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It therefore seems that the case of a brick-field is very similar to that of a quarry or a mine and the proprietor of the land or the lessee is not a mere purchaser of raw materials but a person who has acquired certain rights in the land and the amount invested by him must therefore be treated as capital expenditure within the meaning of section 10(2)(*ix*). The present assessee has agreed presumably to pay some premium and an annual rent for all his rights under the lease, and he or his predecessor might have paid the price of the land purchased. He has really not purchased any raw materials for cash and he cannot be allowed to claim a deduction of the supposed value of the earth taken out of the land as part of the property.

The answer to the question referred to us is therefore in the negative.

REVISIONAL CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Hamilton

MITHAI LAL (APPLICANT) *v.* JAGAN AND OTHERS (OPPOSITE PARTIES)*

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July, 27

Civil Procedure Code, order XXXIII, rule 1, *explanation—"Pauper"—"Possessed of sufficient means to enable" payment of court-fee—Whether the subject-matter of the suit must always be left out of account—Possibility of raising money on the security of the subject-matter—Civil Procedure Code, section* 115*—Material irregularity or illegality in the exercise of jurisdiction—Mere error of law.*

It is not correct to say that in cases coming under the first category mentioned in the explanation to order XXXIII, rule 1, of the Civil Procedure Code, namely cases where a court-fee is prescribed for the plaint, the subject-matter of the suit must always and of necessity be excluded from consideration in deciding the question whether the applicant for leave to sue *in forma pauperis* is or is not possessed of sufficient means to enable him to pay the court-fee; whether it should or should not be so excluded is a matter for the consideration of the

*Civil Revision No. 345 of 1935.

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court in each case. The words used are, "possessed of sufficient means to enable him to pay the fee", and not "possessed of sufficient property, etc."; actual possession of sufficient property is, therefore, not insisted upon. The court can take into consideration the possibility of the applicant's raising money on the security of his interest in the subject-matter of the proposed suit.

So, where the proposed suit was one to recover a share of property belonging to a joint Hindu family, on the allegation that the applicant for leave to sue as a pauper was a member of that family, and the application was refused because the court was not satisfied that the applicant was not able to raise money on the security of his share in the joint property and thereby to pay the court-fee:

Held that the court had taken a correct view of the law and had rightly refused the application.

Held, further, that even if the view of the law taken by the court were erroneous there would be no ground for revision, as the court had not acted with material irregularity or illegality in the exercise of its jurisdiction.

Mr. *G. S. Pathak*, for the applicant.

Mr. *L. M. Roy*, for the opposite parties.

SULAIMAN, C.J., and HAMILTON, J.:—This is an application in revision from an order refusing to grant leave to the applicant to sue as a pauper. The applicant's own case in the plaint was that he was entitled to a large property as a member of the joint Hindu family which yielded a large income but that the same had been denied to him. The learned Judge was not satisfied that the applicant was not able to raise money on the security of his share in the joint property so as to pay the prescribed court-fee and has remarked that "the applicant did not prove that he was not able to raise any money on the security of his share claimed in the suit by partition (and) as such has not the means to pay the fee prescribed."

In revision it is contended that the learned Judge was quite wrong in taking into account the subject-matter in dispute because that property must always be excluded when the question has to be considered

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whether the applicant is a pauper or not. Great reliance is placed on the case of *Bai Balagauri* v. *Motilal Ghellabhai* (1), in which case the plaintiff who had applied for leave to sue *in forma pauperis* was seeking to recover in her suit certain ornaments and maintenance allowance; the defendant actually produced in court the ornaments and cash which he admitted belonged to the plaintiff and which was far in excess of the sum required for the payment of the court-fee. The court below naturally took into consideration this fact and held that the plaintiff was not entitled to sue as a pauper, that she was possessed with means to pay the court-fee. On appeal the learned Judges of the Bombay High Court came to the conclusion that inasmuch as the plaintiff had not actually received the ornaments and cash, she was not possessed of sufficient means to pay the fees, although the ornaments and cash had been deposited in court and had been admitted by the defendant to belong to the plaintiff. We regret we are unable to agree with that decision. The explanation attached to order XXXIII, rule 1 of the Civil Procedure Code consists of two distinct parts, the first relating to the case where a fee is prescribed by law for the plaint and the second to a case where no such fee is prescribed. In the former case the plaintiff would be a pauper when he is not "possessed of sufficient means to enable him to pay the fee"; while in the latter case he would be a pauper when "he is not entitled to property worth Rs.100 other than his necessary wearing apparel and *the subject-matter of the suit.*" It is, therefore, obvious that the legislature has advisedly excluded the subject-matter of the suit in the second case, but has refrained from excluding it in the former case. It is, therefore, not possible to hold that in cases coming in the first category the subject-matter of the suit must always and of a necessity be excluded from consideration. Whether it should or should not be excluded is a matter for the consideration

(1) (1922) I.L.R., 47 Bom., 523.

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of the court which has to decide the question whether the plaintiff is or is not possessed of sufficient means to enable him to pay the fee. The words used are not that the plaintiff should not be possessed of sufficient property to enable him to pay the fee. If such words had occurred, it might well have been argued that it must be established that the plaintiff was in actual physical possession of some property which would yield the necessary amount. But the words used are "possessed of sufficient means to enable him to pay the fee", which in our opinion merely mean that he is able to pay the fee. To lay down that even where the plaintiff can easily obtain possession of ornaments and cash lying to his credit in court he is not possessed of sufficient means, because he has not yet taken delivery of such ornaments and cash, would, in our opinion, be contrary to the intention of the legislature.

Reliance is also placed on a later case of the Calcutta High Court, *Pravash Chandra Lahiri* v. *Municipal Commissioners of Howrah* (1). So far as the facts of that case go there can be no doubt that the plaintiff was a pauper in that case. The suit had been brought for damages for wrongful dismissal and although the defendant had admitted liability to a certain extent, the amount claimed was in the nature of unliquidated damages and was not capable of being transferred in order to give the plaintiff any opportunity for raising money on the security of the subject-matter in dispute. The only other property which he seemed to have possessed was a certain amount lying to his credit in the provident fund which also was not transferable. It is, therefore, obvious that the plaintiff was a pauper, as he could not have raised money on the security of these properties and had no other means to enable him to pay the fee. But the learned Judges seem to have relied strongly on the Bombay case referred to above, with which we are unable to agree, and seem to have laid

(1) (1929) I.L.R., 57 Cal., 980.

down (page 985) that "even in regard to cases coming under the first part of the explanation, the subject-matter of the case cannot be taken into consideration and any amount which is not actually in the petitioner's possession cannot be taken into account in making the calculation". In expressing this view they did not follow the ruling of a learned single Judge of the Madras High Court in *Pokala Mahalakshmi Ammal, In re* (1). In that case the petitioner had obtained a decree for maintenance and had applied for leave to appeal in the High Court *in forma pauperis* as regards the amount disallowed. The judgment-debtor had deposited Rs.571 in court to the credit of the plaintiff as the amount which had been decreed in her favour. The learned Judge held that the plaintiff was possessed of means to pay the court-fee. We entirely concur in that view. If the learned Judges of the Calcutta High Court meant to lay down that the subject-matter of the dispute can not always be taken into account in considering whether the plaintiff is possessed of sufficient means to enable him to pay the fee or not, then we would have no quarrel with that view; but we are unable to agree with the view that the subject-matter in dispute can in no circumstances be taken into consideration even if the case falls under the first part of the explanation.

Quite apart from this we also think that there has been no material irregularity in the exercise of jurisdiction committed by the court below. The court has duly considered this point and has come to the conclusion that the plaintiff had means to pay the court fee. Even if it had committed an error of law, which it has not done in this case, we would not have interfered in revision, as an error of law would not amount to material irregularity in the exercise of jurisdiction. The application is accordingly dismissed with costs.

(1) (1925) 50 M.L.J., 114.