

MANU/BH/0098/1958

Equivalent Citation: AIR1958Pat264, 1958(6)BLJR137

**IN THE HIGH COURT OF PATNA
FULL BENCH**

A.F.O.O. No. 216 of 1953

Decided On: 13.01.1958

Appellants:**Matuki Mistry**
Vs.

Respondent:**Kamakhaya Prasad and Ors.**

Hon'ble Judges/Coram:

Sinha , Chaudhuri and Dayal , JJ.

Counsel:

For Appellant/Petitioner/Plaintiff: A. Ahmad and Rameshwar Prasad Sinha, Adv.

For Respondents/Defendant: Jagdish Pandey, Adv.

JUDGMENT

Chaudhuri, J.

1. Respondent No. 1 filed an application in the court below for permission to sue in forma pauperis under the provisions of Order 33 of the Code of Civil Procedure. He also made an application under the provisions of Order 39 of the Code of Civil Procedure for an injunction, restraining the appellant from proceeding with certain execution case until the final disposal of his application to sue in forma pauperis. The court below allowed that application and passed an order of injunction restraining the appellant from Proceeding with the aforesaid execution case. Being thus aggrieved the appellant preferred the present appeal.

2. This case was placed for hearing before Sinha and Dayal, JJ., before whom an argument was put forward on behalf of the appellant that Order 39 of the Code of Civil Procedure has no application until the application to sue in forma pauperis has been allowed, and there is no suit in which an order of injunction can be passed. Since there appeared difference of opinion amongst the several High Courts on the question relating to the point at issue, their Lordships referred/the following question of law for decision by a larger Bench :

"Whether the filing of the application in forma pauperis is equivalent to the filing of a plaint commencing the suit for the purpose of an application for an injunction under Order 39 of the Code of Civil Procedure?"

This Bench has, therefore, been constituted for deciding the above question of law.

3. It has been submitted on behalf of the appellant that an application to sue in forma pauperis is deemed to be a plaint in the suit when it is granted and till then there is no suit in which an order of injunction under Order 39 can be passed. On behalf of respondent No. 1, the pauper applicant, it has been contended that the suit is instituted as soon as an application to sue in forma pauperis is filed,

4. Various decisions have been cited before us by both the parties for and against the proposition that an application to sue in forma pauperis is a composite document containing a plaint and a prayer for permission to sue as a pauper and that such an application is equivalent to a plaint from the date of the presentation of the application itself. In *Stuart Skinner v. William Orde* ILR 2 All 241(A), their Lordships of the Judicial Committee held that the petition to sue in forma pauperis was a composite document containing the plaint and the prayer for permission to sue as a pauper.

That was a case governed by the old Civil Procedure Code. That principle has, however, been accepted by different High Courts in some of the cases which were covered by the present Civil Procedure Code. Reference may be made in this connection to the case of *Bank of Bihar Ltd. v. S. Ramchanderji Maharaj* (MANU/BH/0181/1929 : AIR 1929 Pat 637) (B) : ILR 9 Pat 439 . A contrary view was taken in other cases. A reference may be made to the case of *Chunna Mal v. Bhagwant Kishore*, MANU/UP/0209/1936 : AIR 1936 All 584 (FB) (C) and *Gupteshwa Mis-sir v. Chaturanand Misir*, MANU/BH/0081/1950 : AIR 1950 Pat 309 (D).

In my opinion, however, it is not necessary for the purpose of answering the question in the present case to examine the correctness or otherwise of the decisions in the above cases on this point, because as I will presently show, whether such an application is equivalent to a plaint or not from the very date of its presentation, the suit undoubtedly commences on its presentation so as to attract the application of Order 39 of the Code of Civil Procedure. I may, however, make a reference to the above Patna Case in MANU/BH/0081/1950 : AIR 1950 Pat 309 (D). In that case a Bench of, this Court took the extreme view that so long as the question of pauperism has not been decided the court had no jurisdiction to determine its own jurisdiction.

A contrary view Has been taken by a Division Bench of the Nagpur High Court in *Channulal Semi v. Shama Ramcharan*, (S) MANU/NA/0097/1955 : AIR 1955 Nag 259 (E). *Sinha and Dayal JJ.* in their order of reference doubted the correctness of the above Patna decision and observed that the same required reconsideration. I perfectly agree with the view of their Lordships that the above case needs reconsideration but, in my view, it is not necessary to do so in the present case because the question that has been referred to this Bench can be answered with reference to the point which has not been decided in the above Patna Case. The correctness of that decision, therefore, may have to be examined on a proper occasion.

5. An order of injunction under the provisions of Order 39 has to be made in a suit. Before such order for injunction can, therefore, be passed, the suit must have commenced, or, in other words, must have been instituted. Ordinarily, as provided in Order 4, Rule 1 of the Code of Civil Procedure, a suit is instituted by presentation of a plaint. But that is not the only mode of the institution of a suit. Section 26 of that Code provides that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

Therefore, a suit can be instituted even-without presentation of a plaint in a manner as may have been prescribed in the Code. Order 33, of the Code of Civil Procedure which is headed as "Suits by faupers" prescribes the mode for institution of a suit by a pauper and R. 1 of that Order says that, subject to the other provisions of that Order, any suit may be instituted by a pauper. Rule 2 of that Order prescribes as to how that suit by a pauper is to be instituted and enacts that an application, should be made for permission to sue as a pauper which must 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 and it has to be signed and verified in the manner prescribed for the signing and verification of pleadings.

The other rules thereof relate to the further procedure to be adopted on filing of such application. In my view, therefore, Order 33 prescribes the mode for institution of a suit by a pauper as contemplated by the words "in such, other manner as may be prescribed" used in Section 26 of the Code of Civil Procedure. The suit, therefore, is instituted or commenced from the moment the application for permission to sue in forma pauperis as required by Order 33 of the Code of Civil Procedure is presented.

In that view of the matter, there is no difficulty in applying the provisions of Order 39 of the Code of Civil Procedure for making an order of injunction while the application, of the pauper to sue in forma pauperis is pending consideration.

6. The above view is borne out by several authorities. In *Chidambaram v. Nataraja Mudaliar* MANU/TN/0020/1938 : AIR 1939 Mad 80 (F), an applicant who had made an application to sue in forma pauperis made a prayer for an order for the appointment of a commissioner for taking an inventory of certain properties. The prayer for appointment of a commissioner was objected on the ground that the right to apply for the appointment of a commissioner arises under Order 39, Rule 7, Civil Procedure Code, which could be applicable only if there was already a suit pending and it was contended that inasmuch as the application to sue in forma pauperis had not been granted, there was no suit pending.

That objection was repelled and the commissioner was appointed as it was held that on presentation of the petition to sue as a pauper, the suit is to be deemed to have been instituted. In *Totaram Ichharam v. Dattu Mangu*, MANU/MH/0126/1942 : AIR 1943 Bom 143 (G), a Division Bench of the Bombay High Court took the same view. *Beaumont, C.J.*, who gave the judgment in that case referring to the decision in *Puma Chandra v. Tara Prosed* MANU/WB/0354/1916 : 21 C WN 870:25 C LJ 159 : AIR 1917 Cal 852 (H), in which it was held that until the Judge has determined whether or not the plaintiff should be permitted to sue as a pauper, there is no suit before the court and it is merely an application, observed that that view was wrong, and held that the filing of the application in the form of a plaint, which is taken on the file as a plaint, commences the suit.

His Lordship further observed that it would be a strange thing if a plaintiff who desires leave to sue as a pauper, cannot apply to prevent the defendants from making away with the property in suit until his application for leave has been disposed of. The decision of the Nagpur High Court also in the case of (S) MANU/NA/0097/1955 : AIR 1955 Nag 259 (E) referred to above is to the same effect. Their Lordships referring to Section 26 of the Code of Civil Procedure held that the suit commences for the purposes of Order 39 with the making of an application for permission to sue in forma pauperis.

7. A contrary view has been taken on this point in some of the cases to which it is necessary to make a reference. In 25 Cal LJ 159 : AIR 1917 Cal 852 (H), referred to above, during the pendency of an application to sue as a pauper an application was made for attachment before judgment. It was held that the prayer for such attachment could not be granted inasmuch as there was no suit pending until the application to sue in forma pauperis was granted. The provisions of S. 26 of the Code of Civil Procedure was not at all considered in that case for deciding the question about the commencement of the suit.

In *Thimmayya v. Sadasivappa* AIR 1952 Mys 76(I) also it was held that the provisions of Order 39 of the Code of Civil Procedure could not apply as there was no suit but only an application for leave to sue as a pauper. No reason has been given apart from following a decision of that court in 11 Mys CCR 90(J), for taking that view. In this case also S. 26 of the Code of Civil Procedure has been overlooked. With due respect to the Judges who decided those cases, I am unable to agree with their view.

8. On consideration of the provisions of law as embodied in the Code of Civil Procedure as well as of the authorities referred to above, it is manifest that whether or not an application to sue in forma pauperis is equivalent to a plaint from the very date of its presentation, the suit is instituted and commences from the moment that application is made and as such the provisions of Order 39 are applicable to it.

9. I would accordingly answer the question as follows:--

"The filing of the application in forma pauperis, whether it is equivalent to the filing of a plaint or not, commences the suit for the purpose of an application for injunction under Order 39 of the Code of Civil Procedure."

Sinha, J.

10. I agree.

Dayal, J.

11. I agree.

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