

(1981) 04 CAL CK 0019
In the Calcutta High Court
Case No : C.O. No. 3380 of 1980

Jogesh Chandra Bera and Others

APPELLANT

Vs

Sri Iswar Braja Raj Jew Thakur

RESPONDENT

Date of Decision : 28-04-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 1
General Clauses Act, 1897 — Section 3(42)

Citation : AIR 1981 Cal 259 : 85 CWN 849

Hon'ble Judges : B.C. Chakrabarti, J; Anil K. Sen, J

Bench : Division Bench

Advocate : S.P. Roy Chowdhury and Probhat Kumar Samanta, for the Appellant;
K.K. Datta, for the Respondent

Final Decision : Allowed

Judgement

B.C. Chakrabarti, J.—This is a revision application at the instance of some of the defendants in a proceeding arising out of an application for leave to sue as indigent person being Judicial Misc. Case No. 31/77 of the 1st Court of the Additional Subordinate Judge at Midnapore. The leave prayed for was granted by the impugned order dated July 5, 1980.

2. The applicant for the leave was Sri Braja Raj Jew Thakur represented by the next friend Smt. Mokshoda Adhikari. It is stated in the application that the landed property described in the plaint schedule were the subject-matter of an Arpannama executed by late Jagannath Adhikary on August 18, 1975. In terms of the Arpannama Haripada Adhikary son of Jagannath Adhikary is the shcbait of the deity. The properties in ka and kha schedules are debultar properties and not subject to alienation. It is alleged in the plaint accompanying the application for leave to sue as an indigent person that Haripada who figures as defendant No. 13 in the suit has been mismanaging the debuttar estate and has alienated the properties by different documents in favour of defendants I to 12. misappropriating the consideration acquired by such alienations. It is further

alleged that Haripada has thereby dispossessed the deity from the properties. Mokshoda Adhikary figuring as the next friend of the deity happens to be the wife of Haripada. It is alleged that she having protested against such conduct of her husband, she was driven out of the house. It is prayed in the plaint that the transfers effected by defendant No. 13 in favour of defendants 1 to 12 be declared fraudulent, collusive and inoperative and not binding on the deity. There is also a prayer for recovery of possession. In the application for leave it is stated that besides the properties described in Sch. Ga which comprises the temple, the deity possesses only some movables worth Rs. 16/-. As such it was prayed that leave may be granted to sue as an indigent person.

3. The application was opposed before the learned Subordinate Judge. He found that the requisite conditions of Order 33 have been fulfilled and as such the applicant was entitled to the leave prayed for. The contention that the suit was mala fide, and does not reveal any cause of action and that too at the instance of the wife of the pre sent shebait were not gone into because the learned Subordinate Judge felt that these matter are not relevant for consideration in an application under Order 33, Rule 5 of the CPC and that they should be left open for consideration at the trial stage. Being aggrieved, some of the defendants have preferred the present application.

4. The application has been heard on contest upon notice to the opposite parties.

5. Mr. S. P. Roy Chowdhury appearing in support of the petitioners urged two points while challenging the order impugned. Firstly it was contended that the deity is not a "person" within the meaning of Order 33 of the Code. The next point urged was that the suit could be brought by the shebait himself or a prospective shebait or by a next friend appointed by the Court to represent the deity. Since Mokshoda was not so appointed, it was contended that the proposed plaint is misconceived and not maintainable and leave should not in the circumstances have been granted to the prejudice of the deity.

6. In support of the first contention that the deity is not a "person" reliance was placed on a decision in the case of Bharat Abhyudoy Cotton Mills Ltd. Vs. Maharajadhiraj Sir Kameswar Singh and Another, . In this case the leave was prayed for by a company. It was held that the word "person" does not include a limited company and it is not possible for and competent to such a company to sue as a pauper or to prefer an appeal as a pauper under Order 44, Rule 1 of the Code. It was held that an isolated reference to the word "person may include a company or an artificial person as denned in Clause (39) (or 42?) of Section 3 of the General Clauses Act, but in deciding the question of pauperism the entire scheme of the order has to be looked into, keeping in view the setting in which the word is placed, the circumstances in which it is used and above all the context in which it stands. Rule 1 as it stood prior to the amendment of the CPC referred to wearing apparel of the person and Rule 3 required presentation of the application in person. It was held that these acts the company is incapable of fulfilling for a company can neither require wearing apparels nor can it present

an application except through an authorised agent and that too when personal, appearance is exempted. Consequently it was held that the expression "person" does not have the extended meaning so as to include a limited company. In arriving at this conclusion reliance was placed in the case of *S. M. Mitra v. Corporation of the Royal Exchange Assurance* AIR 1930 Rang 259 while a contrary view expressed in *Perumal v. T. J. D. Sankanidhi*, AIR 1918 Mad 362 was dissented from. It may be mentioned here that in another case of the Rangoon High Court (*D. K. Cassim v. Abdul Rahman*, AIR 1930 Rang 272) it was held that a firm is a person within the meaning of Order 33 and an insolvent firm may be granted leave to appeal as a pauper.

7. In *Perumal Koundan and Others Vs. The Thirumalarayapuram Jananukoola Dhanasekara Sanka Nidhi Ltd.*, the question was whether a company which has gone into liquidation and a Receiver has been appointed, the Liquidator could sue as a pauper. In that case also the requirements of Rule 1 and Rule 3 of Order 33 were considered. In explaining the explanation to Rule 1 it was observed that the requirement that the applicant should not be entitled to property more than Rs. 100/- "other than his necessary wearing apparel" simply allows deduction of the value of wearing apparel and can only mean that if the applicant has any wearing apparel he can deduct its value. It could not be construed to mean, it was further observed that only such person who in law can possess wearing apparel can sue as pauper. As regards Rule 3 requiring personal presentation of the application it was held that where the law in consequences of personal appearance in Courts being impossible either by reason of the party being a company or an infant or a lunatic allows appearance by somebody else, appearance by such person would be sufficient. In this context analogy was drawn to the provisions of Order 32 relating to minors or persons of unsound mind which authorise appearance by a next friend. In the case of companies, the Act itself prescribes the mode of representation and therefore the Liquidator can fulfil all the obligations required of a pauper petitioner under Order 33, Rule 3. Rule 3 does not cover cases in which from the very nature of the case physical appearance is impossible or where the law owing to any disability directs that all acts required by the Court should be performed by the next friend.

8. The view taken in *Perumal's* case (AIR 1918 Mad 362) was later approved by a Full Bench decision of the Madras High Court in the case of *Swaminathan v. Official Receiver*, AIR 1937 Mad 549 . which held that the Word "person" in Order 33 includes a natural as also a juristic person. The same view was taken in the case of *Syed Ali v. Deccan Commercial Bank*, AIR 1951 Hyd 124; *Shri Gurdwara Sahib Kothi Begowal and Another Vs. Harnam Singh and Others*, ; *East Indian Coal Co. Ltd. Vs. East Indian Coal Co. Ltd., Workers' Union*, ; *Kundan Sugar Mills, Amroha Vs. Indian Sugar Syndicate Ltd. and Others*, ; *Moorti Shree Behari Ji Vs. Prem Das and Others*, ; *Gobardhan Das Babaji Vs. Raghunandan Das Babaji and Others*, . These last two cases relate directly to the question whether a deity can sue as a pauper and it was held that it can on the same reasoning on which a limited company can sue as such. In these cases the plaintiff was the

deity and not the shebait or next friend through whom the deity sought permission to sue as pauper. In the case before us also the deity is the plaintiff and not Mokshoda.

9. The general trend of view taken by most of the other High Courts is that a deity as a juristic person is capable of suing as a pauper.

10. Under the amended CPC the reference to necessary wearing apparels in the explanation to Rule 1 has been deleted. Therefore, one of the two reasonings on which the Calcutta view is based no longer subsists. The other requirement is as provided in Rule 3 which speaks of presentation of the application by the applicant in person. That provision however still holds good. The principles of interpretation of this rule as enunciated in *Perumal's case* (AIR 1918 Mad 362) however came to be considered by the Supreme Court in the case of *N. E. L. and The Nagpur Electric Light and Power Co., Ltd. and Others Vs. K. Shreepathirao*, and the view taken by the Madras High Court was approved. Therefore, it seems that the Calcutta view was impliedly overruled and the law may now be taken to be well-settled that the word "person" in Order 33, Rule 1 includes a juristic as well as a natural person. There can be no controversy that a deity is a juristic person.

11. Mr. Roy Chowdhury, however, contended that the case before the Supreme Court was not a case directly on the point and as such the general observation made therein can be of no avail. In this connection reference was made to the case of *Raval and Co. Vs. K.G. Ramachandran and Others*, . It is stated in this decision that "any general observation cannot apply in interpreting the provision of an Act unless this Court has applied its mind to and analysed the provisions of that particular Act". We are however unable to accept the contention of Mr. Roy Chowdhury in this regard. The observations made by the Supreme Court in *The Nagpur Electric Light and Power Co., Ltd. and Others Vs. K. Shreepathirao*, is not such a general observation as has been contended by Mr. Roy Chowdhury. Although in that case interpretation of the provisions of Order 33 was not directly involved but a principle of interpretation was laid down and in doing so the principle enunciated in *Perumal Koundan and Others Vs. The Thirumalarayapuram Jananukoola Dhanasekara Sanka Nidhi Ltd.*, in particular was approved.

12. In interpreting a statute the principle has to be borne in mind that the legislature is not capricious but that when it confers a right, it should be presumed that the right is conferred not only on a few persons but to all persons entitled to the right. The right to sue in forma pauperis is a privilege given to a litigant provided certain conditions are fulfilled and hence every litigant fulfilling those conditions is entitled to the benefit of those privileges. In the instant case following the principle of interpretation laid down in *Perumal's case* and approved by the Supreme Court we are of the view that a juristic person is entitled to the privilege of suing as an indigent person within the meaning of Order 33, Rule I. The first contention urged by Mr. Roy Chowdhury, therefore,

fails.

13. In the next place Mr. Roy Chowdhury contended that it is not open to anybody to institute a suit in the name of the deity as next friend of the deity unless he has been so appointed by the Court. The idea of having a guardian appointed by the Court to represent the deity seems to have originated from the view taken by the Judicial Committee in the case of AIR 1925 139 (Privy Council) . The point also came up for consideration before Lord Williams, J. in the case of Manindra Chandra Nandi Vs. Rahatannessa Bibi and Others, . It was held that in the case of a private religious trust, with regard to the management of which the public cannot intervene and it cannot be expected that the shebait will bring a suit against himself it is necessary and desirable that the idol should appear in the suit by a disinterested next friend appointed by the Court, and the Court in fact appointed one of the parties as next friend. This principle was substantially accepted as correct in the case of Tarit Bhusan Rai and Another Vs. Sri Sri Iswar Sridhar Salagram Shila Thakur by Krishna Chandra Chandra and Others, where Mr. Justice Paul observed that no person other than the shebait can legally and effectively represent the deity unless he has been specially appointed by the Court. In a later Bench decision of this Court in the case of Sm. Sushama Roy Vs. Atul Krishna Roy and Another, . it was held that ordinarily the interest of the deity requires that nobody other than a shebait be allowed to institute a suit in the name of the deity without the previous order of the Court appointing him to represent the deity. A similar view was expressed in the case of Sri Iswar Radha Kanta Jew Thakur and Others Vs. Gopinath Das and Others, .

14. Finally the Supreme Court in the case of Veruareddi Ramaraghava Reddy and Others Vs. Konduru Seshu Reddy and Others, , held that the possession and management of endowed property with the right to sue in respect thereof, are in the normal course vested in the shebait but where the shebait himself is a guilty party against whom the deity needs relief, it is open to the worshippers or other persons interested in the religious endowment to file suits for the protection of trust properties. It was further observed that in a case where the shebait has denied the right of the deity to the dedicated property it is obviously desirable that the deity should file the suit through a disinterested next friend nominated by the Court. In coming to this conclusion reliance was placed in the case of AIR 1925 139 (Privy Council)

15. In the instant case before us the suit has been instituted by the deity through Mokshoda Adhikari who is the wife of the shebait, making allegations of unlawful alienation by the shebait to the prejudice of the interest of the deity and to the advantage of himself personally. Such allegation has been made obviously to avoid the alienations and it is alleged by Mr. Roy Chowdhury that this is a collusive action brought by the wife in collaboration with her husband with whom she is living together in the same house and whose interest is not shown to be adverse to the shebait. The question of collusion however is a matter of evidence and ought to be left to be considered at the proper stage. But the point that

immediately arises for consideration is whether the suit as framed is competent and maintainable. If, on the face of it, it is found that the suit as proposed is not competent at the instance of Mokshoda posing as a next friend but not being so appointed by the Court it seems to us that this is a matter which may be properly considered at this stage and not left to be considered later during the trial. It would not be proper, as has been held by the learned Subordinate Judge that the question whether the deity has been properly represented may be conveniently gone into at the time of filing of the suit. Obviously, what he means is that at the stage of considering whether the application for leave to sue as an indigent person should or should not be granted this is an irrelevant consideration.

16. We are however unable to accept this view. This is a question which goes to the very root of the matter. Take for instance the case of a minor without not being represented properly asking for leave to sue as an indigent person. He cannot obviously do so nor can the question of his representation be left for consideration at the trial stage. The question should be considered at the moment the suit commences. In the case of *Vijay Pratap Singh Vs. Dukh Haran Nath Singh and Another*, a question arose whether in an application for leave to sue in forma pauperis, another person could be joined as a co-plaintiff under the provisions of Order 1, Rule 10 of the C. P. C. The Supreme Court observed that the application to sue in forma pauperis is but a method prescribed by the Code for institution of a suit by a pauper without payment of court-fees and that the suit commences from the moment an application for leave to sue as pauper is presented and Order 1, Rule 10, C. P. C. would be as much applicable in such a suit as in a suit where court-fees have been, duly paid. Therefore the consideration of the question as raised in the present case touching the point as to the competence of the person instituting the suit may rightly be considered in appropriate cases even at the stage of Order 33 and need not be deferred till after the application is disposed of, unless of course, it involves complicated and controversial questions of fact and law. In the instant case there is no such question.

17. Since we have found upon a consideration of the authorities cited hereinbefore that a suit in the name of the deity unless brought by the shebait himself or a prospective shebait must be so instituted through a next friend appointed in that behalf by the Court, the suit as instituted by Mokshoda without obtaining such leave is incompetent. Consequently the question of granting leave in such a suit cannot arise until Mokshoda obtains the leave of the Court to institute the action. The second point urged by Mr. Roy Chowdhury therefore succeeds.

18. The revisional application accordingly is allowed. Subject to the observations made hereinbefore the impugned order is set aside. There will be no order for costs. 19. Let the order be communicated to the Court below forthwith.

Anil K. Sen, J.

19. I agree.