APPELLATE CIVIL.

Before S. K. Ghose and Patterson JJ.

KALI DASI DASI

v.

SANTOSH KUMAR PAL.*

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July 20, 21, 22, 25.

Pauper—Petition to sue in formâ pauperis—*Payment of court-fee and costs by the petitioner on different dates after rejection of petition—Date of institution of suit—Limitation—Code of Civil Procedure (Act V of 1908), s. 149; O. XXXIII, r. 15—Indian Limitation Act (IX of 1908), s. 14.*

An application for permission to sue as a pauper was refused by the Court with costs to the Government and to the opposite party, and the Court allowed the applicant to pay the court-fee leviable on the plaint within a specified time under s. 149 of the Code of Civil Procedure, which was done; but the costs to Government and the opposite party were put in on separate dates subsequently but before the suit went to trial, all the payments being made beyond the period of limitation from the date of the cause of action.

Held that the suit shall be deemed to have been instituted on the date of the application for permission to sue as a pauper, and that, in any event, the time between the rejection of the pauper application and the payment of court-fee shall be excluded in computing the period of limitation for the suit by operation of s. 14 of the Limitation Act, notwithstanding the provisions of O. XXXIII, r. 15 of the Code of Civil Procedure.

Shiam Sundar Lal v. *Savitri Kunwar* (1); *Ramkrishna Nadar Ponnaya Thirumalai Vandaya Thevar* (2) and *Aubhoya Churn Dey Roy* v. *Bissesswari* (3) distinguished.

Alopi Parshad v. *Gappi* (4) and *Ramabai* v. *Shripad Balwant Sane* (5) disapproved.

Jagadeeshwaree Debee v. *Tinkarhi* (6) approved and followed.

APPEAL FROM APPELLATE DECREE preferred by the plaintiff.

The facts of the case are sufficiently stated in the judgment.

Nanda Gopal Banerjee for the appellant. The suit is not barred by limitation. June 27, 1934, the

*Appeal from Appellate Decree, No. 1581 of 1936, against the decree of S. Sen, District Judge of Hooghly, dated April 23, 1936, reversing the decree of Thakur Das Banerji, Second Subordinate Judge of Hooghly, dated August 13, 1935.

(1) (1935) I. L. R. 58 All. 191.
(2) [1936] A. I. R. (Mad.) 24.
(3) (1897) I. L. R. 24 Cal. 889.
(4) (1936) I. L. R. 17 Lah. 831.
(5) (1935) I. L. R. 59 Bom. 733.
(6) (1935) I. L. R. 62 Cal. 711.

date of the original filing of the plaint along with the pauper application, and not January 10, 1935, when court-fee was paid or July 27, 1935, when the costs were paid, should be considered to be the date of the presentation of the plaint for the purpose of limitation. The court-fee was paid within the time allowed by the Court under s. 149 of the Code of Civil Procedure. Refusal to grant prayer to sue as pauper did not amount to rejection of plaint. I rely on *Jagadeeshwaree Debee* v. *Tinkarhi* (1) the facts of which are similar to those in the present case. *Bank of Bihar, Limited* v. *Sri Thakur Ramchanderji Maharaj* (2) and other cases. Late payment of costs due to defendants of pauper case was no bar to the maintainability of the suit. *Mrinalini Debi* v. *Tinkauri Debi* (3). Order XXXIII, r 15 of the Civil Procedure Code, in the circumstances of the case, could not affect the period of limitation for the suit and s. 14 of the Limitation Act was applicable to it.

Jatindra Mohan Choudhuri for Gopendranath Das and *Lala Hemanta Kumar* for the respondents. The suit must be taken to have been instituted under O. XXXIII, r. 15 of the Code on the date when the costs ordered by the Court were paid. *Shiam Sundar Lal* v. *Savitri Kunwar* (4); *Ramkrishna Nadar* v. *Ponnayya Thirumalai Vandaya Thevar* (5). Or, at any rate, it cannot be said to have been instituted earlier than the date on which the court-fee was paid. *Alopi Parshad* v. *Gappi* (6), and other cases. As both the costs and the court-fee were paid admittedly beyond the period of limitation from the date of the cause of action the suit is barred by limitation. Section 14 of the Limitation Act does not in terms apply to this case. The conduct of the plaintiff has been found to be *mala fide* in bringing the application to sue as a pauper and he cannot take advantage of s. 14 of the Limitation Act.

Cur. adv. vult.

(1) (1935) I. L. R. 62 Cal. 711.
(2) (1929) I. L. R. 9 Pat. 439.
(3) (1912) 16 C. W. N. 641.
(4) (1935) I. L. R. 58 All. 191.
(5) [1936] A. I. R. (Mad.) 24.
(6) (1936) I. L. R. 17 Lah. 831.

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GHOSE J. This is a Second Appeal by the plaintiff in a suit for recovery of money on the allegation that the defendants Nos. 1 to 4, who are related to the plaintiff, an elderly Hindu widow, borrowed from her Rs. 2,000 on Agrahâyan, 1338B.S., corresponding to December 17, 1931, promising to pay interest at 12 per cent. per annum. The loan was an oral one. The defence was that the claim was false, that there was no such loan and, further, that the suit was barred by limitation. The plaintiff brought the suit on June 27, 1934—within three years of the alleged transaction. At the same time she filed an application for permission to sue as a pauper. On December 10, 1934, the Subordinate Judge rejected the pauper application with costs, but it was not till January 10, 1935, that the *rubokâri* was drawn up stating that the costs amounted to Rs. 10-10-6 payable to Government and Rs. 16-7 payable to the defendants-opposite parties. It was not stated that the costs were to be paid within a certain time, nor does it appear that the *rubokâri* was signed by the plaintiff's pleader. Meanwhile, on January 2, 1935, the plaintiff applied to have the pauper application, containing the particulars of her plaint, registered as a plaint in the suit on payment of proper court-fees, for which time was asked for. It was stated in the application that 12 annas court-fee had already been paid, the balance payable being Rs. 209-4. It was further stated in the application that, if the pauper application had been disposed of by the Court earlier, there would have been no difficulty in presenting a fresh plaint with full court-fee within the period of limitation; but since by the act of the Court, the decision had been delayed, the prayer was made for time under s. 149 of the Civil Procedure Code. The Subordinate Judge granted the prayer and gave time till January 10, 1935, for payment of the court-fees. On that date, the amount of the court-fees was paid in and accepted by the Court, and the application was directed to be registered as money suit No. 2 of 1935. Thereafter, proceedings ensued in connection with the suit

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and issues were framed, witnesses were summoned, *etc.* On February 7, 1935, the plaintiff paid to Government the costs payable by the *rubokâri* of January 10, 1935. There is nothing on the record to show that before that date the plaintiff was aware that this sum was payable to Government. The learned advocate for the plaintiff, appellant in this Court, has stated that this payment was made on demand from Government, but there is nothing on the record to show that also. On March 18, 1935, the defendants filed written statements, but nothing was said therein as to the non-payment of costs to the defendants or to Government. On July 4, 1935, the defendants filed additional written statements, in which for the first time a plea was taken to the effect that the plaintiff could not bring the suit without paying the costs to the Government and the defendants and the following issues were suggested: (*i*) the plaintiff's suit is not maintainable as being barred by limitation and (*ii*) the plaintiff not having paid the costs to Government in the pauper application the suit is not maintainable. It is noteworthy that the non-payment of costs to the defendants was not suggested in the issues. However, on July 27, 1935, the plaintiff paid the costs to the defendants as directed by the *rubokâri*. Thereafter the suit went to trial. The Subordinate Judge found that the plaintiff's case on the merit was true, and that there was absolutely no motive on the part of the plaintiff to bring a false case. On the question of limitation it was contended on behalf of defendants that the suit was barred because the date January 10, 1935, must be deemed to be the date of the institution of the suit and, as it was not filed within three years from the date of the loan, the Court had no jurisdiction to extend the time after December 10, 1934, for payment of court-fee. On this question, the Subordinate Judge, following the authority in the case of *Jagadeeshwaree Debee* v. *Tinkarhi* (1), held that June 27, 1934, the date of the original filing of the plaint along

(1) (1935) I. L. R. 62 Cal. 711.

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with the pauper application, and not January 10, 1935, should be considered to be the proper date of the presentation of the plaint, for the purpose of limitation. Then, as to the fact that the costs payable to Government and to the parties in the pauper case were paid by the plaintiff later, the Subordinate Judge held, following the case of *Mrinalini Debi* v. *Tinkauri Debi* (1), that there was no bar to the maintainability of the suit under O. XXXIII, r. 15, Civil Procedure Code. In that view, the learned Subordinate Judge decreed the suit against the defendant No. 1. Against that decision an appeal was taken by the defendant No. 1. The learned District Judge in the lower appellate Court agreed with the Subordinate Judge upon the merits, holding that the defendant No. 1 had really taken the money from the plaintiff. But, on the question of limitation, he took a different view. As to the payment of court-fees, the District Judge agreed with the Subordinate Judge in holding that s. 149, Civil Procedure Code, applied, and the case of *Jagadeeshwaree Debee* v. *Tinkarhi* (*supra*) was the authority to be followed. But on the second point, namely, the delay in the payment of costs under O. XXXIII, r. 15 of the Civil Procedure Code, the learned District Judge distinguished the case of *Mrinalini Debi* v. *Tinkauri Debi* (*supra*) and followed certain Allahabad decisions. In the result he held that the suit was time-barred because the costs had been paid by the plaintiff after the expiry of the period of limitation, counting from the date of the loan. Then the District Judge proceeded to another finding, namely, that the application to sue as a pauper was not *bona fide* and therefore the plaintiff was not entitled to an order in her favour under s. 149, Civil Procedure Code. On these two grounds the District Judge held that the plaintiff's suit was time-barred. Against that decision the present Second Appeal has been filed by the plaintiff.

(1) (1912) 16 C. W. N. 641.

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Apart from the question of *mala fides* referred to above, the decision of this appeal turns on the question of limitation and three questions arise: (*i*) whether the suit must be taken to be instituted at the time of the filing of the pauper application; (*ii*) whether it must be taken to be instituted at the time when court-fees were actually paid, and (*iii*) whether it was properly instituted at the time when the costs were paid. These questions depend upon the application of s 149 and O. XXXIII, r. 15, Civil Procedure Code. Except on the question of *bona fides*, both the Courts below have taken the same view as regards the application of s. 149 in favour of the appellant. But the question has been raised as a question of law in this Court by the respondent. It seems to me, however, that the questions arising out of the aforesaid two provisions of the Civil Procedure Code are not disconnected. We have been referred to a number of decisions by both sides in this Court and most of them were also cited in the lower Courts. These rulings disclose a conflict of judicial opinion not only amongst the different High Courts but also in the same High Court. The position being that the pauper application has been rejected, three views emerge, first, that the suit must be taken to have been instituted at the time of the original pauper application, although the court-fees were paid later with the permission of the Court under s. 149, Civil Procedure Code. This view may be said to be represented by the case of *Jagadeeshwaree Debee* v. *Tinkarhi* (*supra*). The second view is that the suit must be taken to have been instituted on the date of the payment of court-fees. This is the view in *Alopi Parshad* v. *Gappi* (1). In that case there was no question of payment of costs, but O. XXXIII, r. 15 was also referred to. The third view is that the suit was properly instituted when the costs were paid under O. XXXIII, r. 15, *Shiam Sundar Lal* v. *Savitri Kunwar* (2) and *Ramkrishna Nadar* v. *Ponnayya Thirumalai Vandaya Theva* (3), which followed, and,

(1) (1936) I. L. R. 17 Lah. 831. (2) (1935) I. L. R. 58 All. 191.
(3) [1936] A. I. R. (Mad.) 24.

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at the same time distinguished, the Allahabad case. Be it noted that in these cases no question of limitation was expressly raised. The view taken in the case of *Jagadeeshwaree Debee* (*supra*) may be said to represent the Calcutta view. See the case of *Bhusan Chandra Ghose* v. *Kanai Lal Sadhukhan* (1) in which D. N. Mitter J. took the same view citing a previous Calcutta case as one of the authorities. A different view was taken in the case of *Anbhoya Churn Dey Roy* v. *Bissesswari* (2) which, however, was under the old Code. It is by no means irrelevant to remember that ss. 148 and 149, Civil Procedure Code are new provisions, although the provision under O. VII, r. 11 was s. 54 of the old Code. I do not propose to discuss these cases in detail. It will be sufficient to say that the principle of law as laid down in the case of *Jagadeeshwaree Debee* (*supra*) undoubtedly supports the contention of the appellant. The question is whether there is sufficient reason for us to take a different view. The Lahore view expressly differs from the Calcutta view, but it seems to me that the difference is a narrow one. If it is correct that the institution of a suit starts with the payment of court-fees, it is difficult to resist the application of s. 149 and if that applies the conclusion might legitimately be drawn that the proper date for the filing of the suit should go back to the date of the filing of the plaint with the pauper application. This is by no means inconsistent with the decision of the Judicial Committee in the case of *Skinner* v. *Orde* (3), which is the basis of both views mentioned above. In the Privy Council case the pauper application had not been rejected, but it was withdrawn. From the point of view of the plaintiff-applicant the difference seems to be slight, and the learned advocate for the defendant-respondent in this Court conceded that point. But the view in the case of *Jagadeeshwaree Debee* (*supra*) seems to me to be broader and more liberal, while the other views are narrower being based upon

(1) (1937) 41 C. W. N. 537. (2 1897) I. L. R. 24 Cal. 889.
(3) (1879) I. L. R. 2 All. 241 ; L. R. 6 I. A. 126.

a strict reading of O. XXXIII, r. 15, Civil Procedure Code. The result is, it is not surprising to find, that in all those cases in which the narrower view has been taken actual hardship was caused to the plaintiff-applicant and sometimes the Court was constrained to lay the blame on the legislature, as, for instance, in the case of *Ramabai* v. *Shripad Balwant Sane* (1). It is conceded that if the case is true on its merits, where the party follows the orders of the Court, the defect consequential on those orders would become procedural rather than substantive and, therefore, there is a good deal to be said for the proposition that such defect should not defeat the ends of justice. This has been stated as a principle in many decisions : *Sabitri Thakurain* v. *Savi* (2); *Ghirdharee Sing* v. *Koolahul Sing* (3) and *Kendall* v. *Hamilton* (4).

Now there are several answers to the view of law taken by the District Judge and which is sought to be supported by the respondents in this Court. It seems to me that the view taken in the case of *Jagadeeshwaree Debee* (*supra*) gives a reasonable construction to both the provisions, namely, s. 149 and O. XXXIII, r. 15, since if the suit is taken to be instituted as from the date of the pauper application, the plaint being already there and the court-fees being filed later with the Court's permission, the provision in O. XXXIII, r. 15 does not affect the question of limitation. The decision in the case of *Shiam Sundar Lal* v. *Savitri Kunwar* (*supra*) was explained in the case of *Bir Ram* v. *Lachhmi Rai* (5) and there it was pointed out that when the plaint was already registered there was no fresh institution under O. XXXIII, r. 15. That was also the view taken in the case of *Bank of Bihar, Limited* v. *Sri Thakur Ramchanderji Maharaj* (6). This case was sought to be distinguished in a subsequent case, namely, *Sudhir Kumar Choudhuri* v. *Jagannath Marwari* (7), which was, however, a decision of a single Judge.

(1) (1935) I. L. R. 59 Bom. 733.
(2) (1921) I. L. R. 48 Cal. 481; L. R. 48 I. A. 76.
(3) (1840) 2 M. I. A. 344, 350.
(4) (1879) 4 App. Cas. 504, 525.
(5) I. L. R. [1938] All. 11.
(6) (1929) I. L. R. 9 Pat. 439.
(7) [1935] A. I. R. (Pat.) 193.

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On the other hand if the Lahore view is correct, namely, that the suit was instituted when the court-fees were actually paid, which in this case was on January 10, 1935, the question is whether the plaintiff is not entitled to deduct the period of the hearing of the pauper application. If this is done, the suit would be within time. As mentioned above, the plaintiff expressly stated in her pauper application that if the decision in the pauper application had been given earlier by the Court there would have been no difficulty in filing a fresh plaint within time. The question is whether the plaintiff is entitled to the benefit of s. 14 of the Limitation Act. It is contended by the learned advocate for the respondents that the plaintiff is not so entitled, because, in the first place, it cannot be brought within the strict wording of s. 14 as disclosing a "defect of jurisdic-"tion or other cause of a like nature" and, further, as not being "in good faith" as held by the District Judge. The expression "other cause of a like nature" has been the subject of various decisions, most of which will be found mentioned in Chitaley's Indian Limitation Act (1938), pp. 567 to 572. The decisions have been divergent, but a liberal construction has also been favoured. In the present case, having regard to the facts stated above, I am not prepared to hold that the matter has been taken out of s. 14 and that the Court has, in fact, found itself unable to entertain the application for a cause which may not come within the expression "other cause of a like "nature".

On the question of good faith, the District Judge's finding would appear to be a finding of fact, but it is a finding which is based simply on this that the plaintiff's application to sue as a pauper has been dismissed, and the District Judge has relied upon the judgment of the Subordinate Judge. The learned Subordinate Judge distinctly says:—

The case of *Joganmathpuri* v. *Nathoo* (1) also does not apply to the present case because there were no *mala fides* of the plaintiff in the present case in bringing the application for permission to sue as a pauper.

(1) [1929] A. I. R. (Nag.) 268.

On the other hand, the District Judge has agreed with the Subordinate Judge in finding that the plaintiff's case is true on the merits and as to payment of court-fees and costs the plaintiff has throughout acted with the permission of the Court and followed the orders as passed by the Court. In these circumstances, the finding of the District Judge that there was bad faith on the part of the plaintiff is based on no evidence and must be set aside. Thus, even assuming that the Lahore view is correct, the plaintiff is entitled to be excused the period during which the pauper application was pending and if that is done the suit is within time. If that is so no question of limitation arises under O. XXXIII, r. 15. The learned advocate appearing for the plaintiff-appellant in this Court has contended that, in the circumstances, a reasonable construction would be that the costs must be payable by the plaintiff before the suit could be taken up for hearing. A suit may be taken to be properly instituted although insufficient court-fees are paid in the first instance and the matter would come under O. VII, r. 11. In this case also 12 annas court-fee was actually paid at the beginning. Further, it is contended by the learned advocate for the appellant that costs in order to be a bar under O. XXXIII, r. 15, must be calculated by the Court and set out in a decree so that the plaintiff may know what amount to pay. It cannot be said that the suit is barred for ever because the party to whom the costs are payable chooses not to ask for costs. Further, in the present case, the rejection of the pauper application did not actually terminate the proceedings, because a decree for costs was drawn up later, and in fact it was not drawn up until the plaint was ordered to be registered. The Government does not object that costs have not been paid. The defendants objected, but did not raise an issue as to the payment of costs to them. It is contended, therefore, that at that stage the point was taken as waived and on the question of fact as to whether the plaintiff was aware as to what amount was payable

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as costs there was necessarily no investigation. Taking all this into consideration, it seems to me that the learned Subordinate Judge took the right view both on facts and on law and the District Judge's view was wrong.

The result is that this appeal must be allowed against the defendant No. 1 with costs throughout. The decree of the lower appellate Court is set aside and that of the Court of first instance restored.

This appeal has not been pressed against the respondents Nos. 2, 3 and 4. It is accordingly dismissed as against the said respondents who are entitled to their costs from the appellant.

PATTERSON J. I agree.

Appeal allowed; suit decreed.

A. A.