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complaint made under section 145 is equally foreign to the provisions of the Code of Criminal Procedure.

The result therefore is that I allow this application and quash the proceedings under section 145 of the Code of Criminal Procedure pending in the Court of the Railway Magistrate.

Application allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice Ziaul Hasan

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SHEO SHANKAR AND OTHERS (PLAINTIFFS-APPELLANTS) *v.* MUSAMMAT RAM DEI AND OTHERS (DEFENDANTS-RESPONDENTS)*

Civil Procedure Code (Act V of 1908), section 149—Limitation Act (IX of 1908), section 5—Appeal filed without court-fee but with an application for permission to appeal as pauper —Application rejected—Court-fee tendered after limitation— Appeal, if within time—Evidence—Will—Proof of signature of testator, necessity of—Attesting witnesses should be called or their absence accounted for.

Where an appeal is filed within time but without court-fee and with an application for permission to appeal as pauper and, that application being rejected, the court-fee is tendered after the expiration of the period of limitation for filing the appeal, the appeal is not time-barred. Section 149, Civil Procedure Code, gives the Court a discretion to allow the payment of the court-fee at any stage, and when the court-fee is paid it has the same effect as if it had been paid in the first instance. Even if section 149 has not this effect, it would be a case for the application of section 5 of the Limitation Act.

In cases of dispute as to the signature of a will the best evidence procurable that it was signed by the alleged testator should be furnished and the attesting witnesses should be called or their absence accounted for. Evidence that the signature on the will appeared to be genuine is of little worth in the absence of satisfactory evidence by witnesses present when the will is purported to have been signed. *Rajendra Prasad*

*First Civil Appeal No. 89 of 1933, against the decree of Sh. Mohammad Baqar, Subordinate Judge of Rae Bareli, dated the 20th of February, 1933.

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Bose v. *Gopal Prasad Sen* (1), relied on. *Bishnath Prasad* v. *Jagarnath Prasad* (2), *Bai Ful* v. *Desai Manorbhai Bhavanidas* (3), and *Nellavadivu Ammal* v. *Subramania Pillai* (4), referred to. *Ram Gopal Lal* v. *Aipna Kunwar* (5), followed.

Messrs. *Rajeshwar Prasad* and *D. K. Seth*, for the appellant.

Messrs. *Ram Bharose Lal*, *Salig Ram* and *Suraj Sahai*, for the respondents.

SRIVASTAVA and ZIAUL HASAN, JJ.:—This is an appeal against a judgment and decree of the learned Subordinate Judge of Rae Bareli, dated the 20th of February, 1933, dismissing the suit of Sheo Shankar and Kanhaiya Lal, plaintiffs-appellants, for possession of certain plots of land and for mesne profits.

The said plaintiffs are sons of one Parbhoo, who had a brother named Paragi, who pre-deceased him. On the death of Parbhoo the entire property left by him was mutated in the name of his widow, Musammat Ram Dei, defendant-respondent No. 1. The property in suit consists of various plots of land situated in different villages. The defendants-respondents Nos. 2 to 18 are transferees of different plots from Paragi, Parbhoo and Musammat Ram Dei.

The plaintiffs' case was that the property in suit was the joint ancestral property of their family and that their father, uncle and mother had no power to transfer any portion of it. They also stated that the transfers in favour of the different defendants were made without consideration and legal necessity and were not therefore binding on them, who as survivors of their father are entitled to possession of the plots in dispute. Some of the defendants, including Musammat Ram Dei did not contest the suit. The others raised various pleas in defence. They denied that the property in dispute was the joint ancestral property of the plaintiffs' family and alleged that by a will executed by Parbhoo in

(1) (1929) 115 I.C., 678. (2) (1891) I.L.R., 13 All., 305.
(3) (1898) I.L.R., 22 Bom., 849. (4) (1917) I.L.R., 40 Mad., 687.
(5) (1922) L.R., 49 I.A., 413.

favour of his wife Musammat Ram Dei, she became the absolute owner of all the property left by her husband and that therefore the plaintiffs could not challenge the transfers made by their uncle, father and mother. There were other pleas based on section 41 of the Transfer of Property Act, on the transfers being made for legal necessity, etc.

The learned Subordinate Judge framed ten issues on the pleas raised by the defendants. He disposed of the case on issues 1, 3 and 4 which were as follows:

(1) Is the property in suit the joint and ancestral property of the plaintiffs, their father and uncle?

(3) Did Parbhoo execute any will in favour of his wife as alleged by the defendants and was he competent to execute the same?

(4) Was Parbhoo of sound disposing mind on the day of its alleged execution?

On the first issue the Court below held that it was not proved that the property in suit was the joint ancestral property of the plaintiffs' family. On issues 3 and 4 its finding was that Parbhoo did execute the will set up by the defendants in favour of his wife Ram Dei and that he was of sound disposing mind at the time of executing it. On these findings the learned Subordinate Judge dismissed the plaintiffs' suit and did not go into the other issues.

The plaintiffs have brought this appeal and we have to see how far the lower Court's findings on which the suit has been dismissed are correct.

A preliminary objection to the hearing of the appeal was taken on behalf of the respondents on the ground that the appeal was barred by time. The trial Court decided the case on the 20th of February, 1933. On the 20th of March, 1933, the appellants filed this appeal without any stamp and at the same time put in an application for permission to appeal as paupers. This application was, however, rejected by this Court on the 12th of July, 1933. It may be noted that no orders

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were passed on that date on the appeal. The application for permission to appeal *in forma pauperis* was rejected on the ground that there was no reason to think that the decree of the lower Court was contrary to law or was otherwise erroneous or unjust. On the 8th of August, 1933, the plaintiffs tendered the requisite Court-fee and it was accepted subject to any objections that the respondents might make as to limitation.

It was argued before us that as the appeal filed on the 20th of March, 1933, bore no Court-fee stamp, it was practically no appeal at all and that the payment of the Court-fee four or five months later could not revive that appeal. We are not prepared to accept this argument. It is a matter of daily practice in Courts that plaints and memoranda of appeals are filed on insufficiently stamped paper and the deficiency in Court-fee is made good after the expiry of the period of limitation and the suit or appeal is treated as having been brought within time. In principle there is no difference between a plaint or memorandum of appeal bearing no Court-fee stamp at all and those bearing insufficient Court-fee. Exactly the same argument which is raised before us was advanced in the Patna High Court in the case of *Rajendra Prasad Bose* v. *Gopal Prasad Sen* (1) but MULLICK and ROSS, JJ., after reviewing the cases of *Bishnath Prasad* v. *Jagarnath Prasad* (2), *Bai Ful* v. *Desai Manorbhai Bhavanidas* (3) and *Nellavadivu Ammal* v. *Subramania Pillai* (4), held that the weight of authority was against the view that the appeal filed with no Court-fee stamp should be deemed a nullity. They also pointed out the distinction between an application for leave to sue as a pauper and an application for leave to appeal as such, and ROSS, J., in his judgment with which MULLICK, J., agreed, remarked:

> "In my opinion, therefore, there is an appeal before the Court which was presented within the

(1) (1929) 115 I.C., 678.
(2) (1891) I.L.R., 13 All., 305.
(3) (1898) I.L.R., 22 Bom., 849.
(4) (1917) I.L.R., 40 Mad., 687.

time limited by law; but as no part of the court-fee has been paid, section 149 under which the present application was made, gives the Court a discretion to allow the payment at any stage; and when payment is then made, it will have the same effect as if it had been made in the first instance. Even if section 149 had not this effect, this would, in my opinion, be a case for the application of section 5 of the Limitation Act."

We are in entire agreement with the view expressed in the above case and therefore hold that the appeal is not barred by limitation.

Coming now to the merits of the case, there are two points which require decision in this appeal. The first is whether or not the property in suit was the joint ancestral property of the plaintiffs' family and the second is whether the suit should fail by reason of the will said to have been executed by Parbhoo in favour of his wife Musammat Ram Dei. We take up the question of the will first

The alleged will is printed at page 128 of the paper book and the certified copy of it which was produced by the defendants is exhibit B4. It purports to create an absolute estate in favour of Musammat Ram Dei in respect of the entire property movable and immovable which should be left by the executant after his death. With regard to the sons it says:

> "I, the executant, have two minor sons but even in their minority their behaviour is not good. They are of loose character and so it cannot be expected of them that in future they would be able to manage the property satisfactorily, rather they would waste it, so with this end in view I have fully considered and thought over the matter and decided that if I make a will in favour of my wife she will manage my property well and keep it and perpetuate the name of my ancestors . . . ."

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The first objection taken by the learned counsel for the plaintiffs-appellants to this will is that the original has not been produced. As, however, the original of the will should be expected to be in the possession of Musammat Ram Dei, who is own mother of the plaintiffs and in view of the other circumstances proved in the case we think that the defendants can prove it by producing a certified copy. The next objection is, and we consider it a very valid one, that the execution of the will by Parbhoo has not been proved. Six witnesses, namely, D. W. 2, D. W. 3, D. W. 5, D. W. 6, D. W. 7, and D. W. 16 were produced in proof of the alleged will but none of them with the exception of D. W. 16 can swear that it was signed in his presence by Parbhoo. D. W. 16 is Kedar Nath, but his evidence does not convince us not only because being himself a defendant, he is a most interested witness but also because he makes conflicting statements on the point in question. At one place he stated:

> "Parbhoo made the thumb-mark on the deed. The will was read over to Parbhoo. It was registered and the sub-registrar also read it over to Parbhoo,"

but in cross-examination he said:

> "I was not present at the time of the registration of the will . . . At about 11 or 11.30 a.m. I left that place where the deed was being executed in order to file my notices and Parbhoo went to get his will registered. After that I did not see Parbhoo. I do not know whether the deed was read over or not by the sub-registrar as I did not go there."

Further on he says:

> "If I had stated otherwise in my examination-in-chief, it must be wrong."

It is thus clear that little reliance can be placed on Kedar Nath's evidence in proof of the fact that it was Parbhoo who executed the will in question. On behalf

of the respondents reliance was also placed on the evidence of Bhola, P. W. 1 and Musammat Umrai, D. W. 1 in proof of the alleged will. What the plaintiffs' witness Bhola stated was that he heard that Parbhoo executed a will in favour of his wife. This statement being hearsay is no evidence at all. Musammat Umrai D. W. 1 is no doubt the widow of plaintiffs' uncle Paragi. She speaks of his being taken to Maharajganj in a cart "for registration of the will" but all that this can prove is that Parbhoo was taken to Maharajganj a day or two before his death. In fact there is other evidence on the record to show that he was taken to Maharajganj hospital for treatment. This does not necessarily prove that it was Parbhoo who executed the will in question and got it registered at Maharajganj. It may also be noted that Musammat Umrai cannot but be a hostile to the plaintiffs as she says that—

> "Some seven or eight days ago, Jodhi Tewari told me that plaintiffs have attributed unchastity to me."

The evidence produced by the defendants-respondents in proof of the will does not, in short, satisfy us. On the other hand there are circumstances which raise suspicions against the genuineness of the will. In the first place both the sons of Parbhoo were admittedly minors on the date of the will, the elder Sheo Shankar being at most fifteen years of age according to the evidence on the record, and it seems very strange that Parbhoo should have been so convinced of their immoral character as to try to disinherit them. In the second no good reason has been shown why Balli the surviving attesting witness or Badri Prasad who identified the executant before the sub-registrar were not produced. In the case of *Ram Gopal Lal* v. *Aipna Kunwar* (1) it was held by their Lordships of the Judicial Committee that in cases of dispute as to the signature of a will the best evidence procurable that it

(1) (1922) L.R., 49 I.A., 413.

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was signed by the alleged testator should be furnished and the attesting witnesses should be called or their absence accounted for. Their Lordships further remarked that evidence that the signature appeared to be genuine was of little worth in the absence of satisfactory evidence by witnesses present when the will is purported to have been signed. Judging the evidence on the record about the will in question in this case by this standard, we are clearly of opinion that it has not been proved.

We now take up the question whether or not the plaintiffs have succeeded in proving that the property in dispute is their joint ancestral property. The plaintiffs have produced khewats to show the extent of shares possessed by their alleged ancestors. The learned Subordinate Judge was of opinion that it was not proved that those in whose names shares were recorded in the khewats were the plaintiffs' ancestors or that the plots in suit were comprised in those shares. As to the first point we think that the genealogical table attached to their plaint by the plaintiffs has been sufficiently proved by the evidence of P. W. 1 Bhola and by the certified copy of the pedigree (exhibit 11) given in the khewat of village Chak Mirzapur. Bhola proves the pedigree up to Kalka and Gurdin whom he swears to have seen and the rest of the pedigree is proved by exhibit 11. In the case of *Musammat Sarju Dei* v. *Ram Harakh* (1) a similar pedigree taken from the settlement record was held to be a public document and admissible in evidence. On the second point, however, we agree with the trial Court that there is no evidence on the record to show that the plots in dispute were comprised in the shares recorded in the names of the plaintiffs' ancestors. This is not, however, fatal to the entire suit of the plaintiffs. As we have held that the will set up by the defendants-respondents has not

(1) (1913) 18 I.C., 250.

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been proved and as it has been admitted before us that Musammat Ram Dei's title to the property left by Parbhoo rested solely on that will, it follows that the plaintiffs are entitled to the plots transferred by Musammat Ram Dei subject, of course, to the defence that the respondents can take up with respect to those plots.

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As the finding of the trial Court on the question of the will has been reversed, the case must go back to that Court for trial on the merits. We, therefore, remand the case under order XLI, rule 23 of the Code of Civil Procedure. The case will be tried in respect of the plots of land transferred by Musammat Ram Dei and full opportunity will be given to the respondents to put up all possible defences to the claim. Costs will abide the result.

Case remanded.

APPELLATE CIVIL.

Before Mr. Justice C. M. King, Chief Judge and Mr. Justice E. M. Nanavutty

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MUSAMMAT SARWAR ARA BEGAM (PLAINTIFF-APPELLANT) *v.* NAWAB BAHADUR ALI KHAN AND OTHERS, DEFENDANTS AND OTHERS (PLAINTIFF-RESPONDENTS)*

Mohammadan Law—Marriage—Muta—*Co-habitation after expiry of* muta *period—No evidence of fresh agreement of* muta *—Presumption that* muta *continued.*

If it is once proved that co-habitation originated after a *muta* marriage, the proper inference, in default of evidence to the contrary, is that the *muta* continued during the whole period of co-habitation. Where, therefore, co-habitation is continued after the expiry of the term of a *muta* marriage, it must be presumed that the term of the *muta* has been extended, even if there is no evidence to that effect, and the children born of such co-habitation must be held to be legitimate.

Messrs. *Zahur Ahmad* and *Habib Ali Khan,* for the appellant.

*First Civil Appeal No. 26 of 1933, against the decree of Pandit Braj Kishen Topa, Subordinate Judge of Malihabad at Lucknow, dated the 23rd of December, 1932.