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(1974) 02 BOM CK 0019

Bombay High Court (Nagpur Bench)

Case No: C.R.A. No. 72 of 1969

Santoksingh and another		APPELLANT
	Vs	
Radheshyam and another		RESPONDENT

Date of Decision: Feb. 13, 1974

Acts Referred:

- Bombay Court Fees Act, 1959 - Section 40, 5, 6
- Civil Procedure Code, 1908 (CPC) - Section 149

Citation: (1974) MhLj 663

Hon'ble Judges: P.S. Shah, J; M.N. Chandurkar, J

Bench: Division Bench

Advocate: N.M. Dharaskar, for the Appellant; J.M. Dharaskar for Opponent No. 1 and Opponent No. 2 was not represented, for the Respondent

Final Decision: Dismissed

Judgement

M.N. Chandurkar, J.
This revision application has been referred to the Division Bench in view of the divergence of judicial view on the question as to whether the legal representatives of a plaintiff who was granted permission to sue in forma pauperis can continue the suit without payment of court-fee in case he is possessed of sufficient means to pay the required court-fee.

2. One Beant Kuwar widow of Balwantsingh had filed an application for permission to sue the defendants in forma pauperis and the relief claimed against the defendants was the declaration of the plaintiff''s title to the suit property which consisted of a house and a decree for possession and mesne profits against original defendants Nos. 1 to 3. This application was allowed on 2-11-1965 and the application was registered as a regular civil suit on that date. A revision application challenging the order of the trial Court granting permission to the original applicant to file a suit in forma pauperies came to be rejected. However, on 29-8-1967 Beant

Kuwar died and the present applicants Nos. 1 to 3 applied to the trial Court on 25-11-1967 for being brought on record as legal representatives. This application was allowed on 22-7-1968. After the present applicants were substituted as the legal representatives of deceased Beant Kuwar, an objection was taken on behalf of the defendants that the suit could not be allowed to be continued by the legal representatives unless they paid the requisite court-fee. It was contended on behalf of the legal representatives before the trial Court that since the plaint had already been registered after the original plaintiff was adjudged as a pauper, the legal representatives could continue the suit without being required to pay the court-fee. The trial Court took the view that the legal representatives could not continue the suit without cither proving that they were paupers or paying the requisite court-fee. The trial Court had relied on the decision in Rao Saheb Manaji Rajuji Kalewar v. Khandoo Boloo I L R 36 Bom. 279 and Jato Singh and Another Vs. Mt. Malti Kuer, . The trial Court did not accept the view taken in Smt. Kalawati Devi Vs. Chandra Prakash and Others, . The trial Court accordingly directed the legal representatives to pay the requisite court-fee within 15 days from the date of the order or present an application for permission to continue the suit as paupers within the said period. This order is now challenged by the applicants-legal representatives in this revision application.

3. Shri N. M. Dharaskar, appearing on behalf of the applicants, contends that in a case where a person is allowed to sue as a pauper, the suit must be taken to be instituted on the date of the application, and since maintaining a pauper suit was not a personal right of the pauper and the legal representatives of a pauper brought on record and the deceased pauper were two distinct persons in the eye of law, the Court has no jurisdiction to ask the legal representatives to pay the requisite court-fee after the death of the pauper plaintiff. In short, the contention is that once an application made under Order 33, rule 1, of the CPC is allowed by the Court under Order 33, rule 8, the suit must be allowed to continue in the same manner even though the legal representatives of the deceased pauper plaintiff were in a position to pay the court-fee. The argument that after the death of the pauper plaintiff the Court has no power to direct the legal representative to pay the requisite court-fee is founded on the decision of the Allahabad High Court in Kalavati Devi''s case (cited supra). The learned counsel for the applicants has also referred us to the decision of the Supreme Court in Jugal Kishore Vs. Dhanno Devi (Dead) by Lrs., . We shall refer to these authorities in due course. The decision in Kalawati Devi''s case takes a view contrary to the view of this Court in Raosaheb Manaji Rajuji Kalewar v. Khandoo Baloo (cit. sup.). In that case this Court has observed that the provisions of Order 33 of the CPC 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 and that the privilege of maintaining a pauper suit is a personal privilege granted to people who have no means of carrying on or continuing litigation. The consideration of the question on which admittedly

there is a divergence of judicial view requires initially the consideration of the nature of the right or the privilege which is provided under Order 33 of the Code of Civil Procedure. Rule 1 thereof provides that subject to the provisions in Order 33, any suit may be instituted by a pauper, and in the Explanation to rule 1 it is stated that a person is a ''pauper'' when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit. Rule 2 provides for the contents of the application which a person who wants to sue in forma pauperis has to make and it is provided that every application shall contain the particulars required in regard to plaints in suit : a schedule of any movable 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. This application has to be presented by the applicant in person unless he is exempted from appearing in Court, in which case the application could be presented by an authorised agent who is in a position to answer all material questions relating to the application and who can be examined in the same manner as the party represented by him might have been examined if such party had attended in person. Rules 4, 5, 6 and 7 refer to the procedure for the hearing of the application after notice to the opposite party. Under rule 8 it is provided:
Where the 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 that the plaintiff shall not be liable to pay any court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit.

The provisions of rules 2 and 8 thus show that where on an inquiry made by the Court with regard to the question whether the person who has filed an application for permission to sue in forma pauperis is not possessed of sufficient means to enable him to pay the requisite court-fee the Court comes to a positive finding in that behalf, the plaintiff or the applicant is absolved from the liability to pay the requisite court-fee. So far as the present case is concerned, the payment of court-fee on a plaint is governed by the provisions of the Bombay Court-fees Act, 1959. Sub-section (1) of section 5 of this Act provides:

No document of any of the kinds specified as chargeable in the first or second schedule to this Act annexed shall be filed, exhibited or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless in respect of such document there has been paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document.

The amount of court-fee paid on plaints in several kinds of suits are specified in Schedule II to the Act. u/s 40 it is provided that no document which ought to bear a

stamp under the Act shall be of any validity, unless and until it is properly stamped. The general rule, therefore, in the case of suits is that the plaint cannot be treated as a valid plaint unless the requisite amount of court-fee has been paid as provided for in the Court-fees Act. The provisions of Order 33 of the CPC are in the nature of an exception to this general rule. The exception is made in the case of a person who has been found not to be possessed of sufficient means to enable him to pay the court-fee prescribed by law for the plaint in a suit which he proposes to institute. Rule 8 of Order 33 thus absolves a pauper plaintiff from the liability to pay court-fee which is created by the provisions of the court-fees Act. The provisions of the same rule also show that what was filed in the nature of an application for permission to sue in forma pauperis and which by the requirements of rule 2 was to contain all the particulars which are required to be given in plaints in suits and which are required to be signed and verified in the manner prescribed for signing and verifying pleadings is treated as a plaint. The document which is filed by a pauper under Order 33, rule 1, is thus a composite document. It is a plaint and it is in addition an application seeking permission of the Court to sue the opponents without payment of court-fee on the ground that the applicant is not possessed of sufficient means to pay the requisite court-fee. The stage of proceeding with the suit arises only after the Court is satisfied that the application for permission to sue in forma pauperis is well founded. Initially, therefore, the inquiry made by the Court is not with regard to the merits of the claim made in the plaint but the inquiry is made with regard to the incapacity alleged by the plaintiff to pay the requisite court-fee. The proceeding is, therefore, distinctly in two parts. Unless the first part of the inquiry, namely, with regard to the in capacity of the plaintiff to pay the requisite court-fee is over, the occasion for proceeding with the suit does not arise. In a given case where the Court comes to the conclusion that the plaintiff has failed to prove his incapacity to pay court-fee, the provisions of rule 8 of Order 33 cannot come into operation and no question would, therefore, arise of fictionally treating the application as a plaint in the suit. The application would then merely remain as a plaint with inadequate court-fee, and unless the applicant makes good the deficit court-fee, the Court will be bound to act in accordance with Order 7, rule 11, of the Code of Civil Procedure.

4. It is now well settled that the application which is presented by a plaintiff under Order 33, Rule 1 of the CPC is a composite document. In Stuart Skinner alias Nawab Mirza v. William Orde I L R 2 All. 241 the Privy Council was dealing with the question whether an application to be allowed to sue in forma pauperis can be converted into a suit as between the parties at any subsequent date by filing the institution fee, and if this is done, from what date should the institution of the suit be calculated. That was a case in which before an order allowing the pauper application was passed and the question of pauperism was still under inquiry and investigation, the plaintiff converted the matter into a regular suit by payment of court-fee, and the contention was that in computing limitation the computation must be made from the date of the conversion of the application into the suit. Referring to the provisions of the CPC

of 1859 in section 300 which was analogous to the provisions of Order 33, Rule 1 of the present Code of Civil Procedure, the Privy Council took the view that a petition to sue in forma pauparis contains all that a plaint is required to do and "it contains in itself all the particulars the statute requires in the plaint, and, plus these, a prayer that the plaintiff may be allowed to sue in forma pauperis". The Privy Council also took the view that the plaint remained a plaint from the original date when it was filed and becomes free from the objection of an improper stamp when the correct stamp has been placed upon it. This is no doubt a case under the Code of 1859, but as pointed out by Hidayatullah J. (as he then was) in Channulal v. Shama Ramcharan 1955 N L J 545, Order 33 of the present CPC almost reproduces the law on the subject of pauper suits contained both in the Codes of 1859 and 1882 and there had been no substantial change and the general purport of the law is the same. It was observed in that case that "what their Lordships observed in the Privy Council case still holds good so far as the interpretation of Order 33 is concerned." In paragraph 5 of the judgment, referring to the scheme of Order 33, it was pointed out:

The provisions for suits by paupers are contained in Order 33. Under Order 33 ''a suit'' can be commenced by a pauper, and there is an Explanation which says who the pauper is. It is, however, stated in the Order that though the application for permission to sue in forma pauperis shall contain all the particulars required in regard to plaints, it shall be deemed to be a plaint only if the question of pauperism is held in favour of the pauper. This does not mean that there is only an application till the pauperism is established and there is really no plaint. It only means that action on the plaint as such cannot be taken till the pauperism is established. As we read the Order, we are of opinion that in pauper suits, as their Lordships pointed out, there is a plaint plus an application for permission to sue as a pauper, that is to say, a plaint without the necessary court-fee and an inquiry has to be made if the court-fee cannot be paid. Once that is assumed and accepted, the rest is clear. There is a suit pending though it is kept in abeyance till the question of pauperism is decided.

5. In Dhulipalla Brahamaramba Vs. Dhulipalla Seetharamayya and Others, a Division Bench of the Madras High Court took the view, following the decision in Stuart Skinner''s case (cit. supra), that an application for leave to sue in forma pauperis is a composite document, a plaint coupled with a prayer to be allowed to sue without payment of court-fee.

6. We have referred to these authorities in order to bring out the fact that while the application itself is directed to be treated as a suit as having been filed on the day on which the application was filed, the condition precedent for such a course is a positive finding that the person who presented the application was a pauper. The privilege of filing a plaint without the requisite court-fee by way of exception to the general rule is given only to a person in whose favour the Court comes to a finding under Order 33, Rule 8, that in view of his financial circumstances he is unable to

pay the requisite court-fee. This relief and the privilege to that extent is clearly, in our view, a personal relief to the pauper concerned.

7. Mr. N. M. Dharaskar on behalf of the applicants has, however, drawn our attention to the decision of the Supreme Court in Jugal Kishore v. Dhanno Devi (cit. supra) in which certain observations from the earlier decision of the Supreme Court in Vijay Pratap Singh Vs. Dukh Haran Nath Singh and Another, have been quoted with approval. In Vijay Pratap Singh''s case a petition for leave to sue in forma pauperis for the declaration of his title to Ayodhya Raj and for possession and mesne profits was filed by Vijay Pratab Singh, a minor, by his next friend. This petition was rejected by the trial Judge because in his view it disclosed no cause of action. The father of minor Vijay Pratap Singh, who was the second defendant in the suit, applied for being transposed as a petitioner but that application was also rejected. The trial Judge took the view that "no useful purpose would be served" by transposing Ram Jiwan Misir as co-plaintiff when the application filed by the plaintiff was held to be defective and liable to be rejected under Order 33, Rule 5 (d) of the Code of Civil Procedure. A revision application filed by the father also came to be rejected by the High Court. While setting aside the order of the High Court, the Supreme Court made the observations relied upon by the learned counsel for the applicants. These observations are:

We are also of the view that the High Court was in error in holding that by an application to sue in forma pauperis, the applicant prays for relief personal to himself. An 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 fee prescribed by the Court Fees Act. If the claim made by the applicant that he is a pauper is not established the application may fail. But there is nothing personal in such an application. The suit commences from the moment an application for permission to sue in forma pauperis as required by Order 33 of the CPC is presented, and Order 1, Rule 10 of the CPC would be as much applicable in such a suit as in a suit in which court-fee had been duly paid. It is true that a person who claims to join a petitioner praying for leave to sue in forma pauperis must himself be a pauper. But his claim to join by transposition as an applicant must be investigated; it is not liable to be rejected on the ground that the claim made by the original applicant is personal to himself.

Now, it is no doubt true that the Supreme Court has observed that there is nothing personal in a pauper application and that a claim for transposition as a co-plaintiff cannot be rejected on the ground that the claim made by the original applicant is personal to himself. But it is obvious that the relief or the claim which has been referred to as not being personal to the pauper is the relief or the claim made in the suit itself. These observations cannot be read as meaning that the prayer which a pauper plaintiff makes for permission to sue in forma pauperis is not a prayer in respect of a privilege or concession which the pauper is making on grounds which

are personal to himself. Indeed, the provisions of Order 33, Rule 8, read with the provisions of Order 33, Rule 1, clearly indicate that while the application is treated as a plaint, the inquiry has to be only with reference to the condition of the pauper applicant himself, and in our view, neither the observations in Vijay Pratap Singh''s case nor the decision in Jugal Kishore''s case could be construed as meaning that it was held by the Supreme Court that the prayer for permission to sue in forma pauperis was not personal to the pauper alone. The prayer for permission to sue in forma pauperis has to be distinguished and contrasted with the prayer seeking relief in regard to the subject-matter of the suit. That the concession that the plaintiff is exempted from payment of court-fee is personal is also clear from the provisions of Order 33, Rule 9, of the Civil Procedure Code, which provide for dispaupering the plaintiff in the circumstances stated therein. The Court can pass an order dispaupering the plaintiff (1) if the plaintiff is guilty of vexatious or improper conduct in the course of the suit ; (2) If it appears that his means are such that he ought not to continue to sue as a pauper, or (3) if he has entered into any agreement with reference to the subject-matter of the suit under which any person has obtained an interest in such subject-matter. There can be no doubt that all these circumstances are personal to the plaintiff. Once we come to the conclusion that the concession of being exempted from payment of the required court-fee is personal to the pauper plaintiff, then it is difficult to see how this concession which could be granted only after making an elaborate inquiry contemplated by Order 33 of the Code could automatically be availed of by the legal representatives of the deceased pauper plaintiff as a matter of course. When a legal representative applies for permission to be brought on record in place of the deceased plaintiff, he applies for being brought on record not as a person suing for exemption from payment of the court-fee but as one who is entitled to relief in respect of the claim made by the pauper plaintiff in the suit.

8. In our view, therefore, when a pauper plaintiff dies, while the suit remains pending, the person who was entitled to the additional concession to file a suit without payment Of court-fee being no longer in existence, the plaint in the suit becomes one which is deficitly stamped and a defect is created in the suit by the death of the pauper plaintiff in the nature of the plaint being rendered invalid in view of the provisions of sections 6 and 40 of the Bombay Court Fees Act, 1959. In any case, it is always permissible for a Court to take notice of the fact that the plaint which has been accepted by it is dificitly stamped. Such an occasion may arise on a discovery of the fact that though the plaint has been accepted and acted upon, it has been wrongly accepted and acted upon in clear contravention of the provisions of the Court Fees Act. Such an occasion may also arise by virtue of a subsequent event. The plaint may become insufficiently stamped if by an amendment any additional claim is allowed to be made, and in such a case even though the plaint was validly accepted, it would become invalid by virtue of its being deficitly stamped on account of a subsequent event. One such event, in our view, is the death of a

pauper plaintiff. The death of the pauper plaintiff may not affect the time of the institution of the suit, but if as a result of the ceasing of the condition precedent for the suit being prosecuted without payment of court-fee a plaint becomes invalid, the Court, in our view, has the only alternative of asking a person who wants to continue the suit to pay the requisite court-fee or to prove to the Court that he also deserves the same privilege which the deceased pauper had, namely, of prosecuting the suit without payment of proper court-fee. In our view, there is ample power in section 149 of the CPC to make such a demand for the requisite amount of court-fee. Section 149 of the CPC provides:

Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee, and upon such payment the document, in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance.

It is significant to note that u/s 149 the power to demand the adequate court-fee on a document on which the court-fee is payable given to the Court could be exercised at any stage of the proceedings. If such court-fee is paid then the document has the same effect which it would otherwise have had if such fee had been paid in the first instance. Therefore, the plaint in the instant case having become invalid by virtue of its being understamped, the Court had power u/s 149 to make a demand at the stage at which the legal representatives want the suit to be proceeded with.

9. It cannot be seriously disputed that if the legal representatives so desire, they can avail themselves of the concession provided for in Order 33 ; but that again will have to be done after going through the entire inquiry contemplated by Order 33, though the suit will still remain pending and the provisions of Order 33, Rule 1, will not by the terms thereof become applicable in a case like the instant one. There is, however, nothing to prevent the legal representatives from showing that they are also not in a position to pay the requisite court-fee.

10. It is no doubt true that there is no provision to be found in Order 33 of the CPC which provides for a case where the pauper plaintiff dies. In our view, no such express provision was necessary at all because once the circumstances in which the document was exempted from payment of the court-fee provided by the Court Fees Act cease to exist, the general provisions of the Court Fees Act and the CPC will come into operation. There are no doubt provisions in section 40 of the Court Fees Act which provides that if any document is through mistake or inadvertence received, filed or used in any Court or office without being properly stamped, the presiding Judge or the head of the office, as the case may be, or, in the case of the High Court, any Judge of such Court, may, if he thinks fit, order that such document be stamped as he may direct; and on such document being stamped accordingly, the same and every proceedings relative thereto shall be as valid as if it had been

properly stamped in the first instance. These provisions in section 40 of the Court Fees Act are analogous to the provisions in section 149 of the CPC ; but while the CPC would be applicable only to Civil Suits and matters dealt with by civil Courts, the second part of section 40 of the Court Fees Act is a provision of general nature.

11. The question which then further arises is : what is to happen if the required court-fee is not paid by the persons who want to prosecute the suit? Here again, the argument is that there is no provision in Order 33 itself as to what is to happen if court-fee is not paid. In our view, no such specific provision was really necessary. When the plaint in a suit is underdamped and the plaintiff, who wants to prosecute the suit, has failed to comply with the order u/s 149 of the Code the plaint will have to be dealt with as provided for in Order 7 of the Code. Such a plaint has to be rejected under Rule 11(c) of Order 7. The relevant part of Rule 11 provides:

The plaint shall be rejected in the following Cases:-

* * * * * *

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so.

* * * * * * * *

Order 7, Rule 11, therefore, is ample authority for the proposition that where the plaintiff fails to make good the deficit court-fee in spite of the time being granted to him u/s 149 of the Code, the Court has the power to reject the plaint.

12. The decision in Rao Saheb Manaji Rajuji''s case laid down that "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" and that "the privilege of maintaining a pauper suit is a personal privilege granted to people who have no means of carrying on or continuing litigation". We agree with this view. We are not in this case concerned with the further view which the learned Judge has taken on the question whether an executor without any personal interest in the estate of the deceased plaintiff pauper could not continue the suit of his testator or testatrix in forma pauperis even though admittedly he was not a pauper, simply because his testator or testatrix was a pauper.

13. It is no doubt true that the decision of the Allahabad High Court in Kalawati Devi v. Chandra Prakash supports the view which the learned counsel for the applicants has been canvassing before us. There was a difference of opinion between B. Mukerji and J. K. Tandon JJ. on the question whether the legal representative of the deceased pauper plaintiff who had applied to be added as a party to the suit could be allowed to continue the suit without proving that she was a pauper. The legal representative had just mentioned in her application that she was also a pauper but

she did not make any formal prayer in the application that she be either allowed to sue as a pauper or to continue the suit as a pauper. The Court ordered that the applicant be added as a legal representative and proceeded into an inquiry whether she was a pauper and held that she was not a pauper and, therefore, she was directed to pay the requisite court-fee. When the matter came before Raghubar Dayal J., on a construction of rules 9 and 11 of Order, 33, he took the view that the legal representative, when added as a party on the death of the pauper plaintiff, cannot be called upon to pay the court-fee on the plaint. It appears that the argument which the learned Judge was considering was that a legal representative could also be disappeared if he had the means to continue the suit. In paragraph 15, referring to this contention the learned Judge observed:

The contention is that the legal representative when added as a party to the suit becomes the plaintiff and, therefore, becomes liable to such action which could be taken against the original plaintiff in view of the aforesaid rules 9 and 11 and as the original plaintiff could be dispaupered and could be called upon to pay the court-fee, the legal representative could also be dispaupered if he has means to continue the suit and can thereupon be called upon to pay the necessary court-fee.

I do not consider these contentions to be sound and am of opinion that the word ''plaintiff'' in these rules should be taken to refer only to the original plaintiff and not to his co-plaintiffs, who are added as parties later on or to his legal representative, who is added as a party after his death. It appears to me that it is only the person who has been held to be a pauper who can be dispaupered.

When a legal representative has not been held to be a pauper no question arises of disappearing him. If the legal representative cannot be dispaupered under rule 9, the provisions of rule 11 authorising the Court to order the plaintiff to pay court-fee will not come into play.

The learned Judge proceeded to observe in paragraph 22 :

If a person proves himself to be a pauper, he in view of rule 1, Order 33 CPC has a right to institute a suit without payment of court-fee. This right was exercised by Ganga Prasad. The suit has been instituted. The suit must proceed as a suit instituted in the ordinary manner i.e. instituted by presentation of a plaint sufficiently stamped with the requisite court-fee. No demand about the payment of court-fee can be made during the progress of the suit instituted on a plaint sufficiently stamped with court-fee.

Of course, provisions have been made for the realisation of necessary court-fee from a pauper in certain circumstances. Rules 10, 11 and 11 (i) of Order 33, CPC deal with them. When these provisions exist there does not appear to be any reason why the matter of realisation of court-fee be hurried up during the pendency of the suit merely because the original plaintiff happened to die.

(23) I am, therefore, of the opinion that neither the provisions of rule 9 nor of rule 11 necessarily lead to the conclusion that the legal representative, when added as a party on the death of the pauper plaintiff, must be called upon to pay the court-fee on the plaint.

After referring to section 6 of the Court Fees Act, the learned Judge further observed in paragraph 25 :

In the absence of any other provision it would appear that in case the deficiency in court-fee is not made good by the plaintiff or the appellant the case will proceed and the deficient court-fee would be realised at a later stage under any other legal process available to the trial Court, to the appellate Court or to the Government. It is, therefore, nothing unusual if the plaintiff be dispaupered and yet he is not called upon to pay the court-fee during the pendency of the suit, but an order about the payment of the court-fee made after the close of the proceeding.

14. Now, while we agree with the view of the learned Judge that the provisions with regard to the dispaupering of the plaintiff in rule 9 of Order 33 are applicable only in the case of the plaintiff who has been adjudged as a pauper under rule 8, with respect to the learned Judge, we do not agree with the proposition that in the case of a person being dispaupered, or in the case of a legal representative, he cannot be called upon to pay court-fee during the pendency of the suit and that an order about the payment of court-fee could be made only after the close of the proceedings. Rule 11 no doubt provides that where the plaintiff fails in the suit or is dispaupered, or where the suit is withdrawn or dismissed, for reasons specified in clauses (a) and (b) thereof, the Court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper. Rule 14 also provides for recovery of the amount of court-fee ordered to be paid under rule 11 but having regard to the provisions of the court-fees Act it appears to us that when the plaintiff is dispaupered, the plaint before the Court becomes deficitly stamped. The consequence of the failure of the person concerned to make good the deficit court-fee is no doubt not stated in Order 33, but one has then to revert back to the general provisions dealing with a suit in which the plaint has been under-stamped. We are also not inclined to agree with the view of the learned Judge that the provisions of Order 7, rule 11, are attracted only at the preliminary stage and not at any later stage of suit. Indeed, in our view, clause (c) of rule 11, sufficiently indicates that an occasion for the exercise of the power under that rule could arise at any stage of the suit having regard to the provisions of section 149 of the Code of Civil Procedure. It is u/s 149 that the Court has discretion to grant time for making up the deficit court-fee. If this could be done at any stage of the suit, then having regard to the provisions of section 40 of the Bombay Court Fees Act, we fail to see why the power under rule 11 (c) of Order 7 could not be exercised by the Court at any stage of the proceedings. Therefore, with respect to the learned Judge we are not inclined

to follow the decision in Kalawati Devi''s case which is heavily relied upon on behalf of the applicants.

15. The view which we have taken that a legal representative cannot continue the suit initially filed by a pauper plaintiff either without paying the necessary court-fee or without satisfying the Court that he himself is entitled to sue as a pauper is supported by some of the decisions of other High Courts. In Annapurna Bai v. Balaji Sonar 1946 N L J 272 the Nagpur High Court has taken the view that there can be substitution of a legal representative in the place of a party who dies pending his application for permission to sue in forma pauperis and that the legal representative is in reality substituted for the deceased party in his capacity as the plaintiff and not as one suing for exemption from payment of court fee, and after substitution he may pay the requisite court-fee, or if he is unable to pay, he has to apply to the Court for permission to sue as a pauper. In Jato Singh v. Malti Kuer, following the decision in Rao Saheb Manaji Rajuji v. Khandoo Baloo, it was held that where a person obtains permission to institute a suit in forma pauperis but dies during the pendency of the suit his legal representative cannot continue the suit until he has shown that he is himself a pauper and has obtained leave to continue in that capacity. In Brahamaramba v. Seetharamayya a Division Bench of the Madras High Court held that where an applicant for leave to sue in forma pauperis dies during the pendency of his application, his legal representative can be brought on the record and allowed to continue the suit on payment of the requisite court-fee. In Padmanabhan v. Subramoniam AIR 1953 TC 67 a Division Bench of that High Court has held that from rules 1 and 2 of Order 33 it is clear that the presentation of an application for permission to sue in forma pauperis amounts to institution of a suit, and where the pauper applicant dies his legal representative cannot continue the pauper application as the pauperism is personal to the applicant, but the legal representative can be permitted to continue the suit on payment of the requisite court-fee. In In Re: A.S. Radakrishna Iyer, the Madras High Court held that the representative of a pauper cannot continue the suit in forma pauperis, if not a pauper himself and the decision in Raosaheb Manaji Rajuji''s case was followed. In Lalit Mohan Mandal v. Satish Chandra Das I L R 33 Cal. 1163 a Division Bench of the Calcutta High Court held that the right to sue as a pauper, being a personal right, cannot survive in the legal representative of the deceased applicant.

16. The learned counsel for the applicants has referred us to a decision in Ammakannammal and Another Vs. V.K. Damodara Mudaliar and Others, in which it was held that a legal representative of a deceased plaintiff can continue the suit in forma pauperis and as in the case of a next friend or guardian of a minor, the question as to whether the legal representative of a deceased plaintiff can continue the suit in forma pauperis depends not on the property possessed by the legal representative or the next friend or guardian personally in their own right ; that they are two different persons in the eye of law and there is no justification for holding that the legal representative of the deceased plaintiff should not be allowed to

continue the suit as a pauper. Relying on this decision it was contended that the legal representative and the pauper were two different persons in the eye of law and, therefore, the legal representative could not be required to pay the court-fee. Now, the facts in the case for decision before the learned Judge show that the legal representative was not claiming the right of suit in his own right as a legal representative as such, and we are not concerned in the instant case with the question whether where the legal representative does not claim any personal right in the suit property and where it is not his case that the right to sue does not survive to him personally he could be made to pay the court-fee. Since that question does not arise for consideration in the instant case, we refrain from expressing any opinion on that point.

17. Before we conclude we must make it clear that we have proceeded to decide this revision application on a statement made by the learned counsel for the applicants before us that none of the applicants was a pauper and that they were possessed of sufficient means to pay the requisite court-fee. In the view which we have taken, we sec no error in the order of the learned Judge of the trial Court and the revision application is, therefore, rejected. Costs will be costs in the suit. The applicants are granted two Months time to pay the deficit court-fee as prayed for by the counsel for the applicants.