

JUGAL KISHORE

v.

DHANNO DEVI (DEAD) BY L.RS.

August 13, 1973

(D. G. PALEKAR AND A. ALAGIRISWAMI, JJ.)

Civil Procedure Code., Order 33, Rule 2 and 3, Order 7 and 8—Sec. 149 Civil Procedure Code—Pauper application subsequently withdrawn—Enlargement of time by Court for payment of court fee—Subsequent payment of court fee relates back to the presentation of pauper application and the suit is deemed to be presented from the date of the pauper application.

The respondent, on January , 1948, presented on application under Order 33, Rule 2 and 3 of the C.P.C. for permission to sue as a pauper praying for the relief of possession of a house to which she had an undisputed title. On 26-2-1949, the plaintiff's pleader moved the Court for treating the pauper application as a plaint and for giving three months time for the payment of court fee. On default by the respondent, the court dismissed the suit but restored the same after the plaintiff on November 12, 1949, paid the court fee and the costs of the defendant. The appellant contended that the application to sue as pauper being dismissed on January 18, 1949, there was no proceeding pending before the court thereafter and, therefore, the restoration of the proceeding and the payment of Court fee were without any authority of law and hence the suit was barred by limitation. Assuming, it was contended that the Court had authority to treat the application to sue as a pauper as a plaint, the application had been converted into a plaint on November 12, 1949 and on that date, the suit would be barred by time. After losing in trial court and the High Court, the appellant agitated the matter in the Supreme Court.

Dismissing the appeal,

HELD :—(1) Since the suit under section 26 of the C.P.C. may be instituted not merely by presentation of a plaint but also in such manner as may be prescribed, the presentation of the application by pauper u/s 33 would amount to institution of the suit. [363E—F]

Vijay Pratap Singh v. Dukh Haran Nath Singh and Another, [1962] 2 Suppl. S.C.R. 675, relied upon.

(2) A suit by a pauper or a person claiming to be a pauper must be regarded as instituted on the date of the presentation of the application for permission to sue in *forma pauperis*. [364E—F]

(3) Where the application is granted under Order 33 Rule 7 and 8, the application is regarded as the plaint from the date of its presentation, where before the final disposal of the application to sue as a pauper, the plaintiff offers to pay the court fee, treating the application as plaint, or the Court agreeing to treat it as a plaint enlarges the time for the payment of the court fee, the application must be regarded as a plaint instituted on the date when the application was presented. [364F—H]

Stuart Skinner v. William Orde, 2 Allahabad, 241 (P.C.) *Devendar Kumar Bharti v. Mahanta Raghuraj Bharti*, A.I.R. 1955 Allahabad, 154, (F.B.), cited with approval.

(4) In the present case, the actual order passed by the Court on July 18, 1949 was not an order rejecting the plaint but rejecting the application to sue as a pauper. The said order had become otiose since the respondent did not want to proceed as a pauper. There was, in fact, no rejection of the plaint. U/s. 149 C.P.C., the Court can enlarge the time for the payment of the court fee and the effect of the payment is, as if, the court fee is paid on the date of the presentation of the plaint. The suit must, therefore, be regarded as filed on January 2, 1949 and was within limitation. [366D—F]

A CIVIL APPEAL NO. 1326 OF 1967 : Appeal by special leave under article 136 of the Constitution of India from the judgment and decree dated the 31-3-1963 of the Allahabad High Court in *First Appeal* No. 92 of 1955.

B *S. T. Desai, M. Natesan, A.T.M. Sampath and E.C. Agarwala* for the appellant.

M.C. Chagla, Lalit Kumar Gupta and A.G. Ratnaparkhi, for the respondent No. 1 (a).

The Judgment of the Court was delivered by

C PALEKAR, J. The appellant is the son and legal representative of the original defendants to the suit, Kedarnath and Chanda Devi. The respondents are the legal representatives of the deceased plaintiff, Dhanno Devi.

D On January 2, 1948 Bhanno Devi presented an application under Order 33, Rules 2 and 3 of the Code of Civil Procedure for permission to sue as a pauper in the Court of the First Civil Judge, Kanpur. The plaintiff part of the application prayed for the relief of possession of a house situated in the city of Kanpur on the allegation that the house was of the ownership of one Budhu Lal—her father. Budhu Lal died in 1918 and on his death his widow Jumma Devi inherited the property. On Jumma Devi's death on December 26, 1935 Dhanno Devi, as the daughter, was entitled to succeed to the property. The defendants were in possession and were falsely refusing to yield up their possession to Dhanno Devi and hence she was required to file the suit. A very large amount had to be paid as court fee which Dhanno Devi was not in a position to pay and hence she prayed that permission may be given to her to sue as a pauper. The last date for filing the suit was December 26, 1947 but as the courts were closed for X' mas vacation the application had been presented to the court on January 2, 1948

E *i.e.* on the re-opening of the court and thus it was claimed the suit was within limitation.

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The defendants disputed the plaintiff Dhanno Devi's title contending that she was not the daughter of Budhu Lal. They also contended that the suit was barred by limitation.

G The Trial Court negatived the contentions of the defendants and decreed the suit. That decree was confirmed by the High Court of Allahabad by its Judgment dated March 31, 1965 in *First Appeal* No. 292/1955. The present appeal by special leave is directed against the judgment of the High Court.

H Since both the courts held that Dhanno Devi had title to the house and the defendants had none, learned counsel for the appellant did not, rightly, press the contention with regard to Dhanno Devi's title to the property in suit. The only point pressed before us was with regard to limitation.

The point of limitation arises in this way. As already stated the suit had been instituted on January 2, 1948 by an application for permission to sue as a pauper under Order 33 C.P.C. If that date is regarded as the date on which the suit was properly instituted then there is no dispute that the plaintiff's suit is in time. But what happened was that on February 26, 1949, before the question of pauperism was formally decided by the court, the plaintiff's pleader asked for three months time to pay the court fee on the application by treating it as a plaint. The court granted this prayer and adjourned the case from time to time to enable her to pay the court fee. The last date so fixed was July 15, 1949. On that day the plaintiff did not appear, nor did she pay the court fee and consequently on July 18, 1949 the following Order was passed by the court :

"Court fee still unpaid. The applicant did not press his application to sue in forma pauperis but offered to pay court fee. He did not do so till now.

ORDER

The application to sue as a pauper is dismissed with costs."

On August 13, 1949 the plaintiff filed an application for restoration of the case under Order 9 Rule 9 C.P.C. After hearing the defendants the court passed an order that the plaintiff should first pay the court fee and the costs of the defendants whereupon the application for restoration would be considered. Accordingly on November 12, 1949 the plaintiff paid the court fee and the defendant's costs. By his order dated April 15, 1950 the learned Judge held that the plaintiff had sufficient cause for not paying the court fee in time and restored the proceeding to the file after setting aside the order referred to above.

When the court fee was paid on the application *i.e.* on November 12, 1949, the suit would have been barred by time because, as already stated, the last date for filing the suit was January 2, 1948. It is contended on behalf of the appellant that on the application to sue as a pauper being dismissed on January 18, 1949, there was no proceeding pending before the court thereafter and, therefore, the restoration of the proceeding and the payment of court fee were without authority of law and hence the suit was barred by limitation. Assuming, it was contended, that the court had authority to treat the application to sue as a pauper as a plaint, the application had been converted into a plaint on November 12, 1949 and on that date the suit would be barred by time.

Section 26 of the Civil Procedure Code provides how a suit is to be instituted in a Civil Court. Every suit, as stated in that section, shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. On January 2, 1948 the plaintiff had presented an application for permission to sue under Order 33 C.P.C. It was not a suit instituted by the presentation of a plaint. But the suit was obviously instituted in a manner prescribed by Order 33. Rule 1 of Order 33 provides—

A “Subject to the following provisions any suit may be instituted by a pauper”.

The manner of such institution is provided in rules 2 and 3 which are as follows :

B “2. Every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits; 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.”

C 3. Notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorised agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.”

D In short, according to rules 1, 2 and 3 a suit by a pauper is instituted when the application for permission to sue as a pauper containing the necessary particulars of a plaint is presented to the Court by the applicant in person or by his authorized agent. In the present case it is not disputed that this was done on January 2, 1948.

E There has been a conflict of judicial opinion on the question whether a suit could be held to have been instituted when a petition to sue as a pauper was presented. One view is that until permission is granted under rule 7 of Order 33 there is no suit instituted. The other view is that since a suit under section 26 may be instituted not merely by the presentation of a plaint but also in such manner as may be prescribed the presentation of the application by the pauper under Order 33 would amount to institution of the suit. This latter view

F is accepted by this Court in *Vijay Pratap Singh v. Dukh Haran Nath Singh and Another.*(¹). In that case Vijay Pratap Singh filed a petition for leave to sue in *forma pauperis* for the declaration of his title to Ayodhya Raj. He claimed that on the death of the widows of Maharaja Man Singh, the estate devolved on his grand father, Ganga Dutt, who died in 1942. The estate was thus ancestral property in the hands of Ramjivan, the father of the plaintiff, who thus got interest

G in the same by reason of his birth. Ramjivan was made one of the defendants to the suit. The plaintiff's petition to sue as a pauper was rejected by the Subordinate Judge under Order 33 rule 5(d) on the ground that the allegations in the application did not show a cause of action. It is to be noted that the court had not decided the issue about his pauperism because that could be done only under Rule 7(3) after trial of the issue under rule 6. On such rejection Ramjivan—the

H father applied to the court to be transposed as the petitioner but that application was also rejected. This court held that the rejection of both these applications was improper because, in the first case, the

(1) [1962] (2) Suppl. S. C. R. 675.

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 court had to see under rule 5(d) whether the allegations made in the petition showed a cause of action and the court had no power to enter upon a trial of the issues affecting the merits of the claim at that stage. As regards Ramjivan's application for transposition under Order 1 Rule 10 it was held that the application was wrongly rejected because such an application could have been legally entertained by the court because the suit had already been instituted. It was pointed out that an application to sue in *forma pauperis* is but a method prescribed by the Code for institution of a suit without payment of court fee and, therefore, the suit commences from the moment the application for permission to sue in *forma pauperis*, as required by Order 33 of the Code, is presented. Dealing with the point the court observed at page 685.

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 "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 O.33 of the Code of Civil procedure is presented, and O.1, r.10, of the Code of Civil Procedure would be as much applicable in such a suit as in a suit in which court fee had been duly paid."

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 This Court has, therefore, finally resolved the conflict by declaring that the suit by a pauper or a person claiming to be a pauper must be regarded as instituted on the date of the presentation of the application for permission to sue in *forma pauperis* as required by rules 2 and 3 of Order 33 Civil Procedure Code.

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 As regards limitation for such a suit instituted by a pauper, the provisions of rule 8 of Order 33 are relevant. That rule provides :

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 "Where the application is granted, it shall be numbered and registered, and shall be deemed to be 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."

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 In view of this provision there is no dispute that when permission to sue as a pauper is granted by the court under rule 7 of that Order, the petition or application must be regarded as a plaint filed on the day when the application was presented to the court.

There is, however, divergence of opinion with regard to the legal position arising out of an order passed under rule 7(3) *refusing to*

A allow the applicant to sue as a pauper. One view is that on such a refusal, the suit, which was already instituted, does not come to an end, because, the application by which the suit was commenced is a composite document comprising a plaint and a prayer to sue in *forma pauperis* and, therefore, when the latter alone is refused, the suit does not come automatically to an end. The proceedings can still continue if court fee is paid on the application treated as a plaint, in which case the date for limitation would be the date on which the application was presented to the court. See, for example, *Bhanu v. Dalmia and Co.*⁽¹⁾

B The other view is that when the application to sue as a pauper is refused, that puts an end to the application, which is not a composite document, and the court has no power thereafter to permit the defunct application to be revived as a plaint by accepting court fee. See, for example *Chunna Mal v. Bhagwant Kishore.*⁽²⁾

C How far this view can be sustained after this Court's decision in *Vijay Pratap Singh v. Dukh Haran Nath Singh*, referred to above, is a matter which we are not called upon to decide in the present appeal. Nevertheless, it must be noted that there is almost a consensus of opinion that where, before the formal disposal of the application to sue as a pauper, the plaintiff offers to pay the court fee treating the application as his plaint, or, the court, agreeing to treat it as a plaint, enlarges the time for payment of the court fee, the application must be regarded as a plaint instituted on the day when the application was presented. See : *Stuart Skinner v. William Orde*⁽³⁾, *Devender Kumar Pharti, v. Mahanta Raghuraj Bharti*⁽⁴⁾.

D This proceeds on the view that the court has power to permit the application to sue in *forma pauperis* to be treated as plaint and to extend the time, if necessary, for payment of court fee on the document, in view of the fact that it contains all the necessary particulars for the purpose of a plaint.

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In the appeal before us the plaintiff had offered to pay court fee on the application regarded as a plaint and the court had agreed that this may be done. There is nothing in Order 33 Civil Procedure Code which prevents an applicant from telling the court that though he had prayed for permission to sue in *forma pauperis*, he is now in possession of funds and would like to pay the court fee on the application treating it as a plaint. Thereby, in effect the applicant withdraws his prayer for permission to sue as a pauper and requests the court not to apply the provisions of Order 33 to him. If the court agrees, and, generally in practice the court does agree, to treat the application as a plaint, in view of the fact that it contains all the necessary particulars required in a plaint, there could be no objection to the suit being treated as one instituted by the presentation of a plaint. In the present case, as already stated, even before the issue regarding pauperism came for trial and decision the plaintiff offered to pay the requisite fee on the application treating it as a plaint and the court agreed to that course. The plaintiff prayed for three months time to pay the court fee by her application dated February 26, 1949 and the court acceded to that request and adjourned the proceedings from time to time on several

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(1) A.I.R. 1959 M. P. 169.

(2) A.I.R. 1936, Allahabad, 584.

(3) 2 Allahabad, 241 (P. C.)

(4) A. I.R. 1955 Allahabad, 154 (F. B.)

occasions. The plaintiff was finally granted time to pay the court fee until July 15, 1949 but unfortunately the plaintiff did not attend the court on that day, nor was the court fee paid. Hence the court passed the Order dated July 18, 1949 expressly saying that the application to sue as a pauper is dismissed with costs.

Now the above Order dismissing the application to sue as a pauper was, to say the least, otiose. The plaintiff had already withdrawn his prayer for permission to sue as a pauper and the court had agreed to the withdrawal of that prayer and to treat his application as a plaint. From that time onward the suit which had been properly instituted could only proceed on the basis that the suit was as good as a suit filed on a plaint. And in such a case it was open to the court under section 149 C.P.C. to order the plaintiff to pay the deficit court fee and enlarge the period to pay such court fee. If the court fee is not paid, the only order that the court could have passed was to reject the plaint under Order 7 rule 11 (c) C.P.C. The rejection of a plaint is a decree and appealable as such. The question, therefore, is whether in this case there was any rejection of the plaint for non-payment of the deficit court fee. The actual order passed by the court on July 18, 1949 does not show that the plaint had been rejected. What the court did was to reject the plaintiff's application to sue as a pauper which was a redundant order because the prayer to sue as a pauper had been withdrawn much earlier and the application to sue as a pauper, as such, did not survive for being dismissed on July 18, 1949. In law, therefore, there was no rejection of the plaint in the suit and, therefore, the suit continued to remain on the file. While it continued on the file the plaintiff applied to the court and paid the court fee as ordered. On the acceptance of the court fee by the court, the document, namely, the plaint would by virtue of Section 149 C.P.C., have the same force and effect as if such fee had been paid in the first instance viz. on the date it was presented to the court i.e. January 2, 1948. In our view therefore, the suit must be regarded as properly filed on January 2, 1948; and that being admittedly the last date on which the suit could have been legally filed to avoid the bar of limitation, the plea of limitation made on behalf of the defendants must fail. In the result the appeal fails and is dismissed with costs.

S.B.W.

Appeal dismissed.