

REVISIONAL CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Acting Chief
Judge and Mr. Justice G. H. Thomas

ASA RAM (APPLICANT) *v.* MUSAMMAT GENDA AND OTHERS
(OPPOSITE-PARTY)*

1931
September,
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Civil Procedure Code (Act V of 1908), section 115 and order 33 rule 5(e)—Pauper application—Revision against order rejecting application to sue as pauper—Applicant entering into agreement to transfer property in suit—Agreement not subsisting and effective at time of application, no bar to grant of pauper application.

A revision is maintainable under section 115 of the Code of Civil Procedure against an order rejecting an application to sue as a pauper, as the order constitutes a complete decision of the case so far as that court is concerned. *Piare Lal v. Bhagwan Das* (1), and *Ramachandra Raju v. (Dandu) Venkiah* (2), *Mahadeo Sahai v. The Secretary of State for India in Council* (3), referred to

Order 33 rule 5, sub-clause (e) renders applications for permission to sue as a pauper liable to rejection only if the agreement contemplated by that sub-clause is an agreement which is subsisting and effective at the time of the application. Where such agreement is no longer subsisting and effective at the time when the application is made it cannot stand in the way of the plaintiff being allowed to sue as pauper.

Dr. *Qutub Uddin*, for the applicant.

Mr. *K. P. Misra*, for the opposite party.

SRIVASTAVA, A. C. J., and THOMAS, J.:—This is an application for revision of an order of the learned Additional Subordinate Judge of Bara Banki refusing to allow the applicant to sue as a pauper.

A preliminary objection has been raised to the effect that the application is not maintainable under section 115 of the Code of Civil Procedure as there is no case which has been decided by the lower court within the

*Section 115 Application No. 45 of 1933, against the order of Babu Surendra Vikram Singh, Additional Subordinate Judge of Bara Banki, dated the 21st of April, 1933.

(1) (1933) A.I.R., All., 295.

(2) (1927) A.I.R., Mad., 441.

(3) (1922) I.L.R., 44 All., 248.

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meaning of that section. Reliance has been placed upon the remarks of WALSH, J., in *Mahadeo Sahai v. The Secretary of State for India in Council* (1) in support of this objection. It may be pointed out that MR. JUSTICE PIGGOTT, the other member of the Bench which decided that case, left the question open. In a case like this no suit comes into existence until the application for leave to sue as a pauper has been accepted and the petition registered as a plaint. The result of the dismissal of the application was that no suit ever came to be instituted and the only matter before the lower court was the proceeding for the determination of the question of pauperism. The result of the dismissal of the application was to put an end to this proceeding. In the circumstances, these proceedings themselves constituted a case and the order of the lower court rejecting the application constituted a complete decision of the case so far as the lower court was concerned. The same view appears to have been taken by a Bench of the Allahabad High Court in *Piare Lal v. Bhagwan Das* (2) and by a single Judge of the Madras High Court in *Ramachandra Raju v. (Dandu) Venkiah* (3). We accordingly overrule the objection.

Next as regards the merits of the application, the learned Subordinate Judge found on the evidence adduced by the parties that "the plaintiff is indeed a pauper inasmuch as he is not possessed of sufficient means to enable him to pay the court-fee on his plaint". He however rejected the application on the ground that the plaintiff had, on 16th May, 1923, executed a deed in favour of two persons,—Ram Dass and Parwani—transferring to them a 10 annas 8 pies share in the property in suit. He was of opinion that the plaintiff having executed the deed could not be allowed to sue as a pauper by reason of the provisions of Order XXXIII, rule 5, sub-clause (e) of the Code of Civil Procedure. This sub-clause provides that an application for permission to

(1) (1922) I.L.R., 44 All., 248.

(2) A.I.R., (1933) All., 295.

(3) A.I.R., (1927) Mad., 441.

sue as a pauper shall be rejected where the applicant has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter. We are of opinion that the agreement contemplated by this sub-clause is an agreement which is subsisting and effective at the time of the application. The plaintiff's application shows that he claims the property in suit by right of survivorship, the cause of action for the suit having arisen on the death of Sheo Ghulam which took place on 9th September, 1920. The sale-deed, dated the 16th of May, 1923, shows that it was executed for a consideration of Rs.6,000 out of which Rs.5,473 were left with the vendees for the expenses of the proposed suit. It was stated in terms that the vendors namely the plaintiff and his father, had no funds to institute a suit to recover the property they had become entitled to on the death of Sheo Ghulam and that they sold the 10 annas 8 pies share in order to raise funds for the suit. The plaintiff made the application for being allowed to sue as a pauper on 8th September, 1932, which was the last day of limitation for the institution of the suit. It is, therefore, perfectly clear that the vendees, during the nine years following the execution of the sale-deed, took no steps to institute the contemplated suit and that the plaintiff was, therefore, compelled to make the present application on the last day of limitation. One of the vendees was examined as a witness by the defendants and he stated that he had given up the sale-deed. It seems to us clear that the agreement in question was no longer subsisting or effective at the time when the application was made; it cannot, therefore, stand in the way of the plaintiff being allowed to sue as a pauper.

The learned Counsel for the defendants also questioned the finding of the lower court about the plaintiff being a pauper. The finding is one of fact and is fully

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supported by evidence. We, therefore, see no ground to go against it in revision.

The result, therefore, is that we allow the application with costs, set aside the order of the lower court and grant the application for permission to sue as a pauper. The application shall now be numbered and registered as a suit.

Application allowed.

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MESSRS. RAM CHANDRA AND BROTHERS, THROUGH MR. RAM CHANDRA (APPLICANT) v. THE CONTINENTAL STORES AND AGENCY CO., LTD. (OPPOSITE-PARTY)*

Arbitration Act (IX of 1899), section 8(2) and 6 and schedule I—Intention of parties that submission should be to more than one arbitrator—First provision of schedule I does not apply—Court cannot appoint an arbitrator under section 8(2).

Where the intention of the parties is that the submission should be to more than one arbitrator and not to a single arbitrator the first provision of the first schedule of the Arbitration Act has no application and the court has no jurisdiction to appoint an arbitrator under section 8, clause 2 of the Act.

Mr. S. N. Roy, for the applicant.

Mr. Anant Prasad Nigam, for the opposite party.

SRIVASTAVA, A. C. J., and THOMAS, J.:—This is an application for revision of an order dated the 15th of March, 1932, of the learned District Judge of Unao dismissing the applicants' application for appointment of an arbitrator under section 8 clause (2) of the Indian Arbitration Act (IX of 1899).

The facts of the case are that in July, 1930, the parties entered into an agreement whereby the applicants were appointed as the sole selling agents for cigarettes manufactured by the opposite party for a period of three

*Section 115 Application No. 97 of 1932, against the order of Mr. H. Collister, I.C.S., District Judge of Lucknow, dated the 15th of March, 1932.