

## APPELLATE CIVIL.

*Before Sir Guy Ruddle Kt., K.C., Chief Justice and Mr. Justice Brown.*

MA SHOPJAMBI

v.

MUBARAK ALI AND OTHERS.\*

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Mar. 18.

*Civil Procedure Code (Act V of 1908), O. 33—Examination of applicant—Scope of inquiry—Evidence and argument as to matters contained in O. 33, r. 5—Respondent's right to call evidence and to what it is limited—Rule 7 gives procedure, does not restrict scope of inquiry or of argument.*

Under the provisions of Order 33, Civil Procedure Code, a Court is competent to hear arguments as to whether on the face of a pauper's application, he was or was not subject to any of the prohibitions specified in rule 5 of Order 33, and can also take evidence regarding them. It is the respondent who is in a position to raise objections under rule 5 (e), (d) and (c), and this he can only do by examining parties and witnesses. The words in rule 7 "and of the evidence (if any) taken by the Court as herein provided" mean that in an inquiry under rule 7 evidence may be taken with regard to any\* of the five grounds mentioned in rule 5. Rule 7 gives the procedure to be followed in an inquiry into pauperism and is not a rule meant to restrict the scope of the inquiry or of the argument. Otherwise the clauses of rule 5 would be nugatory.

*Sein Tun Aung* for the applicant.

*K. C. Bose* for the respondents.

In Civil Miscellaneous Case No. 88 of 1926 of the District Court of Akyab, petitioner applied for leave to sue as a pauper. The Court issued notice to the respondents who appeared and contested her application on the ground that her cause of action was time-barred and that she had made an agreement with others who thereby obtained an interest in the subject-matter.

Petitioner's claim was for recovery of her share of inheritance in the estate of her father who died in 1870. Her brother applied for and obtained letters of administration of the estate in 1872. The administrator died in 1896 and his son

\* Civil Revision No. 236 of 1927 from the order of the District Court of Akyab in Civil Miscellaneous Case No. 88 of 1926.

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obtained letters of administration. He treated the property of his father and of his grandfather as one. In 1898 petitioner and her sister applied to the Court for their shares of inheritance. They were advised to file a suit. She did nothing till 1912 when she again applied to the Court for her share of inheritance in her father's estate. Her application was dismissed and she was informed that her father's estate had become her late brother's estate. She waited for nearly twenty-nine years before making the present application.

The learned District Judge after referring to the proceedings held that her cause of action arose in 1870 or at the latest in 1897 and therefore her present application was time-barred. It was urged on her behalf that as the Court had not gone into the merits of her claim when the application was presented, under O. 33, r. 4 of the Civil Procedure Code, it was precluded from doing so after issuing notice to the respondents, when the inquiry should be limited to the question of pauperism only.

The learned District Judge held that under rule 7 the Court could hear arguments as to whether on the face of the application, an applicant was or was not subject to any of the prohibitions specified in rule 5. But unless evidence was taken, a Court could not decide under rule 5 (c) whether an applicant had fraudulently disposed of his property. It is the respondent who can raise objections under rule 5 (c), (d) and (e), and this he can only do by examining the parties and witnesses. The words in rule 7 "and of the evidence (if any) taken by the Court as herein provided" must mean that in an inquiry under rule 7 evidence may be taken with regard to any of the five grounds mentioned in rule 5. Rule 7 gives the procedure to be followed in an inquiry

into pauperism and is not a rule meant to restrict the scope of the inquiry or of the argument. To hold otherwise is to render the clauses of rule 5 nugatory.

Petitioner applied to the High Court on revision.

RUTLEDGE, C.J., and BROWN, J.—This is a petition by way of revision from the order of the learned District Judge of Arakan, dismissing the petitioner's application to sue as a pauper under Order XXXIII, rule 5 (*d*) that her allegations do not show a cause of action inasmuch as the cause of action, if any, has been long barred by limitation.

The main objection urged is that the Court was not competent at the enquiry into her pauperism to go into the merits of her case and dismiss it. The learned trial Judge, we notice, has discussed in the first three pages of his judgment a number of cases, not a single one of which is reported in an authorised report. They are consequently of no assistance to us and have no binding force as authorities on the trial Court.

The decisions of the several High Courts are by no means unanimous in respect of how far a Court may go in enquiring into the substance of the cause of action in applications to sue as a pauper. But the decision relied on on behalf of the petitioner in *Jogendra Narayan Ray v. Durga Charan Guha Thakuria* (1), is really against her. There a Bench of the Calcutta High Court held that it is open to the Court to consider not only the statements 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 Order XXXIII, rule 5, clause (*d*), but the Court cannot examine other witnesses for deciding the question of

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limitation or any other question than the pauperism of the applicant.

It is not suggested that any other witness has been examined here except the applicant herself. The Court has taken into consideration her examination as well as her petition which if admitted constitutes her plaint. The Court has also taken judicial notice of certain proceedings in Court in which the petitioner was a party and in which she made certain applications. In so doing the Court's action was, in our opinion, perfectly correct.

The learned trial Judge has set out very clearly from the 5th page of his judgment beginning with the words "The first ground of objection is that the plaint discloses no subsisting cause of action and that applicant's claim is barred by limitation" down to the middle of the 7th page ending with the words "and I do not think any such trust can be inferred from the circumstances of the present case" his reasons for holding that the petitioner's present claim is on the face of it barred by limitation. We are in full agreement with his finding and do not consider it is necessary to add any further reasons.

The application is dismissed with costs.