

The plaintiff's suit for declaration is maintainable as the third defendant was not in possession at the date of the suit.

BRAHMAYYA
v.
PAPPASETTY.

The appeal against order is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Srinivasa Ayyangar.

KAVERI SUBBIAH (THIRD RESPONDENT), PETITIONER,

1927,
October 20.

v.

YABURSU BALA SUNDARA BOYAMMA (PETITIONER),
RESPONDENT.*

Application by a person to sue in forma pauperis—Death of applicant before petition was disposed of—Application by legal representative to continue the petition, whether competent—Jurisdiction.

Where, pending disposal of a petition for leave to sue in *forma pauperis*, the petitioner died, his legal representative is not entitled to continue the further prosecution of the petition.

Lalit Mohan Mandal v. Satish Chandra Das, (1906) I.L.R., 33 Calc., 1163, followed.

PETITION under section 115, Civil Procedure Code, to revise the order of the Court of the Subordinate Judge of Masulipatam, in I.A. No. 1239 of 1926 in Original Petition No. 10 of 1926.

The material facts appear from the judgment.

P. Panini Rao for petitioner.

Respondent was not represented.

JUDGMENT.

The respondent in this Civil Revision Petition has not appeared and therefore on behalf of the petitioner

* Civil Revision Petition No. 785 of 1927.

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it has been argued *ex parte*. But giving the matter such consideration as I have been able to give I have come to the conclusion that the order of the lower Court was clearly wrong and without jurisdiction. The petitioner in this Court was third respondent in a petition for leave to sue in *forma pauperis*. Pending the disposal of that petition, the petitioner died and thereupon the respondent in this Court applied to the lower Court as the mother and legal representative of the deceased petitioner to be brought on the record as the legal representative of the deceased petitioner and for being allowed further to prosecute the petition. I do not see anything in the petition itself to the effect that she was either prepared to continue the proceedings paying the necessary Court fee in respect of the petition allowing the same being treated as a plaint or anything to show that she herself was a pauper. The learned Subordinate Judge allowed the petition and directed that the respondent in this Court be brought on the record as such legal representative. The petition for leave to sue in *forma pauperis* is undoubtedly a personal application on a personal ground. If there can be anything that can be set up or regarded as a cause of action for such a petition it cannot possibly be conceived of as surviving to the legal representative. There is the direct authority of the Calcutta High Court in the matter. In *Lalit Mohan Mandal v. Satish Chandra Das*(1), GHOSH, C.J., and CASPERSZ, J., held that where there is only an application for leave to sue in *forma pauperis*, but no suit pending in Court, and the applicant dies before the leave is granted, the right to sue as a pauper, being a personal right, cannot survive in the legal representative

(1) (1906) I.L.R., 33 Cld., 1163.

of the deceased applicant. I am in entire agreement with the decision in that case. The learned Subordinate Judge in the Court below seems for some reason to have regarded my decision in *Sivagami Ammal v. Gopalaswami Odayar*(1), as an authority for the position that the right to continue the application in such circumstances survives to the legal representative. In that case the petition to sue in *forma pauperis* had been allowed and the matter was registered as a suit. It was during the pendency of the suit that the plaintiff died. In these circumstances, it clearly followed that, in a proceeding which was properly pending as a suit in Court, if the plaintiff should die, undoubtedly the legal representative may be brought on the record. I do not see what the principle of that decision has to do with the question which came up for consideration before the learned Subordinate Judge. There is also in the case of *In re Radhakrishna Iyer*(2) a decision by Mr. Justice JACKSON, directly to the effect that there is no right in the legal representative of a pauper applicant to continue the application itself for being allowed to sue in *forma pauperis*. All that the learned Judge in that case stated was that there was no objection to the legal representative being brought on the record because the legal representative might offer to continue the proceedings transforming it into a suit by payment of the requisite Court fee. I see no offer or indication in the present case of any such sort. I am quite conscious that there might be serious difficulties about limitation if a petition for leave to sue in *forma pauperis* should not be allowed to be continued by the legal representative even on payment of the Court fee, the theory being that if he is allowed to sue in *forma pauperis* ultimately

(1) (1925) 48 M.L.J., 390.

(2) (1925) All. I.R. (Mad.), 819.

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the date of the presentation of the petition itself is treated as the date of the presentation of the plaint or the institution of the suit. If therefore the respondent had appeared in this case and made any such offer, I should certainly have been prepared to consider such an offer and have been willing to afford an opportunity by giving time or otherwise to continue the proceedings as a suit. But the respondent not having appeared though served and there being no offer or indication whatever in the petition originally filed by her to take any such steps I must regard the present petition that was made to the lower Court as one to continue the petition on the claim of the right that she is entitled to continue such a pauper petition as the legal representative of the deceased petitioner. Agreeing with the decision of the Calcutta High Court in the matter and being satisfied that my decision above referred to has nothing to do with the matter, I am clearly of the opinion that the order of the lower Court was made without jurisdiction. I therefore set it aside. The order of the lower Court is therefore set aside. I make no order as to costs.

K.R.