1930

MA MYA THIN v. MA CHU.

OTTER, J.

of her natural parents' estate was established. This depended mainly upon the contention that she was adopted in *Kittima* adoption by U Tint and Ma Hmi. The only real evidence as to this was given by Ma Ma Khin who is now looking after the applicant and is clearly antagonistic to the respondents.

The Subdivisional Judge was not satisfied with her evidence, and in face of the evidence of Ma Shu I cannot hold that in doing so his action was illegal or materially irregular. I do not say that I might not have come to another conclusion, but that would not justify interference in revision.

That being so the application must be dismissed, but in the circumstances, I make no order as to costs in this Court.

APPELLATE CIVIL.

Before Mr. Justice Otter.

MAUNG SAN SHWE AND ANOTHER

v.

HAJI KO ISHAQ.*

1930

Jan. 13.

Civil Procedure Code (Act V of 1908), s. 115, Order 44, R. 1—Order rejecting application to appeal as a pauper—Revision.

An order rejecting an application for permission to appeal as a pauper is open to revision in a proper case.

Bai Ful v. *Desai*, I.L.R. 22 Bom. 809; *Dhapi* v. *Ram Pershad*, I.L.R. 14 Cal. 708; *Ma Mya Thin* v. *Ma Chu*, I.L.R. 9 Ran. 86; *Ma Thau Myaut* v. *Maung Ba Thein*, 4 Ran. 20; *Ma Shapambi* v. *Mubarak Ali*, I.L.R. 7 Ran. 361; *Mani Lal* v. *Durga Parasad*, I.L.R. 3 Pat. 930; *Maung Pe Kye* v. *Ma Shwe Zin*, I.L.R. 7 Ran. 359; *Muhammad Husain* v. *Ajudhia Prasad*, I.L.R. 10 All. 467; *Nassiah* v. *Vythalingam*, 6 L.B.R. 117; *Secretary of State for India* v. *Jillo*, I.L.R. 21 All. 133; *Shaukran Bibi* v. *Abdul Samad*, I.L.R. 45 All. 548; *Sree Krishna Doss* v. *Chandook Chand*, I.L.R. 3 Mad. 334; *S. R. M. M. Chetty* v. *P. L. N. N. Chetty*, 11 L.B.R. 65; *Sumatra Devi* v. *Hazari Lal* (1930), A.I.R. All. 758; *The Jupiter General Insurance Company* v. *Abdul Aziz*, I.L.R. 1 Ran. 231—*referred to.*

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* Civil Revision No. 144 of 1930 (at Mandalay) from the order of the District Court of Mandalay in Civil Miscellaneous No. 106 of 1930.

Mahadeo Sahai v. *Secretary of State*, I.L.R. 44 All. 248 ; *Muhammad Ayab* v. *Muhammud Mahmud*, I.L.R. 32 All. 613 ; *Shankar Ban* v. *Ram Dai*, I.L.R. 48 All. 495—*dissented from.*

Sanyal for the applicants.

Mukerjee for the respondent.

OTTER, J.—This is an application to revise an order of the District Judge at Mandalay refusing permission to appeal as a pauper.

The first question is as to whether proceedings in revision are open to the applicants. If they are it will be necessary to consider whether the matter is one which justified interference.

Applications for permission to appeal as a pauper are governed by the provisions of Order XLIV of the Civil Procedure Code ; and Rule 1 of this Order says :—

"Any person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as a pauper subject . . . . . to the provisions relating to suits by paupers, so far as they are applicable."

A proviso to this rule lays down that "Court shall reject the application unless, upon a perusal thereof, and of the judgment and decree appealed from, it 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."

From the plain words in these provisions it would appear, that the application for permission to appeal as a pauper is a proceeding entirely distinct from the appeal itself.

There is a separate application, and the memorandum of appeal ought not to be considered until after the hearing of the application is concluded, and leave is granted. If anything further were required to show that this is so, I need only refer

1930

MAUNG SAN SHWE v. HAJI KO ISHAQ.

OTTER, J.

to *Bai Ful* v. *Desai Manorbhai Bhavanidas* (1). From this case it is clear that a judge deciding an application for leave to appeal as a pauper, is under no obligation to dismiss the appeal; in fact (except so far as he must consider whether there is reason to think that the decree sought to be appealed from is one to which the proviso to Rule 1 of Order XLIV applies) he has no concern with the appeal at all.

Indeed, as is elementary practice, upon the refusal of an application for leave to appeal as a pauper, the applicant can always appeal within the time allowed by limitation, provided he pays the necessary Court-fees. It may be taken, therefore, that the proceeding, up to the decision of the application for leave to sue as a pauper, is in the nature of a preliminary step, and is entirely distinct from the appeal itself. Moreover, as it seems to me, it is also distinct from the previous proceedings sought to be appealed from.

It becomes necessary then to consider whether the determination of such an application is "a case decided" within the meaning of section 115 of the Civil Procedure Code.

I have already examined this question in relation to appeals from the rejection or grant of an application to sue as a pauper (*see Ma Mya Thin, by her next friend, Maung Maung Lay* v. *Ma Chu and another* (2)); and I think there can be little or no difference in the considerations relevant to either problem.

In each case the decison is upon a proceeding distinct from either the suit on the one hand, or the appeal on the other; and although it is obvious that a decision rejecting either application puts an end to

(1) (1898) I.L.R. 22 Bom. 849. (2) I.L.R. 9 Ran. 86.

that particular proceeding altogether, yet I find it difficult to see why a decision granting the application does not equally put an end to the proceeding. The decision granting leave to sue or to appeal is no doubt followed by the suit or the appeal, as the case may be, but so far as I am able to see, the previous proceeding does not form part of the suit or the appeal, and cannot be said to be a step necessary for the determination of either proceeding.

It is true that in the case of suits, the application, if granted, is deemed to be the plaint, but it would seem that this was provided for convenience only and, upon a grant of leave, the application loses its former character and becomes a document which is the first step in an entirely new proceeding.

I am aware that this view is not in accord with that expressed in the case of *Muhammad Ayab* v. *Muhammad Mahmud and others* (1). This case related to an order granting an application for leave to sue as a pauper, and Chamier, J., drew a distinction between a "case decided" and an "interlocutory order."

He was of opinion that the rejection of an application to *sue or appeal* as a pauper would be a case decided, but that the grant of such an application would be an "interlocutory order" only, and in consequence not subject to revision.

Now, whether or not this distinction is well founded, it is a distinction of small importance; for, as I had reason to point out in *Ma Mya Thin's* case, it is well settled, in this Province, and also by the High Courts of Calcutta, Madras and Patna that proceedings in revision are competent in respect of interlocutory orders. See *The Jupiter General Insurance Co., Ltd., and others* v. *Abdul Aziz* (2);

(1) (1910) I.L.R. 32 All. 623. (2) (1923) I.L.R. 1. Ran. 231.

1930

MAUNG SAN SHWE v. HAJI KO ISHAQ.

OTTER, J.

S. R. M. M. Chetty Firm and another v. *P. L. N. N. Narayanan Chetty* (1); *Dhapi* v. *Ram Pershad* (2); *Sree Krishna Doss* v. *Chandook Chand* (3) and *Mani Lal* v. *Durga Parasad* (4).

The Courts in Allahabad and Lahore, however, have taken a different view upon the general question whether revision lies upon interlocutory orders and this may in part at least account for the view expressed by Chamier, J.

The matter so far as decisions upon application for leave to sue or appeal as a pauper are concerned, is not without authority and it is somewhat curious that almost all the reported cases have been decided by the Allahabad High Court.

The first case I would refer to is *Muhammad Husain* v. *Ajudhia Prasad and others* (5). The Court exercised revisional powers, but I would observe that the case was an exceptional one upon the facts. This was a case where leave to sue was refused.

In the case of the *Secretary of State for India in Council* v. *Jillo* (6), it was decided that no appeal lies from an order rejecting an application for leave to appeal as a pauper. But the Court was of opinion that the case was an extraordinary one, and directed that it should be treated as a case in revision under section 622 of the old Code of Civil Procedure; see also *Ma Than Myint and two* v. *Maung Ba Thein* (7).

In Muhammad Ayab's case (1), as I have shown, it was held that no application in revision will lie to the High Court from an order granting an application for leave to sue *in forma pauperis*.

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(1) (1921-22) 11 L.B.R. 65.
(2) (1887) I.L.R. 14 Cal. 768.
(3) (1909) I.L.R. 32 Mad. 334.
(4) (1914) I.L.R. 3 Pat. 930.
(5) 1883) I.L.R. 10 All. 467.
(6) (1891) I.L.R. 21 All. 133.
(7) (1926) I.L.R. 4 Ran. 20.

In *Mahadeo Sahai* v. *The Secretary of State for India in Council and others* (1), where an order rejecting an application for leave to sue was under consideration, it was held by Walsh, J., that no revision lay, but his opinion in that case was *obiter* merely.

In *Shauran Bibi and another* v. *Abdus Samad and others* (2) revisional powers were exercised where leave to sue was refused; but the point does not seem to have been taken that the Court had no power to take this course.

In *Shankar Ban* v. *Ram Dei and others* (3) a Bench held that no revision lies from an order rejecting an application to sue *in forma pauperis*. This decision followed *Mahadeo Sahai's* case (1).

So far, I suppose the balance of authority in the Allahabad High Court is against the competency of revisional powers, at least where an application to sue as a pauper has been rejected.

The matter does not rest here, however; for in the case of *Sumatra Devi* v. *Hazari Lal and another* (4) (which I can only find reported in the All India Reporter), and which was a case where the lower Court had not held an enquiry into the question of pauperism at all, a Bench of that High Court held that there was a refusal to exercise jurisdiction, and that revision would lie in respect of the order dismissing the application to sue as a pauper. Part of the headnote is :—

"When the matter is altogether at an end and the plaintiff is entirely out of Court because his application has been rejected the order though not a decree cannot be strictly speaking, treated as a mere interlocutory order in the course of the trial of a pending suit. A definite case should be deemed to have ended with

(1) (1922) I.L.R. 44 All. 248.
(2) (1923) I.L.R. 45 All. 548.
(3) (1926) I.L.R. 48 All. 493.
(4) (1930) A.I.R. All. 758.

1930

MAUNG SAN SHWE v. HAJI KO ISHAQ.

OTTER, J.

an order of the Court rejecting an application to sue as pauper because if the Court-fee is not paid subsequently the claim of the pauper cannot be proceeded with."

It is clear, therefore, that the most recent pronouncement from this High Court is in favour of the application of revisional powers in a proper case of refusal of leave. The learned Judges in that case reviewed a number of previous authorities.

It would seem, therefore, that the decisions of the High Court of Allahabad would not, of themselves, afford very strong material in support of the contention that revision does not lie, at least, so far as rejection of application for leave to sue or appeal as a pauper are concerned.

The matter does not rest here however; for, in the case of *Maung Pe Kye* v. *Ma Shwe Zin* (1) a single Judge of this High Court dealt with an application to revise a decision rejecting a petition for leave to sue as a pauper. The application for revision was dismissed. Again, in *Ma Shopjambi* v. *Mubarak Ali and others* (2) a Bench of this High Court dealt with an application to revise an order refusing leave to use as a pauper; but in neither of these cases was the point now under consideration taken. In the case of *Nassiah and others* v. *Vythalingam Thingandar* (3) a Bench of the late Chief Court considered a similar revision application, but did not decide the question now under review. Upon the whole it may be said, I think, that the balance of authority supports the view that revision proceedings are competent at least in a case where leave to sue or appeal as a pauper is refused.

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(1) (1929) I.L.R. 7 Ran. 359. (2) (1929) I.L.R. 7 Ran. 361.
(3) (1911-12) 6 L.B.R. 117.

Upon the authorities, therefore, and also because I am of opinion that if revisional powers can be exercised upon interlocutory matters, they should also be exercised upon the proceedings now under consideration. I think I must hold in the present case that the rejection of the application was a case decided, and subject to revision. Further, though it is unnecessary to decide the point here, I can see no real distinction between the rejection and the grant of an application for leave.

I come to this conclusion quite apart from the question whether the proceeding is in either of its results interlocutory or not; but as I have indicated, and in view of the cases I have mentioned, even if the proceeding is an interlocutory one, I should be bound to hold that revision lies.

The next question is, therefore, whether this is a case where revisional powers ought to be exercised.

The suit was on two promissory notes, as to which the first applicant, Maung San Shwe, denied liability and execution, while the second applicant, Ma Thein Tin, admitted that she herself signed the notes and also that she placed the name of Maung San Shwe together with her own at the foot of the documents.

The documents run throughout as though the promissors were both the applicants, who jointly and severally promised to repay the principal sum of money.

The suit was decreed as against both, and upon application for leave to appeal as a pauper, the learned District Judge said that the documentary evidence was ample to prove that the applicants were ostensibly in partnership, and that as the only result of an appeal would probably be an order directing amendment of the pleadings, and reframing of the issues,

1930

MAUNG SAN SHWE v. HAJI KO ISHAQ.

OTTER, J.

he rejected the application. These remarks were directed to the contention that the lower Court had failed to frame proper issues, and had given a decree against the first applicant, because in its view the transaction was entered into with the two applicants trading as joint partners.

The question for me is whether I should hold that the learned District Judge should have had "reason to think that the decree was contrary to law or to some usage having the force of law, or was otherwise erroneous or unjust;" and if so, whether he was acting illegally or with material irregularity. The question then will be whether this is a case where revisional powers ought to be exercised.

It was suggested to me that the meaning of the proviso to the rule is that a Judge has absolute discretion and that unless it can be shown that he was actuated by reasons which fell outside those materials to the considerations before him, his decision cannot be interfered with.

It seems to me that this may go too far; for, upon the plain wording of the provision, it would appear clear that there must be some material, either upon the application, or upon the judgment and decree from which he could have reasonably formed the opinion that the case fell within the proviso.

The case of *Peram Chennamma* (1) was cited by Mr. Sanyal in his able argument for the applicants. This was a Letters Patent appeal from an order of a single Judge. In that case a single Judge, in rejecting the application, had merely quoted the words of Rule 1 of Order XLIV of the Code and observed that the requirements were not fulfilled. In the course of the judgment of the Bench, a previous decision of the same High Court was approved,

(1) (1930) I.L.R. 53 Mad. 245.

1930

MAUNG SAN SHWE v. HAJI KO ISHAQ.

OTTER, J.

where, as the appeal raised a substantial question of law, an order refusing leave was reversed.

In an unreported case of the Madras High Court also referred to in the judgment in *Peram Chennamma's* case, a Bench had apparently stated that the appellant (whose leave to appeal as a pauper had been refused), "had a *prima facie* good case." The learned Judges also pointed out that it is not necessary that the lower Court should arrive at the definite and final conclusion that the decree complained against is contrary to law or otherwise erroneous or unjust.

I am not sure that I feel myself able to agree with the view approved of in *Peram Chennamma's* case, *viz.*, that all that is required is a *prima facie* good case. This, with respect to the view expressed by the learned Judges, seems to me to go beyond the words of the proviso. Without, however, expressing any opinion as to the accuracy or otherwise of this view, I am of opinion that in the present case it cannot be said that the learned Judge should be held to have had reason to think that the decision was within the words of the proviso.

It is perfectly clear that upon the evidence a partnership in the very business between the two applicants was established beyond any possible doubt. The debt to the respondent in the present case was in respect of goods supplied for the purpose of that partnership business. It seems to me that this case was obviously one where it would have been a waste of time to send the case back for amendment of the plaint and further issues to be framed. Had that course been taken the respondents must have succeeded.

Moreover I observe that the matters upon which the trial Court based its decision were disclosed in an application under section 30 of the Code of Civil

1930

MAUNG SAN SHWE v. HAJI KO ISHAQ.

OTTER, J.

Procedure, where it was sought to establish that both the applicants are carrying on their business and trade together.

Again the 1st and 2nd issues, as framed, would seem to me to cover substantially the necessary ground.

There is much evidence, both oral and documentary, upon the point, and I do not think this is a case where the provisions, for instance, of section 93 of the Evidence Act could be said to have been transgressed ; for the evidence given was directed to show the relationship between the parties to the action, and not to show the meaning of the promissory note or to supply defects in that document. Such evidence would also be admissable to show the course of dealing between the parties ; see as to this section 8 of the Evidence Act, and cases collected at Note 5 to that section on page 145 of the 8th Edition of Woodroff's Law of Evidence.

There is also authority for the proposition that a man may sign a promissory note by getting some one to write his name for him ; see *Nga Myat Thin and another* v. *Nga Mye and another* (1). Now there is ample evidence to show that this was done in the present case. In any event, so far as I am able to see, it cannot be successfully argued that the learned Judge had any real reason to think that the decree was one falling within the proviso to Rule 1 of Order XLIV. I would point out that the application must be rejected unless the Judge had reason to form the opinion which I have mentioned. That being so, it seems impossible to hold that the Judge was acting illegally or with material irregularity.

Moreover this is a revision case, and this Court would not interfere except where grave hardship would result in a refusal.

(1) (1907-09) II, U.B.R., "Execution-Signing," p. 1.

I am satisfied beyond all doubt that so far from hardship resulting to the applicants by refusing to interfere, hardship might well result to the respondent by such interference. It was suggested by Mr. Sanyal that the case ought to go back in order that the question of partnership should be thrashed out. He said that an opportunity should be given for the production of partnership books and so forth.

Now, it is perfectly true that no direct allegation of partnership between the applicants was raised upon the plaint, nor do the issues framed directly cover such an issue. As I have already indicated, however, this very question was brought to the knowledge of the applicants by a petition filed on behalf of the respondent.

An examination of the evidence also clearly shows that the matter was all along before the Court, and if it had been desired to call such evidence as is now suggested, an effort should have been made to do so long ago.

Moreover, the learned Judge obviously had this aspect of the case before him, and the mere fact that he omitted to have the pleadings amended, and a more satisfactory issue framed, when the only result of so doing must have been that the respondent would have succeeded, cannot possibly amount to hardship upon the applicants.

For all these reasons, therefore, I have no doubt at all that this is not a case where this court should interfere in revision; and the application, therefore, is dismissed with costs, advocate's fee three gold mohurs.