

## ORIGINAL CIVIL.

*Before Sir William Wedderburn, Bart., Justice.*

DWA'RKA'NA'TH NA'RA'YAN AND ANOTHER, PETITIONERS, v.  
MA'DHAVRA'V VISHVA'NA'TH, RESPONDENT.

1886.  
January 16.

*Pauper—Suit in formâ pauperis—Application for leave to sue as a pauper—Property admitted by the respondent to be the property of petitioners not the “subject-matter of the suit” although claimed in the petition—Civil Procedure Code (Act XIV of 1882), Secs. 401, 408, 409, 410.*

The petitioners prayed to be allowed as paupers to sue the respondent for certain property specified in the schedule annexed to their petition. At the hearing of the petition under sections 408 and 409 of the Civil Procedure Code (Act XIV of 1882) the respondent appeared and deposited in Court some of the articles claimed by the petitioners to which he admitted they were entitled. The value of the articles deposited was Rs. 100. The petitioners acknowledged that the articles were their property, but declined to take possession of them.

*Held*, that the petitioners were not paupers as defined by section 401 of the Civil Procedure Code (Act XIV of 1882), being possessed of property worth Rs. 100 other than the subject-matter of the suit, and that they could not, therefore, be allowed to sue as paupers. The inquiry into pauperism under sections 408 and 409 takes place before any suit is in existence, for until an application to sue as a pauper is granted, there is no plaint, and, consequently, no suit (see section 410). Any property, therefore, found at such inquiry not to be really in dispute cannot be regarded as part of the “subject-matter of the suit,” although it may be entered in the particulars of the application for leave to sue as a pauper. The ground for excluding the “subject-matter of the suit” under section 401 is because such property is presumably out of the petitioner’s reach, and cannot be made use of by him to carry on his litigation. In the present case the articles deposited in Court were freely at the disposal of the petitioners, and could not, therefore, be excluded from consideration.

THE petitioners prayed leave to sue as paupers.

The petition set forth that the petitioners were the second and third sons of one Náráyan Bákrishna, who died in 1879, leaving moveable property of the value of Rs. 2,664; that at the date of their father’s death the petitioners were minors; and that the said property was then taken possession of by their eldest brother, one Harischandra Náráyan; that the said Harischandra Náráyan subsequently went to reside at the house of the respondent, who was his father-in-law, where he died in the year 1881, whereupon the said property came into the respondent’s hands; that the petitioners had sent a letter to the respondent

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demanding that the said property should be handed over to them, but had received no reply to their letter. They now prayed to be allowed as paupers to sue the respondent for the said property, or for Rs. 2,664, the value thereof.

At the hearing of the application the respondent appeared, and deposited in Court for the petitioners some of the articles claimed by them to which he admitted they were entitled. The value of the articles so deposited was Rs. 100. The petitioners acknowledged that the articles were their property, but declined to take possession of them. The question, consequently, arose whether under these circumstances the petitioners, having property of the value of Rs.100, could be allowed to sue as paupers.

The petitioners appeared in person.

*K. T. Telang* for the respondent.

WEDDERBURN, J.:—In this case the petitioners have applied, under section 403 of the Civil Procedure Code (XIV of 1882), for permission to sue as paupers; and, as directed in that section, have shown the particulars required by section 50 in regard to plaints in suits. Among these particulars they mention certain articles which they desire to claim from the respondent. At the hearing of the application the respondent has produced some of these articles, valued at Rs. 100, and has deposited them in Court, admitting that they are the property of the petitioners. The petitioners acknowledge that the articles are their property, but decline to take possession of them. The question is, whether, under these circumstances, the petitioners are paupers within the meaning of section 401 of the Civil Procedure Code (Act XIV of 1882)?

Section 401 (explanation) declares that “a person is a pauper when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit.” In this Court no fee is prescribed for the plaint, and in the present case there is no question as to wearing apparel: so the point for determination is, whether the articles in Court, worth Rs. 100,

to which the petitioners are admittedly entitled, are property "other than \* \* \* the subject-matter of the suit?" For the respondent it is argued that the "subject-matter of the suit" is not determined until after the inquiry now being made under sections 408 and 409 into the petitioners' pauperism, has been completed. At the present stage of the proceedings there is no plaint and consequently no suit. If the application to sue as paupers is granted, the application will then be numbered and registered under section 410, and will be deemed the plaint in the suit. But the learned counsel argues that any facts brought out in the previous inquiry must be taken into account, and that any property shown not to be in litigation cannot reasonably be held part of the claim. In other words, he contends that, although the articles worth Rs. 100 may have been properly entered in the particulars of the application to sue as a pauper, they cannot be included in the plaint, nor can they be regarded as part of the "subject-matter of the suit," after the respondent has admitted that they belong to the petitioners and has placed them at their disposal. Also it is pointed out that the words "subject-matter of the *proposed* suit" are used in section 407, and it is argued with some force that this phrase would also have been employed in section 401 if it had been intended to include all the particulars shown in the application to sue as a pauper.

I am disposed to accept this view of the case, especially as it appears to be in accordance with the general intention of the chapter relating to pauper suits, the intention apparently being that no person should be declared a pauper who has at his disposal sufficient means to proceed. The wording of section 401 is somewhat peculiar, the conditions of pauperism being different (1) when the plaint requires a court fee, and (2) when none is required. In either case the effect of pauperism is the same, the pauper's suit being, under section 410, exempted from all court fees except those payable for service of process. As regards the first case, the measure of pauperism is the sum required to pay the fee on the plaint. If the petitioner is proved to have this sum at his disposal, he is excluded from the benefit

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of pauperism. And it appears to me that, similarly, in the second case Rs. 100 is the measure of pauperism, and that the intention is not to allow the petitioners exemption from court fees if he has this sum at his disposal. It is, no doubt, true that the wording in the two cases is different, but this seems to have been accidental. In Act VIII of 1859 only the first provision is found, and I have not been able to learn with certainty the origin of the second provision with its peculiar wording. The officers of the Court are under the impression that the wording has been taken from a rule of practice on the Original Side of the High Court. This seems probable, although no rule in writing has been found.

I take it, therefore, that the intention in both cases is the same, *viz.*, to fix a certain sum—in one case the institution fee and in the other case Rs. 100—and to provide that, if the petitioner has not this sum at his disposal, he will be exempt from court fees. If he has this sum at his disposal, he is held to have the means of proceeding, and is not allowed the privilege of pauperism. Applying this principle to the present case it seems clear that the real ground for excluding the “subject-matter of the suit” from the calculation is because it is presumably out of the petitioner’s reach and cannot be made use of by him to carry on his litigation. If, as in the present case, a portion of the property is freely at his disposal, there is no reason for excluding it from the reckoning, and the respondent’s interpretation must be favored, as it accords best with the general purposes of the chapter. It is also to be noticed that it is a privilege to sue as a pauper, so that the provisions, under which the petitioners claim this privilege, must be somewhat strictly construed. For these reasons I find, upon the point of determination, that the articles in Court are property other than the subject-matter of the suit; and I reject the petitioners’ application for permission to sue as paupers.

It appears that the wording of section 401 of the Civil Procedure Code (XIV of 1882) might with advantage be considered when the next amendments of the Code are brought forward.

*Application rejected.*

Attorney for the respondent.—Mr. *Máneklál Munshi.*