

(1924) 10 MAD CK 0046
In the Madras High Court

Sivagami Ammal and Another

APPELLANT

Vs

T.S. Gopalaswami Odayar and Others

RESPONDENT

Date of Decision : 20-10-1924

Acts Referred:

Citation : AIR 1925 Mad 765 : 87 Ind. Cas. 372 : (1925) 22 LW 586 : (1925) 48 MLJ 390

Hon'ble Judges : Srinivasa Aiyangar, J

Bench : Division Bench

Judgement

Srinivasa Aiyangar, J.—The question raised in this Civil Revision Petition is of considerable importance. A suit for partition was allowed to

be instituted by the plaintiff in forma pauperis. He died during the pendency of the suit leaving a will and appointing two of his sisters as executrixes.

On their application to be brought on the record as legal representatives they were made plaintiffs 2 and 3 in the suit. One of the defendants in the

suit would thereafter appear to have applied to the Lower Court under Rule 9 of Order 33, Civil Procedure Code, to dispauper the plaintiffs so

added as legal representatives and the learned Subordinate Judge directed that they should, as a condition precedent to continuing the suit, pay the

institution fee in respect of the plaint on or before a date fixed by him. Against that order this Civil Revision Petition has been preferred.

2. The questions that arise for determination are whether, when the plaintiff in a suit instituted in forma pauperis dies, his executor is liable to be

dispaupered because personally he is not a pauper and whether he is also liable to be called upon at that stage to pay the Court-fees payable on

the institution of the suit. The learned Judge in the Court below made the order following the judgment of Mr. justice Davar in the case of Manaji

Rajuji (Rao Saheb) v. Khandoo Baloo ILR (1911) B 279. It is true that that decision is a direct authority for the position. The learned vakil for the petitioners drew my attention to the statement at page 291 of the report of the judgment in that case where the learned Judge states that it was admitted before him that if the executor had come before the Court and asked to institute the suit in forma pauperis the application would necessarily have to be refused. I am unable to say why or how such an admission came to be made and how far the decision of the learned Judge was influenced by such admission. However that may be, I cannot regard the decision as correct. The real question is whether the expression "plaintiff" in Rule 9 of Order 23 of the Procedure Code when applied to the legal representative of a deceased pauper plaintiff refers to the physical person before the Court or the legal person in his representative capacity as the legal representative of the deceased pauper plaintiff. Under the General Clauses Act the word "person" includes not only individual human beings but also companies or associations or bodies of individuals whether incorporated or not. As I understand the scheme of the Law of Procedure in this country, the word "person" indicates a juridical person. In that view, it is possible that an individual human being might by reason of his possessing several juridical capacities be susceptible of possessing a number of juridical personalities. Rule 4 of Order 7 of the Procedure Code is as follows: ""Where the plaintiff sues in a representative character the plaint shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it."" Rule 5 of Order 11 runs as follows : ""No claim by or against an executor, administrator or heir, as such, 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 the 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 would clearly seem to indicate that the person contemplated even by the Law of Procedure is the juridical person. To hold otherwise would obviously lead to serious and inconvenient consequences. If the trustee of a pauper trust should not be allowed to sue in forma pauperis because he has got private means, what about the converse case of a person himself a pauper

but being possessed of sufficient means as the trustee of trust with plenty of money. Could it then be contended that because it is the same human

individual that- is possessed of sufficient means though in his capacity only as a trustee, he should not be allowed to sue as a pauper in respect of

his own personal claims? The very expression " legal representative " clearly indicates the representative character of the person brought on the

record in the place of the deceased. From Rule 3 of Order 22 it would seem that it is obligatory on the Court to allow the legal representative of

the deceased plaintiff to come on the record and proceed with the suit. In Rule 9 of Order 33 therefore if the expression " plaintiff " should be

construed as including the plaintiff's legal representative, then the means of the plaintiff can only be regarded as the means of the person who is the

legal representative in his character as such legal representative.

3. In the case of *Bhagbut Doss v. Buloram Doss* (1865) 3 WR 20 the learned Judges state as follows: ""There was really no necessity for enquiry

whether the applicant who claimed to be the representative of an admitted pauper was a pauper or not. No such provision is found in Chapter V

of the Civil Procedure Code. The Court if satisfied that the appellant was the legal representative of the deceased ought to have admitted him to

carry on the suit."" Justice Davar in the Bombay case I have already referred to animadverts against this decision and states that he was unable to

understand the reasoning of it. It seems to be that in that case the learned Judges only laid down that once a person is allowed to sue as a pauper

and he dies, it follows necessarily that his legal representative is also a" pauper in his character as such legal representative and that therefore no

inquiry is necessary or prescribed. Again in the case of *Venkatanarasayya v. Achamma* ILR (1881) M 3 Sir Charles Turner, Chief Justice, and

Mr. Justice Kindersley held that the rule of English practice which prevents a minor from instituting a suit in forma pauperis through his next friend

unless he gives proof not only that he is himself a pauper but that the next friend also is a pauper and that he cannot get any substantial person to

act as his next friend, is not to be found in or deduced from the section of the CPC and that the minor may sue as a pauper by next friend who is

not a pauper. The principle to be gathered from this decision is that regard must be had to the real juridical plaintiff in the case and not to the

person who may be merely acting for the plaintiff.

4. Again in *In the matter of the Petition of Marry Ann Bill* ILR (1884) M 390 their Lordships Sir Charles Turner, C. J., and Mr. Justice

Muthuswami Aiyar held that the CPC while it excepts certain cases does not exclude persons holding a fiduciary character from suing in forma

pauperis, and in India, where it is difficult to procure administrators, it may have been thought inexpedient to introduce the English rule. This case

has been explained by Mr. Justice Davar in his judgment already referred to on the ground that in that case the administratrix was herself a pauper.

It may have been so. But nevertheless when the learned Judges refer to persons holding a fiduciary character, I believe they were really referring to

persons holding a representative character; and when the learned Judges refer to the difficulty of procuring administrators in India as the probable

reason for the Indian Legislature having thought it inexpedient to introduce the English rule in India, it seems to me that they were referring not to

any inducement to paupers to accept the administratorship but to the immunity granted to them for not being required to pay their own moneys for

financing the litigation in respect of the estates they might undertake to represent.

5. In the case of *Perumal Goundan v. The Thirumaiarayapuram Jananukula Dhanasekhara Sanga Nidhi, Ltd.* ILR (1917) M 624 : 34 MLJ 421

Mr. Justice Kumaraswami Sastri delivering the judgment of the Court held that the liquidator of a company though not a pauper himself, may file a

suit in forma pauperis on behalf of a pauper company. In the course of his judgment the learned Judge referring to the case of *Manaji Rajuji (Rao*

Saheb) v. Khandoo Baloo ILR (1911) B 279 and also the case of *In the matter of the will of Dawubai Haji Khan, Habib Khan* ILR (1893) B 237

says that they were cases of executors suing and the learned Judge expressly refrains from expressing any opinion as to the correctness of the

decision.

6. The learned Subordinate Judge seems to have adopted the suggested distinction as final, overlooking altogether the intimation that the Court did

not wish to express any opinion as to the correctness of Mr. Justice Davar's view in the Bombay case.

7. In *Mohammad Zaki v. The Municipal Board of Mainpuri* (1918) 16 ALJ 440

Chief Justice Richards and Mr. Justice Banerjee held that while a person suing in forma pauperis becomes an insolvent, the Receiver in insolvency is entitled to continue the suit in forma pauperis as the insolvent might have done.

8. The learned vakil for the respondents referred to the case of Farzand Ali Khan v. Mir Amir Haider 26 IndCas 714 for the position that leave to sue in forma pauperis is a personal right. Undoubtedly it is so. But the mere fact that it is a personal right is no reason for holding that his legal personal representative loses that right.

9. I consider that the Bombay case of Manaji Rajuji (Rao Saheb) v. Khandoo Baloo ILR (1911) B 279 has been wrongly decided and I prefer to follow the Madras cases already referred to by me and the undoubted principles underlying them. It may be that under Rule 9 of Order 33 the legal representative of the deceased plaintiff is sometimes shown to have come into possession in his character as legal representative and out of the estate of the deceased of sufficient means within the meaning of Clause (b); then undoubtedly he too may be dispaupered even as the original plaintiff might have been.

10. The learned Subordinate Judge also refers to the fact that the two executrixes are also legatees under the will. It appears that there are other legatees as well. I do not, however, see the relevancy of the reference to the petitioners' executrixes being also legatees. It is not shown or sought to be argued that in their capacity as executrixes or legatees they are in possession of sufficient means. It follows therefore that the learned Subordinate Judge was wrong in dispaupering the petitioners and ordering them to pay the Court-fee payable on the plaint.

11. It is very doubtful whether even after a plaintiff is dispauperised he could be required to pay the Court-fee in respect of the plaint which has been by the order of Court admitted to be filed without any fee. The right of the Court to levy Court-fees from the plaintiff in such a case would, under the procedure laid down only be by the decree. My attention has been drawn to Rule 11 of Order 7, Civil Procedure Code. I cannot consider that rule as aptly worded or ever intended to refer to the case of a dispaupered plaintiff or to any such stage in the suit. In the absence of any clear provision in Order 33 giving retrospective effect to the order

dispaupering, I cannot see how in reason a dispaupered plaintiff could be required to pay at a later stage what might have been demanded from him at an earlier stage had he not been allowed to proceed as a pauper.

However, it is not necessary for the purpose of the present case to decide that point, because I have already held that the order of the Lower

Court is wrong on a more fundamental ground.

12. I therefore set aside the order of the Subordinate Judge in the Court below and direct that the petitioners be allowed to continue the suit in

forma. The respondents will pay the costs of the petitioners in this suit.