RAI MAHADEO SAHAI v. SECRETARY OF STATE FOR INDIA.

Similarly, we are inclined to think that the words "final order passed on appeal" in section 109 (*a*) may admit of a broader construction, so as to include an order directing the *dismissal of the appeal* consequent upon the appellant's failure to furnish security for the costs of the respondents.

The appellant, however, has founded his application upon section 109 (*c*) which provides for a right of appeal from any *order*, when the case is certified to be a fit one for appeal to His Majesty in Council. This clause evidently embraces cases other than those provided in clauses (*a*) and (*b*), and the order sought to be appealed need not be a final order passed by a High Court or a final order affirming the decision of the lower court.

We are, however, of opinion that the application should be dismissed, the applicant having failed to satisfy this Court either that a substantial question of law was involved in the case or that it was otherwise a fit case to appeal to His Majesty in Council.

[The rest of the judgment, not material for the purpose of this report, is omitted.]

REVISIONAL CIVIL.

Before Mr. Justice Kendall.

1931 *November*, 24.

HUBRAJI (APPLICANT) *v.* BALKARAN SINGH (OPPOSITE PARTY).*

Civil Procedure Code, section 115 and order XLIV, rule 1, proviso—Application for leave to appeal as a pauper—Summary rejection after issue of notice to opposite party and Government pleader—Proviso does not apply after issue of notice—Revision—Practice and pleading—Plea taken in revision but not in lower court.

In an appeal filed *in forma pauperis* the appellate court, after issuing notice to the opposite party and the Government pleader, summarily rejected the appeal on the ground that

*Civil Revision No. 217 of 1931.

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there appeared no reason to think that the decree was contrary to law or was otherwise erroneous or unjust. It was *held*, in revision, that the procedure adopted by the appellate court was erroneous inasmuch as according to the provisions of order XLIV, rule 1, of the Civil Procedure Code the court may either reject the appeal summarily or issue notice to enquire into the question of the pauperism of the applicant. But when once notice has been issued, the court cannot fall back on the proviso to rule 1 which relates only to summary rejection upon a perusal of the judgment and decree appealed from.

The appellate court had acted with material irregularity in the exercise of its jurisdiction in rejecting the appeal summarily after issuing notice, and a revision lay.

Although the plea as to the irregularity of procedure was not urged in the lower court, there was no bar to its being taken in revision in the High Court.

Messrs. *Kedar Nath Sinha* and *Lakshmi Saran*, for the applicant.

Messrs. *Ram Nama Prasad* and *Kanhaiya Lal*, for the opposite party.

KENDALL, J. :—This is an application for the revision of an order passed by the learned Subordinate Judge of Jaunpur, rejecting the applicant's application for leave to appeal as a pauper under rule 1 of order XLIV of the Civil Procedure Code. That order was passed after notice had been issued not only to the Government Pleader but to the respondent, and the present application in revision is made on the ground that the application in the court of the Subordinate Judge could not be rejected under the proviso to rule 1 of order XLIV at that stage, i.e. after the court had had an opportunity of rejecting the application summarily, and had, instead of rejecting it summarily, issued notices to the other parties concerned.

The whole procedure relating to pauper appeals is set forth in the two rules of order XLIV. Rule 1 prescribes that a person who is unable to pay the requisite fee may present an application "accompanied

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by a memorandum of appeal, and may be allowed to appeal as a pauper, subject in all matters . . . to the provisions relating to suits by paupers, in so far as those provisions are applicable". But the proviso shows that the court must reject the application unless "upon a perusal thereof and of the judgment and decree appealed from it sees reason to think that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust".

It is, therefore, clear that the court must in considering these applications always be mindful of the provisions relating to suits, and be ready to apply them to applications for leave to appeal if they are capable of application. Special stress is laid in rule 1 on the provisions relating to the presentation of the application; and rule 3 of order XXXIII (which relates to suits) provides that the application shall be presented to the court by the applicant *in person* unless he is exempted, and it is clear therefore that this provision will also apply to the presentation of an application for leave to appeal. Order XXXIII then goes on to show that the court may examine the applicant "regarding the merits of the claim and the property of the applicant" (rule 4) and in rule 5 are enumerated the reasons for which the court may "reject an application for permission to sue as a pauper". If the application is not thus summarily rejected, the court must issue notices to the opposite party and to the Government Pleader "for receiving such evidence as the applicant may adduce in proof of his pauperism and for hearing any evidence which may be adduced in disproof thereof". In short, the court may under order XXXIII reject an application for leave to sue as a pauper summarily, i.e. after an examination of the applicant or his agent, for any of the reasons given in rule 5; but if the court does not so reject the application summarily it must issue a notice and hold an inquiry to decide whether the

applicant can prove pauperism. If pauperism be proved the suit proceeds as an ordinary suit would, with the one exception that the plaintiff is not required to pay a court fee (rule 8). There is, it will be observed, no provision in order XXXIII by which after issuing notice the court may reject the application on the ground that it "sees no reason to think that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust"; it must try out the suit on its merits.

I have laid some stress on these rules in order XXXIII because the counsel for the opposite party has based his defence to the present application largely on them.

For the applicant it is urged that there is no provision in order XLIV for the rejection of an application for leave to appeal *in forma pauperis* after issue of notice, and it must therefore follow that the rejection of such an application for the reasons given by the learned Subordinate Judge can only be ordered in a summary proceeding, i.e. before notice has been issued to the opposite party and the Government Pleader. This view has been taken in three decisions by Benches of the Patna High Court, viz. the cases of *Mst. Chander Kala Kuer* v. *Mst. Dulhin Raja Kuer* (1), *Mst. Buchan Dai* v. *Jugal Kishore* (2) and *Raghunath Prasad Sahu* v. *Mst. Rampiari Kuer* (3). These decisions are unquestionably in favour of the applicant, and no authority is quoted on the other side, nor does it appear that there is anything in the Code itself which will really lend support to the argument of the counsel for the opposite party. When once notice has been issued the court may, it is true, enquire further into the question of the pauperism of the applicant (this is clear from rule 2 of order XLIV and also by the analogy drawn from the rules in order XXXIII), but it cannot fall back on

(1) (1928) I. L. R., 7 Pat., 827. (2) A. I. R., 1924 Pat., 791.
(3) A. I. R., 1928 Pat., 118.

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(1) (1928) I. L. R., 7 Pat., 827. (2) A. I. R., 1924 Pat., 791.
(3) A. I. R., 1928 Pat., 118.

the proviso to rule 1 which relates only to summary rejection upon a perusal of the judgment and decree appealed from. It has been argued that as notice has been issued to the opposite party it must have been intended that he should have a chance of pointing out that the decree is not "contrary to law or to some usage having the force of law or otherwise erroneous or unjust". That is true, and he will have an opportunity of proving this to the court when the appeal is heard on its merits. But he has no right to put back the hands of the clock and ask the court to reject the application summarily under that special proviso when the proceedings have already passed beyond the summary stage. That this is so is indeed indicated by the form of notice issued to him, which only calls on him to show why the applicant should not be allowed to appeal as a pauper. It does not call on him to show why the application should be rejected because the decree is not contrary to law etc. The notice in fact relates only to the application and not to the appeal against the decree.

Two other legal points were taken by the opposite party, but they can be shortly disposed of. It was argued that the plea of the applicant cannot be taken at this stage because it was not urged in the lower court, and I have been referred to the decision in *Ram Kinkar Rai* v. *Tufani Ahir* (1); but this relates to second appeals and is not relevant to an application for revision. It has further been argued with reference to the decisions in *Yad Ram* v. *Sundar Singh* (2) and *Balakrishna Udayar* v. *Vasudeva Ayyar* (3) that an application for revision can only be made on a point of jurisdiction. I accept this argument, but in the present case the point is that the court has acted with material irregularity in the exercise of its jurisdiction. If the rules of procedure do not clothe the court with jurisdiction to reject an application of this kind after issue of notice to the

(1) (1930) I. L. R., 53 All., 75. (2) (1923) I. L. R., 45 All., 425.
(3) (1917) I. L. R., 40 Mad., 793.

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opposite party then it is clear that section 115 of the Civil Procedure Code will apply and that an application for revision will lie.

For these reasons I allow the application with costs, set aside the order and decree of the Subordinate Judge, and direct that the application be restored and that the hearing proceed according to law.

Before Mr. Justice Niamat-ullah.

BINDESHRI (JUDGMENT-DEBTOR), *v.* BANSHI LAL (DECREE-HOLDER).*

1931 *November*, 26.

Civil Procedure Code, section 60, clauses (a) and (b)—"Cooking vessels"—"Tools of an artisan"—Paraphernalia of soap-boiling.

The expression "cooking vessels" in section 60 (*a*) of the Civil Procedure Code does not mean only vessels in which food is actually cooked but includes vessels necessary for cooking operations; a *thali* and a *gagra* (water jug) are "cooking vessels".

One who practises the art of soap making is an "artisan" within the meaning of that word in section 60 (*b*) of the Civil Procedure Code, and the paraphernalia for his manufacture of soap, such as iron pan, canisters, tubs, etc., would be included in the expression "tools of an artisan" in section 60 (*b*).

Mr. *Mansur Alam*, for the applicant.

Mr. *Damodar Das*, for the opposite party.

NIAMAT-ULLAH, J.:—This revision arises out of execution proceedings. The respondent obtained a decree for Rs. 297 against the applicant, Bindeshri, who is a soap manufacturer by profession. The respondent attached certain articles specified in lists A and B annexed to his application for execution. It was objected by the judgment-debtor that the articles attached were his "cooking vessels" and "tools of an artisan" within the meaning of section 60, clauses (*a*) and (*b*) of the Code of Civil Procedure and were not liable to attachment and sale in execution of a decree. This

*Civil Revision No. 210 of 1931.