(1964) 08 GUJ CK 0014

In the Gujarat High Court

Case No : Civil Revision Application No. 517 of 1962

Chimanilal Bhogilal Pantene and Another — APPELLANT

Vs

Chandanben Shah and Others — RESPONDENT

Date of Decision : 11-08-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 1, Order 33 Rule 2, Order 33 Rule 3, Order 33 Rule 4

Citation : AIR 1965 Guj 207 : (1965) GLR 91

Hon'ble Judges : P.N. Bhagwati, J;J.B. Mehta, J

Bench : Division Bench

Advocate : Mangaldas M. Sha, for the Appellant; S.H. Sheth, for the Respondent

Judgement

Mehta, J.

(1) This revision petition raises an interesting question as to whether a trustee who has got no trust property in his hands could sue as a pauper on behalf of the trust, even he is possessed of sufficient means in his individual capacity.

(2) One Mohanlal Nihalchand, the deceased, had made a will on 16th March 1949 by which he had given the interest to one Chanchalben and after her death the estate was to over to the various trusts. Chanchalben died on 18th September 1958. There were three executors of the will, one of whom was Laherchand who expired on 22nd April 1958. Therefore, the present two executors have filed a suit in forma paupers, as plaintiffs No. 1 and 2 as the trustees under the will against the main defendants 1 and 2. Defendants No 1 and 2 the testator''s sister''s daughter and defendant No 2 is her husband. The suit is for recovery of the properties of the trust in possession of the opponents worth about Rs. 36,000/-. Opponents Nos. 1 and 2 and the other opponents and the Government having taken up a preliminary objection as to the maintainability of this application, the learned Civil Judge had come to the conclusion that such trustees who were admittedly not paupers, having got sufficient means in their individual capacity for payment of the court-fees, they could not sue as paupers

on behalf of the trust. He also came to the conclusion that plaintiff No. 2 was not present at the time of the application was not property presented as required under Rule 2 of O. 33 of the Civil Procedure Code, hereinafter referred to as the Code. Accordingly he has rejected the application of the trustees and has directed them to pay the requisite court-fees on the suit. The said trustee have. Therefore, filed the present revision application.

(3) Order 33 0f the Code prescribes the procedure for institution of a suit by a pauper. Rule 1 provides that subject to the following provisions, any suit may be instituted by a pauper. The explanation provides that 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 plaintiff such suit, ort where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject mater of the suit. Rule 2 provides that every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits and Rule 3 sets out the mode of presentation of the application and it provides that the application shall be presented to the Court by the applicant in person unless he is exempted from appearing in Court, in which case the application may be presented by an authorised agent who can answer all material questions relating to the application and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person. Rule 4 provides for the examination of the applicant or his agent as aforesaid regarding the merits of the claim and the property of the applicant. Rule 5 directs the Court to reject the application of the prohibitions mentioned in clauses (a) to (e) exists. Thus, O. 33 prescribes the method for institution of a suit by a pauper without payment of the institution of fees as prescribed in the Court-fees Act. It is a provision intended to facilitate the institution of suits so that justice is not denied to any person merely because he has no means to pay even the institution fees. Some other provisions of the Code may also be noted at the outset. O. 7, R.4 provides that where the plaintiff sues in a representative character, the plaint shall not show not only that he has an actual existing interest in the subject-matter, but that he has taken steps necessary to enable him to institute a suit concerning it. O. 2 R. 5 also provides that no claim by or against an executor, administrator or heir, shall be joined with claims by or against him personally, unless the last mentioned claims are alleged to arise with reference to the estate in respect of which th4e plaintiff or defendant sues, or is sued as executor, administrator or heir or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents. These provisions in the Code clearly indicate as rightly observed by Shrinivasa Aiyangar, J. in Sivagami Ammal v. T.S.Gopalaswami Odayar AIR 125 Mad 765 that the person contemplated even by the law of procedure is the juridical person. It would be possible for an individual human being to possess a number of juridical personalities by reason of his possessing separate juridical capacities. Salmond on Jurisprudence, Eighth edition, at pages 325-335 observes that persons are

the substances which rights and duties are the attributes. A natural person is capable of having a double personality. A trustee is for many purposes two persons in the eye of law. In the right of the beneficiary he is one person, and in his own right he is another. That is, a natural person could have different personalities according to the character of his rights and duties. The provision in the code for minors and lunatics would also show that such persons being under disabilities, the acts required under the Code to be performed on their behalf are to be done by them in person but through others. Order 32 similarly provides for representation of beneficiaries in suits concerning properties vested in a trustee, executor or administrator, where the contention is between the person beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested and it shall not ordinarily be necessary to make them parties to the suit. Thus, a suit in a representative capacity is well known to the Code. Even under the General Clauses Act, 1897,under S. 3(39) unless there is something repugnant to the subject or context, the word ''person'' would include any company, association or a body of individuals whether incorporated or not. We must, therefore consider what is the meaning of the word ''person;'' intended in the explanation to Rule 1 of O. 33, -- whether it means only the natural person or also embraces a juridical or artificial person.

(4) Two views have been canvassed before us supported by a number of authorities. According to one view, on account of the mention of wearing apparel in the explanation to Rule 1, and on account of the necessity of the application being presented in person under Rule 3 by someone, who is to be examined under Rule 4 by the Court, the subject or context of the various Rules under O.33 would necessitate the narrow construction of the word ''person'' in the sense of only a natural person. While the other view that the Code contemplates suits in a representative character or by legal or juridical persons as well. Such facility for institution of suits should not be restricted merely because such persons are incapable of possessing a wearing apparel or whose physical presence would be impossible or where the law directs owing to any disability as in the case of minor that all acts required by the Code should be performed by the next friend.

(5) The former view has found favour with Davar, J.in Manaji Rajuji v. Khandoo Baloo ILR 36 Bom 279 at p. 281 where the learned judge observed that all the provisions of O.33 of the CPC seem to negative the idea of anybody but an actual pauper, a real pauper, a man without means, being permitted to maintain or defend a suit in forma pauperis. He held that the privilege of maintaining a pauper suit is a personal privilege granted to people who have no means of carrying on or continuing litigation and the legal representative of a pauper could not continue a suit in forma pauperis unless he was himself a pauper. The decision proceeded on a concession of the lawyer because of some observations of Starling, J. In the matter of the will of Dawubal Hajikhan Hubib Khan ILR 18 Bom 237, which indicated that an executor or an administrator would not be

allowed either to maintain or to continue any petition unless and until it was shown that he himself was a pauper, which observations were really obiter in that case, as the executor there was actually as pauper. This is the view of the Rangoon High Court also in S.M.Mitra v. Corporation of Royal Exchange Assurance AIR 1930 Rang. 259 , where it was held that the official receiver could not sue on the ground that the requirement about wearing apparel and the necessity of presenting the application in person would justify the restricted construction of the word ''person'' in the sense of a natural person only in the context of O.33. the same view is also expressed by the Calcutta High Court in Bharat Abhyudoy Cotton Mills Ltd. Vs. Maharajadhiraj Sir Kameswar Singh and Another, , where it was held that a limited company could not sue or appeal as a pauper. It maybe noted that in the case of Nemichand Bhickchand Marwadi Vs. Kevalchand Jasraj Marwadi, , the Division Bench consisting of Macleod C.J. and Shah approved the dissenting view that in Venkatanarasayya v. Achemma, ILR 3 Mad and held that the rule of English practice which presents a minor from instituting a suit on forma pauperis through his next friend, unless he gives proof not only that he himself is a pauper, should not be deduced from the provisions of the Civil Procedure Code, and that it was only necessary to show, when a minor was seeking to file a suit in forma pauperis, that the minor had no means to pay the court-fees,. Finally Mudholkar, J. in the case of Gendalal Cotton Mills Ltd. and Another Vs. Basant Kumaribai and Others, , differed from the Calcutta view in Bharat Abhyudoy Cotton Mills Ltd. Vs. Maharajadhiraj Sir Kameswar Singh and Another, and distinguished the earlier Bombay decision in ILR 36 Bom 279 (supra) and held that a Corporation is entitled to sue in forma pauperis and, therefore, the official liquidator of a limited company could under O. 33, R.1 institute a suit in forma pauperis for obtaining possession of the property belonging to the company. Thus, the latest trend in Bombay is clearly in favour of the latter view. The latter view has been well favoured and approved in the Full Bench decision of the Madras High Court in Swaminathan v. Official Receiver, Ramnad AIR 1937 Mad 549 (FB), where it was held that the word ''person'' occurring in the Explanation in Rule 1 of O.33 would include both natural and legal persons and the official receiver was a person within the meaning of the said explanation. Their Lordships of the Madras High Court had considered Salmond''s definition of a juridical person and it was held that a natural person in his own right was a different person when he represented the estate of another. The test was whether in that representative character and as the owner of that estate, he was a pauper within the meaning of the explanation. It was also held that the context and object of the enactment would not exclude an official receiver or a person suing in a representative character or an artificial person. The mention of wearing apparel in the explanation and the necessity of presenting the application in person would not exclude such a juridical person who could not possess a wearing apparel whose value could be deducted and in whose case physical presence would be impossible or in cases where the law directs owing to the disability that all the acts required by the Code should be performed by the next friend. In Sivagami Ammal and Another Vs. T.S.

Gopalaswami Odayar and Others, , Srinivasa Aiyangar, J. had also held that the executor of a pauper plaintiff could not be dispaupered because personally he was not a pauper. According to him, the correct principle was to have regard to the real juridical plaintiff in the case and not to the person who may be acting for the plaintiff. He referred to the provisions of O.7, R.4 and O.2, Rule 5 and held that those provisions would clearly indicate that the person contemplated by the law of procedure was the juridical person and to hold otherwise would obviously lead to serious and inconvenient consequences. He rightly pointed out that in the converse case where a trustee was possessed of sufficient means as a trustee of a trust with plenty of money, he would be denied the right to sue as a pauper in respect of his own personal claims. Even the Calcutta High Court in Mabia Khatun Vs. Sheikh Satkari and Others, , has held that when a plaintiff sues in a representative character such as a Mutawalli, trustee or a shebait, unless it is shown that the plaintiff has in his possession property, belonging to the wakf estate or trust or the idol for whom he sues, sufficient to enable him to pay the requisite Court-fee prescribed by law, he may be allowed to sue as a pauper even if it is shown that he has sufficient personal property of his own. The capacity of a person sueing in a representative character must be kept distinct from his personal capacity. Finally, we find this view approved in U.M. Usman Vs. Mayor Simon, , which relied upon similar observations of the Oudh Chief Court and the Full Bench of the Mysore High Court.

(6) We are in complete agreement with this latter view as approved by the Full Bench of the Madras High Court in Swaminathan''s case AIR 1937 Mad 549 (FB) (Supra) and we would now state some of our reasons for the said preference.

(7) The word ''person'' in the explanation being capable of both a wide and a narrow meaning, we should give that construction which would advance this salutary remedy and achieve the purpose underlying enactment so that this facility for institution of a suit without the payment of the requisite court-fees can be properly availed of by all persons, who would be otherwise denied the remedy merely be cause the person had no funds to pay the requisite fees. We agree with the observations of Srinivasa Aiyangar, J. in AIR 1925 Mad 765 that the other construction would lead to anomalous results. The pauper minors and lunatics, who, on account of their legal disabilities, could not act except through someone else on their behalf could not sue at all unless the next friend or guardian was a pauper because they could not present the application in person. Similarly, the trustee of an executor or a Mutawalli or a shebait could not sue or appeal against a decree against a trust-estate unless they were themselves paupers or they chose to put in their own moneys to finance the litigation. If pauper persons could file such suits in a representative character, the difficulties would start for the real plaintiff in execution of the decree obtained. Such results could not have been intended by the Code which in terms provides for suits in a representative capacity by splitting one''s own natural personality.

(8) Further, there is nothing in the subject or contest which would negative this

wider interpretation which is in consonance with the object of these provisions. The rule of construction which was adopted by the Rangoon High Court and the Calcutta High Court to restrict the scope of the word ''person'' to natural persons, because of the mention of wearing apparel in the explanation, has not been accepted by the Supreme Court as it appears from the observations in The Nagpur Electric Light and Power Co., Ltd. and Others Vs. K. Shreepathirao, , where their Lordships seem to approve the contrary view taken in Perumal Gaunden v. Thirumalarayapuram Jananukoola Dhanasekhara Sangha Nidhi ILR 41 Mad 624: (AIR 1918 Mad 362) regarding this explanation. In the Madras case the question was whether the provisions of O.33 could be applied to the companies and it was held that it would be wrong to construe the provisions to mean that only a person who could possess wearing apparel could sue as a pauper. Merely because the test of a wearing apparel could not be fulfilled and no deduction of its value could be claimed by persons possessing no wearing apparel, it would not justify a construction that the word ''person'' in the clause refers only to natural persons who can possess wearing apparel. So also there is no difficulty in complying with Rule2, as regards the presentation of the application by the person himself. In such cases of trustees and executors, if the suit is brought in a representative capacity, they could present the application in that capacity and they would remain present as such before the Court to answer any question relating to the trust. If the distinction between the representative capacity in which a person sues and the personality of the individual himself is kept in mind, there would be no difficulty presented by Rule 2. Even the view as regards the claim being personal to the pauper himself has to some extent lost ground after the decision of the Supreme Court in Vijay Pratap Singh Vs. Dukh Haran Nath Singh and Another, . That was a case of a minor suing through the next friend. The Supreme Court in that case has held that there was nothing personal in that application under O.33 and any person who claimed to be transposed as a plaintiff under O.1 R.10 could also join the petitioners if be was a pauper. In view of these observations of the Supreme Court, we find that the former view seems to have lost its appeal, as it proceeded to give a narrow construction to the word ''Person'' on the ground of mention of wearing apparel in the explanation and because the application could not be filed in person by such juridical person.

(9) So far as the question of a limited company is concerned, no doubt the Bombay view, as earlier set out, is in conflict with the Calcutta view, but it is not necessary for us, in the present case, to express any final opinion in that question.

(10) Mr.Sheth also relied on certain decisions like Brahamaramba v. Seetharamayya AIR 1947 Mad 405, Salem B.S.R.V. Motors (P) Ltd. v. S.S.Krishna Sastry AIR 1962 Mys.47 , Satish Chandra Vs. Phani Bhusan De and Others, , Mt. Annapurna Bai v. Balaji Maroti AIR 1946 Nag 320 and certain other authorities where it was held that the legal representatives could continue the application filed by the deceased in forma pauperis only on payment of the necessary court-

fee or on the proof that they were themselves paupers. But these decisions have not considered the question of a dual personality of the same person and how far the Code has included juridical person in its scope and that is why the earlier decisions which support the other view were not referred to in these decisions. These decisions have, therefore, no application to the present case and in so far as they proceeded on the ground that the relief was personal in nature, even that view seems to have lost its appeal after the decision of the Supreme Court in Vijay Pratap Singh Vs. Dukh Haran Nath Singh and Another, .

(11) We are, therefore, of the view that the correct test in such cases is to see in what capacity a person sued and whether in that capacity he is a pauper. The trustees could, therefore, sue on behalf of the trust provided they had no sufficient trust moneys in their hand to pay the necessary court fees even though in their individual capacity they may not be paupers. Resources of the trustees themselves in their individual capacity would be entirely irrelevant.

(12) Mr.Sheth next contended that the application was presented by the pleader for the applicants and was not presented by any of the trustees in person. It was, therefore, not a sufficient compliance with Rule 3 of O.33. Now, it appears from the Rojnama that the appellant No.1 was examined in the Court on the same day. The learned Judge was, therefore, right in holding that applicant No.1 was present in the Court and the application must be deemed to have been presented by him. in the case of co-trustees it is sufficient if anyone of the co-trustees applies to the Court and remains present personally for examination by Court as required under Rule 4, all the trustees having a common cause. In these circumstances the learned Judge was wrong in holding that the application was not properly presented as required by Rule3.

(13) Mr.Sheth urged that the trust must have sufficient properties as portable had already been obtained, but it would be open to the lower Court to consider all such objections as and when they would be raised before the learned Judge.

(14) In the result, the order of the lower Court is set aside and the matter is remanded to the learned Judge for being disposed of according to law in the light of our observations. The petition is accordingly allowed and the Rule is made absolute. No order as to costs throughout.

(15) Petition allowed.