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I would therefore allow this appeal and setting aside the decree of the lower appellate court, restore that of the court of first instance.

HARRIES, J.:—I agree.

FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Thom and Mr. Justice Niamat-ullah

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POWDHARI (PLAINTIFF) *v.* RAM SANWARI AND OTHERS (DEFENDANTS)*

Civil Procedure Code, order XLIV, rule 1, *proviso—Application for leave to appeal as pauper—Issue of notice to opposite party and to Government Advocate—Whether proviso applicable after issue of the notice—Civil Procedure Code, Appendix G, Form No.* 11.

It is open to the court which is dealing with an application for leave to appeal as a pauper, and which has ordered notices to issue to the opposite party and to the Government Advocate, to consider the question whether the application should be rejected under the proviso to order XLIV, rule 1 of the Civil Procedure Code on the ground that the decree appealed from is not contrary to law or to some usage having the force of law nor is otherwise erroneous or unjust; and the court is not precluded from determining such question merely because notices to the opposite party and the Government Advocate have been issued previously.

A mere order directing the notices to issue does not necessarily imply a final adjudication as to the right of the applicant to appeal as a pauper, subject only to his establishing the fact of his pauperism. The court has jurisdiction to order the notices to issue before finally considering the question and making up its mind as to whether the decree appealed from is contrary to law or usage or is otherwise erroneous or unjust. There is nothing in the proviso to order XLIV, rule 1 to compel the court there and then to make up its mind finally and to prevent it from postponing its opinion till counsel for the opposite party or for the Government have been heard.

*Application in First Appeal No. 562 of 1930, from a decree of Bishun Narain Tankha, Additional Subordinate Judge of Gorakhpur, dated the 25th of August, 1930.

Form No. 11 of Appendix G to the Civil Procedure Code makes it clear that when notice has been ordered to be issued to the opposite party the latter is expected to appear and show cause against the whole application, which would necessarily include the question not only whether the applicant is a pauper but also whether the decree appealed from is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust.

Mr. *A. Sanyal*, for the applicant.

Messrs. *Shambhu Prasad*, *Haribans Sahai* and *Shiva Prasad Sinha*, for the opposite parties.

SULAIMAN, C.J., THOM and NIAMAT-ULLAH, JJ.:—In this case the applicant had filed an appeal in this High Court *in forma pauperis*. The case was put up before a Division Bench which made the following order: "Let notice go to the respondents and also to the Government Advocate." When after notices had been served the matter came up for disposal again, an objection was raised that counsel for the respondents and the Government Advocate could not show cause against the applicant being allowed to appeal as a pauper, except in so far as the question of his pauperism was concerned. In view of some conflict of opinion the Division Bench has referred the following question to the Full Bench: "Is it open to a court, hearing an application under order XLIV, rule 1 of the Civil Procedure Code, after issuing notice to the opposite party and the Government Advocate, to consider the question whether the decree appealed from is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust, or is it precluded from determining that question by the fact that the order issuing notice impliedly held that the decree was contrary to law or usage having the force of law or that it was otherwise erroneous or unjust, or is it precluded from considering this question by the fact that notice was issued?" Following certain earlier decisions of the Patna High Court a learned Judge of this Court in *Hubraji* v. *Balkaran Singh* (1) expressed

(1) (1931) I.L.R., 54 All., 394.

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the opinion that when once notice has been issued by the court under order XLIV, rule 1 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, and if it does so the court acts with material irregularity in the exercise of its jurisdiction in rejecting the appeal summarily. Since then a Full Bench of the Patna High Court in *Tilak Mahton* v. *Akhil Kishore* (1) has reviewed the case law and arrived at a contrary conclusion.

In the case of *Masuria Din* v. *Moti Lal* (2) another Division Bench had a case in which notice had first been issued by the court below and then without hearing the counsel for the opposite party or the Government Pleader the court had reviewed its previous order and summarily rejected the appeal, being of the opinion that on a careful perusal of the judgment and the decree there was no reason to think that the decree was contrary to law or otherwise erroneous or unjust. The learned Judges did not in express terms mean to follow the ruling in *Hubraji* v. *Balkaran Singh* (3) because they remarked that they need not consider such cases and would prefer to "decide the matter from another standpoint". They came to the conclusion that the Judge's second opinion was perhaps influenced by certain objections without hearing the pauper upon them and in that view of the matter the order complained of was considered to be without jurisdiction and was set aside. In the course of the judgment YOUNG, J., remarked: "The court has no option but to reject the application, unless, having read the application and the judgment it has definitely come to the conclusion that there is a *prima facie* case to be heard. The court having once come to that conclusion and passed the necessary order issuing notice, it is, in our opinion, *functus officio* as regards a summary dismissal. The Judge cannot thereafter disregard his previous conclusion and order and

(1) (1931) I.L.R., 10 Pat., 606. (2) (1933) I.L.R., 56 All., 268.
(3) (1931) I.L.R., 54 All., 394.

dismiss the application summarily. He is bound before he does anything further to hear the parties." We do not think that the learned Judges meant to say that when a Judge hears the parties he cannot come to a conclusion against the pauper. But if it was intended to lay down that the issue of notice makes the Judge *functus officio*, then with great respect we would not be prepared to agree. Indeed, the Judge cannot become *functus officio* because he has yet to pass an order either disallowing the application or allowing the pauper to appeal.

In the case of *Secretary of State for India* v. *Sonkali* (1) another Division Bench, of which one of us was a member, came to the conclusion that there was nothing to prevent the court from hearing the Government Pleader and rejecting the appeal on the ground that it was not contrary to law or to some usage having the force of law or otherwise erroneous or unjust, even though notice had been previously ordered to be issued But the case of *Masuria Din* v. *Moti Lal* (2) had not been cited before the Bench.

The Madras High Court in *Somasundaram Chettiar* v. *Arunachalam Chettiar* (3) has expressed an opinion which is partly in favour of the applicant before us, but not wholly so. The decision appears to be based to a large extent on the long established practice which prevails in that Court.

It seems to us that when a court, before which an application for leave to appeal as a pauper comes up, merely orders "Let notice go" it does not necessarily make up its mind finally that the judgment is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. There is nothing in the proviso to order XLIV, rule 1 to compel a court there and then to make up its mind finally and prevent it from postponing its opinion till counsel for the opposite party or for the Government have been heard.

(1) (1934) I.L.R., 56 All., 305. (2) (1933) I.L.R., 56 All., 268.
(3) (1932) I.L.R., 55 Mad., 982.

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No doubt there is no express provision in order XLIV, applicable to appeals, for the issue of a notice but the provisions, in so far as they are applicable, contained in order XXXIII ought to be understood to be incorporated inasmuch as rule 1 expressly lays this down. It is therefore difficult to hold that a court has no jurisdiction to order notice to issue before deciding the question. It would follow that it cannot be seriously contended that a mere order directing notice to issue implies a final adjudication as to the right of the applicant to appeal as a pauper, provided he establishes the fact of his pauperism.

Form No. 11, Appendix G, which is part of the Code contains the form of notice of appeal *in forma pauperis* which may be issued under order XLIV, rule 1. In some judgments it has been wrongly supposed that notice on this form is issued under rule 2 and not under rule 1. The form itself expressly states that it is a notice under order XLIV, rule 1. Under this notice the opposite party is called upon to show cause why the applicant should not be allowed to appeal as a pauper and is informed that an opportunity would be given to him of so doing. It is therefore quite clear that when notice has been ordered to be issued to the opposite party the latter is expected to appear and show cause against the whole application, which would necessarily include the question not only whether the applicant is a pauper but also whether the judgment and decree are also contrary to law or to some usage having the force of law or is otherwise erroneous or unjust.

We do not, of course, mean to lay down that the court is bound to issue notice to the opposite party, nor do we lay down that once notice has been issued the court is compelled to hear the opposite party and cannot change its mind and review its previous order under section 151 of the Civil Procedure Code. Our view is that there is nothing to prevent the court from hearing counsel and dismissing the application ultimately on the ground that

the decree and judgment are not contrary to law, etc. even if notice has been issued and parties have appeared through counsel.

Our answer to the question referred to us, therefore, is that it is open to the court to consider the question whether the decree appealed from is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust, and the court is not precluded from determining such question merely because notices to the opposite party and the Government Advocate have been issued previously.

APPELLATE CIVIL

Before Mr. Justice Kendall and Mr. Justice Iqbal Ahmad

ZEBAISHI BEGAM AND OTHERS (DEFENDANTS) *v.* NAZIR-UDDIN KHAN AND ANOTHER (PLAINTIFFS)*

1934 *September, 6*

Civil Procedure Code, order I, rule 9—Non-joinder of a defendant—Suit for possession—Maintainability of suit where want of parties—Abatement of suit, extent of—Civil Procedure Code, order XXII, rule 4.

It is not in every suit for possession that the omission to implead one of the defendants in possession is fatal to the suit. When the interest of the person not made a party to the suit is distinct and separate from the interests of the persons who have been made parties to the suit, the suit is maintainable and there would be no justification for not dealing with the matter in controversy so far as the rights and interests of the parties actually before the court are concerned, as directed by order I, rule 9. In such cases the decree, while operative against the interests of the persons who are parties to the decree, can in no way adversely affect the distinct and separate interest in the subject-matter of the suit of the person who has not been made a party, and it can not, therefore, be rendered infructuous or nugatory at his instance.

The interests acquired by the heirs of a deceased Muhammadan in his property are always definite, distinct and ascertained, and therefore the non-joinder as a defendant of one of the co-heirs in a suit brought by another co-heir for possession

*First Appeal No. 145 of 1930, from a decree of Muhammad Junaid Nomani, Subordinate Judge of Agra, dated the 18th of December, 1929.