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AIR 1944 Bom 63 : (1943) 45 BOMLR 1002

Bombay High Court

Case No: Civil Revision Application No. 198 of 1942

Vamanrao Lallubhai — APPELLANT

Vs

Pranlal Bhagwandas — RESPONDENT

Date of Decision: Feb. 22, 1943

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 149
- Limitation Act, 1908 - Section 3

Citation: AIR 1944 Bom 63 : (1943) 45 BOMLR 1002

Hon'ble Judges: Sen, J

Bench: Single Bench

Judgement

Sen, J.

The petitioner made an application in the Court of the First Class Subordinate Judge, Surat, for leave to sue in forma pauperis. In his application he gave the particulars required in regard to plaints in suits and filed a schedule of the moveable and Immovable property belonging to him and the estimated value thereof and he signed and verified the same, as required by Order XXXIII, Rule 2, Civil Procedure Code, 1908. Notice was issued to the Government Reader and the opponents under Order XXXIII, Rule 6. The learned Subordinate Judge found that, though the petitioner had no means to pay the court-fees, his application did not disclose any subsisting cause of action. He, accordingly, dismissed the application with costs, apparently under Order XXXIII, Rule 7(3). The petitioner then filed the present civil revision application, alleging inter alia that the opponents having admitted his pauperism the lower Court was wrong in going into the question as to what would be the effect of the previous proceedings and in holding : that the suit would be barred by res judicata. He, accordingly, prayed (1) that the lower Court''s order be set aside and (2) that he be allowed to proceed with his suit on payment of proper court-fees. Mr. Justice N.J. Wadia passed the following order :-

Rule, limited to the question whether time should have been given to pay proper court-fees.

This rule has now come up for hearing. It seems to me clear that Mr. Justice N.J. Wadia has rejected the application so far as the prayer for the setting aside of the lower Court''s order is concerned and that it has been admitted only for the consideration of the question whether thereafter the petitioner should be allowed to pay proper court-fees and to proceed with his suit in the ordinary manner.

2. The learned advocate for the petitioner has contended that this Court should exercise its discretion in his favour u/s 149 of the Civil Procedure Code. That section reads thus :-

Whether 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.

3. This application raises a question on which there is a conflict of views in the different High Courts, In some of the decisions it has been held that the Court has power to treat an application for leave to sue as a pauper which has been refused as an unstamped plaint and to permit the requisite court-fee to be paid within a time to be fixed by the Court (Bank of Bihar Limited v. Sri Thakur Ramchanderji Maharaj ILR (1929) Pat. 439, Jagadeeshwaree Debee v. Tinkarhi Bibi ILR (1935) Cal. 711 and Kali Dasi Dasi v. Santosh Kumar Pal [1939] 1 Cal. 112 while in other cases it has been held that the application can only be treated as a plaint if it is granted, but that if it is refused, the only remedy open to the applicant is that provided by Order XXXIII, Rule 15, i.e. the filing of a fresh suit after first paying the costs incurred by the Provincial Government and by the opposite party in opposing his application for leave to sue as a pauper. [Aubhoya Churn Dey Roy v. Bissesswari ILR (1897) Cal. 889 Biswa Nath Das v. Khejer Ali Molla [1939] 2 Cal. 68, Chunna Mal v. Bhagwant Kishore [1937] All. 22 and Lala Mistry v. Ganesh Mistry. ILR (1937) Pat. 281

4. In Keshav Ramchandra v. Krisknarao Venkatesh ILR (1895) 20 Bom. 500 which was followed by Keshavlal Hiralal Vs. Mayabhai Premchand, both of which decisions were given before the enactment of the present Section 149, it was held that on the application to sue as a pauper having been refused or rejected there was no proceeding pending which could be continued and kept alive by the payment of court-fees, and that on the rejection of such an application the only course open to the applicant was that declared in the old Section 413, viz., to institute a suit, the date of the institution of that suit for the purposes of limitation being the actual date thereof.

5. Apart from the authorities, it is to be observed that under Order XXXIII, Rule 2, the application for permission to sue as a pauper should contain the particulars required in regard to plaints in suits, but that in spite of this it is referred to not only in Rule 2 but also in the subsequent rules as an, " application." It is only Rule 8 that lays down that 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", etc. So that apart from the provisions of Rule 8, an application for permission to sue as a pauper is throughout regarded as an application and not as a plaint. That being so, prima facie it cannot be said that the court-fee that is required to be paid on a plaint has not been paid " with respect to such an application" within the meaning of Section 149. As to Order XXXIII, Rule 15, again, apart from the authorities, the intention of the Legislature appears to be that when an order has been made refusing to allow the applicant to sue as a pauper, the liberty that is given to him to " institute a suit in the ordinary manner" is the only remedy then open to him. The rule first says that an order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; and then it proceeds :-

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 applicant''s right to institute a suit in the ordinary manner is thus subject to the condition of prior payment by him of costs incurred by the Government and the opposite party, and it seems to me prima facie that his liberty to sue, so limited, is intended to be the only course open to him on his application to sue as a pauper being refused.

6. Coming now to the authorities, nearly all the cases on this point have referred to and either relied on or distinguished the case of Stuart Skinner alias Nawab Mirza v. William Orde ILR (1879) All. 241. It is to be noted that that case was decided at a time when, as remarked by their Lordships, "it presented a case which was not provided for by the CPC ", neither Section 149 nor the latter part of Rule 15 of Order XXXIII being then in existence. In that case a person, being at the time a pauper, had made an application for leave to sue as a pauper, but subsequently, pending an inquiry into his pauperism, had obtained funds which enabled him to pay the court-fees, and his petition was allowed upon such payment to be numbered and registered as a plaint; and the question arose whether the suit should be deemed to have been instituted from the date when he filed his pauper petition or from the date on which the payment of court-fees was made. Their Lordships held that the petition contained all the particulars that the statute required the plaint to contain plus a prayer that the plaintiff might be allowed to sue in forma pauperis, and that as the petitioner had given up only so much of his prayers as related to his being allowed to sue as a pauper, the decision of the trial Court, accepting the payment of court-fees and numbering and registering the application as a plaint, was correct. Their

Lordships remarked (p. 250) :-

Although the analogy is not perfect, what has happened is not at all unlike that which so commonly happens in practice in the Indian Courts, that a wrong stamp is put upon the plaint originally, and the proper stamp is afterwards affixed. The plaint is not converted into a plaint from that time only, but remains with its original date on the file of the Court, and becomes free from the objection of an improper stamp when the correct stamp has been placed upon it.

They held that the petition should accordingly be considered as a plaint from the date on which it had been filed, as otherwise very great injustice might be done, for nothing more unjust to the plaintiff could have happened than that he should have been deprived, by having done an act which was in itself meritorious, of the benefit which he would have had if he had been found to be a pauper. It is to be observed that in that case there was no refusal of the applicant''s petition to be allowed to sue as a pauper, and that the order enabling him to pay the necessary court-fees was passed pending an inquiry into his pauperism. That, however, is not the case here. In this case the lower Court has refused to allow the applicant to sue as a pauper under Order XXXIII, Rule 7(3). The question, therefore, arises whether on such refusal the provisions of Order XXXIII, Rule 15, do not come into operation, enabling him to resort to the only remedy provided, viz. to institute a suit in the ordinary manner, as held in Keshav Ramchandra v. Krishnarao Venkatesh ILR (1895) 20 Bom. 508 and Keshavlal Hiralal Vs. Mayabhai Premchand, . It has been contended that the application to sue as a pauper has not been finally rejected as the matter is still pending in the present civil revision application, and that N.J. Wadia J.''s order limiting the rule to the question whether the applicant should be allowed to pay the court-fees is only a stage in the consideration of the said application wherein final orders are still to be made. It is clear that N.J. Wadia J. has rejected the prayer that the order of the lower Court should be set aside and that, whatever further may be done in the present application, that order cannot be interfered with. But in any case it seems to me that the provisions of Order XXXIII, Rule 15, are incompatible with the view that the Court may even simultaneously (1) admit the applicant to the benefit of Section 149 and (2) reject the application for leave to sue as a pauper, or confirm such rejection by the trial Court under Order XXXIII, Rule 7(3). If this view were adopted, it would in my judgment entitle an applicant to evade the provision occurring in Rule 15 that before the applicant can proceed as a plaintiff in the suit he must first pay the costs incurred by the Government and by the opposite party in opposing the application. It seems to me that, apart from the construction of the language in Rule 15, this is an additional ground for holding that the view taken in Keshav Ramichandra v. Krishnarao Venkatesh is right, though at the date of that decision Section 149 had not been enacted, viz. that on the petitioner''s application to sue as a pauper having been rejected the only course open to him is to institute a suit, the date of the institution of that suit for the purposes of limitation being the actual date thereof. That means that in such an event the petitioner would not be entitled to the benefit of the provisions subsequently enacted in Section 149. If it was

open to the petitioner after his application to sue as a pauper had been refused to have recourse to some remedy different from and less onerous than that provided by Order XXXIII, Rule 15, he would certainly resort to that remedy in preference to the remedy of instituting a fresh suit in the ordinary manner as provided by Rule 15 and thus avoid the payment of the costs of the Government and the opposite party; and the language in which the second half of Order XXXIII, Rule 15, has been worded clearly shows, in my opinion, that it could not have been the intention of the Legislature to leave any remedy open to a person whose application to sue as a pauper has been refused which would enable him to pursue his suit as an ordinary plaintiff in a manner different from what is there provided. In this view, it seems to me, with respect, that the view which has prevailed in some High Courts that it is open to the Court to allow the applicant the benefit of Section 149 and simultaneously refuse his application to sue as a pauper, or the view that even after the refusal of the application to sue as a pauper the application which contains material particulars of plaint can be regarded as a plaint or a potential plaint and can be allowed to be converted into a regular plaint by the payment of court-fees, is not warranted by the provisions of Order XXXIII and Section 149.

7. In Jagadeeshwaree Debee v. Tinkarhi Bibi ILR (1935) Cal. 711 it was held that the document mentioned as an application for permission to sue as a pauper in Order XXXIII, Rule 2, is a plaint required to be filed in a suit and that the refusal by the Court to grant the prayer of the plaintiff to sue as a pauper and the termination of the proceedings in the matter of granting or refusing leave to sue as a pauper does not amount to rejection of such plaint. Their Lordships remarked (p. 714) :-

If the position under the law is, as it must be held to be the case, that the plaint was before the Court, and it was a document, on which proper court-fees had not been paid by virtue of a refusal of the prayer of the plaintiff to sue as a pauper, the provisions of Section 149 of the CPC could come to the assistance of the plaintiff.

This decision purported to follow Stuart Skinner v. William Orde (supra), but it seems to me that it went beyond the Privy Council''s decision in that the Privy Council does not appear to have held that the document mentioned in Order XXXIII, Rule 2, was "a plaint required to be filed in a suit" (page 713) and in that whereas in Skinner''s case the application for permission to sue as a pauper had not been rejected or refused, such had been the case in Jagadeeshwaree''s case. Besides, this case does not appear to notice the conflict between its interpretation of Section 149 and the provisions of Order XXXIII, Rule 15. The case of Kali Dasi Dasi v. Santosh Kumar Pal [1939] 1 Cal. 112. followed Jagadeeswaree Debee v. Tinkarhi Bibi (supra) and their Lordships said that they saw no sufficient reason to differ from the said authority. Their Lordships also remarked that in all the cases in which the " narrower view " had been taken actual hardship had been caused to the plaintiff-applicant and that sometimes the Court had been constrained to lay the blame on the Legislature. The case of Biswa Nath Das v. Khejer Ali Molla [1939] 2 Cal. 68 followed the earlier decision in Aubhoya Churn Dey Roy v. Bissesswari ILR (1897) Cal. 889. There it was held that the purpose of Order XXXIII, Rule 15, was not to

allow an unsuccessful applicant to treat his pauper application as a plaint with effect from the date on which it was originally filed and that it allowed him to institute a suit in the ordinary manner in respect of the right which he claimed, but only after he had paid the costs due to the Government and the opposite party. The view there adopted of the document in question was that when the application was rejected there was no document before the Court in respect of which the Court in its discretion u/s 149 could allow any deficiency for, court-fees to be made good. Aubhoya Churn Dey Roy v. Bissesswari (supra) was a case where an application for permission to sue in forma pauperis had been rejected and the full court-fee was paid for a suit for the same relief, and it was held that the suit must be considered, for the purposes of limitation, to have been instituted only after the payment of court-fee, and not at the date of the presentation of the petition to sue as a pauper. This decision was based on the then Section 413, corresponding to the present Rule 15 of Order XXXIII.

8. In Chunna Mal v. Bhagwant Kishore [1937] All. 22 the two questions referred were :

(1) Whether while rejecting the application for permission to sue as a pauper the court can u/s 149 of the CPC allow the applicant to pay the requisite court fee and treat the application as a plaint?

(2) Whether after rejecting the application for permission to sue as a pauper, the court can by a separate and subsequent order allow the applicant to pay the requisite court fee u/s 149 of the Cade of Civil Procedure and treat the application as a plaint?

Their Lordships held (Allsop J. dissenting) that while refusing under Order XXXIII, Rule 7(3), an application for permission to sue as a pauper the Court could not u/s 149 allow the applicant to pay the requisite court-fee and treat the application as a plaint, but that if the application had been rejected under Order XXXIII, Rule 5, the Court had the power to allow the applicant to pay the requisite court-fee and treat the application, as a plaint. On the second question they held that in neither case could the Court by a separate and subsequent order allow the applicant to pay the requisite court-fee under s, 149 and treat the application as a plaint. Their Lordships negatived the contention that an application for permission to sue as a pauper could be regarded as a composite document, both a plaint and an application, so that on an application being refused there still remained the plaint to be proceeded with requiring another order for its disposal. They held that there remained nothing pending on such refusal to which Section 149 could thereafter be applied. They were distinctly of opinion that when a Court refused to allow the applicant to sue a pauper, then the provisions would be governed solely by the provisions of Section 15, and that then it would no longer be open for the applicant to say that the plaint was still on the record as the suit was still pending, so that he was entitled to pay the court-fee u/s 149. With this view I have already indicated my agreement. In Lala Mistry v. Ganesh Mistry ILR (1937) Pat. 281 it was held that the Court had undoubtedly the power to permit an application to sue in forma pauperis to be converted into a plaint on payment of court-fees during the pendency of the application, and that such power could be

exercised at the time of rejecting the application, that is to say, if in one single order the Court declined leave to sue as a pauper and also gave time for filing court-fees, that would be within the discretion allowed by Section 149, but that once an order finally disposing of the application for leave had been passed, it was no longer open to the Court to give any further time so as to revive the proceedings already completely disposed of and to permit them to be resumed, It seems to me that in arriving at this conclusion Rowland J., who delivered the main judgment, was influenced largely by the view taken by the dissenting judgment of Allsop J. in Chunna Mal''s case. With respect, however, I am unable to agree with the view that the Court can simultaneously in a single order decline leave to the applicant to sue as a pauper and also give him time for the payment of proper court-fees u/s 149; it seems to me that in that decision the provisions of Order XXXIII, Rule 15, were not properly appreciated nor was the inconsistency noticed between allowing an applicant the advantages of the provisions of Section 149 and the requirement that on his application to sue as a pauper having been refused his remedy was to institute a suit in the ordinary manner in, respect of the right he claimed on payment of the costs incurred.

9. Mr. H.D. Thakor has contended, in the first place, that the remedy provided by Rule 15 is not the only remedy open to the applicant on his application to sue as a pauper being refused, and, secondly, that even if that be the only remedy, the expression " shall be at liberty to institute a suit in the ordinary manner " includes in its meaning " shall be at liberty to proceed u/s 149," i.e. merely by payment of the court-fees. It seems to me that neither of these contentions can be allowed to prevail. I have already sufficiently commented on the first contention. With regard to the second contention it seems to me clear that such institution of the suit must be made by the filing of a fresh plaint and not by converting the so-called potential plaint contained in the application to sue as a pauper into a suit by payment of the necessary court-fees. If that had been the intention of the Legislature, one would have expected that when Section 149 was enacted, i.e. in 1908, some reference to it would have found place in Order XXXIII, Rule 15, and there would have been a different expression in the place of the words, "shall be at liberty to institute a suit in the ordinary manner in respect of such right."

10. Reliance has also been placed on the wording of an explanation to Section 3 of the Indian Limitation Act, which reads thus :-

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; and, in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator.

It seems to me that this explanation is intended to show when limitation begins to run on a suit being instituted, and not to affirm that an application for leave to sue as a pauper is tantamount to the filing of a suit. In the present case I have held that the applicant is not entitled to convert his original application into a suit by payment of the proper court-fees.

That being so, this argument fails.

11. It seems to me, therefore, that in this case on the first prayer of the applicant, viz, that the lower Court"s order must be set aside, being rejected, it is not possible to grant the second prayer, viz. that he should be allowed to pay the court-fees with the necessary consequences u/s 149.

12. The rule must be discharged with costs.