

(1949) 12 OHC CK 0006
In the Orissa High Court
Case No : First Appeal No. 15 of 1945

Mt. Jinatun Nisa Bibi and Another	Vs	APPELLANT
Mt. Idrakun Nisa and Others		RESPONDENT

Date of Decision : 15-12-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 15, Order 33 Rule 2, Order 33 Rule 7, Order 33 Rule 8, 149

Citation : AIR 1950 Ori 183

Hon'ble Judges : Panigrahi, J;Narasimham, J

Bench : Division Bench

Advocate : S.N. Sen Gupta and R.N. Sinha, for the Appellant; M.S. Rao and A.S. Khan, for the Respondent

Final Decision : Dismissed

Judgement

Panigrahi, J.—This is an appeal against the judgment of the Additional Subordinate Judge, Cuttack, granting a decree to the plaintiff in a suit for recovery of Rs. 7530 as her dower debt due from the estate of her deceased husband. The point debated on this appeal is whether a Court, while rejecting an application to sue in forma pauperis, can grant time to the petitioner for payment of court-fee and whether in such a case the suit shall be deemed to have been instituted on the day of the presentation of the pauper application.

2. The facts briefly are that the plaintiff started her suit with an application under Order 33, Rule 2, Civil P. C. praying for permission to sue in forma pauperis. That application sets out in detail all the particulars required for a plaint, states the cause of action and the relief that the plaintiff is entitled to, and in the prayer portion contains a request (1) that the petitioner be permitted to sue as a pauper; and (2) that she may be given a decree for their recovery of her dower money amounting to BS. 7530 together with costs. The learned Subordinate Judge registered this application as Misc. case No. 143 of 1939 on and 27th May 1940 allowed the application of the plaintiff and registered the suit as O. S. No.

77 of 1940, The defendants went up in appeal to the High Court against this order of the Subordinate Judge. The order of the Subordinate Judge was reversed and the petition was remanded, by the High Court's order dated 30th October 1940, for instituting a fresh enquiry into the pauperism of the petitioner. On 8th March 1941 the Subordinate Judge restored Misc. case No. 142 of 1939 and directed that the proceedings in the original suit which had been registered as O. S. 77 of 1940 shall be stayed. The enquiry into the pauperism of the petitioner was taken up and was being adjourned from time to time till 30th October 1941 when farther proceedings in the suit were dropped; and on 20th December 1941, the petition for leave to sue as a pauper was rejected. The order of the learned Subordinate Judge reads as follows :

"Hence the original application of applicant for permission to sue in forma pauperis shall stand rejected with costs and pleader's fee at Rs. 16.

C. C. Coari. Subordinate Judge.

The applicant is now called upon to pay court-fees for the plaint by 10th January 1942.

C. C. Coari. Subordinate Judge.

The point for determination is whether this order of the learned Subordinate Judge is really one order or constitutes two separate orders passed at different times. The two portions are separately numbered as Orders Nos. 46 and 47 of the same date. Mr. Sen Gupta appearing for the defendant-appellants contends that these are two separate orders and that the latter order was beyond the jurisdiction of the Subordinate Judge as he became functus officio when he rejected the application to sue in forma pauperis by his order numbered as 46. The defendant, appellants went up in revision to the High Court again against the order of the Subordinate Judge permitting the plaintiff to pay court-fee, i.e., against the order numbered as 47. In dismissing the revision (civil Revn. No. 28 of 1942) Shearer J. observed that the learned Subordinate Judge in making the order complained against acted suo motu and that he was dealing with the matter simultaneously by two orders and that "it is impossible to say that the order under revision was without jurisdiction." Mr. Sen Gupta's contention is that this order of the High Court does not prevent him from raising the point once again in this Court in first appeal as the earlier order of the High Court was passed in revision.

3. We allowed Mr. Sen Gupta to argue the point at length irrespective of whether or not the previous order of the High Court operated as res judicata; and after hearing him we take the same view of the proceedings as Shearer J. did previously. The learned Subordinate Judge had throughout treated the document which was filed as a petition by the plaintiff, in initiating her suit, as a composite document consisting of plaint and a petition. In fact, he kept both the suit and the petition pending for a long time, although the High Court directed a fresh enquiry into the pauperism of the petitioner. Though the learned Subordinate

Judge ultimately directed the proceedings in the suit to be dropped he was aware throughout that the document was capable of being converted into a plaint on payment of court-fee. He therefore called upon the petitioner to pay court-fee while rejecting her application to sue as a pauper. The fact that the learned Judge divided the order into two portions and signed twice has given rise to the contention that he passed two separate orders as indeed they have been separately numbered as 46 and 47. We are however unable to accede to this contention as we find, on a reference to the orders, that they were written by the learned Subordinate Judge himself in his own hand, at the same time and on the same day, though the numbering was done by the clerk subsequently. The expression used by the learned Judge is also significant. He says : "The applicant is now called upon to pay court-fees." The use of the word "now" clearly indicates that the petition having been rejected, there was an unstamped plaint before the Court which could be registered as a suit on payment of the court fee. The applicant was, therefore, given the option to pay court-fee. This contention of Mr. Sengupta must, therefore, fail.

4. It is now necessary to examine whether the Court had the power to grant time, after he had rejected the application for permission to sue in forma pauperis.

5. Order 33, Civil P. C. is entitled "Suits by Paupers" and prescribes the procedure to be adopted by a suitor who claims to be a pauper. Rule 2 lays down that the application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits and shall be signed and verified as a pleading. Rule 8 says that where the application is granted, it shall be numbered and registered and shall be deemed the plaint in the suit and shall proceed in all other respects as a suit instituted in the ordinary manner. The expression "shall be deemed the plaint in the suit" used in Rule 8 gives rise to a contention that until the application is granted the document filed by a pauper is not a plaint. This argument is further strengthened by the language used in Rule 16 which lays down that an order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application 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 Provincial Government and by the opposite party in opposing his application for leave to sue as a pauper. The appellants' contention is that if the petitioner is permitted to pay Court fee, simultaneously with the rejection of his application then Rule 15 would be reduced to silence inasmuch as the obligation to pay the costs of the opposite party, devolving on the unsuccessful applicant, will be circumvented. It has been pointed out that Rule 15 contemplates the institution of a suit by the filing of a fresh plaint, after payment of the costs of the opposite side. In support of this contention Mr. Sen Gupta relied upon a decision of King J. In *Uthuman Pillai Tharagan and Others Vs. T. Muhammad Usaf Tharaganar and Others*, ; *Biswa Nath Das Vs. Khejerali Molla*, and *Lala Mistry Vs. Ganesh Mistry and Another*, All these cases are based on a Full Bench decision of the Allahabad High Court

reported in *Chunna Mal Vs. Bhagwant Kishore*,

6. The Allahabad High Court has consistently held the view that the Court has no power, while rejecting the application for permission to sue as a pauper, to allow the applicant to pay the requisite court-fee and treat the application as a plaint. In *British India Corporation Ltd. and Others Vs. Robert Menzies*, the Full Bench held that the Court could grant time u/s 149, Civil P. C. only if the application was rejected under Rule 5. Allsop J., who was also a party to the Full Bench decision, however, held that

"when the Court refused to allow an applicant under Order 33 to sue as a pauper it may at the same time give him permission to stamp it as an application and treat it as a plaint. The point is that we should look to the substantial intention of the Court at the time when it still had jurisdiction u/s 149, Civil P. C. and if it means to exercise that jurisdiction before the proceedings came to an end, we should not say that it is incompetent to do so merely because it expresses its intention at the same time not to allow the applicant to sue as a pauper."

7. The leading case on the subject which has given rise to a conflict of opinion, is the Privy Council decision reported in *Stuart Skinner v. William Orde* 6 I. A. 126: 2 ALL. 241. This was a case under the old Civil P. C. which did not contain any provision corresponding to Section 149 of the present Code. Their Lordships of the Judicial Committee after considering the provisions of the Code held that

"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

" Their Lordships then posed the question:

"Is there anything in the Act which requires that in such a state of things the petition of plaint shall be rejected altogether and the plaintiff be compelled to commence de nove. Their Lordships do not see their way to the middle course followed by the Court in holding that the petition was converted into a plaint from the date of the payment of the fees."

In the view of the Judicial Committee the petition to sue in forma pauperia contains in itself all the particulars that the statute requires in a plaint plus the prayer that the plaintiff may be allowed to sue in forma pauperis. If the prayer to be exempted from payment of court-fee is rejected, the particulars required for a plaint and the prayer for relief based on these particulars still remain which, on payment of the requisite court-fee, entitle the plaintiff to continue the suit in the ordinary manner. It has accordingly been held consistently by the different High Courts in India that the application to sue in forma pauperis is a composite document and that the plaint must be deemed to be pending when the application to sue as a pauper is rejected. See in this connection, *Sundarathammal v. Paramaswami* A. I. R. 1933 Mad. 883: 146 I. C. 566; *Nellavadivammal v. Subramania Pillai* 40 Mad. 687: A. I. R. 1918 Mad. 1039 ;

Thangathammal v. Iravatheswara Aiyar 28 I.C. 504: A. I. R. 1916 Mad 685; Chidambaram v. Nataraja Mudaliar A. I. R. 1939 Mad. 80; I. L. R. (1938) Mad. 1060 Brahamaramba v. Seetharamayya A. I. R. 1947 Mad. 405: I. L. R. (1947) Mad. 820 and Periasami Padayachi v. Ulaganathan A. I. R. 1949 Mad. 162: I. L. R. (1949) Mad. 333.

8. The practice in the Madras High Court has consistently been to treat the application as a plaint and regard the suit as having been instituted from the date of presentation of the application itself. Even interlocutory orders such as the appointment of a commissioner have been passed on the basis that the suit has been instituted on presentation of the application to sue as a pauper. The same view has been taken in the Calcutta High Court in the cases reported in Baidya Nath Pandey and Another Vs. Hemlata Dasi and Others, and Kali Dasi Dasi Vs. Santosh Kumar Pal and Others, . The view taken by Edgley J. in Biswa Nath Das Vs. Khejerali Molla, cited above followed an earlier decision of that High Court reported in Aubhoya Churn v. Bisseswari 24 Cal. 889 but the earlier decision was distinguished in Durga Charan v. Dukhram 26 Cal. 925 and has not since been followed in that Court. The Patna High Court has also consistently been that the document referred to in Rule 2 of Order 33 is a composite document consisting of an application for permission to sue as a pauper and a plaint and that therefore the Court has jurisdiction u/s 149, Civil P. C. while refusing leave to sue in forma pauperis, to permit the payment of the requisite stamp on the plaint within a specified time, and after this is done to treat the unstamped plaint as having been validly presented with proper court-fee, on the date it was originally filed. See Bank of Behar Limited Vs. Ramchanderji Maharaj and Others, . The case reported in Lala Mistry Vs. Ganesh Mistry and Another, is not in conflict with the earlier decision of that Court as, indeed, Fazl Ali J. (as he then was) takes care to point out in his judgment. All that this case lays down is that the Court has no power to grant time by a separate order on a petition filed by the plaintiff on the subsequent date. The Bombay High Court has also taken the same view, viz., that the Court may, in its discretion u/s 149, Civil P. C. while rejecting an application for permission to sue in forma pauperis, allow the applicant time to pay the requisite court-fee; and treat the document as an unstamped plaint while refusing to allow the applicant to sue as a pauper under Order 33, Rule 7. It was laid down, however that in doing so the Court should make the payment of costs mentioned therein a condition precedent, but for purposes of limitation the suit will be deemed to have been instituted on the day on which the application for leave to sue as a pauper is made ; but that if the Court does not keep the application alive as an unstamped plaint, the proceedings will come to an end the Court has no power to do so by a separate and subsequent order. It has also been held by the Bombay High Court in Abdul Rahman Syed Lal Vs. Aminabi Syed Lal, that the payment of costs prescribed under Rule 15 of Order 33, Civil P. C. is not a condition precedent and can be waived.

9. On a review of these decisions, we are satisfied that the view taken by the

Madras, Calcutta, and Patna High Courts is consistent with the decision of the Judicial Committee in *Stuart Skinner v. William Orde* 6 I. A. 126 : 2 ALL. 241 P. C. and we hold that an application to sue as a pauper is composite document consisting of an unstamped plaint and an application for permission to sue in forma pauperis. If the application is rejected the plaint still remains and the Court may, in its discretion, while rejecting the application, allow the petitioner to pay the requisite fee, and in such a case the suit shall be deemed to have been instituted on the date of presentation of the application. When the Court however passes an unconditional order rejecting the application, the question whether it can, by a subsequent order, permit the applicant to pay the requisite court-fee does not arise for decision. In the present case, as we have held that the learned Subordinate Judge did not in fact pass two separate orders the suit must be held to have been instituted on the day of presentation of the application to sue as a pauper and is not barred by limitation. The learned Advocate for the appellants did not challenge the finding of the lower Court on: the merits of the plaintiff's case. The only point that was argued related to limitation and that having failed the judgment of the Court below must be affirmed.

10. This appeal fails and is dismissed with costs.

Narasimham, J.

11. The appellants are the sisters of one Shah Md. Yaqub Ali who died on 31st December 1936. The plaintiff-respondent claiming to be the widow of the said Shah Md. Yaqub Ali brought a suit for recovery of her unpaid dower debt amounting to Rs. 7530. The suit was originally brought in forma pauperis and the application for permission to sue as a pauper was filed before the Subordinate Judge, Cuttack on 13th December 1939. Along with that application, the respondent filed all the particulars of a plaint as required by Rule 2 of Order 33, Civil P. C. The learned Subordinate Judge allowed the application 27th May 1940 and then a regular suit (O. R. No. 77 of 1940) was registered in his Court. In the meantime, however, a civil revision (C. R. NO. 95 of 1940) was filed against his order and the Hon'ble High Court on 14th February 1941 set aside the Subordinate Judge's order dated 27th May 1940 and remanded the application for fresh hearing in the light of the observations contained in the High Court's judgment. This order was received by the Subordinate Judge along with the record on 8th March 1941. He thereupon restored the original Miscellaneous case No. 142 of 1939, re-heard the pauper application and by his order dated 20th December 1941 rejected it. Then he allowed the respondent time to pay the court-fees taking the original pauper application to be an unstamped plaint. The suit was, in due course, decreed in favour of the plaintiff-respondent on contest. The relevant portions of his orders are given below.

Serial No. Date. Order

46 20-12-41

Hence the original application of the applicant for permission to sue in forma

pauperia shall stand rejected with costs and pleader's fee at Rs. 16.

Sd/- C. C. Coari S. J.

47 20-12-41

The applicant is now called upon to pay court-fees for the plaint by 10-1-42.

Sd/- C. C. Coari S. J.

O. S. No. 176 of 1941.

48 23-12-41

Register and put up on 10-1-42 when the plaintiff should pay the court-fees worth Rs. 606/4/-.

Sd/- C. C. Coari S. J.

12. The only point agitated in this appeal is the question of limitation. Mr. Sengupta, on behalf of the appellants, urged that the first order of the Subordinate Judge dated 20th December 1941 rejecting the application to sue in forma pauperis was completed when the Subordinate Judge put his signature below the order and that his subsequent order of the same date calling upon the respondent to pay court-fees and giving time till 10th January 1942 for that purpose would be a distinct order. Consequently for the purpose of limitation the relevant date was 20th December 1941 and not the original date of application (13th December 1939). The former date is admittedly beyond the period of limitation of three years and he, therefore, urged that the suit should have been thrown out.

13. The whole question, therefore, turns on the construction of the various provisions of Order 33, in particular, of Rules 6 and 15. Under Rule 8 if the application to sue as a pauper is allowed that application shall be deemed to be a plaint and shall be deemed to have been instituted on the date on which it was originally presented. If, however, the application is rejected there is no express provision in Order 33 or any other part of the CPC directing that the application may still be deemed to be an unstamped plaint which on payment of court-fee would become a regular plaint and would relate back to the original date of presentation.

14. The decisions of the various High Courts on this question are conflicting though they all seem to be based on the observations of the Privy Council in *Skinner v. Orde* 6 I. A. 126: 2 ALL. 241. One view is that an application for permission to sue in forma pauperis which must necessarily contain all the particulars of a plaint, is in the nature of a composite document and that even though the application may be refused there is nothing in the Code to prevent the Court from treating it as an unstamped plaint and giving the applicant time u/s 149, Civil P. C. to pay the necessary court-fee. As pointed out by my learned brother, the Madras High Court has consistently taken this view (see *Nellavadi*

Ammal v. Subramanie Pillai 40 Mad. 687; A. I. R. 1918 Mad. 1039 ; Thangathammal v. Iravatheswara Iyer 28 I. C. 504; A. I. R. 1916 Mad. 685 ; Sundarathammal v. Paramaswami Asari A. I. R. 1933 Mad. 883 : 146 I. C. 566 ; Dhulipalla Brahamaramba Vs. Dhulipalla Seetharamayya and Others, and Periyasami Padayachi v. Ulaganathan A. I. R. 1949 Mad. 162 . : I. L. R. (1949) Mad. 333. There is also a similar Calcutta decision reported in Jagadiswari Debi and Others Vs. Tinkari Bibi and Others, . But in the other extreme there are some decisions of Calcutta, Bombay and Allahabad High Courts to the effect that as soon as an application to sue in forma pauperis is rejected, the Court cannot while rejecting the application permit the applicant u/s 149, Civil P. C., to pay the requisite court-fee and treat the application as a plaint. The leading decisions in support of this view are the majority view in the Full Bench decision reported in Chunna Mal Vs. Bhagwant Kishore, and another decision of the Rangoon High Court reported in Ma Saw Yin v. S. P. K. A. A. M. Firm A.I.R.1937 Rang. 185 : I.L. R. 1987 Rang 331 both of which have been followed in a single Judge's decision of the Madras High Court reported in Uthuman Pillai Tharagan and Others Vs. T. Muhammad Usaf Tharaganar and Others, . There is also a decision of a single Judge (Edgley J.) of the Calcutta High Court reported in Biswa Nath Das Vs. Khejerali Molla, to the same effect. A single Judge of the Bombay High Court in Vamanrao Lallubhai Vs. Pranlal Bhagwandas, . 731 has taken the same view. The entire case law has been fully discussed in all the aforesaid decisions and it is unnecessary to repeat it here.

15. A third view which seems to be a via media between the aforesaid two extreme views has been taken by the Patna High Court. In Bank of Behar Limited Vs. Ramchanderji Maharaj and Others, it was held that if the Court while rejecting the application to sue in forma pauperis, by the same order grants time to the applicant to pay the court-fee such an order would be a valid order u/s 149, Civil P. C., and if the court-fee is paid within the time allowed by that order the unstamped plaint will be deemed to have been validly presented on proper court-fee on the date it was originally filed. This view has been reiterated in a later Patna decision reported in Lala Mistry Vs. Ganesh Mistry and Another, where it was pointed out that though after finally disposing of a pauper application the Court has no jurisdiction to grant further time, the Court may in one single order decline leave to sue as a pauper and also give time for filing court-fee. This view is in accord with the minority view in the Full Bench decision of the Allahabad High Court reported in Chunna Mal v. Bhagwant Kishore AIR 1936 ALL. 684 : ILR (1937) ALL. 22 There is also a later Bombay decision reported in Mahadev Gopal Savant Vs. Bhikaji Vishram Chavan, supporting the same view. I may quote the relevant passage from that decision.

"Even if the Court decides to reject the application under Order 33, Rule 5, or to refuse to allow the applicant to sue as a pauper under Order 33, Rule 7, it may treat the application as an unstamped plaint and either before or at the time of passing the order under Rule 5 or Rule 7, it may in its discretion u/s 149 allow the applicant time to pay the requisite court-fees, and upon such payment within

the time allowed, number and register the plaint. But in doing so, the Court should have regard to the provisions of Order 33, Rule 15 and make the payment of the costs mentioned therein a condition precedent. In all these cases, for the purposes of limitation, the suit will be deemed to have been instituted on the day on which the application for leave to sue as a pauper is made. But if once the Court passes an order rejecting the application under Rule 5 or refusing to allow the applicant to sue as a pauper under Rule 7, without keeping the application alive as an unstamped plaint and granting the applicant time to pay the requisite court-fees, the proceedings come to an end, and it has no power to do so by a separate and subsequent order."

With respect I would agree with the middle view taken in the aforesaid decisions of Patna, Calcutta and Bombay. In the present case, therefore, one has to see whether the two orders of the Subordinate Judge (C. C. Coari) dated 20th December 1941 can, in substance be held to be one single order. It will be noticed that though the serial number has been given by the benekhlerk the two orders were written by Mr. Coari in his own hand and the only circumstance from which the two orders can be said to be separate is his signing the first order and then writing out the second order. Otherwise, the second order appears to be merely a continuation of the first order as will be clear from the fact that he has expressly used the word "now" and further the second order was passed by him suo motu without waiting for an application from the party. It is thus clear that he intended while passing an order rejecting the application to sue as a pauper to grant him time to pay the court-fee. But he wrote it as two distinct orders because he was anxious to show that they dealt with two aspects of the application to sue as a pauper. As a matter of mere construction, I am inclined to agree with my learned brother's view to the effect that the two orders dated 20th December 1941 are in substance only one order. The same view has been taken by Shearer J. when the matter went up to him in C. R. No. 28 of 1942 at the interlocutory stage and with respect I would agree with the reasons given there. The question as to whether that decision would operate as res judicata is of mere academic interest in view of our accepting his reasons.

16. The result is that the present case is fully covered by the third line of decisions discussed above. The order dated 20th December 1941 granting extension of time to pay court-fee is a valid order u/s 149, Civil P. C., and on payment of the court-fee the unstamped plaint relates back to the date of its original presentation, namely, 13th December 1939. The suit is thus well within the period of limitation.

17. I would therefore agree that the appeal fails and should be dismissed with costs.