

MISCELLANEOUS CIVIL.

Before Tek Chand and Agha Haidar JJ.

BANARSI DAS AND OTHERS (DEFENDANTS)

Petitioners

versus.

MUNSHI RAM AND OTHERS

(PLAINTIFFS)

BISHNU MAL AND ANOTHER

(DEFENDANTS)

} Respondents.

Civil Miscellaneous No. 312 of 1933.

Civil Procedure Code, Act V of 1908, Order XLIV, rule 1—Application to High Court—for permission to file an appeal in forma pauperis—Appeal admitted and notice issued by order of a Judge of the Court in the absence of respondents—whether precludes respondents from questioning the maintainability of the application at the hearing.

An application for permission to file an appeal in *forma pauperis* in the High Court was admitted and notice issued by the order of a Judge of the Court. On the date of hearing of the application, it was contended on behalf of the petitioner that the application must be deemed to have been granted and cannot be opposed by the respondent.

Held (overruling the contention) that any order passed behind the back of a party cannot operate to the prejudice of that party, and therefore in the present case apart from the question of pauperism the order, having been passed in the absence of the respondents, cannot preclude them from arguing that “the decree sought to be appealed from was not contrary to law or to some usage having the force of law and was not otherwise erroneous or unjust.”

Basant Kaur v. Chandu Lal (1), *Shamas-ud-Din v. Sant Ram* (2), *Ramsobha Das v. Ramsarup Das* (3), *Ghulam Nabi v. Secretary of State* (4), and *Tilak Mahton v. Akhil Kishore* (5), followed.

Other cases referred to.

(1) 1929 A. I. R. (Lah.) 514.

(3) (1931) 133 I. C. 125.

(2) (1933) 141 I. C. 649.

(4) 1932 A. I. R. (Lah.) 654.

(5) (1931) I. L. R. 10 Pat. 606 (F. B.).

Petition under Order XLIV, rule 1, Civil Procedure Code, for permission to file an appeal in forma pauperis in the High Court against the decree of Faqir Ferozepore, dated the 21st February, 1933, decreeing Sayad Said-ud-Din, Senior Subordinate Judge, the plaintiffs' suit against the defendants on foot of a mortgage.

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NAWAL KISHORE, for Petitioners.

MEHR CHAND MAHAJAN, for Plaintiffs-Respondents.

AGHA HAIDAR J.—This is an application under Order 44, rule 1 of the Code of Civil Procedure for permission to file an appeal in *forma pauperis* in this Court against the judgment and decree of the Senior Subordinate Judge, Ferozepore, dated the 21st February, 1933, decreeing the plaintiffs' suit against the defendants on foot of a mortgage. The applicants along with their application filed an affidavit in which they have made allegations in support of their pauperism. On the 2nd October, 1933, one of the respondents, Durga Das, filed in this Court, a counter affidavit in which he has made specific allegations as regards the financial condition of the applicants leading to the inference that they were not paupers. There is nothing on the record to show that the detailed affidavit filed by Durga Das contains an erroneous statement of fact. It was open to the applicants to give a further and fuller affidavit, meeting the points raised in the affidavit of Durga Das. This has not been done.

Apart from the question of pauperism, Mr. Nawal Kishore on behalf of the applicants argued that, inasmuch as notice had been issued by the learned Chief Justice, the application for permission to

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file an appeal in *forma pauperis* must be deemed to have been granted and that it was not open to the other side at this stage to raise any question as to the maintainability of the application on the ground that "the decree appealed from is not contrary to law or to some usage having the force of law or is not otherwise erroneous or unjust." He has quoted *Somasundaram v. Arunachalam* (1), and *Hubraji v. Balgaran Singh* (2). These cases no doubt support the argument advanced by Mr. Nawal Kishore, but there is a series of rulings of this Court in which a contrary view has been taken. I may mention here the following reported cases:—

1. *Basant Kaur v. Chandu Lal* (3);
2. *Shamas-ud-Din v. Sant Ram* (4);
3. *Ramsobha Das v. Ramsarup Das* (5);
4. *Ghulam Nabi v. Secretary of State* (6).

There is a Full Bench decision reported as *Tilak Mahton v. Akhil Kishore* (7), which lends support to the view of the Lahore High Court and overrules the previous decision of the Patna High Court reported as *Raghunath Prasad v. Mst. Rampiari Kuer* (8), in which a contrary view was expressed. These cases are based upon the well known principle that any order which has been passed behind the back of a party should not operate to the prejudice of that party. I may also note here that the Allahabad case follows *Raghunath Prasad v. Mst. Rampiari Kuer* (8), but apparently the attention of the learned Judge was not drawn to *Tilak Mahton v. Akhil Kishore* (7).

(1) 1932 A. I. R. (Mad.) 523.

(5) (1931) 133 I. C. 125.

(2) (1932) I. L. R. 54 All. 394.

(6) 1932 A. I. R. (Lah.) 654.

(3) 1929 A. I. R. (Lah.) 514.

(7) (1931) I. L. R. 10 Pat. 606.

(4) (1933) 141 I. C. 649.

(8) (1927) I. L. R. 6 Pat. 687.

The order in the present case was passed by the learned Chief Justice in the absence of the respondents and, therefore they could not be precluded, as a result of that order, from arguing before the Court that "the decree sought to be appealed against was not contrary to law or to some usage having the force of law or was not otherwise erroneous or unjust" and that, therefore, the application was obnoxious to the provisions of Order 44, rule 1 of the Code of Civil Procedure. I would, therefore, prefer to follow the precedents of this Court and overrule the contention which has been raised on behalf of the applicants.

So far as the judgment and decree sought to be appealed against are concerned we have considered them carefully and I do not consider that the decree is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust.

I would accordingly dismiss the application for permission to file an appeal in *forma pauperis* in this Court. The parties shall bear their own costs. The applicants are allowed one month's time to pay the requisite court-fee on the memorandum of appeal, if so advised.

TEK CHAND J.—I agree.

A. N. C.

Application dismissed.

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