

award in this case was not made within the period allowed by the Court, and consequently it must be held to be invalid; that is, there was no award on which the Court could make a decree." That judgment appears quite in point in this case, and it is a judgment of which their Lordships entirely approve.

Upon these grounds their Lordships will humbly advise Her Majesty to reverse the judgments of the Subordinate Court and the High Court, to declare the award invalid, and to direct that the suit shall be proceeded with, and that neither party shall be entitled to costs in either Court below from and after the date of the first of the said judgments; and that the costs prior to that date shall await the issue of the case. The respondents must pay to the appellant the costs of this appeal. The reason for not giving the appellant the costs in the Courts below arises from the fact that their Lordships are of opinion that the point upon which this award is now held to be invalid, was certainly not raised before the Subordinate Judge, nor, as far as appears, in the objections that were urged before the High Court.

Appeal allowed.

Solicitors for the appellant:—*Messrs. Barrow and Rogers.*

Solicitors for the respondent:—*Messrs. Linklater and Co.*

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr Justice Straight.

BISHNATH PRASAD (PLAINTIFF) v. JAGARNATH PRASAD AND OTHERS
(DEFENDANTS).*

Limitation—Application for leave to appeal in forma pauperis—Subsequent appeal in regular form—Payment of Court-fee on appeal no retrospective effect.

Where an application for leave to appeal *in forma pauperis* having been presented and rejected, a regular appeal was subsequently filed, but after the period of limitation had expired.

* Second appeal No. 423 of 1890, from a decree of H. F. D. Pennington, Esq., Additional Judge of Ghazipur, dated the 3rd January 1890, confirming a decree of Maushi Lalta Prasad, Subordinate-Judge of Ghazipur, dated the 3rd May 1889.

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Held that the payment of the court-fee on the regular appeal could not be held to relate back to the memorandum of appeal which accompanied the application for leave to appeal as a pauper, so as to convert that memorandum of appeal into a good appeal within time. Until the regular appeal was filed there was nothing before the Court which it could treat, even provisionally, as a memorandum of appeal.

In this case the plaintiff filed a suit in the Court of the additional Subordinate-Judge of Gházipur on the 24th September 1885. That suit was dismissed on the 10th May 1887. The plaintiff appealed; and the case was remanded to the lower Court for trial on the merits. Judgment was given on remand on the 3rd May 1889, and the plaintiff's claim was again dismissed. On the 22nd May 1889 the plaintiff presented to the District Judge an application for leave to appeal *in formá pauperis*, accompanied, as required by law, by a copy of the proposed memorandum of appeal. That application was rejected on the 27th May. On the 31st May 1889, the plaintiff applied to the Judge to review his order of the 27th May. That application also was rejected on the 13th June. On the 22nd June the plaintiff applied to the High Court for revision of the Judge's order of the 13th June. The High Court disallowed that application on the 16th August. On the 25th August the plaintiff applied to the Judge to be allowed to file a regular appeal in respect of so much of the property claimed as would be covered by a court-fee of Rs. 10. That application having been allowed, the plaintiff paid in Rs. 10, and on the 19th September filed a regular appeal. When that appeal came on for hearing on the 3rd January 1890 it was dismissed as being barred by limitation. The plaintiff then appealed to the High Court, where it was contended that a memorandum of appeal, namely, that presented on the 22nd May 1889, was already before the Court, and that the payment of the court-fee would convert that memorandum into a good memorandum of appeal from the very date when it was presented along with the application for leave to appeal *in formá pauperis*.

Mr. *Abdul Raoof* and *Munshi Gobind Prasad* for the appellants.

Munshi Ram Prasad and *Pandit Sundar Lal* for the respondents.

EDGE, C. J., AND STRAIGHT, J.—This is an appeal from a judgment of the Additional Judge of Gházipur, dated the 3rd January,

1890, by which he dismissed the plaintiff's appeal to his Court on the ground that it was not presented within the limitation period. The following are the dates material for consideration. The plaintiff-appellant brought a suit in the Court of the Subordinate Judge of Gházipur which was dismissed on the 3rd May 1889. The plaintiff-appellant then presented a petition under s. 592 of the Code of Civil Procedure for leave to appeal as a pauper, and that petition was accompanied by a memorandum of appeal as required by law. The Judge, acting in the matter as required by the second paragraph of s. 592, perused the judgment and decree of the first Court, and, being of opinion that they were not open to objection as being "contrary to law or some usage having the force of law" or as being "otherwise erroneous or unjust," on the 27th May 1889, rejected the petition. The plaintiff-appellant still had time up to the 13th June, within which to file an appeal on a properly stamped memorandum, but he did not do so; on the contrary he applied to the Judge for review of his order of refusal on the 31st May, and on the 13th June that application was also refused. On the 22nd June 1889, the plaintiff-appellant then came to this Court with an application for revision of the Judge's order under s. 622 of the Code of Civil Procedure, and that application was refused by this Court on the 16th August 1889. The plaintiff-appellant then went back to the Court of the Judge of Gházipur, and, on the 25th August, asked permission, while abandoning a portion of his claim, to be allowed to confine his appeal to so much of the property as would be represented by payment of the court-fee of 10 rupees. On the 17th September this prayer of the plaintiff was granted and on the 19th September the memorandum of appeal was filed and registered. It was in reference to these facts that when the appeal came to a hearing on the 3rd January 1890, the Judge who had to deal with it came to the conclusion that it was not presented within the period of time allowed by law, and it could not be regarded as an appeal until the 19th September 1889, when it was filed and registered. The contention which has been raised before us by Mr. *Gobind Prasad* on behalf of the plaintiff-appellant is that although the petition of appeal *in formâ pauperis*,

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dated the 22nd May 1889, was rejected on the 27th May, nevertheless there was already on the file of the Judge's Court a memorandum of appeal in respect of which that Court was competent to make orders granting time for supplying the deficiency in stamp, and that when the deficiency in stamp *pro tanto* was made good on the 28th August 1889, by the payment of 10 rupees, that payment acted retrospectively so as to make the memorandum of appeal a good memorandum of appeal from the very date on which it was presented along with the application *in formâ pauperis*. The learned pleader has laid much stress on the case of *Stuart Skinner v. William Orde* (1). That case has reference to Act VIII of 1859, as ss. 308 and 310, though I am not aware that in the present Code of Civil Procedure the provisions relating to pauper suits are materially different to those of the former Act, and, if we were dealing on the present Code with the same facts as appear in that case, we should probably have to hold ourselves governed by the ruling of their Lordships of the Privy Council. The case before us, however, is distinguishable. In the first place we have to deal with a memorandum of appeal, and in the next place we have to deal with a memorandum of appeal which accompanied an application to appeal *in formâ pauperis* which was refused. I am of opinion that when the petition to appeal *in formâ pauperis* was disallowed on the 27th May, the whole of that proceeding came to an end and that along with it fell the so-called memorandum of appeal which accompanied it. I do not think that a piece of un-stamped paper which only accompanied a petition to appeal *in formâ pauperis* could be called a memorandum of appeal. It was never a memorandum of appeal in the proper sense of the term which the Judge of the appellate Court could take cognizance of or make any order upon. Consequently, whatever directions were given by the Judge, either in his order of rejection of the 27th May, or of his refusal to review his judgment on the 13th June, were *ultra vires*. Mr. *Gobind Prasad* has urged that the provisions of s. 54 of the Code are applicable in the Courts of first appeal below. Conceding that it is so for sake of argument, he has not satisfied me that the

(1) I. L. R. 2, All., 241.

words "insufficient stamp" in paragraph 2 of s. 54 refer to or include a wholly unstamped paper. If this view were correct a litigant on the last day of limitation with what purported to be a plaint or memorandum of appeal written on a plain paper might come to a Court and insist on the Court receiving it for the purpose of making an order under s. 54, and thereby obtain an extension of the period of limitation. I think whenever insufficient stamps are used the Court may consider the memorandum of appeal under s. 54; but in this case the paper had no stamp, therefore it was not a memorandum of appeal and never became a memorandum of appeal until, at the earliest, the 26th August 1889, when Rs. 10 was paid into Court, though probably, strictly speaking, not till the 19th September, when it was filed and registered. Consequently, as there was no memorandum of appeal, we hold that the orders of the Judge of the 27th May and 13th June, were of no effect and that the filing and registration of the 19th September was long beyond the period of limitation. The appeal is dismissed with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Know.

NASRAT-ULLAH (PLAINTIFF) v. MUJIB-ULLAH AND OTHERS (DEFENDANTS).*

Act XIX of 1873 (N.-W. P. Land Revenue Act) s. 113—Civil Procedure Code s.

13—Question of title arising on an application for partition before a Revenue Court, how to be determined—Suit for declaration of right to partition—Res judicata.

Where a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, and the decree has become, by lapse of time or otherwise, unenforceable, it is competent to the parties, or any of them, if they still continue to be interested in the joint property, to bring a fresh suit for a declaration of their right to partition. Such a suit will not be barred by reason of the former decree for partition, though that decree may operate as *res judicata* in respect of any claim or defence which was, or might have been, raised in the suit in which it was passed.

If a Revenue Court in disposing of an application for partition determines a question of title, it must, in so doing, act in conformity with the provisions of s. 113

* First appeal No. 27 of 1889 from a decree of Babu Brijpal Das, Subordinate Judge of Gorakhpur, dated the 28th February 1888.

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