

1895

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Gobind and Khimmi, were sentenced to transportation for life. We think the Sessions Judge adopted a very lenient course in merely passing a sentence of transportation on these men. It was a most daring dacoity, and the dacoits were determined to carry it out regardless of life. Gobind and Khimmi have been sentenced to ten years' rigorous imprisonment. As to Gobind, if the case had been tried by us, he would assuredly have been sentenced to transportation for life. There may be a good reason in the case of Khimmi, in view of his youth, why a sentence of ten years was sufficient. We may mention that in arriving at our conclusion we have not relied on the statements of Pirbhu and Kishan, as they, having pleaded guilty, were not on their trial. Nor have we placed any reliance on the dying statement of Kirat Singh. It is not necessary to go into the matter, but we may say that we consider that his statement was not admissible in evidence.

Some of the appellants plead that their witnesses were not examined. So far as we can judge from the English record, they did not call any witnesses at their trial. As, however, it is a frequent ground of appeal that the Court of Session has refused or omitted to examine witnesses for the defence, it would be advisable for Sessions Judges to state specifically in their record whether or not the accused had present witnesses, and whether or not the accused refused to call witnesses or elected to call some, and whether the witnesses whom he elected to call were examined. We dismiss these appeals.

[See also *Queen-Empress v. Pahuji* (1)—ED.]

APPELLATE CIVIL.

1895

April 25.

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

NARAINI KUAR (PLAINTIFF) v. MAKHAN LAL AND OTHERS (DEFENDANTS).*

Civil Procedure Code, ss. 403, 409—Application for leave to sue in formâ pauperis—Refusal of application—Institution of regular suit—Limitation.

When an application for leave to sue as a pauper is refused and the applicant subsequently brings a suit in the same matter on a full court-fee, such suit dates,

* First Appeal No. 47 of 1894, from a decree of Maulvi Muhammad Mazhar Hussain Khan, Subordinate Judge of Mainpuri, dated the 23rd December 1893.

for the purposes of limitation, from the time of filing the plaint and not from the date of the application for leave to sue as a pauper. *Aliter* when, leave to sue as a pauper having been granted, the applicant is dispaupered.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Baldeo Ram Dave* for the appellant.

Mr. *T. Conlan* and Pandit *Moti Lal* for the respondents.

EDGE, C. J., and BANERJI, J.—This was a suit for possession, and the plaintiff claimed by right of inheritance to her father. Her father died on the 18th of October 1879, and on the 21st of September 1891 the plaintiff presented an application, under s. 403 of the Code of Civil Procedure, for permission to sue as a pauper. On the 21st of November 1891 the Court made an order, under s. 409 of the same Code, refusing the plaintiff's application to sue as a pauper. The same Court gave the plaintiff one week within which to pay into Court the full stamps for a non-pauper's suit. Neither the Code of Civil Procedure nor the Court-Fees Act seems to have authorized that latter order of the Court below giving a week's time. The order could not have been made under s. 28 of the Court-Fees Act, inasmuch as the application to sue as a pauper was sufficiently stamped and there was no insufficiently stamped document before the Court on that application. On the 28th of November 1891 the plaintiff filed in Court the stamps necessary for a non-pauper's suit. The Subordinate Judge dismissed the suit on ground of limitation. He was of opinion that the suit could not be considered as instituted until the necessary stamps required by the Court-Fees Act had been filed along with the plaint. He also found that twelve years prior to the payment of those stamps into Court adverse possession had been taken, and consequently twelve years' limitation had expired before the 28th of November 1891. Pandit *Baldeo Ram*, on the question of the construction of Act No. XIV of 1882, has relied on the decision of the Privy Council in *Skinner v. Orde* (1).

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

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The Subordinate Judge thought that that case did not apply, as in that case, before any adverse order had been made on the application for leave to sue as a pauper, the requisite stamp had been filed, whereas in the present case the stamps requisite for a fully stamped suit had not been filed in Court until after the order of refusal under s. 409 of the present Code of Civil Procedure had been made.

It appears to us that the present Code of Civil Procedure makes a distinction between what is to happen in the case of an order being made under s. 409, refusing permission to the applicant to sue as a pauper, and the case of an order dispauperising a person already having permission to sue as a pauper. In the case of an order dispauperising a plaintiff, the Court, under s. 412, must make an order on the plaintiff to pay the court fees which would have been paid if he had not been permitted to sue as a pauper, and the presumption is that on payment of those court fees the dispauperised plaintiff could continue his suit as of the date on which it was first instituted. It is obvious from s. 413 that when an order of refusal under s. 409 is made, the suit cannot be continued as of its original institution. When an order under s. 409 is made there is a bar to any further application to sue as a pauper, but the plaintiff, having first paid the costs, if any, incurred by Government in opposing his application for leave to sue as a pauper, is allowed by that section the liberty of instituting a suit in the ordinary manner in respect of such right as he may have. That section satisfies us that under this Code, upon an order of refusal under s. 409, the proceedings instituted under s. 403 come to an end, and if the applicant for leave to sue as a pauper wishes to proceed with the vindication of his rights, he must sue in the ordinary course, and of course the date of the institution of that suit would not be the date of the presentation of the application for leave to sue as a pauper, but would be the date on which the suit was instituted. We are bound to hold that this suit was instituted for the purposes of limitation on the 28th of November 1891, and not before.

The plaintiff had endeavoured to show that Makhan Lal and Ram Dyal did not take possession of any kind, much less adverse

possession, until Magh or Phagun following the death of the plaintiff's father in October 1879. Magh and Phagun were respectively the January and February following the death. We must look to what was the position of affairs when Jagan Nath died. Jagan Nath had been carrying on an extensive business, he likewise had a zamíndári, and the kharíf rents would fall due in November and December, and it is not pretended on behalf of the plaintiff that she, or anyone on her behalf, took possession on the death of her father. At the time when her father died Ram Dyal was living with him and Makhan Lal was living next door. In our opinion the probabilities are that Ram Dyal and Makhan Lal immediately on the death of Jagan Nath took possession of his mercantile business and entered into occupation of his lands, shops and zamíndári. One of the witnesses relied on by the plaintiff says that Makhan Lal and Ram Dyal took possession of the houses and shops immediately on the death of Jagan Nath.

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We think the circumstances make it probable that they did take possession, and the evidence on the part of the defendants that possession was so taken is more reliable than the evidence on behalf of the plaintiff.

We hold the suit time-barred at the time when it was instituted and we dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Burkitt.

JHABBU SINGH (APPLICANT) v. GANGA BISHAN (OBJECTOR). *

*Act No. VIII of 1890 (Guardian and Wards Act)—Joint Hindu family—
Appointment of guardian of property of minor.*

1895

May 1.

It is not competent to a Court under Act No. VIII of 1890 to appoint a guardian of the property of a minor who is a member of a joint Hindu family. *Virupakshappa v. Nilgangava* (1) and *Sham Kuar v. Mohanunda Sahoy* (2) referred to.

* First Appeal No. 9 of 1895, from an order of H. F. D. Pennington, Esq., District Judge of Fatehgarh, dated the 9th January 1895.

(1) I. L. R., 19 Bom., 309.

(2) I. L. R., 19 Calc., 301.