

MISCELLANEOUS CIVIL

Before Mr. Justice R. L. Yorke, and Mr. Justice Radha
Krishna Srivastava

PREM KUMAR AND OTHERS (APPLICANTS) v. LALA GIR-
DHARI LAL AND OTHERS (OPPOSITE-PARTIES)*

1940
January, 17

Civil Procedure Code (Act V of 1908), Order XXXIII, rule 1, and Order XLIV, rule 1—United Provinces Encumbered Estates Act (XXV of 1934), section 7—Pauper appeal—Applicant under Encumbered Estates Act possessing considerable property, whether a pauper.

Where an applicant under the Encumbered Estates Act against whom a claim has been decreed by the Special Judge, applies under Order XLIV, rule 1, Civil Procedure Code, for permission to appeal as a pauper, and he is possessed of considerable property, he cannot be held to be a pauper within the meaning of the Explanation to rule 1, of Order XXXIII, Civil Procedure Code.

Mr. C. P. Lal, for the applicants.

YORKE, and RADHA KRISHNA, JJ.:—This is an application under rule 1 of Order XLIV of the Code of Civil Procedure for permission to appeal as a pauper. The applicants are applicants under the Encumbered Estates Act against whom a decision has been given by the Special Judge, First Grade, who has decreed the claim of the respondents for Rs. 1,55,555 instead of Rs. 1,30,838 on a view taken by him in regard to the interpretation of sections 15 and 14 of the Encumbered Estates Act.

The first question which has to be considered in cases of this kind is whether the Court sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. On a consideration of the order of the learned Special Judge we see no reason to doubt that there is an important question of law involved in the appeal, and that the applicants are therefore entitled to be allowed to pass the first bar which finds a place in rule 1 of Order XLIV.

*Civil Miscellaneous Application No. 414 of 1939, for permission to appeal as a pauper.

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LAL
AND OTHERS

*York,
and
Radha
Krishna,
JJ.*

On the other hand we do not see how it is possible to hold that the applicants come within the definition of a pauper contained in rule 1 of Order XXXIII. The explanation to rule 1 of Order XXXIII provides that "A person is a 'pauper' when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit." The same rule applies to appeals. In the present application the applicants themselves state that the valuation of their property is no less than 7 lakhs odd. The amount of the court-fee which is required to be paid on the present appeal is said to be Rs.1,302-8, and although it is stated that the property of the applicants is seriously over-encumbered, it is stated to us that the total debts amount to only Rs 1,60,000, that is to say the debt in suit and one or more small debts totalling about rupees four or five thousand. The real difficulty which is said to stand in the way of the applicants is that under section 7, sub-clause (2) of the Encumbered Estates Act after the passing of the order of the Collector under section 6 and until the application is dismissed, etc. etc., "the landlord shall not be competent without the sanction of the Collector to make an exchange or gift of, or to sell, mortgage or lease, any of that property." It is admitted that no application has been made to the Collector. In any case if the applicants were free to dispose of their property, as they can easily make themselves by an application to the Collector in the present case, they could not be heard to say that they were paupers merely because they alleged that they were unable to find a buyer for their property. The question how the applicants should proceed in order to get rid of the difficulty arising out of section 7 is not one for us. It is obvious they they can make an application and they should have done so.

As the record stands before us it is clear that it cannot be said that the applicants are paupers within the meaning of the explanation to rule 1 of Order XXXIII.

In these circumstances we find no force in the present application and dismiss it accordingly.

In view of the difficulties in which the applicants find themselves we allow them a period of three months to make proper arrangement for deposit of the court-fee.

Application rejected.

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APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan

LASA DIN (PLAINTIFF-APPELLANT) v. MOHAMMAD ABDUL SHAKOOR AND ANOTHER (DEFENDANTS-RESPONDENTS)*

1940

January, 19

Civil Procedure Code (Act V of 1908), Order XXXIV, rule 1, and Order I, rule 9—Non-compliance with provisions of Order XXXIV, rule 1, whether fatal to suit—Order I, rule 9 whether applies to mortgage suits—Transfer of Property (Amending) Act (XX of 1929), section 67-A, whether has retrospective effect—Law prior to amendment—Holder of two independent mortgages on same property, whether can sue on each of them separately.

Non-compliance with the provisions of Order XXXIV, rule 1, is not necessarily fatal to a suit to enforce a mortgage and Order I, rule 9, applies to mortgage suits as well. *Mahmood Ali Khan v. Ali Mirza Khan* (1), relied on.

Present section 67-A of the Transfer of Property Act has no retrospective effect. *Ko aung Bye v. Ko Po Kyaing* (2), *V. R. S. Chettiar Firm v. Ya Ya* (3), and *Corporation of Calcutta v. Arunchandra Singha* (4), relied on.

According to the law in these provinces before the Amending Act of 1929 added section 67-A to the Transfer of Property Act, the holder of two independent mortgages over the same property was not bound to disclose his second mortgage at the time of suing on his first mortgage so that his failure in that respect did not debar him from bringing a subsequent suit to enforce the second mortgage. *Sundar Singh v. Bholu* (5), and *Bansidhar v. Jagmohan Das* (6), relied on. *Dhondo Ramchandra Kulkarni v. Bhikaji walad Gopal* (7), referred to.

Mr. *D. K. Seth*, for the appellant.

Mr. *Naimullah*, for the respondent.

*Second Civil Appeal No. 110 of 1937, against the order of Mr. Bhagwati Prasad, Civil Judge of Lucknow, dated the 27th of October, 1936.

(1) (1934) I.L.R., 10 Luck., 70.

(2) (1931) A.I.R., Ran., 208.

(3) (1933) A.I.R., Ran., 377.

(4) (1933) I.L.R., 60 Cal., 1470.

(5) (1898) I.L.R., 20 All., 322.

(6) (1925) 12 O.L.J., 127.

(7) (1914) I.L.R., 39 Bom., 138.