

1936.

JANKIRAM
SITAL RAM
FIRM
v.
THE CHOTA
NAGPUR
BANKING
ASSOCIATION,
LTD.

Chetty's case⁽¹⁾, that what the appellant took by his execution purchase from defendants 2 and 3 was their right, title and interest in house no. 1 subject to the estoppel imposed upon them by their conduct to the plaintiff Bank.

Appeals dismissed.

DHAVLE, J.

REVISIONAL CIVIL.

Before Agarwala and Madan, JJ.

MOSSAMAT BIBI MARIM

v.

SURAJMAL.*

1936.

August, 6,
7, 14.

Substitution—*Heir of deceased applicant for leave to sue in forma pauperis, if entitled to apply for.*

Where the plaintiffs applied for leave to sue in *forma pauperis* and during the pendency of the enquiry into the question of pauperism one of the plaintiffs died and the applicants asked for time for substitution but the Subordinate Judge rejected the application.

Held, in revision, that the legal representatives of the deceased could continue the proceedings as a suit by substitution on payment of the court-fee or else by filing a fresh application for leave to sue as a pauper.

Lalit Mohan Mandal v. Satish Chandra Das⁽²⁾, *In re A. S. Radhakrishna Aiyar*⁽³⁾, distinguished.

Kaveri Subbiah v. Yabarsu Bala Sundara Boyamma⁽⁴⁾, followed.

Applications in revision by the plaintiffs.

The facts of the case material to this report are set out in the judgment of Madan, J.

*Civil Revision nos. 152 to 155 of 1934, from an order of Mr. Nidheswar Chandra Chandra, Subordinate Judge, Purnea, dated the 22nd December 1933.

(1) (1919) I. L. R. 43 Mad. 135.

(2) (1906) I. L. R. 33 Cal. 1163.

(3) (1924) 88 Ind. Cas. 91.

(4) (1927) I. L. R. 51 Mad. 697.

Khurshaid Husnain and D. L. Nandkeolyar,
for the petitioners.

S. M. Mullick (with him *Jaleswar Prasad*,
A. H. Fakhruddin, *B. B. Saran* and *Balram Kumar*
Sinha), for the opposite party.

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MADAN, J.—These four Civil Revisions arise from suits brought for setting aside a compromise decree in money suit no. 80 of 1930 as well as certain sales in execution of the decree. The five plaintiffs were two parda ladies, and a minor son, step son and step daughter of one of the ladies, and they brought the suits for a declaration that the compromise in the money suit was fraudulent and without their knowledge, and that the three minors were wrongly impleaded as majors in that suit. The decreeholders, who are also the auction-purchasers, were made defendants in the suits, in which the plaintiffs applied for permission to sue as paupers. On enquiry it was reported that the plaintiffs were paupers, but the matter was contested by the defendants, and the 16th December, 1933, was fixed for hearing by the Subordinate Judge. Meanwhile on the 11th December Nurul Huda a minor plaintiff died, on the date fixed the applicants asked for time for substitution of his heirs, and also on the ground that owing to their recent bereavement they had been unable to bring their witnesses. The defendants, the present opposite party, also prayed for time. The Subordinate Judge summarily rejected the petition for time, and then the plaintiffs examined the surviving male minor, who was the only witness available. The Subordinate Judge after taking the evidence of the defendants came to the conclusion that the applicants had properties and were not entitled to sue as paupers, and he, therefore, dismissed their applications. Against this order this Court has now been moved.

The question whether the learned Subordinate Judge exercised a sound discretion in refusing an

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adjournment owing to the death of one of the plaintiffs, as also whether the applicants, as they now assert, could have produced documentary evidence to prove that the properties found to be with them by the Subordinate Judge had since left their possession, does not arise here, and Mr. Khurshaid Husnain for the applicants confined his argument to the question whether the applicants had a right to apply for substitution of the heirs of the deceased minor plaintiff and should have been granted an adjournment on that account. Mr. S. M. Mullick for the opposite party referred to *Lalit Mohan Mandal v. Satish Chandra Das*(¹) which was a case where an applicant for leave to sue as a pauper died during the pendency of his application leaving a minor son. Fifteen years later, on attaining majority, that son applied for substitution and also for permission to continue the application to sue as a pauper. The Court held that as the application for leave to sue as pauper was a personal right it was not open to the legal representative of a deceased applicant to apply for substitution in his place, the more so as that legal representative might not himself be a pauper. Certain passages in this judgment might be taken to imply that the legal representative was not entitled even to apply for substitution as plaintiff in the original suit on payment of the court-fee, and such in fact was the argument of Mr. S. M. Mullick before us. The Calcutta case is, however, referred to by the Madras High Court in *In re A. S. Radhakrishna Aiyar*(²), where it was taken to be an authority for the proposition that it was a wrong procedure to apply for substitution in a suit by way of a collateral enquiry into the question of pauperism. In *Kaveri Subbiah v. Yabursu Bala Sundara Boyamma*(³) the same High Court pointed out that serious difficulty

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

(2) (1924) 88 Ind. Cas. 91.

(3) 1927) I. L. R. 51 Mad. 697.

might arise about limitation if the legal representative of an applicant to sue in *forma pauperis* is not allowed to be brought on to the record at all, and it was held that it was open to such legal representative to continue the proceedings as a suit by substitution, on payment of the court-fee or else filing a fresh application for leave to sue as a pauper. Accepting this view I find that the Subordinate Judge acted with material irregularity in not allowing the applicants time for substitution of the heirs of the deceased plaintiff, in which case it was possible that funds for payment of the court-fee might have been secured.

In Civil Revision no. 154 a further point was raised, namely that the whole proceeding had abated as one of the opposite party died during its pendency in this Court, and a petition for substitution was rejected as being out of time. The powers of the High Court under section 115 of the Civil Procedure Code are wide, and it has been held by the Calcutta and other Courts that action can be taken under this section even without application by the party aggrieved. I would accordingly allow all these four applications, and direct the lower court to give the applicants sufficient opportunity for bringing the heirs of the deceased minor plaintiff on to the record, and then to proceed according to law. If the application for leave to sue as a pauper is ultimately proceeded with opportunity should be given to either side to adduce such further evidence as may be required. I would make no order for costs in this Court.

AGARWALA, J.—I agree.

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Applications allowed.