(1938) 06 CAL CK 0017

In the Calcutta High Court

Bharat Abhyudoy Cotton Mills Ltd. APPELLANT

Vs

Maharajadhiraj Sir Kameswar Singh and Another RESPONDENT

Date of Decision : 30-06-1938

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 44 Rule 1

Citation : AIR 1938 Cal 745

Hon'ble Judges : Costello, J;Biswas, J

Bench : Full Bench

Judgement

This Judgment has been overruled by : Union Bank of India Vs. Khader International Construction and Others, AIR 2001 SC 2277 : (2001) 105 CompCas 856 : (2001) 3 CompLJ 137 : (2001) 5 JT 218 : (2001) 4 SCALE 56 : (2001) 5 SCC 22 : (2001) 3 SCR 580 : (2001) AIRSCW 2045 : (2001) 4 Supreme 132 : (2001) 4 Supreme 573

Costello, J.—This is an application for leave to appeal in forma pauperis under the provisions of Order 44, Rule 1, Civil P.C. The application is made by a company incorporated under the Companies Act called the Bharat Abhyudoy Cotton Mills Ltd. and the respondent to the application is stated to be Maharaja Sir Kameswar Singh, K. C. I. E., Maharaja Bahadur of Darbhanga. There was respondent 2 named in the petition Baidyanath Jha of District Darbhanga who is described as defendant 2. The matter arises in this way. Respondent 1, the Maharaja of Darbhanga instituted a suit against the company claiming a sum of eight lacs of rupees said to have been borrowed by the company through their managing agents, the firm of Sital Prosad Kharag Prosad and by means of the issue of 80 debentures of Rs. 10,000 each which debentures were secured by an indenture dated 4th May 1927 and were issued subject to and with the benefits of the conditions contained in, that indenture. The suit was tried in the Court of the Second Subordinate Judge at Howrah and was described as Title Suit No. 36 of 1936 and on 19th March 1938, the learned Sub-ordinate Judge made a decree in favour of the plaintiff. It is against that decree that the applicant desires to appeal as a pauper. In the petition by which the application was made it is stated in para. 15:

That your petitioner is not possessed of sufficient means to pay the fee prescribed by law for the memorandum of appeal; and that the fee necessary for preferring the appeal is Rs. 91262-8-0.

2. It is then stated that besides the subject-matter of the appeal, the petitioner is now possessed of the properties mentioned in Schedule A annexed to the application, Then in para. 17 it is set out that:

Out of these properties item 3 represents a sum of Us. 60,000 due from a firm named Ram Prosad Badrinarayan and Rs. 30,000 from another firm named Surajnath Onkarmull on account of goods supplied to them by your petitioner.

3. There are further particulars given with regard to these debts which I need not specify. All that need be said is that the petitioners alleged that they are not likely to realize anything from these debtors. The petition concludes by making the essential averment that there are substantial questions of law involved in the appeal and that the decree sought to be appealed against is contrary to law. It is in those circumstances that the petitioner company asks that they be granted leave to appeal as a pauper. The matter originally came before us on 30th May last when we made an order that the Subordinate Judge of Howrah should make an order as to what the position of the company is and that he should submit a report to this Court within three weeks from the date of our order. The report was duly submitted by the Subordinate Judge with a covering letter dated 21st June 1938, and the effect of that report seems to be that the position of the company is such that their total assets consist of a deposit of Rs. 18-12.0 in the Hongkong Bank. The learned Subordi-nate Judge sums up his conclusions by saying:

In such circumstances it seems clear that the company has no properties and no means to pay the court-fees for the appeal.

4. With the report of the learned Judge are enclosed depositions of the witnesses who had been examined before him and certain documents and a report of the Collector of the district. It may be taken for the purpose of our decision in this matter that the company in the non-technical sense may be considered to be a pauper in that it has no assets and clearly is not in a position to pay the very substantial court-fee which normally is requisite for the purpose of bringing an appeal against the decree which has been made against the company. It is clear therefore that had this application been made by an individual, we should have no difficulty in holding that as regards the fact of pauperism, the applicant had established his case. There is however an important point of law to be considered and having regard to the view we have-formed on that point of law, it is not necessary for us to consider the matter set out in the Proviso to Rule 1 of Order 44, namely the question whether there is 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. In other words, we have not to consider the averment made in the last paragraph of the petition. The point of law to which I have referred is this-whether it is possible for and competent to a company incorporated under the Companies Act to prefer an appeal as a pauper under the provisions of Order 44 of the Code. Rule 1 of that order provides that

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 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.

5. The provisions relating to suits by paupers are to be found in Order 33, Rule 1 which says "Subject to the following provisions, any suits may be instituted by a pauper." That on the face of it clearly seems to be an enabling provision, so as to give an opportunity to the would-be plaintiff to bring a suit in circumstances in which but for the provisions of this order he might be unable to do so owing to lack of means. The expression ''pauper'' is de-fined in the Explanation to Rule 1 of Order 33 and it runs thus:

A person is a ''pauper'' when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit or, where no such fee is prescribed, when he is not entitled to property worth Rs. 100 other than his necessary wearing apparel and the subject-matter of the suit.

6. As I have already stated, the would-be appellant in the present case is not possessed of sufficient means to enable the fee prescribed by law to be paid and is not entitled to property worth Rs. 100. Mr. Sen who appears on behalf of the petitioner Company has argued that the word ''person'' as given in the Explanation to Rule 1 of Order 33 must be taken to include a corporation or a limited company. Mr. Sen relies for this purpose on the definition of ''person'' as given in Section 3, Clause 39, General Clauses Act, 1897, which says that the word ''person'' shall include any company or association or body of individuals, whether incorporated or not. It would be observed that that is a rather wider definition than the corresponding definition in the English law as contained in the Interpretation Act of 1889 which in Section 2(1) says that the expression ''person'' shall, unless the contrary intention appears, include a body corporate. The definition contained in Section 3, Clause 39, General Clauses Act, is however subject to the opening words of the Section which are these:

In this Act, and in all Acts of the Governor-General in Council and Regulations, made after the commencement of this Act, unless there is anything repugnant in the subject or context....

7. So that putting the two things together we get this proposition that in all Acts made after the commencement of that Act unless there is anything repugnant in the context, a ''person'' shall include any Company unless there is anything repugnant in the subject or context. Mr. Sen has relied also on a decision of the

Madras High Court in Perumal Koundan and Others Vs. The Thirumalarayapuram Jananukoola Dhanasekara Sanka Nidhi Ltd., , the headnote of which is as follows:

An official liquidator of a Company is competent to apply for leave to sue in forma pauperis on behalf of the Company under O.33 of the Code, if the Company is a paupar within Rule 1 thereof.

8. It was there held that the reference to ''necessary wearing apparel'' in the Explanation to Rule 1 and the provisions of Rule 3 requiring presentation of the petition by the ''applicant in person'' in Order 33 do not necessarily exclude the application of the Order to a Company, and the definition of ''person'' as including a Company under the General Clauses Act (10 of 1897) applies to Order 33 of the Code, as there is nothing in the definition which is repugnant to the subject or context of the Order. I may say at once that I find it somewhat difficult to accept the reasoning of the learned Judge who gave the judgment in that case. In my opinion, the reference to ''necessary wearing apparel'' in Rule 1 of Order 33 and the fact that Rule 3 of the Order says that "the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court," are of extreme importance in considering whether or not one ought to come to the conclusion that the word ''person'' as used in Order 33, Rule 1 should be taken to include a limited Company incorporated under the Companies Act. It is to be borne in mind that in the case in the Madras High Court the limited Company concerned was in liquidation and the application was made not by the Company itself but by the liquidator. The Madras High Court expressed the opinion that

the fact that the liquidator in his personal capacity is not a pauper does not affect the question nor does the fact that the liquidator receives a commission on collections realized, make him a person interested in the subject-matter of the suit within Clause (e), Rule 6 of Order 33.

9. Without expressing any final opinion on the point, I am disposed to think that even that decision of the Madras High Court went too far and that as the liquidator is making the application on behalf of the limited Company, the real applicant was the Company itself. It is clear law that in order to decide whether in a particular instance the word ''person'' includes an artificial person or a Corporation or a Company, regard must be had to the setting in which the word ''person'' is placed, to the circumstances in which it is used and above all, to the context in which it stands. No doubt under the provisions in the General Clauses Act to which I have referred if the word ''person'' is isolated, it would be easily possible to say that it includes not only human beings, but also artificial persons and corporations, statutory or otherwise. Moreover in some circumstances and in some contexts there would be no difficulty in coming to the conclusion that that extended meaning should be ascribed to the person. The scope of the meaning of the word ''person'' depends essentially on the connexion and the circumstances in which it is used. In Hirst v. West Riding Union Banking Co. 1901 2 K B 560 Stirling L. J. said:

I will refer to what Lord Blackburn said in Pharmaceutical Society v. London and Provincial Supply Association 1880 5 AC 857 with regard to the meaning of the word ''person'' in a statute.

10. And then the learned Lord Justice makes a quotation from a well-known judgment of Lord Blackburn. I will only pick out one sentence from that quotation which is in these words:

I do not think that the presumption that it (the word ''person'') does include an artificial person, a corporation, if that is the presumption, is at all a strong one.

11. That means no more than this that if there is (I put emphasis on the word ''if'') any presumption that the word ''person'' includes a corporation the presumption is no more than of a slight nature and therefore easily displaced. One has to consider the subject-matter of the particular enactment in which the word ''person'' appears and especially the immediate context in which it is used in order to decide whether that presumption will apply or whether it will not. In the present instance it is to be emphasized that under the terms of the Explanation to Rule 1 of Order 33 that there are two sets of circumstances which may entail pauperism: (1) where a person is unable to pay the fee prescribed by law and (2) where no such fee is prescribed, he is not entitled to property worth Rs. 100 other than his necessary wearing apparel and the subject-matter of the suit.

12. Mr. Sen invited us to hold that those two sets of circumstances are so disconnected or disjointed that no inference ought to be drawn from the reference to necessary wearing apparel, which of course is a thing which a limited Company does not and cannot possess. Mr. Sen tried to induce us to come to the conclusion that in cases where there is a fee prescribed by law, no question of wearing apparel enters into the matter and therefore if the applicant is not possessed of sufficient means to enable him to pay the fee prescribed by law, he is a pauper and so it is quite possible for a limited Company to fulfil that condition. In my opinion however it would not be right to sever the two branches of the explanation in the way contended for by Mr. Sen. Leaving out altogether the reference to payment of a fee prescribed by law or to the non-existence of any such fee, the explanation would read something like this : A person is a pauper when he is not entitled to property worth Rs. 100 other than his wearing apparel. It was held in a Bombay case that the words "other than his necessary wearing apparel" have reference to the question of whether there is property worth Rs. 100. In other words, to ascertain whether a ''person'' comes within the necessary conditions, one must find out what his various items of property consist of and then deduct from the catalogue the value of his "necessary wearing apparel." So far as that part of the Explanation is concerned therefore the criterion or test to be applied is, has the applicant property worth Rs. 100 after ignoring "necessary wearing apparel". It is quite obvious that it is a matter of commonsense that that particular test can have no application to the present case. Furthermore, in my opinion, all the provisions of Order 33 must be read

together, not only Rule 1, but Rules 3 and & of that Order. Rule 3, as already indicated, provides that an application for leave to appeal as a pauper shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, as for instance in the case of a pardanashin woman as was decided in Wazir-un-nessa v. Ilahi Baksh 1902 24 All 172.

13. In the present instance the petition which we are considering was presented'' by one Narayan Dutt Tewari, who described himself as one of the Directors of the Company. There is nothing to show that that particular Director was authorized to present this petition on behalf of the Company: there is no resolution of the Board of Directors instructing or directing this particular Director to lodge this petition on behalf of the Company of which he is the Director nor had he merely in his capacity as a Director the right to come into Court to represent the Company. In any event however it cannot be that the petition presented by a Director of a Company is an application presented to the Court by the applicant in person where the real applicant is a limited Company and indeed it is not possible for a limited Company to come to Court in person. Similarly in Rule 4 we find a provision which could not be complied with in the case of a limited Company. That Rule says:

Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant or his agent when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

14. Now, the reference therein to an applicant who is allowed to appear by an agent obviously relates back to the provision to Rule 3 which says that "unless he is exempted from appearing in Court, in which case the application may be presented by an authorized agent." It seems therefore that the only case in which an agent can present the application is in cases where the applicant is exempted from appearing in Court. All these provisions go to show that the word ''person'' in the Explanation to Order 33, Rule 1 does not have the extended; meaning as contended before us by Mr. Sen and the expression ''person'' does not in this instance include a limited Company. That was the view taken by the Rangoon High Court in S. M. Mitra v. Corporation of the Royal Exchange Assurance 17 AIR 1930 Ran 259. In that case, it was held by Heald J. who was then the Acting Chief Justice of the Court and Otter J. quite clearly and definitely that the word ''person'' in Order 33 means a natural person, that is a human being, and does not include a juridical person, such as a receiver. The Court said, "a receiver appointed under the Provincial Insolvency Act cannot be allowed to sue as a pauper, where the receiver himself is possessed of sufficient funds to carry on the suit though the estate of which he is the receiver may not be sufficient for that purpose". The learned Judges considered the case report-ed in 41 Mad 6241 to which I have already adverted. In the opinion of the learned Judges of the Rangoon High Court, the interpretation to be put upon the word ''person'' in Order 33, Rule 1 and the Explanation to that Rule is of a limited

character and the word should be construed in a non-technical sense and should only be given the meaning which even an ordinary layman would give to it. The Acting Chief Justice after having referred to that pronouncement of Lord Blackburn from which I have quoted above made this comment:

That expression of opinion was, of course, before the date of the Interpretation Act, 1889, to which General Clauses Act more or loss corresponds, but although under the latter Act the word "person" in the Code ordinarily includes any Company or association or body of individuals, whether incorporated or not, nevertheless it need not do so if there is anything repugnant in the subject or con-text. It seems to me that the provisions of Order 33, Rule 3 prescribing that an application for leave to sue as a pauper must be presented by the applicant in person is repugnant to the view that "person" in that Rule was intended to mean anything but a natural person or was intended to include a juridical or artificial person, and that the provisions of Rules 4 and 7 regarding the examination of the applicant and the reference to "wearing apparel "in the Explanation to Rule 1 tend in the same direction. I would accordingly hold that "person" in Order 33, means a natural person, that is a human being and does not include a juridical person such as a Receiver.

15. Otter J. in a concurring judgment says at page 262:

We agree that the word "person" in the provision under review must be considered in its ordinary and plain meaning, and we see nothing in the context in which it stands to indicate that the Legislature meant that the word "person" should or might have the meaning of a juridical person.

16. With these expressions of opinion I am disposed to agree. It is not necessary however for our present purposes that one should go to the length of agreeing with the views of the learned Acting Chief Justice and Otter J. in their entirety. It is sufficient for our present purpose to say that it is my considered and definite opinion that the word "person" in Order 33, Rule 1, and so the word "person" in Order 44, Rule 1, does not include a limited Company incorporated under the Companies Act. I doubt very much whether it is even right to say, as the Madras High Court have said, that it includes a liquidator of a limited Company in liquidation. I am therefore definitely of opinion that the application now before us is not competent and it must accordingly be dismissed. The rejection of this application, of course, in no way prevents the Company from paying the appropriate court-fees and appealing in the ordinary way, should it find itself able to raise the money.

Biswas, J.

17. I agree in the order proposed by my learned brother. I am not at all sure that the word "person", in the setting in which it appears in Order 33, Rule 1, Civil P.C., includes a Company incorporated under the Companies Act. There is authority no doubt in support of the contrary view in 41 Mad 624.1 That is mainly based on the definition of "person" in the General Clauses Act (10 of

1897). Clause 39 of Section 3 of this Act provides that "person" shall include any Company or association or body of individuals, whether incorporated or not. But it will be observed that the definitions in this Section are subject to an important qualification contained in the words "unless there is anything repugnant in the subject or context". As my learned brother has pointed out, the con. text in which the word "person" occurs in Order 33, Rule 1, shows that a Company can hardly be brought within the ambit there of. The Explanation added to Rule 1 is in two parts, one of which is applicable where court-fee is prescribed by law for the plaint in the proposed suit, and the other where no such fee is prescribed. Obviously in a case where no fee is prescribed, the test laid down in the Rule that the plaintiff is "not entitled to property worth Rs. 100 other than his necessary wearing apparel and the subject-matter of the suit", cannot be applied to a Company. The interpretation suggested in the Madras case for getting rid of this difficulty does not appeal to me. The other provisions in Order 33 to which my learned brother has referred also seems to militate against the view that a Company is competent to sue as a pauper : there can, for instance, be no personal examination of the Company as such under Rule 4. This Rule provides that if the Court thinks fit, the Court may examine the applicant, or his agent, when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant. There is no provision in the Code or in any other law under which a Company is allowed, as of right, to appear by an agent. As Swinfen Eady L. J. remarked in Charles P. Kinnell & Co. v. Harding Wace & Co. 1918 1 KB 405, from its nature a Company cannot appear in person, not having as a legal entity any visible person. It seems to me that the word "person" in Order 33, Rule 1, must be given the same meaning as is indicated by Lord Blackburn in Pharmaceutical Society v. London and Provincial Supply Association (1880) 5 AC 857.

18. There is another distinguishing feature of the case which, to my mind, makes it impossible to entertain the present application. It is that the application is made by a Company to sue as a pauper without previously going into liquidation. In the Madras case it is important to observe the application was made by the Official Liquidator representing the Company.

