

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan and
Mr. Justice A. H. deB. Hamilton

LALTA (DEFENDANT-APPELLANT) v. AVADH NARESH SINGH
(PLAINTIFF-RESPONDENT)*

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Civil Procedure Code (Act V of 1908), section 149 and Order XXXIII, rule 2—Pauper application—Application under Order XXXIII, rule 2, containing necessary particulars for plaint—Before rejecting application court permitting applicant to deposit court-fee within certain time—Court-fee deposited within time allowed but after expiry of limitation for suit—Plaint whether deemed to have been filed when application under order XXXIII, rule 2, was filed or when court-fee was deposited—Hindu Law—Debt—Family necessity—Proof of application of money borrowed, whether necessary—Agriculturists' Relief Act (XXVII of 1934), section 3(1)—Instalments—Court's discretion to allow instalments.

Where an application for leave to sue in *forma pauperis* contained all the particulars necessary for a plaint and before the application was rejected the court at the request of the applicant permitted him under section 149, Civil Procedure Code, to pay the necessary court-fee within a certain time and it was paid within that time but the limitation for the suit had expired before that date, *held*, that the plaint must be deemed to have been filed when the application for leave to sue as pauper was filed and not when the court-fee was paid. *Bank of Behar v. Ramchanderji Maharaj* (1) and *Jagadeeshwaree Debee v. Tinkarhi Bibi* (2), relied on. *Biswu Nath Das v. Khejerali Molla* (3), *Pratap Chand v. Atmaram* (4), *Alopi Prasad v. Mst. Gappi* (5), *Chunna Lal v. Bhagwant Kishore* (6), *Bhushan Chandra Ghose v. Kanailal Sadhu Khan* (7), *Balaguru Naidu v. Muthu Ratnam Aiyar* (8), *Sundarathammal v. Paramaswarni Asari* (9), and *Mata Bakhsh Singh v. Ajodhia Bakhsh Singh* (10), referred to.

It is not necessary for a creditor to prove the application of the money borrowed after proving that the loan was intended to be taken for a family necessity.

The words "unless for reasons to be recorded it directs otherwise" in section 3(1) of the Agriculturists Relief Act clearly

*Second Civil Appeal No. 146 of 1936, against the decree, of Mr. Gopendra Bhushan Chatterji, District Judge, Gonda, dated the 20th February, 1936.

(1) (1929) A.I.R., Patna, 637.

(3) (1939) A.I.R., Cal., 394.

(5) (1937) A.I.R., Lahore, 151.

(7) (1937) A.I.R., Cal., 241.

(9) (1933) A.I.R., Madras., 833.

(2) (1935) I.L.R., 62 Cal., 711.

(4) (1933) A.I.R., Nagpur, 237.

(6) (1936) A.I.R., All., 584.

(8) (1924) A.I.R., Madras, 118.

(10) (1936) A.I.R., Oudh, 340.

show that the section gives discretion to the court not to allow instalments in some cases in which it considers there are reasons for not allowing them.

Mr. H. N. Misra, for the appellant.

Messrs. Ghulam Hasan and S. N. Srivastava, for the respondent.

ZIAUL HASAN and HAMILTON, JJ.:—This second appeal against a decree of the learned District Judge of Gonda arises out of a suit brought by the plaintiff-respondent against the defendant-appellant on foot of a mortgage, dated the 8th December, 1917, executed by the appellant's father in favour of the respondent for a sum of Rs.1,500.

The mortgage was made for a period of five years. On the 24th September, 1934, the plaintiff-respondent applied for leave to sue in *forma pauperis*. The application as required by law contained all the particulars necessary for a plaint and the amount claimed was Rs.10,497-1-5.

The learned Civil Judge in whose court the application was made, held an inquiry into the alleged *pauperism* of the plaintiff and on the 2nd March, 1935, arguments were heard on the application for leave. In the course of arguments a request was made on behalf of the plaintiff that if the Court should not be inclined to grant the application for leave to sue in *forma pauperis* time be granted to the plaintiff to pay the necessary court-fee. The learned Judge after hearing the arguments passed an order the concluding portion of which runs as follows:

“The opposite-party opposes the request of the applicant to give him time for payment of court fee but I think it would be inequitable to dismiss his application *in forma pauperis* and at the same time preclude him from maintaining his suit even on payment of the court fee. Accordingly under section 149, Civil Procedure Code, I permit the applicant to pay the necessary court-fee within a fortnight, i.e. by the 18th March, 1935, on his claim. On his failure to do so within the time fixed, the case shall be consigned to records and the defendant shall get his costs from the applicant.”

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The plaintiff reduced his claim from Rs.10,497-1-5 to Rs.5,000 and the requisite court-fee on this amount being paid within the time fixed by the court the suit proceeded. The defendant put up the plea that as limitation for the suit on the mortgage in question expired on the 8th December, 1934, and as the court-fee on the plaint was paid on the 18th March, 1935, the suit was time barred. This plea found favour with the learned Civil Judge who tried the case and the suit was thereupon dismissed as time barred. The plaintiff appealed and the learned District Judge holding that the plaint must be deemed to have been filed on the 24th September, 1934, along with the application for leave to sue as a pauper, found that the claim was not time barred. He gave the plaintiff a decree for Rs.5,000 with interest at $6\frac{1}{2}$ per cent. per annum with yearly rest from the date of suit till the 15th January, 1936 and at $5\frac{1}{4}$ per cent. per annum from the 16th January, 1936, to the date fixed for payment of the mortgage money, under Order XXXIV, rule 4, Civil Procedure Code.

The defendant has brought this appeal against the decree of the learned District Judge and the following questions arise for determination in the appeal:

- (1) Was the suit of the plaintiff respondent barred by time?
- (2) Was the mortgage made for legal necessity?
- (3) Was the court below wrong in not allowing the defendant appellant to pay up the decretal amount by instalments?

On the question whether the date of the institution of the suit in the present case be taken to be the 24th September, 1934, or the 18th March, 1935, the learned counsel for the appellant has referred us to the following cases: *Biswa Nath Das v. Khejerali Molla* (1), *Pratap Chand v. Atmaram* (2), *Alopi Prasad v. Mst. Gappi* (3) and *Chunna Lal v. Bhagwant Kishore* (4).

(1) (1939) A.I.R., Cal., 394.

(2) (1933) A.I.R., Nagpur, 237.

(3) (1937) A.I.R., Lahore, 151.

(4) (1936) A.I.R., All., 584.

In *Biswa Nath Das v. Khejerali Molla* (1) a Judge of the Calcutta High Court sitting singly held that where an application to sue *in forma pauperis* is rejected under Order XXXIII rule 7(3) and the applicant seeks to deposit the full court-fee in respect of the relief sought, the suit must be considered for the purposes of limitation to have been instituted only after the payment of the requisite court-fee and not on the date of the presentation of the petition to sue as a pauper.

In *Pratap Chand v. Atmaram* (2), the learned Additional Judicial Commissioner held that where an application for leave to sue *in forma pauperis* is rejected under Order 33, rule 7, there is no proceeding before the Court and that the plaint cannot be said to remain, and an order granting the plaintiff permission to pay Court-fee cannot be deemed to be one under section 149 and the suit must be held to have been instituted on the date on which the Court fee is paid.

In *Alopi Prashad v. Mst. Gappi* (3), a Bench of the Lahore Court was of opinion that when an application to sue *in forma pauperis* is rejected it cannot be deemed to be a plaint and the payment of the Court fee after the application to sue *in forma pauperis* has been rejected cannot revive a potential plaint which ceased to exist when the application for leave was rejected and that in such a case the suit must be considered for the purposes of limitation to have been instituted only after the payment of the court fee and not at the date of presentation of the petition to sue as a pauper.

In *Chunna Lal v. Bhagwant Kishore* (4) the following two questions had been referred to a Full Bench :

(1) Whether while rejecting the application for permission to sue as a pauper the Court can under section 149 C. C. P., allow the applicant to pay the requisite court-fee and treat the application as a plaint.

(2) Whether after rejecting the application for permission to sue as a pauper, can the Court by a separate and subsequent order allow the applicant to pay the requisite court-fee under section 149, C. P. C. and treat the application as a plaint.

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(1) (1939) A.I.R., Cal., 894.
(3) (1937) A.I.R., Lahore, 151.

(2) (1933) A.I.R., Nagpur, 237.
(4) (1936) A.I.R., All., 584.

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It was held that where the application for permission to sue as a pauper is rejected under Order XXXIII, rule 5, the Court while rejecting the application can under section 149 allow the applicant to pay the requisite court fee and treat the application as a plaint but that if the Court has refused to allow the applicant to sue as a pauper under Order XXXIII, rule 7(3) then the Court while rejecting the application for permission to sue as a pauper cannot under section 149 allow the applicant to pay the requisite court-fee and treat the application as a plaint.

These cases no doubt support the appellant's contention to a certain extent but there are other cases in which a contrary view has been taken by Courts including our own.

In *Bhushan Chandra Ghose v. Kanailal Sadhu Khan* (1) a learned Judge of the Calcutta High Court held that if the application for leave to sue as a pauper be not granted, the applicant may pay the court-fees on the plaint already presented and the date of the institution of the suit will be the original date when the plaint was actually presented with the application.

Similarly in *Balaguru Naidu v. Muthu Ratnam Aiyar* (2) a learned Judge of the Madras High Court held that when a petition for leave to sue as a pauper is dismissed whether on the ground that the petitioner is not a pauper or on the ground that a dismissal of a similar previous petition bars the present petition, it is the application that fails but the plaint remains and may be validated by payment of court-fees within a time to be fixed by the Court, if the Court in the exercise of its discretion is prepared to grant time.

In *Sundarathammal v. Paramaswami Asari* (3) another learned Judge of the same Court held that though the pauper application be dismissed the plaint remains still pending until it is actually dismissed and if the court-fees are paid, limitation will count from the date of the

(1) (1937) A.I.R., Cal., 241.

(2) (1924) A.I.R., Madras, 118.

(3) (1933) A.I.R., Madras, 833.

presentation of the petition which will be regarded as the date of the plaint.

A Bench of the Patna High Court held in the *Bank of Behar v. Ramchonderji Maharaj* (1), that an application to sue as a pauper contains an unstamped plaint and the Court can under powers vested in it under section 149, even if the application is rejected, permit the requisite stamp to be paid thereon within a time fixed by it and after it has been done, the unstamped plaint will be considered to be validly presented on a proper stamp duty on the date when it was originally filed and that this holds even if the court-fee is paid subsequently under the orders of the Court on the date when it is barred by limitation.

In *Jagadeeshwaree Debee v. Tinkarhi Bibi* (2) a Bench of the Calcutta High Court held that an application under Order XXXIII, rule 2, which contains all the particulars that the law requires to be given in a plaint and in addition a prayer that the plaintiff might be allowed to sue as a pauper is a plaint required to be filed in a suit and that the plaint being before the Court and it is a document on which proper court-fees had not been paid by virtue of a refusal of the prayer of the plaintiff for leave to sue as a pauper the provisions of section 149, Civil Procedure Code, could come to the assistance of the plaintiff.

In the Oudh case of *Mata Bakhsh Singh v. Ajodhia Bakhsh Singh* (3) the facts were very similar to those before us. In that case the plaint was filed on the 30th April, 1934, along with the application under Order XXXIII, rule 2, Civil Procedure Code. The suit was for possession of immovable property and the period of limitation applicable was twelve years. On the 12th September, 1934, the plaintiff presented an application praying that the disposal of his application under Order XXXIII, rule 2 be postponed as he was making attempts to raise money to pay the necessary court-fee. The inquiry was thereupon adjourned on that date. Some

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(2) (1935) I.L.R., 62 Cal., 711.

(3) (1936) A.I.R., Oudh, 340.

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other adjournments followed and on the 19th November, 1934, the plaintiff tendered the requisite court-fee and prayed that it might be accepted, the suit be proceeded with and the application to sue as a pauper need not be considered. The plaint was thereupon registered and summonses ordered to be issued to the defendants. Limitation for the suit was to expire ordinarily on the 27th May, 1934, and the question arose whether the suit should be deemed to have been instituted on the 30th April, 1934, the date on which the application for leave was presented or on the 19th November, 1934, when the court-fee was paid. The learned Judge (now the Hon'ble Chief Judge) who was trying the suit on the Original Side held that the plaint must be deemed to have been filed on the 30th April, 1934.

It will be seen from the above that though there are some cases in which the view taken was that on the rejection of an application under Order XXXIII, rule 2, Civil Procedure Code, the proceedings cease to exist and the Court has no discretion to grant time under section 149, Civil Procedure Code, it must be noticed that these cases are not applicable to the case now before us inasmuch as in the present case the application under Order XXXIII, rule 2 had not been rejected when the Court granted time for payment of the court-fee under section 149. An application under Order XXXIII, rule 2, Civil Procedure Code, is always accompanied by a plaint duly signed and verified according to law and we are in perfect agreement, if we may respectfully say so, with what their Lordships of the Patna High Court said in *Bank of Behar v. Ramchanderji Mahraj* (1) and the learned Judges of the Calcutta High Court in *Jagadeeshwaree Debee v. Tinkarhi Bibi* (2). Moreover, the weight of authority is undoubtedly also in favour of the view taken in the cases relied on by the respondent and in some of them it has been held that action under section 149, Civil Procedure Code, can be taken even after an application for leave to sue as a pauper has already been rejected. The present,

(1) (1929) A.I.R., Patna, 637.

(2) (1935) I.L.R., 62, Cal., 711.

however, is a case in which that application was not rejected when the order granting time to the plaintiff for payment of the court-fee was passed under section 149. In this connection the following words of Mr. Justice ALLSOP in the Full Bench case of *Chunna Lal v. Bhagwant Kishore* (1) may usefully be quoted:

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"My conclusion is that a Court when it refuses to an applicant under Order XXXIII, to sue as a pauper may at the same time give him permission to stamp his application and treat it as a plaint. The point is that we should look to the substantial intention of the Court at the time when it still has jurisdiction under section 149, C. P. C., and if it means to exercise that jurisdiction before the proceedings came to an end, we should not say that it is incompetent to do so merely because it expresses its intention at the same time not to allow the applicant to sue as a pauper."

In any case therefore we are of opinion that the learned District Judge was right in holding that the suit was within limitation though he was not correct in saying that the application for leave to sue as a pauper was rejected by the trial court on the 2nd March, 1935. We decide this point against the appellant.

The next question is of legal necessity for the mortgage in suit. The learned Judge of the court below has held that out of the mortgage consideration a sum of Rs.1,132 was justified by legal necessity. It is not disputed before us that the defendant's father Subkaran Singh was liable for one-sixth of Rs.6,696 of the family debt which comes to Rs.1,116 (and not Rs.1,132 as the learned District Judge holds). It is however contended that the plaintiff respondent has failed to prove that the family debt was actually paid off by Subkaran Singh out of the mortgage consideration. We do not think that it was necessary for the plaintiff-respondent to prove the application of the money borrowed after proving that the loan was intended to be taken for a family necessity. This point also fails and is decided against the appellant.

The last ground taken by the learned counsel for the appellant is that the court below should have extended the benefit of the Agriculturists' Relief Act to the

(1) (1936) A.I.R., All., 584 F.B.

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defendant appellant. The material portion of section 3(1) of the Agriculturists' Relief Act runs as follows:

"Notwithstanding any provision in the Code of Civil Procedure (V of 1908) to the contrary, the Court at the time of passing a decree for money or a preliminary decree for sale in default of payment of money or a preliminary decree for foreclosure against an agriculturist may, and, on the application of such agriculturist, shall, unless for reasons to be recorded it directs otherwise, direct that the total amount found due for principal, interest up to the date of the decree and costs, if any, shall be paid in such number of instalments payable on the dates fixed by the Court as having regard to the circumstances of the judgment-debtor and the amount of the decree, the Court considers proper."

The words "unless for reasons to be recorded it directs otherwise" clearly show that the section gives discretion to the Court not to allow instalments in some cases in which it considers there are reasons for not allowing them. In the present case the learned District Judge refused to allow instalments to the appellant on the grounds that though the mortgage bond was executed nineteen years before the suit, the mortgagor or his successor—the present appellant—did not pay a single pie to the mortgagee and that the plaintiff has already remitted a large portion of the amount actually due to him on the bond. We consider that the learned Judge exercised his discretion under section 3 of the Agriculturists' Relief Act properly. This point is also decided against the appellant.

The appeal is therefore dismissed with costs and the decree of the learned District Judge affirmed.

Appeal dismissed.

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*Before Mr. Justice G. H. Thomas, Chief Judge and
Mr. Justice Radha Krishna Srivastava*

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APPELLANTS) v. LAL AMBIKA BAKHSH SINGH
AND OTHERS (DEFENDANTS-RESPONDENTS)*

*Court Fees Act (VII of 1870), section 7(iv)(b) and Schedule II,
Article 17(vi)—Plaintiff alleging joint possession—Suit for*

*First Civil Appeal No. 15 of 1936, against the order of Mr. Abid Raza, Sub-Judge of Partabgarh, dated the 30th September, 1935.

August 18,
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