APPELLATE CIVIL.

Before Addison and Abdul Rashid JJ.

ALOPI PARSHAD AND OTHERS (DEFENDANTS) Appellants

versus

MST. GAPPI AND OTHERS (PLAINTIFFS) Respondents.

1936

April 21.

Civil Appeal No. 837 of 1935.

Civil Procedure Code, Act V of 1908, Order XXXIII, rules 8, 15 — Application for permission to sue in forma pauperis*—rejected—Payment of Court fee after rejection—Limitation—whether relates back to date of filing the application—or starts on date of payment of Court fee.*

Held, that an application to sue in *forma pauperis* is a potential plaint. If it is rejected under rule 5 or rule 7 of Order XXXIII, it never ripens into a plaint. If, however, the application ripens into a plaint, then the date of the institution of the suit relates back to the date of the filing of the application. If, on the other hand, such an application is rejected, it cannot be deemed to be a plaint and the payment of Court fee after the application to sue in *forma pauperis* has been rejected, cannot revive a potential plaint which ceased to exist when the application for leave to sue in *forma pauperis* was rejected.

Keshav Ramchandra v. Krishnarao Venkatesh (1), and *Abhoya Churn Dey Roy v. Bissesswari* (2), relied upon.

Held also, that where an application for leave to sue in *forma pauperis* is rejected under Order XXXIII, rule 7, there is no proceeding left before the Court and the applicant can then only (*vide* rule 15) institute a suit in the ordinary manner and pay the Court fee and such suit must be held to have been instituted on the day on which the Court fee is paid.

Pratabchand v. Atmaram (3), relied upon.

(1) (1896) I. L. R. 20 Bom. 508. (2) (1897) I. L. R. 24 Cal. 889.
(3) 1933 A. I. R. (Nag.) 237.

1936

ALOPI PARSHAD
v.
MST. GAPPI.

Mahant Diyal Das v. Mahant Sundar Das (1) and *Nallvadiva v. Subramania* (2), referred to.

Jagadeeshwaree Debee v. Tinkarhi Bibi (3), *Stuart Skinner v. William Orde* (4), and *Maria Thangathamal v. Iravatheswara Iyer* (5), distinguished.

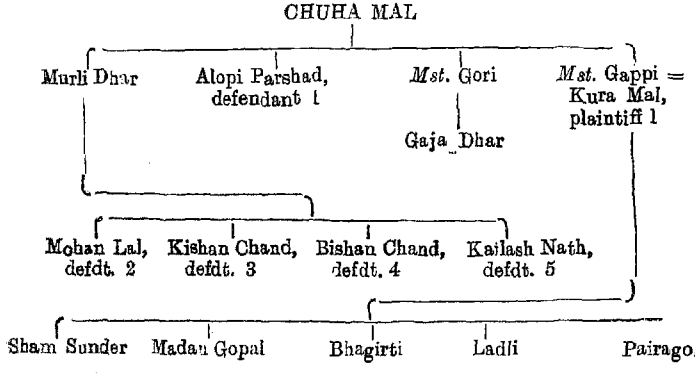
First appeal from the decree of Khan Sahib Mirza *Abdul Rab, Senior Subordinate Judge, Delhi, dated 29th March, 1935, ordering the defendants to pay to the plaintiff the sum of Rs.7,000, etc.*

JAGGAN NATH AGGARWAL, MEHR CHAND MAHAJAN and ASA NAND, for Appellants.

BADRI DAS, and ACHHRU RAM, for Respondents.

The judgment of the Court was delivered by—

ABDUL RASHID J.—The following pedigree-table will be helpful in understanding the facts of this case :—



On the 8th of October, 1930, *Mst.* Gappi made an application under Order XXXIII rule 2 of the Code of Civil Procedure, for permission to sue her brother Alopi Parshad, and her four nephews Mohan Lal, Kishan Chand, Bishan Chand and Kailash Nath in *forma pauperis* for recovery of Rs.7,000. It was stated in the plaint that the

(1) (1922) I. L. R. 3 Lah. 35.
(2) (1916) I. L. R. 40 Mad. 687.
(3) (1935) I. L. R. 62 Cal. 711.
(4) (1880) I. L. R. 2 All. 241 (P. C.).
(5) (1915) 28 I. C. 504.

plaintiff's father Chuha Mal was the manager of the joint Hindu family consisting of himself, his sons and grandsons, that thirty years ago the plaintiff began to deposit her money with her father and her brother and that the total sum due to her on the date of the institution of the suit on account of principal and interest was Rs.7,000, which the defendants refused to pay. The defendants opposed the application to sue in *forma pauperis*. After recording the evidence of the parties, the trial Court held that *Mst.* Gappi had failed to establish that she was a pauper. Her application to sue as a pauper was accordingly rejected on the 8th of July, 1931. At the end of his order rejecting the application the learned Senior Sub-Judge made a remark to the effect that *Mst.* Gappi was at liberty to prosecute the suit on payment of the necessary Court fees.

On the 21st of July, 1931, *Mst.* Gappi presented an application, stating that she had arranged to pay the entire Court fee amounting to Rs.532-8-0 and that the Court may be pleased to allow her to deposit the Court fees. The Court, thereupon, passed an order to the effect that " the Court fees should be paid on that very day, that the file be sent for, and the case should come up on the 6th August, 1931." On the 6th August it was ordered by the Court that the case be registered and summonses for settlement of issues be issued to the defendants for the 3rd November. On the 8th December the defendants presented an application, stating that as the petition to sue in *forma pauperis* had been rejected on the 8th July, 1931, and as no suit had been instituted thereafter, there was no regular plaint before the Court. On the 13th February, 1932, the defendants put in a complete written

1936

ALOPI PARSHAD
v.
MST. GAPPI.

statement. It was pleaded, *inter alia*, that the suit was barred by limitation, that after the rejection of the application to sue in *forma pauperis* on the 8th July, 1931, no regular plaint was before the Court and the entire proceedings terminated. On the merits, it was pleaded that Kura Mal, the husband of the plaintiff, from time to time deposited certain sums with the firm Banarsi Das-Daya Shankar in the name of her sons and daughters, that this money was transferred by Chuha Mal from the account books of Banarsi Das-Daya Shankar into his own notebook in 1901, that thereafter Chuha Mal performed the marriage of Bibi Ladli, the daughter of Kura Mal, and that the sums deposited by Kura Mal were spent in meeting the expenses of the marriage by Chuha Mal. It was further stated that after the death of Kura Mal, his sons Sham Sundar and Madan Gopal, carried on piece-goods business in agreement with the firm Banarsi Das - Daya Shankar belonging to the defendants, and that it was agreed that the amount that was still left in the *khata* of *Mst.* Gappi be pledged with the defendants as security for any losses that might accrue to Sham Sundar and Madan Gopal. Disputes arose between the firm Banarsi Das - Daya Shankar on the one side and Sham Sundar and Madan Gopal on the other. These disputes were referred to arbitrators who gave their award according to which a decree was passed for Rs.47,000 in favour of the defendants against Sham Sundar and Madan Gopal, sons of the plaintiff. It was claimed that the defendants were entitled to appropriate the amount available in the *khata* of *Mst.* Gappi towards these losses.

The trial Court held that the suit was not barred by limitation as it must be taken to have been instituted on the 8th of October, 1930, that is, the day on

which application for leave to sue in *forma pauperis* was made under Order XXXIII, rule 2. It was further held that the amounts credited in the plaintiff's account in the defendants' books were the property of the plaintiff and that in accordance with these accounts Rs.7,000 were due to *Mst.* Gappi on the 8th October, 1930. The trial Court was of the opinion that it had not been established that there was any agreement between the plaintiff and the defendants to the effect that the money due to the plaintiff would be adjusted against losses incurred by Sham Sundar and Madan Gopal in the piece-goods business. On these findings a decree for Rs.7,000 was passed in favour of the plaintiff. Against this decision, the defendants have preferred an appeal to this Court.

It has been amply established on the record that *Mst.* Gappi made a written demand for the amount in dispute on the 9th of October, 1927. This point was not contested by the learned counsel for the respondent. It is common ground between the parties that if the suit be taken to have been instituted on the day when the application to sue in *forma pauperis* was presented, *i.e.* on the 8th of October, 1930, the claim would be within time, and that if the suit be taken to have been instituted on the 21st July, 1931, it would be barred by limitation. Order XXXIII, rule 2 of the Code of Civil Procedure, lays down that "every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits." Rule 5 entitles the Court to reject an application for permission to sue as a pauper on various grounds. Rule 6 is to the effect that "where the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall fix a day

1936

ALOPI PARSHAD v. MST. GAPPI.

for receiving such evidence as the parties may adduce on the question of pauperism." Rule 8 of Order XXXIII is of the utmost importance and runs in the following terms:—

"Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any Court-fee in respect of any petition, appointment of a pleader or other proceeding connected with the suit."

The language employed in rule 8 makes it perfectly clear that the application to sue in *forma pauperis* cannot be deemed to be a plaint until and unless it is granted. If the application is rejected, the proceedings under Order XXXIII terminate and there is no document which can be deemed to be a plaint under the Code of Civil Procedure. The rejection of an application to sue in *forma pauperis* takes place under rule 5 or rule 7 of Order XXXIII and the provisions of rule 8 do not become applicable at all. In other words, the application to sue in *forma pauperis* is a potential plaint. If it is rejected under rule 5 or rule 7, it never ripens into a plaint. If the application ripens into a plaint, then the date of the institution of the suit shall relate back to the date of the filing of the application to sue in *forma pauperis*. If, on the other hand, such an application is rejected, it cannot be deemed to be a plaint, and the payment of the Court-fee after the application to sue in *forma pauperis* has been rejected cannot revive a potential plaint which ceased to exist when the application for leave to sue in *forma*

pauperis was rejected. Reference may be made in this connection to *Keshav Ramchandra v. Krishnarao Venkatesh* (1). In that case, the plaintiffs applied for leave to sue in *forma pauperis* on the 2nd February, 1890. After investigation the Court, on the 15th July, 1890, refused leave, but on the plaintiff's application granted him time to pay the Court-fees. He paid the fees on the 12th August, 1890. At this date the suit was barred and the defendant pleaded limitation. The plaintiff contended that the suit should be taken to have been instituted at the date of his application for leave to sue as a pauper. It was held that the plaintiff's application to sue as a pauper, having been disposed of under section 409 of the Civil Procedure Code (Act XIV of 1882), there was no proceeding pending which could be continued and kept alive by the payment of Court-fees. On the rejection of an application for leave to sue as a pauper the only course open to the applicant is that declared in section 413, *viz.* to institute a suit, and the date of the institution of that suit for the purposes of limitation is the actual date thereof. It was held by a Division Bench of the Calcutta High Court in *Abhoya Churn Dey Roy v. Bissessvari* (2), that where an application for permission to sue in *forma pauperis* is rejected, and a full Court-fee is paid for a suit for the same relief, the suit must be considered for the purposes of limitation to have been instituted only after the payment of the Court-fee, and not at the date of presentation of the petition to sue as a pauper.

In the present case, it was contended by the learned counsel for the respondent that the trial Court at the time of rejecting the application for leave to

(1) (1896) I. L. R. 20 Bom. 508. (2) (1897) I. L. R. 24 Cal. 889.

1936

LOPI PARSHAD v. MST. GAPPI.

sue in *forma pauperis* observed in its order that the plaintiff shall be at liberty to prosecute the suit on payment of the necessary Court-fees, and that this showed that the Court had granted a reasonable time for the payment of Court-fees under section 149 of the Civil Procedure Code, and that upon the payment of Court-fees the plaint must be held to have the same force and effect as if Court-fee had been paid in the first instance. In our opinion, this contention is without any force. Order XXXIII, rule 15, lays down that 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. The Court had obviously in mind the provisions of rule 15 when it remarked that the plaintiff will be entitled to prosecute the suit on payment of the necessary Court-fee. It was laid down in *Pratapchand v. Atmaram* (1) that it is essential for the granting of permission to pay Court-fees that there should be a pending proceeding before the Court. Where, therefore, an application for leave to sue in *forma pauperis* is rejected under Order XXXIII, rule 7, there is no proceeding before the Court and the plaint cannot be said to remain, and an order granting the plaintiff's permission to pay Court-fees cannot be deemed to be one under section 149, and the suit must be held to have been instituted on the day on which the Court-fee is paid. The cases dealing with applications for leave to appeal in *forma pauperis* stand on an entirely different footing from an application for leave to sue in *forma pauperis*, and

(1) 1933 A. I. R. (Nag.) 237.

1936

ALOPI PARSHAD v. MST. GAPPI.

the distinction between the two proceedings has been emphasized in *Mahant Diyal Das v. Mahant Sundar Das* (1) and *Nallvadiva v. Subramania* (2).

The learned counsel for the respondent principally relied on *Jagadeeshwaree Debee v. Tinkarhi Bibi* (3), where the following observations occur :—

" The document mentioned as an application for permission to sue as a pauper in Order XXXIII, rule 2 of the Code of Civil Procedure, 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 * * * *. 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 for leave to sue as a pauper, the provisions of section 149 of the Code of Civil Procedure, could come to the assistance of the plaintiff."

This ruling is based on the observations of their Lordships of the Privy Council in *Stuart Skinner alias Nawab Mirza v. William Orde* (4). It was held by their Lordships that where a person, being at the time a pauper, petitions under the provisions of the Civil Procedure Code for leave to sue as a pauper, but subsequently, pending an enquiry into his pauperism, obtains funds which enable him to pay the

(1) (1922) I. L. R. 3 Lah. 35.
(2) (1916) I. L. R. 40 Mad. 687.
(3) (1935) I. L. R. 62 Cal. 711.
(4) (1880) I. L. R. 2 All. 241 (P.C.).

1936

GAPPI PARSHAD v. ST. GAPPI.

Court-fees, and his petition is allowed upon such payment to be numbered and registered as a plaint, his suit shall be deemed to have been instituted from the date when he filed his pauper petition, and limitation runs against him only up to that time. The facts of the case dealt with by their Lordships of the Privy Council were clearly distinguishable from the facts of the present case. In the reported case, the application for leave to sue in *forma pauperis* had not been dismissed under rules 5 and 7 of Order XXXIII before the payment of the Court-fees. The application was still pending and this application could be granted under the provisions of rule 8 of Order XXXIII and could thus be deemed to be a plaint in the suit. It is only the rejection of the application which terminates the proceedings and as the application in the reported case had not been rejected, the proceedings never terminated. *Maria Thangathammal v. Iravatheswara Iyer* (1) was also relied upon by the learned counsel for the respondent. It is a very brief judgment and does not show whether the application to sue in *forma pauperis* had actually been rejected before time was granted for the payment of the Court-fee. The explanation to section 3 of the Indian Limitation Act is also of no assistance to the respondent, as in our opinion the pauper in that explanation means a "declared pauper" and not a person whose application to sue in *forma pauperis* has been rejected by the trial Court.

On a consideration of the authorities referred to above and the provisions of rules 8 and 15 of Order XXXIII of the Code of Civil Procedure, we are of the opinion that in the present case it cannot be held

(1) (1915) 28 I. C. 504.

that the plaintiff's suit was instituted on the 8th October, 1930. It must be taken to have been instituted only on the 21st July, 1931, and was, therefore, obviously barred by time.

Our finding on the question of limitation makes it unnecessary to deal with the case on the merits in detail. The principal argument addressed by the learned counsel for the appellants was that the money deposited by *Mst.* Gappi was spent by Chuha Mal in meeting the marriage expenses of *Mst.* Ladli. *Mst.* Ladli's marriage took place in 1903. Kura Mal, the husband of *Mst.* Gappi, died in 1902. *Mst.* Gappi had, therefore, become a widow before her daughter's marriage was celebrated. It is not uncommon amongst Indian families for a grandfather to celebrate the marriage of his granddaughter, specially if his daughter happens to be a widow. The account book of Chuha Mal shows that he continued to credit *Mst.* Gappi with the interest on her deposits till the 18th of February, 1904, though *Mst.* Ladli had been married in 1903. This shows that Chuha Mal did not debit the expenses of the marriage of *Mst.* Ladli in the account of *Mst.* Gappi. Chuha Mal died in 1906. He, therefore, lived for three years after the marriage of *Mst.* Ladli, and even during that period he never debited the expenses of the marriage in the account of his daughter. These considerations make it obvious that Chuha Mal paid the expenses of the marriage of *Mst.* Ladli from his own pocket. Chuha Mal throughout his life-time looked upon the deposit made by his daughter as belonging to her. After his death, his sons Murli Dhar and Alopi Parshad, started their account books, in 1906, and they continued to show these deposits as belonging to *Mst.* Gappi. These

1936

PARSHAD
v.
MST. GAPPI.

entries continued up to the year 1924. No accounts subsequent to 1924 have been placed on the record of the present case. In these circumstances we are of the opinion that the amounts shown in the name of *Mst.* Gappi in the account book of Chuha Mal are her property.

There is no dispute between the parties regarding the amount due, it being admitted that the amounts standing in the name of *Mst.* Gappi together with interest thereon, up to the 8th October, 1930, amount to Rs.7,000. On the merits, therefore, we are in agreement with the finding of the trial Court.

For the reasons given above, we accept this appeal, set aside the judgment and the decree of the Court below, and dismiss the plaintiff's suit as being barred by limitation. In view of all the circumstances, we leave the parties to bear their own costs throughout.

P. S.

Appeal accepted.