

APPELLATE CIVIL.

Before Mr. Charles Gordon Spencer, Officiating Chief Justice, and Mr. Justice Srinivasa Ayyangar.

1924,
August 28.

P. BABA SAH (DEFENDANT), APPELLANT,

v.

V. M. PURUSHOTHAMA SAH (PLAINTIFF), RESPONDENT.*

Letters Patent, cl. 15—Judgment—Application to sue in forma pauperis—Order of a single Judge of High Court permitting petitioner to sue as pauper—Order, whether judgment—Appeal—Statement by Government Solicitor admitting petitioner to be a pauper, whether conclusive—Right of defendant to disprove pauperism, notwithstanding such admission.

The final order of a Judge of the High Court sitting on the Original Side, allowing or refusing to allow a plaintiff to sue as a pauper is a judgment under clause 15 of the Letters Patent and is appealable.

Such an order is neither interlocutory nor made in the exercise of a discretionary power. *Appasami Pillai v. Somasundra Mudaliar* (1903) I.L.R., 26 Mad., 437, doubted; *Tuljaram Row v. Alagappa Chettiar*, (1912) I.L.R., 35 Mad., 1 (F.B.), referred to.

Where the learned Judge allowed a person to sue as a pauper upon the Government Solicitor stating that he had received a report that the plaintiff was a pauper, but the defendant had not been given an opportunity to prove the statements in his counter-affidavit which was not contradicted by the plaintiff by any reply affidavit: *Held*, that the order should be set aside and evidence should be allowed to be adduced on both sides and a fresh order should be passed.

APPEAL from the order of KUMARASWAMI SASTRI, J., dated 15th April 1924, and passed in the exercise of the ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 275 of 1924. The material facts appear from the judgment.

R. Rajagopala Ayyangar for appellant.

K. Rajah Ayyar for respondent.

* Original Side Appeal No. 50 of 1924.

JUDGMENT.

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This is an appeal against an order of Mr. Justice KUMARASWAMI SASTRI permitting the plaintiff in C.S. No. 275 of 1924 to sue *in forma pauperis*. A preliminary objection has been taken that no appeal lies. In *Appasami Pillai v. Somasunbra Mudaliar*(1), it was held that there was no appeal under the Letters Patent against an order of a single Judge refusing to give leave to appeal *in forma pauperis*. Although the Civil Procedure Code does not provide for appeals against orders made under Order XXXIII, rule 7, an appeal lies under clause 15 of the Letters Patent against the judgment of a single Judge sitting on the Original Side, with certain exceptions which do not include the present kind of order. It is argued that the order of the learned Judge was merely an order upon an interlocutory application which was a step towards obtaining a final adjudication and that it does not finally dispose of the plaintiff's right to bring the suit, as it was always open to him to pay the Court fees and proceed. In our opinion the learned Judge's order was not an interlocutory one and we think that the law confers a substantive right on every plaintiff who has a good case at law, but no means to prosecute it, to sue *in forma pauperis*, and we think, with due respect, that the view taken in *Appasami Pillai v. Somasundra Mudaliar*(1), where such an order was treated as made in the exercise of a discretionary power, was not the correct view to take of the order passed upon such applications. Under section 592 of the old Civil Procedure Code the words used are "Any person entitled to prefer an appeal who is unable to pay the fee required . . . may be allowed to appeal as a pauper." The learned

(1) (1908) I.L.R., 26 Mad., 487.

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Judges treated these words "may be allowed" as vesting in the Court a discretionary power. But the principle on which that case was decided has been doubted in the Full Bench decision in *Tuljaram Row v Alagappa Chettiar*(1), and it has now been made quite clear by Order XLIV, rule 1, of the present Code that such applications have to be dealt with in the same manner as applications to sue *in forma pauperis* in the first instance. In Order XXXIII, rule 7, clause 3, the words are "The Court *shall* then either allow or refuse to allow the applicant to sue as a pauper." It can no longer be doubted that it is not open to the discretion of the Court to allow a person to sue as a pauper if, on hearing the evidence, the Court finds that he is not a pauper. The final order of a Judge sitting on the Original Side allowing or refusing to allow a plaintiff to sue as a pauper is in our opinion a judgment under clause 15 of the Letters Patent.

As to the merits of the present appeal, the defendant filed a counter-affidavit denying the plaintiff's allegation that he had no means and giving details as to a number of items of property which belonged to him and as to a fraudulent alienation of property in favour of his nephew shortly before he applied to sue as a pauper. The plaintiff did not file any reply affidavit. After several adjournments, the matter then came before the Court and the learned Judge gave leave to the plaintiff to sue as a pauper upon the Government Solicitor stating that he had received a report that the petitioner was a pauper. The appellant now says in his affidavit that he was prepared to cross-examine the plaintiff and to let in evidence in support of his allegations. We think that, if the Judge was not prepared to act on his uncontradicted

(1) (1912) I.L.R., 35 Mad., 1 (F.B.).

affidavit, the defendant should have been given an opportunity to prove the statements contained in it, notwithstanding that the Government did not choose to dispute the alleged pauperism. Apparently he had not evidence ready at that hearing and he wanted time to produce his witnesses. But it appears that he expected that the other side would ask for an adjournment to file a reply affidavit and that they would not allow his statements to remain uncontradicted. It was reasonable, therefore, to suppose that if he had applied for time to produce his evidence he would have got an adjournment, and we think that now he should be given an opportunity of substantiating his allegations. The learned Judge's order is, therefore, set aside and the case will be remanded for letting in such evidence as the parties may adduce to prove or disprove the plaintiff's pauperism and for making a fresh order after considering such evidence. Costs of this appeal to abide and be provided for in the final order.

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P.
PURU-
SHOTHAMA
SAH.

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APPELLATE CIVIL.

Before Sir Murray Coultts Trotter, Kt., Chief Justice,
and Mr. Justice Krishnan.*

B. R. SAWMY RAO (RESPONDENT), APPELLANT,

v.

1925.
February 6.

THE OFFICIAL ASSIGNEE OF MADRAS (PETITIONER),
RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. II, r. 2—Mortgage bond—Independent covenant to pay interest—Provision for payment of principal and interest on demand—Suit on independent covenant for payment of interest only—Petition by Official Assignee of mortgagor against mortgagee in

* Original Side Appeal No. 46 of 1924.