
(1939) 03 CAL CK 0006
In the Calcutta High Court

Biswa Nath Das

APPELLANT

Vs

Khejerali Molla

RESPONDENT

Date of Decision : 17-03-1939

Acts Referred:

Penal Code, 1860 (IPC) — Section 409

Citation : AIR 1939 Cal 394

Hon'ble Judges : Edgley, J

Bench : Division Bench

Judgement

Edgley, J.—This rule is directed against the order of the Third Munsif, Alipore, dated 23rd December 1938, whereby he refused the petitioner permission to convert a plaint attached to an application to, sue in forma pauperis into a regular plaint with effect from the date of the presentation of his pauper application and directed that the petitioner's plaint should be registered with effect from the date of filing courts fees in the Court below and not with effect from the date upon which the pauper application was presented. The relevant facts connected with this matter are briefly as follows: On 11th April 1938 the petitioner applied in the Court of the learned Munsif to sue the opposite party in forma pauperis for the recovery of a sum of money alleged to be due to him by Khejer Ali Mollah, the opposite party, under a mortgage bond. The case was numbered as pauper case, 112 of 1938. While this particular case was pending, a similar application filed by the petitioner in case No. 88 of 1938 was dismissed by the learned Munsif on 31st October 1938, on the ground that the applicant had the necessary means to enable him to pay the court-fees due in respect of the relief sought by him in that case. Thereafter the requisite steps were taken in connexion with case No. 112 of 1938 to hear the matter under Order 33, Rule 7, Civil P. C. Hajiraa were duly filed but, on 5th November 1938, the petitioner applied for time which was granted until 26th November 1938, which day was fixed for the peremptory hearing of the case. On the latter date, the petitioner filed a further application for time in which he informed the Court that he did not think it proper to prosecute his application to sue in forma pauperis and asked

that he might be allowed to carry on the suit by paying the proper court-fees, and by converting into a regular plaint the plaint which was filed with his pauper application. The learned Munsif on receipt of this application directed that the matter should be put up on 17th December 1938 for further hearing. On this date the petitioner filed two further applications; in the first of these applications he repeated the request contained in the petition which he had filed on 26th November 1938, and informed the Court that he had filed court-fees to the value of Rs. 90 payable on account of the relief sought by him in the mortgage suit. In the second application he asked that his original pauper application should be rejected and requested the Court to pass orders for the registration of the plaint attached to his pauper application on acceptance of the requisite court-fees. The learned Munsif heard the parties with reference to this matter and, on 23rd December 1938, he then made the order against which this rule is directed.

2. It follows from the recital of the above mentioned facts that, as the matter stood before the learned Munsif on 17th December 1938, he had been asked by the petitioner (I) to reject the application to sue in forma pauperis which had been filed on 11th April 1938 and (2) to convert the plaint which was attached to and formed part of the original application into an ordinary plaint. It also appears to have been the wish of the applicant that the conversion should take effect from 11th April 1938 in order that the relief sought by him in the mortgage suit might not become time-barred under the law of limitation. The learned Munsif by his order dated 23rd December 1938, granted the petitioner's request to the effect that his pauper application should be rejected. From the circumstances in; which the order was made it must be taken to be an order under Order 33, Rule 7 (3), Civil P. C., refusing to allow the applicant to sue as a pauper. The learned Munsif also directed that the court-fees should be accepted with effect from 17th December 1938 and not from the earlier date. This order therefore, as it stands, would probably have the effect of making the petitioner's mortgage suit time-barred, and it is on this account that he is anxious to have it set aside.

3. The question for consideration is whether, after refusing the petitioner's application to sue as a pauper on payment of the requisite amount of court-fees due in respect of the relief sought by the petitioner, the learned Munsif should have allowed the petitioner to convert his pauper application into a plaint with effect from the date on which the application to sue in forma pauperis was filed. In the first place, it may be mentioned that an unstamped plaint was attached to the original pauper application on 11th April 1938. Order 33, Rule 2, Civil P. C., requires that every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits. Having regard therefore to the express requirements of this Rule, the unstamped plaint must be regarded as an essential part of the application to sue in forma pauperis, which standing alone did not contain the essential particulars which the law requires in the case of plaints. The decision in this case mainly depends upon the view which should be taken of the effect of an order refusing an application to sue in forma pauperis under Order 33, Rule 7 of the Code and we are not directly concerned

with the effect of a summary order of rejection under Rule 5. After refusing a pauper application is it open to the Court to treat the original application as a plaint in the suit or after such refusal, will it be necessary for the unsuccessful applicant to institute a fresh suit in the ordinary way? The views which have been taken with regard to this question in this Court and in other High Courts are by no means uniform. In *Aubhoya Churn Dey v. Bisseswari* (1897) 24 Cal 889 it was held that, after the rejection of a pauper application, the Court had no power to give time for the presentation of a plaint or to treat the old application as a plaint in the suit, with the result that, where an application to sue in forma pauperis is rejected, and the applicant seeks to deposit the full court-fee in respect of the relief sought, the suit must be considered for the purposes of limitation to have been instituted only after the payment of the requisite court-fees and not at the date of the presentation of the petition to sue as a pauper. The learned Judges considered the effect of certain observations made with reference to pauper applications by the Judicial Committee of the Privy Council in *Skinner v. Orde* (1878) 2 All 241 but they held that that case was clearly distinguishable because in the matter before their Lordships of the Judicial Committee there was no order rejecting the application. Although the learned Judges in *Aubhoya Churn Dey v. Bisseswari* (1897) 24 Cal 889 in the course of their judgment refer to the order of 16th May 1891 as an order of rejection the order in question appears to have been made u/s 409 of the Code of 1882, which corresponds to Order 33, Rule 7 of the new Code. It was not therefore an order of summary rejection but an order refusing the applicant permission to sue as a pauper.

4. A view contrary to that which was expressed in *Aubhoya Churn Dey v. Bisseswari* (1897) 24 Cal 889 was taken by this Court in *Jagadiswari Debi and Others Vs. Tinkari Bibi and Others*, . In that case the learned Judges were dealing with a pauper application which had been refused but they held that the observations made by the Judicial Committee in *Skinner v. Orde* (1878) 2 All 241 were applicable in such a case and they decided, on the basis of that decision, that if the position under the law is, as it must be held to be the case, that the plaint was before the Court, and it was a document on which proper court-fees had not been paid by virtue of a refusal of the prayer of the plaintiff to sue as a pauper, the provisions of Section 149, Civil P.C., could come to the assistance of the plaintiff.

5. It must therefore be considered which of these conflicting views is correct. The earlier view has been adopted by a Full Bench of the Allahabad High Court in *Chunna Mal Vs. Bhagwant Kishore*, in which it was held that, if the Court has refused to allow an applicant to sue as a pauper under Order 33, Rule 7 (3), Civil P.C., then the Court cannot u/s 149 of the Code allow the applicant to pay the requisite court-fee and to treat the application as a plaint. A similar view was taken by the Lahore High Court in *Alopi Parshad v. Mt. Gappi* AIR (1937)Lah 151. The later view is similar to that which was accepted by the Patna High Court in *Bank of Behar Limited Vs. Ramchanderji Maharaj and Others*, and was followed by this Court in *Kali Dasi Dasi Vs. Santosh Kumar Pal and Others*, . The decision

in *Aubhoya Churn Dey v. Bisseswari* (1897) 24 Cal 889 appears to have been mainly based upon the provisions of Section 413, Civil P.C. of 1882, which has been-reproduced with slight verbal alterations in the present Code as Rule 15, Order 33, which reads as follows:

An order refusing to allow the applicant to sue-as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper.

6. It is true that the Code of 1882 contained no Section corresponding to Section 149 of the present Code, but, even if such a Section had been in existence at the time of the decision, it could have made no difference thereto in view of the line of reasoning which was adopted by the learned Judges who decided *Aubhoya Churn Dey v. Bisseswari* (1897) 24 Cal 889. In order that Section 149 may become operative there must be a document before the Court in respect of which the Court in its discretion may allow any deficiency of court-fees to be made good. The learned Judges decided that the original application could not be treated as a plaint after it had been rejected. It follows therefore that, in their view, there was no document before the Court in respect of which a provision such as Section 149 of the Code could have had any application. The decision in *Jagadiswari Debi and Others Vs. Tinkari Bibi and Others*, on the other hand, proceeded on the assumption that the plaint was still before the Court and had not been rejected by reason of the refusal to allow the applicant to sue in forma pauperis. In other words, that decision treated the original application as a sort of composite document consisting of a plaint plus an application to sue in forma pauperis. As already pointed out, the learned Judges who decided *Jagadiswari Debi and Others Vs. Tinkari Bibi and Others*, based their decision mainly upon certain observations made by the Judicial Committee of the Privy Council in *Skinner v. Orde* (1878) 2 All. 241. Their Lordships in the latter case were dealing with the case of an applicant, who, after prosecuting for some time a bona fide application to sue in forma pauperis, pending an enquiry into his pauperism, obtained funds which enabled him to pay the court-fees. No order had been passed refusing him permission to sue as a pauper, but, having regard to the circumstances of the case, he was allowed to convert his original application into a plaint with effect from the date upon which that application was filed. The case in question was decided under the CPC of 1859, Sections 308 and 310 of which have been slightly" re-drafted and reproduced in the present Code as Rules 8 and 15 of Order 33. Their Lordships pointed out that

the Act provides what shall happen if the prayer of the petition be granted by Section 308. It also provides by Section 310 what shall be the effect of a rejection of the petition. But this case is one which the statute has not in terms provided for. The intention of the statute evidently was that, unless the petition

was rejected, as it contained all the materials of the plaint, it should operate as a plaint without the necessity of filing a new one.

7. They went on to say:

There are no negative words in the Act requiring the rejection of the plaint under circumstances like the present, nor anything in its enactment which would oblige their Lordships to say that this petition, which contains all the requisites which the statute requires for a plaint, should not when the money has been paid for the fees be considered as a plaint from the date that it was filed.

8. Their conclusion was to the effect that in the circumstances of the case

the petition to sue as a pauper became a plaint, and under the statute the suit must be deemed to be instituted when that application was filed.

9. They were however careful to point out that

supposing there had been any fraud found by the Judge, the consideration which would determine the judgment would then have been different.

10. As pointed out by Sulaiman C.J. and Bennet J. in the Allahabad decision cited above, their Lordships of the Judicial Committee nowhere stated that, even if the application to sue as a pauper be rejected, the plaint still stands and remains undisposed of until some separate order is passed with reference to it. On the other hand, it was apparent that their Lordships intended to lay down that, where an application was granted the position was governed by the old Section 308, and, where the application was rejected, the position was governed by Section 310. In my view the decision of the Judicial Committee of the Privy Council as it stands, is merely an authority for the proposition that on the analogy of the provisions of Section 308 of the Code of 1859, which corresponds with Rule 8, Order 33, of the present Code, a bona fide applicant to sue in forma pauperis, whose application has not been already refused, may be allowed to covert his application into a plaint which after it has been so converted should be deemed to have been filed on the date upon which the original application was presented to the Court. It is however quite clear from the terms of the judgment that their decision would have been different if they had been dealing with a case in which the petitioner's application had been refused u/s 306 (which corresponds to Order 33, Rule 7 of the new Code) or with a matter in which the applicant had presented a pauper application male fide or with intent to defraud the revenue.

11. It follows therefore that having regard to the provisions of Order 33, Rule 8, Civil P.C., the original application should be deemed to be the plaint in the suit when the application to sue in forma pauperis is granted. It may also be so treated in the case of a bona fide application in circumstances such as those which were present in the case with which their Lordships of the Judicial Committee were dealing in *Skinner v. Orde* (1878) 2 All. 241 and *Jankdhary Sukul v. Janki Koer* (1901) 28 Cal. 427. Different considerations must however

apply when, as in the present case, an application to sue in forma pauperis has been refused under the provisions of Order 33, Rule 7(3), Civil P.C. In such a case the applicant clearly comes within the scope of Order 33, Rule 15 of the Code. The order of refusal will therefore act as a bar to any subsequent application of the like nature by him in respect of the same right to sue, but he will be at liberty to institute a suit in the ordinary manner in respect of such right provided he first pays the costs incurred by Government and by the opposite party in opposing his application for permission to sue as a pauper.

12. It seems to be quite clear from the language of Rule 15 that the intention of the Legislature is not to allow an unsuccessful applicant to treat his pauper application as a plaint with effect from the date on which it was originally filed. It allows him to (institute a suit in the ordinary manner in respect of the right which he claims but only after he has paid the costs due to Government and the opposite party. In my view the expression "in the ordinary manner" can only mean that the applicant must present in Court a duly stamped plaint which as regards limitation will be effective only from the date on which it is presented. Such plaint must fulfil all the "requirements of Order 7, Civil P.C. If it had been intended that, after refusal to allow the applicant to sue as a pauper, the suit might be continued on the basis of the original application there is little doubt that language similar to that which has been used in Rule 8 would have been employed in Rule 15. Rule 8 expressly stated that, where the application is granted, such application shall be deemed to be the plaint in the suit. No such language has been used in Rule 15 and to my mind the manner in which this Rule has been drafted indicates clearly that any suit which the applicant may wish to file under this Rule shall not relate back to the original pauper application but must proceed upon the basis of a fresh plaint presented in the ordinary manner. The Rule was probably deliberately framed with the intention of discouraging frivolous or dishonest applications to sue in forma pauperis. In this connexion, I agree with the views expressed by Abdul Rashid J. in *Alopi Parshad v. Mt. Gappi A.I.R.(1937) Lah. 151*. In that case the learned Judge observed that

the application to sue in forma pauperis is a potential plaint. If it is rejected under Rule 5 or Rule 7 it never ripens into a plaint. If the application ripens into a plaint, then the date of the institution of the suit shall relate back to the date of the filing of the application to sue in forma pauperia. If on the other hand such an application is rejected, it cannot be deemed to be a plaint and the payment of the court-fee after the application to sue in forma pauperis has been rejected cannot revive a potential plaint which ceased to exist when the application to sue in forma pauperis was rejected.

13. The learned Judge went on to say:

Where therefore an application for leave to sue in forma pauperis is rejected under Order 33, Rule 7, there is no proceeding before the Court and the plaint cannot be said to remain, and an order granting the plaintiff permission to pay court-fees cannot be deemed to be one u/s 149 and the suit must be held to

have been instituted on the day on which the court-fee is paid.

14. The learned advocate for the petitioner-places some reliance upon the provisions of the Explanation to Section 3, Limitation Act,. which states that, in the case of a pauper, a suit is instituted when his application for leave to sue as a pauper is made but, as pointed out by Banerji J. in *Jankdhary Sukul v. Janki Koer* (1901) 28 Cal. 427:

This provision must no doubt be taken to have reference to a case in which such application is granted, and it is not intended to apply to a case in which the application to sue as a pauper is rejected.

15. It follows from what I have stated above" that, in my opinion, the correct view of the law has been taken in *Aubhoya Churn Dey v. Bisseswari* (1897) 24 Cal. 889 and I am not prepared to follow the later decision in *Jagadiswari Debi and Others Vs. Tinkari Bibi and Others*, . In this view of the case, the learned Munsif, after refusing the petitioner's application to sue as a pauper quite properly refused to allow him to-convert his application into a plaint with effect from the date, upon which the pauper application was filed. The only point in which his order, dated 23rd December 1938, may be said to be incorrect is with reference to his decision to the effect that the applicant should register his plaint with effect from the date on which the court-fees were filed. Having regard to the provisions of Order 33, Rule 15, Civil P.C., the correct order would have been to direct payment by a specified date of the costs (if any) incurred by Government and the opposite party in opposing the pauper application as a condition precedent to the acceptance of a plaint to which the Court might have permitted the court-fee stamps to be attached which had been deposited on 17th December 1938. If it be held that the decision in *Aubhoya Churn Dey v. Bisseswari* (1897) 24 Cal. 889 contains a correct statement of the law, I am nevertheless asked to apply the principles laid down in Section 14, Limitation Act, and to-deduct the period during which the petitioner was prosecuting his pauper application. In support of this argument some reliance is placed upon the judgment of S.K. Ghose J. in *Kali Dasi Dasi Vs. Santosh Kumar Pal and Others*, . That case is however distinguishable from the one with which we are now dealing because, having regard to the particular circumstances of the case, this Court did not accept the finding of the District Judge to the effect that the pauper application was not a bona fide application. In the-present case I am not prepared to disagree with the clear finding of fact contained in the order of the learned Munsif to the effect that the application was mala fide. That being the case, Section 14, Limitation Act, can have, no application and, in any case, it cannot be said that the learned Munsif "from defect of jurisdiction or other cause of a like nature" Was unable to entertain the petitioner's application. This argument must therefore fail.

16. Finally, I am asked to ignore the application which was filed on 12th December 1938 in which the petitioner asked for the rejection of his pauper application and to treat the matter as being in substance merely an intimation to

the Court that the petitioner did not wish to proceed with his original application and as a prayer for the conversion of that application into a plaint. It is contended that, in that event, the matter would be governed by the principles laid down by the Judicial Committee in *Skinner v. Orde* (1878) 2 All. 241. In the circumstances of the case, I am not prepared to accede to this request. According to the finding of the learned Munsif the petitioner's pauper application was filed with an intent to defraud Government. It is clear from the judgment of the Privy Council in the case cited above that their Lordships would have been guided by different considerations if fraud had been found by the Judge and, in my view, even if application for the rejection of the pauper application were totally ignored, any discretion which the Court may have to convert a pauper application into a plaint should not be used in a case such as that with which we are now dealing. In view of what I have stated above, this rule must be discharged with costs subject to a direction to the learned Munsif to fix a date by which the costs (if any) incurred by Government and the opposite party in opposing the application may be deposited as a condition precedent to presenting a fresh plaint with the court-fees which have already been filed in Court. Limitation will run from the date on which the plaint is actually presented. The hearing fee is assessed at five gold mohurs.