APPELLATE CIVIL.

Before Mr. Justice Baguley, and Mr. Justice Mosely.

1934

Sep. 4.

VERTANNES

v.

LAWSON AND OTHERS.*

Appeal in formâ pauperis—*Rejection of application for leave to appeal as a pauper—Unstamped memorandum of appeal—Validation of memorandum by payment of court-fee—No subsisting appeal—Payment of court-fee, Court's discretion—Civil Procedure Code (Act V of 1908), s. 149.*

Where an application for leave to appeal *in formâ pauperis* is rejected the appeal does not subsist. The memorandum accompanying the application cannot be stamped so as to validate it with effect from the date of the presentation of the application for leave to appeal. The applicant may file, subject to limitation, a memorandum of appeal duly stamped.

S. Anamallay v. *O.M.M.R.M. Chetty Firm*, 7 L.B.R. 90—*approved.*

Bishnath Prasad v. *Jagarnath*, I.L.R. 13 All. 305—*referred to.*

Achut Ramchandra v. *Balyya*, I.L.R. 38 Bom. 41 ; *Bai Ful* v. *Bhavanidas*, I.L.R. 22 Bom. 849 ; *Nallavadiva Ammal* v. *Subramania*, I.L.R. 40 Mad. 687—*dissented from.*

Under s. 149 of the Civil Procedure Code the Court has a discretion to allow or disallow court-fees to be paid on a document that is filed without a court-fee or an insufficient amount of court-fee.

Khatumannissa Bibi v. *Chowdhury*, 38 C.W.N. 650—*referred to.*

The applicant sued on the Original Side for Rs. 15,000 as damages for malicious prosecution. The suit was dismissed. He applied for leave to appeal as a pauper, but his application was rejected under O. 44, r. 1, of the Civil Procedure Code. He then applied, nearly two months after the dismissal of his application, to amend his memorandum of appeal by reducing the amount claimed to Rs. 1,000 or Rs. 500, and for further time to stamp it on the new valuation. He pleaded proverty as his excuse, and urged that he was anxious to clear his good name.

Held, that the appeal was barred, and even if the memorandum originally filed could be regarded as a subsisting document, the Court in the circumstances of the case ought to refuse to exercise its discretion in favour of the applicant.

J. Vertannes for the applicant.

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* Civil Misc. Application No. 67 of 1934 from the judgment of this Court on the Original Side in Civil Reg. No. 493 of 1933.

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MOSELY, J.—The application before the Court is one under section 149 of the Civil Procedure Code. The applicant filed a suit on the Original Side of this Court for Rs. 15,000, damages for malicious prosecution. His suit was dismissed. He then applied for leave to appeal *in formâ pauperis* against this decree, and his application was rejected under Order 44, rule 1, as the Court saw no reason to think that the decree was contrary to law or otherwise erroneous or unjust. The applicant then applied for an opportunity to be allowed to amend his memorandum of appeal by reducing the amount claimed, and then to be allowed time to stamp it on a new valuation.

We have heard the applicant's advocate at length on this application. Even now he will not state the exact amount at which he wishes to value his appeal, but says that he proposes to reduce it to Rs. 1,000, or Rs. 500 or so. It should be noted that the applicant has been adjudicated insolvent and has not been discharged.

Section 149 of the Civil Procedure Code reads as follows :

"Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee ; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."

There are two questions for decision. Firstly, whether there is a subsisting appeal before the Court of which the memorandum can be stamped with this reduced court-fee ; and, secondly, whether

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the Court ought to use its discretion in allowing such a reduction.

The limitation for applications for leave to appeal *in formâ pauperis* is thirty days from the date of the decree, under Article 170; while limitation for admission of appeals from decrees of the Original Side is twenty days, under Article 151. The date of the decree of the Original Side was the 6th of June, 1934, and the appeal was filed on the 25th of June. The application for leave to appeal *in formâ pauperis* was rejected on the 24th of July.

There is no reported ruling of this Court on the question whether in such a case, after rejection of an application to appeal *in formâ pauperis*, the appeal still subsists. The only reported decision on the subject in this Province is a ruling of the late Chief Court in 1913 [*S. Anamallay* v. *O.M.M.R.M. Chetty Firm* (1)], where it was held that the appeal did not subsist. An earlier case quoted [*Shaik Buffati* v. *Kalloo Khan* (2)] was a case where the application for leave to appeal was itself presented out of time.

In *S. Anamallay*'s case, a Bench of the Chief Court held that the earliest case on the subject [*Skinner* v. *Orde* (3)] was clearly distinguishable. That was a case where the applicant obtained funds which enabled him to pay the court-fees during the enquiry into his pauperism. It was held, agreeing with *Bishnath Prasad* v. *Jagarnath Prasad* (4), that when the application for permission to appeal as a pauper was before the Judge there was no appeal before him, but merely this application. The appeal would have, it was said, only come into existence before him on leave to

(1) (1913) 7 L.B.R. 90.
(2) (1905) 3 L.B.R. 194.
(3) (1879) I.L.R. 2 All. 241.
(4) (1891) I.L.R. 13 All. 305.

appeal having been granted. As the application was rejected no appeal ever became alive before the Court in connection with the application proceedings. The memorandum of appeal only became such, and could be acted on as such, when duly stamped. It started a fresh proceeding altogether, and the period of limitation ran from the time that it was received duly stamped.

In *Bishnath Prasad*'s case, Edge C.J. and Straight J. said :

> "We do not think that a piece of unstamped paper which only accompanied a petition to appeal *in formâ pauperis* could be called a memorandum of appeal in the proper sense of the term which the Judge could take cognizance of or make any order upon."

A leading case on which the applicant here relies is *Bai Ful* v. *Desai Manorbhai Bhavanidas* (1). That was a case where leave to appeal *in formâ pauperis* was refused, and the applicant was allowed to stamp his appeal at a lower valuation. This appeal was accepted, but then was dismissed as time-barred. The Judges differed as to whether the original memorandum of appeal ceased to be such when the application for leave to appeal *in formâ pauperis* was rejected. Farran C.J. said that the application and the appeal were separate documents, thereby differing from a petition to sue as a pauper, which included the plaint, the allegations as to pauperism, and the prayer to sue *in formâ pauperis*. He said that the Judge had dealt with the pauper application, but not necessarily with the memorandum of appeal which accompanied it. An unstamped memorandum of appeal was not a nullity. In every case

(1) (1897) I.L.R. 22 Bom. 849.

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the appeal would be time-barred if the application were rejected. If so, he said, the liberty reserved by section 413 (Order 33, rule 15) to file an ordinary appeal would be rendered idle. He said that this consideration must, he thought, have been present in the mind of the Legislature when they enacted section 592 (Order 44, rule 1), or else why should they have provided for the presenting of two separate documents, and not one as in the case of a petition to sue as a pauper.

It is not, I think, necessary to impute any intention of this kind to the Legislature, for it is obvious, I think, that the reason why an application to sue as a pauper must contain the plaint as an integral part of the application is merely that the application must show the cause of action, and if there is no cause of action the application is bound to be dismissed under Order 33, rule 5 (*d*).

Order 33, rule 15, refers to pauper suits, and enacts that if the application to sue as a pauper be refused the applicant should be at liberty to institute a suit in the ordinary manner. Order 44, rule 1, lays down that a 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 in all matters . . . to the provisions relating to suits by paupers in so far as those provisions are applicable." I cannot see how Order 33, rule 15, which relates to suits *in formâ pauperis* is in favour of this line of argument. There is nothing, of course, to prevent a person whose application to appeal as a pauper has been rejected from appealing in the ordinary manner. If Order 33, rule 15, has any

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application at all, it would, on analogy, I think merely imply that the pauper appellant could not file a fresh application to appeal *in formâ pauperis*, but could file a (separate) appeal later. It is true that in some cases, as here, the limitation for appeal is shorter than that for pauper applications, but that is not invariably so, and, in fact, the limitation for appeals from Courts other than the Original Side is ninety days under Article 156.

Candy J. (pp. 858 and 859), on the other hand, appears to have held that there was no subsisting appeal before the Court. He said that if the application was rejected the applicant was at liberty, on the analogy of Order 33, rule 15, to file an appeal in the ordinary manner, and there was no possible objection to the memorandum of appeal being returned to him so that it might be used as the memorandum of appeal "instituted in the ordinary manner", that is, with the necessary court-fee attached. But he said he could find no rule in the Civil Procedure Code providing that if this be done the appeal should be deemed to have been instituted on the day when the application to appeal as a pauper was presented. He went on to remark (p. 860):

> "I do not think that the fact that when the would-be appellant presents an application for leave to appeal as a pauper he presents with it a separate memorandum of appeal (whereas a would-be plaintiff asking for leave to sue as a pauper writes his application and plaint all in one), makes any difference. If the Legislature intended that on the Court refusing to allow the would-be appellant to appeal as a pauper, the Court must dispose of the memorandum of appeal, which had been filed with the application, then nothing would have been easier than to enact provisions to that effect. No doubt the short period of limitation given for filing an appeal in a District Court must in most cases make an appeal time-barred if the application to be allowed to appeal as a pauper is refused."

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In an earlier case [*Jumnabai* v. *Vissondas Ruttonchund* (1)] it was assumed without discussion that the court-fee in such a case can be paid at any time. *Durga Charan Naskar* v. *Dookhiram Naskar* (2), also relied on by the applicant, is not relevant here. It is a case where the court-fees were paid during the hearing of the application for leave to appeal. Another case relied on for the applicant is *Achut Ramchandra Pai and another* v. *Nagappa Bab Balgya and others* (3). It was a case of an ordinary appeal filed on an eight-anna stamp on the last day allowed by the law of limitation where a court-fee of Rs. 205 was required. The Court refused to grant the time applied for to pay the requisite sum and rejected the appeal. It was held by the High Court, reversing that order, that Order 7, rule 11, applied, and that the Court should have granted time. This ruling has been dissented from, I believe, by every other High Court in India. I need only quote, to the contrary, *Akkaraju Seshamma and others* v. *Namburi Venkatakrishna Rao* (4); *Ram Sahay Ram Pande* v. *Kumar Lachmi Narayan Singh* (5); *Brij Bhukhan* v. *Tota Ram* (6); and *Lekh Ram* v. *Ramji* (7). Other cases are quoted in Mulla's Commentary on section 149, page 390, 3rd Edition.

Nallavadiva Ammal v. *Subramania Pillay and others* (8) is much relied on by the applicant. The Judges there followed Farran C.J. in *Bai Ful*'s case. Oldfield J. agreed that the decision on the appellant's pauperism disposed only of his application for leave to appeal as a pauper, and left undisposed of the memorandum of appeal which must accompany that

(1) (1897) I.L.R. 21 Bom. 576.
(2) (1899) I.L.R. 26 Cal. 925.
(3) (1913) I.L.R. 38 Bom. 41.
(4) 27 Mad. L.J. 677.
(5) 3 P.L.J. 74.
(6) (1928) I.L.R. 50 All. 980.
(7) (1920) I.L.R. 1 Lah. 234.
(8) (1916) I.L.R. 40 Mad. 687.

application. The memorandum, though unstamped, was not a nullity, and could be validated with effect from the date of presentation by the supply of the requisite stamp. He admitted that this reasoning was, of course, open to the objection that appeal memoranda in pauper cases were not usually dismissed by any order distinct from that passed on the pauperism application, and are not in practice returned for payment of deficient duty, as ordinary memoranda would be.

Sadasiva Ayyar J. adopted Farran C.J's argument that the memorandum of appeal was a different paper from the application for permission to appeal as a pauper, and therefore,—thereby differing from the procedure in pauper suits,—the rejection of the application to appeal as a pauper left the separate memorandum of appeal intact.

The learned Judge went so far as to suggest (p. 697) that there might be a rule framed that whenever an application to appeal as a pauper was rejected that Court should at once pass an order granting reasonable time to the appellant to pay the stamp duty due on the memorandum of appeal.

I would, with all respect, dissociate myself as emphatically as I can from the assumption underlying this remark. So far from encouraging pauper appeals, the Legislature has thought fit to discourage them by enacting that they shall only be admitted on very limited grounds,—that is only where the judgment and decree are on the face of it unjust and contrary to law. Why a pauper appellant should be at liberty to have two opportunities of appealing,—opportunities denied to the ordinary appellant,—I do not know. He has chosen to take advantage of his privilege of appealing as a pauper and suffer the disadvantage of

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confining his appeal to those limited grounds. I cannot see why he should be allowed, as suggested by the learned Judge, to revise his appeal, raise money from his friends, and file an appeal, which can be on grounds far wider than a pauper application, namely on the evidence.

Nallavadiva Ammal's case was also followed in *Mahant Diyal Das* v. *Mahant Sundar Das* and *Mst. Bhagwan Devi and another* (1), and on the same grounds.

It appears to me that the decision in *S. Anamallay*'s case was on the right lines. The question is not whether the Court when rejecting an application to appeal as a pauper has *disposed* of the appeal, but whether there is really a subsisting appeal before the Court. Admittedly the appeal is on a separate piece of paper, and is not necessarily disposed of, in the sense of *adjudicated on*. An application to appeal as a pauper must, like an application to sue as a pauper, contain certain particulars, namely the reasons why it is alleged that the decree of the lower Court was unjust or contrary to law. The grounds of appeal attached usually reiterate these particulars, and may, in addition, contain other grounds based on the evidence. But, in my opinion, the memorandum of appeal is merely ancilliary to the application, and can only come into effect and be treated and acted on as a memorandum of appeal when and if the application to appeal as a pauper is allowed ; whereon the appeal is necessarily admitted (provided, of course, that subsequent enquiry does not disprove the alleged pauperism). I am not moved by the argument that if the application to sue as a pauper be rejected there can seldom be time for the

(1) (1921) I.L.R. 3 Lah. 35.

applicant to stamp and file an ordinary appeal within the period of limitation, for, as I have said, I see no reason why he should be allowed such an exceptional double opportunity, and, as remarked by Candy J. in his judgment, there is no express provision in the Code for this. I would note here that the provisions of Order 44, rule 1, have recently been dealt with by this Court in *San Shwe* v. *Haji Ko Ishaq* (1), but in a different connection, namely as to whether an order rejecting an application to appeal as a pauper is "a case decided" or merely an interlocutory order. This case came before a single Judge (Otter J.), who said that from the plain words in the provisions of Order 44, rule 1, it would appear that the application for permission to appeal as a pauper is a proceeding entirely distinct from the appeal itself. The memorandum of appeal ought not to be considered until after the hearing of the application. The Judge deciding an application for leave to appeal is under no obligation to dismiss the appeal. In fact, except for the purposes of the proviso to rule 1, he has no concern with the appeal at all. Indeed it was said "the applicant can always appeal within the time allowed by limitation, provided he pays the necessary court-fees." This case is cited as one in favour of the applicant, but these remarks, perhaps somewhat *obiter* to that case, will not help him.

In any case, as regards the second question before us, we are on, I think, indisputable ground. The provisions of section 149 are discretionary, and I cannot see how in the present case we should be exercising a proper discretion if we allowed the applicant, as he prays, to put a nominal value on

(1) (1930) I.L.R. 9 Ran. 92.

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his appeal, for the purpose, he says, of clearing his name. In this connection I would quote the case of *In re Sm. Khatumannissa Bibi* v. *Durjodhone Roy Chowdhury and others* (1), where it was held that inability to raise funds is not a sufficient ground which would entitle the Court to exercise its discretion under section 149 of the Civil Procedure Code. This was a case of an ordinary appeal filed on a court-fee of Rs. 2 only, on which the court-fee payable was Rs. 975. The ground alleged for the deficiency was poverty and inability to pay the court-fee on the day of presentation of the memorandum of appeal. The cases already cited as differing from *Achut Ramchandra Pai*'s case were quoted here, and it was said that where the appellants had deliberately, and to suit their own convenience, paid on their appeals insufficient court-fees, and in effect only a small fraction of the fees admittedly payable, the Court was not bound to receive the appeals and give the appellants time to make good the deficiency. It could hardly be said that the discretion should be exercised where the ground urged was mere inability to pay. No doubt, as was remarked in *Bishnath Prasad*'s case, if an insufficiently stamped memorandum of appeal was accepted by inadvertence time might be given to the appellant to supply the deficiency.

The present case is stronger, for it is not merely a case of poverty, and not a case of mistake or inadvertence at all. The applicant was presumably in a position to raise the small court-fee now proposed when he filed his original application to appeal as a pauper, and I entirely fail to see why any second opportunity should be given him. This application will therefore be dismissed.

(1) 38 C.W.N. 650.

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BAGULEY, J.—I agree with the judgment of my learned brother, and would like to associate myself emphatically with his remarks concerning the suggestion thrown out in *Nallavadiva Ammal* v. *Subramania Pillay and others* (1) that whenever an application to appeal as a pauper is rejected the Court should automatically pass an order granting time to the would-be appellant to pay the stamp duty due on the memorandum of appeal. I am unable to approve of that frame of mind which thinks that no case has been satisfactorily decided until it has been carried through every Court of appeal allowed by law. Courts which deal with the trial of cases are not so bad as all that. It is interesting to work out what would really happen if such an order allowing time for payment of the stamp duty were automatically to be allowed. In every such case the result would be either (*a*) that the stamp duty is paid, or (*b*) that it is not paid. In the case of (*b*) the order allowing time is clearly infructuous. The case (*a*) may be sub-divided into :

(*a*) (*a*) The applicant could not have paid the duty when he applied for leave to appeal as a pauper, and

(*a*) (*b*) he could have paid the duty.

In case (*a*) (*b*) it is clear that his original petition for leave to appeal as a pauper was made *mala fide*, and supported, presumably, by perjury. That such a man should be given a second chance is obviously improper.

In case (*a*) (*a*), when the duty is subsequently paid, it follows that the person must have raised money after his application for leave to appeal as a pauper was dismissed. In practically every case

(1) (1916) I.L.R. 40 Mad. 687.

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there is only one way in which money can be raised under these circumstances and that is by entering into a champertous agreement with some litigious speculator to provide funds; and it is well known that when a case has been lost in the trial Court and an application for leave to appeal as a pauper has been dismissed, such an agreement would mean that, if the appeal was successful, the speculator would get practically all the profits, and only a small residue would be left for the pauper. The cases (*a*) (*a*) may, therefore, be divided into:

(*a*) (*a*) (*a*) in which the appeal is ultimately successful, and

(*a*) (*a*) (*b*) in which it is unsuccessful.

In case (*a*) (*a*) (*b*), the unfortunate opposite party would be saddled with the costs of the appeal, which he would be quite unable to realize unless he were able to track down the financier and get an order for him to furnish security for the costs, or make him a joint-appellant; and in every other case the order which allowed the appeal to be proceeded with would result in an irreparable loss,—a loss which is really irreparable,—to the ultimately successful party, who must be regarded as being in the right as he has won in the ultimate Court of appeal. The pauper, therefore, would only benefit, almost to a negligible extent in cases which come under (*a*) (*a*) (*a*).

We see, therefore, that in cases (*b*) the proposed order would be infructuous; in cases (*a*) (*b*) the proposed order would have improper results; and in cases (*a*) (*a*) (*b*) the order would cause irreparable loss to an innocent party, and in the small residue of cases the main benefit would accrue to a speculator in litigation. In my opinion, the passing of the rule as proposed would be to the highest degree objectionable.

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In the present case Mr. Vertannes on behalf of his client says that he only wants to appeal in order to save his client's good name. He should have thought of that before. When he filed the application for leave to appeal as a pauper he was thinking mainly of the Rs. 15,000 damages. It is only when he has failed to get this money that his good name becomes of great importance to him; and I agree that when a man has had his chance and lost it there is no reason why the Court should go out of its way to give him a second chance.

PRIVY COUNCIL.

DAWSONS BANK, LIMITED, AND OTHERS

v.

VULCAN INSURANCE COMPANY, LIMITED.

*P.C. 1934

Oct. 29.

[On Appeal from the High Court at Rangoon.]

Insurance (Fire)—Policy—Misdescription of insured premises—Material misdescription—Avoidance of Policy.

A misdescription of the premises insured under a policy against fire is a material misdescription which avoids the policy if it would affect the mind of a reasonable insurer, either as to accepting the risk, or as to the premium which he would place upon the risk. Whether a misdescription is material or is not, is partly a question of evidence and partly a question of law.

A policy described the premises thereby insured against fire as constructed of brick walls in the ground storey, whereas only the back wall was wholly of brick, the front wall being of timber and the side walls of timber for two-thirds of their length. The evidence of witnesses experienced in the business of insurance in Burma showed that a higher premium would have been charged in the case of premises of the latter description.

Held, that the misdescription was material to the policy, and prevented the insured from succeeding in a suit to recover under it.

Decree of the High Court, I.L.R. 11 Ran. 266, affirmed.

Appeal (No. 16 of 1934) from a decree of the High Court in its Appellate Jurisdiction (March 8, 1933) reversing a decree of that Court in its Original Jurisdiction (May 17, 1932).

* *Present*: LORD ATKIN, LORD ALNESS, and SIR SHADI LAL.