1934

RAM KALI v. BIRBHADRAMAN TEWARI

in accordance with law did not amount to an application for taking steps in aid of execution. Accordingly the decree-holder did not get a fresh start from the 29th of April, 1929, when this application for execution was ultimately dismissed. The present application, not being within three years of any order on any application in accordance with law for execution or on any valid application for taking step in aid of execution, is barred by time.

The application is accordingly dismissed with costs.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Justice Sir Lal Gopal Mukerji

SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) *v.* SONKALI (PLAINTIFF)*

1934 *January*, 3

Civil Procedure Code, order XLIV, rule 1, *proviso—Pauper appeal—Whether proviso applies after issue of notice—Civil Procedure Code, section* 115*—"Case decided"—Court refusing to apply the proviso, rule* 1, *order XLIV to a pauper appeal—Revision on behalf of Government.*

The fact that the court, on considering that a pauper appeal presented to it was not liable to be rejected under the proviso to rule 1 of order XLIV of the Civil Procedure Code, has allowed notice to issue to the Government Pleader and to the respondent does not preclude the court from considering the question again, if raised by the Government Pleader or the respondent when they appear.

Under order XLIV, rule 1 of the Civil Procedure Code the court, when a pauper appeal is presented, has to scrutinise it as laid down in the proviso to the rule; it has to see whether the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. If the court finds that *prima facie* there is such a ground, it is to issue notice to the Government Pleader and also to the respondent to show cause why the application should not be granted. When a notice has been issued it is open to the Government Pleader and to the respondent to show not only that the applicant is not a pauper, but they are also entitled to show that the decree appealed against is not contrary to law or to some usage having the force of law or is not otherwise erroneous or unjust; and

*Civil Revision No. 264 of 1933.

1934

SECRETARY OF STATE FOR INDIA IN COUNCIL v. SONKALI

the court has to decide, after hearing them, on both these points.

The allowing of an application to appeal as a pauper, without hearing the Government Pleader on the question whether the application should be rejected under the proviso to rule 1 of order XLIV of the Civil Procedure Code, is a decision that the Government has no *locus standi* in opposing the presentation of the appeal in *forma pauperis*, and amounts to a case decided within the meaning of section 115 of the Civil Procedure Code, so far as the Government is concerned.

Mr. *Muhammad Ismail* (Government Advocate), for the applicant.

The opposite party was not represented.

SULAIMAN, C.J., and MUKERJI, J.:—This is a civil revision under section 115 of the Civil Procedure Code which has arisen in the following circumstances. The respondent, who is unfortunately unrepresented before us, brought a suit *in forma pauperis* in the court of the Munsif of Jaunpur for certain reliefs. She having failed there, filed an appeal before the learned Subordinate Judge of Jaunpur. The learned Subordinate Judge thought that the appeal was not liable to be rejected under the proviso to rule 1, order XLIV of the Civil Procedure Code, and being of that opinion ordered notice to issue to the Government Pleader and to the respondent. When, however, the Government Pleader appeared, he wanted to contend that the appeal was liable to be rejected in view of the proviso to rule 1 of order XLIV. The learned Subordinate Judge thought that the fact that he had allowed notice to issue precluded him from considering the question again. Accordingly he passed the following order: "The application to appeal as pauper is allowed and notice should be issued to the respondents in accordance with law."

The learned Government Advocate has filed this revision on behalf of the Secretary of State for India in Council.

There can be no doubt that an application in revision is maintainable. There has been a "case decided" so

far as the Government is concerned. By allowing the plaintiff to appeal as a pauper without hearing the Government Pleader the court has decided, so far as the Secretary of State is concerned, that the Secretary of State has no *locus standi* in opposing the presentation of the appeal *in forma pauperis*, and no court fee need be paid.

On the merits we think that the revision should succeed. As we read order XLIV, rule 1 it means this. When a person wants to appeal as a pauper, the first thing that he is to do is to present an application for that purpose. The court has then to scrutinise the application as laid down in the proviso to rule 1. It has to see whether the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. If the court finds that the decree does not suffer from any of these defects, then the court must reject the application for permission to appeal as a pauper. On the other hand, if the court finds that *prima facie* there is no reason to reject the application, it is to issue notice to the Government Pleader and also to the respondent to show cause why the application should not be granted. The Civil Procedure Code in Appendix G, Form No. 11, prescribes how the notice is to be worded. It is true that rule 1 does not in so many terms say that the court is to issue notice to the Government Pleader or to the respondent, but paragraph 1 of rule 1 has the following words: "subject, in all matters, . . . to the provisions relating to suits by paupers, so far as those provisions are applicable." These words imply that so far as possible the procedure laid down in order XXXIII of the Civil Procedure Code is to be followed. The Form No. 11 in Appendix C seems to confirm this view. In most cases issue of a notice would be desirable, even if it be not incumbent on the court to issue it in all cases.

When a notice has been issued it is open to the Government Pleader and also to the respondent to show not

1934

SECRETARY OF STATE FOR INDIA IN COUNCIL v. SONKALI

only that the applicant is not entitled, owing to possession of sufficient property, to appeal as a pauper, but they are also entitled to show that the decree appealed against is not contrary to law or to some usage having the force of law or is not otherwise erroneous or unjust.

The learned Judge of the court below has followed a single Judge decision of this Court, *Hubraji* v. *Balkaran Singh* (1), in which it was held that after the court has decided to issue notice to the Government Pleader and the respondent it is no longer open to it to consider whether the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. The learned Government Advocate argues that this view of the learned single Judge was based on certain rulings of the Patna High Court and that the Patna High Court itself by a Full Bench ruling has overruled the previous decisions. The Full Bench decision of the Patna High Court is *Tilak Mahton* v. *Akhil Kishore* (2).

We have been taken through the three judgments of the three learned Judges who composed the Full Bench and we are of opinion that the pronouncements contain the true exposition of the law. The view taken there is in substance what we have stated to be the correct view of the law, namely, the court has first to consider on receipt of the application whether *prima facie* there is any ground for the rejection of the application. If the application is rejected, the whole matter ends there. If it is not rejected, a notice is to go to the Government Pleader and the respondent, and when they appear the court has to decide on hearing them whether the applicant is in a position to pay the court fee and, further, whether the decree is one which is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust.

(1) (1931) I.L.R., 54 All., 394. (2) (1931) I.L.R., 10 Pat., 606.

1934

SECRETARY OF STATE FOR INDIA IN COUNCIL v. SONKALI

The view taken in the Patna High Court is also the view taken by the learned Chief Justice of the Lahore High Court in *Basant Kuar* v. *Chandulal* (1).

This being our view, the order of the learned Subordinate Judge allowing the opposite party, Musammat Sonkali, to appeal as a pauper, dated the 30th of November, 1932, should be set aside. We order accordingly, set aside that order and send back the case to the learned Subordinate Judge at Jaunpur and direct him to hear the respondent if he appears and the Government Pleader and after hearing them to pass such orders as may be in accordance with law. We make no order as to costs.

MISCELLANEOUS CRIMINAL

Before Justice Sir Lal Gopal Mukerji and Mr. Justice King

HAIDARI BEGAM *v.* JAWAD ALI SHAH*

1934
January, 4

Criminal Procedure Code, section 491—Order not appealable under Letters Patent—Appeal—Letters Patent, clause 10—Costs—Costs of appeal can be awarded though no question of costs could arise on the original matter.

No appeal lies under clause 10 of the Letters Patent of the Allahabad High Court (as amended in 1919) from an order passed upon an application made under section 491 of the Criminal Procedure Code, inasmuch as the order is made in the exercise of criminal jurisdiction.

The High Court can make an order awarding the costs to the respondent of such an appeal, which purported to have been filed under clause 10 of the Letters Patent, though it might be that no question of costs could arise in the original proceeding which was on the criminal side.

Sir *Tej Bahadur Sapru* and Messrs. *S. M. Husain* and *Kalim Jafri*, for the appellant.

Messrs. *Muhammad Ismail* and *Masud Hasan*, for the respondent.

*Appeal No. 34 of 1933, under section 10 of the Letters Patent.

(1) A.I.R., 1929 Lah., 514.