

(1930) 32 BOMLR 1343

Bombay High Court

Case No: O.C.J. Suit No. 1551 of 1928

R.M. Vora

APPELLANT

Vs

The Japan Cotton
Trading Co. Ltd.

RESPONDENT

Date of Decision: March 28, 1930

Acts Referred:

Civil Procedure Code, 1908 (CPC) " Order 33 Rule 2, Order 33 Rule 4, Order 33 Rule 6#Limitation Act, 1908 " Section 3

Citation: (1930) 32 BOMLR 1343

Hon'ble Judges: Blackwell, J

Bench: Single Bench

Judgement

Blackwell, J.

This is a suit for damages for wrongful dismissal. In the written statement, the defendants submit inter alia that the suit is

barred by the law of limitation. By a consent Judge's order, dated August 26, 1929, a trial of the preliminary issue as to limitation was ordered.

That issue is before me.

2. The plaintiff was dismissed by the defendants on June 30, 1925. Accordingly the institution of a suit would be within time provided that the suit

was commenced not later than June 30, 1928.

3. As appears from an endorsement of one of the assistants in the Prothonotary's office, the plaintiff presented a petition for leave to sue in forma

pauperis to the Court on June 28, 1928. The petition bears thereon an endorsement signed by the acting Prothonotary that it was to be interpreted

and declared gratis, and the date of that endorsement is June 30, 1928. The petition itself was signed and solemnly declared on July 3, 1928. It

further appears from an endorsement on the petition that the investigation into the question whether leave should be granted was made on July 24,

1928, that leave to sue as a pauper was granted on that day, and the petition was then filed on that day.

4. The question for decision turns upon the proper construction to be placed on the explanation to Section 3 of the Indian Limitation Act, which is

as follows:-

A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer; in the case of a pauper, when his application for leave to

sue as a pauper is made.

5. Mr. Jhabwalla, who appears for the plaintiff, contends that the application for leave to sue as a pauper was made on June 28, the date upon

which the petition, although not then signed and verified, was lodged and presented in the Prothonotary's office. On the other hand, Mr. Lalji, who

appears for the defendants, contends that there was no application for leave to sue as a pauper until July 3 when the petition was signed and

declared.

6. The procedure in regard to suits by paupers is governed by Order XXXIII of the Civil Procedure Code, to some of the rules of which it is

necessary to refer. Rule 2 is in the following terms:-

Every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits: a schedule of any moveable or

Immovable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto; and it shall be signed and verified in the

manner prescribed for the signing and verification of pleadings.

Mr. Lalji relies strongly on this rule. He contends that there is no application for permission to sue as a pauper unless it has been signed and verified

in the manner prescribed for the signing and verification of the pleadings; and as this was not done in the present case until July 3, 1928, he submits

that the suit is barred by limitation.

7. Rule 4 of Order XXXIII is as follows:--

Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant...

That rule appears to throw upon the officer, to whom the application is presented, the duty of examining whether it is in proper form and duly

presented.

8. The material portion of Rule 5 for the present purpose is as follows :-

The Court shall reject an application for permission to sue as a pauper- (a) where it is not framed and presented in the manner prescribed by Rules

2 and 3...

Here again, the duty is cast upon the Court of ascertaining whether an application for permission to sue as a pauper is or is not in accordance with

Rule 2. Hence, even if it is not in accordance with Rule 2, and is rejected for that reason, it is nevertheless-as it seems to me-an application for

permission to sue which the Court must consider as such within the meaning of Rule 5 of Order XXXIII.

9. Rule 6 provides that where the Court sees no reason to reject the application on any of the grounds stated in Rule 5, it shall fix a day of which

notice must be given, for receiving evidence, and so forth. Here again, what is the application which the Court must consider ? It appears to me to

be an application for permission to sue presented by a pauper, even though it might be summarily rejected for non-compliance with either Rule 2 or

Rule 3. It is nonetheless an application for leave to sue as a pauper, though it may not so far have been signed and verified as required by Rule 2 of

Order XXXIII.

10. Then Rule S provides that where an application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and

the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except as therein provided.

11. Mr. Lalji has argued, quite properly, that a plaint could not be presented unless it was signed and duly verified, and a document purporting to

be a plaint, which was not so duly signed and verified, would not be a plaint at all, and if presented, could not constitute the institution of the suit.

Rule 8, in my opinion, draws a pointed distinction between an application for permission to sue as a pauper and the institution of a suit by a plaint;

and, in my opinion, it contemplates that so long as the petition is not summarily rejected, but is ultimately admitted and duly signed and verified, the

suit shall be deemed to have been duly instituted from the time at which the application for permission to sue as a pauper was presented to the

Court.

12. I now turn to Rule 200 of the High Court Rules (Rule 214 of the High Court Rules, 1930). That is in these terms:-

An application for permission to sue, to proceed with a suit, or to defend, a suit as a pauper, shall be made on petition setting out concisely in

separate paragraphs the facts and the relief prayed; such petition shall be presented to the Prothonotary in Chambers, who shall, on satisfying

himself that the provisions of Order XXXIII of the CPC have been complied with and not otherwise, order it to be interpreted and declared gratis.

That rule contemplates a petition being presented to the Prothonotary. It does not contemplate verification until the Prothonotary has considered it,

and it provides in terms that no charge shall be made for declaration if the Frothonotary is satisfied that the provisions of Order XXXIII have been

complied with. Inasmuch as one of the provisions of Rule 2 is verification and signature, it cannot be contemplated by Rule 200 that that i.

provision should already have been complied with. Otherwise " there would have been no point whatever in requiring by Rule 200 the

Prothonotary to consider the petition as an application for permission to sue and to permit the latter requirement of Rule 2 of Order XXXIII to be

complied with gratis.

13. Rule 201 of the High Court Rules provides for a notice for investigation of pauperism being issued on the petition being filed in the

Prothonotary's office. That deals with a later stage after the Prothonotary has considered the application for leave to sue as a pauper, and has

permitted it to be interpreted and declared gratis, and has ultimately granted permission for leave to sue, In my opinion, Rule 201 in no way affects

the question which I have to determine, namely, what is the proper meaning to be attached to the expression in the explanation to Section 3 of the

Indian Limitation Act in the case of a pauper "" when his application for leave to sue as a pauper is made.

14. Mr. Jhabwalla has been good enough to draw my attention to one or two authorities. In *Dhavle v. Samvat* (1867) 4 B. H. C. R. 39 it was held

that a pauper suit commences for the purpose of limitation on the day when the petition to sue in forma pauperis is presented to the Court under s

299 of the Code then in force, and not on the day when, the application being granted, it is numbered and registered u/s 308. Similarly, in the case

before me, it seems to me that the application for leave to sue as a pauper was made when the petition was lodged in the Prothonotary's office on

June 28 for the purpose of enabling the Prothonotary to determine whether he would permit it to be interpreted and declared gratis. In my opinion,

the signature and verification could properly be made at a subsequent day after the Prothonotary had considered the application, and the absence

of signature and verification in the first instance does not prevent the petition as presented from being properly regarded as an application within the

explanation to Section 3 of the Indian Limitation Act.

15. Mr. Jhabwalla also referred me to *Ambika Partap Singh v. Dwarka Prasad* ILR (1907) All. 95. In that case, a suit was brought by mortgagees

to enforce a mortgage against an adopted son of a Hindu widow, who, shortly before that mortgage was executed, had applied for leave to sue in

forma, pauperis for recovery of his adoptive father's estate. The mortgage in suit had been executed on January 17, 1894. The application for

permission to sue in forma pauperis had been made on June 27, 1893. The application was not granted until May 12, 1894. It was contended that

there was no suit pending within the meaning of Section 52 of the Transfer of Property Act until leave to sue had been granted and the suit had

been numbered and registered. The Court refused to accept that argument. In the course of the judgment, their Lordships said at p. 102 :-

It appears to us that so soon as the defendant filed his application for leave to sue, there was a contentious suit, or at least a contentious

proceeding, pending within the meaning of the section, and it is clear that that suit or proceeding was at the time being actively prosecuted .

It was pointed out by Mr. Lalji that there was nothing in this case to show whether the application for permission to sue when made had not at that

time been signed and verified as required by Order XXXIII, Rule 2. That is true. But, in my opinion, the signing and verification are not essential in

order to constitute an application for permission to sue. The other rules of Order XXXIII, in my opinion, plainly negative Mr. Lalji's contention,

inasmuch as they contemplate the possibility of summary rejection of an application, because it does not comply with Rule 2. In my judgment, all

that Rule 2 involves is that before permission can finally be given for leave to sue as a pauper, and before the notice contemplated by Rule 6 of

Order XXXIII is issued, the Court must be satisfied that the requirements of Rule 2 have at that time been complied with. The fact that they had

not, at an earlier stage, been complied with, in my opinion, does not prevent the document in the form of a petition, presented to the Prothonotary

for consideration, being an application for permission to sue as a pauper within the explanation to Section 3 of the Indian Limitation Act.

16. Accordingly, I answer the preliminary issue as to whether the suit is barred by limitation in the negative. I direct that the defendants shall pay to

the plaintiff the costs of this issue, and that the plaintiff" shall pay to Government any court-fees in connection with the trial of this issue, which the

plaintiff would have had to pay had he not been permitted to sue as a pauper.

17. It was provided by the consent Judge's order dated August 26, 1929, that in the event of the issue as to limitation being decided in favour of

the plaintiff, the chamber summons dated August 9, 1929, should be made absolute with costs. Accordingly, I make it absolute with costs to be

paid by the defendants to the plaintiff, and I make a further order for payment to Government by the plaintiff of any court-fees which he would

have had to pay in connection with that summons had he not been permitted to sue as a pauper. I direct that the defendants shall have up to July 3

next as the time within which they are to deliver particulars of the alleged negligence, and I order that in the event of their failing to furnish the said

particulars, the suit is to be set down for an ex parte decree on one of the daily boards for want of a proper written statement.