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WORT, J.

the record-of-rights. It is said that by coming to the conclusion that the defendant had *sasan* in the village he indirectly decided that they were not Khuntkattidars of the village. In my judgment that argument has no foundation, and the argument must fail. The next point which the learned Subordinate Judge dealt with was the contention by the defendant, the appellant before him, that the Munda of the village was appointed from the clan or Koli of the defendant. He has come to the conclusion on the facts contrary to the defendant's contention and, it seems to me, upon materials which were sufficient. The last and the final point which he has discussed in this case was whether or not the majority of the villagers were in favour of the defendant's candidature. On that point, which is obviously a question of fact, the learned Subordinate Judge also came to a conclusion against the defendant. In my judgment, so far as the merits of the case are concerned, this appeal fails. It succeeds to this extent that the learned Subordinate Judge was wrong in law in deciding that the Deputy Commissioner had no jurisdiction, but generally the learned Subordinate Judge having decided in favour of the plaintiffs on the merits, the appeal must fail and is dismissed with costs.

JAMES, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Jwala Prasad and Rowland, JJ.

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May, 23.

BANK OF BIHAR LIMITED

v.

SRI THAKUR RAMCHANDERJI MAHARAJ.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XXXIII, rule 2—pauper, application to sue as, whether*

*Appeal from Appellate Order no. 186 of 1928, from an order of Babu Amar Nath Chaterji, District Judge of Gaya, dated the 27th of August, 1928, reversing an order of Maulavi Syed Mohammad Ibrahim, Munsif of Gaya, dated the 16th August, 1927.

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contains plaint—application, rejection of—court, jurisdiction of, to permit requisite stamp to be paid within a certain time—order, effect of—section 149, applicability of—discretion, use of.

Order XXXIII, rule 2, Code of Civil Procedure, 1908, requires that an application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits.

Held, that the document referred to in rule 2 of Order XXXIII is a complete document consisting of an application for permission to sue as a pauper and a plaint, and that, therefore, the court has jurisdiction under section 149, Code of Civil Procedure, 1908, while refusing leave to sue in forma pauperis, to permit the requisite stamp to be paid on the plaint within a certain time and after it has been so done, the unstamped plaint will be deemed to have been validly presented on proper court-fee on the date it was originally filed.

Skinner v. *Orde*(1), *Marca Thangathamal* v. *Iravatheeswara Aiyar*(2) and *Sook Lal* v. *Dal Chand*(3), followed.

Chunder Mohun Roy v. *Bhubon Mohini Dabea*(4), *Naraini Kuar* v. *Makhan Lal*(5), *Abbasi Begam* v. *Nanhi Begam*(6), *Aubhoya Churn Dey Roy* v. *Bissesswari*(7), *Janakdhary Sukul* v. *Janki Koer*(8), *Keshav Ramchandra Deshpande* v. *Krishnarao Venkatesh Inamdar*(9), referred to.

Per *Rowland, J.*—The discretion given to the court of first instance by section 149, Code of Civil Procedure, 1908, to accept the plaint on a court-fee and hear the suit as having been instituted on the date when the application to sue as a pauper was filed, should not be too widely used by the court in favour of a plaintiff who has failed to establish his right to sue as a pauper.

Appeal by the defendant.

(1) (1880) I. L. R. 2 All. 241, P. C.
(2) (1915) M. W. N. 228.
(3) (1923) I. L. R. 1 Rang. 196.
(4) (1877) I. L. R. 2 Cal. 389.
(5) (1895) I. L. R. 17 All. 526.
(6) (1896) I. L. R. 18 All. 206.
(7) (1887) I. L. R. 24 Cal. 889.
(8) (1900) I. L. R. 28 Cal. 427 (432).
(9) (1895) I. L. R. 20 Bom. 508.

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The facts of the case material to this report are stated in the judgment of Jwala Prasad, J.

A. K. Roy and *N. C. Ghosh*, for the appellant.

Satyadeo Sahay, for the respondent.

JWALA PRASAD, J.—The only point involved in this appeal is whether the plaintiffs' suit is barred by limitation. The Court below has held that it is not barred. The defendant aggrieved by that decision has come up to this Court in appeal and urges that the view taken by the Court below is erroneous.

Shorn of details the plaintiffs instituted a suit in forma pauperis on the 21st January, 1926, his cause of action having arisen on the 24th of January, 1925. On the 26th June, 1926, the application to sue as paupers was refused but the Court by the same order allowed the applicants to proceed with the suit on payment of court-fee by the 10th of July. The court-fee was paid before that date. The contention urged by Mr. Roy appearing on behalf of the appellant is that the suit was barred on the date the court-fee was paid and the order of the Court allowing the plaintiffs to proceed with the case on payment of court-fee is one without jurisdiction. In support of his contention, apart from the consideration of the provisions in the Code of Civil Procedure, reference has been made to various authorities: *Chunder Mohun Roy* v. *Bhubon Mohini Dabea*(1), *Naraini Kuar* v. *Makhan Lal*(2), *Abbasi Begam* v. *Nanhi Begam*(3), *Aubhoya Churn Dey Roy* v. *Bissesswari*(4), *Janakdhary Sukul* v. *Janki Koer*(5), *Keshav Ramchandra Deshpande* v. *Krishnarao Venkatesh Inamdar*(6) and *Sook Lal* v. *Dal Chand*(7). All these cases, except the last one of the Rangoon High Court, were

(1) (1877) I. L. R. 2 Cal. 389.
(2) (1895) I. L. R. 17 All. 526.
(3) (1896) I. L. R. 18 All. 206.
(4) (1897) I. L. R. 24 Cal. 889.
(5) (1900) I. L. R. 28 Cal. 427 (432)
(6) (1895) I. L. R. 20 Bom. 508.
(7) (1923) I. L. R. 1 Rang. 196.

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decided under the Civil Procedure Code of 1859 or of 1882. In those Acts there was no provision similar to section 149 of the present Code of Civil Procedure (Act V of 1908). That section gives discretion to the Court to allow the plaintiff to pay the whole or any part of court-fee and upon such payment the plaint in respect of which such court-fee is payable shall have the same force and effect as if the court-fee had been paid in the first instance. Now, if the application to sue as paupers be construed to be a plaint, the Court had ample discretion under section 149 to allow the plaintiffs, within the time to be fixed by it, to pay the requisite court-fee and the plaint would be deemed to have been properly stamped with court-fee on the date on which it was filed, that is, on the 21st of January, 1926. Mr. Roy contends that the document filed by the plaintiffs in the present case was not a plaint at all and that it could become a plaint only when the application to sue as paupers was granted under rule 8 of Order XXXIII. He says that the application in this case to sue as paupers was not granted and, therefore, the stage had not reached when the document filed by the plaintiffs became a plaint by virtue of section 8 of the Act. It is also contended that even if it were a plaint the order refusing the applicants to sue as paupers under rule 15 of the said Order had the effect of rejecting the plaint and the Court had no jurisdiction to grant them time to put in the requisite court-fee and to treat the document as a plaint filed on the date on which it was presented in Court, that is, the 21st February, 1926.

Now Order XXXIII is headed: "suits by paupers" and the first rule says that subject to the provisions contained therein any suit may be instituted by a pauper. The subsequent rules in that Order deal with the procedure prescribed for a suit to be instituted by a pauper. Rule 2 requires that an application for permission to sue as a pauper shall contain the particulars required in regard to

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plaints in suits: a schedule of any movable or immovable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto: and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings. The provisions relating to a schedule of all the properties of an applicant is with a view to find out whether the applicant is or is not really a pauper; and the particulars required to be given as in a plaint are with a view to enable the Court, upon determination that the applicant is a pauper, to proceed forthwith with the trial of the suit without necessitating the filing of a fresh plaint. The document referred to in rule 2 of the Order is a composite document consisting of an application for permission to sue as a pauper and a plaint. Rule 7 (*3*) says that "The Court" after necessary enquiry referred to before

> "shall then either allow or refuse to allow the applicant to sue as a pauper."

Rule 8 says that

> "Where the application is granted,"

the application which, as observed above, contains the plaint as well apart from the prayer to sue as a pauper

> "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, etc."

Rule 15 provides:

> "That an order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Government and by the opposite party in opposing the application for leave to sue as a pauper."

This is all about the point in Order XXXIII which concerns itself only with the application to sue as a pauper which may either be allowed or refused. If allowed, the application which contains the plaint will be registered and treated as a plaint and the suit shall proceed in all respects as if it was filed on the date on which the application was made. If it

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is refused, the applicant will be prevented only from filing another application to sue as a pauper. His right to institute a suit in the ordinary way is not at all affected if it is not barred by limitation. But, there being in the application all the particulars of a plaint, the Court may treat it as a plaint and exercise its discretion under section 149 of the Code as a document not bearing court-fee and may allow the plaintiff to pay the court-fee and prosecute the suit upon such payment. The contention that the application for permission to sue as a pauper was not a plaint and could not be treated as a plaint unless the application is granted under rule 8, does not find favour with their Lordships of the Judicial Committee in the case of *Skinner* v. *Orde*(1). In that case the enquiry as to pauperism of the plaintiff was pending and the Court had neither granted nor rejected it. In the meantime the plaintiff offered to pay the court-fee, and it was held that upon such payment the suit would be deemed to have been presented on the date on which the application to sue as a pauper was filed, and not on the date on which the court-fee was paid. Their Lordships treated the petition as a composite document containing the plaint and the prayer to sue as a pauper. Regarding the view taken by the Allahabad High Court that the petition should be retained as a plaint but that it should be taken to be converted into a plaint only from the day when those fees were paid, their Lordships observed as follows: "Now a petition to sue in forma pauperis contains all that a plaint is required to do. By section 300 'the petition shall contain the particulars required by section 26 of this Act in regard to plaints, and shall have annexed to it a schedule of any movable or immovable property belonging to the petitioner, with the estimated value thereof, and shall be subscribed and verified in the manner hereinbefore prescribed for the subscription and verification of plaints'. Therefore, it contains in itself all the

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

particulars the statute requires in a plaint, and, plus these, a prayer that the plaintiff may be allowed to sue in forma pauperis."

The provisions in the present Code of Civil Procedure relating to suits by paupers correspond with the provisions contained in the Acts of 1859 and 1882. Besides that, from rule 15 of Order XXXIII of the present Civil Procedure Code the words

" unless precluded by the rules for the limitation of suits "

contained in section 310 of the Code of 1859 have been deleted. This is obviously so because the Court is now vested by section 149 of the present Code with discretion to treat the plaint originally filed, without any court-fee or with insufficient court-fee, as validly filed on the original date although court-fee is paid subsequently under the orders of the Court on the date when it is barred by limitation. The Madras High Court, in the case of *Marea Thangathammal* v. *Iravatheeswara Aiyar*(1), held that " In the case of an application to sue as a pauper, the amendment of the plaint contained in the application to sue as a pauper, does not prevent the Court from treating the unstamped amended plaint forming part of the application as a plaint filed on the original date of the presentation of the application and does not present the granting of time to pay the necessary court-fees thereon so as to make the amended plaint become a validly stamped plaint presented on the original date." Therefore, an application to sue as a pauper contains an unstamped plaint and the Court can under the power vested in it by section 149 of the Civil Procedure Code 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 have been validly presented on proper stamped duty on the date when it was originally filed. In this view the decisions relied upon by Mr. Roy on behalf of the appellant will have no application to the present case, inasmuch as they were passed before

(1) (1915) M. W. N. 228.

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the new provision contained in section 149 was made in the Civil Procedure Code of 1908. The point was raised under the present Code on the Original Side of the Rangoon High Court in the case of *Sook Lal* v. *Dal Chand*(1). Though the application to exercise discretion under section 149 was refused, in the circumstances of that case Young, J. held that section 149 gives the Court discretion in the matter. Even before the section was enacted their Lordships of the Judicial Committee in the case referred to above, namely, *Skinner* v. *Orde*(2), had held that, although the case before their Lordships was not provided for in the Code, the Court had its discretion to accept the court-fee filed by the applicant to sue as a pauper and treat the plaint as having been filed on the date on which the application to sue as a pauper was filed, and not on the date when the court-fee was paid. Their Lordships observed that the Court would not be justified in exercising the discretion in favour of the plaintiff where it finds that the plaintiff is guilty of fraud. Therefore, the question whether the Court should or should not have allowed the plaintiff to pay proper court-fee and to treat the suit as having been presented on the date the application to sue as a pauper was filed is not a question of jurisdiction, for the Court has undoubtedly that jurisdiction vested by express provisions in the Code, but is only question of discretion and the judicial exercise of that discretion. Nothing has been addressed to us to shew that the discretion exercised in this case was not properly exercised.

The appeal must, therefore, be dismissed with costs.

ROWLAND, J.—I agree. I should like to observe that in my opinion the discretion given to the Court of first instance by section 149 to accept the plaint on a court-fee and treat the suit as having been instituted on the date when the application to sue as a pauper

(1) (1923) I. L. R. 1 Rang. 196.
(2) (1879) I. L. R. 2 All. 241, P. C.

was filed, should not be too widely used by the Court in favour of a plaintiff who has failed to establish his right to sue as a pauper. If the Courts use this liberty too freely it seems to me there is danger of fraud on the revenue.

Appeal dismissed.

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APPELLATE CIVIL.

Before Das and Wort, JJ.

GOPI RAM BHOTICA

v.

THAKUR JAGARNATH SINGH.*

1929.

April, 3, 4, 5, 6, 8, 9. May, 27.

Code of Civil Procedure, 1908 (Act V of 1908), Order IX, rule 9—"plaintiff" whether includes "person claiming through the plaintiff"—legal representative, substitution of—whether subject to disabilities which affected original party—Order IX, rule 9, proceeding under—appeal—substitution of plaintiff's legal representative—subsequent suit by such representative in respect of same cause of action, whether barred—trespasser wrongfully extracting minerals, whether acquires possession of the mine itself—adverse possession—mineral rights—non-user, whether amounts to abandonment.

Where there is substantial substitution in a proceeding entitling the representative of the original plaintiff or defendant to the rights and benefits, qua procedure, of the original plaintiff or defendant, such representative becomes the plaintiff or the defendant, as the case may be, and subject to the disabilities which affected the original party.

Where, therefore, a suit was dismissed for default and in the appeal arising out of a proceeding under Order IX, rule 9, Code of Civil Procedure, 1908, the original plaintiff's legal representative was substituted after his death, *Held*, that such representative was precluded from instituting a fresh suit in respect of the same cause of action.

Query: Whether the word "plaintiff" referred to in Order IX, rule 9, includes "persons claiming through the plaintiff" so as to preclude the latter from instituting a fresh suit in respect of the same cause of action?

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*Appeal from Original Decree no. 149 of 1925, from a decision of Babu Narendra Nath Chakraverti, Subordinate Judge of Monghyr, dated the 29th June, 1925.