1901
April 18.

Before Mr. Justice Knox and Mr. Justice Aikman.

MUMTAZAN (DEFENDANT) *v.* RASULAN (PLAINTIFF).*

Civil Procedure Code, sections 403, 409, 588—*Suit* in formâ pauperis—*Appeal —Propriety of order allowing plaintiff to sue* in formâ pauperis *not a ground of appeal.*

Where after consideration of an application for leave to sue as a pauper the Court of first instance has allowed the suit to be instituted *in formâ pauperis*, and has passed a decree in favour of the plaintiff, it is not open to the defendant in appeal to question the propriety of the first Court's order permitting the plaintiff to sue as a pauper.

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Munshi *Gobind Prasad*, for the respondent.

KNOX, J.—Application to sue as a pauper was made by Musammat Rasulan at a time when, if she had instituted a suit upon payment of a proper fee, the suit would have been amply within time. The application was granted by the Court of first instance. After some delay the Court went on to consider Musammat Rasulan's suit on its merits, and granted her a decree. The defendant appealed, and in her memorandum of appeal took the plea that the plaintiff was not a pauper within the meaning of section 401 of the Code of Civil Procedure, and that her application to sue *in formâ pauperis* should not have been granted by the Court of first instance. The lower appellate Court considered this plea, and giving effect to it directed that the plaintiff should pay in a certain sum as Court fees. This she did within the time allowed by the Court. The appeal was then considered upon its merits, and again the plaintiff won her suit, the Subordinate Judge coming to the same conclusion on the merits as the Court of first instance. In the appeal before us the learned vakíl for the appellant finds himself unable to contend that he has any case upon the merits. His argument turns upon the question whether the order of the lower appellate Court, passed on the 17th of February, 1899, was or was not an order within the jurisdiction of that Court to pass. That order directed the appellant, within eleven

* Second Appeal No. 392 of 1899 from a decree of Babu Nihal Chandar, officiating Subordinate Judge of Shahjahanpur, dated the 1st March, 1899, confirming the decree of Babu Banke Behari Lal, Munsif of Shahjahanpur, dated the 27th April, 1898.

days from the date of its passing, to pay in the Court fees she should have paid on the plaint and other petitions in the Court of first instance. He does not dispute the power of the lower appellate Court to enter into the question whether the plaintiff was or was not rightly permitted to sue *in formâ pauperis*. But he contends that by the 28th of February the suit of the plaintiff had become time-barred. The Court was not empowered to permit the plaint to be validated by the affixing of the proper Court fee stamp at a date when the suit was barred. The order should have been an order for dismissal of the plaint. The learned vakíl for the respondent takes his stand in reply upon the decision of the Court of first instance, which held that the plaintiff was a pauper, and which granted the plaintiff's application to sue *in formâ pauperis*. This order, he contends, cannot be set aside in appeal. What has therefore to be considered now is, whether an order granting an application to sue *in formâ pauperis* is an order which affects the decision of a case, and can be dealt with in appeal in spite of the provisions of section 588 of the Code of Civil Procedure. The order granting an application to sue *in formâ pauperis* is an order affecting the institution of a suit rather than an order affecting its decision, and therefore not an order contemplated by section 591 of the Code. In the present case the plaintiff made her application well within time; it was granted; and in accordance with the explanation to section 4 of the Indian Limitation Act of 1877 her suit was instituted when her application for leave to sue as a pauper was filed. Both this Court and the Calcutta High Court have read these words as though they ran as "filed and granted." Accepting this interpretation, the plaintiff's suit was instituted within time, and the lower appellate Court could not afterwards deal with the order which granted the application. The Court of first instance had dealt with the case under section 411 of the Code of Civil Procedure, and the matter might well have been allowed to rest there. The appeals fail and should be dismissed.

It has been pointed out by this office that a sum of Rs. 12-8, in addition to the amount recovered from the plaintiff by the lower appellate Court, would have been payable by the respondent if she had not been allowed to sue as a pauper. Under the

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provisions of section 411, this amount of Rs. 12-8 is a first charge on the subject-matter of the suit, and will be recoverable by Government from the defendant in the same manner as costs of the suit.

The appeal is dismissed with costs.

AIKMAN, J.—I have arrived at the same conclusion. The respondent Musammat Rasulan applied under section 403 of the Code of Civil Procedure for permission to sue as a pauper. After necessary inquiry the Court of first instance made an order under section 409 allowing the application, and ultimately decreed the plaintiff's claim. The defendant appealed. The first ground taken in the defendant's memorandum of appeal to the lower Court was that the plaintiff was not a pauper, and ought not to have been allowed to sue as such. The lower appellate Court considered this plea and sustained it. It thereupon directed the plaintiff to pay into Court, within a time fixed, the Court fee which it held to be payable on the plaint if the plaintiff had not been allowed to sue *in formâ pauperis*. The plaintiff complied with the order and paid in the Court fee within the time fixed. The learned Subordinate Judge then took up the other pleas raised in the defendant's memorandum of appeal. On these pleas he arrived at the same conclusion as the Munsif. The defendant's appeal was accordingly dismissed, and the decree of the first Court in the plaintiff's favour affirmed.

The defendant comes here in second appeal. The only plea urged is, that by the time it was decided that the plaintiff ought not to have been allowed to sue as a pauper her suit was barred by limitation, and it was too late for her to pay the Court fee. Had it been necessary, I should have been prepared to hold that this case falls within the purview of section 28 of the Court Fees Act.

But I consider that the answer of the learned vakil for the respondent to the plea now urged sufficiently meets it. That answer is, that it was *ultra vires* on the part of the lower appellate Court to entertain a plea attacking the order of the first Court which granted permission to the plaintiff to sue as a pauper. It is clear that no appeal from such an order is allowed by section 588 of the Code of Civil Procedure. The learned vakíl for the

appellant endeavours to support the order of the lower Court by a reference to section 591. I have no hesitation in holding that section 591 will not help him. If the Munsif was in error in allowing the plaintiff to sue as a pauper, it was not an error affecting the decision of the case. I agree in the order proposed.

Appeal dismissed.

Before Mr. Justice Knox and Mr. Justice Aikman.

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April 22.

BANNA MAL AND OTHERS (PLAINTIFFS) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT).*

Act No. IX of 1890 *(Indian Railways Act), section 47(b)—Responsibility of Railway Company for goods left on its premises without a receipt being obtained for them—Rules framed by the Company under the Act.*

Held that a rule by which a Railway Company disclaimed all responsibility for goods left on the Company's premises unless certain conditions were fulfilled, the principal of which was that the goods should have been accepted and a receipt given for them by a duly authorized employé of the Company, was a rule properly made under the provisions of the Indian Railways Act, 1890, and that no suit in respect of the loss of goods merely deposited upon the Company's premises without such a receipt being taken for them could be maintained. *Shea* v. *The Great Northern Railway Company* (1) referred to.

THIS was a suit for damages for the loss of goods alleged to have been delivered to the Oudh and Rohilkhand Railway Company at Cawnpore on the 28th January, 1895, which goods, according to the plaintiffs, never reached their destination. The defendant denied delivery. It was found that the goods in question had been brought on to the Company's premises; but the defendant replied that the Company was under no liability in respect thereof, because the goods had never been accepted for transmission, and no receipt had been given for them by any duly authorized employé of the Company, as required by rules 49 and 50 of the Goods Tariff Rules of the Company which were rules duly made under the powers conferred by the Indian Railways Act, 1890, section 47*(b)*. The particular rules applicable were as follows:—

Oudh and Rohilkhand Railway. Goods Tariff.

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* Second Appeal No. 407 of 1899 from a decree of J. Sanders, Esq., District Judge of Cawnpore, dated the 6th March, 1899, confirming the decree of Pandit Kanhaya Lal, Munsif of Haveli, district Cawnpore, dated the 29th June 1897.

(1) 14 C. B., 647.