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and unless he proved his right to the minerals in the Chota Nagpur Raj it cannot be said that he was entitled to a declaration that he had the rights in the minerals in pargana Tori. The defendants, however, have no title, or possession. The defendant no. 1 did not dispute the title of the plaintiff apart from the grant of 1867, as in fact he could not do so inasmuch as he claimed title through the predecessor in title of the plaintiff. The defendants nos. 2 and 3 who claim through the defendant no 1 also cannot raise the question having no title by possession, and in my opinion there is no substance in the cross-objection.

In the result, therefore, I would allow this appeal and decree the suit with costs here and in the court below and dismiss the cross-objection of the defendants nos. 2 and 3.

Appeal allowed.
Cross-objection dismissed.

APPELLATE CIVIL.

Before Adami and Scroope, JJ.

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Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XLIV, rule* 1, *proviso, scope of—court, power of, to consider whether decree contrary to law or usage or otherwise erroneous or unjust, after notice is issued.*

When an application for leave to appeal in forma pauperis has been admitted and the court has ordered notices to be served on the opposite party and the Government Pleader, it is no longer open to the court to consider whether the proviso to rule 1, Order XLIV, Code of Civil Procedure, 1908, applies,

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* Pauper Case no. 7 of 1926.

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that is to say, it cannot examine the question whether the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust.

Mussammat Buchan Dai v. *Jugal Kishore*(1), followed.

Application by the plaintiffs.

The facts of the case material to this report are stated in the judgment of Adami, J.

S. N. Bose (with him *A. K. Gupta*), for the petitioner.

The court is precluded at this stage from going into the merits of the case and considering under the proviso to Order XLIV, rule 1, whether the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust, I rely on *Mussammat Buchan Dai* v. *Jugal Kishore* (1) where it was held that it was open to the court to reject the application before admission if it was not satisfied that the decree was contrary to law, etc.; but when once it is admitted and notices have been ordered to issue on the opposite party and on the Government Pleader, the question is finally decided.

Abani Bhushan Mukerjee (Government Pleader), *Parmeshwar Dayal* and *Anand Prasad*, for the opposite party. Every case must be decided on its own facts; and where it is not manifest that the Court, while admitting the application, considered the question arising under the proviso to rule 1, Order XLIV, the court is not precluded from examining the question at this stage.

S. N. Bose, replied.

S. A. K.

ADAMI, J.—This is an application for leave to appeal in forma pauperis. The applicant instituted a suit claiming a declaration that certain sums of money deposited with a banking business in the name

(1) (1924) A. I. R. Pat. 791.

of an idol were joint family property and that he was entitled to a one-sixth share of the amounts so deposited.

The learned Subordinate Judge decided that the applicant was not entitled to any of the sums deposited and also that the suit was barred by limitation. His suit was therefore dismissed on the 28th August, 1926.

This Court reopened on the 27th October but it was not until the 25th November that the application was made. In that application the applicant sought leave to appeal in forma pauperis and he also asked that under section 5 of the Limitation Act the time for making the application should be extended. On the 1st December the learned Advocate for the applicant was heard and an order was passed that notice should issue both on the respondents and the Government Pleader.

The applicant was allowed in the lower Court to sue in forma pauperis and it is not shown before us that since permission was granted to him in the lower Court that he has acquired other properties. We have not the materials before us to form any adequate opinion on that point.

Now it is uncertain whether the order of this Court passed on the 1st December, 1926, referred only to the application for leave to appeal in forma pauperis or also covered the application for extension of time under section 5. If it referred to the application to appeal in forma pauperis it would seem that under a ruling of this Court in the case of *Mussammat Buchan Dai* v. *Jugal Kishore*(1) it is not open to us now to consider whether the proviso to rule 1 of Order XLIV of the Code of Civil Procedure applies, that is to say we cannot examine the question whether the decree of the lower Court was contrary to law or to some usage having the force of law, or was otherwise erroneous or unjust. Even in that case, however,

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we have to consider the question whether the application could be received as having been filed within time and whether any extension can be granted.

* * * * *

To my mind there is no good justification for overlooking the delay made by the applicant in putting forward his application. He was long out of time and the explanation given by him is, in my mind, insufficient and I would hold that this application is barred and no further extension should be given.

Now if we take it that the notice was issued on the respondents and the Government Pleader with regard to the application for extension of time only, it would fall upon us to consider whether the proviso to Order 44, rule 1, should be applied and we should look to see whether the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or injust. If we were to look into the judgment of the lower Court from this point of view, I would be inclined to say that there is nothing in the judgment to show that it is erroneous or unjust or that there is anything in it which is contrary to law.

The learned Subordinate Judge has found as a fact that though some items are mentioned in the books of the banking business of the idol, the applicant failed to show that he had a claim to any of those items, and also the Subordinate Judge has found as a fact that even if the applicant had a claim to those sums mentioned in those three books, there are entries mentioned in the fourth book which show that the applicant would be indebted to the idol to a larger amount than he could claim under the other three books. From all points of view I would hold that this application for leave to appeal in forma pauperis is an application which should not be allowed especially as it was filed too late.

I would reject the application.

A month's time will be allowed from this date to the applicant for extension of the time allowed by law for the filing of an appeal with the proper court-fee.

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SCROOPE, J.—I agree.

Application rejected.

REVISIONAL CRIMINAL.

Before Adami and Scroope, JJ.

BIGAN SINGH

v.

KING-EMPEROR.*

1927.

Feb., 10.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 353, 530 *and* 537—*witnesses not examined in presence of accused—trial vitiated.*

Except in the cases mentioned in section 353 of the Code of Criminal Procedure, 1898, a trial is vitiated by failure to examine the witnesses in the presence of the accused person.

Where, therefore, the witnesses were examined-in-chief in the absence of the accused persons, and the latters' legal representative did not object but at a later date cross-examined the witnesses in the presence of the accused, *held*, that the trial was vitiated by the irregularity.

Subrahmania Ayyar v. *King-Emperor* (1), applied.

The facts of the case material to this report are stated in the judgment of Scroope, J.

H. L. Nandkeolyar (with him *D. L. Nandkeolyar*) for the petitioner.

C. M. Agarwala, Assistant Government Advocate, for the Crown.

SCROOPE, J.—The petitioner has been convicted under section 211/109 of the Indian Penal Code for

*Criminal Revision no. 41 of 1927 against an order of J. A. Saunders, Esq., I.C.S., Sessions Judge of Muzaffarpur, dated the 8th January 1927, modifying the order of A. Whittaker, Esq., I.C.S., Subdivisional Magistrate of Sitamarhi, dated the 4th December, 1926.

(1) (1902) I. L. R. 25 Mad. 61, P. C.