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instalment was to be made was not just and proper. We make the first instalment due on the 7th of October, 1938.

The application is therefore partly allowed and the order of the court below amending the decree modified in the light of the findings recorded above. In view of the success and failure of the parties, we order them to bear their own costs.

Thomas, A. C. J., and Ziaul Hasan, J.

Application partly allowed.

MISCELLANEOUS CIVIL

Before Mr. Justice A. H. deB. Hamilton and Mr. Justice R. L. Yorke

LALA DURGA PRASAD (DEFENDANT-APPLICANT) *v.* BABU GUR DULAREY AND OTHERS (PLAINTIFFS-OPPOSITE PARTY)*

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Civil Procedure Code (Act V of 1908), section 115 and Order XXXIII, rules 1, 5(d) and 9—Order granting application for leave to sue in forma pauperis*—Revision, if lies—Proceedings under order XXXVIII, rule 1 and those under order XXXIII, rule 9, distinction between—Setting aside of order granting application to sue in* forma pauperis*—Court relying on statement made by the defendant opposing application—No ground for setting aside order if plaintiff's allegations show cause of action without court's falling back on defendant's statement.*

Proceedings on an application for permission to sue in *forma pauperis* are proceedings before the commencement of a suit. They are therefore not interlocutory proceedings, and an application for revision will lie from the final decision in such proceedings. Since, an order either rejecting or granting an application for leave to sue in *forma pauperis* amounts to a case decided, and if the order falls within the purview of clauses (*a*), (*b*) or (*c*) of section 115, Civil Procedure Code, an application in revision is competent.

Case law discussed.

There is a clear distinction between proceedings prior to the commencement of the suit on an application under order XXXIII, rule 1, Civil Procedure Code, and the proceedings during the pendency of the suit on an application for the

*Section 115 Application No. 129 of 1937, against the order of Mr. Yaqub Ali Rizvi, Additional Civil Judge of Bara Banki, dated the 26th of October, 1937.

dispaupering of the plaintiffs under the provisions of order XXXIII, rule 9, Civil Procedure Code. Orders passed in the latter case are interlocutory orders.

The fact that the lower court in deciding the question which arises under clause (*d*) to rule 5 of order XXXIII, Civil Procedure Code, did commit an irregularity in availing itself of a statement made by the defendant opposing the application to sue in *forma pauperis* and in fact in permitting the defendant to be cross-examined with the object of eliciting such an admission, cannot be a ground for setting aside the order of lower court granting the application, if there was material justifying the lower court in coming to the conclusion that the plaintiff's allegations did show a cause of action without his falling back on the statement of the defendant. *Jogendra Narayan Ray* v. *Durga Charan Guha Thakurta* (1), *Vasanbai* v. *Radhibai* (2), *Bai Chandan* v. *Chhotalal Jekisondas* (3), and *Ramachandra Raju* v. *Dandu, Venkiah* (4), referred to.

Mr. *B. K. Dhaon*, for the applicant.

Messrs. *D. P. Khare* and *Nasir Ullah Beg*, for the opposite party.

HAMILTON and YORKE, JJ.:—This is an application in revision under section 115 of the Code of Civil Procedure, by one Durga Prasad defendant against the order of the Additional Civil Judge of Bara Banki, dated the 26th of October, 1937, holding the opposite-parties-plaintiffs to be paupers and directing under the provisions of order XXXIII, rules 7(3) and 8 of the Code of Civil Procedure, that their application be registered as a plaint in *forma pauperis*.

A preliminary objection is taken on behalf of the opposite-parties plaintiffs that no application in revision lies from the order of the lower court. The basis of this objection is the contention that in a case where an application for permission to sue in *forma pauperis* is granted, the order does not come within the scope of the words "any case which has been decided by any subordinate court" which are found in section 115 of the Code. The argument rests on the footing that where such an

(1) (1913) I.L.R., 46 Cal., 651. (2) (1928) A.I.R., Sindh, 118.
(3) (1932) A.I.R., Bom., 584. (4) (1927) A.I.R., Mad., 441.

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application is granted, the application itself is deemed to be the plaint and is numbered and registered and the suit proceeds in all other respects as a suit instituted in the ordinary manner. Hence the order of the court is to be regarded as in the nature of an interlocutory order, and therefore not subject to revision. Learned counsel for the opposite-parties rests his contention on the authority of the ruling reported in *Muhammad Ayab* v. *Muhammad Mahmud and others* (1) with some support from the ruling of the Judicial Commissioner of Sindh reported in *Chandumal and another* v. *Tejulbai and others* (2). As has been pointed out in Chitaley's discussion of this matter in his note to section 115 at pages 924 and 925 of Volume I of the second edition of his Code of Civil Procedure, the Allahabad view originally depended on a distinction between cases in which the application had been rejected and cases where it had been accepted. The point has come up for consideration since from different points of view—see for example *Shankar Ban* v. *Ram Dei and others* (3), but the view still taken by the Allahabad High Court is that no application in revision lies from an order granting an application for leave to sue in *forma pauperis*, and the ruling quoted in *Muhammad Ayab* v. *Muhammad Mahmud* (1) has been followed in *B. B. & C. I. Railway Co.* v. *Mitthu* (4). In the latter case it was expressly remarked that a revision cannot be entertained where an application to sue as a pauper is accepted because the order accepting such an application is not a case decided, but is more or less in the nature of an interlocutory order.

It is conceded in argument that all the other High Courts have dissented from this view of the Allahabad High Court, and we have been referred to a number of rulings of which the Lahore ruling reported in *Hari*

(1) (1910) I.L.R., 32 All., 623.
(2) (1933) A.I.R., Sindh, 82.
(3) (1926) I.L.R., 48 All., 493.
(4) (1931) A.I.R., All., 659.

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Krishna Datta, Captain v. *K. R. Khosla* (1) is a good example. In that case it was held in clear terms that proceedings in an application for permission to sue in *forma pauperis* are distinct from and antecedent to the suit itself and can be looked upon as a "case" within the meaning of section 115. Hence revision is competent from a final order granting permission to sue in *forma pauperis*. Another case in which this point was discussed and the Allahabad view dissented from is reported in *Ma Ma Gale* v. *Ma Mi* (2), where a single Judge of the Rangoon High Court held that an order either rejecting or granting an application for leave to sue in *forma pauperis*, amounts to a case decided, and if the order falls within the purview of clauses (*a*), (*b*), or (*c*) of section 115, an application in revision is competent. In that ruling the learned Judge remarked that he was in entire agreement with the learned Judges who decided *Shankar Ban* v. *Ram Dei and others* (3) that the fine distinction drawn in the case of *Muhammad Ayab* v. *Muhammad Mahmud and others* (4) quoted above cannot be justified. He went on to say "with all due respect, I must dissent from their view that an application in revision will not lie in any case", and he went on to hold as stated above and to refer to rulings of the Calcutta and Madras High Courts supporting his view.

So far as this Court is concerned, it is conceded that there is no decision on the question whether an application lies from an order granting permission to sue in *forma pauperis*. There is a decision on the question whether an application lies in the case of rejection reported in *Asa Ram* v. *Genda, Musammat and others* (5) where it was held that a revision lies under section 115 of the Code of Civil Procedure against an order of a court rejecting an application for permission to sue as pauper, inasmuch as such an order constitutes a complete

(1) (1934) A.I.R., Lah., 231.
(2) (1931) A.I.R., Rang., 318.
(3) (1926) I.L.R., 48 All., 403.
(4) (1910) I.L.R., 32 All., 623.
(5) (1934) I.L.R., 10 Luck., 265.

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decision of the case so far as that court is concerned. The learned Judges who decided this case had to deal with a preliminary objection similar to the one which has been raised in the present case, it being urged that there was no case which had been decided by the lower court within the meaning of section 115 of the Code of Civil Procedure. They went on to remark, "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". This reasoning seems to depend in the main on what actually happened in that particular case, namely that because of the decision of the pauper application, no suit came to be instituted and therefore that was said to be a case decided. As a matter of principle, it appears to us that there is really no fundamental distinction between cases where an application has been granted and cases where it has been refused. In a sense neither order could be said to be final because in the one case where the application is granted, the application is taken to be the plaint, and in the other case where the application is rejected, the matter does not end there because the plaintiff can be and usually is given time to deposit the amount of court-fees. The real question at issue is whether an application under order XXXIII, rule 1 is a proceeding "in the case", that is an interlocutory proceeding or something prior to the case. In this connection we may refer to the Full Bench ruling of this Court reported in *Paras Nath* v. *Ran Bahadur and*

others (1). In that case the Full Bench held that no revision of an interlocutory order lies, firstly on the ground that no "case" has been decided within the meaning of section 115 by the mere decision of a preliminary point regarding court-fees, etc. etc. SRIVASTAVA, J. further remarked in that case. "The words used in section 115 do not contemplate the invoking of the revisional jurisdiction of the High Court in the case of interlocutory orders passed during the trial of a pending suit. In other words, my opinion is that in the case of a suit it is the suit itself and not any branch of it which can be regarded as a 'case' within the meaning of section 115. On the correct legal interpretation of the term all interlocutory orders passed during the trial of a pending suit must be excluded from the application of the section". He further remarked at page 548, "I should however make it clear that proceedings before the commencement of a suit as well as proceedings after a suit has come to an end, being proceedings independent of the suit, must stand on a different footing."

The question for our decision then really is limited to the question whether proceedings on an application for permission to sue in *forma pauperis* are proceedings before the commencement of a suit or proceedings in a suit. As we have noted already the consensus of opinion of High Courts other than the High Court at Allahabad and the Sindh Court is in favour of the former view. While it is true that there is no case of this Court precisely bearing on the point in question, there are two cases of the Court of the Judicial Commissioner of Oudh which follow the view taken by the majority of the High Courts. These cases are reported in *Shamim-ud-din and others* v. *Amir Husain and others* (2) and *Sheo Narayan Lal* v. *Musammat Munaqqa and others* (3). In the former case SUNDAR LAL, J. C. held that an application for permission to sue as a pauper is in itself a case within the meaning of that term as used in section 115

(1) (1935) I.L.R., 11 Luck., 529. (2) (1909) 12 O.C., 381.
(3) (1923) A.I.R., Oudh, 118.

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of Act V of 1908. He held further that orders under Chapter XXVI of Act XIV of 1882 are open to revision under section 622, and also that interlocutory orders are not liable to revision under section 115 of Act V of 1908. In his judgment in this case the learned Judicial Commissioner examined and discussed the Allahabad cases and he pointed out that in the case of *Mumtazan* v. *Rasulan* (1) two Judges of the Allahabad High Court held that where an application to sue in *forma pauperis* had been allowed and the case proceeded to trial and decision, it was not open to the defendant in appeal to question the propriety of the first court's order permitting the plaintiff to sue as a pauper, and he remarked that he thought that this was the correct view of the situation. He went on to remark. "The defendants will not be entitled to raise this point in their appeal from the final decree. The decision of the application to sue as paupers is a final decision of that case, one way or the other, and, as far as the case then before the court, namely the application for leave to sue as a pauper is concerned, the matter has been finally decided." In the latter case of the Court of the Judicial Commissioner, ASHWORTH, J.C. held, following the above mentioned decision, that an application for permission to sue as a pauper is in itself a case within the meaning of that term as used in section 115. It appears to us that as was held by a Bench of the Allahabad High Court itself in *Shankar Ban* v. *Musammat Ram Dei* (2), the subtle distinction which was drawn in *Muhammad Ayub* v. *Muhammad Mahmud* (3) between an order "granting" and an order "refusing" an application for permission to sue as a pauper cannot be justified. As we have already indicated such orders are in one sense final and in another sense not final, but it appears to us that in the light of the views entertained by the Judicial Commissioners and the other High Court, it is more reasonable

(1) (1906) I.L.R., 28 All., 364. (2) (1926) I.L.R., 48 All., 493.
(3) (1910) I.L.R., 32 All., 623.

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to hold that proceedings on an application for permission to sue as a pauper really constitute a separate case. Such proceedings are registered separately as applications. In case of refusal of the application, there may or may not be, by reason of subsequent payment of court-fees, a suit registered. If payment of court fees is made, a suit will be registered. In the same way on the grant of permission to sue as a pauper, the application comes to an end and the petition is registered as a plaint in the suit. We are of opinion that to use the words of SRIVASTAVA, J. in *Paras Nath* v. *Ran Bahadur and others* (1), such proceedings are proceedings before the commencement of a suit. In either case they are therefore not interlocutory proceedings, and as has been held in most of the High Courts, an application in revision will lie from the final decision in such proceedings. The preliminary objection therefore fails.

Before we leave this point we would remark that learned counsel for the opposite-parties sought to rely in support of the preliminary objection on an unreported decision of a Bench of this Court in section 115 Application No. 57 of 1934, the judgment of which was put before us. That however was a case of an application under order XXXIII, rule 9 for dispaupering the plaintiff. The learned Judges held that the application was admittedly made during the pendency of the suit and the order rejecting the application was clearly an interlocutory one. They were therefore unable to say that there was any case decided within the meaning of section 115 of the Code of Civil Procedure and dismissed the application. It seems to us that there is a clear distinction between the proceedings prior to the commencement of the suit on an application under order XXXIII, rule 1 and the proceedings during the pendency of the suit on an application for dispaupering of the plaintiffs under the provisions of order XXXIII, rule 9.

(1) (1935) I.L.R., 11 Luck., 529.

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Coming now to the merits of the present application the main points taken are two—(1) that the order of the lower court was without jurisdiction because the opposite-parties had failed to prove that they were not possessed of sufficient means to defray the court-fees, and that in this connection the court had acted with material irregularity by omitting to take into consideration the value of the equity of redemption possessed by the opposite-parties, and (2) that the court had no jurisdiction to allow this application because the plaintiffs' allegations did not show a cause of action, while in support of this point, it was argued that the lower court acted with material irregularity because in deciding this question, it relied not only upon the allegations stated in the plaint and the statement of the plaintiff in examination and cross-examination, but also on a statement of the defendant-applicant Durga Prasad taken in the course of proceedings under order XXXIII, rule 7, which statement should have been limited entirely to the question of sufficient means. Learned counsel has exhaustively discussed the procedure on an application for permission to sue in *forma pauperis* under order XXXIII, Civil Procedure Code. He points our that after the presentation of the application under rule 3, the court has authority under rule 4 to examine itself or on commission the applicant or his agent regarding the merits of the claim and the property of the applicant. Thereafter by rule 5 it is provided that "the court shall reject an application for permission to sue as a pauper" in certain cases falling under clauses (*a*) to (*e*). Learned counsel was inclined to suggest that there was no examination of the plaintiff under rule 4, and that the order under rule 6 was passed without any proper consideration of the duty of the court under rule 5. We find no force in this contention. The record of the lower court shows that on the 6th of July, 1937, the learned Civil Judge examined plaintiff applicant No. 1, and there-

after passed the following order: "Register the application and issue notice to the other parties and to Government pleader for 31st July, 1937." When the case actually came up for hearing on the 25th of September, a statement by a pleader representing the defendant-applicant was recorded, in which he stated. "The application as it stands now is not maintainable. The applicants have not shown their immovable property in the list annexed to the application." On the 23rd of October, the lower court took the statement of Gur Dularey, plaintiff-applicant No. 1 and Durga Prasad, defendant. This would be under the provisions of rule 7, paragraph (1). The court then proceeded to hear arguments under paragraph 2 of the same rule and passed the order which is the subject of the present application.

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So far as the question of sufficient means is concerned, the only point which is urged is that on the face of the plaint, the applicants were entitled as mortgagors to the equity of redemption of three mortgages, and counsel for the defendant-applicant has by calculations of his own contended that these items of property must be worth in the neighbourhood of Rs.3,000. There is no sign that the lower court took these items of property into consideration at all, and it is contended that thereby the court acted with material irregularity, and further that by granting permission in the absence of proof that the plaintiffs were not possessed of sufficient means to defray the court-fee, the court acted without jurisdiction. The important point, as we see it, in this connection, is that this matter was not raised in the lower court. Gur Dularey plaintiff opposite party put himself forward as a witness and submitted himself to cross-examination and no questions were put to Gur Dularey on this subject. It must be further conceded that the value of the equity of redemption of these properties must be a matter of considerable doubt, and it would be difficult

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to say that the lower court acted with material irregularity in omitting to make an inquiry into this point itself when the defendant having full opportunity to do so made no attempt to indicate the existence of this alleged valuable property by cross-examination of the plaintiff. In these circumstances the lower court was clearly entitled to come to a conclusion on the evidence that the plaintiffs-applicants were not possessed of sufficient means to pay the court-fee. We would not further be prepared to hold, bearing in mind the nature of these assets, that the lower court was deprived of jurisdiction, or acted with material irregularity in coming to its conclusion by reason of the fact that the plaintiffs-applicants had failed to mention those dubious items of property in the application for leave to sue in *forma pauperis*.

A more important and in some way more difficult question is that which has been argued before us based on clause (*d*) of rule 5 of order XXXIII, and the connected question in regard to the basing of the lower court's conclusions, at any rate in part, on the statement of the present applicant. Learned counsel for the applicant relies on the provision in rule 7(2) of order XXXIII that the court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the court as herein provided, the applicant is or is not subject to any of the prohibitions specified in rule 5. It is contended on behalf of the applicant that when the plaint and statement of Gur Dularey are taken together, it is quite plain that the application should have been rejected because the allegations of the plaintiffs-opposite parties did not show a cause of action. The plaintiffs' suit was a suit to recover possession over certain properties on the allegation that the plaintiffs' father Gur Bakhsh Rai, with whom they had been members of a joint Hindu family, had alienated the said property, being joint Hindu

family property, without legal necessity and for immoral purposes. The necessary foundation for such a suit was that the property in suit must have been joint family property and that the plaintiffs must have been members of a joint family with their father Gur Bakhsh Rai. Gur Dularey, however, in the course of his statement said among other things "we are separate from Gur Bakhsh Rai for the last 4 or 5 months. . . All the property in fact belongs to our father. We only dine with him." It is contended that Dularey did not even give *prima facie* proof that the property in suit was ancestral because he said "I do not know from where my father got all this property". We are not inclined to attach much value to the statement of Gur Dularey who was admittedly a young man, aged only about 21. He was not in a position in the main to depose from his own personal knowledge as to how his father came to be in possession of the property in suit. His statement therefore that he did not know where that property came from, and that, in fact, it belonged to his father was not a statement of any real value. It did of course belong to his father also as a member of the joint Hindu family and Gur Dularey never said that this property was exclusively the property of his father. On the statements in the plaint coupled with other oral statements made by Gur Dularey, as for instance where he said that all the movable and immovable property of their father and themselves was joint, it was quite competent for the court to come to the conclusion that the plaintiffs' allegations did show a cause of action and it would be impossible to hold that the lower court acted illegally or without jurisdiction in coming to the conclusion which it actually did. The lower court, however, based its conclusions not only on the statements in the plaint and those made by the plaintiff Gur Dularey himself, but it further remarked that "at the fag end of his cross-examination, Lala Durga Prasad

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himself admitted that the applicants as sons were interested in the property in possession of their father" What Durga Prasad actually stated was that "'In all this property the applicants as sons of Gur Bakhsh have got a share and are interested." Durga Prasad was cousin of Gur Bakhsh Rai and he was in a position to make that statement intelligently, and if the court was entitled to rely on it at all, it was a good ground for the court to hold that the allegations in the plaint did show a cause of action. Learned counsel for the applicant has however contended at considerable length and relying on a number of rulings that the evidence on which a court may rely for decision of the question which arises under clause (*d*) to rule 5 of order XXXIII, does not include any evidence other than the statement of the applicant. The applicant is not entitled to call evidence on that point and even the statement of the defendant opposing the application cannot be taken into consideration in that connection. He relies on the ruling reported in *Jogendra Narayan Ray* v. *Durga Charan Guha Thakurta* (1), in which it was laid down that "in an inquiry under order XXXIII, of the Code of Civil Procedure, the court cannot take evidence (except the evidence of the applicant himself) on the merits of the claim. Rule 4 expressly gives power to the court to examine the applicant regarding the merits of the claim and the property of the applicant so that there is no doubt that the applicant himself can be examined not only with reference to the question of his pauperism but also with reference to the merits of his claim.

Hamilton and Yorke, JJ.

It is open to the court to consider not only the statement made in the plaint but also the statements made in his examination by the applicant before determining whether his allegations disclose a cause of action as laid down in clause (*d*) of rule 5 of order XXXIII.

(1) (1918) I.L.R., 46 Cal., 651.

But the Court cannot examine other witnesses for deciding the question of limitation or any other question than the pauperism of the applicant."

This ruling was quoted and followed in another ruling upon in this connection in *Vasanbai* v. *Radhibai* (1). The same proposition is to be found in *Bai Chandan* v. *Chhotalal Jekisondas* (2) in which it was held that "the proper materials on which to base a decision as to the applicability for example of the prohibitions contained in clause (*d*) of rule 5, consist only of the application and the statement of the applicant himself taken under rule 4 or rule 7 (or both), and there is nothing in order XXXIII, which authorises a court to take evidence on the merits of the claim at this stage other than the evidence led under rule 4, read with rules 5 and 7." In our opinion it may be the case that the lower court did commit an irregularity in availing itself of a statement made by the defendant applicant and in fact in permitting the applicant to be cross-examined with the object of eliciting such an admission, but we are not prepared to hold in the circumstances of the present case that that would be a sufficient ground for setting aside the order of the lower court for the reason that there was, in our view, material justifying it in coming to the conclusion that the plaintiffs' allegations did show a cause of action without his falling back on the statement of the applicant. In this connection we might refer to the ruling reported in *Ramachandra Raju and others* v. *Dandu, Venkiah and others* (3) where it was remarked that the non-existence of a cause of action should appear clearly on the face of the application itself, which alone would justify the court in rejecting the application. It could certainly not be said in the present case that the allegations contained in the plaint did not show a cause of action.

Hamilton and Yorke, JJ.

(1) (1928) A.I.R., Sindh, 118. (2) (1932) A.I.R., Bom., 584.
(3) (1927) A.I.R., Mad., 441.

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Taking all the facts of the present case into consideration, we are not prepared to hold that the lower court has acted in the exercise of its jurisdiction illegally or with material irregularity. We accordingly dismiss this application with costs.

Application dismissed.

REVISIONAL CIVIL

Before Mr. Justice A. H. de B. Hamilton and Mr. Justice R. L. Yorke

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July, 19

NISAR KHAN (DEFENDANT-APPLICANT) *v.* ABDUL HAMEED KHAN AND OTHERS (PLAINTIFFS-OPPOSITE PARTY)*

United Provinces Encumbered Estates Act (XXV of 1934), section 7(1)(a)—"Proceedings pending in any civil or revenue court in respect of any public or private debt" in section 7(1)(a), meaning of—Proceedings having an ultimate bearing on property to be available to meet any public or private debt, whether included.

The words "proceedings pending in any civil or revenue court in respect of any public or private debt" in section 7(1)(*a*) of the United Provinces Encumbered Estates Act do not mean and include proceedings which can have any ultimate bearing not merely on any public or private debt but on the property to be available to meet the same. Where, therefore a suit is filed by a creditor under section 53 of the Transfer of Property Act for a declaration that a deed of gift executed by the debtor landlord is fictitious and showy and so void and ineffective it cannot be stayed under section 7(1)(*a*) of the Encumbered Estates Act. *Brij Kishore* v. *Parshotam Das* (1) and *Mukat Bihari Lal* v. *Manmohan Lal*(2), distinguished. *Champa Devi* v. *Asa Devi* (3), and *Sitla Bakhsh Singh* v. *Balchand*(4), referred to.

Messrs. *Radha Krishna Srivastava* and *Ganesh Prasad*, for the applicant.

Mr. *D. K. Seth*, for the opposite party.

*Section 115 Application No. 11 of 1937, against the order of Mr. Abbas Raza, Munsif, Lucknow District, dated the 27th of November, 1936.

(1) (1937) R.D., 114.
(2) (1938) I.L.R., All., 246.
(3) (1937) A.L.J.R., 945.
(4) (1936) I.L.R., 12 Luck., 655.