1938 *Present :* **Poyser S.P.J. and Wijeyewardene J.**

FERNANDO *v.* FERNANDO *et al.*

APPLICATION TO SUE IN *Forma pauperis.*

D. C. Negombo, 3.

Application to sue in forma pauperis—*Certificate by Proctor—Discretion of Judge—Meaning of pauper—Civil Procedure Code ss. 441, 447.*

A person seeking to sue for redemption of a mortgage in *forma pauperis* cannot claim to sue as a pauper so long as he could raise money on his equity of redemption.

It is within the discretion of the District Judge whether he should grant or refuse permission to sue in *forma pauperis,* even though a Proctor has certified that the applicant has a good cause of action.

APPEAL from an order of the District Judge of Negombo.

A. Sambandan (with him *P. Navaratnarajah*), for the petitioner.

Cur. adv. vult.

November 14, 1938. WIJEYEWARDENE J.—

This is an appeal from an order of the District Judge made under section 447 of the Civil Procedure Code refusing to allow the appellants to sue as paupers. It was contended in support of the appeal that the Judge had misdirected himself in going behind the certificate of the proctor who had certified that the appellants had a good cause of action and holding that the appellants' cause of action was bad, as the only matter which the Judge had to consider under section 447 was the question of pauperism. Though the Counsel who appeared for the appellants argued the appeal as if it involved a pure question of law, I think it desirable to set out briefly the facts disclosed in the present proceedings as well as the proceedings in the connected action No. 9,451 of the District Court of Negombo.

[1] *39 N. L. R. 121.*

The appellants—Mary Angelina Pieris and her husband—instituted action No. 9,451 in the District Court of Negombo on May 7, 1936. In the plaint they stated that—

(*a*) they mortgaged the land called Murungahawatta with the defendant by a bond of September 6, 1930, for the sum of Rs. 2,000 but received only a sum of Rs. 1,000 ;

(*b*) the mortgage was executed to place the mortgaged land beyond the reach of their creditors who had obtained decrees against them.

(*c*) the defendant put the bond in suit in action No. 6,708 of the District Court of Negombo, in 1932, and sold the mortgaged premises and purchased the same on February 7, 1933 ;

(*d*) they had paid Rs. 750 to the defendant prior to the institution of the mortgage action.

The appellants asked for judgment against the defendant directing him to reconvey Murungahawatta on their paying him Rs. 250 and the costs of the conveyance or in the alternative for a sum of Rs. 1,500.

The defendant filed answer asking for the dismissal of the action.

On the application of the defendant the District Judge ordered the appellants under section 417 of the Civil Procedure Code to give security in cash Rs. 100 or in property worth Rs. 200 within a certain stated time. On the appellants failing to give security as ordered, the District Judge entered decree on November 16, 1936, dismissing the action with costs. The appellants thereupon filed a motion in Court dated December 22, 1936, asking the Court to set aside the order of dismissal. This motion reads:—

No. 9,451, D. C. Negombo.

We Kurukulasuriya Moderage Emalianu Fernando and Kurukulasuriya Mary Angelina Pieris of Negombo, the plaintiffs in the above case move that the Court may be pleased to permit us to deposit the amount ordered as cash security by the Court which we are prepared to do so and we beg of the Court to vacate the order made and to refix the same for trial in due course.

(1) Emalianu Fernando,
(2) ———— (illegible)
Plaintiffs.

Witness to the signature and identity of the plaintiffs above named.

D. E. Justin Pieris,
Proctor S. C. & N. P.

Negombo, December 22, 1936.

The District Judge refused to set aside his order dismissing the action as the application was not made within thirty days as required by section 418 of the Civil Procedure Code. The appellants, thereupon, applied to the Judge for leave to file a fresh action and the Judge granted this application subject to the condition that the appellants should pay to the defendant all the taxed costs of the action before instituting a fresh action. The proceedings do not show under what provision of the law the learned

Judge purported to act when he made that order. But assuming that the Judge had the power to give the appellants leave to institute a fresh action long after their action had been dismissed the appellants would not be entitled to file such fresh action without paying the defendant first the costs as ordered by the Judge (vide *Scriven & Co. v. Perera* [1]).

Without making any payment on account of costs in terms of the order of the District Judge the appellants instituted the present proceedings against the defendant on March 22, 1937, and filed papers applying for permission to sue as paupers. The plaint in the present action it may be added is identically the same as the plaint in the previous action.

On August 24, 1937, the District Judge referred the application to Mr. D. E. J. Pieris, Proctor, requesting him to certify to the Court whether the appellants had a good cause of action against the defendant. Mr. Pieris forwarded to Court on September 14, 1937, a report in very general terms certifying that the appellants had a good cause of action. He stated in his report that "he made due inquiry of the plaintiffs (appellants) as to the grounds of their proceedings and the evidence by which they propose to support it and have duly examined such documents and other evidence as they have produced". It will be noted that Mr. Pieris who gave the certificate is the proctor who identified the signature of the appellants on the motion of August 22, 1936, filed in the earlier case. It is not likely that Mr. Pieris was unaware of the earlier action when he gave his certificate. It was undoubtedly the duty of Mr. Pieris to have made some investigation regarding the earlier case before he gave his certificate. He has either been misled by the appellants or has dealt with the matter without a proper appreciation of his responsibilities. When the matter came up for inquiry before the Court under section 447 the District Judge referred to the previous action and held that the appellants could not succeed in the present action as they had failed to pay the costs and therefore refused to grant them leave to appeal as paupers. It is against this order that the present appeal is preferred.

The only reported decision in which the Court has considered the scope of section 447 appears to be the case of *Hinniappu v. Hendris* [2]. That case is of some assistance in showing that a Proctor's certificate does not have the conclusive effect claimed for it by the appellants. There does not appear to be any good reason for so limiting the jurisdiction of a Judge as to deny him the power in circumstances such as those arising in the present case to take cognizance of an order made by him in a previous action between the parties in order to ascertain whether the plaintiff has a good cause of action. The Judge would otherwise be helpless to prevent a flagrant abuse of the process of Court. In *McCabe v. The Governor & Company of the Bank of Ireland* [3], a somewhat similar question came up for decision in the House of Lords. A certain amount of stock standing in the name of a third party was alleged by the appellant James McCabe to have been settled upon his wife. After the death of his wife the appellant brought an action in the Exchequer Division in Ireland to recover from the Bank of Ireland the stock that stood in the name of the third party. Judgment was entered against him with costs. The

[1] *19 N. L. R. 503.*

[2] *7 N. L. R. 326.*

[3] *(1889) 14 Appeal Cases 413.*

appellant then brought an action in the Chancery Division of the same Court alleging that the previous action was dismissed because it was instituted in the wrong division of the Court. He made an application to sue as a pauper. The Court ordered that the petition for leave to sue in *forma pauperis* should be dismissed and that the action should be stayed until the appellant paid the costs of the previous action. The House of Lords affirmed the order of the lower Court and Lord Herschell stated :—"I think the judgment is really not open to objection of any sort. It was a matter within the discretion of the learned Judge of the Court below, the Court of first instance, whether he would refuse or grant the permission to sue in *forma pauperis*. He, in the exercise of that discretion considered that it was not a case in which he ought to grant it. The Court of Appeal have concurred in that view and I can see no reason to doubt that they acted with perfect propriety". The position of the appellant in the present case is much weaker. If the District Judge's order giving the appellants leave to file a fresh action is bad, then the previous action operates as *res judicata* against the appellant. The appellant could sustain the present action only on the authority of the order made by the District Judge giving him leave and that leave was granted subject to the condition that the appellant should prepay the costs of the previous action. The attempt of the appellants to file the present action relying on the order of the District Judge and yet to circumvent the condition regarding the prepayment of costs by moving for leave to sue as paupers cannot possibly be countenanced in a Court of law.

A further question also arises for consideration with regard to the alleged pauperism of the defendant. Section 441 of the Civil Procedure Code defines a pauper as a person who "is not entitled to property worth Rs. 50 other than his necessary wearing apparel and the subject-matter of the action". The corresponding provision of the Indian Code of Civil Procedure, 1908 (order 33 Rule 1), gives the following definition of a pauper :—

> "A person is a pauper when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit or where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject matter of the suit."

In *Kapil Deo Singh v. Ram Rikha Singh et al.*[1] the High Court of Allahabad held that a plaintiff seeking to sue for redemption in *forma pauperis* cannot claim to sue as a pauper so long as he could raise money on his equity of redemption, and that in doing so he would not in effect be mortgaging his claim. If the principle underlying that judgment is applied to the present case it cannot be said that the appellant is a pauper within the meaning of section 441 of the Civil Procedure Code.

I do not think that the learned District Judge has erred in refusing to grant leave to the appellants to sue as paupers and I dismiss the appeal.

POYSER S.P.J.—I agree.

Appeal dismissed.

[1] *(1910) 33 Allahabad 238.*