

(1911) 06 BOM CK 0011
In the Bombay High Court
Case No : Suit No. 893 of 1909

Rao Saheb Manaji Rajuji Kalewar

APPELLANT

Vs

Khandoo Baloo

RESPONDENT

Date of Decision : 16-06-1911

Acts Referred:

Citation : (1911) 13 BOMLR 577

Hon'ble Judges : Davar, J

Bench : Single Bench

Judgement

Davar, J.—Maloobai, widow of Rajanna Mahadavji, originally petitioned to this Court to be allowed to institute this suit in forma pauperis against Khandoo Baloo, the present defendant, praying for certain reliefs in connection with a document which she alleged the defendant had fraudulently got her to execute. She was granted leave to sue in forma pauperis and her petition became a suit. In that suit she claimed that the defendant may be ordered to deliver up to be cancelled a certain deed of gift which she alleged he had obtained fraudulently from her and she prayed that the title-deeds of her property may be ordered to be returned to her.

2. Pending the hearing of the suit she died, but she was a woman who was either herself very astute or was in very astute hands, and before her death she made a will whereby she appointed Rao Saheb Manaji Rajuji Kalewar the executor thereof and she disposed of the property which she was claiming in the suit in certain ways in that will. The defendant was one of her nephews. She had three other nephews, and I am told that the will is in favour of the other three nephews. Rao Saheb Manaji Rajuji, on the 16th of June 1910, made an affidavit setting out the circumstances under which he became executor of Maloobai's will and he prayed that this Honourable Court may be pleased to allow his name to be brought on the record as plaintiff in place of the deceased Maloobai and that he may also be allowed to continue the suit in forma pauperis. On the 17th of June 1910, an order was made by the Prothonotary, which, amongst other

things, directed that the said Rao Saheb Manaji Rajuji Kalewar be at liberty to continue this suit in forma pauperis.

3. The suit came on for hearing before me on the 1st of April 1911. Mr. Talyarkhan, for the defendant, asked me to try as a preliminary issue the following question, namely, whether the plaintiff can maintain or continue this suit in forma pauperis. The order of the Prothonotary of the 17th of June 1910 seems to me to be very unusual. At all events that is the first time I came across an instance where a well-to-do and a titled citizen of Bombay was allowed to continue a suit as a pauper and I allowed the arguments on that issue to stand adjourned and directed the Prothonotary to give notice to the Government solicitor and inform him that the Court would hear counsel on behalf of Government, if they wished to be heard. I have no doubt the Prothonotary in making the order was influenced by certain arguments, such as Mr. Vakil has addressed to the Court on the argument of this question at present. But it seems to me a most anomalous thing to permit the present plaintiff to continue the suit against the defendant as a pauper. All the provisions of Order XXXIII 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. Mr. Vakil admits that if his client had come before the Court and asked to institute this suit in forma pauperis, the application would necessarily have to be refused. But he contends that permission once being given to Maloobai, her

4. representative, as a matter of right, is entitled to come in and continue the suit with the same privilege that was accorded to his testatrix. This is an argument which I am not prepared to accept. 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 there seems to be no authority whatever for holding that the representative of a pauper is entitled to continue the suit of his testator or testatrix, even though admittedly he is not a pauper, simply because her testator or testatrix was a pauper.

5. In this case there is no question that the plaintiff is in well-to-do circumstances. He is not beneficially interested in the estate of Maloobai and he is carrying on this suit in the interest of the three nephews of Maloobai. I do not know whether the three nephews are paupers or not. They may be in well-to-do circumstances. They may have their rights ; they will be able to establish those rights by taking such steps as may be necessary to carry on the fight which Maloobai had begun. Here we have an executor without any personal interest in the estate of Maloobai fighting other people's battle and insisting on continuing the suit with the privilege to which Maloobai was entitled but to which he is clearly not entitled.

6. Reliance is placed upon a very ancient case-Takhuroodeen v. Kurimbux (1865) 3 W.R. 20. Since yesterday evening when the argument stood over, I have gone through all the cases that were cited before me and this is a case which I have tried to understand the reasoning of and I regret to say I have failed. The

learned Judges begin there by saying that there was no provision to be found in Chapter V, Civil Procedure Code, for an enquiry that the applicant who claimed to be the representative of an admitted pauper was a pauper or not and because there is no provision for an enquiry, their Lordships held that the man ought to be allowed to continue the suit in, *forma pauperis*. I confess I absolutely fail to grasp the reasoning of the decision. I should have thought that the absence of such provision in the Code was very strong argument for holding the other way. Whatever may be the meaning of that judgment, I am not prepared to follow it.

7. Then the case of *Arunachala v. Ayyavu* ILR(1884) Mad. 820, was cited. Looking through the case I find that that was a case in which the administratrix who sought to institute the proceedings as the administratrix of her husband in *forma pauperis* was admittedly herself a pauper. In this case the plaintiff is admittedly a man of means.

8. I find that in a case decided by Mr. Justice Starling, viz. In the matter of the will of Dawubai, ILR (1893) 18 Bom, 237, there are very clear indications that an executor or an administrator would not be allowed either to institute or maintain or continue legal proceedings, unless and until it was shown that he himself was a pauper.

9. Under these circumstances I am clearly of opinion that Rao Saheb Manaji Rajuji is not entitled to maintain this suit in *forma pauperis*.

10. I find on the issue that the present plaintiff is not entitled to maintain or to continue the suit in *forma pauperis*. Plaintiff must pay defendant's costs incurred by him from the 17th of June 1910 up to date.

11. Suit to stand over to Monday next to enable the plaintiff to consider his position. Question of the costs of Government to be considered then.

12. [Two out of the three nephews who were beneficially interested under the will of Maloobai subsequently applied to be made parties and they were ordered to be substituted plaintiffs in the place of Rao Saheb Manaji Rajuji, who declined to go on with the suit. The third nephew was ordered to be joined as co-defendant. The original plaintiff being sole executor was retained on the record being ordered to be made a defendant.

13. Government were ordered to bear their own costs. The substituted plaintiffs undertook to pay to Rao Saheb Monaji Rajuji such costs as he was ordered to pay, out of Maloobai's estate if they succeeded in recovering any.]