

APPELLATE CIVIL.

Before Costello and Biswas JJ.

BHARAT ABHYUDAY COTTON MILLS,
LIMITED

v.

MAHARAJA OF DARBHANGA.*

1938

June 30.

Pauper—Company, if can sue or appeal as a pauper—“Person”, Meaning of—Code of Civil Procedure (Act V of 1908), O. XXXIII, r. 1; O. XLIV, r. 1.

The word “person” in the Explanation to O. XXXIII, r. 1 and consequently the word “person” in O. XLIV, r. 1 of the Code of Civil Procedure, 1908, means a natural person, that is, a human being, and does not include a juridical person, such as a limited company incorporated under the Indian Companies Act.

Perumal Goundan v. Thirumalarayapuram Jananukoola Dhanasekhara Sangha Nidhi (Limited) (1) doubted.

S. M. Mitra v. Corporation of the Royal Exchange Assurance (2) relied on in part.

In order to determine whether or not the word “person” used in a particular provision in an enactment includes an artificial person, such as a corporation or a company, regard must be had to the setting in which the word is placed, to the circumstances in which it is used and to the context in which it stands. The provision in the General Clauses Act, 1897, to the effect that the word “person” shall include any company or association or body of individuals, whether incorporated or not, is subject to “anything repugnant to the subject or context.”

Pharmaceutical Society v. London and Provincial Supply Association, Limited (3) referred to.

APPLICATION, *ex parte*, by a limited company for leave to appeal *in forma pauperis*.

The facts material for this application appear from the judgment of COSTELLO J.

Chandra Sekhar Sen and *Subodh Chandra Basak* for the applicant company. The question is whether

*Application for leave to appeal as a pauper from the decree, dated March 19, 1938, of the Second Subordinate Judge of Howrah in the Title Suit No. 36 of 1936.

(1) (1917) I. L. R. 41 Mad. 624.

(2) [1930] A. I. R. (Ran.) 259.

(3) (1880) 5 App. Cas. 857.

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a limited company incorporated under the Indian Companies Act can institute a suit as a pauper under O. XXXIII, r. 1 of the Code of Civil Procedure, 1908, and prefer an appeal as a pauper under O. XLIV, r. 1 of the Code. The word "person" used in the Explanation to O. XXXIII, r. 1 has not been defined in the Code. The definition of the word as given in the General Clauses Act, 1897, must, therefore, be adopted. According to this definition the word "person" includes companies or associations whether incorporated or not. A company, therefore, is entitled to sue as a pauper: *Perumal Goundan v. Thirumalarayupuram Jananukoola Dhanasekhara Sangha Nidhi (Limited)* (1); *Swaminatham v. Official Receiver of Ramnad* (2).

It cannot be said that the word "person" in the Explanation to O. XXXIII, r. 1 refers only to a natural person. A *Thâkur* is not a natural person; but it has been held that a *Thâkur* can sue as a pauper: *Mabia Khatun v. Sheikh Satkari* (3); *Shankarji Maharaj v. Godavaribai* (4); *Kunja Behari v. Mohit Singh* (5).

The Explanation to O. XXXIII, r. 1 consists of two parts. The requirement of the earlier part of the Explanation is only that the person seeking to sue as a pauper must not be possessed of sufficient means to enable him to pay the prescribed court-fee. A limited company can satisfy this requirement. The fact that the words "other than his necessary wearing "apparel" in the latter part of the Explanation can have no application to a limited company need not prevent the earlier part of the Explanation from being applicable to a limited company: *Krishnabai v. Manohar Sundarrao* (6).

It is not necessary that a company should go into liquidation before it can apply for leave to sue as a pauper. It is nowhere laid down that winding up

(1) (1917) I. L. R. 41 Mad. 624.

(2) I. L. R. [1937] Mad. 784.

(3) (1926) 45 C. L. J. 68.

(4) [1935] A. I. R. (Nag.) 209.

(5) [1934] A. I. R. (Pat.) 531.

(6) (1906) I. L. R. 30 Bom. 593.

is a condition precedent to a company suing as a pauper. All that is necessary is that the company must not be possessed of sufficient means to enable it to pay the prescribed court-fee.

COSTELLO J. This is an application for leave to appeal *in formâ pauperis* under the provisions of O. XLIV, r. 1 of the Code of Civil Procedure. The application is made by a company, incorporated under the Indian Companies Act, called the Bharat Abhyudoy Cotton Mills, Ltd., and the respondent to the application is stated to be Maharaja Sir Kameswar Singh, K.C.I.E., Maharaja Bahadur of Darbhanga. There was a second respondent named in the petition, Baidya Nath Jha, of District Darbhanga, who is described as defendant No. 2.

The matter arises in this way: The first respondent, the Maharaja of Darbhanga, instituted a suit against the company, claiming a sum of eight *lakhs* of rupees, said to have been borrowed by the company through its managing agents, the firm of Sital Prasad Kharag Prasad, by means of an issue of eighty debentures of Rs. 10,000 each, which debentures were secured by an indenture dated May 4, 1927, and were issued subject to, and with the benefits of, the conditions contained in that indenture. The suit was tried in the Court of the Second Subordinate Judge of Howrah, and was described as Title Suit No. 36 of 1936, and on March 19, 1938, the learned Subordinate Judge made a decree in favour of the plaintiff. It is against that decree that the applicant desires to appeal as a pauper.

In the petition by which the application was made, it is stated in para. 15:—

That your petitioner is not possessed of sufficient means to pay the fee prescribed by law for the memorandum of appeal; and that the fee necessary for preferring the appeal is Rs. 2,262-8.

It is then stated that besides the subject-matter of the appeal, the petitioner is now possessed of the

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properties mentioned in Sch. A annexed to the application. Then in para. 17 it is set out that—

Out of these properties item No. 3 represents a sum of Rs. 60,000 due from a firm named Ram Prosad Badri Narayan and a sum of Rs. 30,000 from another firm named Suraj Nath Onkarmull on account of goods supplied to them by your petitioner.

There are further particulars, given with regard to these debts which I need not specify. All that need be said is that the petitioner alleged that it is not likely to realise anything from the debtors. The petition concludes by making the essential averment that there are substantial questions of law involved in the appeal and that the decree sought to be appealed against is contrary to law. It is in those circumstances that the petitioner company asks that it be granted leave to appeal as a pauper.

The matter originally came before us on May 30 last, when we made an order that the Subordinate Judge of Howrah should make an enquiry as to what the position of the company is, and that he should submit a report to this Court within three weeks from the date of our order. The report was duly submitted by the Subordinate Judge with a covering letter dated June 21, 1938, and the effect of that report seems to be that the position of the company is such that its total assets consist solely of a deposit of Rs. 18-12 in the Hongkong Bank. The learned Subordinate Judge sums up his conclusions by saying:—

In such circumstances, it seems clear, that the company has no properties, and no means to pay the court-fee for the appeal.

With the report of the learned Judge are enclosed depositions of the witnesses who had been examined before him and certain documents and a report of the Collector of the district.

It may be taken, for the purpose of our decision in this matter, that the company may be considered to be a pauper, in a non-technical sense, in that it has no assets, and clearly is not in a position to pay the very substantial court-fee which normally is requisite

for the purpose of bringing an appeal against the decree which has been made against the company. It is clear, therefore, that had this application been made by an individual, we should have no difficulty in holding that as regards the fact of pauperism, the applicant had established his case. There is, however, an important point of law to be considered, and having regard to the view we have formed on that point of law, it is not necessary for us to consider the matters set out in the Proviso to r. 1 of O. XLIV, namely, the question whether there is reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. In other words, we have not to consider the averment made in the last para. of the petition. The point of law to which I have referred is this: whether it is possible for and competent to a company, incorporated under the Indian Companies Act, to prefer an appeal as a pauper under the provisions of O. XLIV of the Code. Rule 1 of that Order provides that—

Any person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as a pauper, subject, in all matters, including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable.

The provisions relating to suits by paupers are to be found in O. XXXIII, r. 1 which says:—

Subject to the following provisions, any suit may be instituted by a pauper.

That, on the face of it, clearly seems to be an enabling provision, so as to give an opportunity to an intending plaintiff to bring a suit in circumstances in which, but for the provisions of this Order, he might be unable to do so, owing to lack of means. The expression "pauper" is defined in the Explanation to r. 1 of O. XXXIII and it runs thus:—

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.

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As I have already stated, the intending appellant in the present case is not possessed of sufficient means to enable the fee prescribed by law to be paid, and is not entitled to property worth Rs. 100. Mr. Sen, who appears on behalf of the petitioner company, has argued that the word "person" as given in the Explanation to r. 1 of O. XXXIII must be taken to include a corporation or a limited company. Mr. Sen relies for this purpose on the definition of "person" as given in s. 3, cl. (39) of the General Clauses Act, 1897, which says that the word "person" shall include any company or association or body of individuals, whether incorporated or not. It would be observed that this is a somewhat wider definition than the corresponding definition in the English law as contained in the Interpretation Act of 1889, which in s. 2(1) says that the expression "person" shall, unless the contrary intention appears, include a body corporate. The definition contained in s. 3, cl. (39) of the (Indian) General Clauses Act, 1897, is, however, subject to the opening words of the section which are these:—

In this Act, and in all Acts of the Governor-General in Council and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context.....

So that, putting the two provisions together we get this proposition, that in all Acts made after the commencement of that Act a "person" shall include any company unless there is anything repugnant in the subject or context. Mr. Sen has relied also on a decision of the Madras High Court in the case of *Perumal Goundan v. Thirumalarayapuram Jananukoola Dhanasekhara Sangha Nidhi (Limited)* (1) the head-note of which is as follows:—

An official liquidator of a company is competent to apply for leave to sue *in forma pauperis* on behalf of the company under O. XXXIII of the Civil Procedure Code, if the company is a pauper within r. 1 thereof.

It was there held that the reference to "necessary "wearing apparel" in the Explanation to r. 1 and the

provisions of r. 3 requiring presentation of the petition by the "applicant in person", in O. XXXIII, do not necessarily exclude the application of the Order to a company, and that the definition of "person", as including a company, under the General Clauses Act, 1897, applies to O. XXXIII of the Code as there is nothing in the definition which is repugnant to the subject or context of the Order. I may say at once, that I find it somewhat difficult to accept the reasoning of the learned Judge who gave the judgment in that case. In my opinion, the reference to "necessary wearing apparel" in r. 1 of O. XXXIII, and the fact that r. 3 of the Order says that—

the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court—

are of extreme importance, in considering whether or not one ought to come to the conclusion that the word "person" as used in O. XXXIII, r. 1, should be taken to include a limited company incorporated under the Indian Companies Act. It is to be borne in mind that in the case in the Madras High Court, the limited company concerned was in liquidation, and the application was made not by the company itself, but by the liquidator. The Madras High Court expressed the opinion that the fact that the liquidator in his personal capacity is not a pauper does not affect the question, nor does the fact that the liquidator receives a commission on collections realised make him a person interested in the subject-matter of the suit within the meaning of cl. (e) of r. 5 of O. XXXIII. Without expressing any final opinion on the point, I am disposed to think that even then the decision of the Madras High Court went too far, and that as the liquidator was making the application on behalf of the limited company, the real applicant was the company itself. It is clear law that in order to decide whether in a particular instance the word "person" includes an artificial person or a corporation or a company, regard must be had to the setting in which the word "person" is placed, to the circumstances in which it is used, and, above all, to the

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context in which it stands. No doubt, under the provisions in the General Clauses Act to which I have referred, if the word "person" is isolated, it would be easily possible to say that it includes not only human beings, but also artificial persons and corporations, statutory or otherwise. Moreover, in some circumstances and in some contexts, there would be no difficulty in coming to the conclusion that the extended meaning should be ascribed to the word "person". The scope of the meaning of the word "person" depends essentially on the connection and the circumstances in which it is used. In the case of *Hirst v. West Riding Union Banking Company, Limited* (1), Stirling L. J. said:—

I will refer to what Lord Blackburn said in *Pharmaceutical Society v. London and Provincial Supply Association, Limited* (2) with regard to the meaning of the word "person" in a statute.

And then the learned Lord Justice makes a quotation from a well known judgment of Lord Blackburn. I will only pick out one sentence from that quotation which is in these words:—

"I do not think that the presumption that it" (the word "person") "does include an artificial person, a corporation, if that is the presumption, "is at all a strong one."

That means no more than this, that *if* there is any presumption that the word "person" includes a corporation, the presumption is of no more than of a slight nature, and therefore, easily displaced. One has to consider the subject-matter of the particular enactment in which the word "person" appears, and especially, the immediate context in which it is used, in order to decide whether that presumption will apply or not. In the present instance, it is to be emphasised that under the terms of the Explanation to r. 1 of O. XXXIII, there are two sets of circumstances which may entail pauperism: first, where a person is unable to pay the fee prescribed by law and, secondly, where no such fee is prescribed, he is not entitled to property worth Rs. 100 other than his necessary wearing apparel and the subject-matter of

(1) [1901] 2 K. B. 560, 562.

(2) (1880) 5 App. Cas. 857.

the suit. Mr. Sen invited us to hold that those two sets of circumstances are so disconnected or disjointed that no inference ought to be drawn from the reference to necessary wearing apparel, which, of course, is a thing which a limited company does not, and cannot possess. Mr. Sen tried to induce us to come to the conclusion that in cases where there is a fee prescribed by law, no question of wearing apparel enters into the matter, and therefore, if the applicant is not possessed of sufficient means to enable him to pay the fee prescribed by law, he is a pauper, and so it is quite possible for a limited company to fulfil that condition. In my opinion, however, it would not be right to sever the two branches of the Explanation in the way contended for by Mr. Sen. Leaving out altogether the reference to payment of a fee prescribed by law or to the non-existence of any such fee, the Explanation would read something like this: A person is a pauper when he is not entitled to property worth Rs. 100 other than his wearing apparel. It was held in *Krishnabai v. Manohar Sundarrao* (1) that the words "other than his necessary wearing apparel" have reference to the question as to whether there is property worth Rs. 100. In other words, to ascertain whether a "person" comes within the necessary conditions, one must find out what his various items of property consist of, and then deduct from the catalogue the value of his "necessary wearing apparel". So far as that part of the Explanation is concerned, therefore, the criterion or test to be applied is—has the applicant property worth Rs. 100 after ignoring "necessary wearing apparel"? It is quite obvious that such a test can have no application to the present case. Furthermore, in my opinion, all the provisions of O. XXXIII must be read together, not only r. 1, but rr. 3 and 4 of that Order. Rule 3, as already indicated, provides that an application for leave to appeal as a pauper shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, as for instance, in the

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case of a *pardānashin* woman, as was decided in the case of *Wazir-un-nissa v. Ilahi Baksh* (1). In the present instance, the petition which we are considering was presented by one Narayan Dutt Tewari, who described himself as one of the directors of the company. There is nothing to show that that particular director was authorised to present this petition on behalf of the company; there is no resolution of the board of directors instructing or directing this particular director to lodge this petition on behalf of the company of which he is a director, nor had he merely in his capacity as a director the right to come to Court to represent the company. In any event, however, it cannot be that the petition presented by a director of a company is an application presented to the Court by the applicant in person, where the real applicant is a limited company, and indeed, it is not possible for a limited company to come to Court in person. Similarly, in r. 4 we find a provision which could not be complied with in the case of a limited company. That rule says—

Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant, or his agent, when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

Now, the reference therein to an applicant who is allowed to appear by an agent obviously relates back to the provision in r. 3 which says that—

..... unless he is exempted from appearing in Court, in which case the application may be presented by an authorised agent.....

It seems, therefore, that the only case in which an agent can present the application is where the applicant is exempted from appearing in Court. All these provisions go to show that the word "person" in the Explanation to O. XXXIII, r. 1 does not have the extended meaning as contended before us by Mr. Sen, and does not, in this instance, include a limited company. That was the view taken by the Rangoon High Court in the case of *S. M. Mitra v. Corporation of the Royal Exchange Assurance* (2).

(1) (1901) I. L. R. 24 All. 172.

(2) [1930] A. I. R. (Ran.) 259.

In that case, it was held by Heald A. C. J. and Otter J. quite clearly, and definitely, that "the word "person" in O. XXXIII means a natural person, that "is, a human being, and does not include a juridical "person, such as a receiver." It was, therefore, decided that—

a receiver appointed under the Provincial Insolvency Act cannot be allowed to sue as a pauper, where the receiver himself is possessed of sufficient funds to carry on the suit, though the estate, of which he is the receiver, may not be sufficient for that purpose.

The learned Judges considered *Perumal Goundan v. Thirumalarayapuram Jananukoola Dhanasekhara Sangha Nidhi (Limited)* to which I have already adverted. In the opinion of the learned Judges of the Rangoon High Court, the interpretation to be put upon the word "person" in O. XXXIII, r. 1 and the Explanation to that rule is of a limited character and the word should be construed in a non-technical sense and should only be given the meaning which a layman would give to it. The Acting Chief Justice after having referred to that pronouncement of Lord Blackburn from which I have quoted above made this comment at p. 263 :—

That expression of opinion was of course before the date of the Interpretation Act, 1889, to which the General Clauses Act more or less corresponds, but although under the latter Act the word "person" in the Code ordinarily includes any company or association or body of individuals, whether incorporated or not, nevertheless it need not do so if there is anything repugnant in the subject or context. It seems to me that the provisions of O. XXXIII, r. 3 prescribing that an application for leave to sue as a pauper must be presented by the applicant in person is repugnant to the view that "person" in that rule was intended to mean anything but a natural person or was intended to include a juridical or artificial person, and that the provisions of rr. 4 and 7 regarding the examination of the applicant and the reference to "wearing apparel" in the Explanation to r. 1 tend in the same direction. I would accordingly hold that "person" in O. XXXIII means a natural person, that is, a human being, and does not include a juridical person, such as, a receiver.

Otter J. in a concurring judgment says at p. 262 :—

We agree that the word "person" in the provision under review must be considered in its ordinary and plain meaning, and we see nothing in the context in which it stands to indicate that the legislature meant that the word "person" should or might have the meaning of a juridical person.

With these expressions of opinion I am disposed to agree. It is not necessary, however, for our

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present purposes that one should go to the length of agreeing with the views of the learned Acting Chief Justice and Otter J. in their entirety. It is sufficient for our present purpose to say that it is my considered and definite opinion that the word "person" in O. XXXIII, r. 1, and so the word "person" in O. XLIV, r. 1 does not include a limited company incorporated under the Indian Companies Act. I doubt very much whether it is even right to say, as the Madras High Court have said, that it includes a liquidator of a limited company in liquidation. I am, therefore, of opinion, that the application now before us is not competent and it must, accordingly, be dismissed.

The rejection of this application, of course, in no way prevents the company from paying the appropriate court-fee and appealing in the ordinary way, should it find itself able to raise the money.

BISWAS J. I agree in the order proposed by my learned brother. I am not at all sure that the word "person", in the setting in which it appears in O. XXXI, r. 1 of the Code of Civil Procedure, includes a company incorporated under the Indian Companies Act. There is authority, no doubt, in support of the contrary view, in the case of *Perumal Goundan v. Thirumalarayapuram Jananukoola Dhanasekhara Sangha Nidhi (Limited)* (1). That is mainly based on the definition of "person" in the General Clauses Act, 1897. Clause (39) of s. 3 of this Act provides that "person" shall include any company or association or body of individuals, whether incorporated or not. But it will be observed that the definitions in this section are subject to an important qualification contained in the words "unless there is anything repugnant in the subject or context". As my learned brother has pointed out, the context in which the word "person" occurs in O. XXXIII, r. 1, shows that a "company" can hardly be brought within the ambit thereof. The Explanation to r. 1 is in two parts, one of which is

(1) (1917) I. L. R. 41 Mad. 624.

applicable where a court-fee is prescribed by law for the plaint in the proposed suit, and the other, where no such fee is prescribed. Obviously, in a case where no fee is prescribed, the test laid down in the rule, viz., whether or not the plaintiff is "entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit", cannot be applied to a company. The interpretation suggested in the Madras case for getting rid of this difficulty does not appeal to me. The other provisions in O. XXXI to which my learned brother has referred also seem to militate against the view that a company is competent to sue as a pauper; there can, for instance, be no personal examination of the company as such, under r. 4. This rule provides that if the Court thinks fit, the Court may examine the applicant, or his agent, when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant. There is no provision in the Code or in any other enactment, under which a company is allowed, as for right, to appear by an agent. As Swinfen Eady L.J. remarked in *Charles P. Kinnell & Co. v. Harding, Wace & Co.* (1): "from its nature a company cannot appear in person, not having as a legal entity any visible person". It seems to me that the word "person" in O. XXXIII, r. 1, must be given the same meaning as is indicated by Lord Blackburn in the case of *Pharmaceutical Society v. London and Provincial Supply Association, Limited* (2).

There is another distinguishing feature of the case which, to my mind, makes it impossible to entertain the present application. It is that the application is made by a company to sue as a pauper without previously going into liquidation. In the Madras case, it is important to observe, the application was made by the Official Liquidator representing the company.

Application dismissed.

(1) [1918] 1 K. B. 405, 413.

(2) (1880) 5 App. Cas. 857.

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