

## APPELLATE CIVIL.

Before Mr. Justice Baguley, and Mr. Justice Sharpe.

1937

Aug. 25.

M.K. AHMED EBRAHIM ROWTHER

v.

O.T. MOHAMED MEERA SAHIB.\*

*Judgment—Letters Patent, clause 13—Rejection of application for leave to sue as pauper—Civil Procedure Code, O. 33, rr. 2, 4, 5—Rejection of petition—No decision of matters in issue—Continuation of plaint with court-fee attached—Matter of procedure—Substantive rights not conferred by Code.*

An order passed by a Judge on the Original Side of this Court dismissing an application for leave to sue as a pauper is not a judgment within clause 13 of the Letters Patent and no appeal lies therefrom.

*In re Dayabhai v. A.M.M. Murugappa Chettiar*, I.L.R. 13 Ran. 457, followed.

Under Order 33 of the Civil Procedure Code, as recast by the High Court, a plaint is not rejected automatically if the petition is rejected, for the Court may allow the plaint to continue if it is supported by the necessary court-fee. The rejection of the petition for leave to sue as a pauper does not finally decide the matters in issue between the parties; the plaintiff can still file his plaint in the ordinary way with proper court-fee attached. The Civil Procedure Code does not confer a substantive right and all that the plaintiff loses is the right to a certain procedure, and this is not a final determination of the matters in issue between the parties.

*Baba Sah v. Purushothama Sah*, I.L.R. 48 Mad. 700; *Maurice v. The Secretary of State for India*, Civil Misc. Ap. 31 of 1935; H.C. Ran.; *S. M. Mitra v. Corporation of the Royal Exchange Assurance*, Civil Misc. Ap. 134 of 1929, H.C. Ran.; *Tuljaram v. Alagappa Chettiar*, I.L.R. 35 Mad. 1, dissented from.

*N. M. Cowasjee* for the appellant.

*Doctor* for the respondent.

BAGULEY, J.—This is an appeal against an order passed by the learned Judge on the Original Side dismissing the appellant's application for leave to sue as a pauper. A preliminary point has been raised that no appeal lies. In my opinion this preliminary point is a good one. It is admitted that an appeal will not lie against this as an order under the Civil Procedure.

\* Civil Misc. Appeal No. 31 of 1937 from the order of this Court on the Original Side in Civil Misc. Case No. 220 of 1936.

Code, but it is argued that the order amounts to a judgment under clause 13 of the Letters Patent. What a judgment is has been laid down by this Court in *In re Dayabhai Jiwandas v. A.M.M. Murugappa Chettiar* (1), and on page 475 there occurs the passage

" I am of opinion that in the Letters Patent of the High Courts the word 'judgment' means and is a decree in a suit by which the rights of the parties at issue in the suit are determined ",

and that is the gist of the whole case which was a unanimous decision by a Bench of seven Judges.

It is argued on behalf of the appellant that a rejection of the application for leave to sue as a pauper is equivalent to a dismissal of the plaint. Order 33 has been recast by the Rule Committee of this Court. It is now laid down in Order 33, rule 2, that the 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 certain matters. It is pointed out that the person who comes to Court is not described as a petitioner but as a plaintiff and he has brought a plaint to the Court. It is argued that if his petition for leave to sue as a pauper is rejected the plaint is automatically rejected together with it, and as the rejection of the petition involves the rejection of the plaint, the rejection of the plaint is a decree. With this argument I would be in full accord were I to agree that the rejection of the petition involves with it the rejection of the plaint ; but the Code does not say that this shall be the case.

Rule 4 deals with the rejection of the plaint. In rule 4 (4) it is stated

" \* \* \* the petition shall be rejected under this rule if the Court is not satisfied of the truth of any of the statements made

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in the petition ; provided that the Court may admit the plaint on payment of the Court-fee due thereon ”,

which shows that the plaint is certainly not rejected automatically if a petition is rejected, because it says that the Court may allow the plaint to continue provided it is supported by the necessary stamp fee. Again in sub-rule (5) of the same rule the result of rejecting petition is noted :

“ If the petition is rejected the plaintiff shall be precluded from filing any further petition to sue as a pauper in respect of the same cause of action .”

That is the result if the petition is rejected : the plaintiff cannot sue in that way again, but the rule does not say that the plaint is automatically rejected or that the plaintiff is precluded from suing on his plaint if he files his plaint in the ordinary way : all that happens to the plaintiff is that he is precluded from availing himself of this particular form of suing, namely, suing without paying the necessary court-fees. This, however, is a matter of procedure. It should be unnecessary to labour this point because the right to sue as a pauper in certain circumstances is given not even in the Civil Procedure Code but in the schedule attached to the Civil Procedure Code, and in my opinion a substantive right cannot be given in a Code which deals only with procedure. It is however necessary to mention this particular point in view of *P. Baba Sah v. V.M. Purushothama Sah* (1), a case in which a Bench of the Madras High Court held that an appeal against an order permitting a plaintiff to sue *in forma pauperis* will lie. On page 701 occurs the passage :

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(1) (1924) I.L.R. 48 Mad. 700.

"We think that the law confers a substantive right on every plaintiff who has a good case at law but no means to prosecute it, to sue *in forma pauperis*."

With due respect I am unable to accept this view. I do not think substantive rights are meant to be awarded in the Code of procedure : the plaintiff may have a right to a certain form of procedure : It can hardly be called a substantive right. It is also to be noted that the Madras High Court in this matter is governed by *Tuljaram Row v. Alagappa Chettiar* (1), which is the leading case in Madras as to what is the meaning of the word "judgment" in the Letters Patent. *Tuljaram Row's* case was dissented from in *In re Dayabhai Jiwandas's* case afore mentioned. Mr. Cowasjee has referred us to two cases of this Court. One is *J. C. Maurice v. The Secretary of State for India in Council* (2) in which an appeal by this Court was allowed against an order rejecting an application to sue as a pauper. The question whether an appeal lay or not was not discussed, but this can be explained easily by the fact that this case was decided before the Full Bench decision in *In re Dayabhai Jiwandas's* case (3) was announced. Another case—*S. M. Mitra v. Corporation of the Royal Exchange Assurance* (4)—again is no longer good law because that also was decided before *In re Dayabhai Jiwandas's* case. In my opinion it cannot possibly be said that the rejection of the petition for leave to sue as a pauper finally decides the matters in issue between the parties : the plaintiff can still file his plaint in the ordinary way, that is to say with proper court-fee attached. All that he loses is the right to a certain procedure, and this is not a final determination of the matters in issue between the parties.

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(1) (1910) I.L.R. 35 Mad. 1.

(3) (1935) I.L.R. 13 Ran. 457.

(2) Civil Misc. Ap. No. 31 of 1935,

(4) Civ. Misc. Ap. No. 134 of 1929,

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For these reasons I would dismiss this appeal with costs, advocate's fee two gold mohurs.

SHARPE, J.—An application for leave to sue as a pauper is entirely a matter of procedure. I agree with my brother Baguley that the preliminary objection taken in this case succeeds. We are not at liberty to entertain this appeal.

### COURT FEES ACT REFERENCE.

Before Mr. Justice Ba U.

SUBHAN KHAN AND ANOTHER

v.

MOHAMED EUSOOF.\*

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Sep. 14.

*Court-fees—Order refusing or granting letters of administration—Appeal from order to the High Court—Court-fee on memorandum of appeal—Subject matter of letters or probate—Memorandum, application or petition—Order not a decree—Right of appeal—Burma Succession Act, s. 299—Court Fees Act, art. 1, Sch. I, arts. 1, 11, 17 (vi), Sch. II.*

The court-fee payable on a memorandum of appeal presented to the High Court from an order of the District Court refusing or granting letters of administration or probate of a will is Rs. 2 under art. 11, Sch. II of the Court Fees Act.

The subject matter in dispute in a proceeding for either letters of administration or probate of will is the right to represent the estate of the deceased. No money value can be placed on it and so art. 1, Sch. I of the Court Fees Act does not apply, and moreover fees are chargeable on the estate on grant of letters or probate. A memorandum of appeal is different from an application or petition and so art. 1 of Sch. II cannot apply.

An order granting or refusing letters or probate is appealable not because it has the force of a decree, so as to make art. 17 (vi) of Sch. II applicable, but because there is a special provision, *viz.*, s. 299 of the Burma Succession Act, which confers the right of appeal.

*Eva Mountstephens v. Orme*, I.L.R. 35 All. 448; *Lee v. Hardy*, 9 W.N., H.C. Cases, N.W.P. 27; *Rodrigues v. Mathias*, 21 M.L.J. 481, dissented from.

J. C. Ray for the appellant. The court-fee payable on an appeal from an order granting or refusing letters of administration is Rs. 2 either under article 1 or article

\* Court Fees Act reference arising in Civil First Appeal No. 57 of 1937 of this Court.