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MUTHU K. M. MEYYAPPA CHETTYAR v. PERIYAH.

CARR, J.

In my view of section 263 of the Contract Act it permits the use of the old firm name by the defendant in the manner alleged. I also find it definitely stated in Halsbury's Laws of England, Vol. 22, paragraph 162, that "after dissolution, if the assets are divided between the partners, each of them is entitled, in the absence of contrary agreement, to use the name of the old firm, unless the other partners would thereby be exposed to a risk of litigation or responsibility and an injunction will not be granted to restrain such use; unless it exposes the other partners to risk of liability."

The appellant's advocate has been unable to produce any authority to the contrary, and I cannot see that the defendant's use of the old firm name to recover outstandings can cause any risk of liability to the plaintiff.

The appeals are dismissed with costs. Advocate's fee three gold mohurs in each case.

APPELLATE CIVIL.

Before Mr. Justice Otter.

1931

Jan. 13.

MA MYA THIN

v.

MA CHU AND ANOTHER.*

Civil Procedure Code (Act V of 1908) s. 115—Order rejecting application to sue as a pauper—Revision.

An order rejecting an application to sue *in forma pauperis* is open to revision in a proper case.

Dhapi v. *Ram Pershad*, I.L.R. 14 Cal. 768; *Ma Shopjambi* v. *Mubarak Ali*, I.L.R. 7 Ran. 361; *Mani Lal* v. *Durga Prasad*, I.L.R. 3 Pat. 930; *Maung Pe Kye* v. *Ma Shwe Zin*, I.L.R. 7 Ran. 361; *Muhammad Husain* v. *Ajudhia Prasad*, I.L.R. 10 All. 467; *P. Baba Sah* v. *V.M. Purushothama*, I.L.R. 48 Mad. 700;

* Civil Revisoin No. 70 of 1930 (at Mandalay) from the order of the Subdivisional Court of Mandalay in Civil Misc. No. 87 of 1929.

Secretary of State for India v. *Jillo*, I.L.R. 21 All. 133 ; *Sree Krishna Doss* v. *Chandook Chand*, I.L.R. 32 Mad. 34 ; *S.R.M.M. Chetty* v. *P.L.N.N. Chetty*, 11 L.B.R. 65 ; *Sumutra Devi* v. *Hazari Lal* (1930) A.I.R. All. 758 ; *The Jupiter General Insurance Company* v. *Abdul Aziz*, 1 Ran. 231—*referred to.*

Mahadeo v. *Secretary of State for India in Council*, I.L.R. 44 All. 248 ; *Muhammad Ayab* v. *Muhammad Mahmud*, I.L.R. 32 All. 623 ; *Shankar Ban* v. *Ram Deo*, I.L.R. 48 All. 493—*dissented from.*

P. K. Bose for the applicant.

A. C. Mukerjee for the respondents.

OTTER, J.—This is an application to revise an order refusing of permission to the applicant to bring a suit as a pauper against the two respondents.

The first question to be decided is whether proceedings in revision are open to the applicant ; and as will be seen, there has been some conflict of authority upon this point.

There can be no doubt, I think, that an appeal does not lie in such a case ; for the question to be determined is a preliminary one, and there are special rules framed under Order 33 dealing with the presentation of an application for permission to sue as a pauper and the various formalities to be observed.

Rule 8 of this Order seems to me to be conclusive. It provides that when an application (for permission to sue as a pauper) is granted, it shall be numbered and registered and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner.

The order, therefore, is obviously not a decree, preliminary or otherwise ; for it was not made by way of adjudication upon any matter arising in the course of the suit. Upon this part of the case I might refer to the *Secretary of State for India in Council* v. *Jillo* (1).

(1) (1899) I.L.R. 21 All. 133.

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OTTER, J.

In considering whether revision proceedings lie or not, it must be borne in mind that under section 115 of the Civil Procedure Code, it is only where a "case" has been "decided," that such proceedings lie.

Moreover, should the decision called in question be upon a "case decided," it will then be necessary to consider whether it falls within any of the succeeding provisions of this section. The question has received attention, however, in certain decided cases, and I have referred to a number of them in my judgment in Civil Revision No. 144 of this Court. This was an application to revise an order refusing leave to *appeal* as a pauper, but as I there remarked, I can see no real distinction between the matters to be considered. I would however mention the case of *Muhammad Husain v. Ajudhia Prasad and others* (1). Part of the headnote is :—

"All orders passed under section 407 of the Code of Civil Procedure (which corresponds to Rule 5 of Order 33 of the present Code) are not excluded from the exercise of revisional powers of the High Court . . . ."

In that case, although the point was taken that proceedings in revision would not lie, it does not seem to have been suggested, in terms, that the matter sought to be revised was equivalent to "a case decided" within the provision of the Civil Procedure Code to which I have referred. It is clear from the report that in the view of the learned single judge of that Court who tried the case, the lower court had not applied its mind properly to the relevant circumstances for his consideration.

In *Muhammad Ayab* v. *Muhammad Mahmud and others* (2) it was held that no application in revision will lie to the High Court, from an order *granting*

(1) (1888) I.L.R. 10 All. 467. (2) (1910) I.L.R. 32 All. 623.

an application for leave to sue *in forma pauperis*. Previous decisions of the Allahabad High Court were referred to; and it is clear from the judgments in the case, that the Bench drew a wide distinction between a case where an application for revision was rejected and a case where it was allowed.

It is also clear that this distinction was drawn upon a consideration whether such rejection or grant could be said to be a case decided. Chamier, J. (at page 625 of the report) said :—

"It appears to me that there is a clear distinction between the case of an application for permission to sue or appeal *in forma pauperis* being dismissed or rejected, and the case in which a similar application is allowed. In the former it may be said that the case had been decided, while in the latter the order appears to be merely interlocutory."

I would point out at this stage, that even if the order complained of was passed upon an interlocutory proceeding only, there is considerable body of authority in other Courts of India and also in this Province, to the effect that such orders are subject to revision; *see The Jupiter General Insurance Co., Ltd. and others* v. *Abdul Aziz* (1); *S.K.M.M. Chetty Firm and another* v. *P.L.N.N. Narayanan Chetty* (2); *Dhapi* v. *Ram Pershad* (3); *Sree Krishna Doss* v. *Chandook Chand* (4); and *Mani Lal* v. *Durga Prasad* (5). It will be necessary to refer to this aspect of the case at a later stage.

In *Mahadeo Sahai* v. *The Secretary of State for India in Council and others* (6), Walsh, J., expressed the opinion that no application in revision under section 115 of the Code will lie from an order rejecting an application for leave to sue *in forma pauperis*.

(1) (1923) I.L.R. 1 Ran. 231.
(2) (1921-22) 11 L.B.R. 65.
(3) (1887) I L.R. 14 Cal. 768.
(4) (1909) I.L.R. 32 Mad. 334.
(5) (1924) I.L.R. 3 Pat. 930.
(6) (1922) I.L.R. 44 All. 248.

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The matter does not rest here, however; for in *Shankar Ban* v. *Ram Deo and others* (1), it was held by Walsh, J., and another learned Judge of that Court, that no revision lies from an order rejecting an application to sue *in forma pauperis*. The Bench did not agree with the view of Chamier, J., in *Muhammad Ayab's* case as to the distinction between the rejection and grant of such an application. I would refer also to *Sumatra Devi v. Hazari Lal and another* (2).

The distinction is certainly a fine one; for, although it is true that upon a decision to dismiss, no further step in the case can be taken, yet, the real question may well be as to whether the particular proceeding could be called a case or not. Whatever it was, it was certainly decided, and the mere fact that in the case of a grant of leave the application becomes, under Rule 8 of Ordor 33 of the Code, the plaint in the suit, the essential and only matter sought to be called in question was once and for all determined.

Moreover, what was decided was not in issue in the suit, but something entirely separate and distinct, *viz.*, the question whether the applicant should be granted leave or not.

It is true that it might be argued that such application (especially where it was granted) was in the nature of an interlocutory application, but having regard to the authorities which I have already mentioned, this would seem to me to make no difference. The matter is clearly one of some subtlety; and in the present case, beyond giving expression to the view already stated, I do not propose to decide here whether the proceeding is interlocutory or not.

(1) (1926) I.L.R. 48 All. 493. (2) (1930) A.I.R. All. 758.

Upon this point I might refer to *P. Baba Sah v. V. M. Purushothama Sah* (1).

If it is, in view of the cases I have referred to in this, and the Calcutta, Madras and Patna High Courts, revision must lie. If it is not, I think that it might well be held that the determination of such a question is a case decided. That this is so, both where the application is granted and also where it is refused, seems to follow from the nature of the proceeding. The question raised in the case is as much decided in the one as in the other.

It is unnecessary, however, to do more than hold (as I do) that revision lies in the present case. I am fortified in this conclusion by the knowledge that revision has been held to lie in cases of decision upon interlocutory matters. Moreover, I might mention that in two recent cases in this Court (though the point was not taken) revision proceedings were heard. I therefore feel bound to hold that the remedy is available in the present case ; see *Maung Pe Kywe* v. *Ma Shwe Zin* (2) and *Ma Shopjambi* v. *Mubarak Ali and others* (3).

The question for me now is therefore whether the Lower Court acted illegally or with material irregularity, and if so, whether grave hardship to the applicants resulted. I have little hesitation in answering this question in the negative.

The evidence, was, it is true, somewhat slender. The onus was upon the applicant, however, and the lower Court was not satisfied as to her status as a pauper. It is true that there was evidence in support of her allegation, but her application failed unless her contention that she was left out of the partition

(1) (1925) I.L.R. 48 Mad. 700. (2) (1929) I.L.R. 7 Ran. 359.
(3) (1929) I.L.R. 7 Ran. 361.

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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.