

(1934) 01 CAL CK 0029
In the Calcutta High Court

S.M. Bose and Others

APPELLANT

Vs

Hafiz Md. Fateh Nasib and Another

RESPONDENT

Date of Decision : 22-01-1934

Acts Referred:

Citation : AIR 1934 Cal 623

Hon'ble Judges : Mallik, J; Jack, J

Bench : Full Bench

Judgement

Mallik, J.—This rule is directed against an order dated 8th August 1933 made by the learned Subordinate Judge, First Court Alipur, setting aside an order rejecting a plaint on 17th January 1933. What happened in the case was this. One Hafiz Mahommed Fateh Nasim instituted a suit (being Title Suit No. 144 of 1931) in the Court of the First Subordinate Judge, Alipur, against the petitioners for declaration of his title to and for recovery of possession of some lands valuing the property at Rs. 2,000 only and paying court-fees on that valuation. A written statement was filed in which the correctness of the valuation of the suit was questioned the property being alleged to be worth more than one lac of rupees. On 27th July 1932 the plaintiffs admitted the value of the property to be one lac of rupees and prayed for being allowed to continue the suit in forma pauperis. On 11th November 1932 the plaintiffs' petition to continue the suit in forma pauperis was dismissed for default. Fourteen days later, on 25th November 1932 the plaintiffs filed a fresh suit in forma pauperis regarding the same subject matter on the same cause of action (being Pauper Suit No. 7 of 1932). On 17th January 1933 the plaintiffs' plaint in suit No. 144 of 1931 was rejected on the ground that the pauper suit No. 7 of 1932 was in respect of the same cause of action. On 24th February 1933 the plaintiffs filed an application Under Order 47, Rule (1), Civil P.C, for the cancellation of the order made on 17th January 1933 and for restoration of the suit. The Court directed the plaintiffs, petitioners, to pay half of the ad valorem court-fees within seven days and apparently, as the plaintiffs were unable to pay the court-fees, they prayed that the petition made ;Under Order 47, Rule (1) might be treated as a petition under S. 151 of

the Code. The defendant . objected to the plaintiffs' application. This objection was however overruled and on 8th August 1933 the learned Subordinate Judge set aside the order of rejection of the plaint and restored the suit in the exercise of the powers vested in him by Section 151 of the Code. It is against this order that the present rule is directed. This rule in our opinion, must be made absolute. The order of 17th January 1933 no matter whether it was a decision rightly or wrongly given was an order of rejection of a plaint and an order of rejection of a plaint is a decree as defined in Section 2 of the Code. If the plaintiff felt aggrieved by this order his remedy lay either by an application Under Order 47, Rule (1) or by filing an appeal against it. The plaintiff did not choose to take either of these two courses open to him under the Code. It is well settled that a Court cannot make use of the special provisions of Section 151 when the applicant has his remedy prescribed elsewhere in the Code and has neglected to avail himself of such a remedy. Section 151 is therefore inapplicable to the present case and the order of the Subordinate Judge must therefore be vacated on that ground alone. The result therefore is that the rule is made absolute with costs?hearing fee one gold mohur.

Jack, J.

2. I agree.