CIVIL REVISION.

Before Mr. Justice Mya Bu, and Mr. Justice Mackney.

MA SAW YIN AND OTHERS
v.
S.P.K.A.A.M. FIRM.*

1937
Jan. 21.

Pauper suit—Rejection of application for leave to sue in forma pauperis—*Termination of proceedings—Application to pay court-fees after rejection of petition—Fresh suit barred by limitation—Civil Procedure Code (Act V of 1908), s. 149—Limitation Act (IX of 1908), s. 3, Explanation.*

Under Order 33 of the Civil Procedure Code, as originally enacted, when the application for leave to sue as a pauper is rejected the proceedings before the Court are completely terminated. The plaint falls with the application for leave to sue, and the only recourse of the applicant in such an event is to find the court-fees and institute the suit in the ordinary way. When that is done, s. 149 of the Civil Procedure Code cannot be invoked so as to enable the Court to deem the suit to have been instituted at the time the application for leave to sue as a pauper was made, inasmuch as the two proceedings are entirely distinct and the one is commenced after the termination of the other.

Bank of Bihar, Ltd. v. *Sri Thakur Ramchanderji Maharaj*, I.L.R. 9 Pat. 439; *Skinner* v. *Orde*, I.L.R. 2 All. 241, distinguished.

Jagadeeshwaree v. *Tinkarhi Bibi*, I.L.R. 62 Cal. 711, dissented from.

G. R. Rajagopaul for the applicants. O. 33, r. 2 of the Civil Procedure Code requires that every application to sue as a pauper shall contain the particulars required in regard to plaints, so that the application to sue *in forma pauperis* really consists of a plaint to which is added a prayer to be allowed to sue as a pauper. The dismissal of the application to sue as a pauper does not terminate the proceedings, and the Court may, in the exercise of its discretion under s. 149 of the Code, allow the applicant to pay the necessary court-fee and continue the suit as from the date of the original petition. The Court may exercise its discretion under this section even if the claim be barred by limitation at the time the court-fee is allowed to be paid.

* Civil Revision No. 331 of 1936 from the order of the District Court of Myaungmya in Civil Misc. No. 3 of 1935.

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There is direct authority for this proposition in *Jagadeeshwaree Debee* v. *Tinkarhi Bibi* (1) and *Bank of Bihar, Ltd.* v. *Sri Thakur Ramchanderji Maharaj* (2) which purported to follow the decision of the Judicial Committee in *Skinner* v. *Orde* (3). See also *Balaguru Naidu* v. *Muthuratnam Aiyar* (4). The decisions relied upon by the District Judge have either been overruled or dissented from in the Calcutta case above cited, and therefore in holding that he had no jurisdiction to entertain the applicants' petition he had failed to exercise a jurisdiction vested in him. See also *Sook Lal* v. *Dal Chand* (5).

Order 33 has now been recast by the High Court, and sub-rule 4 of rule 4 suggests that the Court has power to admit the plaint when dismissing the pauper application. The present application, however, is governed by the old rules, and, as pointed out in the Patna case, O. 33, r. 15, has not the effect of terminating the proceedings; that rule merely makes a second pauper application incompetent. Cases relating to pauper appeals stand on a different footing.

Venkatram for the respondent. O. 33, r. 15, shows what happens when a pauper application is dismissed. A fresh application is barred, but the applicant can bring a new suit with proper court-fee. That is to say the old proceedings have definitely terminated. *Skinner* v. *Orde* has no application because in that case the proceeding shad not terminated at the time the court-fee was allowed to be paid.

MACKNEY, J.—The three applicants in this case originally filed their suit in the District Court of

(1) I.L.R. 62 Cal. 711.
(2) I.L.R. 9 Pat. 439.
(3) 6 I.A. 126.
(4) 46 M.L.J. 254.
(5) I.L.R. 1 Ran. 196.

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Myaungmya but it was found that they had not paid the requisite court-fees. Being unable, so they say, to find the money for the payment of these fees they applied for leave to sue as paupers. This application was filed in the District Court on the 6th February 1935. On the 20th May 1935, the application was dismissed. It may be remarked that by this date the suit on the cause of action alleged by the applicants was already barred by the law of limitation. Against the order of the District Court dismissing their application they applied to this Court in revision. The application was dealt with in Civil Revision No. 218 of 1935. By an order of this Court the order of the District Court of Myaungmya was set aside and it was directed to allow the necessary amendment to the application and to proceed with it on its merits. In pursuance of this order the District Court reheard the application but again dismissed it by its order dated the 13th January 1936. Again the applicants applied to this Court in revision on the 8th April 1936 but their application was dismissed in Civil Revision No. 132 of 1936 on the 5th May 1936. In the order of this Court it was remarked :

"Upon the merits of the case this application cannot be sustained, but Mr. Rajagopaul states that his object in coming to this Court is to get an opportunity of paying in the necessary amount of court-fees upon the proposed plaint that was filed with his original application for leave to sue *in forma pauperis*. As regards this matter there has been no order of the trial Court which can be the subject of revision by this Court."

The application was accordingly dismissed.

The applicants then returned to the District Court and on the 19th June 1936 they filed an application in which they prayed that they might be allowed to pay the requisite court-fees on their petition and to be permitted to prosecute and continue the suit further.

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They explained that after long and arduous attempts they had found out a friend who had agreed to advance funds for the payment of the court-fees. They asked the Court to exercise its discretion under section 149 of the Code of Civil Procedure, or, alternatively, under section 151 of the Code of Civil Procedure. The learned District Judge by an order dated the 17th August 1936 declined to accede to this prayer. He considered various rulings of reported cases and came to the conclusion that the applicants' petition to sue as paupers having been disposed of there was no proceeding pending which could be continued by the payment of court-fees. He further refused to have recourse to section 151 of the Code of Civil Procedure on the ground that it cannot be invoked for the purpose of controverting the established law.

It may be remarked that the applicants are now prevented from filing a suit on the original cause of action as that suit would be barred by the law of limitation.

Against the decision of the District Court the applicants have now applied to this Court in revision. It is now contended that the Court has sufficient ground to act under section 149 of the Code of Civil Procedure. The view which is put forward for acceptance is that the original application to sue *in forma pauperis* was in reality a plaint to which was added a prayer that the applicants might be exempted from paying the court-fees. The rejection of this portion of the plaint does not imply the rejection of the whole plaint and it is, therefore, still before the Court even when the Court has passed an order rejecting the prayer for leave to sue *in forma pauperis*. The proceedings, therefore, are not terminated but are merely at the stage that one prayer in the plaint has been rejected but the rest of the plaint has not yet been considered. Consequently section 149

of the Code of Civil Procedure can be applied and the Court in its discretion may allow the applicants to pay the court-fees due. Upon such payment the plaint would have the same force and effect as if the court-fee had been paid in the first instance and thus the applicants would escape the law of limitation.

It may be remarked that Order XXXIII of the Code of Civil Procedure has by notification which came into force on the 18th December 1935 been re-modelled by this Court and the provisions as now in force are somewhat different from those which were in force at the time this application was filed, namely, on the 6th February 1935. Under the present rule 2, sub-rule (1),

"A plaintiff may obtain leave to sue as a pauper by presenting his plaint with a petition signed and verified in the manner prescribed for the signing and verification of plaints stating (i) that the plaintiff is a pauper and that all the property of the plaintiff consists of the items set out and valued in the schedule to the petition, (ii) that the plaintiff has not within two months next before the presentation of the petition disposed of any property fraudulently or in order to enable him to plead pauperism, and (iii) that the plaintiff has not entered into any agreement with any person whereby such person has or will have an interest in the proceeds of the suit."

Sub-section (2) reads :

"The plaint and petition shall be presented by the plaintiff in person unless he is exempted from appearing in Court, in which event the petition may be presented by an authorized agent who can answer all questions relating to the application."

Under rule 3 the Court shall reject the petition summarily in certain cases. Under rule 4 if the petition is not so rejected the Court shall fix a day in order to give the parties an opportunity to produce evidence in proof or disproof of the statement made in the petition. After hearing the evidence the Court shall make an

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order allowing or rejecting the petition. Sub-rule (4) of rule 4 reads :

"Subject to any amendment which the Court may allow the petition shall be rejected under this rule if the Court is not satisfied of the truth of any of the statements made in the petition ; provided that the Court may admit the plaint on payment of the court-fee due thereon."

As now worded, it would appear from the wording of the Order that the plaint which the applicants for leave to sue as paupers are required to present to the Court is merely a document to be presented with the petition for leave to sue as paupers, a document which has to be referred to in considering whether the petition is to be accepted or not. It would appear that at no time is this document before the Court as a plaint until the petition has been allowed. The cases to which learned counsel for the applicants has referred us are cases under Order XXXIII as originally enacted and I do not think they would be applicable to Order XXXIII as at present in force in this Province. Nevertheless, inasmuch as the application by the present petitioners was filed on the date when the old Order XXXIII was in force in this Province, we may put the applicants' case at its best by dealing with it as one made under the old Order.

In *Jagadeeshwaree Debee* v. *Tinkarhi Bibi* (1) reference was made to the decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Skinner* v. *Orde* (2). The learned Judges state :

"In our judgment, the position must be recognised as settled by the pronouncement of their Lordships of the Judicial Committee of the Privy Council in the case of *Skinner* v. *Orde* (2), that the document mentioned as an application for permission to sue as a pauper in Order XXX, rule 2 of the Code of Civil Procedure,

(1) (1935) I.L.R. 62 Cal. 711. (2) (1879) I.L.R. 2 All. 241.

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 the refusal by the Court to grant the prayer of the plaintiff to sue as a pauper, and termination of the proceedings in the matter of granting or refusing leave to sue as a pauper, does not amount to rejection of plaint, so far as the plaintiff was concerned. If the position under the law is, as it must be held to be the case, that the plaint was before the Court, and it was a document, on which proper court-fees had not been paid by virtue of a refusal of the prayer of the plaintiff to sue as a pauper, the provisions of section 149 of the Code of Civil Procedure could come to the assistance of the plaintiff."

The learned Judges then referred with approval to the case of *Bank of Bihar, Limited* v. *Sri Thakur Ramchanderji Maharaj* (1). I shall refer to this case later.

Order 33 of the Code of Civil Procedure as originally in force laid down (see rule 2) :

"Every application for permission to sue as a pauper shall contain the particulars required in regard to 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."

And rule 15 reads :

"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 his application for leave to sue as a pauper."

It does not appear to me from the wording of these rules that it is correct to hold that on the rejection of the application to sue as a pauper the application shall be regarded as a plaint still before the Court so that

(1) (1929) I.L.R. 9 Pat. 439.

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section 149 of the Code of Civil Procedure could be applied. In the ordinary cases, when the application for leave to sue as a pauper is rejected, the proceedings before the Court are terminated completely. The plaint could only be considered as a plaint if the application for leave is allowed. On the failure of the application for leave the document cannot be considered any further by the Court. With great respect to the learned Judges who decided the case of *Jagadeeshwaree Debee* v. *Tinkarhi Bibi* (1), it appears to me that they misapplied the pronouncement of the Judicial Committee of the Privy Council in *Skinner* v. *Orde* (2). In that case, at the time that the application for leave to sue *in forma pauperis* was being considered the applicant paid the court-fees and desired the Court to try his application as a plaint filed on the date on which his application had been originally filed. The proceedings with regard to his petition for leave to sue were still pending before the Court. Their Lordships remarked :

"The intention of the statute evidently was that unless the petition was rejected, as it contained all the materials of the plaint, it should operate as a plaint without the necessity of filing a new one."

They then pointed out

"In this case the petition is filed, and proceedings are taken to inquire into the pauperism, which are delayed by various orders of the Court, after the plaintiff had been already bandied about from one Court to another until a very considerable period of time has elapsed. Then, pending that inquiry, the plaintiff by paying the amount of stamp fees into Court admits that he is no longer desirous to sue as a pauper, and gives up so much of the prayer of his petition as asks to be allowed to sue, but no more."

It appears perfectly clear to me that their Lordships' remarks can be applied only to a case where the peti-

(1) (1935) I.L.R. 62 Cal. 711. (2) (1879) I.L.R. 2 All. 241.

tion for leave to sue is still pending before the Court and, indeed, their Lordships have been particularly careful to explain that their remarks apply to such a case and not to a case where the petition has been rejected. It appears to me, therefore, that there is no justification for the conclusion drawn by the learned Judges who decided the Calcutta case that the refusal by the Court to grant the prayer of the plaintiff to sue as a pauper and the termination of the proceedings in the matter to sue as a pauper does not amount to rejection of the plaint. Certainly there is no authority for such a proposition in the case of *Skinner* v *Orde* (1).

In the case of *Bank of Bihar, Limited* v. *Sri Thakur Ramchanderji Maharaj* (2) the facts are slightly different from those which we have before us in the present case. There the application to sue *in forma pauperis* was refused but the Court by the same order allowed the applicant to proceed with the suit on payment of the court-fees by a date fixed. The court-fee was paid before that date. It was contended that the suit was barred on the date the court-fee was paid and that the order of the Court allowing the applicant to proceed with the case on payment of the court-fee was one without jurisdiction.

In the case before us, no application to pay the court-fee was made to the Court at the time the petition for leave to sue as a pauper was rejected. Whether that would make any difference it is not necessary for me to decide in the present case. It would seem, however, that as the Court by its very order retained the document before it the proceedings were not entirely terminated, and section 149 of the Code of Civil Procedure would be applicable. As I have remarked, however, such is not the case in the present case and

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

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the decision in the Patna case cannot be taken as authority to guide us in the present case. It may be noted, however, that the learned Judges of the Patna High Court also seem to have failed to stress the important condition which appears in the case of *Skinner* v. *Orde* (1), namely, that the proceedings should be still pending before it can be allowed that the petition for leave to sue as a pauper is still before the Court as a plaint.

In the course of argument we have been referred to the explanation to section 3 of the Indian Limitation Act, the relevant portion of which reads :

"A suit is instituted ; in the case of a pauper when his application for leave to sue as a pauper is made."

But this cannot mean that when the application for leave to sue as a pauper is rejected the suit is still continuing before the Court so that the provisions of section 149 of the Code of Civil Procedure could be applied. It appears to me that by the rejection of the application for leave to sue the proceedings before the Court are completely terminated. The plaint falls with the application for leave to sue, and the only recourse of the applicant in such an event is to find the court-fees and institute the suit in the ordinary way. When that is done, section 149 of the Code of Civil Procedure cannot be invoked so as to enable the Court to deem the suit to have been instituted at the time the application for leave to sue as a pauper was made, inasmuch as the two proceedings are entirely distinct and the one is commenced after the termination of the other. In the present case the application cannot be considered to be made a stage of the proceedings instituted on the filing of the application for leave to sue as a pauper. Even if that application be considered to be a plaint, it

(1) (1879) I.L.R. 2 All. 241.

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has been refused admission on the rejection of the prayer for leave to sue as a pauper, and is no longer before the Court.

For these reasons I am of the opinion that the learned District Judge was right in holding that he had no jurisdiction to accede to the prayer of the applications. This application must be dismissed with costs five gold mohurs.

MYA BU, J.—The question that falls for determination is whether a Court after having rejected an application for leave to sue *in forma pauperis* has jurisdiction to exercise its discretion under section 149 of the Civil Procedure Code on a subsequent application by the petitioner to allow him to pay court-fees upon the proposed plaint.

The petitioner filed his application for leave to sue *in forma pauperis* within the time prescribed by the Indian Limitation Act for the institution of a suit of the nature which he proposed to file. The application was pending for some months and when the order rejecting the application was passed the period of limitation for such a suit had expired. The petitioner did not make his application for permission to pay the court-fees on the proposed plaint which he had embodied in his application as required by rule 2, as was then in force, of Order XXXIII, Civil Procedure Code. When the Court passed an order rejecting his application he came to this Court to have that order revised, and only upon failure to have that order revised upon the merits he went to the District Court and applied for permission to pay the requisite court-fees upon the proposed plaint.

The rulings in *Bank of Bihar, Limited* v. *Sri Thakur Ramchanderji Maharaj* (1) and *Jagadeeshwaree Debee*

(1) (1929) I.L.R. 9 Pat. 439.

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v. *Tinkarhi Bibi* (1) have been placed before us in support of the contention that the District Court had jurisdiction to grant the petitioners' application for permission to pay the court-fees on the proposed plaint, in spite of the fact that the application was made after the rejection of the application for leave to sue *in forma pauperis*. If these two rulings lay down the correct law on the point, the District Court must be held to have erred in coming to the conclusion that inasmuch as the application for leave to sue *in forma pauperis* had been rejected before the making of the application for permission to pay the court-fees upon the proposed plaint, the Court had no power to grant the latter application under section 149 of the Civil Procedure Code. These rulings purported to follow the ruling of the Judicial Committee in *Skinner* v. *Orde* (2).

A noteworthy feature of *Skinner*'s case is that the application for permission to pay the court-fees on the proposed plaint was made and granted before the application for leave to sue *in forma pauperis* was finally disposed of, and their Lordships observed :

"The Act provides what shall happen if the prayer of the petition is granted, by section 308. It also provides by section 310 what shall be the effect of a rejection of the petition. But this case is one which the statute has not in terms provided for. The intention of the statute evidently was that unless the petition was rejected, as it contained all the materials of the plaint, it should operate as a plaint without the necessity of filing a new one."

Skinner's case was decided in 1879 when the Civil Procedure Code in force did not have a specific provision similar to that of section 149 of the Civil Procedure Code of 1908, and it seems to me that when section 149 was drawn up the passage

"The intention of the statute evidently was that unless the petition was rejected, as it contained all the materials of the

(1) (1935) I.L.R. 62 Cal. 711. (2) (1879) 6 I.A. 126 ; I.L.R. 2 All. 241.

plaint, it should operate as a plaint without the necessity of filing a new one "

was given its due weight by the employment of the phrase "at any stage" in the first part of the section. If it was intended to permit the petitioner to make a valid application at any time either before or after the rejection of the application to sue *in forma pauperis* the employment of this phrase would be absolutely out of place. The only reasonable construction to be placed on this phrase is that the application for permission to pay court-fees on the proposed plaint either embodied in or annexed to the application for leave to sue *in forma pauperis* must be made before the order rejecting the latter is made finally.

In my opinion with all respect to the learned Judges who decided the cases of *Bank of Bihar, Limited* (1) and *Jagadeeshwaree Debee* (2), the significance of this phrase was over-looked in those cases. The plaint which is either incorporated in or annexed to the petition cannot possibly be considered to have subsisted after the petition is rejected.

A petitioner in an application for leave to sue *in forma pauperis* desiring to take advantage of the provisions of section 149 must in my opinion make his application for permission to pay the court-fees on the proposed plaint or for a grant of time for such payment before his application for leave to sue *in forma pauperis* is finally rejected. In practice, when the Court pronounces its decision to be followed by an order rejecting the application, an application for permission to pay the court-fees on the proposed plaint can be made either orally or in writing.

For these reasons I agree in the order proposed by my learned brother.

(1) (1929) I.L.R. 9 Pat. 439. (2) (1935) I.L.R. 62 Cal. 711.