follow and, in my judgment, the protections of Article 311 are not against harsh words but against hard blows. It is the effect of the order alone that matters ; and in my judgment, Article 311 applies whenever any substantial evil follows over and above a purely "contractual one". I do not think the article can be evaded by saying in a set of rules that a particular consequence is not a punishment or that a particular kind of action is not intended to operate as a penalty. In my judgment, it does not matter whether the evil consequences are one of the "penalties" prescribed by the rules or not. The real test is, do they in fact ensue as a consequence of the order made ?

I would allow the appeal with costs.

BY THE COURT.—In accordance with the opinion of the majority, the appeal is dismissed with costs.

B.R.T.

CIVIL MISCELLANEOUS

Before Falshaw and Mehar Singh, JJ.

SMT. MOHD-UN-NISA BEGUM,—*Appellant*

versus

SHRI FAYAZ ALI HASHMI,—*Respondent*

Civil Miscellaneous No. 489-D/57.

1957

Nov., 1st

Code of Civil Procedure (Act V of 1908)—Order 44, Rule 1—Application for leave to appeal in forma pauperis *under—Duty of the Court while considering the application—Issue of notice to the respondent—Respondent, whether entitled to oppose the application on the ground that the judgment appealed against is not* prima facie *contrary to law or otherwise unjust or erroneous—Order XXXVII, Rule 3—Leave to defend suit granted on condition of depositing the amount in Court—Condition not satisfied and the suit decreed—Judgment, whether* prima facie *contrary to law or otherwise erroneous or unjust—Section 115—Revision against the order granting conditional leave to defend—Whether competent after the suit decreed.*

Held, that both under the original proviso and the new sub-rule (2) of rule 1 of Order 44, Code of Civil Procedure, it is clearly the duty of the Court to examine the judgment straight away and decide whether it is *prima facie* right or wrong. If the judgment is *prima facie* correct, then the application must be dismissed without any further ado. If the Court comes to the conclusion that the judgment is *prima facie* wrong, it will issue notice to the opposite party and it is quite wrong and unjustified to hold that the judgment has only to be considered after the question whether the applicant is a pauper or not has been decided.

Held, that after the opposite party has appeared in answer to notice it is open to it to oppose the application on the ground that the judgment which is sought to be challenged in appeal is not *prima facie* contrary to law or otherwise erroneous or unjust.

Held, that where leave to defend a suit under Order XXXVII, Rule 3, is granted to the defendant on condition that he deposits the sum in suit and costs within a specified period and on his failure to do so the suit is decreed against him, there is nothing *prima facie* contrary to law or otherwise erroneous or unjust in it even if the order imposing the condition is considered a part of the judgment.

Held, that an order imposing a condition while granting leave to defend a suit under Order XXXVII, Rule 3, Code of Civil Procedure, cannot be challenged in a revision petition after it has been followed by the order decreeing the suit, which is appealable and against which the petitioner seeks to appeal in *forma pauperis*.

UDAI BHAN, for Petitioner.

D. K. KAPUR, for Respondent.

ORDER

Falshaw, J.

FALSHAW, J.—The respondent in this case Fayaz Ali Hashmi instituted a suit against the petitioner Mst. Mohammad-un-Nisa Begum under Order 37, Rule 2, Civil Procedure Code, for the recovery of Rs. 7,885 on the basis of a pronote in July, 1956. The

defendant applied under Order 37, rule 3, for permission to defend the suit which was based on a pronote and receipt on printed Urdu forms bearing the thumb-mark and signature of the defendant, and the execution of these documents was not denied, the defendant's case being that the plaintiff was her employee and somehow had obtained her thumb-marks and signatures on these documents. In these circumstances on the 13th of November, 1956, the Court passed an order permitting the defendant to defend the suit on the condition that the amount in suit and costs were deposited in Court within two months. The amount in question was not deposited and on the 14th of January, 1957, the Court passed orders both dismissing an application for extension of the time and decreeing the suit.

On the 9th of March, 1957, the petitioner simultaneously filed a revision petition in which she challenged the order of the 13th of November, 1956, by which she was only permitted to defend the suit on depositing the amount in question and an application under Order 44 rule 1, Civil Procedure Code, for permission to appeal against the decree *in forma pauperis*. Both the petitions came before my Lord the Chief Justice and Chopra, J., on the 27th of March, 1957, and in both notice was ordered to be issued and an order of stay of execution was passed.

At the outset the objections were raised on behalf of the decree-holder respondent that since the order which was challenged in the revision petition had already been superseded by the order decreeing the suit, no revision petition could possibly be entertained and that there was nothing in the terms of the judgment, on which the decree was based on account of which the Court could in the words of the proviso in Order 44 rule 1, see reason to think that the decree was

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contrary to law or some usage having the force of law or is otherwise erroneous or unjust.

On behalf of the petitioner the contention is raised that once notice has been ordered to be issued on an application under Order 44 rule 1 the Court is precluded from going any further into the question whether the judgment is contrary to law or otherwise erroneous or unjust and can only consider the question whether the applicant is a pauper or not. The relevant provisions of law are contained in order 44 rule 1, Civil Procedure Code, which, until an amendment was introduced by Act 66 of 1956, in December, 1956, used to read as follows—

> "Any 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, including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable : 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."

By the recent amendment the first paragraph of this rule has been numbered sub-rule (1) and the following sub-rule (2) has been substituted for the proviso.—

> "The Appellate Court, after fixing a day for hearing the applicant or his pleader

and hearing him accordingly if he appears on that day, and upon a perusal of the application and of the judgment and decree appealed from, shall reject the application, unless 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."

In support of his contention the learned counsel for the petitioner relies almost entirely on a recent decision of a Division Bench of the Calcutta High Court in *Sm. Panchu Bala Dasi* v. *Nihil Rajan Pal* (1), decision by K. C. Dass Gupta and Guha, JJ., refers to rule 1 as it was before the amendment, and the learned judges held that when the Court before which an application to file an appeal in *forma pauperis* is made, does not reject the application in view of the proviso to that rule, but issues notice on the opposite party to show cause why the application to prosecute the appeal as pauper should not be allowed, it is not open to the Court at a later stage to reject the application on the ground that under the proviso it is bound to reject it.

It is, however, pointed out that this view is opposed to the view expressed by other High Courts as well as the view expressed in an earlier case by a Division Bench of the Calcutta High Court consisting of Mookerjee and Renupada Mukherjee, JJ., In *Arunendra Nath Chatterjee and another* v. *Sanat Kumar Mukherjee and others* (2). These learned Judges held that when an application for leave to file an appeal *in forma pauperis* is presented under Order 44, rule 1, of the Civil Procedure Code, it is not necessary at the initial stage

(1) A.I.R. 1956 Cal. 530
(2) 58 C.W.N. 367

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for the Court to arrive at a definite conclusion that the decree complained against is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust, and merely because the Court has issued a rule calling upon the opposite party to show cause why the petitioner should not be allowed to file an appeal *in forma pauperis* it would not debar the Court from considering all the questions which arise under the proviso to Order 44, rule 1, of the Civil Procedure Code, after giving a hearing to the opposite party and also to the Government Pleader, if notice has been given to him as well.

In that case the views of other High Courts are collated and it has been found that although in some Courts views at one stage had been taken on the lines of the later Calcutta case mentioned above, the final view of the Courts of Patna in *Tiluk Mahsto* v. *Akhil Kishore* (1), Oudh in *Habshi Mia* v. *Mehdi Hasan* (2), Allahabad in *Powdhari* v. *Ram Sanowari* (3), Madras in *Mitturi Suryanarayanamurty* (4), Bombay in *Ladobi Shaikh Umar* v. *Saukarlal Pannalal Kalantri* (5), and finally Lahore in *Banarsi Das and others* v. *Munshi Ram and others* (6), was that which the learned Judges now adopted in their decision. In the Lahore case 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, and 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 could not be opposed by the respondent, and it was held by Tek Chand and

(1) I.L.R. 10 Pat. 606 (F.B.)
(2) A.I.R. 1937 Oudh. 222 (F.B.)
(3) I.L.R. 57 All. 440 (F.B.)
(4) 71 M.L.J. 497
(5) 50 Bom. L.R. 133
(6) I.L.R. 15 Lah. 132

Agha Haidar, JJ., 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 could not 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. It was contended on behalf of the respondent that since this decision, which has been followed in practice, the issuing of the notice on an application under Order 44, rule 1, both in the Lahore Court and subsequently in this Court, has not been regarded as precluding the respondent from raising the question whether the judgment against which it was sought to appeal was *prima facie* correct. From my own experience I can only say that this is so. I have had to deal with the admission of a number of these applications both sitting singly and in Division Bench, and as far as I am aware, neither I nor any of my colleagues have ever regarded the issuing of the notice on such an application as finally settling the matter that leave should be given provided that the petitioner could show that he was a pauper. Similarly, when deciding these applications in the presence of both parties the same view has been taken, and in fact this is the first case in which an objection of this kind is being raised by the petitioner before me.

At the same time it is clear that if the Judges of this Court have fallen into a practice which is actually contrary to law the matter should be set right and the practice discontinued. However, there is undoubtedly a good deal to be said for the view adopted by so many High Courts. Generally speaking when notice is issued on an application of any kind it is open to the respondent to oppose the application on any ground which arises out

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of it, and no part of the application is deemed to have been decided *ex-parte* in favour of the petitioner by the mere order of admission.

At the same time there is undoubtedly something to be said in support of the view taken in the recent Calcutta decision. The only difference between the original proviso and the amended sub-rule (2) is that it is now specifically provided for the petitioner or his counsel to be heard, which seems to have been doubted by some High Courts, otherwise it is still the duty of the Court to peruse the application and the judgment and decree appealed from and it is the duty of the Court to dismiss the application *in limine* if *prima facie* the judgment does not appear to be contrary to law or otherwise erroneous or unjust. It is thus clear that before notice is ordered to be issued to the opposite party the Court has at least to come to a tentative conclusion on this point. The question is whether this tentative conclusion is open to be attacked by the respondent before leave is granted to appeal as a pauper, or whether it is sufficient that the respondent should only be heard to uphold the soundness of the judgment after the petitioner's status as a pauper has been established and the appeal is heard.

The main point from which the divergence of views stems seems to relate to the question of what is to be decided first in a case of this kind. Those learned Judges who have supported the view taken by majority of the Courts seem to think that *prima facie* the first question to be decided is whether the petitioner is a pauper, and that it is only when this is decided that it is necessary to consider the question whether the judgment is contrary to law or otherwise erroneous. On the other hand the learned Judges in the later Calcutta decision have taken the view that it is

only when the Court has decided that the judgment is *prima facie* wrong is some way that it is necessary or even advisable to embark on the enquiry as to whether the applicant is a pauper or not, which may be expensive, and it is justifiably pointed out that if after an expensive enquiry in which the applicant is found to be a pauper and therefore, unable to afford the expenses, it would be intolerable that the application should then fail on the ground that the judgment was *prima facie* not wrong.

With the utmost respect to the views of the majority I am definitely of the opinion that this view is correct and that both under the original proviso and the new sub-rule (2) it is clearly the duty of the Court to examine the judgment straight away and decide whether it is *prima facie* right or wrong. If the judgment is *prima facie* correct then the application must be dismissed without any further ado. If the Court comes to the conclusion that the judgment is *prima facie* wrong it will issue notice to the opposite party, and in my opinion it is quite wrong and unjustified to hold that the judgment has only to be considered after the question whether the applicant is a pauper or not has been decided.

The question thus boils down to one whether if a Court has come to a conclusion, whether tentative or firm, that the judgment is in some way wrong, and has ordered the issue of notice, this conclusion is open to attack when the respondent appears.

The rule itself makes the provisions of Order 33 so far as they are applicable to govern the procedure under Order 44. Order 33 relates to suits *in forma pauperis,* and it is to be noted that in rule 5 of Order 33, which sets out the grounds on which

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an application to sue as a pauper should be rejected, the only ground which has anything to do with the allegations in the plaint is (d) "where his allegations do not show a cause of action," and this is the only ground which can be raised by a respondent in such a petition relating to the nature of the suit, and he is not permitted to attack the plausibility of the allegations made in the plaint. From this it seems to me that it might well be argued that once the Court has perused the judgment and found it *prima facie* wrong and has isisued notice, the respondent ought not to be heard at all on the merits of the case unless and until leave has been granted and the appeal is heard as such.

At this stage I may discuss the effect of the amendment of rule 1, which, it is contended on behalf of the petitioner, clinches the matter in that whereas there may have been doubt as to the interpretation of the earlier proviso, it is now made clear that the decision of the Court as to whether the judgment is *prima facie* wrong or right is final, and not to be challenged even after the issue of notice to the opposite party. As I have said, however, the essential provisions of the proviso and sub-rule (1) still remain the same and all that has been made clear, which was not stated before, was that the decision as to the correctness or otherwise of the judgment should only be taken after hearing the petitioner or his counsel, and it has been pointed out that this amendment was necessitated because some Courts had cast doubt on the right of the petitioner to be heard. I am, therefore, of the opinion that the amendment has little bearing on the crucial question whether the Court, in not rejecting the application outright under the provisions of either the proviso or sub-rule (2), is precluded from going further into the question

whether the judgment is *prima facie* right or wrong after the opposite party has appeared in response to the notice.

If the matter were *res integra* and were not the subject of any decisions by the various High Courts I might be inclined to take the view that the decision in the later Calcutta case was correct, but as matters stand, in view of the weight of authority from so many High Courts in favour of the opposite view, including that of the Lahore High Court, which has been followed in practice both in Lahore and in this Court, I think it must be held that after the opposite party has appeared in answer to notice it is open to it to oppose the application on the ground that the judgment which is sought to be challenged in appeal is not *prima facie* contrary to law or otherwise erroneous or unjust. After all the legislature must have been aware of the way the proviso was being interpreted, by the Courts and if this was contrary to the intended meaning of Rule 1 the Rule would probably have been amended accordingly when the other amendment was made.

If we apply this to the present case I am of the opinion that the application to appeal *in forma pauperis* must be dismissed, since the judgment appealed against is simply a formal order to the effect that since the defendant had failed to deposit the sum in suit and costs in Court within the specified period, on which condition alone she was allowed to defend the suit under Order 37 rule 3, Civil Procedure Code, the suit was decreed, and even if the order of the 13th of November, 1956, by which this condition was imposed on her were to be treated as part of the judgment under appeal, there is nothing *prima facie* contrary to law or otherwise erroneous or unjust in it. It is

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also clear that this earlier order could not be challenged in a revision petition after it had been followed by the order decreeing the suit which is appealable and against which in fact the petitioner is in fact seeking to appeal in *forma pauperis*.

The result is that I would dismiss both the application under Order 44 rule 1, Civil Procedure Code, and the revision petition but would allow the petitioner two months to deposit the necessary court-fee. I would leave the parties to bear their own costs in these petitions.

Mehar Singh, J.

MEHAR SINGH, J.—I agree.

B.R.T.

APPELLATE CIVIL.

Before Falshaw and Mehar Singh, JJ.

SHRI SURAJ MAL,—*Plaintiff-Appellant.*

versus

SHRI VISHAN GOPAL—*Defendant-Respondent.*

R.F.A. 38-D of 1957

1957

Nov., 1st

Indian Limitation Act (IX of 1908)—Section 19 and Article 64—Acknowledgment—Date of—Entry in the account of defendant opened by him with his name at the beginning—Entry not signed by him—Whether sufficient to extend period of limitation—Stamp Act (II of 1899)—Schedule 1 Article 1—Acknowledgment—essentials of—How does it differ from acknowledgment under limitation Act—Acknowledgment within the meaning of Article 1, Schedule 1, Stamp Act, being not stamped—Whether admissible in evidence.

Held, that an acknowledgment under section 19 or Article 64 of the Limitation Act extends the period of limitation from the date on which it is signed by the party making it. An entry in the account of the defendant opened by him by writing his name at its head, the particular entry