

APPELLATE CIVIL.

Before Mr. Justice Poutifex and Mr. Justice McDonell.

RAM SAHAI SING AND ANOTHER (PETITIONERS) v. MANIRAM AND
OTHERS (OPPOSITE PARTIES).*

1880
Feb'y. 18.

Application to sue in Formâ Pauperis—Refusal on ground of Limitation—Renewal of Application—Civil Procedure Code (Act X of 1877), s. 622.

An application to sue as a pauper having been refused, on the ground that the suit was barred by limitation, the High Court, on revision, permitted the applicant to renew his application to the Court below. The Subordinate Judge verbally rejected this second application, stating that he would deliver a written judgment. Before the written judgment was delivered, the applicant offered to pay the usual court-fees (although not actually tendering them at the time), and asked that the petition might be taken as a plaint filed on the date of the first application; this offer was mentioned and refused in the written judgment.

Held, on the case coming up to the High Court under s. 622 of Act X of 1877, that the circumstances of the case were not such as would justify the Court in interfering under that section.

Query—Whether, if the question of limitation were considered, the ruling in *Skinner v. Orde* (1) could be held to apply?

On the 5th October 1877 Ram Sahai Sing and others applied to the Subordinate Judge of Patna to be allowed to bring a suit in *formâ pauperis*, for the purpose of recovering possession of certain properties and mesne profits thereon. On the 28th February 1878, the Subordinate Judge, without enquiring into the means of the plaintiffs, rejected the application, on the ground that the claim was barred by limitation.

On the 8th April 1878 the plaintiffs applied to the High Court for leave to appeal in *formâ pauperis*, against the order of the Subordinate Judge. The Court rejected the application, but allowed the petitioners to appeal in the usual manner on payment of the proper court-fees.

* Rule No. 954 of 1879, against the order of Baboo Poresh Nath Banerjee, Subordinate Judge of Patna, dated the 27th June 1879.

(1) I. L. R., 2 All., 241; S. C., L. R., 6 I. A., 126.

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The plaintiffs thereupon abandoned their claim as to mesne profits due before the institution of the suit, and filed a regular appeal.

The respondents objected to the appeal, on the ground that no appeal lay; and on the 19th August 1878, the High Court found that no appeal would lie, but seeing that the proceedings in the lower Court were irregular, directed the appeal to be taken off the file, treating the appeal as an application under s. 15 of the Charter, and remanded the case to the lower Court to be dealt with as provided by s. 407 of Act X of 1877.

The Subordinate Judge, on the 27th June 1879, rejected the application to sue in *forma pauperis*, on the ground that the applicants were able to pay the sum of Rs. 375, being the court-fees on the reduced claim; but further refused to receive the court-fees and treat the application as a plaint filed on the 5th October 1877, the date on which the application was first made. On the 14th August 1879 a rule was obtained calling upon the defendants to show cause why, on payment of the court-fees, the petitioners' application in the Court below should not be treated as a plaint filed on the 5th October 1877.

Mr. Branson (with him Mr. Sandel) in support of the rule,

The Advocate-General (Mr. Paul) (with him Mr. C. Gregory, Munshi Mahomed Yusuff, and Baboo Saligram Singh) showed cause.

The judgment of the Court was delivered by

PONTIFEX J. (McDONELL, J., concurring).—The rule that has been argued before us discloses rather a peculiar state of circumstances. The applicants, in October 1877, applied to the Subordinate Judge of Patna for permission to sue as paupers. On the 28th February 1878 he rejected that application, on the ground that he was bound to do so, as in his opinion, according to the plaintiffs' own petition, they were barred by limitation. Against that order the applicants made an appeal to this Court; but, on the 19th August 1878, this Court, considering the matter not properly a matter for appeal, dealt with it as follows by way of revision,—holding that, at that stage,

the application could not be rejected on the score of limitation applying. They said that, as the applicants had paid the stamp fees on the appeal on the principle of having given up their claim for mesne profits, they might apply to the Court below again to admit their application as paupers if the mesne profits were excluded from their petition. Thereupon the applicants again applied to the lower Court to admit their petition as a pauper plaintiff.

On the 27th June 1879, after witnesses as to pauperism had been examined, the lower Court rejected that application to sue in *formâ pauperis*. It was in consequence of the order made on that application, that the applicants came again to this Court and obtained the following rule:—"That the defendants should show cause why, on payment of the proper court-fees within a time to be fixed by the Court, the petitioners' application in the Court below should not be treated as a plaint filed on the 5th October 1877."

It appears that, after the evidence had been taken and the arguments concluded in the case before the Subordinate Judge on the second application to be admitted as paupers, he, on the 17th June, intimated to the parties that he rejected the application, but that he would give a written judgment. Before delivering his written judgment, either on the 21st or 22nd of June, the applicants made an oral offer to the Subordinate Judge to pay the court-fee stamps upon their petition in order to turn it into a plaint.

The learned Judge, on the 27th June, delivered a written judgment, and in that judgment, after deciding that the petition could not be accepted as a pauper plaintiff, he stated that an offer had been made by the petitioners to pay in the court-fee stamps if time were allowed them. He then goes on to state that he was sorry that he was obliged to reject that application, because, according to his view of the law, the original pauper application being rejected, any further proceeding must lie by way of a first suit.

At that time *Skinner's case* (1), which has been lately decided by the Privy Council, had not come out to this country. At

(1) I. L. R., 2 All., 241; S. C., L. R., 6 I. A., 126.

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any rate, it does not appear that it was brought to the learned Judge's attention.

Before us it is argued on the authority of *Shinner's case* (1), that it was the duty of the Subordinate Judge, upon the offer to pay the court-fee stamps, to treat the petition as a plaint filed in October 1877, for the purposes of limitation.

The rule was granted by this Court under s. 622 of the Civil Procedure Code, and the question now before us is, whether we can interfere on the ground that the Subordinate Judge has in his decision exercised a jurisdiction not vested in him by law, or failed to exercise a jurisdiction so vested, or has committed some material irregularity.

Now, no doubt, we are bound by the decision of this Court on the first application, even if we were inclined to think that the Subordinate Judge could dismiss the petition of pauperism on the ground of limitation only. Whatever may be our opinion on that question, it is not open to us to go behind that decision. But we think that it was a question of very great doubt, whether this petition of pauperism, which had never been accepted, and which, on the 17th June 1879, the Subordinate Judge had verbally stated that he had rejected, and which only awaited the written judgment for its absolute rejection, could be considered as a subsisting proceeding which could be treated as a plaint filed on the 5th October 1877, even though the applicants on the 21st June offered to make immediate payment of the court-fees; and we also think that even if it could be so treated, it was imperative on the applicants to show, not only that they offered to pay the court-fee stamps, but also that they had them ready in Court to put in.

We observe, however, that the applicants have not produced any affidavit stating that they were ready in Court with the court-fees on the day that they made that application, and we think that unless that offer was made, and the court-fees actually ready to be tendered, that it was not in the power of the Court to allow time for the purpose of obtaining and providing the money; and that, under the circumstances, the lower Court

was right in rejecting the application, though this was not the proper ground given for its rejection.

At all events, we think that this is not a case in which we ought to interfere under s. 622 of the Code. We must, therefore, discharge the rule with costs.

Rule discharged.

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ORIGINAL CIVIL.

Before Mr. Justice Wilson.

PEPIN v. CHUNDER SEEKUR MOOKERJEE AND ANOTHER.

*Contract of Indemnity—Limitation Act (XV of 1877), sched. ii, art. 83—
 Costs.*

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 April 1.

In 1864 a lease of a house was granted to A for a term of ten years. The lease contained a covenant to repair. A died, and B, his administrator, assigned the lease to another, and it ultimately became vested in the plaintiff. In 1872 the plaintiff assigned the lease to the defendants, "under and subject to the covenants" therein contained. The defendants failed to repair, and after the term had expired, C, the representative of the lessor, sued B for arrears of rent and damages for non-repair. B defended the suit, but C obtained a decree against him for Rs. 6,167-3 and costs, amounting in all to Rs. 8,328-3. His own costs amounted to Rs. 1,491-1. In 1876 B paid C the Rs. 8,328-3. In 1877 B sued the plaintiff for the amount which he had been compelled to pay C, and for the amount of his own costs. The plaintiff gave notice to the defendants to intervene and defend if they desired; but they did not reply, and the plaintiff consented to a decree for Rs. 6,932-12-11 with costs. Thereupon the plaintiff instituted the present suit to recover from the defendants the sum recovered from him by B, together with his own costs of defence.

Held, that the suit was not barred under Act XV of 1877, sched. ii, art. 83—which provides a period of three years' limitation for a suit upon any contract of indemnity other than those specifically provided for, from the time "when the plaintiff is actually damaged"—as the time when the plaintiff was actually damaged was when B recovered against him.

In the case of contracts of indemnity, the liability of the party indemnified to a third person, is not only contemplated at the time of the indemnity, but is the very moving cause of that contract; and in cases of such a nature costs reasonably incurred in resisting, or reducing, or ascertaining the claim may be recovered.