order to make it clear that, in saying that Ganeshi Lal is in our opinion entitled to have a re-partition of the joint family property made in consequence of the success of Khairati Lal's suit, we are not pronouncing any opinion one way or the other as to whether the assets or the liabilities of the Landour business should or should not be taken into account in connection with such re-partition. Our order therefore is that we remand this case to the court below under order XLI, rule 23, for re-trial subject to the remarks we have made. We leave all costs of this appeal to be costs in the case.

WALSH, J.—I entirely agree. I only wish to add one word on the point arising on the merits which was substantially argued before us. I agree with the decision in I. L. R., 21 Bom., 333, but I think that there is danger in stating as a general principle that proof of such matter entitles the party to re-partition. I do not think that it entitles him to open up the previous decision except in so far as is necessary to apportion the loss which arises out of the new fact. The right is based simply upon this principle, that where parties arrive at a partition either by agreement, or by a decree (which after all is only a more solemn and binding form of agreement), there is an implied and mutual right of indemnity or contribution in respect of any paramount claim by a third person which throws the burden of a loss not contemplated in the partition proceedings unfairly upon one of the parties. If the original decision has been arrived at by a common mistake, which, of course, in the case of a decree is adopted by the court making the decree, the mistake can be set right *pro tanto*.

Appeal decreed and cause remanded.

REVISIONAL CIVIL.

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February.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

MUHAMMAD FARZAND ALI (PLAINTIFF) *v.* RAHAT ALI AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), *order XLIV, rule* 1—*Application for leave to appeal* in formâ pauperis—*Application rejected—Further application for leave to pay the full court fee also rejected—Revision.*

The rejection of an application made under order XLIV, rule 1, of the Code of Civil Procedure, for leave to appeal as a pauper, is not the rejection of

* Civil Revision No. 129 of 1917.

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the appeal. It is, therefore, no ground for rejecting a subsequent application for permission to pay the full court fee on the appeal.

A SUIT was instituted *in formâ pauperis*, and a decree was passed therein. The plaintiff applied under order XLIV, rule 1, of the Code of Civil Procedure to be allowed to appeal as a pauper. The application was accompanied by a memorandum of appeal as directed by the rule. The appellate court directed further inquiry to be made by the court of first instance in respect of the applicant's pauperism, and that court reported that the applicant was a pauper. The appellate court then took action under the proviso to rule 1 of order XLIV and rejected the application. On receiving intimation of the rejection the applicant filed a petition praying for permission to pay the requisite court fee on his memorandum of appeal. But the court rejected his petition on the ground that his appeal had already been dismissed. Against this order he applied in revision to the High Court.

Maulvi *Iqbal Ahmad*, for the applicant :—

What had been rejected was the application for leave to appeal as a pauper. The memorandum of appeal itself had never been dealt with or rejected. The wording of order XLIV, rule 1, clearly shows that the memorandum of appeal is not a part of the application for leave to appeal as a pauper, but that the two things are quite distinct and separate. In rejecting the one the Judge thought that he had rejected the other as well. Under this misapprehension he thought he had no jurisdiction to entertain the petition for permission to pay the court fee on the memorandum of appeal. The court undoubtedly had jurisdiction to allow the applicant to pay the court fee, although the memorandum of appeal was filed without any stamp. The words, "*the whole* or any part," in section 149 of the present Code have made this clear.

Pandit *Uma Shankar Bajpai*, (for Dr. *S. M. Sulaiman*), for the opposite party, relied on the cases of *Bishnath Prasad* v. *Jagarnath Prasad* (1) and *MG Wa Tha* v. *Abdul Gani Osman* (2). He submitted that even if the court fee were allowed to be paid the appeal would be barred by limitation. It was further submitted that the granting or rejection of an application to pay

(1) (1891) I. L. R., 13 All., 305. (2) (1913) 18 Indian Cases, 518.

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in court fees was a matter within the discretion of the lower court, and even an incorrect exercise of that discretion did not furnish a ground for revision.

Maulvi *Iqbal Ahmad*, was not heard in reply.

TUDBALL and MUHAMMAD RAFIQ, JJ. :—The present applicant brought a suit *in formâ pauperis* for possession of certain property which had been mortgaged. He sought to recover possession without payment of any sum of money. On the 15th of July, 1916, the court gave a decree for redemption of the mortgage on payment of Rs. 4,301-3-2. On the 19th of August, he filed an application under order XLIV, rule 1, together with a memorandum of appeal as directed therein asking for permission to be allowed to appeal *in formâ pauperis*. The appellate court directed further inquiry by the court of first instance into the alleged pauperism and, on the 15th of February, that court reported that the applicant was a pauper. On the 17th of February, 1917, the Court then took action under the proviso to rule 1 of order XLIV. It examined the judgement and the decree and rejected the application under that proviso. Information of this was sent to the applicant by post and he received it on the 17th of March, 1917. On the 20th of March, 1917, the applicant filed a petition stating that he had received a post card from the court intimating that his application for permission had been rejected. He therefore prayed that he might be permitted to pay the court fee on his memorandum of appeal. On this the lower court passed the following order :—" Yesterday the applicant filed a petition requesting to be allowed to deposit fees and to prosecute his appeal. His appeal was dismissed on the 17th of February last. I reject his petition." The court therefore refused to exercise its jurisdiction in allowing the court fee to be paid under the impression that the appeal had been dismissed on the 17th of February. This is clearly wrong. The appeal had never been dismissed. The memorandum of appeal is still before the court. On the 17th of February, what was rejected was the application for permission to appeal *in formâ pauperis*. We think that in the circumstances the appellant should have been allowed to pay the court fee, if he so wished, and we allow this application and direct the lower court

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to allow this to be done. Any question of limitation that may arise will be decided by the court in the usual way according to law. The court below will fix a time within which the applicant will pay the court fee. In regard to the costs of this application, they will be costs in the cause and will abide the result.

Application allowed.

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February, 5.

MISCELLANEOUS CIVIL.

*Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.**

BHANA AND ANOTHER (PETITIONERS) *v.* GUMAN SINGH AND OTHERS (OPPOSITE PARTIES).*

Act No. XVI of 1908 (*Indian Registration Act*), *section* 17—*Registration—Agreement by reversioners to forego right to sue for declaration respecting an alienation made by a Hindu widow.*

Held that an agreement by which the reversioners to certain property in the possession of a Hindu widow agreed not to enforce their right to sue for a declaration that a gift of such property made by the widow was not binding upon them was not a document which was compulsorily registrable under section 17 of the Indian Registration Act, 1908.

THE facts of this case were as follows :—

One Musammat Bhana, a Hindu widow, having a widow's estate, executed a deed of gift in favour of her husband's sister's sons. The plaintiffs were the presumptive reversioners. After the deed of gift had been executed, they were preparing to bring a suit for a declaration that the deed of gift was not binding upon them. The donees and the plaintiffs came to terms. The plaintiffs executed an agreement in favour of the donees under which they agreed not to enforce their right to the declaration which they were about to seek in consideration of the donees transferring to them half of the property and also undertaking to support Musammat Bhana for the rest of her life and to pay off her debts. The donees executed an agreement at the same time under which they agreed that they would transfer half the property to the plaintiffs and would support Musammat Bhana and pay her debts. In spite of this agreement the plaintiffs brought the present suit, in which they asked for a declaration that they were heirs to the

* Civil Miscellaneous No. 421 of 1917.