

under it, or expressed his willingness to pay such amount as might be found to be due on taking the accounts; but we are not disposed to be too technical in a matter of this kind, where the defendant has the undoubted right which he now asserts, and on which, if we did not recognize such right, but upheld the decree of the Court below *simpliciter*, the effect of our doing so would be to extinguish his security. We think that, under the circumstances, the defendant should be placed in the same position he would have held if the decree of the 17th March, 1877, had never been passed: for, looking to the facts that he was in possession of the village of Pulwa at the time of the suit, and that his mortgages were registered instruments, it must be presumed that the plaintiff had notice of their existence, and should therefore have made him a party thereto.

The appeal is decreed to this extent, and the decree of the Subordinate Judge will be so far modified that the defendant will be declared entitled to retain possession of mauza Pulwa, if within ninety days from the date of our decree he pays into this Court the amount of the plaintiff-respondent's mortgage-debt, with interest, otherwise the decree as passed by the Subordinate Judge will stand.

The costs of the plaintiff-respondent throughout will be paid by the defendant-appellant.

*Decree modified.*

*Before Mr. Justice Oldfield and Mr. Justice Brodhurst.*

BALDEO AND OTHERS (DEFENDANTS) v. GULA KUAR (PLAINTIFF).

*Suit in formâ pauperis—Application for permission to sue as a pauper—Rejection of application on the ground that it had been withdrawn—Civil Procedure Code, s. 2—“Decree”—Appeal.*

*Held* that an order rejecting an application for permission to sue as a pauper, and striking the case off the Court's file, on the ground that the applicant had previously withdrawn the application and entered into a new contract with the defendants, was a “decree” within the meaning of s. 2 of the Civil Procedure Code, and appealable as such.

THE appellant in this case, Musammat Gula Kuar, made an application to the Subordinate Judge of Cawnpore for permission

\* First Appeal No. 191 of 1886, from an order of W. Blennerhasset, Esq., District Judge of Cawnpore, dated the 7th August, 1886.

1886

MUHAMMAD  
SAMI-UD-DIN  
v.  
MAY SINGH.

1886  
December 6.

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 BALDEO  
 v.  
 GULA KUAR.

to sue her deceased husband's relatives for maintenance *in formâ pauperis*. Subsequently a petition was presented, apparently by her pleader on her behalf, withdrawing the application, and thereupon the case was struck off the Court's file without any inquiry having been made into the alleged poverty of the applicant. After this Gula Kuar presented a petition to the Subordinate Judge, praying that her application for permission to sue *in formâ pauperis* might be restored to its original number on the Court's file and proceeded with, alleging that she had never made or authorised any petition for withdrawal.

The Subordinate Judge found that the petition withdrawing the application for permission to sue *in formâ pauperis* had been made by the applicant upon the faith of some promise to her by the defendants, which had not been carried out; and the Court held that the proper procedure for the applicant to adopt would be to sue on the basis of this promise. The order of the Court was as follows:—"That the case be struck off; the petitioner is at liberty to bring a maintenance suit on the contract, if she wishes to do so."

The applicant appealed from this order to the District Judge of Cawnpore, who was of opinion that it was not proved that she had made the petition withdrawing her original application, and directed that the application should be restored to the file of the Court of the Subordinate Judge, and re-heard on the merits.

The defendants appealed from the District Judge's order to the High Court, on the ground that "the Judge had no jurisdiction to entertain the appeal from the order of the Subordinate Judge, inasmuch as that order was not appealable under s. 588 of the Civil Procedure Code."

Munshi *Hanuman Prasad*, for the appellants.

Pandit *Moti Lal*, for the respondent.

OLDFIELD, J.—In this case the respondent before us made an application to be allowed to sue *in formâ pauperis*. This application was, by a petition put in by her, withdrawn; she subsequently repudiated the petition and desired to proceed with her application.

The first Court did not deal with the application on the merits, but dealt only with the question whether she did really withdraw,

and on that question the Court held that she had withdrawn and entered into another contract. The order of the Court was "that the case be struck off; the petitioner is at liberty to bring a maintenance suit on the contract if she wishes to do so." This order was appealed to the Judge, who set it aside, and directed the lower Court to restore the application of the respondent to its file and hear it on its merits. Against this order of the Judge an appeal has been preferred to this Court on the ground that the Judge had no jurisdiction to make it. It appears to me the Judge had jurisdiction, and that the question depends on whether the first Court's order was a decree within the meaning of s. 2 of the Civil Procedure Code, so as to allow of an appeal to the Judge. I think it was. The matter disposed of by the Court was, in fact, whether the plaintiff had a right to institute the suit, and the effect of the order was to negative that right and to strike the case off the file, and I think it was an adjudication in respect of a right within the meaning of s. 2; and I may add that it might also be regarded as analogous to an order rejecting a plaint, the application, by s. 410 of the Code, in the event of its being granted, being to be deemed to be the plaint in the suit.

On these grounds I would affirm the Judge's order and dismiss this appeal with costs.

BRODHURST, J.—I entirely concur.

*Appeal dismissed.*

## FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield,  
Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

MUHAMMAD HUSAIN AND OTHERS (DEFENDANTS) v. KHUSHALO  
(PLAINTIFF).\*

1886  
November 11

*Appeal—Abatement of suit—Suit to recover share of joint family property sold in execution of decree—Death of plaintiff—respondent—Survival of right to sue.*

In a suit for the recovery of a share of ancestral family property which had been sold in execution of a money-decree for a debt contracted by the plaintiff's grandfather, the plaintiff obtained a decree in the lower appellate Court, from which

\* Second Appeal No. 1800 of 1885, from a decree of W. R. Barry, Esq., District Judge of Aligarh, dated the 15th June, 1885, reversing a decree of Maulvi Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 30th June, 1883.