1939

JANAK DULARI v. SRI GOPAL

of India Act or orders in Council made thereunder in accordance with the provisions of section 205(1) for such certificates. As Dr. *Sen* has failed to show us any justification in section 317 or the ninth schedule for the argument which he put forward, we cannot say that this question was a substantial question of law and therefore we regret that we cannot grant the respondents the certificate under section 205(1).

Before Justice Sir Edward Bennet and Mr. Justice Verma

RAM KAILASH KUNWARI (PLAINTIFF) *v.* ISHWAR SARAN AND OTHERS (DEFENDANTS)*

1939
August, 10

Civil Procedure Code, order XLIV, rule 1, *provisos—Pauper appeal—Notice to proposed respondent—Object of notice—No right to be heard on the legality or correctness of the decree appealed from—"Perusal".*

On an application under order XLIV, rule 1, of the Civil Procedure Code to be allowed to appeal as a pauper, the proposed respondent to whom notice has been issued has no right whatever to be heard at any stage of the proceedings under order XLIV, rule 1 on the merits of the proposed appeal, i.e. as to whether the decree appealed from is or is not contrary to law or otherwise erroneous or unjust. All that he can argue is on the question of whether the appellant is or is not a pauper.

The word "perusal" in the proviso to rule 1 of order XLIV implies that the matter is not to be the subject of argument by counsel and that there is no right of counsel to argue. At the most it may be argued that the court may, if it desires, obtain the assistance of counsel, but the court is not bound to hear counsel on the point.

The addition, by rules framed by this High Court, of a further proviso to rule 1 of order XLIV, in the following terms, "Provided further that no application under this rule shall be allowed unless a notice of the application has been given to the proposed respondents", does not imply that the notice shall entitle the respondents to argue the matters referred to in the proviso to rule 1. Order XXXIII, rule 6, read with the concluding portion of order XLIV, rule 1, provided for the giving of such notice.

---

*Application in First Appeal No. 227 of 1939.

1939

RAM KAILASH KUNWARI v. ISHWAR SARAN

Mr. *Sri Narain Sahai*, for the applicant.

Mr. *Baleshwari Prasad*, for the opposite parties.

Mr. *S. K. Dar*, for the Crown.

BENNET and VERMA, JJ.:—This is an application of an unsuccessful plaintiff to appeal as a pauper. She was allowed to sue as a pauper in the court below. By our order of the 5th of September, 1938, we stated: "We have gone through the judgment of the court below and the application for leave to appeal as a pauper. We consider that it has been established that the case does come within the provisions of the order of pauper appeals. Accordingly we direct that notice should issue to the opposite party to show cause why this application should not be allowed. The notice will be solely on the question as to whether the appellant is or is not a pauper." Notice was also to issue to the learned Government Advocate. Today the Standing Counsel for Government states that he does not desire to oppose the application. In fact, under the provisions of order XLIV, rule 2, no notice need have been issued. Mr. *Baleshwari Prasad* for the respondents has objected to the previous order and claims that he is entitled to argue on the merits of the proposed appeal and to show that it does not come under the proviso to order XLIV, rule 1. He refers for this proposition to a Full Bench ruling, *Powdhari* v. *Ram Sanwari* (1). In that case the referring order shows, at page 962: "By the order issuing notice the Division Bench did not express any opinion as regards 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." The Full Bench decided that under these circumstances the mere issue of notice did not preclude the Bench hearing the matter after the issue of notice from considering 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. On page 965 the Full Bench

(1) [1934] A.L.J. 961; I.L.R. 57 All. 440.

further observed: "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 Code of Civil Procedure." The Full Bench therefore does not support the proposition advanced by Mr. *Baleshwari Prasad*. Mr. *Baleshwari Prasad*, however, points out that the Rules framed by this High Court contain an amendment to this order XLIV, rule 1 as follows: "Provided further that no application under this rule shall be allowed unless a notice of the application has been given to the proposed respondents." This amendment, he states, is not mentioned by the Full Bench ruling and he argues that it was not brought to the notice of the Full Bench. The amendment is dated prior to the Full Bench ruling, as the amendment is dated the 14th of January, 1933, and the Full Bench ruling is of the 3rd of September, 1934, almost two years subsequent. There is a passage on page 964 in the Full Bench ruling which states: "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 down." This refers to the words in rule 1 "subject, in all matters, including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable." Obviously the provisions in order XXXIII, rule 6 in regard to notice are applied in this manner to order XLIV, rule 1. The amendment on which counsel lays stress makes provision only for notice to the respondent and makes no provision for notice to the learned Government Advocate or Standing Counsel, which is contained in order XXXIII, rule 6, and which is the practice of this Court in cases where the proposed appellant has not been permitted to appear as a

1939

RAM KAILASH KUNWARI v. ISHWAR SARAN

pauper in the court below. The Full Bench therefore was perfectly correct, in our opinion with due respect, in referring to the provisions of order XXXIII for the issue of notice. Now the argument of learned counsel is that the amendment directing notice to issue to the respondent implies that the notice shall entitle the respondent to argue the matters referred to in the proviso to rule 1. If this had been the intention of this High Court in adding an amendment to order XLIV, rule 1, we consider that the amendment would have stated this matter plainly and that the amendment would have altered the wording of the first proviso. The wording of the proviso has not been altered and it directs the court to reject the application unless upon a perusal thereof and of the judgment and decree certain matters appear to the court. Now the word "perusal" implies that this is not to be the subject of argument by counsel and that there is no right of counsel to argue. At the most it may be argued that the Full Bench ruling states that the court may, if it desires, obtain the assistance of counsel. But the Full Bench ruling nowhere lays down that the court is bound to hear counsel on the point. The procedure in order XXXIII shows that there is rejection of an application to sue as a pauper under rule 5 and this may be based on rule 5, sub-rule (*d*) "where his allegations do not show a cause of action"; that is, the trial court may examine the merits of the proposed plaint but it does not examine those merits after hearing counsel for each side on the subject. To hear counsel for each side on the merits of the proposed appeal would be tantamount to giving some decision on the merits of the appeal. In our opinion, this is exactly what order XLIV, rule 1, proviso, is designed to avoid. The course is objectionable, firstly because such an expression of opinion by an appellate court after hearing counsel is something which will prejudice one party or the other, and, secondly, this would introduce a difference between the procedure of the trial court and of the appellate court.

1939

RAM KAILASH KUNWARI v. ISHWAR SARAN

For these reasons we think that there are no merits in the argument of learned counsel for the respondents and that he has no right whatever to be heard at any stage of the proceedings under order XLIV, rule 1 on the merits of the proposed appeal. All that he can argue is on the question of whether the proposed appellant is or is not a pauper and on that point he has not brought any affidavit or other materials. He asked for further time. The order was dated nearly a year ago, on the 5th of September, 1938. We think there are no merits in the request for further time. As already pointed out, in the present case the appellant sued as a pauper and under order XLIV, rule 2, proviso, the issue of notice was not necessary.

We accordingly hold that the applicant is a pauper and we allow the applicant to appeal as a pauper.

Before Sir John Thom, Chief Justice, and Mr. Justice Ganga Nath

1939
August, 11

DHANDEI KUAR (PLAINTIFF) *v.* FATMA ZOHRA AND OTHERS (DEFENDANTS)*

Abatement—Abatement of appeal as a whole upon abatement as against one respondent—Where two inconsistent decrees would otherwise result or decree be incapable of effectual execution—Cause of action and relief jointly against several persons—Civil Procedure Code, order XXII, rules 4, 11.

Where in an appeal the absence of the legal representatives of a deceased respondent from the record will result in the possibility of two inconsistent and contradictory decrees or will make it impossible effectually to execute a decree that may be passed in the appeal, the appeal must abate not only as against the deceased respondent but must abate as a whole. Whether this result will follow or not will depend on the nature of the relief granted by the decree appealed against. Where the cause of action is based on the joint act of several defendants and a joint relief is sought by the plaintiff against all the defendants, there in the absence of the legal representatives of a deceased defendant respondent the whole appeal must fail.

*Appeal No. 38 of 1938, under section 10 of the Letters Patent.