admitted as evidence of general repute that he is called upon to answer it. Up to that moment, it is for the Court or for those who initiate the proceedings to satisfy the Court that the conditions laid down in the Explanation to section 36 (*1*) were duly observed.

In this view, therefore, the rule must be made absolute and the order made against the applicant set aside. There will be no order as to costs.

Rule made absolute.

B. G. R.

APPELLATE CIVIL.

Before Mr. Justice Rangnekar.

BAI CHANDAN DAUGHTER OF GIRDHARLAL DALPATRAM AND WIDOW OF WADILAL JEKISANDAS (ORIGINAL APPLICANT), APPLICANT *v.* CHHOTALAL JEKISANDAS AND ANOTHER (ORIGINAL OPPONENT), OPPONENT.*

1932 *February* 29.

Civil Procedure Code (Act V of 1908), section 115, Order XXXIII, rules 4, 5, 6, 7—Pauper, application to sue as—Evidence—High Court—Revisional jurisdiction.

The evidence which the Court has to take under rule 7 read with rule 6 is evidence only on the question of pauperism.

Shauran Bibi v. *Abdus Samad*[1] ; *Jogendra Narayan Ray* v. *Durga Charan Guha Thakurta*[2] ; *Shaikh Muhammad Nasrullah* v. *Shaikh Muhammad Shukrullah*[3] ; and *Ma Shopjambi* v. *Mubarak Ali*,[4] followed.

The scheme of Order XXXIII discussed. A Court cannot go into the merits except in so far as this is disclosed in (*a*) the application, (*b*) the evidence (if any) taken that the applicant is or is not subject to any of the prohibitions specified in rule 5.

Where there is a wilful disregard or a conscious violation by a Judge of a rule of law or procedure, the High Court has jurisdiction to interfere in revision under section 115 of the Civil Procedure Code.

Umed Mal v. *Chand Mal*[5] ; *Shew Prosad Bungshidhur* v. *Ram Chunder Haribux*[6] ; and *Shiva Nathaji* v. *Joma Kashinath*,[7] followed.

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

*Civil Revision Application No. 32 of 1931.

(1) (1923) 45 All. 548.
(2) (1918) 46 Cal. 651.
(3) (1923) 3 Pat. 275.
(4) (1929) 7 Rang. 361.
(5) (1926) L. R. 53 I. A. 271 : 54 Cal. 338.
(6) (1913) 41 Cal. 323.
(7) (1883) 7 Bom. 341.

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Jogendra Narayan Ray v. *Durga Charan Guha Thakurta*[1]; *Ma Mya Thin* v. *Ma Chu*[2]; *Shaikh Muhammad Nasrullah* v. *Shaikh Muhammad Shukurullah*[3]; *Mani Lal* v. *Durga Prasad*[4]; *Mt. Kako* v. *Sohna*[5]; *Rathnam Pillai* v. *Pappa Pillai*[6]; and *Ramachandra Raju* v. *Venkiah*,[7] followed.

Shankar Ban v. *Ram Dei*,[8] dissented from.

CIVIL REVISIONAL APPLICATION against an order passed by P. B. Patel, Subordinate Judge at Ahmedabad, in miscellaneous application No. 175 of 1930.

Application for leave to sue as a pauper.

On July 1, 1930, Bai Chandan (applicant) applied to the Court of the Subordinate Judge at Ahmedabad for leave to sue in *forma pauperis* for recovering her maintenance from the opponent. On the same day the Court issued notices to the opponent and the Government Pleader. The opponent put in a written statement. The Court examined the applicant, the opponent and one more witness. On the evidence the Court held that the applicant was a pauper but in view of an award between the parties the Court was of opinion that the applicant had no good subsisting cause of action and rejected the application under Order XXXIII, rule 5 (*d*).

The applicant applied to the High Court to revise this order.

S. T. Desai, with *I. B. Desai*, for the applicant.

A. G. Desai, for the opponents.

RANGNEKAR J. The petitioner filed an application in the Court of the Third Joint Subordinate Judge at Ahmedabad for leave to sue in *forma pauperis*. The learned Judge issued a notice to the opponent and also to the Government Pleader. The opponent appeared and put in a written statement. The learned Judge thereupon examined the plaintiff, one witness Exhibit 22, and the opponent. Full arguments were

(1) (1918) 46 Cal. 651.
(2) (1930) 9 Rang. 86.
(3) (1923) 3 Pat. 275.
(4) (1924) 3 Pat. 930.
(5) [1927] A. I. R. Lah. 56.
(6) (1902) 13 Mad L. J. 292.
(7) (1926) 52 Mad. L. J. 330.
(8) (1926) 48 All. 493.

heard and the learned Judge held that the petitioner was a pauper, but on the merits she had no good subsisting cause of action and rejected the petition. The petitioner applies in revision against that order.

The learned advocate for the opponent has raised a preliminary objection. I am of opinion that the preliminary objection must be overruled, and that, in a proper case, a revisional application will lie against an order rejecting the petitioner's application for leave to sue in *forma pauperis*.

In the first place, it is necessary to understand the scheme of Order XXXIII of the Civil Procedure Code which relates to suits by paupers. Rule 1 defines a "pauper". Rule 2 deals with the contents of an application by a pauper. Rule 3 lays down how the application is to be presented. Rule 4 is important, and says that where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant or his agent, where the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant. Rule 5 is also important, and enables the Court to reject an application for permission to sue as a pauper in certain cases, two of which are material in this appeal: (*b*) where the applicant is not a pauper, and (*d*) where his allegations do not show a cause of action. Now it is clear from this that the Court has jurisdiction to examine the applicant on two points: (1) as to his alleged pauperism, and (2) on the merits of his claim; and if the Court concludes that the definition in rule 1 is not satisfied, or that there are no merits in the claim, it has jurisdiction to reject the application. It is obvious that the only materials, at this stage, on which the Court can proceed, in coming to the conclusion that there are no merits in the applicant's claim, are the application itself under rule 4, and the evidence of the applicant or his agent. The term "allegations" in rule 5 (*d*) can only refer to the application and the evidence, if any, of the applicant himself allowed by rule 4. Then comes rule 6, and under it if at that stage

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the application is not rejected under rule 5, the Court has to fix a day for receiving such evidence as the applicant may adduce in proof of his pauperism and for hearing any evidence which may be adduced in disproof thereof either by the opponent or by the Government, to both of whom a clear ten days' notice has to be given under this rule. Rule 7 prescribes the procedure to be followed on the day fixed under rule 6. On that day the Court is bound to examine the witnesses, if any, produced by either party and may examine the applicant, and the Court is bound to make a memorandum of the substance of the evidence led before it. It is clear that in addition to the examination of the applicant under rule 4 the Court can examine him again under rule 7. Now, there is a current of decisions which lay down that the evidence which the Court has to take under rule 7 read with rule 6 is the evidence only on the question of pauperism. See *Shauran Bibi* v. *Abdus Samad*,[1] *Jogendra Narayan Ray* v. *Durga Charan Guha Thakurta*,[2] *Shaikh Muhammad Nasrullah* v. *Shaikh Muhammad Shukurullah*,[3] and *Ma Shopjambi* v. *Mubarak Ali*.[4]

It is clear that there is nothing in Order XXXIII which authorises the Court to take evidence on the merits of the claim at this stage other than the evidence led under rule 4 read with rules 5 and 7. Reading rules 4, 5, 6 and 7, the scheme of Order XXXIII of the Civil Procedure Code seems to be (1) the evidence of the applicant either under rule 4 or rule 7 on the question of pauperism, (2) the evidence of witnesses called by the applicant or his opponent under rule 6 also on the question of pauperism and on no other, and (3) the evidence of the applicant himself under rule 4 or possibly under rule 7 on the merits of the claim. It follows, therefore, that the materials for forming an opinion whether the applicant has a subsisting cause of action or not, or to use the words of rule 5 (*d*) whether "his allegations do

(1) (1923) 45 All. 548.
(2) (1918) 46 Cal. 651.
(3) (1923) 3 Pat. 275.
(4) (1929) 7 Rang. 361.

not show a cause of action" are (1) the application, and (2) the evidence of the applicant under rule 4 or rule 7. Then under rule 7 (2), the Court has to hear arguments, if any, offered on the face of (*a*) the application, and (*b*) the evidence (if any) taken, that the applicant is or is not subject to any of the prohibitions specified in rule 5.

The next question which arises on this petition is whether an order made under rule 7 (3) in this case refusing the petitioner to allow to sue as a pauper can be revised by this Court under section 115 of the Code.

Here, a professional lawyer is sorely perplexed and bewildered by the conflict of judicial decisions as to what is the meaning of the expression "case which has been decided" in section 115 of the Civil Procedure Code, and what is the meaning of clause (*c*) in that section when it is said that the Court has acted in the exercise of its jurisdiction "illegally or with material irregularity", and one can only express a pious hope that the legislature may step in and say precisely what it means and fix the limits of the revisional jurisdiction of the High Courts in a manner intelligible even to a layman. The first two clauses (*a*) and (*b*) of section 115 do not present any difficulty, it is the last clause that does. Apart from the conflict between the different High Courts, in this Presidency the difficulty is still further enhanced by the application of an old regulation, being Bombay Regulation II of 1827, which is sometimes invoked, and cases are not wanting to show that even the provisions of the Government of India Act which confer upon the High Courts a general power of superintendence over all the Courts subordinate to it have been brought under requisition. One thing is clear that clause (*c*) means and must mean something which is different from what is meant by clauses (*a*) and (*b*). It is clear that clause (*c*) excludes clause (*b*), for, "the Court cannot refuse to exercise its jurisdiction and act in the exercise of it with material irregularity". The plain meaning of the clause seems to be that the Court having

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jurisdiction has exercised it but in so exercising it has acted illegally or with material irregularity. As the law stands at present, one cannot do better than to go to the Privy Council decisions which are binding on all the Courts in India, but which, one regrets to find, have not been understood uniformly by the Courts in this country and have resulted in a conflict of decisions which makes the law open to the reproach which an ordinary layman is often fond of laying against it.

There are three decisions of the Privy Council which deal with the meaning and construction of section 115 of the Code. The first is the well known case of *Rajah Amir Hassan Khan* v. *Sheo Baksh Singh*.[1] In that case it was laid down by the Privy Council that where a Court has jurisdiction to decide the question before it, and in fact decides it, it cannot be regarded as acting in the exercise of its jurisdiction illegally or with material irregularity merely because its decision is wrong. The next case is *Balakrishna Udayar* v. *Vasudeva Aiyar*,[2] where their Lordships observed as follows (p. 267) :—

"It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

The third case is the case of *Lachmi Narain Marwari* v. *Balmakund Marwari*.[3] No particular proposition was laid down in that case, but on the facts before them the Judicial Committee held that the case was one of exercise of jurisdiction not vested in the Court, and their Lordships observed that the Subordinate Judge had not the jurisdiction to make the order which he made ; the order was not merely wrong in law but it was an order which he had no jurisdiction to make. The question in that case arose in this way. There

(1) (1884) L. R. 11 I. A. 237 : 11 Cal. 6. (2) (1917) L. R. 44 I. A. 261 : 40 Mad. 793.
(3) (1924) L. R. 51 I. A. 321 : 4 Pat. 61.

were earlier proceedings in a suit for partition, and the suit had come in appeal before the High Court. In appeal the parties arrived at a compromise on certain terms. The case was then remanded to give effect to the compromise and a day was fixed by the Subordinate Judge to proceed with the matter. On that day the plaintiff remained absent, and the Subordinate Judge purporting to act under the provisions of Order IX, rule 8, dismissed the suit. Now that rule clearly shows that if the plaintiff is absent the Court has to dismiss the suit unless the claim or part of it is admitted by the defendant. It is clear, therefore, that in this case in which part of the plaintiff's claim was admitted and given effect to by the compromise, the Court had no jurisdiction to dismiss the suit under the provisions of Order IX, rule 8.

It will be seen that even with the help of these Privy Council decisions the question as to the proper meaning of clause (*c*) of section 115 is not free from doubt. We have of course the decision in *Balakrishna's* case which shows that according to the Privy Council the section only deals with the question of jurisdiction or illegal or irregular exercise of it. What then is the meaning of the terms "illegally" or "with material irregularity"? On this as I have remarked there is considerable conflict of judicial decisions, but the general trend of decisions seems to be to emphasise the word "acted" which occurs in that clause. Thus, in *Shew Prosad Bungshidhur* v. *Ram Chunder Haribux*,[1] Sir Lawrence Jenkins, one of the most eminent Judges who ever sat in any of the High Courts, observes as follows (p. 338) :—

> "It appears to me that section 115 can only be called in aid when the failure of justice (if any) has been due to one or other of the faults of procedure indicated in that section. If there was an error committed [by the Small Cause Court], it was an error of law and not of procedure, and in my opinion Mr. Justice Fletcher had no power to interfere."

This view seems to have been accepted by the Privy Council in a latter case in *Umed Mal* v. *Chand Mal*.[2] Therefore,

[1] (1913) 41 Cal. 323. [2] (1926) L. R. 53 I. A. 271 : 54 Cal. 338.

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it seems to me that where there is a wilful disregard or a conscious violation by a Judge of a rule of law or procedure, the High Court will have jurisdiction to interfere in revision. I am aware that this view has not found acceptance in some of the Indian High Courts, who have said that this would add something to the decision of the Privy Council which was not there. On the other hand some other Courts, particularly the Allahabad and the Calcutta High Courts, have accepted this view. I may also refer to an earlier decision of the Bombay High Court in *Shiva Nathaji* v. *Joma Kashinath*[1] which seems to have taken the same view.

This brings me to the cases bearing on the point of the preliminary objection raised by Mr. A. G. Desai, and I find without going into the details that almost all the Courts excepting the Allahabad High Court in its recent decision have laid down that in a proper case the High Court will interfere in revision against an order of a subordinate Court rejecting a petition of an applicant for leave to sue in *forma pauperis*. The course of decisions in the Calcutta High Court has been uniform on this point, and I need refer only to *Jogendra Narayan Ray* v. *Durga Charan Guha Thakurta*.[2] Of course the question whether a revisional application would lie in such a case or not was not specifically raised in that case, but a revisional application wasentertained and the order of the subordinate Court was set aside on the ground that the Court had gone beyond the provisions of Order XXXIII in that the Court had gone into the merits of the case not merely on the application and the evidence of the applicant but the evidence of other witnesses also, and the learned Judges laid down that the evidence to be taken under rule 7 must be confined to the evidence which may be adduced by the applicant in proof of his pauperism and any evidence which may be adduced in disproof thereof as laid down in rule 6. This case followed an earlier decision

[1] (1883) 7 Bom. 341 F. B. [2] (1918) 46 Cal. 651.

of that Court, to which it is not necessary to refer. The Rangoon High Court has taken the same view. I need only refer to *Ma Shapjambi* v. *Mubarak Ali*.[1] The head-note of that case, however, seems to be much wider than the actual point decided. There also the point now taken by Mr. A. G. Desai was not specifically taken, but the application was under the revisional jurisdiction of the High Court. But in a later case, *Ma Mya Thin* v. *Ma Chu*,[2] the question as to whether a revisional application would lie against an order of rejection of an application for leave to sue in *forma pauperis* was specifically raised and carefully considered by Mr. Justice Otter, and I respectfully agree with the view of that learned Judge that an order rejecting an application to sue in *forma pauperis* is open to revision in a proper case. In Patna the same view prevails as also in the Lahore High Court. See *Shaikh Muhammad Nasrullah* v. *Shaikh Muhammad Shukurullah*,[3] *Mani Lal* v. *Durga Prasad*,[4] *Mt. Kako* v. *Sohna*.[5] In Allahabad the course of decisions is not uniform. Up to 1925 the opinion of the Allahabad High Court seems to have been that there was no objection to the High Courts entertaining a revisional application againt such an order. The question arose specifically in *Mahadeo Sahai* v. *The Secretary of State for India in Council*.[6] There Piggot J. reserved his opinion on the question, the other learned Judge, Walsh J., however, expressed an opinion that the High Court cannot interfere under section 115. In *Shankar Ban* v. *Ram Dei*[7] Mr. Justice Walsh and Mr. Justice Dalal held that no revision lay from an order rejecting an application to sue in *forma pauperis*. I may say with respect to the learned Judges that I do not agree with that view. In my opinion, it is certainly, as I have indicated, too broadly stated. Undoubtedly, in some cases of rejection of such a petition the High Court

[1] (1929) 7 Ran. 361.
[2] (1930) 9 Ran. 86.
[3] (1923) 3 Pat. 275.
[4] (1924) 3 Pat. 930.
[5] [1927] A. I. R. Lah. 56.
[6] (1921) 44 All. 248.
[7] (1926) 48 All. 493.

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will not interfere, but I see no objection, where there has been a conscious violation of the specific rules laid down in Order XXXIII resulting, as it must, in an injustice to an applicant, why the High Court should deny him the benefit of its revisional jurisdiction under section 115. In Madras, the view that I have been taking has been consistently taken by that Court. See *Rathnam Pillai* v. *Pappa Pillai*,[1] *Ramachandra Raju* v. *Venkiah*,[2] *Govindasami Pillay* v. *Municipal Council, Kumbakonam*.[3] That being the position, in my opinion, the preliminary objection must be overruled.

What happened in this case was that not only was the opponent allowed to put in a written statement, for which, as far as I can see, there is no provision in Order XXXIII, but the learned Judge went into the merits of the case and actually relied upon the evidence of two witnesses and also the evidence of the opponent himself, and came to the conclusion that there was no subsisting cause of action, and that, to use his own words, the plaintiff had failed to make out a *prima facie* case on the merits. There is no warrant for this procedure in the provisions of Order XXXIII. Mr. A. G. Desai says that what the learned Judge really did was to rely upon the evidence of the applicant himself. I cannot accept this argument, as the judgment makes it clear that the learned Judge also relied upon the evidence of the two witnesses. The opponent contended that the plaintiff's claim was barred by a valid award. Mr. Desai says that the plaintiff admitted the award. But her evidence makes it clear that she denied it, and that in any case she contended that the award was not valid and binding on her. That being the position, the learned Judge was wrong in dismissing the application and refusing the applicant to sue as a pauper on the ground that no *prima facie* case on the merits was made out.

[1] (1902) 13 Mad. L. J. 292, F. B. [2] (1926) 52 Mad. L. J. 330.
[3] (1917) 41 Mad. 620.

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Therefore, the petition must be allowed, the order made by the lower Court reversed, and the case remanded to that Court with a direction that it should admit the petition to the file, and proceed to deal with it in accordance with law. The opponent to pay the costs of this application. Rule absolute with costs.

Rule made absolute.

B. G. R.

ORIGINAL CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Mirza.

1932
April 1.

SHANTILAL MEWARAM AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* MUNSHILAL KEWALRAM (ORIGINAL DEFENDANT No. 2), RESPONDENT.*

Hindu law—Partition—Father and minor son—Reference to arbitration by minor's mother—Absence of order of Court permitting reference—Competency of mother to make such reference—Award—Decree on award—Partition binding on father—Minor could impeach award on attaining majority—Fraudulent transfer—Transfer of Property Act (IV of 1882), section 53.

A suit was brought against defendants Nos. 1 and 2, a father and his minor son, for recovery of a sum of money due to the plaintiffs in respect of certain forward transactions in cotton and silver effected by the father during January to September 1928. The claim was resisted by the son on the ground that he had separated from his father as a result of an award made by an arbitrator who was appointed by the father and the mother of the minor acting on his behalf. It appeared that defendant No. 1 inherited property of considerable value on the death of his father in 1925. Defendant No. 1 squandered a considerable portion of the property by 1928. His wife and minor son, defendant No. 2, were dissatisfied with the conduct of defendant No. 1 and frequent disputes arose between them. These disputes were referred to arbitration on January 31, 1928. The arbitrator published his award on February 19, 1928. Under the terms of the award the whole property was allotted to defendant No. 2 and a sum of Rs. 150 per month was directed to be paid to defendant No. 1 and certain other monthly payments were directed to be made to certain widows of the family. The award was registered on March 10, 1928. A suit was filed to make the award an order of the Court, and a decree in terms of the award was passed on September 25, 1928. Defendant No. 1 consented to that decree. The plaintiffs contended that the said partition was a colourable transaction and was not intended to be acted upon. It was further contended that the intention of the reference was to defeat and delay the creditors of defendant No. 1.

*O. C. J. Appeal No. 51 of 1931, Suit No. 349 of 1929.