MANU/BH/0131/1931

Equivalent Citation: AIR1931Pat183, (1931) ILR 10 PAT 606, 132Ind. Cas.364

IN THE HIGH COURT OF PATNA

Decided On: 20.01.1931

Appellants:**Tilak Mahto**
Vs.
Respondent:**Akhil Kishore and Ors.**

Hon'ble Judges/Coram:
Jwala Prasad, Wort and Kulwant Sahay, JJ.

JUDGMENT

Jwala Prasad, J.

1. The question referred to the Full Bench runs as follows:

> The question of law to be submitted is whether upon hearing of the rule under Order 44, Rule 1, the question of whether the judgment is contrary to law or not can be considered and whether the decision of Sir Dawson Miller in Buchan Dai v. Jugat Kishore MANU/BH/0010/1923 : A.I.R. 1924 Pat. 791 was rightly decided.

2. In the course of the judgment in the above case Sir Dawson Miller stated:

> The learned Judges who heard the application instead of rejecting it as they were entitled to do under Order 44, Rule 1, if they had no reason to think that the decree was contrary to law or otherwise erroneous or unjust, admitted the application, that is to say, they said that the application will be heard, and they ordered notice to be served upon the opposite party and the Government Advocate. The object of that was undoubtedly that an enquiry should be made into the pauperism of the applicant, the Court being satisfied that there was a proper case to present in appeal. We are therefore not concerned with the question now whether the proviso to Order 44, Rule 1, has been complied with.

3. This view was adopted in the subsequent cases of this Court: Raghunath Prasad v. Mt. Rampiari Kuer A.I.R. 1.928 Pat. 118 and Mt. Bibi Sogra v. Radha Kishun MANU/BH/0199/1928 : A.I.R. 1929 Pat. 27. The Lahore High Court has dissentec from the decisions of this Court and has taken a contrary view in the case of Basant Kuar v. Chandulal, A.I.R. 1929 Lah. 514. In the present application (No. 7 of 1929). which came up for hearing before a Divisional Bench of this Court, Wort and Fazl Ali, JJ., were inclined to agree with the Lahore High Court as against the view taken by this Court and have consequently referred the question to this Full Bench.

4. Upon a true construction of Rule 1, Order 44, relating to pauper appeals, I have no hesitation in holding that the view taken by the Lahore High Court is correct. In order to appreciate the import and scope of the above rule I would by way of analogy refer to the relevant provisions in Order 33, Civil P.C., relating to suits by paupers, Rule 5 says:

The Court shall reject an application for permission to sue as a pauper.

(a) where it is not framed and presented in the manner prescribed by Rules 2 and 3; or

(b) where the applicant is not a pauper; or

(c) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper; or

(d) where his allegations do not show a cause of action, or

(e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter.

5. Rule 6 says:

Where the Court sees no reason to reject the application of any of the grounds stated in Rule 5, it shall fix a day (of which at least ten days' clear notice shall be given to the opposite-party and the Government Pleader for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof.

6. The form of notice referred to in this rule has been prescribed in item No. 12 of App. H, which runs as follows:

Whereas ... has applied to this Court for permission to institute a suit against ... in forma-pauperis under Order 38, Civil P.C., 1908; and whereas the Court sees no reason to reject the application; and whereas the ... day of ... 19 ... has been fixed for receiving such evidence as the applicant may adduce in proof of his pauperism and for hearing any evidence which may be adduced in disproof thereof: Notice is hereby given to you under Rule 6, Order 83, that in case you may wish to offer any evidence to disprove the pauperism of the applicant, you may do so on appearing in this Court on the said day of ... 19....

7. Rule 7, Sub-rule (2) says:

The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in Rule 5.

and Sub-rule 3 says:

The Court shall then either allow or refuse to allow the applicant to sue as a pauper.

8. The Court must reject "an application for permission to sue as a pauper" when it is presented and need not issue to the opposite party and the Government Pleader if it finds that any of the grounds mentioned in Rule 5 exists. If, the Court however does not see any reason to reject the application on any of the grounds mentioned in Rule

5, it shall issue notice to the opposite party and the Government Pleader for the purpose of receiving evidence as to pauperism or otherwise of the applicant, but the opposite party and the Government Pleader at the hearing are not confined to the question of pauperism only but are also entitled to show that the applicant is subject to any of the other prohibitions specified in Rule 5 and the Court shall then either allow or refuse the application as the case may be. Therefore notwithstanding the fact that the Court while dealing with the application ex parte did not think that any of the grounds mentioned in Rule 5 existed for rejecting the application, it is bound to reject it when the other side comes and shows that the application was fit to be rejected on any of the grounds mentioned in that rule. Therefore the fact that the Court did not reject the application before issuing notices to the opposite party and the Government Pleader does not debar them from reopening the question and having the permission granted to sue as a pauper rejected. These rules have not been reproduced in Order 44 relating to pauper appeals, but they have been made applicable to an application for permission to appeal as, a pauper by enacting in Rule 1 of that order that such an application shall be

> subject, in all matters ... to the provisions relating to suits by paupers, in so far as those provisions are applicable.

9. The proviso to this rule like Rule 5, Order 33 says that

> the Court shall reject the application unless upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.

10. The order rejecting the application for leave to appeal as a pauper may be passed ex parte on the perusal of the judgment and decree without issuing notice to the opposite party and the Government Pleader; but if the application is not rejected at the outset and notice is issued to the opposite party and the Government Pleader, certainly they have a right to show to the Court that the application for permission to appeal as a pauper should have been rejected under the proviso to Rule 1. Order 44. This right is similar to that given by Rule 7, Clause (2), Order 33 relating to permission to sue as a pauper referred to above. Although it is not expressly provided in Order 44 as in Rule 43, Order 33 that notice of an application for leave to appeal as a pauper shall be given to the opposite-party, yet Appendix G in item 11 gives the form for such a notice which runs as follows:

> Whereas the above-named ... has applied to be allowed to appeal as a pauper from the decree in the above suit dated the ... day of ... 19 ... and whereas the day of ... 19 ... has been fixed for hearing the application, notice is hereby given to you that if you desire to show cause why the applicant should not be allowed to appeal as a pauper an opportunity will be given to you of doing so on the aforementioned date.

11. Now the grounds of objection to permission being given to appeal as a pauper are two-fold: (1) that the applicant is not a pauper; and (2) that the judgment and the decree appealed from are contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust as laid down in the proviso to Rule 1, Order 44. The permission may be refused on any of the aforesaid grounds. Therefore upon notice being given to the opposite party and the Government Pleader, they are entitled to take any or both of these objections and hence, although the Court might

not have thought that the application was fit to be rejected under the proviso to Rule 1 and issued a notice to the opposite party, the opposite party is entitled to show that the application is affected by the rule laid down in the proviso. This right is similar to that given in Rule 7, Order 33 by express mention thereof in Clause (2) of that rule, and the form of notice (No. 11 of Appendix G) of an application for permission to appeal as a pauper leaves it open to the opposite party and the Government Pleader to ask the Court to reject the permission sought on any of the grounds, namely that the applicant is not a pauper and that the application is affected by the proviso to Rule 1, Order 44, namely, the judgment and decree are not contrary to law or to some usage having the force of law, etc.

12. Upon the first principle the opposite party who obtained a decree from the Court below dismissing the suit of the applicant is entitled to be heard and to show that although under the proviso to Rule 1, Order 44 the Court did not reject an application for leave to appeal as a pauper when it was presented, it ought; (sic) do so. The opposite party obtained a valuable right by winning the case against the respondent in the Court below and that right cannot be destroyed without hearing him and an ex parte order admitting the application cannot take away his vested right to show that the order should not have been made. This principle has been well laid down by their Lordships of the Privy Council in the case of Krishnasami Panikondar v. Ramasami Chettiar A.I.R. 1917 P.C. 179. We have not been shown the decision of any other Court in support of the view taken by this Court in the case referred to in the order of reference. On the other hand, in the case of Sakubai v. Ganpat Ramkrishna [1904] 28 Bom. 451, Sir Lawrence Jenkins pointed out that to provide a safeguard against the proviso being overlooked, the Judge admitting a pauper appeal should express and record the reasons on which the leave proceeds. The rule no doubt does not expressly say that the Judge should record his reasons but the order should in my opinion at any rate indicate that the permission to sue as a pauper was given by the Court, for the applicant is required to obtain first the permission to be allowed to appeal as a pauper. To my mind, merely the order directing notice to issue does not necessarily show that permission was granted to appeal as a pauper and that the Court considered that the proviso to that rule did not affect the permission Bought for.

13. In the present case when the applicant presented his application for permission to appeal as a pauper the order passed by the Court was:

> Issue notice, and let notice issue on the Government Pleader.

14. It does not show that permission was granted to appeal as a pauper and in fact the permission could not be granted because the other matter had to be considered whether the applicant was a pauper in the Court below and though he would prima facie be deemed to be a pauper for the purpose of the appeal, the opposite party has a right to show that the applicant since he was declared a pauper in the Court below has become solvent as is contemplated by Rule 2, Order 44. Therefore the order of this Court, to my mind, does not seem to decide that the application was admitted after considering the proviso to the rule and hence it is yet open to the opposite party to show that the Court should reject the application for permission to appeal as a pauper under that proviso. Now supposing that the orders issuing notices or similar orders might be construed as a decision on the point raised in favour of the permission being granted, yet when notice is issued to the opposite party and the Government' Pleader in accordance with the form prescribed by the Code of Civil Procedure referred to above, they are entitled to show that the Court should reject the

application for permission to appeal as a pauper. I therefore hold that the view taken by the Lahore High Court is correct and the view taken by the Court in the cases referred to above is not correct. I would answer the first part of the question in the order of reference in the affirmative, and the second in the negative.

Wort, J.

15. None of the arguments which have been addressed to us by the learned advocate on behalf of the appellant have in any way shaken the view I held when the matter came before the Division Bench which referred this question to the Full Bench. The matter may be looked at from the point of view of law and from the point of view of practice. In so far as it is a question of law, it depends upon the construction of Order 44, Rule 1, Civil P.C. In that connexion the learned advocate relies upon the proviso to that order and rule. The proviso reads:

> that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.

16. It is contended that all that the applicant has to do is to make out a prima facie case that there is a question of law. Now to some extent that argument is well founded. It can be supported from this view namely that it is true that a prima facie case as to the question of law has to be made out. In other words the question of law (which must be for the purpose of argument assumed to arise) is not to be finally decided in the application to sue in forma pauperis; but that is however far from deciding at what stage in the application to appeal in forma pauperis the Court has to be satisfied that there is in fact' a prima facie case on a question of law.

17. The argument which is addressed to us assumes, it seems to me, that Order 44, Rule 1, specifically deals with the procedure in an application to appeal in forma pauperis. That, obviously on a plain reading of the order and the rules is an erroneous assumption. Order 44, Rule 1 deals with the conditions precedent to the admission of an application for leave to appeal in forma pauperis and not the procedure. The procedure has to be got from Order 33, Rules 5--7 as specifically stated in the latter part of para. 1, Order 44, Rule 1. When we come to look to Order 33, Rule 7, Clause 2 quite clearly and definitely states that when the application comes to be heard, that is to say, after notice has issued and a certain number of days have expired, the Court shall also hear any argument which the parties may desire to offer on the question whether on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in Rule 5. In Rule 5 are: (b) where the applicant is not a pauper, and (d) where his allegations do not show a cause of action. Now Clause (d) obviously cannot apply to a case which has reached the stage of an appeal. It must have been assumed that in the action even if it were dismissed, the plaint in fact disclosed a cause of action; and therefore it seems to me that when one reads Order 44, Rule 1, together with Order 33, Rules 5--7. it must be understood that the latter order and rules apply mutatis mutandis to the application to leave to appeal in forma pauperis.

18. As has already been pointed out by my learned brother, that a further argument in this connexion against the contention made by the learned advocate on behalf of the applicant will be seen from the form of notice which has to be issued under Order

44. Under Form 2 of Appendix G, Civil P.C., quite clearly the whole matter of the application to appeal in forma pauperis is left open for argument when both parties are before the Court. In my judgment for those reasons it will be sufficient to dispose of this case.

19. But assuming that the matter is also a matter of practice, it has been pointed, out the principle to be applied is laid down in the case of Krishnasami Panikondar v. Ramasami Chettiar A.I.R. 1917 P.C. 179. That was a case, it is true, which deals with a question of limitation and the judgment itself applies peculiarly to the facts and circumstances of that case. But, as I read the judgment, a principle is laid down which is applicable not only to the case then before the Judicial Committee but a principle which should be followed in all matters of that kind of which in my judgment the matter which comes before us is one, Sir Lawrence Jenkins in delivering the judgment of their Lordships of the Judicial Committee of the Privy Council states thus:

> Their Lordships therefore desire to impress on the Courts in India the urgent expediency of adopting in place of this practice a procedure which will secure, at the stage of admission, the final determination (after due notice to all the parties) of any question of limitation affecting the competence of the appeal.

20. It seems to me therefore on general principles alone it would be unjust and therefore unlawful to finally decide in the application for the issue of a rule the question of whether a point of law did arise and thus shut out the respondent on the hearing of the application from arguing that no such question of law arose and that therefore the applicant should not be allowed to appeal in forma pauperis. In this case it would have the most extraordinary result. It is part of the argument of the learned advocate that if the Court, when the application for a rule is made, is satisfied that no question of law arises, that Court is entitled to dismiss the application. Assuming that the Court erroneously came to a conclusion in such an application and without hearing the respondent that a point of law arose, then the net result would be that although no question of law at all may arise in the case, yet the person desiring to appeal in forma pauperis would be entitled to raise the whole facts of the case and the appeal would be disposed of on facts alone, in spite of the clear prohibition in Order 44, Rule 1. In my judgment, as I have stated, I think the decision in Bachan Dai v. Jugal Kishore MANU/BH/0010/1923 : A.I.R. 1924 Pat. 791 was wrong and I agree with the order which has been made by my learned brother.

Kulwant Sahay, J.

21. I agree to the answer proposed by my learned brothers to the question referred to the Full Bench. I took a contrary view in the case of Mussamat Bibi Sogra v. Radha Kishun MANU/BH/0199/1928 : A.I.R. 1929 Pat. 27. In that case the law on the subject was not considered at all. Ever since the establishment of this Court in 1916 the practice had always been that on an application for leave to appeal in forma pauperis, when notice was issued, the opposite party was heard not only on the question of pauperism, but also on the question as regards the decree being contrary to law or to some usage having the force of law, or its being otherwise erroneous or unjust as provided by the proviso to Rule 1, Order 44, Civil P.C. This was the practice in the Calcutta High Court and was allowed in this Court until the decision of this Court in the case of Mt. Bachan Dai v. Jugal Kishore MANU/BH/0010/1923 : A.I.R. 1924 Pat. 791. Since the date of that decision the practice in this Court had changed

and once notice was issued on an application under Order 44, Rule 1, the question as regards the decree being contrary to law or to some usage having the force of law or its being otherwise erroneous or unjust, was not allowed to be reopened by the opposite party at the final hearing of the application. That practice had continued from April 1924, the date of the decision of Sir Dawson Miller in Mt. Bachan Dai v. Jugal Kishore MANU/BH/0010/1923 : A.I.R. 1924 Pat. 791. The case that came before me, Bibi Sogra v. Radha Kishun MANU/BH/0199/1928 : A.I.R. 1929 Pat. 27 was heard in May 1923 when the said practice had been established in this Court for more than four years and the view taken by me in that case was in conformity with the said practice.

22. On a consideration of the law however, I am fully satisfied that the view taken by my learned brothers is correct. After a notice is issued to show cause why the application for leave to appeal in forma pauperis should not be granted, it is open to the opposite party to show that the case did not satisfy the proviso to Order 44, Rule 1; in other words that it was not shown that the decree was contrary to law or to some usage having the force of law or was otherwise erroneous or unjust. The order directing the issue of a notice does not decide the question finally; it only shows that the Court in issuing the notice was satisfied that there was a prima facie question which ought to be heard and decided under Order 44, Rule 1 and in calling upon the opposite party to show cause the Court could not preclude him from showing that the case did not comply with the provisions and was not a fit case in which leave ought to be granted. Having regard to the reasons given by my learned brothers; I am satisfied that the decision of Sir Dawson Miller in Bachan Dai's case MANU/BH/0010/1923 : A.I.R. 1924 Pat. 791 was not correct.