(1), *Lakshmishankar Kanji Rawal* v. *Gresham Life Assurance Society, Limited* (2) and *Condogianis* v. *Guardian Assurance Company, Limited* (3) and having regard to the terms of the policy in question, the plaintiff is not entitled to sue upon the policy.

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THE ASIAN ASSURANCE COMPANY, LIMITED v. ASA RAM

The appeal is therefore allowed and the plaintiff-respondent's suit dismissed. In view however of the special circumstances of the case and of the fact that no wilful fraud or misrepresentation on the part of the assured has been proved, we order parties to bear their own costs in all the courts.

Ziaul Hasan and Hamilton, JJ.

Appeal allowed.

FULL BENCH

Before Mr. Justice G. H. Thomas, Chief Judge, Mr. Justice Ziaul Hasan and Mr. Justice A. H. deB. Hamilton

BABA NARAIN BHARTHI (PLAINTIFF-APPLICANT) *v.* TRUST MANDIR NAGESHAR NATH JI MAHADEO, THROUGH BABU HAZARI LAL, SECRETARY (DEFENDANT-OPPOSITE-PARTY)*

1939 *December*, 19

Civil Procedure Code (Act V of 1908), section 115 and Order XXXIII, rule 2—Pauper application refused—Revision, if lies against the order on application for permission to sue as pauper—Plaintiff suing on behalf of idol in representative capacity—Plaintiff can be allowed to sue as pauper if not possessed of sufficient property of waqf to pay court-fee—Plaintiff's personal property immaterial.

Per Full Bench—An order on an application for permission to sue *in forma pauperis* is not revisable by the Chief Court unless there has been an exercise of jurisdiction not vested by law or failure to exercise a jurisdiction so vested or an exercise of jurisdiction illegally or with material irregularity. *Durga Prasad* v. *Gur Dularey* (4), *Asa Ram* v. *Mst. Gendo* (5), and *Badri Nath* v. *Ram Chandra* (6), referred to and discussed.

Per Bench—When a plaintiff sues in a representative character such as a mutawalli, trustee, or a *shebait*, unless it

*Section 115 Application no. 169 of 1936, for revision of the order of Pundit Kishen Lal Kaul, Civil Judge of Fyzabad, dated the 31st of August, 1936.

(1) (1931) A.I.R., Bombay, 146.
(2) (1932) A.I.R., Pom., 589
(3) (1921) A.I.R., P.C., 195.
(4) (1938) I.L.R., 14 Luck., 116.
(5) (1935) I.L.R., 10 Luck., 265.
(6) (1939) I.L.R., 14 Luck., 442.

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is shown that the plaintiff is in possession of property belonging to the waqf estate or trust or the idol for whom he sues, sufficient to enable him to pay the requisite court-fee prescribed by law, he may be allowed to sue as a pauper even if it is shown that he has sufficient personal property of his own. The capacity of a person suing in a representative character must be kept distinct from his personal capacity. *Sm. Mabia Khatun* v. *Sheikh Satkari* (1), relied on.

The case was originally heard by a Bench consisting of the Hon'ble the CHIEF JUDGE and Mr. Justice ZIAUL HASAN who referred an important question of law involved in it to a Full Bench for decision. The order of reference of the Bench is as follows:

1939 *September*, 28

THOMAS, C. J. and ZIAUL HASAN, J.:—This is an application under section 115 of the Code of Civil Procedure against an order of the learned Civil Judge of Fyzabad dismissing the applicant's application for permission to sue as a pauper.

The learned counsel for the opposite-party raises a preliminary objection on the ground that the application for revision is not maintainable. He relies on the case of *Badri Nath* v. *Ram Chandra* (2). In that case an official receiver in insolvency applied for permission to bring a suit *in forma pauperis* and his application having been disallowed he applied in revision to this Court. It was contended by the opposite-party that no revision lay against the order of the trial court. A Bench of this Court of which one of us was a member relying on two decisions of their Lordships of the Privy Council, namely, *Raja Amir Hassan Khan* v. *Sheo Bakhsh Singh* (3) and *Balakrishna Udayar* v. *Vasudeva Aiyar* (4), held that as the courts below had jurisdiction to grant or refuse the application for permission to sue *in forma pauperis* no revision lay against that order.

The learned counsel for the applicant however relies on the cases of *Asa Ram* v. *Genda* (5) and *Durga Prasad* v. *Gur Dularey* (6). In the former case an application in revision had been brought against an order refusing the applicant permission to sue as a pauper and it was held by another Bench of this Court that a revision lay against such an order as the order constituted a complete decision of the case so far as the court passing the order was concerned. In the latter decision an application in revision had been brought against an order

(1) (1927) A.I.R., Cal., 309.
(2) (1939) I.L.R., 14 Luck., 442.
(3) (1884) L.R., 11 I.A., 237.
(4) (1917) L.R., 44 I.A., 261.
(5) (1935) I.L.R., 10 Luck., 265.
(6) (1938) I.L.R., 14 Luck., 116.

allowing the application for leave to sue as a pauper. In this case it was held by a third Bench that a revision lay against an order allowing or rejecting an application for leave to sue *in forma pauperis*. The view taken was that where an application under Order XXXIII, rule 2, Civil Procedure Code, is allowed or rejected the proceedings constitute a case in themselves within the meaning of section 115, Civil Procedure Code, and that therefore the order is revisable by this Court. Reference was made in this case to the Full Bench decision of *Paras Nath* v. *Raj Bahadur* (1) in which it had been held that no revision lies against an interlocutory order passed in a suit, but it was held that proceedings on an application for permission to sue as a pauper constituted a separate case.

Although in the cases referred to above the question whether or not an order on an application under Order XXXIII, rule 2, Civil Procedure Code, is revisable by this Court was looked upon from different points of view, yet there seems to be a conflict of decisions on the point in this Court. In these circumstances we consider it advisable that the question be referred for decision to a Full Bench. We frame the question to be referred to the Full Bench as follows:

> "Is an order on an application for permission to sue *in forma pauperis* revisable by this Court and should a distinction be made between orders allowing applications under Order XXXIII, rule 2, Civil Procedure Code, and those rejecting such applications?"

Mr. *H. D. Chandra*, for the applicant.

Mr. *S. S. N. Tankha*, for the opposite-party.

1939 *November*, 22

THOMAS, C.J., ZIAUL HASAN and HAMILTON, JJ.:—The point which has been referred to us for decision by a Divisional Bench is in the words of that Bench as follows:

> "In an order on an application for permission to sue *in forma pauperis* revisable by this Court and should a distinction be made between orders allowing applications under Order XXXIII, rule 2, Civil Procedure Code, and those rejecting such applications?

Prima facie, the terms of the reference are wide, but an examination of the referring order shows that the scope is really restricted. The reason why the reference

(1) (1935) I.L.R., 11 Luck., 529, F.B.

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was made is that there appeared to be a conflict of decisions on the point whether an order on an application under Order XXXIII, rule 2, was revisable in view of three decisions of Divisional Benches, although it was recognized that the matter was considered from different points of view. No reference has been made to any decision of any other Court, barring two decisions of their Lordships of the Privy Council which are quoted in one of those three decisions, and it is clear that the reference has been made not because there was any conflict real or apparent with decisions of any other High Court but because those three decisions of this Court might be regarded as conflicting.

The three decisions are *Badri Nath* v. *Ram Chandra* (1) which was quoted by Counsel for the opposite-party before the Divisional Bench and, on the other hand, *Asa Ram* v. *Mst. Genda* (2) and *Durga Prasad* v. *Gur Dularey* (3) which were quoted by Counsel for the applicant.

What we have to consider, therefore, is whether there is any conflict between the cases of *Badri Nath* v. *Ram Chandra* (1) on the one hand, *Asa Ram* v. *Mst. Genda* (2) or *Durga Prasad* v. *Gur Dularey* (3), on the other, and only if there is such conflict are we called upon to say which of the decisions has to be preferred to the other. We, therefore, bear this in mind and do not refer to cases of other High Courts and consequently do not give any express decision here as to the correctness or otherwise of any of the three decisions of this Court independent of their bearing one upon the other.

Badri Nath v. *Ram Chandra* (1) was a case in which an Official Receiver in insolvency had applied for permission to bring a suit *in forma pauperis* and as his application had been rejected, he applied in revision to this Court. It was contended that in the circumstances of the case no revision lay, and the Divisional Bench decided that the contention was well founded.

(1) (1939) I.L.R., 14 Luck., 442. (2) (1935) I.L.R., 10 Luck., 265.
(3) (1938) I.L.R., 14 Luck., 116.

The decision of the Divisional Bench was based on two decisions of their Lordships of the Privy Council, *Raja Amir Hassan Khan* v. *Sheo Bakhsh Singh* (1) and *Bala Krishna Udayar* v. *Vasudeva Aiyar* (2) and on them it was held that as the courts below had jurisdiction to grant or refuse the application for permission to sue *in forma pauperis*, no revision lay against that order. Neither of the decisions of their Lordships of the Privy Council had to deal with an order on an application for permission to sue *in forma pauperis*.

The first case was one where under section 622 of Act X of 1877 as amended by a later Act a decree of the District Judge had been reversed and cancelled. It was not suggested there that the Judicial Commissioner had no power to call for the record and to pass an order if the lower court had exercised a jurisdiction not vested in it by law, or had failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity but their Lordships of the Privy Council held that the lower courts had jurisdiction to decide the case and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity.

The second case was one in which it was held that when the remaining members of a temple committee have for three months failed to fill up a vacancy therein by holding an election, as provided by section 10 of Act XX of 1863, and have been ordered by the civil court under that section to fill up the vacancy forthwith, they must do so by themselves making an appointment. The civil court after so ordering has no jurisdiction to make an order declaring valid an appointment made upon election by the persons interested. If it does so, the order is open to revision by the High Court under section 115 of the Code of Civil Procedure, 1908, the proceedings by petition to the civil court being a "case" within the meaning of that section. The District Judge had held that a

(1) (1884) L.R., 11 I.A., 237. (2) (1917) L.R., 44 I.A., 261.

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certain appointment was valid and the respondent by a civil revision petition to the High Court under section 115 of the Code of Civil Procedure prayed that the order of the District Judge might be set aside. The High Court rejected a preliminary objection that the High Court had no jurisdiction under section 115 and set aside the order of the District Judge. The decision of the High Court was upheld by their Lordships of the Privy Council who, however, in referring to section 115 pointed out that it applied to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it, and it was not directed against conclusions of law or fact in which the question of jurisdiction is not involved.

The Divisional Bench in *Badri Nath* v. *Ram Chandra* (1), when it stated that no revision lay, did not mean by this that revision was prohibited by statute or by case law. It stated that the court, below had jurisdiction either to allow or disallow the application for permission and it had exercised that jurisdiction following a ruling of one High Court. In other words the finding was that the court which had passed the order rejecting the application had exercised a jurisdiction which was vested in it by law and in the exercise of its jurisdiction it acted neither illegally nor with material irregularity. Consequently, the application for revision failed. Perhaps the use of the expression "no revision lies" was not quite appropriate because it did not correctly express what the Bench found, for the Divisional Bench did not find that the application in revision could not be considered at all but that what it alleged did not constitute an exercise of jurisdiction not vested by law, or an exercise of that jurisdiction illegally or with material irregularity, or a failure to exercise a jurisdiction vested in it. The application, therefore, failed in view of the provisions of section 115 of the Code of Civil Procedure, not really because it did not lie at all.

(1) (1939) I.L.R., 14 Luck., 442.

Asa Ram v. *Mst. Genda* (1), was a case where the application for permission to sue as a pauper had been rejected and the finding by the lower court that the plaintiff was not a pauper was one of fact and was fully supported by evidence and, therefore, there was no ground for the High Court to go against it in revision. There were, therefore, two findings—

(1) that revision was not absolutely barred on the ground that there was no case decided, and

(2) that the application in revision failed because there was a finding of fact, or, in other words, because there was no exercise of jurisdiction which was not vested: no failure to exercise jurisdiction which was vested and no material irregularity in the exercise of jurisdiction which in fact was vested.

Durga Prasad v. *Gur Dularey* (2), was a case in which the application for leave to sue *in forma pauperis* was granted. It was found (1) that there was a case decided, but (2) there was no exercise of jurisdiction not vested, no failure to exercise jurisdiction which was vested and not material irregularity in the exercise of jurisdiction which was vested.

It is clear, therefore, that the reason for which the revision application was rejected in *Badri Nath* v. *Ram Chandra* (3), was the reason for which the Divisional Benches in *Asa Ram* v. *Mst. Genda* (1), and also in *Durga Prasad* v. *Gur Dularey* (2), rejected the application in revision.

There is, therefore, full agreement between the three Benches on the one point which was common to the three cases. In *Badri Nath* v. *Ram Chandra*, the application had been rejected and, therefore, the case was similar to that in *Asa Ram* v. *Mst. Genda* (1), and by implication there was agreement in the two decisions that a revision application could be considered when the application to sue *in forma pauperis* was rejected. Whether an application could be considered when the

(1) (1935) I.L.R., 10 Luck., 265. (2) (1938) I.L.R., 14 Luck., 116.
(3) (1939) I.L.R., 14 Luck., 442.

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application to sue *in forma pauperis* was granted was not considered in *Badri Nath* v. *Ram Chandra* (1), because in that case the application had been rejected. As we have said before, the reason for which the reference was made was not because there was any difference between the decision in *Durga Prasad* v. *Gur Dularey* (2), and that of other High Courts in the same matter and we are not called upon, therefore to express any opinion on this.

We may perhaps say that there are two stages when an application in revision comes before a court. The first stage is where an application in revision is altogether barred by statute or by case law in the same way that an appeal is barred though an application in revision would be maintainable. The second stage is where an application in revision should be dismissed in view of the provisions of section 115 of the Code of Civil Procedure, that is to say, because there has not been an exercise of jurisdiction not vested, material irregularity in the exercise of jurisdiction vested or failure to exercise jurisdiction vested. *Asa Ram* v. *Mst. Genda* (3), and *Durga Prasad* v. *Gur Dularey* (2) deal specifically with both stages while *Badri Nath* v. *Ram Chandra* (1), deals specifically with the second stage only.

In view of what we have said above we decide the reference in the following terms:

> An order on an application for permission to sue *in forma pauperis* is not revisable by this Court unless there has been an exercise of jurisdiction not vested by law or failure to exercise a jurisdiction so vested or an exercise of jurisdiction illegally or with material irregularity in the sense in which the words "illegally or with material irregularity" have been construed by past decisions of this Court and of their Lordships of the Privy Council.

(1) (1939) I.L.R., 14 Luck., 442. (2) (1938) I.L.R., 14 Luck., 116.
(3) (1935) I.L.R., 10 Luck., 265.

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THOMAS, C.J., and ZIAUL HASAN, J.:—This is an application for revision of an order of the learned Civil Judge of Fyzabad refusing to allow the applicant to sue *in forma pauperis*.

When this application came on for hearing before us, a preliminary objection was taken on behalf of the opposite-party that no revision lies against an order refusing permission to sue as a pauper. As the cases of this Court bearing on the point appeared to be in conflict, we referred the following question for decision to a Full Bench—

> "Is an order on an application for permission to sue *in forma pauperis* revisable by this Court and should a distinction be made between orders allowing applications under Order XXXIII, rule 2, Civil Procedure Code, and those rejecting such applications?"

The Full Bench answered the question as follows:

> "An order on an application for permission to sue *in forma pauperis* is not revisable by this Court unless there has been an exercise of jurisdiction not vested by law or failure to exercise a jurisdiction so vested, or an exercise of jurisdiction illegally or with material irregularity in the sense in which the words 'illegally or with material irregularity' have been construed by past decisions of this Court and of their Lordships of the Privy Council."

In view of this decision of the Full Bench, we have heard the application on the merits in order to see whether the learned Judge of the court below failed to exercise a jurisdiction vested in him by law or exercised it illegally or with material irregularity and on a consideration of the arguments addressed to us, we have come to the conclusion that the learned Judge did exercise jurisdiction illegally.

The suit which the plaintiff-applicant wanted to bring was for possession of certain property which the plaintiff alleged belong to a temple dedicated to the idol of Sri Paleshur Nath Mahadeo of which the plaintiff claimed to be the manager or sarbarakar in succession to Mahant

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Sarabjit Bharti whose disciple the plaintiff claimed to be. It is thus clear that the plaintiff claimed possession of the property in a representative capacity and not in his personal right. In certain khewats (Exs. A-3 and A-4) filed by the opposite-party, one Sundar's name appeared as a sub-mortgagee of some land in village Gangaputri Purwa. The applicant denied that the entries in the khewats related to him but the learned Judge did not believe his denial and was of opinion that as the applicant's allegations in support of his pauperism were not true he could not be held to be unable to pay the requisite court-fee. He therefore dismissed the applicant's application for leave to sue *in forma pauperis* under Order XXXIII, rule 2, Civil Procedure Code.

It is argued on behalf of the applicant that the opposite-party has himself practically admitted in his objection to the plaintiff's application that the plaintiff is a *sanyasi* inasmuch as it is contended that he derives sufficient income from *chelahi* (discipleship) and that as a *sanyasi* he is under the Hindu law incapable of holding any property. It is further argued that if the applicant be deemed to be the sub-mortgagee of the land mentioned in the khewats it should not be taken into account on the question of his pauperism as it would be his personal property and the suit filed by him is not his own account but on behalf of the Paleshur Nath Trust. In support of this argument learned counsel place reliance on the case of *Sm. Mabia Khatun* v. *Sheikh Satkari* (1). The decision in this case undoubtedly supports him. In that case a lady proposed to sue the opposite-party as mutawalli with regard to certain waqf property. The learned Subordinate Judge was of opinion that she had personal property out of which she could pay the court fee payable on the plaint and therefore rejected her application to sue as a pauper. Their Lordships of the Calcutta High Court observed—

> ". . . We are of opinion that when a plaintiff sues in a representative character such as a mutawalli, trustee, or

(1) (1927) A.I.R., Cal., 309.

a *shebait,* unless it is shown that the plaintiff is in possession of property belonging to the waqf estate or trust or the idol for whom he sues, sufficient to enable him to pay the requisite court-fee prescribed by law, he may be allowed to sue as a pauper even if it is shown that he has sufficient personal property of his own. The capacity of a person suing in a representative character must be kept distinct from his personal capacity."

These remarks apply in our opinion with full force to the case before us, and the applicant should in our opinion be allowed to sue as a pauper if he is not possessed of any property of the alleged waqf even though he has some personal property of his own.

Thomas, C.J. and Ziaul Hasan, J.

The learned counsel for the opposite-party contended, and quoted texts of Hindu Law and rulings to show, that one cannot be said to be a *sanyasi* merely because he shaves his head or wears a coloured dress like that of a *sanyasi;* but in the first place the opposite-party himself has in a way admitted that the plaintiff is a *sanyasi,* and in the second, the question whether or not the plaintiff is entitled as a *sanyasi* to possession of the property in suit will arise in the suit and cannot be decided in the present proceedings.

We therefore allow this application with costs and send back the case to the court below for decision of the applicant's application under Order XXXIII, Civil Procedure Code, in the light of what we have said above.

Application allowed.