APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Pakenham Walsh.

SUBBA RAO (PLAINTIFF), APPELLANT,

1929, August 1.

v.

VENKATARATNAM AND NINE OTHERS (DEFENDANTS 1 TO 8 AND 10 AND 12), RESPONDENTS.*

Civil Procedure Code (V of 1908), O. XXXIII, rr. 2 and 8—Plaint with insufficient court-fee—Conversion into a pauper suit—Jurisdiction of Court to convert.

Where a plaint had been admitted with a certain court-fee and a written statement had been put in and issues settled and the Court, at the trial of an issue as to the court-fee, required additional court-fee which in amount was so large that the plaintiff could not pay it, an application for permission to continue the suit as a pauper should not be dismissed because it was not in accordance with rules 2 and 8 of Order XXXIII, Civil Procedure Code. In such a case, the Court can in its inherent power allow the application, if the plaint disclosed a subsisting cause of action, and the plaintiff is after notice to the opposite side and the Government found to be a pauper.

Thompson v. *The Calcutta Tramway Company*, (1893) I.L.R., 20 Calc., 319, followed.

APPEAL *in forma pauperis* against the decree of the Court of the Subordinate Judge of Rajahmundry in Original Suit No. 8 of 1923.

C. Rama Rao for appellant.

P. Somasundaram for respondent.

The facts and arguments appear from the judgment.

The JUDGMENT of the Court was delivered by

KUMARASWAMI SASTRI, J.—In this case the plaintiff is the appellant. He filed the suit for partition and

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delivery to him of his share in the properties, alleging that he is a member of an undivided family with defendants 1 to 6, that the immovable properties in the plaint schedule are joint-family properties, and praying that the decree in Suit No. 24 of 1922 should be set aside as not binding on him. He paid a stamp duty of Rs. 250 valuing the suit as one by a coparcener to be in possession with the other coparceners. The suit was filed on the 17th April 1923, written statements were filed and preliminary objection was taken as to the valuation of the suit and the court-fee paid. Issue 12 is "Are the valuation of the suit and the court-fee paid not correct?" The Subordinate Judge in dealing with it disposed of the preliminary point and held that the valuation was not correct. He held that the plaintiff should not value the suit under section 7, paragraph 4 (*b*) and was not entitled to put his own valuation on the property. He held that the amount payable was prescribed by section 7, paragraph 5, of the Court Fees Act. When he held this, the plaintiff put in an application to be permitted to continue the suit *in forma pauperis* on the ground that he was unable to pay the heavy stamp duty of Rs. 1,523 and odd which would be payable by him in addition to the fee already paid. He put in the usual application through his pleader to allow him to continue *in forma pauperis*. The Subordinate Judge dismissed the application on the short ground that it was not in the form prescribed by the Code and that it was not presented by the plaintiff in person and hence the appeal. The first question is whether the Subordinate Judge was right in dismissing the application. It is now clear on the authorities that in a case like the present it is open to the plaintiff to apply to continue the suit *in forma pauperis*. We need only refer to *Thompson* v. *The Calcutta Tramway*

Company(1), and *Revji Patil* v. *Sakharam*(2). Although there is no direct decision in the Madras Court on the point, the learned Judges who decided *Solayappa Chetty* v. *Lakshmanan Chetty*(3) express no dissent from the view that such an application would lie. If such an application lies, then the question is whether the Subordinate Judge was right in holding that it should be in the form prescribed in rule 2 of Order XXXIII, and presented in person as required by rule 3. It is difficult to see how these rules can apply to a case like the present. Rule 2 contemplates that the application itself should be in the form of a plaint. It should contain all the particulars required as regards plaints in suits; there should be a schedule of any movable and immovable property belonging to the applicant and its estimated value and the application should be signed and verified in the manner prescribed for signing and verification of pleadings. Rule 3 says that the application should be presented by the applicant in person unless he is exempted from appearing in Court in which case the application may be presented by an authorized agent who can answer all material questions relating to the application and may be examined in the same manner as the party. Rule 4 is that when the application is in proper form and duly presented to the Court, it may, if it thinks fit, examine the applicant or the agent when the applicant is allowed to appear by agent regarding the merits of the claim and the property of the applicant. Rule 5 says that the application shall be rejected if it is not, *inter alia*, framed and presented in the manner prescribed by rules 2 and 3. Then we come to rule 8 which says that where the application is granted, it shall be

(1) (1893) I.L.R., 20 Calc., 319. (2) (1884) I.L.R., 8 Bom., 615.
(3) (1919) 38 M.L.J., 146.

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numbered and registered and shall be deemed 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. Now the question is, where, as in the present case, the plaint has already been filed with a stamp duty which is found to be inadequate, where a written statement has been put in and issues settled and the Court at a trial of an issue as to the court-fee wants additional court-fee which in amount is so large that the plaintiff could not pay it, is the application for permission to continue the suit *in forma pauperis* to be dismissed, because it is not presented as required by rule 8 which, *ex hypothesi*, requires that the application should be in the form of a plaint and when admitted is to be numbered and registered as a plaint. It is obviously impossible in a case like the present. There is already a plaint registered and numbered containing all the allegations, and an application to continue it *in forma pauperis* could not be treated as a plaint or registered as a plaint. It is, therefore, obvious that it is not possible to comply with this provision. In such cases the question is what is to be done. It has been held as we said before that it is competent to the Court to allow in its inherent power the party to apply to continue the suit *in forma pauperis*. If that power exists, there should certainly be some power in the Court by which that procedure can be followed up. There is no use of saying that the Court can do it and at the same time requiring the party to do something which is impossible, under rules 2 and 8. In such cases, the proper thing would be to see if the plaint discloses a cause of action and

issue notice to the opposite side and to the Government to see if the plaintiff is really a pauper, unable to pay the additional stamp duty. If that is inquired into and found, he should be allowed to continue the suit *in forma pauperis*. In the present case, there is no doubt that on the plaint there is a sufficient cause of action. It is not barred on the face of it and there is no reason for any inquiry except the inquiry as to whether the plaintiff is or is not able to pay the large additional fee demanded. We are therefore of opinion that the Subordinate Judge is wrong and that the matter should be tried on the lines indicated above. If the plaintiff is found a pauper, of course the other issues will go on as if the proper stamp duty had been paid.

One other point has been raised by the appellant's advocate, viz., that the order of the Subordinate Judge wrong in requiring him to pay additional duty. In view of the decision on the other question, it is unnecessary to decide this point. We think that when occasion should arise for the plaintiff or the defendant to pay stamp duty, an inquiry as to the proper court-fee payable should be held after notice to the Government. We allow the appeal and send the case back to be disposed of in the light of the observations in our judgment. The costs of the appeal will abide and follow the result.

There is no question of any court-fee paid to the Government on the appeal memorandum, because, even if it had been paid, the appellant would be entitled to refund.

N.R.