

REVISIONAL CIVIL.

Before *Jwala Prasad and Adams, J.J.*

SHAIKH MUHAMMAD NASRULLAH

1923.

v.

SHEIKH MUHAMMAD SHUKURULLAH.*

December 17.

Code of Civil Procedure, 1908 (Act V of 1908), Order XXXIII, rule 6—Pauper suit—dismissal of suit on ground of imitation, illegality of.

In an inquiry under Order XXXIII of the Code of Civil Procedure, 1908, the court has power under rule 4 to examine the applicant himself on the merits of the claim, but cannot examine other witnesses for deciding the question of limitation or any other question than the pauperism of the applicant.

Vijendra Tirtha Swami v. Sudhindra Tirtha Swami(1), dissented from.

Parkash Ojha v. Dusruth Ojha(2) and *Jogendra Narayan Ray v. Durga Charan Guha Thakurta*(3), followed.

Application by the plaintiff.

This was an application against an order of the Subordinate Judge of Patna, dated the 16th July, 1923, dismissing an application of the petitioner for permission to sue *in forma pauperis*. The plaintiff was the son of Opposite Party No. 1, daughter's son of Opposite Party No. 2 and full brother of Opposite Party No. 3. His case was that his mother, Mussamat Chanda, died possessed of movable and immovable properties on the 28th April, 1912, leaving the petitioner, the opposite party and Sheikh Muhammad Shamiullah as her legal heirs; that the opposite party, No. 2 made a gift of the share which he inherited from Mussamat Chanda in favour of the petitioner and his two brothers. He also claimed his share in the

*Civil Revision No. 350 of 1923, from an Order of Rai Bahadur Surendra Nath Mukharji, Subordinate Judge Patna, dated the 16th July, 1923.

(1) (1896) I. L. R. 19 Mad. 197.

(2) (1876) 25 W. R. 74.

(3) (1919) I. L. R. 46 Cal. 651.

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dower debt due to his mother and his father, defendant No. 1. He prayed for the following reliefs in the plaint: (1) Rs. 10,012 with interest to be his share of the dower debt due to his mother from the opposite party; (2) for recovery of possession of his share in the immovable property left by his mother; (3) an account of the income of the immovable property; and (4) for his share of the movable properties left by his mother. He stated in the plaint that he was born on the 15th of February, 1904, and that his mother died on the 28th of April, 1912; and these dates he alleged to be the dates on which the cause of action for the suit arose. The plaint was filed on the 24th of March, 1923, and registered on the 28th of March, 1923, and the Court directed notice to issue to the opposite party and the Government Pleader. This notice was apparently directed to be issued under Order XXXIII, rule 6, of the Civil Procedure Code, for the purpose of "receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof."

The defendants appeared and stated that the suit was barred by limitation, alleging that the plaintiff was born on the 28th of February, 1899, and that he attained majority on the 28th of February, 1917. The plea of limitation was based upon the ground that the suit was brought more than three years after the plaintiff attained majority. In proof of this plea the defendants examined a clerk of the New College who produced the admission register showing that the plaintiff was 9 years, 8 months and 21 days old on the 1st of February, 1911, that is, he was born in May, 1901. The defendants further produced a post card (*Exhibit C*) showing that the plaintiff was born on the 28th of February, 1899. Upon this evidence the Court held that the plaintiff was born on the 28th of February, 1899, and not on the 15th of February, 1904, as alleged by him; and the suit, having been brought three years after he had attained majority, was barred

by limitation. Accordingly the Subordinate Judge dismissed the application for permission to sue in *forma pauperis*.

J. N. Sen Gupta and *M. N. Pal*, for the applicant.

Brij Kishore Prasad, for the opposite party.

JWALA PRASAD, J. (after stating the facts, as set out above, proceeded as follows) :—

The order complained of amounts to a dismissal of the claim of the plaintiff as having been barred by limitation; in other words, this was a dismissal upon the merits of the claim of the plaintiff, but at that stage the merits of the plaintiff's claim were not before the Court. The Subordinate Judge could enter into the merits of the case under rule 4 of Order XXXIII, and for that purpose he could examine the plaintiff who applied for permission to sue as pauper. That stage has, however, passed, inasmuch as the Court upon a reading of the plaint was satisfied that the case, as laid in the plaint, disclosed a cause of action, and that the facts, if true, showed that the plaintiff's claim had merits. Unless the Court was satisfied upon these grounds and had held that the application was not bad under any of the grounds mentioned in rule 5, it could not register the application and receive evidence as to the pauperism or otherwise of the applicant. The Court, therefore, acted without jurisdiction in going into the merits of the case upon the plea of limitation. This seems to be the proper construction of the rules laid down in the Code under Order XXXIII and the trend of authorities upon the subject, the latest authority being *Jogendra Narayan Ray v. Durga Charan Guha Thakurta* (1). This decision has reviewed the case law on the subject and also the rules contained in Order XXXIII. So far back as 1876 in the case of *Parkash Ojha v. Dusruth Ojha* (2) it was held that where a Subordinate Judge decided the question of limitation, not upon the examination of

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the petitioner, but upon that of other witnesses summoned for a different purpose, he exceeded his jurisdiction. In the present case the Court decided the question of limitation not upon the examination of the petitioner but upon the evidence of the clerk of the New College, and certain documents filed on behalf of the defendants, apparently when the evidence called for by the Court was for the purpose of determining the pauperism or otherwise of the applicant. A contrary view upon the subject in *Vijendra Tirtha Swami v. Sudhindra Tirtha Swami* (1) was considered and dissented from in the aforesaid case of *Jogendra Narayan Ray v. Durga Charan Guha Thakurta* (2). We fully accord with the views of the learned Judges of the Calcutta High Court, and we hold that the decision of the Subordinate Judge is *ultra vires*. This fully meets the contention of the learned Vakil, on behalf of the opposite party, who urges that the Subordinate Judge had acted within his jurisdiction and that the present application did not raise a question of jurisdiction and that it was, therefore, not fit to be entertained by us in revision. The decision of the Subordinate Judge is wrong, however, upon a firmer ground, and it seems to us that the finding of the Subordinate Judge that the suit was brought more than three years after the plaintiff attained majority does not seem to dispose of the entire claim of the plaintiff. His claim was, among others, for recovery of possession of his share in the movable properties left by his mother who is said to have died on the 28th April, 1912. Such a suit can well be maintained within twelve years of the death of the lady or of the dispossession of the plaintiff if he had already acquired possession at any time after her death. The suit was instituted on the 24th March, 1923, well within twelve years of the death of the plaintiff's mother. Therefore, that portion of the plaintiff's claim, if not the other portion, is undoubtedly not barred by limitation, and the applicant, in spite of

(1) (1896) I. L. R. 19 Mad. 197.

(2) (1919) I. L. R. 46 Cal. 651.

the finding of the Subordinate Judge was entitled to have his application for permission to sue as pauper legally disposed of.

Accordingly we set aside the order of the Subordinate Judge, and direct that the application be disposed of in accordance with law. The application is allowed with costs.

ADAMI, J.—I agree.

Order set aside.

PRIVY COUNCIL.

RAGHUNATH PRASAD

v.

SARJU PRASAD.*

Undue Influence—Onus on Party seeking to avoid contract—Unconscionable transaction—Indian Contract Act (IX of 1872), section 16.

Under the Indian Contract Act, 1872, section 16 (as amended by Act VI of 1899) a party to a contract cannot avoid it on the ground of undue influence unless he proves that the other party was in a position to dominate his will. It is only when it has been so proved that the question arises whether that position has been used to obtain an unfair advantage, the onus being then on the other party if the transaction appears unconscionable.

Thus, although a mortgage for ample security provides for excessive and usurious interest, no presumption arises that it was induced by undue influence in the absence of proof by the mortgagor that the mortgagee was in a position to dominate his will.

Present.—Lord Shaw, Lord Carson, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

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