

Exhibit C is fraudulent, we hold that an act of insolvency has been committed by the first respondent and he is therefore adjudicated an insolvent. The petition will be remanded to the lower Court for taking the necessary steps subsequent to adjudication and for fixing a time in which he may apply for discharge. The appellant is entitled to his costs both here and in the Court below.

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v.
SUBBANNA.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Bardswell.

DURAI PANDIYAN, MINOR, BY HIS MOTHER AND GUARDIAN,
KARUPPAYEE AMMAL (RESPONDENT), PETITIONER,

1934,
March 28.

v.

SOLAIMALAI PILLAI AND TWO OTHERS (PETITIONERS),
RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XXII—In forma pauperis—Application to sue—Character of—Death of applicant before passing of orders on—Application by his legal representatives to continue the proceedings on payment of proper court-fee—Validity of.

Pending an application for leave to sue *in forma pauperis* the applicant died. His sons applied to be joined as his legal representatives and sought to go on with the suit, which the applicant wanted to file, on payment of the necessary court-fees.

Held, that they could be joined as the legal representatives of the deceased applicant and could be allowed to pay the court-fee, upon which payment the application was to be filed as a suit.

* Civil Revision Petition No. 54 of 1934.

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PETITION under section 25 of Act IX of 1887, and section 107, Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Madura, dated 16th October 1933 and made in Interlocutory Application No. 318 of 1933 in Original Petition No. 21 of 1933.

K. V. Srinivasa Ayyar for petitioner.

K. Venguswami Ayyar for respondents.

Cur. adv. vult.

JUDGMENT.

A petition (Original Petition No. 21 of 1933) for leave to sue *in forma pauperis* was presented by the father of the present respondents. Before final orders could be passed on that petition the person who had presented it died. His sons, the respondents to this petition, then applied to be joined as his legal representatives. They did not want to sue *in forma pauperis* but sought to go on with the suit which their father had wanted to file, on payment of the necessary court-fees. The Additional Subordinate Judge has ordered that the petitioners are to be added as petitioners 2 to 4 in Original Petition No. 21 of 1933, and that that petition is to be registered as a suit on their paying the necessary court-fee. This petition is for the revision of that order.

The learned Advocate for the petitioner relies on *Lalit Mohan Mandal v. Satish Chandra Das*(1) in which it was pointed out that the right to apply to sue as a pauper was obviously a personal right and could not survive to the legal representative who might or might not be a pauper

(1) (1906) I.L.R. 33 Cal. 1163.

himself. What the legal representative could do was to present a fresh application, if he was himself a pauper, for permission to sue or to institute a suit for the same relief which the deceased had sought to recover. That was a curious case in which an application for leave to sue was struck off, in what circumstances it did not appear, but apparently because the applicant had died before final orders could be passed on it, and his son upon attaining majority, some fifteen years later, prayed that he might be substituted for his deceased father and that he might proceed with the application. This decision, which was that of a Bench, has been followed by a single Judge of this Court, SRINIVASA AYYANGAR J., in *Subbiah v. Sundara Boyamma*(1), but that learned Judge does not appear to have agreed with everything that was said in the course of it. The circumstances of the case dealt with by him were not quite the same as those of the Calcutta case. A person who had applied for leave to sue *in forma pauperis* had died while the application was still pending and his mother, as his legal representative, then applied to be brought on the record in his place and to be allowed to proceed with the application. SRINIVASA AYYANGAR J. held that a petition for leave to sue *in forma pauperis* was admittedly a personal application on a personal ground, and that, as the right so to sue was a personal right, it could not survive to the legal representative of the deceased applicant. At the same time, however, the learned Judge pointed out that there was nothing in the mother's petition to the effect that she was

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(1) (1927) I.L.R. 51 Mad. 697.

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prepared to continue the proceedings paying the necessary court-fee in respect of the petition, allowing it to be treated as a plaint, or anything to show that she herself was a pauper. Had there been any offer to pay court-fee he would have been prepared to consider it and have been willing to afford an opportunity, by giving time or otherwise, to continue the proceedings as a suit. It may be said that these remarks were *obiter* and not necessary for the decision, but they were made with reference to *In re Radakrishna Aiyar*(1), a case decided by JACKSON J. In that case a petition had been presented asking for leave to prefer a second appeal and there was also another petition asking that the delay which had occurred in presenting the petition for leave might be excused. Before these petitions could be disposed of, the party who had put them in died and Radhakrishna Aiyar, who claimed to be his legal representative, sought to be joined as a party to the petition for excusing the delay. He did not allege that he was himself a pauper. The finding of the learned Judge was that the assignee of the pauper must pay the necessary court-fees or else have himself, *qua* pauper, declared entitled to "sue" *in forma pauperis* before continuing the proceedings. The order was one allowing a month's time for paying court-fees. It is true that the procedure with reference to applying for leave to appeal as a pauper is somewhat different from that for applying for leave to sue as such. In the case of an appeal the memorandum of appeal has to be accompanied by an application for leave, whereas in the case of a suit the prayer

(1) (1924) 21 L.W. 550.

for leave is contained in an application which has to be drawn up as a plaint and which itself becomes a plaint upon leave being granted, and the plaint then dates as if it had been presented at the time when it was put in as an application ; but I do not think that this difference in procedure makes any difference in principle between applications for leave to sue *in forma pauperis* and applications for leave to appeal as such. There is plenty of authority for the view that, once leave has been granted to sue as a pauper, the suit can be continued by a legal representative, though there has been a difference, with which I am not now concerned, as to whether or no the legal representative, if not himself a pauper, has to pay court-fee. Of course when leave to sue has been given there is definitely a plaint before the Court and a suit has been registered (Order XXXIII, rule 8). An application for leave to sue *in forma pauperis* on the other hand is not a plaint, and the question is whether it can be treated as an inchoate plaint to which section 149 can be applied. That section cannot apply, in the case of a legal representative who is not a pauper, to the application for leave to sue as a pauper as such, but if the application is to be regarded not merely in that light but also as an inchoate plaint which will develop into a plaint on certain conditions being fulfilled, then Order XXII, rule 1, read with section 141, will apply and there can be a substitution of the legal representative for the original would-be plaintiff. In the case of a pauper suit that has been admitted, the plaintiff has two positions, that of a pauper which is his personal position, and that of an ordinary

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plaintiff. So, too, I take it, an applicant for leave to sue *in forma pauperis* occupies two positions, one of these being what may be called the general one of a would-be plaintiff, and the other the particular one of a person wishing his plaint to be entertained without a court-fee being paid on it. That his application may be considered as an inchoate or incomplete plaint is indicated by what is the practice of this High Court, though it is not that of all the High Courts, of allowing court-fee to be paid by the applicant, on his application for leave to sue as a pauper being refused, and dating the filing of the plaint on such payment from the day on which the application was filed. This practice has been allowed by this Court in a number of decisions. It has been held, too, by the Privy Council in *Stuart Skinner* alias *Nawab Mirza v. William Orde*(1) that, when a person who had at first applied for leave to sue *in forma pauperis* sought for permission, before the enquiry had been made into his pauperism, to pay the necessary court-fee, and it was found that he had acted all through in good faith, his petition could, on such payment, be allowed and his suit should be taken as instituted from the date when he filed his pauper petition. As pointed out in that decision the defendant so far from being a sufferer by the change is benefited as both parties will go on with the litigation on equal terms. It is also remarked that, though the analogy is not perfect, what has happened is not at all unlike that which so commonly happens in Indian Courts, namely, a wrong stamp is put upon the plaint originally and the proper stamp is afterwards affixed.

(1) (1879) I.L.R. 2 All. 241 (P.C.).

It is to be observed that in the Privy Council case, as in this case, permission to pay the court-fee was asked for before the question of pauperism had been decided. The difference between the two cases is that in the one it was the original applicant who sought permission to pay the court-fee while in the other it was his legal representatives that did so. But I take it that this makes no difference in principle. The right to pay court-fee is not a personal right and the point is that an application to sue as a pauper can be treated as an insufficiently stamped plaint.

I find then that the learned Subordinate Judge has passed a correct order in allowing the respondents here to be joined as legal representatives of the deceased applicant and to pay the court-fee, upon which payment the application is to be filed as a suit. This revision petition is therefore dismissed with costs.

G.R.

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