

FULL BENCH

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge,
Mr. Justice E. M. Nanavutty and Mr. Justice Ziaul Hasan

1936
November, 23

ZALIM AND OTHERS (DEFENDANTS-APPELLANTS) v. BABU TIRLO-
CHAN PRASAD SINGH (PLAINTIFF-RESPONDENT)*

Civil Procedure Code (Act V of 1908), order XXII, rule 5—Legal representative of a deceased party, determined under order XXII, rule 5—Decision, whether operates as res judicata—Separate suit for determination of legal representative, if barred.

Held, that the determination of the question whether a certain person is, or is not, the legal representative of a deceased party in a proceeding under order XXII, rule 5 of the Code of Civil Procedure, does not operate as *res judicata* so as to preclude the same question from being re-agitated in a separate suit. *Jai Narain v. Ram Deo* (1), overruled. *Antu Rai v. Ram Kinkar Rai* (2), *Chiragh Din v. Dilawar Khan* (3), *Samsariusa Sarvathi Palekhan Erukkapakkan v. Pathumma* (4), and *Laxmi alias Godi v. Ganpat* (5), referred to and relied on. *Raj Bahadur v. Narain Prasad* (6), *Parsotam Rao v. Janki Bai* (7), *Ram Sarup v. Moti Ram* (8), *Rampal Singh v. Abdul Hamid* (9), *Pakkai, S. E. v. Pathumma, M. K.* (10), *Bala Bai v. Ganesh* (11), *Venkatakrishna Reddi v. Krishna Reddi* (12), *Raoji Bhikaji Kondkar v. Anant Laxman* (13), and *Dumi Chand v. Arja Nand* (14), referred to.

The case was originally heard by a Bench consisting of NANAVUTTY and SMITH, JJ. who referred the question involved, to a Full Bench for decision. The referring order of the Bench is as follows:

NANAVUTTY and SMITH, JJ.: This is a defendants' appeal against an appellate judgment and decree of the court of the learned Subordinate Judge of Partabgarh upholding the judgment and decree of the court of the Munsif of Kunda at Partab-

*Second Civil Appeal No. 198 of 1934, against the decree of Thakur Surendra Vikram Singh, Civil Judge of Partabgarh, dated the 13th of April, 1934, confirming the decree of S. Abbas Raza Rizvi, Munsif of Kunda at Partabgarh.

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| (1) (1933) I.L.R., 8 Luck., 477. | (2) (1936) A.L.J., 622. |
| (3) (1934) 154 I.C., 985. | (4) (1913) 20 I.C., 950. |
| (5) (1920) 62 I.C., 303. | (6) (1926) I.L.R., 48 All., 422. |
| (7) (1905) I.L.R., 28 All., 109. | (8) (1920) I.L.R., 1 Lah., 498. |
| (9) (1928) A.I.R., Oudh, 362. | (10) (1913) M.W.N., 673. |
| (11) (1902) I.L.R., 27 Bom., 162. | (12) (1925) I.L.R., 49 Mad., 450. |
| (13) (1918) I.L.R., 42 Bom., 535. | (14) (1915) I.L.R., 37 All., 272. |

garh decreeing the plaintiff's suit with costs. This appeal first came up for hearing before a learned single Judge of this Court, who, by his order, dated the 22nd of April, 1936, referred to it a Bench of two Judges under section 14(2) of the Oudh Courts Act.

The facts out of which this second appeal arises are briefly as follows:

On the 20th of April, 1873, Basti Lal and others mortgaged their under-proprietary rights in plot no. 160/81 of the first regular settlement in village Golapur to Ruchi Pasi. The superior proprietor, the taluqdar of Amargarh, obtained a decree against the under-proprietors, Basti Lal and others, and in execution of the decree the under-proprietary rights of these persons were sold and purchased by the taluqdar himself. Subsequently the Amargarh estate came under the management of the Court of Wards and on the 23rd of December, 1903, the Court of Wards in charge of the Amargarh estate sold village Golapur to Rai Krishna Prasad Singh, taluqdar of Bhadri, who by his will gave this village Golapur to the plaintiff. Before the filing of the present suit, the plaintiff's father Rai Krishna Prasad Singh, brought a suit on the 16th of January, 1920, for redemption of the mortgage in favour of Ruchi Pasi. The case was fixed for hearing on the 20th of April, 1920. The suit was dismissed on the same day for default under order 9, rule 8 of the Code of Civil Procedure (see exhibit C-1). Babu Tirlochan Prasad Singh, the plaintiff of the present suit, applied for substitution of his name in place of his deceased father, Rai Krishna Prasad Singh on the 20th of August, 1920. This application was dismissed on the 18th of December, 1920. An appeal was filed before the District Judge, but it was also dismissed, and in second appeal the Judicial Commissioner, on the 22nd of November, 1922, dismissed the appeal of Babu Tirlochan Prasad and confirmed the order dismissing the plaintiff's application for substitution of his name in place of his deceased father Rai Krishna Prasad Singh. Subsequently, on the 18th of April, 1933, the present suit was filed by the plaintiff Babu Tirlochan Prasad Singh for redemption of the mortgage-deed, dated the 20th of April, 1873, executed by Sheopaltan Lal, Basti Lal, Buddhu Lal and Ganpat Lal in favour of Ruchi Pasi. The plaintiff in his plaint alleged that his father had sued for redemption, but owing to a legal flaw, he withdrew his suit on the 19th of December, 1919, with permission to file a fresh suit. This allegation of the plaintiff is categorically denied by the defendants, who alleged that the father of the plaintiff filed

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a suit on the 16th of January, 1920, against the defendants and other heirs of Ruchi Pasi for redemption of the mortgage in suit, which was dismissed on the 20th of April, 1920, in the presence of the defendants and in the absence of the plaintiff, and that that order of dismissal is a bar to the filing of the present suit. It would appear that the plaintiff in his plaint refers to the previous suit for redemption filed by his father (suit no. 253 of 1919) which Rai Krishna Prasad Singh withdrew with liberty to bring a fresh suit on the 19th of December, 1919, because of certain legal defects (see exhibit 16). Subsequently the plaintiff's father filed a fresh suit on the 16th of January, 1920, and that suit was dismissed for default under order 9, rule 8 of the Code of Civil Procedure on the 20th of April, 1920 (see exhibit C-1). Upon the pleadings of the parties the learned Munsif in the present suit framed the following issues:

- “1. Is the plaintiff successor-in-title of the mortgagors as alleged?
2. Is the mortgage-deed in question genuine?
3. Is the present suit barred as pleaded?
4. On payment of what amount is the plaintiff entitled to redeem?”

The learned Munsif answered the first three issues in favour of the plaintiff, and he accordingly decreed the plaintiff's suit for redemption on payment of Rs.72-6. The defendants appealed, and in appeal the learned Subordinate Judge held that the present suit of the plaintiff was not barred by order 22, rule 9 of the Code of Civil Procedure. He accordingly dismissed the appeal of the defendants, and confirmed the judgment and decree of the trial court.

The defendants have come up in second appeal to this Court and two contentions have been principally advanced before us. The first is as to the effect of the suit for redemption brought in 1920, which was dismissed for default; and the second is as to whether the sale certificate (exhibit 3) does transfer to the plaintiff the equity of redemption of the mortgage in suit or not.

As to the first point, reliance has been placed upon a ruling of this Court reported in *Jai Narain and another v. Ram Deo and two others* (1), in which it was held that where it has been decided in a proceeding under order XXII, rule 5, of the Code of Civil Procedure that a certain person was, or was not, the legal representative of the deceased party, the decision operated as *res judicata*, and the same question could not be re-agitated in

a separate suit. This ruling follows a ruling of the Allahabad High Court reported in *Raj Bahadur v. Narain Prasad and others* (1), in which it was held that where it has once been decided in a proceeding under order XXII, rule 5 of the Code of Civil Procedure that a certain person was or was not the legal representative of the deceased party, the same question could not be re-agitated in a separate suit.

On the other hand, the learned counsel for the plaintiff-respondent relies upon a ruling of the Bombay High Court reported in *Shridhar Sadba Powar v. Ganu Mahadu Kavade and others* (2), in which it was held that the dismissal of a redemption suit for default did not bar a second suit for redemption. He also relied upon a ruling of the Lahore High Court reported in *Chiragh Din and others v. Dilawar Khan* (3), in which the late learned Chief Justice of the Lahore High Court, SIR SHADI LAI, and ABDUL QADIR, J., have held that a decision in proceedings under order XXII, rule 5 of the Code of Civil Procedure, that a certain person was or was not a legal representative of the deceased, did not bar the re-agitating of the same question in a separate suit, and that the rule of *res judicata* did not apply in such a case. He also relied upon a Bench decision of the Allahabad High Court decided by Sir JOHN STANLEY, C. J. and Sir WILLIAM BURKIT, J., in *Parso-tam Rao and others v. Janki Bai and another* (4), in which it was held that the appointment of a legal representative of a deceased plaintiff was not a determination of any issue which was properly raised in the suit, and was therefore, not *res judicata*. He further referred to a bench ruling of the Madras High Court reported in *Samsarivsa Saroathi Pulekhan Erukha-pakhan v. Pathumma and others* (5), in which it was held that the question whether a person should be admitted as the legal representative of the deceased plaintiff to continue a suit could not be regarded as one of the questions arising for decision in the suit itself, and that that was really a matter collateral to the suit, and one that had to be decided before the suit itself was proceeded with, and that the Civil Procedure Code did not provide for an appeal against the order deciding the question, and that therefore the matter was not *res judicata* by reason of any previous order declaring the plaintiffs as legal representatives of the deceased plaintiffs. He has also referred to a decision of the late Court of the Judicial Commissioner of Nagpur in *Musammat Laxmi alias Godi v. Ganpat* (6), in which

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(1) (1926) I.L.R., 48 All., 422.

(3) (1934) 154 I.C., 985.

(5) (1913) 20 I.C., 950.

(2) (1927) I.L.R., 52 Bom., 111.

(4) (1905) I.L.R., 28 All., 109.

(6) (1920) 62 I.C., 303.

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it was held that an order rejecting a husband's claim to be the legal representative of his wife did not amount to a decree, and did not operate as *res judicata* so as to bar a suit for a declaration that he was the legal representative of the deceased. In this case the learned Additional Judicial Commissioner of Nagpur expressed himself as follows:

"The object of rule 5, order XXII, seems to be merely to take away the option and compel the court to decide the question itself. The rule does not lay down that the court has exclusive jurisdiction to determine it and that no other court can try and decide the question when brought before it in a regular suit so as to affect its decision. If the view is accepted that the decision of the court before which the question arises is not a decree, it would be incompatible with that view to hold that its jurisdiction to try the question is exclusive, for the result would be to give the decision an absolute finality, both right of appeal and remedy in a regular suit having been taken away, a thing which it would not be reasonable to suppose that the law contemplated."

Reliance was also placed on behalf of the plaintiff-respondent on a ruling of the Lahore High Court reported in *Ram Sarup v. Moti Ram and others* (1), in which it was held that the Code of Civil Procedure provided no appeal from an order dismissing the application of a person to be brought on the record as the legal representative of the deceased plaintiff, and that such an order did not amount to a decree as defined in the Code of Civil Procedure. It was further held that an order of abatement of a suit amounted to a decree, but that as the plaintiff in the suit before the Lahore High Court had not been a party to the first suit which had abated, he had no status to appeal from the decree declaring that the suit had abated, and therefore that suit was not a bar to the filing of the present suit. We have carefully considered the rulings cited by the learned counsel of both parties on this point, and as there is a clear conflict of authorities on this point, and as doubt has been cast upon the correctness of the decision in *Jai Narain and another v. Ram Deo and others* (2), we think it proper, under the provisions of section 14(1) of the Oudh Courts Act, to refer the following question for the decision of a Full Bench:

"Does the determination of the question whether a certain person is or is not the legal representative of a deceased party in a proceeding under order XXII, rule 5, Civil

(1) (1920) I.L.R., 1 Lah., 498.

(2) (1933) I.L.R., 8 Luck., 477.

Procedure Code, operates as *res judicata* so as to preclude the same question from being re-agitated in a separate suit? Does the ruling reported in *Jai Narain v. Ram Deo and others* (1), lay down the law correctly?"

Mr. *Ghulam Imam*, for the appellants.

Messrs. *M. Wasim* and *Ali Hasan*, for the respondent.

SRIVASTAVA, C.J., NANAVUTTY and ZIAUL HASAN, JJ. :—The facts of this case have been fully set forth in the order of reference, dated the 14th of October, 1936, made by the Divisional Bench and need not be recapitulated here. The question for determination that has been formulated by the Divisional Bench runs as follows:

“Does the determination of the question whether a certain person is, or is not, the legal representative of a deceased party in a proceeding under order XXII, rule 5, Civil Procedure Code operate as *res judicata* so as to preclude the same question from being re-agitated in a separate suit? Does the ruling reported in *Jai Narain and another v. Ram Deo and others* (I. L. R., 8 Luck., 477), lay down the law correctly?”

We have heard the learned counsel of both parties at length and in our opinion the answer to the question under reference ought to be in the negative. On behalf of the defendants-appellants, reliance has been placed upon the rulings reported in *Jai Narain and another v. Ram Deo and two others* (1), *Raj Bahadur v. Narain Prasad and others* (2) and *Rampal Singh v. Abdul Hamid* (3). The last ruling is a Full Bench decision of this Court, but the question that fell to be decided in that case was different from what has been referred for decision to this Full Bench. The question decided in that Full Bench case was—

“Was the order of abatement passed in this case appealable?”

(1) (1933) I.L.R., 8 Luck., 477. (2) (1926) I.L.R., 48 All., 422.
(3) (1928) A.I.R., Oudh, 362.

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The Full Bench decision in that case is, therefore, not relevant for the right determination of the question that falls to be decided in the present case. The learned counsel for the defendants-appellants has relied upon the view of WAZIR HASAN, J., as expressed in that case. WAZIR HASAN, J., was of opinion that "matters in controversy in the suit" are not merely matters which arise on the face of the plaint as at first presented, but may include matters which are of vital importance between the parties, but which may come to arise and in respect of which the parties may be at controversy at a subsequent stage of the case and that the question whether a right to sue survives or not within the meaning of rule 1, order XXII, Civil Procedure Code, is such a matter. He was further of opinion that whether a person is a legal representative or not is again a question which may be a matter in controversy in the suit if his status as such is disputed. The question whether a certain person is, or is not, the legal representative of a deceased party in a proceeding under order XXII, rule 5 of the Code of Civil Procedure was not however the question in issue in that case, and therefore the observations of WAZIR HASAN, J., relied upon by the learned counsel for the defendants-appellants in the Full Bench ruling cited above are mere *obiter dicta*, which no doubt are entitled to weight, but are not binding upon us. The decision of the question under order XXII, rule 5 of the Code of Civil Procedure whether a certain person is, or is not, the legal representative of a deceased plaintiff or of a deceased defendant is not an issue arising in the case, but is a matter which falls to be decided at a preliminary stage before the matters in issue in the case can be decided. The Bench decision of this Court in *Jai Narain and another v. Ram Deo and two others* (1), followed a decision of the Allahabad High Court

(1) (1933) I.L.R., 8 Luck., 477.

reported in *Raj Bahadur v. Narain Prasad and others* (1). That decision dissented from an earlier decision of the same Court reported in *Parsotam Rao and others v. Janki Bai and another* (2). In that case, STANLEY, C.J. and BURKITT, J. expressed themselves as follows:

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"Section 367, Civil Procedure Code (the same as order XXII, rule 5 of the present Code of Civil Procedure) empowers the court in a case where a dispute arises as to who is the legal representative of a deceased plaintiff, to appoint a legal representative for the purpose of prosecuting the suit, but the appointment of such legal representative is not a determination of any issue which is properly raised in the suit; and particularly a vital issue such as the one to which we have referred."

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The Allahabad High Court in a recent Bench decision reported in *Antu Rai and others v. Ram Kinkar Rai and another* (3), has dissented from the ruling reported in *Raj Bahadur v. Narain Prasad and others* (1), and has followed the earlier decision reported in *Parsotam Rao and others v. Janki Bai and another* (2), and has held that order XXII, rule 5 of the Code of Civil Procedure provides a summary procedure for appointing a person to be the legal representative of the deceased party for the purpose of prosecuting the suit and the order appointing the legal representative does not operate as a final determination of the representative character of the person appointed, that is to say, it does not operate as *res judicata*.

The most recent expression of opinion of the Allahabad High Court, namely that an order under order XXII, rule 5 of the Code of Civil Procedure does not operate as *res judicata* is supported by various decisions of other High Courts. In *Ram Sarup v. Moti Ram and others* (4), it was held that the present Code of Civil Procedure provides no appeal from an order dismissing the application of a person to be brought on

(1) (1926) I.L.R., 48 All., 422.

(2) (1905) I.L.R., 28 All., 109.

(3) (1936) A.L.J., 622.

(4) (1920) I.L.R., 1 Lah., 493.

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the record as the legal representative of a deceased plaintiff and that such an order is not a decree. In *S. E. Pakkai v. M. K. Pathumma and others* (1), it was held that "the question whether a person should be admitted as the legal representative of a deceased plaintiff to continue a suit cannot be regarded as one of the questions arising for decision in the suit itself, and that it is really a matter collateral to the suit and one that has to be decided before the suit itself can be proceeded with". The same view was expressed by the Bombay High Court in *Bala Bai v. Ganesh* (2). A Full Bench ruling of the Madras High Court reported in *Venkatakrishna Reddi and two others v. Krishna Reddi* (3), lays down that no appeal lies against an order under order XXII, rule 5 of the Code of Civil Procedure, dismissing the application of a person to be brought on the record as the legal representative of a deceased plaintiff even when there is no rival claimant to be brought on the record as the legal representative. In this Full Bench decision the ruling reported in *Ayya Mudali Velan v. Veerayee* (4), was overruled. It was held that an order under rule 5 of order XXII of the Code of Civil Procedure is not such an order as falls within the list of orders given under order XLIII, rule 1 of the Code of Civil Procedure, from which appeals lie to a higher tribunal. Order XXIII, rule 1 of the Code of Civil Procedure does provide for an appeal against an order passed under order XXII, rules 9 and 10, but not against orders made under any other rules in that order. It is therefore clear that the Code expressly excludes an order under order XXII, rule 5 of the Code of Civil Procedure from being appealed against as an order. In *Raoji Bhikaji Kondkar v. Anant Laxman Kondkar* (5), it was held by Sir STANLEY BATCHELOR, Acting Chief Justice and SHAH, J., that in a partition suit the court was bound under

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(1) (1913) M.W.N., 673.

(2) (1902) I.L.R., 27 Bom., 162.

(3) (1925) I.L.R., 49 Mad., 450.

(4) (1920) I.L.R., 43 Mad., 812.

(5) (1918) I.L.R., 42 Bom., 535.

order XXII, rule 5 of the Code of Civil Procedure to make an inquiry as to who were the heirs of the widow who was the plaintiff in that case, and that there was no necessity to bring a separate suit, as when the plaintiff died the cause of action survived to her heirs and her heirs had to be brought on the record.

In *Dumi Chand v. Arja Nand and others* (1), it was held by Mr. Justice CHAMIER and Mr. Justice PIGGOTT that an order dismissing an application of the applicant to be brought on the record as a plaintiff is not a decree and no appeal lies against such an order. In *Chirag Din and others v. Dilawar Khan* (2), SIR SHADI LAL, C.J. and ABDUL QADIR, J. held that a decision in a proceeding under order XXII, rule 5 of the Code of Civil Procedure that a certain person was, or was not, a legal representative of the deceased, did not bar the re-agitating of the same question in a separate suit and that the rule of *res judicata* did not apply. In this case it was held that there is no doubt that an order under order XXII, rule 5 of the Code of Civil Procedure, was not appealable under the present Code and that was a very strong argument in favour of the contention that the decision in a proceeding under order XXII, rule 5 of the Code of Civil Procedure, that a certain person was or was not a legal representative of the deceased did not operate as *res judicata*. In *Samsarivsa Sarvathi Palekhan Erukkapakkan v. M. K. Pathumma and others* (3), SIR RALPH BENSON and SUNDARA AIYAR, JJ., of the Madras High Court held that the question whether a person should be admitted as the legal representative of a deceased plaintiff to continue a suit could not be regarded as one of the questions arising for the decision in the suit itself and that it was really a matter collateral to the suit and one that had to be decided before the suit itself could be proceeded with and that the Civil Procedure Code did

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(1) (1915) I.L.R., 37 All., 272. (2) (1934) 154 I.C., 985.

(3) (1913) 20 I.C., 950.

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not provide for an appeal against an order deciding the question. It was held that the plea of the second defendant was not *res judicata* by reason of the order in the prior suit declaring the plaintiffs as the legal representatives of Kunahamed. In *Musammatt Laxmi alias Godi v. Ganpat* (1), it was held by the late Court of the Judicial Commissioner of Nagpur that an order rejecting a husband's claim to be the legal representative of his wife did not amount to a decree and did not operate as *res judicata* so as to bar a suit for declaration that he was the legal representative of the deceased. In this case the learned Additional Judicial Commissioner of Nagpur expressed himself as follows:

“The object of rule 5, order XXII, seems to be merely to take away the option and compel the court to decide the question itself. The rule does not lay down that the court has exclusive jurisdiction to determine it and that no other court can try and decide the question when brought before it in a regular suit so as to affect its decision. If the view is accepted that the decision of the court before which the question arises is not a decree, it would be incompatible with that view to hold that its jurisdiction to try the question is exclusive, for the result would be to give the decision an absolute finality, both right of appeal and remedy in a regular suit having been taken away,—a thing which it would not be reasonable to suppose that the law contemplates.”

After a careful consideration of the case law on the subject and the trend of authorities in the various High Courts, we are clearly of opinion that the answer to the question referred to the Full Bench should be in the negative, and we hold that the determination of the question whether a certain person is, or is not, the legal representative of a deceased party in a proceeding under order XXII, rule 5 of the Code of Civil Procedure, does not operate as *res judicata* so as to preclude the same question from being re-agitated in a separate suit, and we decide that the ruling reported in *Jai*

Narain and another v. Ram Deo and two others (1), does not lay down the correct law on the subject.

The reference is answered accordingly.

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Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge,
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HABSHI MIAN ILMAS KHWAJA SARA (APPLICANT) v.
KHAN BAHADUR NAWAB MEHDI HASAN KHAN
AND OTHERS (OPPOSITE-PARTY)*

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Civil Procedure Code (Act V of 1908), order XLIV, rule 1 (proviso)—Application for leave to appeal in forma pauperis—Notice ordered to issue to opposite party and Government Advocate—Opposite party, whether can show that case does not satisfy proviso to order XLIV, rule 1, Civil Procedure Code.

Where an application is made for permission to appeal in forma pauperis on which notice is ordered to issue to the opposite party and the Government Advocate, held, that there is no reason why the *ex parte* order directing issue of notice should preclude the opposite party from showing that the case does not fulfil the requirements of law as enacted by the proviso to order XLIV, rule 1 of the Code of Civil Procedure. *Powdhari v. Ram Sanwari* (2), *Tilak Mahton v. Akhil Kishore* (3), *Basant Kuar v. Chandu Lal* (4), and *Mutturi Suryanarayan-amurty v. Karumuri Nagachendramowli* (5), relied on. *Hubraji v. Balkaran Singh* (6), *Raghunath Prasad Sahu v. Ram Piari Kuar* (7), and *Bibi Sogra v. Radha Kishun* (8), referred to.

Messrs. *Hyder Husain* and *H. H. Zaidi*, for the applicant.

Mr. *S. M. Mehdi*, for the opposite party.

*Civil Miscellaneous Application No. 691 of 1936, for *forma pauperis*, under order XLIV, rule 1, Civil Procedure Code.

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| (1) (1933) LL.R., 8 Luck., 477. | (2) (1934) LL.R., 57 All., 440. |
| (3) (1931) I.L.R., 10 Pat., 606. | (4) (1929) A.I.R., Lah., 514. |
| (5) (1936) A.I.R., Mad., 842. | (6) (1933) I.L.R., 54 All., 394. |
| (7) (1927) I.L.R., 6 Pat., 687. | (8) (1928) I.L.R., 7 Pat., 825. |