

CIVIL REVISION.

*Before Mr. Justice Sharpe.*MATHURA PRASAD *v.* R. A. PHILIPS.*

1938

Feb. 21.

Pauper, application by, to sue—Petition and plaint—Rejection of petition—Plaint not automatically rejected—Payment of court-fee on plaint—Court's discretion—Date of filing plaint—Limitation—Application to pay court-fees—Abandonment of petition for leave to sue as pauper—Plaintiff's motive—Civ. Procedure Code, s. 149, O. 33, r. 2 (1), 4.

Order 33 of the Civil Procedure Code as amended by the High Court requires a plaint to be presented together with the application to sue as a pauper. If the petition to sue as a pauper is rejected, the plaint is not automatically rejected, and the Court has discretion, under s. 149 of the Civil Procedure Code, to allow the plaintiff to pay the necessary court fee, and upon such payment within the time allowed by the Court the plaint must be deemed to have been properly stamped on the date on which it was originally filed.

An application by the plaintiff to pay the court-fees during the pendency of the inquiry into his pauperism amounts to an abandonment of his petition for leave to sue as a pauper.

Bank of Bihar Ltd. v. Maharaj, I.L.R. 9 Pat. 439; *Jagadeeshwari v. Tinkari Bibi*, I.L.R. 62 Cal. 711; *Rowther v. Meera Sahib*, [1938] Ran. 68; *Skinner v. Orde*, I.L.R. 2 All. 241 (P.C.), referred to.

Semble.—The Court would not exercise its discretion in favour of a plaintiff whose motive is merely to circumvent the law of limitation.

Soek Lal v. Dal Chand, I.L.R. 1 Ran. 196, referred to.

Ma Saw Yin v. S.P.K.A.A.M. Firm, [1937] Ran. 331, distinguished.

A. N. Basu for the applicant.

G. N. Banerji for the respondent.

SHARPE, J.—This application for revision raises two short points namely : (1) can an applicant for leave to sue as a pauper subsequently, and prior to the determination of that application, apply to pay the proper court-fees ? and (2) if in such a case he is allowed to pay the court-fees, is the date of his application to sue as a pauper or the date upon which he pays the court-fees the guiding date for the purposes of the Limitation Act ?

* Civil Revision No. 377 of 1937 from the judgment of the Small Cause Court of Rangoon in Civil Regular Suit No. 559 of 1937.

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It is necessary to bear in mind from the outset that Order XXXIII of the Code of Civil Procedure has been entirely superseded, so far as this High Court is concerned, by this High Court's own Order XXXIII, which differs in a number of material particulars from the corresponding order to be found in the Code of 1908. In this judgment references to Order XXXIII are references to the Order XXXIII of this High Court.

The material dates and facts in this case are as follows : On the 5th August 1933 the defendant executed a promissory-note for 350 rupees in favour of one Nandakumar Mahajan who on the 6th March 1936 endorsed it over to the plaintiff for valuable consideration. On the 5th August 1936 the plaintiff presented a plaint in the Court of Small Causes, Rangoon, in which plaint he claimed from the defendant the said principal sum of 350 rupees together with interest thereon and, in accordance with Rule 2 (i) of Order XXXIII he also presented therewith a petition for leave to sue as a pauper. The Court proceeded to the hearing of the petition in accordance with the provisions of Rule 4 of Order XXXIII. The petition was down for hearing on the 21st August 1936, but for various reasons it was adjourned from time to time, and still no evidence had been taken by the following 21st December, on which date the petition was again in the List for hearing. Upon its being called on that day, the learned pleader appearing for the petitioner intimated that he was proposing to pay the full court-fees on the plaint. He was given time to do so until the 15th January 1937 and on that date the full court-fee stamps were affixed to the plaint. The matter was placed before the Chief Judge who directed that regular proceedings should be opened and that the matter should be placed before the Second Judge for further action. The latter subsequently transferred the plaint to the regular file and

the suit proceeded in the usual way. Two issues were framed, the second of which raised the question as to limitation. The learned Second Judge found that the original application for leave to sue as a pauper was not made in good faith and that the plaintiff's claim was time-barred, and he dismissed the suit with costs. The plaintiff has now filed this application for revision.

The learned advocate for the applicant cited three cases before me : *Skinner v. Orde* (1), a Privy Council decision, *Bank of Bihar Ltd. v. Maharaj* (2), and *Jagadeeshwari Debee v. Tinkhari Bibi* (3). Each of those cases fell to be decided under a provision of the law whereby a pauper applicant was not required to present a plaint together with an application to sue as a pauper as is required by our present Order XXXIII but had only to file a petition to sue as a pauper without a plaint, such petition being required however, to contain the particulars required in regard to plaints. It is because of this distinction between our Rules and the Rules under which the above mentioned cases were decided that it is not possible to apply the reasoning in those judgments to the facts of the present case, but in my judgment the ultimate result of the different wording in our Order XXXIII is substantially the same as the results arrived at in the three cases which I have just mentioned.

The position under Order XXXIII of this High Court appears to me to be this : A pauper applicant has, as I have already pointed out, actually to present a plaint. My Brother Baguley and I have recently held, in *M.R. Ahmed Ebrahim Rowther v. O.T. Mohamed Meera Sahib* (4), that an application for leave to sue as a pauper is entirely a matter of procedure, and that the plaint is not automatically rejected when the petition to sue as a

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

(2) (1929) I.L.R. 9 Pat. 439.

(3) (1935) I.L.R. 62 Cal. 711.

(4) [1938] Ran. 68.

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pauper is rejected. In my judgment, in such cases as the present, the position is that there is before the Court a plaint on which proper court-fees have not been paid, but the provisions of section 149 of the Code of Civil Procedure are available for the assistance of the plaintiff. That section gives the Court a discretion to allow the plaintiff to pay the whole or any part of the necessary 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. If the Court exercises its discretion in favour of the plaintiff and allows him to pay the requisite court-fee within the time to be fixed by it, then the plaint must be deemed to have been properly stamped on the date on which it was originally filed. By applying, during the pendency of the inquiry into his pauperism, for leave to pay the court-fees ordinarily payable in respect of his plaint, a plaintiff admits that he is no longer desirous of suing as a pauper and must be taken to abandon his petition to be allowed so to sue. But he gives up nothing else; he does not thereby abandon his suit. Therefore a plaintiff, who has applied for leave to sue as a pauper in accordance with the terms of Order XXXIII, may at any time apply to the Court under section 149 for leave to pay the court-fee payable on the plaint. By making such application his prior application to sue as a pauper must be taken to be abandoned and will accordingly stand rejected. It is then incumbent upon the Court to deal with the application under section 149. The Court must exercise its discretion judicially and must consider all the circumstances of the case, including, of course, the fact that, if the application is granted, the plaintiff may, by presenting and subsequently abandoning a petition for leave to sue as a pauper, have obtained a valuable extension of time, and that the Court, by exercising its

discretion in the plaintiff's favour, may in effect be extending the limitation of time imposed by statute.

The general principles which I have just enunciated would appear to be entirely in consonance with the decision of Young J. in *Sook Lal v. Dal Chand* (1). The recent Bench decision of *Ma Saw Yin v. S.P.K.A.A.M. Firm* (2) is distinguishable from the case which I have to decide because (a) it fell to be decided under Order XXXIII as it stood before it was recast by the Rule Committee of this High Court and (b) in that case no application was made under section 149 until after the rejection of the petition to sue as a pauper.

I will now apply these principles to the present application for revision. When, on the 21st December 1936 the learned advocate for the plaintiff intimated that he was paying the court-fees (the Diary entry reads : "Basu is paying court-fee. To pay on 15-1-37"), he was not entitled, as of right, to pay them. He ought to have been taken as merely applying for leave to do so, and the Court ought to have considered the matter and exercised its discretion judicially, and have either granted or refused that application only after a proper consideration of the whole matter. It does not appear either that the Court treated Mr. Basu's statement as an application under section 149 or that, if it did treat it as such an application, it considered it as it should have done. When the matter subsequently came before the Second Judge in the circumstances which I indicated at an early point in this judgment, he framed an issue as to limitation, and in connection with that issue recorded certain evidence of the plaintiff and two of his witnesses with a view to ascertaining, as he later expressed it in his judgment, "whether the original application to sue *in forma pauperis* was fraudulent and *mala fide* or a *bona fide* one."

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(1) (1923) I.L.R. 1 Ran. 196.

(2) [1937] Ran. 331.

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I will deal with the case as if, on the 21st December 1936, the plaintiff had asked for leave under section 149 to pay the court-fees on his plaint. That is the most favourable assumption which I can make in the plaintiff's favour. I am quite satisfied from the evidence to which I have just referred and which I need not here discuss, that that application, if considered at all, must have failed. The dismissal of that application leaves an unstamped plaint without any supporting application to sue as a pauper, because, as I have already held, upon an application for leave to pay court-fees being made, the application for leave to sue as a pauper automatically stands rejected. The net result is an unstamped plaint, which must involve the dismissal of the suit.

As in fact the plaintiff's suit has been dismissed, the result arrived at by the Small Cause Court is correct in law, although the means by which that result was achieved were not such as they should have been. But as the actual result is what it should have been, this application for revision is dismissed with costs.