for the wrong done to him, the tribunal cannot refuse to exercise jurisdiction merely because he does not have means to pay the fee. Before the establishments of the claim tribunal a person would have been able to file the suit invoking order 33 of CPC as an indigent person. Now that a Special Claims Tribunal has been established under the act, it can be said that an indigent person who do not have any means to pay the required fees are altogether debarred from seeking compensation for the wrong done to them. Access to justice cannot be denied to an individual merely because she/he does not have the means to pay the prescribed fees. Such a view would leave indigent person without a remedy.

A plaintiff suing in a civil court must pay the court fees prescribed by the law for the plaint and subsequent proceedings in the suit. These fees are prescribed by the Court-Fees Act (7 of 1870).

But a person may be too poor to pay the court-fee, and the object of this order is to enable such a person to bring and prosecute suits without payment of court fees. The **object** and purpose of Order 33 of the Code of Civil Procedure are to enable a **person**, who is ridden by poverty, or not possessed of sufficient means to pay court fee, to seek justice. Order 33 of the Code of Civil Procedure exempts such **indigent person** from paying requisite court fee at the first instance and allows him to institute suit or prosecute appeal in *forma pauperis*.

#### **(B) Application and procedure followed by an indigent person**

Before a person can file a suit as an indigent person, she /he should present an application before the court, acceptance of which is necessary for the person to have the privileges which she/he would be entitled to as an indigent person. It is not important for the application to be presented to the court itself, presentation to proper office of the court is also sufficient. The court has to satisfy itself that the application is filed by a person who does not have sufficient means or who is a pauper. If the person claiming to be an indigent person, presenting an application for the same, is exempted from the court, the application can be filed by an authorized agent. An advocate is an authorized agent within the meaning of this rule.

After the presentation of the application, the court may examine the applicant regarding the merits of the claim and whether the applicant comes under the ambit of pauperism or not. The court may examine other persons, other than applicant but only to ascertain the factor of

pauperism and not regarding the claim. “Under Order XXXIII, the Petitioner who files an application has to present the application in person. Rule 3 states that the person who is presenting the application shall be in a position to answer all material questions relating to the application and he may also be examined by the court.”<sup>11</sup>

After the examination, the court may or may not reject the application. Rule 5<sup>12</sup> of the order provides for the grounds for rejecting the application. It has been a debatable topic whether the grounds mention under rule 5 are exhaustive are not. Many of the high courts have conflicting views regarding the exhaustiveness of the grounds mentioned.

1) The first ground is **if the application is not in compliance with rule 2 and 3, then the application is deemed to be rejected**. Utmost good faith is required of the petitioner in the matter of disclosure of his assets and an intentional departure from this rule must result in the dismissal in the application.<sup>7</sup> But if the omission is not intentional, is done in good faith, then the application will not be dismissed. If the inclusion or omission of the property doesn't affect the position of the person as an indigent person, then the inclusion will be treated as one done in good faith. The proper procedure to be followed is to return the petition for amendment and then enquire whether the inclusion would affect the position of petition as pauper.<sup>8</sup> Failure to calculate the court-fee value also leads to rejection of the application, it being not with accordance to rule 2 and 3 of order. If there is no attachment of the schedule of the movable and immovable property and its estimated value, belonging to the applicant, to the application, and the collector showed in its report that the person has sufficient movable property, then it would be against what is provided in rule 2, and hence the application will be rejected in such a case too.<sup>9</sup>

2) The second ground is **when the applicant is not an indigent person**. If the court is not satisfied that the person filing the application is not an indigent person, then under rule 5, the court can reject the application. In the case of *Abdul Khalique v Yasmin Sultan*<sup>10</sup>, a petition was filed by a woman, for the dissolution of the marriage, recovery of dower debt and recovery of gold and silver ornaments. The petition was file under order 33, rule 1 to sue as an indigent person. The court held that the wife can file the suit as an indigent person as she did not had sufficient means, because she was made to leave her matrimonial house without her gold and silver ornaments, in a state of advanced pregnancy.

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<sup>7</sup> RL Nathan v PK Ojha AIR 1976 Pat 127.

<sup>8</sup> Ramdas Sahu v Ramchandra AIR 1957 Pat 562.

<sup>9</sup> Powsulph (India) Pvt. Ltd. v Inventa Technical and Ors., AIR 1995 Ori 291.

<sup>10</sup> AIR1986 Ori 189.

3) The third ground is when there is **fraudulent disposal of property**. It means that if the applicant, two months before filing the application, has disposed of her/his property to make herself/himself eligible to sue as an indigent person, then the application of such a person will be rejected under this rule.<sup>11</sup>

4) The fourth ground is when **there is no cause of action**. The court has to ascertain whether the application shows a good subsisting cause of action capable of enforcement in court and calling for an answer, and not barred by the law of limitation or any other law.<sup>12</sup> In the case of *Kamu alias Kamala Ammal v M. Manikandan and Anr.*<sup>13</sup>, it has been held that “It is, therefore, obvious that the application for permission to sue as an indigent person has to be rejected and could not be allowed if the allegations in the plaint do not show a cause of action”. The question as to the extent and scope of an inquiry as regards the existence of a cause of action under clause (d) came up for consideration before the Supreme Court, and the law was thus stated<sup>14</sup>:

*“But in ascertaining whether the petition shows a cause of action, the Court does not enter upon a trial of issues affecting the merits of the claim made by the petitioner. It cannot take into consideration the defences which the defendant may arise on the merits, nor is the court competent to make an elaborate inquiry into doubtful or complicated questions of law or fact. If the allegations in the petition, prima facie, show a cause of action, the court cannot embark upon an enquiry whether the allegations are true in fact, or whether the petitioner will succeed in the claims made by him. By the statute, the jurisdiction of the court is restricted to ascertaining whether on the allegations a cause of action is shown; the jurisdiction does not extend to trial of issues which must fairly be left for decision at the hearing of the suit.”*

5) The fifth ground is where **there is transfer of interest in subject matter of proposed suit**. It means where the applicant has entered into any agreement relating to the subject matter of the concerned suit under which any other person has obtained interest in such subject matter.

6) The sixth ground is where there is **bar of any law for the time being in force**. It means that when there is an allegation in the application which shows that the suit would be

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<sup>11</sup> Sibasankar Tiadi vs Koli Tihadhiani And Ors, AIR 1964 Ori 106.

<sup>12</sup> Kamu v M Manikandan (1998) 8 SCC 522.

<sup>13</sup> (1998) 8 SCC 522.

<sup>14</sup> Vijai Pratap v Dukh Haran Nath AIR 1962 SC 941.

barred by the law for the time being in force, then the application will be rejected.<sup>15</sup> to decide whether the application should be rejected or not, the court has to look at the allegations present in the application, it was held in the case of *Western India Plywood Ltd v Pashokan*, that where the suit is barred under section 53 of the Employees State Insurance Act, 1948, the application under order 33, rule 1 is also not maintainable.

7) The last ground is when there is an **agreement to finance the litigation**. If the whole process of litigation is financed by a third person, it would act as a reason for rejecting the application. When the application has been carefully scrutinized by the court and every ground for rejecting it has been negated, the court shall fix a day on which it would direct the applicant to present the evidences which may prove that the applicant is an indigent person. At least ten days' notice should be given to the opposite party and the government pleader regarding the same. Evidence should be confined only to the question of pauperism and not extend to the merits of the case.<sup>16</sup> The notice is also a mandatory provision which should be carried out by the court. If a notice of ten clear days is not given, the defect is fatal and any finding recorded by the court is illegal and must be set aside.<sup>17</sup>

Rule 7 says about allowing or refusing the applicant to file the suit as an indigent person after considering the evidences produced by the applicant or of the opposite party. This stage is reached only after the court has issued the notices under rule 6 and served on them.<sup>18</sup>

Provisions of rule 8 relate only to proceedings in the original court and do not apply to applications for revision in the high court. Where pursuant to a preliminary decree, accounts were taken of the amounts due to the plaintiff for mesne profits, and on that a finding was recorded by the court and this was followed by an order directing the payment of court- fees, on the amount found due, it was held that such an order could not be made as the suit must be deemed to be pending until a final decree was passed. There is a conflict in the judicial opinion as to whether a court can authorise to make a suit before granting leave on the basis of indigent nature. The Patna High Court has held that a decision on the question of jurisdiction can be given in Order 7 rule 10, only in a suit and that there is no suit until leave is granted.<sup>19</sup>

Rule 9 provides for contingency where the plaintiff though originally permitted to sue as an indigent person ceases to be an indigent person subsequent to the institution of the suit. If the

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<sup>15</sup> Sukadeolal Banka and Anr. v Jogeswar Prasad Sharma and Anr. AIR 1986 Ori 144.

<sup>16</sup> Abdul Wakil Khan v Bibi Talimunnissa, AIR 1950 Pat 517.

<sup>17</sup> Radhika Prasad v Shyama Charan, AIR 1966 Pat 387.

<sup>18</sup> Province of Orissa v Dibyasingh Nand AIR 1941 Pat 594.

<sup>19</sup> Gupteshwar v Chaturanand AIR 1950 Pat 309

plaintiff ceases to be an indigent person then he shall be ordered to pay the court fee which he would have done if he would have had to if a non-indigent person. It is a matter of discretion by the court if they would like to disputer the plaintiff.<sup>20</sup> Application under this rule should be disposed of before the suit is decided. It is not sound practise to disputer the plaintiff while the suit is going on. Where leave to sue was given after notice to the defendant, who did not appear, an application by him under this rule to disputer the plaintiff on the ground that he was possessed of sufficient means on the date of application is not maintainable. The matter of pauperism is co-related with payment of court fees. The state government is principally concerned with the payment of court fees.<sup>21</sup>

### **(C) Other Provisions**

Rule 10 applies only when suit has been permitted to be instituted in forma pauperis. The charge is to be enforced by an application for the attachment and sale of the subject-matter of the suit. A separate suit for the sale of the subject-matter to realise the court-fees is now barred. The right to realise the court fee is not merely because the property for the recovery of which the pauper suit was brought has passed from the hands of the judgement –debtor into the hands of the pauper decree-holder.

If the plaintiff is directed to pay the court-fees, the government may realise the same by an application for execution against the person or property of the plaintiff and if the defendant is directed to pay the court – fees, the government may realise the same by an application for execution against the person or property of the defendant. Hence if the amount of the court fees is not paid, the government is not entitled to sell the decree obtained by the plaintiff for the purpose of recovering. Receiver can be appointed to realise court-fees even out of future maintenance subject to the safeguards as to payment of a sufficient sum for maintenance of the party liable to bay the court fee. if the plaintiff succeeds in the suit and the amount payable under the decree by the defendant is paid into court, the government is entitled to payment of the court-fees out of the fund in the court on a mere application for payment without attaching the fund for the first time. There is no separate provision for the case in which a pauper plaintiff has partly succeeded and partly failed. The plaintiff is bound to pay the court fee for the disallowed part of the claim and it is not open to the court to direct the defendant to pay court fee exceeding the amount payable on that portion of the plaintiff's claim which is allowed.

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<sup>20</sup> *Ananga Bhusan v. Ghanashyam* AIR 1951 Ori 349

<sup>21</sup> *Jetport Evangel Lutheran Chrch v Samuel Santhi Kumar Chaudbry* AIR 1985 Ori 195



However, when the court fees payable would consume the maintenance amount for three years. An order under this rule directing the pauper plaintiff to pay the court –fees can only be made in the following cases-

- Where the plaintiff fails in the suit.
- Where the plaintiff is dispaupered under rule 9
- Where the suit is withdrawn
- Where the suit is dismissed under the circumstances specified in cl (a) or cl (b)

It follows from what has been stated above that where an application for leave to sue in forma pauperis is returned under order 7, rule 10 for want of jurisdiction to be presented to the proper court, no order can be made under this rule directing the applicant to pay the court fees dismissal of the suit at the request of the plaintiff and the defendant, on the suit being settled out of court, amounts to failure within the meaning of this rule. Where a plaint filed with insufficient court fees was registered as a suit and subsequently an order was made for payment of deficient court-fees and the plaintiff then withdrew the suit, it was held that no order could be made for payment of court –fees under this rule. The court has full power under sec 35 to give and apportion costs in any manner as it thinks fit.

Rule 12 enables the government, in cases of error and omission with regard to court fees, to have the error or omission rectified by a mere application to the court. Rule 12 can be invoked only when the court had omitted to make an order under rule 10 and 11.

Under rule 14 it is showed that order operates as a decree in favour of the collector and the civil court under this rule informs the collector of the order. but the collection of revenue is no part of the rule informs the collector of the order. but the collection of revenue is no part of the business of the court and the copy of the order should not be sent to the collector for necessary actions.

Rule 15 does not apply unless consequent on the dismissal of the applicant to sue in forma pauperis, a court has passed an order specifying the amount of costs to be paid by the unsuccessful applicant to government and the opposite party. The condition under this rule as to payment of costs is required to be fulfilled only when a suit in the ordinary manner is instituted after rejection of application to sue as a pauper.

### **III. ORDER 44: APPEALS BY INDINGENT PERSON**

Under rule 1 of Order 44 the question that comes up is whether the applicant is an indigent person or not. No question on the merit of the case does not arise here at this stage. A

rejection of the applicant under rule 1 can only mean that the court is not satisfied about the claim of the applicant that he is an indigent person. It does not amount to a finding that the appeal is not fit for admission on merits.

The Calcutta High court has held that the word person does not imply company. The Orissa High Court however held that the meaning of the expression 'Person' is to be given a liberal meaning. As a juristic person the company is entitled for exemption from court fees.

In a case the petitioner had obtained a decree for maintenance and sought to appeal in forma pauperis for higher maintenance, but the defendant paid Rs 571 as arrears of maintenance into court to her credit, and the petition was dismissed on the ground that she had sufficient means to pay the court – fee on the memorandum of appeal. But in later case, in which the appeal arose out of a partition suit, the same high court held that the subject – matter of the suit, that is, the property covered by the decree which was passed in the appellant's favour should be excluded. In a suit to enforce a simple mortgage the equity of redemption, is not the subject – matter of the suit and so the defendant appealing from the decree is bound to state its value in the application for leave in forma pauperis. Where the appellate court directs an inquiry as to pauperism by the lower court, it does not divest itself of its jurisdiction. It is not bound to accept the subordinate court's finding and decides independently whether a leave is to be granted or not.

The present rule provides that the provisions relating to suits by paupers shall apply, so far as may be, to appeal by paupers. Therefore, the application referred to in this rule for leave to appeal as a pauper must be presented by the applicant in person just as an application for leave to sue as a pauper. This is now made clear by the addition of the words 'in all matters including the presentation of a pauper's petition did not apply to pauper appeals.

Since provisions relating in Order 33 along Order 44b will also apply to appeal under cl 15 in letter patent. Thus, where the schedule of movable and immovable properties belonging to

Two separate documents are required for rule 1- memorandum of Appeal and an application for leave to appeal as a pauper. A judgement and a decree sought to be appealed has to accompany them. When the pauper's application is disposed, he does not thereby necessarily dispose of the appeal. He may still treat it as an existing appeal if the appellant desires to pay the full court – fees on the appellant continue it as an ordinary appeal. If the appellant is granted leave by the judge as a pauper then the judge is under no obligation to dismiss the case. Where an application for leave to sue as a pauper is rejected owing to the memorandum of appeal which accompanied it being unstamped, the rejection of the application does not

carry with it the rejection of the memorandum of the appeal. The rejection of the application for leave to file the appeal in forma pauperis does not involve the rejection of the memorandum of appeal, and where the court grants, at the time it refuses leave, time for payment of court fee, and that is paid within the time given, the appeal must be taken to have been presented, for purposes of limitation, at the time of its original presentation.

No appeals lies under the Code of Civil Procedure from an order refusing leave to appeal as a pauper.

#### **IV. CONCLUSION**

To sum up, the indigent person, in terms of explanation I to Rule 1 of Order 33 of the Code of Civil Procedure, is one who is either not possessed of sufficient means to pay court fee when such fee is prescribed by law, or is not entitled to property worth one thousand rupees when such court fee is not prescribed. In both the cases, the property exempted from the attachment in execution of a decree and the subject-matter of the suit shall not be taken into account to calculate financial worth or ability of such indigent person. Moreover, the factors such as person's employment status and total income including retirement benefits in the form of pension, ownership of realizable unencumbered assets, and person's total ineptness and financial assistance received from the family member or close friends can be taken into account in order to determine whether a person is possessed of sufficient means or indigent to pay requisite court fee. Therefore, the expression "sufficient means" in Order 33 Rule 1 of the Code of Civil Procedure contemplates the ability or capacity of a person in the ordinary course to raise money by available lawful means to pay court fee.

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