CIVIL REVISION.

Before Jack and Mitter JJ.

1932

Dec. 7.

RAJENDRANATH PARAMANIK

v.

TUSHTAMAYEE DASEE.*

Pauper—Leave to sue as pauper—Refusal, meaning of—Second application, to sue in forma pauperis, *when barred—Civil Procedure Code (Act V of 1908), O. XXXIII, rr. 5, 6, 7, 15.*

Where an order rejecting a previous application to sue in *forma pauperis* was made *ex parte* for default in payment of process fee, when the case had not reached the stage contemplated by Order XXXIII, rule 7 of the Code of Civil Procedure, such an order cannot be regarded as an order refusing to allow the applicant to sue as a pauper within the meaning of Order XXXIII, rule 15 of the Code, so as to bar any subsequent application of the like nature.

A subsequent application to sue as a pauper is not barred unless the previous application had been refused after contest under Order XXXIII, rule 7, when only the stage of " refusal," as contemplated under Order XXXIII, rule 15 was arrived at.

Khondkar Ali Afzal v. *Purna Chandra Tewari* (1), *Ranchod Morar* v. *Bezanji Edulji* (2) and *Atul Chandra Sen* v. *Peary Mohan Mookerjee* (3) distinguished.

Krishnamoorthy v. *Ramayya* (4), *Kedar Nath Roy* v. *Tula Bibi* (5) and *Ma Sein* v. *Ma Kya Hmyin* (6) followed.

CIVIL RULE obtained by the (defendant) objector.

The facts of the case and relevant portions of arguments of counsel in the Rule appear fully in the judgment.

Manmathanath Ray and *Urukramdas Chakrabarti* for the petitioner.

Heeralal Chakrabarti for the opposite party.

*Civil Revision, No. 1147 of 1932, against the order of Bamacharan Chakrabarti, First Subordinate Judge of Howrah, dated July 4, 1932.

(1) (1924) 40 C. L. J. 188.
(2) (1894) I. L. R. 20 Bom. 86.
(3) (1915) 20 C. W. N. 669.
(4) (1926) I. L. R. 50 Mad. 63.
(5) (1906) 10 C. W. N. civ.
(6) (1926) I. L. R. 4 Ran. 245.

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JACK J. This Rule was issued on the opposite party to show cause why an order giving leave to the plaintiff to sue as a pauper should not be set aside and why the plaintiff's suit should not be dismissed.

The ground, on which this Rule has been pressed, is that the court below ought to have held that the application of the plaintiff opposite party was barred under the provisions of Order XXXIII, rule 15 of the Code of Civil Procedure.

It appears that a previous application to sue as a pauper had been made in 1930 and that application was dismissed for default, because the process fee paid for the issue of notices on the opposite party in that application as required under Order XXXIII, rule 6 was insufficient. It is urged, therefore, that under the provisions of Order XXXIII, rule 15 the present application is barred. The wording of rule 15 of Order XXXIII is as follows: "An order "refusing to allow the applicant to sue as a pauper "shall be a bar to any subsequent application of the "like nature" to be made "by him in respect of the "same right to sue." The wording of this rule corresponds with the wording of Order XXXIII, rule 7, which says: "On the day so fixed," namely, by rule 6, "or as soon thereafter, as may be "convenient, the court shall examine the witnesses, "(if any) produced by either party," and hear arguments and then shall "either allow or refuse the "application to sue as a pauper." On the other hand the wording in Order XXXIII, rule 5 is that the court shall reject the application for permission to sue as a pauper in the circumstances mentioned therein. *Prima facie*, therefore, it would appear that the subsequent application was not barred unless the previous application had been refused under Order XXXIII, rule 7.

The present Rule is supported on the authority of the decision in *Khondkar Ali Afzal* v. *Purna Chandra Tewari* (1), in which it has been held that

(1) (1924) 40 C. L. J. 188.

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an order, rejecting an application for default, operates as a bar under rule 15 of Order XXXIII. That case, however, is distinguishable from the present case, inasmuch as there notices were actually issued on the opposite party under rule 6 and it was only when the case came up for disposal under rule 7 that the application was dismissed. The language used in that decision also shows that the previous order was passed under rule 7, Order XXXIII. In the present case, since no notices were issued on the opposite party, as required under rule 6, no order under rule 7 could be passed: and the order in fact passed was one dismissing the suit for default, because the pauper applicant had failed to carry out the orders of the court under rule 6.

It is urged that there is no real distinction here, inasmuch as the order in that case was not passed under rule 5, as the court has held that "there does "not appear any reason for the throwing out of the "application under Order XXXIII, rule 5." If the case came up to the stage of Order XXXIII, rule 7, then the application would ordinarily be dismissed on the merits or on such grounds as would have the same effect as if it were dismissed on the merits, the opposite party being present.

In the present case, the suit was dismissed for default at a previous stage and before the opposite party was called upon to reply to the grounds urged by the pauper. It should be mentioned that in deciding the case of *Khondkar Ali Afzal* v. *Purna Chandra Tewari* (1) the learned Judges relied on the authority of *Ranchod Morar* v. *Bezanji Edulji* (2). But we find that the Madras High Court, in deciding the case of *Krishnamoorthy* v. *Ramayya* (3), held that, where an application to sue in *forma pauperis* is summarily rejected under Order XXXIII, rule 5 (*a*) of the Code of Civil Procedure without making any enquiry under rule 6 and a consequent order under rule 7, a second

(1) (1924) 40 C. L. J. 188. (2) (1894) I. L. R. 20 Bom. 86.
(3) (1926) I. L. R. 50 Mad. 63.

application for the same purpose is not barred under rule 15 of the same order. That was also the opinion of the learned Judges, who decided the case of *Kedar Nath Ray* v. *Tula Bibi* (1)—a decision, which was not referred to by the learned Judges, who decided the case of *Khondkar Ali Afzal* v. *Purna Chandra Tewari* (2). In the case of *Ma Sein* v. *Ma Kya Hmyin* (3) the learned Judges also held that, where the first application for leave to sue in *forma pauperis* was dismissed, as the application was not framed and presented in accordance with the rules and the second application was dismissed for default, neither party appearing, the third application was not barred under Order XXXIII, rule 15, as in the two applications the stage of "refusal" as contemplated under Order XXXIII, rule 15 was not arrived at.

In the present case, it is only necessary for us to say that we think that the order, not having been passed under rule 7 of Order XXXIII, rule 15 had no application and, therefore, the present application is not barred under that rule.

The portion of the order of the court below as to costs must, however, be modified. The costs will be costs in the suit under Order XXXIII, rule 6. With this modification this Rule is discharged. We make no order as to costs in this Rule.

MITTER J. I agree with my learned brother that this Rule should be discharged. I rest my decision on the ground that the order in the case rejecting the previous application to sue in *forma pauperis* has not reached the stage of Order XXXIII, rule 7 of the Code of Civil Procedure and, therefore, such an order cannot be regarded as an order refusing to allow the applicant to sue as a pauper within the meaning of Order XXXIII, rule 15 of the Code, so as to entitle the petitioner in the present Rule to contend that the previous order operates as a bar to

(1) (1906) 10 C. W. N. civ. (2) (1924) 40 C. L. J. 188.

(3) (1926) I. L. R. 4 Ran. 245.

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any subsequent application of the like nature. In support of this Rule Mr. Manmathanath Ray has relied on a decision of this Court, which my learned brother has already referred to, *viz.*, the case of *Khondkar Ali Afzal* v. *Purna Chandra Tewari* (1). At the first blush that case seems to support his contention. On a close examination of the case, however, it will appear that the learned Judges rested their decision on the ground that there the order was made under Order XXXIII, rule 7 of the Civil Procedure Code. The order was made after notices had been served on the learned Government Pleader and on the opposite party under Order XXXIII, rule 6. The opposite party was present on the date fixed for enquiry into pauperism and it appears from the record of the case, which we sent for, that the applicant, who prayed to be allowed to sue as a pauper, was absent and his application was dismissed. No costs were allowed to the opposite party. There can be no doubt, therefore, that the learned Judges, while referring to the provisions of Order XXXIII, rule 7 of the Code were of opinion that the previous application operated as a bar, because the previous order was one refusing to allow the applicant to sue as a pauper, although his application was dismissed as no evidence was adduced on behalf of the alleged pauper on the date fixed for hearing. It is true that in some portions of the judgment language has been used, which would seem to suggest that a second application would be barred if the previous application was either rejected or refused. In support of that contention the learned Judges were relying on the decision in the case of *Ranchod Morar* v. *Bezanji Edulji* (2). An examination of this case will show that there also the order, which was said to be a bar to a subsequent application to be allowed to sue as a pauper, was one, which was made under Order XXXIII, rule 7 of the Code, which corresponds to section 409 of the Code of Civil Procedure of 1882. That that is so appears

(1) (1924) 40 C. L. J. 188, 189.

(2) (1894) I. L. R. 20 Bom. 86.

also from a remark made by the learned Judges of the Madras High Court in the case of *Krishnamoorthy* v. *Ramayya* (1), where Phillips J. pointed out that in the case of *Ranchod Morar* v. *Bezanji Edulji* (2) there had been an enquiry under rule 6, although the Court purported to pass an order under rule 5. From the facts of the present case, which have already been stated by my learned brother, it will appear clear that, although the court in the first instance made an order fixing the 12th of July as the date of the hearing of the pauper application under rule 7, it afterwards modified that order and, as a matter of fact, the stage of rule 7 could not be reached, because no process fees were paid by the applicant to be declared a pauper, who is the opposite party before us. Another case, to which reference has been made, is that of *Atul Chandra Sen* v. *Peary Mohan Mookerjee* (3), where the learned Judges held that there is no distinction between orders of rejection passed under rule 5 and orders of refusal under rule 7. No authorities were cited by the learned Judges in support of this contention and we do not find that the subsequent authorities on this question would justify this broad proposition laid down by them in that case. For these reasons I agree that Rule should be discharged.

Rule discharged.

G. S.

(1) (1926) I. L. R. 50 Mad. 63. (2) (1894) I. L. R. 20 Bom. 86.
(3) (1915) 20 C. W. N. 669.