

Shakuntla Devi v. Sham Nath and Prem Nath (S. S. Sodhi, J.)

follow the construction that we have placed on the combined reading of rule 5(2) and rule 11 of the Rules, that is, that while confirming the members of the Service, the quota rule between the promotee and the direct recruits shall be adhered to in the manner suggested in this judgment.

(21) In the result, out of petitions filed by the employees of the Punjab State, Civil Writ Petitions Nos. 71 of 1984 and 1219 of 1984 are dismissed while the third one, that is, Civil Writ Petition No. 2786 of 1982 is allowed and Civil Writs Nos. 3438 and 3899 of 1983 filed by the employees of the Haryana State are allowed with the direction that the seniority of the members of the Service shall be finalised within six months. There will, however, be no order as to costs in these writ petitions.

R.N.R.

Before : S. S. Sodhi, J.

SHAKUNTLA DEVI,—Petitioner.

versus

SHAM NATH AND PREM NATH,—Respondents.

Civil Revision No. 2702 of 1985

November 20, 1986

Code of Civil Procedure (V of 1908)—Order VIII, Rule 1, Order XXXIII, Rules 2 and 8—Plaintiff filing application for leave to sue the defendants as indigent person—Such application required under Order XXXIII, Rule 2 to contain all particulars prescribed with regard to Plaints—Defendants filing reply thereto—Said application subsequently withdrawn but ordered to be treated as a suit—Defendants seeking to file written statement in reply to the plaintiff—Reply to the application—Whether bars the defendant from filing the written statement after the application has been ordered to be treated as a plaintiff—Application for leave to sue as an indigent person—Whether can be treated as a composite document as being a plaintiff as well—Occasion for filing the written statement—When arises.

Held, that Order VIII, Rule 1 of the Code of Civil Procedure, 1908, which pertains to the filing of the written statement specifically mentions that the defendant shall file the written statement

'on or before the first date of hearing'. Order XXXIII, Rule 2 of the Code is to the effect that the application for permission to sue as an indigent person must also contain all the particulars prescribed in regard to plaints in suits and Rule 8 thereof prescribes that when the application for leave to sue as an indigent person is granted it shall be numbered and registered and deemed to be a plaint in the suit. The first date of hearing would obviously be a date subsequent to the grant of such leave and this would be the occasion for the defendant to file a written statement and not earlier. It is significant to note that there is no provision in the Code to the effect that the reply to an application for leave to sue as an indigent person shall be deemed to be a written statement when such an application is granted. The filing of reply to an application under Order XXXIII cannot debar the defendants from later filing a written statement to the application after it is deemed to be a plaint. Such being the state of the law, there can be no escape from the conclusion that an application for leave to sue as an indigent person cannot be treated as a composite document and can thus be deemed to be a plaint only when the application is granted or when the Court fee is paid and it is ordered to be treated as a plaint and it is only thereafter that the occasion for filing a written statement arises.

(Paras 6, 7 and 8).

Munshiwar Puri, Advocate, *for the Petitioner.*

Amarjit Markan, Advocate, *for the Respondent.*

JUDGMENT

(1) Does the filing of a reply to an application under Order 33 of the Code of Civil Procedure, (hereinafter referred to as 'the Code'), for permission to sue as an indigent person debar the defendant from filing a written statement when the application is deemed to be a plaint? This here is point in issue.

(2) To give a brief background, on July 24, 1981, Shakuntla Devi filed an application under Order 33 of the Code for leave to sue the defendants as an indigent person to recover a sum of Rs. 23,000 odd from them. Soon thereafter Shakuntla Devi died and later her legal representatives were brought on record. On April 3, 1982, the defendants filed a reply to the application of Shakuntla Devi, calling it a written statement, controverting thereby all the allegations contained therein. This application was, later permitted to be withdrawn by the order of the trial Court of March 1, 1985 and it was ordered to be treated as suit and the case was then adjourned for the filing

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of the written statement to April 15, 1985, and then to May 17, 1985, on which date the plaintiffs filed a replication to the written statement filed by the defendants on April 3, 1982. While the defendants filed an application for time being granted to them for the filing of a written statement. This was declined with the observations that the written statement had already been filed. Issues were thereafter framed. Later, however, on the same day, that is, May 17, 1985, an application for review was made praying therein that the defendants be permitted to file a written statement. This was opposed by the plaintiffs, but the trial court reviewed its earlier order and permitted the defendants to file a written statement on the ground that no written statement had been filed after the application under order 33 of the Code had been converted into a plaint. It is this order that is now sought to be challenged in revision.

(3) Great emphasis was placed by the counsel for the petitioner upon the provisions of order 33 Rule 2 of the Code to the effect that the application for permission to sue as an indigent person must also contain all the particulars prescribed in regard to plaints in suits. The arguments being that when these particulars are given in the application and a reply has been filed thereto, and the application is ordered to be deemed to be a plaint, on a parity of reasoning, the reply to it too, must be (treated to be the written statement to such plaint. Further, as a necessary corollary to this, the application under Order 33 of the Code must be deemed to be composite one, namely, an application to sue as an indigent person and also a plaint. This argument, on the face of it is indeed attractive, but not one that can be sustained.

(4) Treating an application under order 33 of the Code to be a composite document, that is, both an application for leave to sue as an indigent person as also a plaint would lead to anomalous results contrary to the relevant provisions of the Code as was so well brought out by the Full Bench in *Chunna Mal v. Bhagwant Kishore* (1). In this behalf, it would, in the first instance, be pertinent to advert to the provisions of Rule 15 of Order 33 of the Code, which deal with denial of the application for leave to sue as an indigent person. In terms thereof, such an order bars any subsequent application of a like nature in respect of the same right to sue, but it enables the applicant to institute a suit in the ordinary manner in respect of such right provided he first pays the costs if any, incurred by the State Government or the opposite party in opposing his

(1) AIR 1936 Allahabad 584.

application for leave to sue as an indigent person. It is now well-settled that payment of such costs is a condition precedent to the institution of the suit, though the Court has the discretion to permit the plaintiff to pay such costs within such time as it may allow. A suit filed without the plaintiff having paid such costs, would not be maintainable and this defect cannot be cured by subsequent payment of costs during the pendency of the suit. Here, if the application to sue as an indigent person is treated as a composite one, the provisions of Rule 15 of order 33 of the Code, could be directly evaded by the plaintiff being enabled to prosecute his claim, without, in the first instance, paying the costs referred to in that Rule.

(5) Further, Order 33 Rule 5 of the Code allows the Court to dismiss an application for permission to sue as an indigent person on grounds quite different and distinct from those on which a plaint can be rejected under Order 7 Rule 11 of the Code.

(6) It is also relevant here to note that Order 8 Rule 1 of the Code, which pertains to the filing of the written statement, specifically mentions that the defendant shall file a written statement at or before the first date of hearing'. Order 33 Rule 8 of the Code prescribes that when the application for leave to sue as an indigent person is granted, it shall be numbered and registered and be deemed to be a plaint in the suit. The first date of hearing would obviously be a date subsequent to the grant of such leave and this would thus be the occasion for the defendant to file a written statement and not earlier.

(7) Finally, it is significant to note here that there is no provision in the Code to the effect that the reply to an application for leave to sue as an indigent person shall be deemed to be a written statement, when such application is granted.

(8) Such being the state of the law, there can be no escape for the conclusion that an application for leave to sue as an indigent person cannot be treated as a composite document and it can thus be deemed to be a plaint only when the application is granted or as in the present case when court-fee is paid and it is ordered to be treated as a plaint. It is only thereafter that the occasion for filing a written statement arises. This being so, the filing of a reply to such an application cannot be taken to bar the defendant from later filing a written statement to the application after it is deemed to be a plaint,

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(9) Faced with this situation, there was a half-hearted attempt on the part of the counsel for the petitioner to contend that the court had acted with material irregularity in permitting review of its earlier order of May 17, 1985 by allowing the defendants to file a written statement after having earlier declined such a request. No exception can indeed be taken to the impugned order on this account. The scope of review under Order 47 Rule 1 of the Code is clearly wide enough to have permitted the trial court to correct its earlier error in disallowing the filing of the written statement.

(10) No interference is, therefore, warranted in the impugned order of the trial Court which is accordingly hereby up-held and affirmed. This revision petition is thus dismissed. There will, however, be no order as to costs.

H.S.B.

Before : D. S. Tewatia and J. V. Gupta, JJ.

FOOD CORPORATION OF INDIA and another,—*Petitioners.*

versus

STATE OF HARYANA and others,—*Respondents.*

Civil Writ Petition No. 1573 of 1983

November 26, 1986

Haryana General Sales Tax Act (XX of 1973)—Schedule 'D' Entry 2(c)(i)—Haryana Rice Procurement (Levy) Order, 1979—Clause 3—Rice procured by the State Government under Levy Order and handed over to the Food Corporation of India under bilateral agreement—Said rice transferred by the Corporation to deficit States—Procurement of rice as aforementioned—Whether amounts to 'sale'—Such transactions—Whether exigible to tax under Entry 2(c)(i) of Schedule 'D' of the Act.

Held, that the compulsory acquisition of rice under Clause 3 of the Haryana Rice Procurement (Levy) Order, 1979, and the transactions made thereunder would not amount to sales. In the transactions between the State Government and the Food Corporation of India there is no profit motive at any stage nor do the goods vest in the State Government in the sense that it can bargain with