APPELLATE CIVIL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

H C.
1948

July 16.

MA THAN (APPLICANT)

v.

U TUN YIN AND ONE (RESPONDENTS).*

Code of Civil Procedure, Order 44, Order 33, Rule (2)—Conditions for entertaining pauper appeal.

Held : That there is a difference between an application for leave to sue as a pauper and an application for leave to appeal as a pauper. When the appellate stage is reached a more severe test has to be applied and it is incumbent on the appellant to satisfy the court that the judgment is erroneous and this after a perusal of the judgment and decree. This is a necessary safeguard introduced by the Legislature for the benefit of the litigants.

Ma Tha Din v. *Daw Paw*, 4 B.L.J. 55-A.I.R., (1925) Ran. 249 ; *Thirupuraneni Narayana Rao* v. *Soorapaneni Veerayya and three others*, (1933) I.L.R. 56 Mad. 323 at pp. 326-327 ; *Chennamma, In re* (1929) I.L.R. 53 Mad. 245 ; *Sakubai, widow of Vinayak Ramkrishna* v. *Ganpat Ramkrishna*, (1904) I.L.R. 28 Bom. 451 at p. 452, followed and applied.

Tun Sein for the applicant.

The judgment of the Bench was delivered by

U THEIN MAUNG, C.J.—This is an application under Order 44, Rule 1, of the Code of Civil Procedure for permission to appeal as a pauper from the judgment and decree of the 2nd Assistant Judge, Maubin, in Civil Regular Suit No. 12 of 1947. The plantiff-petitioner claimed in that case that she is entitled to a half share of the properties which were possessed by her father, the 1st defendant-respondent U Tun Yin, at the time of his marriage with the 2nd defendant-respondent, Ma Thein Yin, as she is a daughter of U Tun Yin by his first wife Ma Mai Khin, who died many years before his remarriage. Her case was that

* Civil Misc. Application No. 39 of 1948—Application for leave to appeal as a pauper under Order 44, read with Order 33, Rule 2, of the Code of Civil Procedure.

the said remarriage took place in October 1930 (*i.e. Thadingyut* of that year) and that her suit was not time-barred as she is entiled to the benefit of section 7 of the Courts (Emergency Provisions) Act, 1943, as regards the period beginning with the 8th December 1941 and ending with the 31st March 1947.

The defendants-respondents pleaded *inter alia* that her suit was time-barred inasmuch as the remarriage took place on the 11th *lazan* of *Kason*, 1291 B.E. (the 18th April 1929) and the period of 12 years expired on the 18th April 1941, *i.e.* about 8 months before the said Act came into force.

The learned Assistant Judge has found that the remarriage did take place on the 18th April 1929 as alleged by the defendants-respondents and that the suit is time-barred. He has come to the said conclusion after a careful consideration of the evidence in the case. He has given reasons for rejecting the evidence of witnesses who gave evidence as to the date of the remarriage from memory. He has also given reasons for preferring the documentary evidence in the form of an inscription on a "Kyizi", which shows that the "Kyizi" was donated by the two defendants-respondents on the Full Moon of *Kason*, 1291 B.E. (the 22nd April 1929), *i.e.* four days after their marriage.

Now, the proviso to Order 44, Rule 1, reads :

"Provided that the 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."

With reference to this proviso, Brown J. has observed in *Ma Tha Din* v. *Daw Paw* (1) :

"If the judgment and the decree are on the face of them unexceptionable, the application cannot be entertained and it is

(1) 4 B.L.J. 55-A.I.R. (1925) Ran. 249.

H.C. 1948

MA THAN v. U TUN YIN AND ONE.

U THEIN MAUNG, C.J.

not open to the appellate Court to consider whether the judgment is justified by the record. It is only on the payment of Court-fees that an appellant can claim the full rights of appeal. He cannot claim the special privileges of Order 44 unless the conditions of the proviso to Rule 1 are satisfied.".

The ruling in *Ma Tha Din* v. *Daw Paw* (1) has been cited with approval in *Thirupuraneni Narayana Rao* v. *Soorapaneni Veerayya and three others* (2), where Beasley C.J. has observed :

"What appears to me to have been overlooked in *Chennamma, In re* (3) is the difference between an application for leave to sue as a pauper and an application for leave to appeal as a pauper. In the former case, apart from the question of pauperism, the only test applied is whether there is a cause of action shown ; but when the appellate stage is reached, a more severe test has to be applied. The defendant has been successful in the lower Court and he has been put to great cost in successfully defending the suit and in most cases he has not been able to recover one anna from the plaintiff towards his costs. Therefore it is that when the pauper litigant comes to the appellate Court for leave to continue the litigation as a pauper, it is incumbent upon him to satisfy the Court that the judgment is erroneous This does not mean a final decision by the Court, but such a decision as can be given after a perusal of the judgment and the decree."

Jenkins C.J. has also observed in *Sakubai, widow of Vinayak Ramkrishna* v. *Ganpat Ramkrishna* (4) :

"That proviso is a very necessary safeguard introduced by the Legislature for the benefit of litigants who found themselves opposed by paupers, and in our opinion the Court should be careful to see that the proviso is satisfied."

So, all that we are concerned with at the present moment is whether, on the face of them, the judgment and decree are contrary to law or to some usage having

(1) 4 B.L.J. 55-A.I.R. (1925) Ran. 249.
(2) (1933) I.L.R. 56 Mad. 323 at pp. 326-327.
(3) (1929) I.L.R. 53 Mad. 245.
(4) (1904) I.L.R. 28 Bom. 451 at p. 452.

the force of law, or are otherwise erroneous or unjust, and although we have heard the arguments of the learned advocate for the plaintiff-petitioner at considerable length, we must say that we are not in a position to say that they are. [Compare *Rajendra Prasad Bose* v. *Gopal Prasad Bose* (1).]

The application is dismissed accordingly.

(1) (1925) I.L.R. 4 Pat. 67.