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to sue, they are entitled to sue by reason of the implied obligation which is expressly provided by Article 115 of the Limitation Act.

In those circumstances it seems to me that the decision of the learned Judge in the Court below is correct and the appeal fails and must be dismissed with costs.

WORT, J.

VARMA, J.—I agree.

J. K.

Appeal dismissed.

REVISIONAL CIVIL.

Before Fazl Ali and Rowland, JJ.

1937.

November, 25.

LALA MISTRY

v.

GANESH MISTRY.*

Code of Civil Procedure, 1908 (Act V of 1908), section 149 and Order XXXIII, rules 5 and 8—application for leave to sue in forma pauperis rejected—court, when is empowered to permit payment of court-fees—application finally disposed of—court, whether has power to allow plaintiff at a later date to pay court-fees—refusal to permit payment of court-fees, whether is a question of jurisdiction—section 115.

An application for leave to sue as a pauper does not require two separate orders for its disposal, that is to say, an order refusing leave and a further order rejecting the plaint; but the order refusing leave finally disposes of the whole proceeding.

The power to permit an application to sue in *forma pauperis* to be converted into a plaint by payment of court-fees, which the Court undoubtedly has during the pendency of the application, can be exercised at the time of rejecting the application, that is to say, if in one single order the Court declines leave to sue as a pauper and also gives time for filing court-fees, this would be within the discretion allowed by

*Civil Revision no. 380 of 1937, from an order of Babu Shivapujan Rai, Munsif of Patna, dated the 16th April, 1937.

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section 149, Code of Civil Procedure, 1908, but once an order finally disposing of the application for leave has been passed, it is no longer open to the Court to give any further time so as to revive the proceedings already completely disposed of and to permit them to be resumed

Chunna Mal v. *Bhagwant Kishore*(1) (judgment of Allsop, J.), *Sudhir Kumar Chaudhuri* v. *Jagannath Marwari*(2) and *Aubhoya Churn Dey Roy* v. *Bissesswari*(3), followed.

Jagadishwari Debi v. *Tinkari Bibi*(4), *Sundarathammal* v. *Paramaswami Asari*(5) and *Balaguru Naidu* v. *Muthurathnam Iyer*(6), not followed.

Skinner v. *Orde*(7), explained.

Bank of Bihar, Ltd. v. *Sri Thakur Ramchanderji Maharaj*(8), distinguished.

Per Fazl Ali, J.—The question whether the Court should or should not have allowed the plaintiff to pay the 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 a question of discretion and the judicial exercise of that discretion.

Quaere:—Whether, in those cases where the Court is asked to exercise its power under section 149 of the Code, the suit should be deemed to have been filed on the date when the application for leave to sue in *forma pauperis* is treated as a plaint or on the date when the application for leave was originally filed?

Application in revision by the plaintiff.

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

Bindeshwari Prasad, for the petitioner.

B. C. Sinha, for the opposite party.

(1) I. L. R. (1937) All. 22, F. B.
(2) (1935) A. I. R. (Pat.) 193.
(3) (1897) I. L. R. 24 Cal. 889.
(4) (1936) A. I. R. (Cal.) 28.
(5) (1933) A. I. R. (Mad.) 883.
(6) (1923) 76 Ind. Cas. 767.
(7) (1879) I. L. R. 2 All. 241, P. C.
(8) (1929) I. L. R. 9 Pat. 439.

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ROWLAND, J.—This is an application in revision against an order of the Munsif, First Court of Patna whereby after the rejection of an application by the petitioner to sue in forma pauperis he refused to treat the application as a plaint and to accept the court-fee stamps payable on it as a plaint and to treat the suit as having been instituted on the date on which the pauper application was presented. The case has something of a history. The petitioner's application to sue as a pauper was, to begin with, dismissed on the 20th April, 1936. Thereafter on the 18th May, 1936, the petitioner requested the leave of the court to file deficit court-fee which the Munsif refused on the 16th June, 1936. Thereafter the petitioner moved the High Court in revision and the previous order of the Munsif was set aside and the Munsif was ordered to make further enquiry and to dispose of the application to sue as a pauper in accordance with law. This order was passed on the 13th October, 1936, and the Munsif after some other proceedings passed an order on the 9th December, 1936, again refusing leave to sue as a pauper. The petitioner moved the High Court against this order, but his petition was rejected on the 10th March, 1937, without issuing notice to the opposite party. The petitioner's Advocate apparently understood that a direction would be given to receive the required court-fee treating the application as a plaint and thereafter proceeding as with an ordinary suit. Varma, J., however, in his order merely observed that the petitioner might move the Munsif. The petitioner did so on the 18th March. The Munsif called for the record and the officer before whom the case came directed the applicant to pay the court-fee by the 10th April, and the record to be put up on that date for orders. The court-fee of Rs. 112-8-0, was paid on the 10th April, but the Munsif on looking through the order-sheet felt himself unable to accept the court-fee at that stage at any rate without hearing both sides. After hearing both sides he passed on the 20th April, 1937, the order against

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which the petitioner has moved this Court, the substance of which is that the application is rejected. Among the grounds for this decision the Munsif said that a similar petition had been rejected by his predecessor on the 16th June, 1936, and that no new circumstance had been brought to his notice to justify him in reviewing that order. He observed incidentally that the order passed by the Hon'ble High Court appeared to have been passed in ignorance of that order. Besides this ground he was of opinion that the law was as stated in the Full Bench decision of the Allahabad High Court in *Chunna Mal* v. *Bhagwant Kishore*(1).

In revision it is pointed out that the Munsif should not have relied on the order of 16th June, 1936, because that order was passed as a sequel to the order of the 20th April, 1936, dismissing the application to sue as a pauper and the order of the 20th April having been set aside by the High Court on the 13th October, 1936, all the orders consequential to it must have fallen to the ground with it. This reasoning is quite correct and the Munsif erred in thinking that the order of the 16th June barred him from considering the case on the merits and the suggestion in his judgment that the order of this Court was passed in consequence of ignorance of the Munsif's order of 16th June, is entirely uncalled for.

The position has to be examined with reference to the order of refusal of leave to sue as a pauper which was passed by the Munsif on the 9th December, 1936, and was affirmed by this Court on the 10th March. With reference to the view of law expressed by the Munsif it is contended that the law so far as this Court is concerned is laid down by the decision of a Division Bench in *Bank of Bihar, Ltd.* v. *Sri Thakur Ramchanderji Maharaj*(2) and that the Munsif was not entitled to prefer the decisions of other

(1) I. L. R. (1937) All. 22, F. B.
(2) (1929) I. L. R. 9 Pat. 439.

High Courts even by Full Benches to a decision of a Division Bench of this Court. That is a correct statement of the duty of subordinate courts but we shall have to see what was decided in the Patna decision relied on and examine the law for ourselves in so far as points arise which the previous decision of this Court does not cover.

Before coming to this, however, I should indicate the substantial point on which there is some conflict of authority in the several High Courts in India. One view is that the application to sue as a pauper is not a plaint; it can only be treated as a plaint if it succeeds and that when it fails there is nothing before the court on which to proceed. Therefore on this view a court has no jurisdiction after disposing of the application to make an order extending the time for filing the necessary court-fees for a plaint. The other view is that the application containing all the particulars which the law requires in a plaint as well as the prayer to be allowed to sue as a pauper is itself a plaint or a composite document including a plaint and the termination of the proceeding for leave to sue as a pauper does not, if adverse to the applicant, amount to a rejection of the plaint which continues to be before the court on the same footing as a document on which proper court-fees have not been paid. On this view the same position would arise as when a plaint is presented on deficit court-fee stamp and the court in such a case would be bound in duty to allow some time for making good the deficit before rejecting the plaint under Order VII, rule 11, of the Code. These are the two views and before I examine the authorities I had better refer to the relevant provisions of the Code of Civil Procedure.

Order IV, rule 1—

"Every suit shall be instituted by presenting a plaint to the court."

Then of course Orders VI and VII regulate the contents of a plaint and we have next to consider Order XXXIII, rule 1, which says that

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subject to the provisions of the Order any suit may be instituted by a pauper and under rule 2 every application for permission to sue as a pauper is required to contain particulars required in regard to the plaints in suit as well as a schedule of property belonging to the applicant. In certain circumstances the application is rejected under rule 5, otherwise notice is issued and the parties are heard. When under rule 8 the application is granted, it shall be numbered and registered and shall be deemed to be the plaint in the suit. There is nothing here to say that the application is deemed to be a plaint in any other case except that in which the application is granted. The other statutory provision regarding the institution of a suit is in section 3 of the Limitation Act where the explanation says that a suit is instituted in ordinary case when a plaint is presented to the proper officer and in the case of a pauper when his application for leave to sue as a pauper is made. But that is not exhaustive as appears from the Privy Council decision in *Skinner* v. *Orde*(1). Here the applicant during the pendency of his application for leave to sue as a pauper having acquired some property tendered the court-fee on the plaint and was permitted to convert the application into a plaint and was deemed to have instituted his suit on the date when his pauper application was presented. This is clear authority that at any time during the pendency of the application for leave to sue as a pauper the applicant, provided that his application is in good faith and not fraudulent, can be permitted to pay the court-fees and convert his application into a plaint. Now, the decisions relied on in support of the argument that this power is not exhaustive even when the application to sue as a pauper is rejected and that the court may even thereafter extend the time are to be found in a decision of a Division Bench of the Calcutta High Court in *Jagadishwari Debi* v. *Tinkari Bibi*(2) and two

(1) (1879) I. L. R. 2 All. 241, P. C.
(2) (1936) A. I. R. (Cal.) 28.

decisions, each of a single Judge of the Madras High Court, namely, *Sundarathammal* v. *Paramaswami Asari*(1) decided by Walsh, J., and *Balaguru Naidu* v. *Muthurathnam Iyer*(2), decided by Krishnan, J. In the Calcutta case reliance is placed on the Privy Council decision in *Skinner* v. *Orde*(3) which is quoted as having pronounced that the document mentioned as an application for permission to sue as a pauper is a plaint, but I am unable to find any such words in the decision of their Lordships. What their Lordships said was that they could see nothing which would oblige their Lordships to say that this petition which contains all the requisites which the statute requires for a plaint should not, when the money has been paid for the fees, be considered as a plaint from the date when it was filed. I think that the Privy Council decision was intended to be regarded as a case of petition being converted into a plaint and to this extent the reasoning in *Jagadishwari Debi's* case(4) does not appear to me to be entirely satisfactory. Reliance is also placed in that decision on a case of this Court in *Bank of Bihar, Ltd.* v. *Sri Thakur Ramchanderji Maharaj*(5) but the facts of that case were that the order granting time to file the requisite court-fee and the order refusing leave to sue as a pauper were passed simultaneously and this decision therefore does not apply to the case of a dismissal of the application to sue as a pauper followed at a later date by an application to be permitted to resume the proceedings on payment of the necessary court-fee. In *Sundarathammal's* case(1) the opinion expressed by Walsh, J. was clearly an obiter dictum for he said that the matter did not really arise on the view which he took on the main question before him. He did, however, observe that "though the pauper application be dismissed the plaint is still pending until it is actually dismissed".

ROWLAND, J.

(1) (1933) A. I. R. (Mad.) 883.

(2) (1923) 76 Ind. Cas. 787.

(3) (1879) I. L. R. 2 All. 241, P. C.

(4) (1936) A. I. R. (Cal.) 28.

(5) (1929) I. L. R. 9 Pat. 439.

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In the other Madras case [*Balaguru Naidu* v. *Muthurathnam*(1)] the facts are not fully stated but Krishnan, J. said " it was not necessary that there should be a competent application to sue in forma pauperis on record before time can be given to pay court-fee on the plaint filed at the same time ". It had been held in an earlier Calcutta decision in *Aubhoya Churn Dey Roy* v. *Bissesswari*(2) that assuming that the petition is treated as a plaint and the required court-fee affixed to it the suit will then be deemed to have been instituted on the date on which the court-fee was affixed. It was observed that under the Civil Procedure Code the court was bound either to allow or reject the application. If it allowed the application, it was to be numbered and registered as a plaint in the suit. If it was rejected, then the applicant could not again apply to sue as a pauper in respect of the same right but was at liberty to institute a suit in the ordinary manner. It is provided in the Limitation Act that in the case of a pauper the suit is instituted when the application for leave to sue as a pauper is filed. That obviously applies only to a case in which the application is granted. It was held that the Subordinate Judge had no power, after the rejection of the application, to give time for the presentation of the plaint or treat the application as a plaint in the suit. In this case *Skinner* v. *Orde*(3) was distinguished on the ground that there had in that case been no order rejecting the application. In this Court the decision in *Bank of Bihar's* case(4) has not, as far as I know, been read as authorising the view that there is power to extend the time for filing the court fees even after the dismissal of an application for leave to sue as a pauper. Too much should not be made of the observation that the application may be regarded as a composite document. In *Sudhir Kumar Choudhuri*

(1) (1923) 76 Ind. Cas. 767.
(2) (1897) I. L. R. 24 Cal. 889.
(3) (1879) I. L. R. 2 All. 241, P. C.
(4) (1929) I. L. R. 9 Pat. 439.

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v. *Jagannath Marwari*(1), it was pointed out by Wort, J. that an application to sue in forma pauperis is not for all purposes a plaint. It was pointed out that in *Skinner* v. *Orde*(2) the application which was allowed to be treated as a plaint had not at the time which was material been rejected. In the Full Bench decision of Allahabad High Court in *Chunna Mal's* case(3) the majority of the Judges held that leaving aside the application rejected under rule 5 of Order XXXIII the application could not be considered and treated as a plaint and allowed to be regularised by permission to file the court-fee either at the time of the dismissal of the pauper application or thereafter. Allsop, J., however, was not prepared to go quite to this length. In his view the application did not require two separate orders for its disposal, that is to say, an order refusing leave to sue as a pauper and a further order rejecting the plaint, but the order refusing leave finally disposes of the whole proceeding. This in my opinion is the correct view. Allsop, J. went on to express the opinion that the power to permit the application to be converted into a plaint by payment of court-fees which the court undoubtedly has during the pendency of the application as held by the Judicial Committee could be exercised at the time of rejecting the application, that is to say, if in one single order the court declined leave to sue as a pauper and also gave time for filing of court-fees, this would be within the discretion allowed by section 149 but he agreed with the other Judges that once an order finally disposing of the application for leave to sue as a pauper had been passed it was no longer open to the court to give any further time so as to revive the proceedings already completely disposed of and to permit them to be resumed. I am inclined on a review of the Code and of the authorities to agree with the view expressed by Allsop, J. In my opinion it is not in conflict with the previous decision of this Court in *Bank of Bihar, Ltd.* v. *Sri*

(1) (1935) A. I. R. (Pat.) 193.
(2) (1879) I. L. R. 2 All. 241, P. C.
(3) I. L. R. (1937) All. 22, F. B.

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Thakur Ramchanderji Maharaj(1) and it appears to me to be also consonant with the view expressed by Wort, J. in *Sudhir Kumar Chaudhuri* v. *Jagannath Marwari*(2). On this view it is to be observed that the order of the Munsif dated the 9th December, 1936, was not coupled with any reservation of leave to the petitioner to file the court-fee within a stated time. It was, so far as the Munsif could make it, a final order, the effect of which would be to relegate the applicant to the position set forth in Order XXXIII, rule 15, leaving him the liberty to institute the suit in the ordinary manner. Any application made thereafter to the Munsif would necessarily be beyond the power of that officer to entertain.

There is nothing in the observation of Varma, J. made at the time of rejecting the petition of the applicant on the 10th March, 1937, to indicate that he had formed any opinion as to whether on the facts of the case an application before the lower court would prove maintainable or not. The order merely points out that the Munsif was the person to whom the application should be made. Indeed it is obvious that it would have been inappropriate in an order rejecting an application to embody an order modifying the decision moved against.

In the result it does not seem possible to interfere with the order of the Munsif which, though in parts unfortunately expressed, was the correct order. I would dismiss the application with costs. Hearing fee one gold mohur.

As the court-fee of Rs. 112-8-0 was deposited in response to a direction of the Munsif who subsequently declined to accept it, the petitioner may apply to the Munsif for a certificate entitling him to a refund.

FAZL ALI, J.—I am also of the opinion that this application should be dismissed with costs.

(1) (1929) I. L. R. 9 Pat. 439.
(2) (1935) A. I. R. (Pat.) 193.

An application for leave to sue in forma pauperis is sometimes described as a composite document, because it contains as is provided by Order XXXIII, rule 2, of the Civil Procedure Code, all the particulars required in regard to a plaint in a suit together with a prayer that the applicant may be allowed to sue as a pauper. It has, however, been nowhere described as a plaint in the Code and strictly speaking it is not a plaint but a mere application. Rule 8 of Order XXXIII only provides that where the application is granted, *it shall be deemed to be the plaint in the suit* and therefore in such a case it will not be necessary for the applicant to file any fresh plaint. There is also nothing in the Code to prevent the court from treating the application as a plaint, if before it is rejected the applicant asks the court to treat it as such and either accepts from him then and there the proper court-fee for the suit upon the footing that it is a plaint or gives him time under section 149 of the Civil Procedure Code to pay the court-fee within a reasonable time. Where, however, the application has already been rejected, there is nothing before the court which may be treated as plaint and, therefore, it appears to me that the only remedy which the unsuccessful applicant has in such circumstances is to bring a fresh suit as contemplated in Order XXXIII, rule 15. It appears to me, therefore, that the view expressed by my learned brother is the only logical view which can be taken upon a consideration of the various provisions of Order XXXIII.

In a large number of cases, however, and particularly in those cases where the court is asked to exercise its power under section 149 of the Code of Civil Procedure there may arise for decision a further question as to whether the suit should be deemed to have been filed on the date when the application for leave to sue in forma pauperis is treated as a plaint or on the date when the application was originally filed.

It appears to me that a possible corollary of the view expressed above might be that the suit should be

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deemed to have been filed only on the date on which the Court decides to treat the application for leave to sue in forma pauperis as a plaint. Such a view, however, would seem to be opposed to the view which was expressed in *Bank of Bihar, Ltd.* v. *Sri Thakur Ramchanderji Maharaj*(1) in these words:

"Under section 149 of the Code of Civil Procedure the court may order the requisite stamp to be paid within a time fixed by it and after it has been done the application which may be regarded as an unstamped plaint will be considered to have been validly presented on proper stamped duty on the date when it was originally filed".

Therefore, as at present advised, I do not wish to lay down anything which might tend to bring our decision into conflict with the earlier decision of this Court especially as the view expressed therein is based on the decision of the Judicial Committee in *Skinner* v. *Orde*(2). The matter, however, need not be pursued because I find that the present case can be decided on a totally different ground.

It appears from the order-sheet that when the learned Munsif directed the petitioner to deposit the court-fee by the 10th April, 1937, he did not purport to act under section 149 nor did he commit himself to the view that the court-fee would necessarily be accepted. The order which was passed on that date clearly shows that the matter was to be finally dealt with by the Munsif on a subsequent date. On the next date the learned Munsif after looking into the circumstances of the case came to the conclusion that the court-fee could not be accepted and he finally passed an order to this effect after hearing the parties on the 26th April, 1937. Thus the Munsif has in effect refused to exercise his discretion under section 149 of the Code of Civil Procedure. As was pointed out in *Bank of*

(1) (1929) I. L. R. 9 Pat. 439.
(2) (1879) I. L. R. 2 All. 241, P. C.

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Bihar, Ltd. v. *Sri Thakur Ramchanderji Maharaj*(1) the question whether the court should or should not have allowed the plaintiff to pay the 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 a question of discretion and the judicial exercise of that discretion. In this particular case I find that the Munsif refused to exercise the discretion in favour of a party who was guilty of concealing material facts and in these circumstances I have no hesitation in holding that the present application should not be entertained.

FAZL ALI, J.

S. A. K.

Application dismissed.

APPELLATE CIVIL.

1937.

December, 20.

Before Courtney Terrell, C. J. and Khaja Mohamad Noor, J.

SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

SURENDRA MOHAN LAHIRI.*

Arbitration—Code of Civil Procedure, 1908 (*Act V of* 1908) *Schedule II, paragraphs* 18 *and* 22—*agreement to refer dispute to arbitration—suit instituted in disregard of the agreement—no application for stay of suit under paragraph* 18 *—suit, whether maintainable—court, jurisdiction of, to pronounce judgment—Specific Relief Act,* 1877 (*Act I of* 1877), *section* 21.

If any party who has contracted to settle a dispute by arbitration backs out of it and institutes a suit in disregard of that contract, the court has been given discretion at the instance of the other party to stay the suit under paragraph

*Circuit Court, Cuttack. Appeal from Original Decree no. 1 of 1935, from a decision of Babu Surjyamani Das, Additional Subordinate Judge, Cuttack, dated the 30th September, 1934

(1) (1929) I. L. R. 9 Pat. 489.