

Mst. Latif-Un-Nissa And Ors. vs Mst. Khair-Un-Nissa And Anr. on 22 September, 1954

Equivalent citations: AIR1955ALL53, AIR 1955 ALLAHABAD 53

JUDGMENT

Malik, C.J.

1. Civil Revision No. 474 of 1946 filed by the legal representatives of Mohammad Baksh came up before a Bench of this Court on 14-9-1950, and, while my brother Agarwala, J. was of the opinion that the applicants could continue the proceedings if they were prepared to pay the court-fee, or if they could allege and establish that they were paupers and were not able to pay the court-fee, the other learned Judge, Pearey Lal Bhar-gava J. took a contrary view.

2. By reason of the difference of opinion two questions of law were formulated and referred to a larger Bench for decision. The points are:

"1. Whether the heirs of a person, who has made an application for leave to sue in 'forma pau-peris' under Order 33 of the Code of Civil Procedure and dies before the application is allowed or refused under Rule 7 of the Order, can continue the proceedings in their own right either upon showing that they are themselves paupers or by offering to pay court-fee on the plaint? If the answer be in the affirmative, whether the heirs have to show that the original applicant was also a pauper?

2. Whether, in the circumstances of the present case, the objection that the right to sue did not survive is open to the applicants, in view of the order bringing the heirs on the record in the previous revision application and the final decision passed on that revision appli-cation?"

3. The facts of the case so far as they are necessary for the decision of the points raised are that Mohammad Baksh and Haidar Baksh filed an application under Order 33 of the Code of Civil Procedure for permission to file a suit in 'forma pauperis'. They claimed that they were brothers and were the legal representatives and heirs of Haji Ahmad Baksh, who had died on 11-12-1928 and were entitled to his property which was to the wrongful possession of the opposite party. This application was rejected by the lower Court on a finding that Mohammad Baksh and Haider Baksh were not paupers. An application in revision was filed in this Court and during the pendency of the application Mohammad Baksh died. On the death of Mohammad Baksh his legal representatives Latif-un-Nissa & others applied that they be brought on the record and allowed to continue the civil revision. This application was granted without any objection and on 27-4-1944, the revision application came up for hearing.

The application was allowed and the following order was passed:

"We send the case back to the learned Civil Judge with the direction to consider the question of pauperism on the materials on the re-cord. He should not take into consideration the value of the property covered by the gift and the wakf. If, independently of the property covered by these two transactions, the plaintiffs have sufficient means within the meaning of the law, to pay court-fee, they shall not be entitled to sue in 'forma pauperis'. If, on the other hand, they succeed in establishing that they have not sufficient means, they will be entitled to sue as paupers."

4. When the case went back to the trial Court the heirs of Mohammad Baksh made an application on 10-11-1945, duly verified it and gave the list of properties belonging to them to show that they were paupers and were not in a position to pay the court-fee. On behalf of the opposite party objections were raised that Mohammad Baksh having died his legal representatives could not continue the proceedings and the suit so far as Mohammad Baksh was concerned had abated.

The learned Civil Judge decided in favour of the objectors that the application could not be continued by the heirs of Mohammad Baksh as the application under Order 33 filed by Mohammad Baksh had abated. But the learned Judge granted the application of Haider Baksh. The learned Judge, however, held that the heirs of Mohammad Baksh were paupers and were not in a position to pay the court-fee.

5. Order 33 of the Code of Civil Procedure (Act 5 of 1908) provides for suits by paupers and such a suit can be instituted by a pauper in accordance with the provisions of that Order. Under Rule 2 of this Order the petition for leave to sue in 'forma pauperis' must contain the particulars required in regard to plaints and it must be signed and verified in the manner prescribed for the signing and verification of pleadings. The petition should also contain a schedule of any move-able or immoveable property belonging to the applicant with the estimated value thereof.

The rules under Order 33 do not require in this State two documents but one document which contains all the particulars required for a plaint with a prayer superadded that the applicant be granted the reliefs claimed without payment of the court-fee as he is not in a position to pay the same. Dealing with an application for leave to sue in 'forma pauperis' their Lordships of the Judicial Committee in -- 'Stuart Skinner v. William Orde', 2 All 241 (A) observed:

"Now a petition to sue in 'forma pauperis' contains all that a plaint is required to do. By Section 300 'the petition shall contain the particulars required by Section 26 of this Act in regard to plaints, and shall have annexed to it a schedule of any moveable or immoveable property belonging to the petitioner, with the estimated value thereof, and shall be subscribed and verified in the manner hereinbefore prescribed for the subscription and verification of plaints'. Therefore it contains in itself all the particulars the statute requires in a plaint, and, plus these, a prayer that the plaintiff may be allowed to sue in 'forma pauperis'."

Since 1859 the Code was re-enacted three times in 1877, 1882 and 1908 but no material change has been made in these provisions of the Code and the observations of their Lordships of the Judicial Committee in -- 'Skinner's case (A)' are, therefore, still good law. The document, therefore, contains, as their Lordships have pointed out, all the prayers that are contained in a plaint with a prayer super-imposed that the plaintiff be granted the reliefs claimed without payment of the court-fee. The other prayers contained in the document can only be entertained and granted if the prayer to be excused from payment of the court-fee is allowed. Where, therefore, that prayer, is refused the document before the Court has been completely disposed of and it cannot be said that another order is necessary to dispose of the other prayers which were conditional on the Court allowing the applicant to sue in 'forma pauperis'.

So long as the Court is seized of the application, in which the applicant prays that he be allowed to claim certain reliefs without payment of the court-fee due under the Court-fees Act, as he is not in a position to pay the same, the applicant can come forward and pay the court-fee and, if that is accepted, the plaint dates back to the date when it was originally filed and cannot be deemed to have been filed on the date when the court-fee was paid. If the prayer to be excused from payment of the court-fee is granted then also nothing more remains to be done and the Court has to proceed with the decision of the claim put forward before it. Order 33, Rule 8, provides that the application to sue as a pauper shall be deemed to be the plaint in the suit if the application is granted. Even without that provision in Rule 8, probably, the same result would have followed.

6. If the Court is still seized of the application to sue as a pauper and it is of the opinion that the petitioner cannot be excused the payment of the court-fee, and the petitioner prays for an opportunity to pay the court-fee, there seems to be no good ground why the Court cannot grant time under Section 149 of the Code. It is not necessary to deal with this point at any length as it has arisen for decision before a recent Full Bench in -- 'Devendra Kumar v. Raghuraj Bharti', Civil Revn. No. 452 of 1949 (All) (B), in which arguments have been concluded but the judgment has been reserved.

7. Learned counsel for the opposite party has conceded that if a petitioner, who has applied under Order 33, Rule 1 of the Code, dies before the application is disposed of, the legal representatives of the deceased can pay the court-fee and continue the proceedings and the suit would be deemed to have been instituted on the date when the application under Order 33 was filed by the predecessor-in-interest of the plaintiff. This view was taken by Jackson J. -- In re, A. S. Radhakrishna Iyer', AIR 1925 Mad 819 (C). In -- 'Kaveri Subbiah v. Bala Tripura Sundara', AIR 1928 Mad 278 (D), Srinivasa Ayyangar J. held that a petition for leave to sue in 'forma pauperis' was a personal application on a personal ground and if the applicant died the application could not be continued.

The learned Judge pointed out that unlike the case that was before Jackson J. the legal representatives had not appeared before him to pay the court-fee but, if they had, he would have been prepared to consider such an offer and willing to afford an opportunity by giving time to continue the proceedings as a suit. In several cases an offer was made to pay the court-fee by the legal representatives of the deceased who had applied under Order 33 of the Code and had died before the application was disposed of and the offer was accepted. See -- 'Mt. Tarif Begam v.

Raziuddin', AIR 1945 Oudh 219 (E); -- 'Durai-pandiyan v. Solaimalai', AIR 1934 Mad 467 (P) and -- 'Brahamaramba v. Seetharammayya', AIR 1947 Mad 405 (G).

The ground on which the learned Judges allowed the court-fee to be paid was that though the prayer to file the suit in 'forma pauperis' made to the deceased could no longer be granted by reason of his death, the other prayers in the application still remained undisposed of and the legal representatives could by paying the court-fee convert the document into a plaint and continue it as such.

8. The application, however, had been verified by the deceased and, if it, therefore, became a plaint on payment of the court-fee, it became a plaint which had been filed by the deceased. The legal representatives are not required to verify the plaint again and the payment of the court-fee dates back to the date when the original application to file the suit in 'forma pauperis' was filed.

9. As we have already said, the other reliefs claimed in the petition are subject to the prayer to be granted that the petitioner being a pauper he should be allowed to sue in 'forma pauperis'. If that prayer is rejected under Order 33, Rule 7(3) of the Code, in our view, the petition is completely disposed of and it is not necessary to pass another order rejecting the other prayers.

10. It must also be remembered that the question of pauperism is not decided once for all. If a suit has been filed in the ordinary way on payment of court-fee and, after the suit has been registered, it is discovered that there is a deficiency but the plaintiff is not able to make good the same and applies that he be allowed to continue the suit in 'forma pauperis' that prayer can be granted. If the petitioner is allowed to sue in 'forma pauperis' he, or after his death his legal representatives, can be dispaupered if it is found that they are in a position to pay the court-fee.

11. There is before the Court, in our view, a document in which the main prayer is that the petitioner may be allowed to claim certain reliefs mentioned in the document without payment of court-fees. The other prayers cannot be considered so long as the main prayer that the petitioner be excused from paying the court-fee is not granted or the court-fee is not paid.

The question whether a person is or is not in a position to pay the court-fee is a personal matter and on his death, therefore, his legal representatives cannot claim that the application filed by their predecessor-in-interest to sue in 'forma pauperis' must be granted on the ground that the deceased was a pauper. If they are in a position to pay the court-fee, they will have to pay the same, just as the deceased would have had to pay the court-fees if his circumstances had so altered that he was in a position to pay the same.

12. If they can continue the proceedings on payment of court-fees, why should they not be able to say that since they are also paupers they may not be required to pay the court-fees. Just as on payment of court-fee the original petition is registered as a suit, even if the court-fee was paid by the heirs of the deceased petitioner, on the Court holding that the legal representatives were also paupers, it is the original application that shall be registered as a plaint and it should date back to the date when the original application was filed. In effect it would mean that the legal representatives are allowed to claim the reliefs claimed by their predecessor-in-interest without

payment of the court-fee.

13. Where a petitioner was not a pauper and had wrongly made an application to be allowed to sue in 'forma pauperis' but, before that application could be disposed of, he had died and his legal representatives who were paupers pray that they should be allowed to continue the application, the question may arise whether permission should be granted.

If the petitioner had been alive the Court could have dismissed his application if he was not a pauper, unless the Court had given him time under Section 149 of the Code of Civil Procedure to pay the court-fees. His legal representatives who are continuing the original petition should not be in a better position and, while they can be granted exemption from payment of the court-fee if they are paupers, if the Court finds that the original petition was not bona fide and the Court would not have granted the petitioner time under Section 149 to pay the court-fee, the petition should fail, unless the legal representatives are themselves paupers and the court decides to treat their application as a fresh application under Order 33 of the Code.

14. What we have held above may be summarised as follows:

(i) When a person makes an application for leave to file a suit in 'forma pauperis' his prayer that he be excused from paying the court-fees is personal to himself and cannot survive after his death;

(ii) the other reliefs mentioned in the application are subject to permission being granted to sue in 'forma pauperis'. If that relief is refused, the application is completely disposed of and it is not necessary to pass a separate order rejecting the other reliefs as they could only be claimed if the court-fees were paid or were excused;

(iii) the petitioner can so long as the application is pending pay the court-fees and if the court-fees are accepted the plaint will date back to the date of the original application;

(iv) if, before the application has been disposed of, the petitioner dies and his legal representatives are allowed to pay the court-fees the case will be registered as a suit filed on the date when the original petition was filed; and

(v) if they are not able to pay the court-fees, they will have to allege and prove that they were paupers and may be allowed to sue in 'forma pauperis.' If they are held to be paupers the proceedings would date back to the date when the original application was filed, unless the court comes to the conclusion that the original application was not a bona fide application and the deceased was not a pauper.

15. A question might arise whether the legal representatives can file a fresh application in 'forma pauperis' in their own right if their claim is still within time if the application filed by the deceased

had been rejected on the ground that he was not a pauper. The answer to that question will depend on the interpretation of Order 33, Rule 15 of the Code.

If the prayer to file a suit in 'forma pauperis' is personal to the deceased, as has been held by us, then there is no reason why Order 33, Rule 15 of the Code should bar the legal representatives from making a fresh application that they were paupers if their claim was still within time. A question might arise whether in such a case the legal representatives can be allowed to file a suit without payment of costs due from the deceased. In case they are claiming the property in their own right no such question can arise. If, however, they are claiming through the deceased, it may be urged that their right to claim the property should be subject to the same disability.

The other view might be that the provisions of Order 33, Rule 15 impose personal disabilities and do not affect the rights of his legal representatives. As the point has not arisen in this case, we need not express any opinion.

16. Learned counsel has referred us to some cases in which the application for leave to file a suit in 'forma pauperis' was held to be a proceeding in which on the death of the applicant his legal representatives could not be substituted as his legal representatives. They are, -- 'Laiit Mohan Mandal v. Satish Chandra Das', 33 Cal 1163 (H); -- 'Jatindra Nath Ghose v. Sourindra Nath Mitra', 64 Ind Cas 63 (Cal) (I); -- 'Farzand Ali Khan v. Mir Amir Haider', AIR 1914 Oudh 384 (J) and -- 'AIR 1928 Mad 278 (D).

In those cases the learned Judges took the view that on the death of the petitioner, it was no longer necessary to decide whether he was or was not in a position to pay the court-fee and the proceedings started by deceased finally terminated. If the petition is considered to be a document for certain reliefs, which the plaintiff claimed he was entitled to get with a prayer super-imposed that he may be allowed to claim them without payment of the requisite court-fee then it is possible to take the view that the legal representatives may pay the court-fees & continue the proceedings or claim that as they were also paupers they, in their turn, may be allowed to sue without payment of court-fees. It may not be of much significance, but it may be noted that Order 33, Rule 7(3) does not say that the application for leave to sue in 'forma pauperis' shall be dismissed but it says that the Court shall then either allow or refuse to allow the application to sue as a pauper.

17. As we have already said once the Court has refused to grant the permission to be allowed to sue in 'forma pauperis' and has rejected the application the Court has ceased to have seisin of the case and can no longer exercise the powers under S, 149 of the Code. But while still seized of the case the Court can refuse the prayer for permission to sue in 'forma pauperis' and grant time under Section 149 of the Code to pay the court-fees. On the death of the petitioner, his legal representatives can also be allowed to continue the proceedings on payment of the court-fees or be allowed to allege and prove that they were paupers and they should, therefore, be excused from payment of the court-fee and if their prayer is granted they would have the right to continue the suit.

18. There are decisions of the other High Courts where the legal representatives were allowed to continue the proceedings in 'forma pauperis' after the death of the original petitioner. In -- 'Mt. Bibi

Marim v. Surajmal', AIR 1936 Pat 591 (K), Agarwala and Madan JJ. held that where one of the applicants applying for permission to sue as pauper dies during the pendency of the application his legal representative is entitled to be brought on the record in his place and to continue the proceedings as a suit on payment of court-fee or on proof of the fact that they were paupers and were not able to pay the court-fee.

In -- 'Satish Chandra v. Phani Bhusan De', AIR 1952 Cal 696 (L), the legal representatives were allowed to pay the court-fee within the extended time allowed by the Court and the suit was, therefore, registered as a regular suit dating back to the date when the original application to sue as a pauper was filed.

In -- 'AIR 1947 Mad 405 (G)', a Bench of the Madras High Court allowed the legal representatives to continue the proceedings initiated under Order 33 of the Code on payment of court-fee. The plaint was deemed to have been instituted on the day when the application under Order 33 was filed.

In--'Mt. Annapurna Bal v. Balaji Maroti', AIR 1946 Nag 320 (M), Niyogi J. held that the legal representatives could continue the proceedings on proof of the fact that they were also paupers where the original applicant had died before the application had been granted. To the same effect is the decision of the Mysore High Court in --'Devaraju Naidu v. T. M. Prabhuviah', AIR 1953. Mys 57 (N).

19. Our answer to the first question, therefore, is as follows:

"That the heirs of Mohammad Baksh could continue the proceedings either upon showing that they were themselves paupers or by offering to pay the requisite court-fee in deciding the question whether the legal representatives should be allowed to continue the proceedings under Order 33 the Court is entitled to go into the question whether the original applicant was or was not a pauper."

In view of the answer that we have given to the first question the second question does not arise and need not, therefore, be answered and we express no opinion on the point.