

18 B. 464.

## [464] APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

BAI CHANDABA AND ANOTHER (Original Plaintiffs), Appellants v.  
 KUVAR SAHEB BAPU SAHEB (Original Defendants), Respondents.\*  
 [16th October, 1893.]

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Civil Procedure Code (Act XIV of 1882), ss. 412 and 414—Costs—Appeal in forma pauperis—Withdrawal of appeal—Right of Government to costs—Agreement between the parties.

The plaintiffs filed a suit in *forma pauperis* to recover possession of certain property. The Court of first instance dismissed the suit. Thereupon the plaintiffs preferred an appeal in *forma pauperis* to the High Court. Pending the appeal the parties entered into a compromise, under which it was agreed (*inter alia*) that the appeal should be withdrawn, and that the respondent should pay to Government the Court fees which the plaintiffs were liable to pay both in the first Court and in the Court of appeal. When the appeal came on for hearing, the appellants informed the Court of their intention to withdraw from the appeal. Thereupon the Government Pleader intervened, and applied for an order directing the respondent to pay, in accordance with the terms of the compromise, all the costs payable to Government on account of institution fees, &c., in the first Court as well as in the appellate Court. This application was opposed by both parties. The Government Pleader then moved the Court to dispauper the appellants under s. 414 of the Code of Civil Procedure (Act XIV of 1882).

Held, that the appeal having been withdrawn, no order could be made either under s. 412 or under s. 414 of the Code of Civil Procedure.

Held, also, that it was not open to the Court to order the respondent to pay any fees on the strength of any agreement between the parties.

[Overruled, 31 B. 10 (14)=8 Bom. L.R. 689; R., 7 S.L.R. 52; D., 29 B. 102=6 Bom. L. R. 1122 (1124).]

APPEAL in *forma pauperis* from the decision of Rao Bahadur Chunilal Maneklal, First Class Subordinate Judge of Ahmedabad, in suit No. 420 of 1888.

The plaintiffs filed a suit in *forma pauperis* to recover possession of the taluka of Sonipur belonging to their deceased husband, Thakor Amarsang Bahadursang.

The defendant pleaded that, according to the custom prevailing among the thakors and talukdars of the district, females were excluded from succession to a talukdar's estate; that, in accordance with this custom, the plaintiffs had no right to inherit the property in dispute, and that the Government of Bombay had placed him in possession of the estate as the legal heir of the deceased thakor.

[465] The First Class Subordinate Judge, who tried this case, found the alleged custom proved, and dismissed the suit, ordering the plaintiffs "to pay all the costs which they would have incurred had they not been allowed to sue in *forma pauperis*."

Against this decision the plaintiffs preferred an appeal (No. 82 of 1889) in *forma pauperis* to the High Court.

The respondent (defendant) applied to the Court for an order to dispauper the appellants, on the ground that they had sufficient means to pay the Court fees leviable on the memorandum of appeal.

Pending the disposal of this application, the parties entered into a compromise, under which it was arranged that the appellants should receive the income of certain villages during their lifetime in lieu of

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maintenance; that the appeal pending in the High Court should be withdrawn; and that the respondent should pay to Government all the Court fees which the appellants would have had to pay both in the Court of first instance and in the Court of appeal, if they had not been allowed either to sue, or to appeal, in *forma pauperis*.

The appeal came on for hearing on 20th April, 1893. On that day the appellants informed the Court of their intention to withdraw the appeal.

Thereupon the Government Pleader intervened, and applied for an order, directing the respondent to pay, in accordance with the terms of the compromise, the Court fees which the appellants were liable to pay both in the Court of first instance and in the Court of appeal. This application was opposed by both parties.

The Government Pleader then applied on behalf of the Collector to have the appellant dispaupered under s. 414, cls. (b) and (c) of the Code of Civil Procedure (Act XIV of 1882).

Rao Sahab *Vasudev J. Kirtikar* (Government Pleader), for the Crown.—I contend, in the first place, that the appellants have sufficient means to pay the necessary Court fees. There cannot be better evidence of this fact than the affidavits and documents which the respondent has himself filed in support of his application to dispauper the appellants. The appellants should not, [466] therefore, be allowed to proceed with the appeal in *forma pauperis*. I contend further that, under the compromise effected between the parties, the appellants have allowed other persons to obtain an interest in the subject-matter of this suit. They should, therefore, be dispaupered under s. 414 of the Code of Civil Procedure.

*V. K. Bhatavdekar*, for the appellants (plaintiffs).—The appeal having been already withdrawn, the present application under s. 414 of the Code will not lie. We do not wish to continue the appeal any further. Clause (b) of the section does not, therefore, apply, even assuming that we had sufficient means to pay the Court fees, as alleged by the Collector. Nor does cl. (c) apply, as the agreement referred to therein should be of the nature of a champertous or maintenance agreement. The compromise between the parties is not of this character.

*Ganpat Sadashiv Rao*, for the respondent (defendant).—The Collector is not entitled to recover the costs of this appeal from the respondent. The appeal is withdrawn, and not dismissed, under s. 97 or 98 of the Code of Civil Procedure. Section 412 of the Code does not, therefore, apply—*The Collector of Kanara v. Krishnappa* (1).

#### JUDGMENT.

CANDY, J.—The suit in this case was brought in *forma pauperis*, and was dismissed by the First Class Subordinate Judge, who ordered that plaintiffs do pay all the costs which they would have incurred had they not been allowed to sue in *forma pauperis*. Plaintiffs then filed First Appeal No. 82 of 1889, and this was also in *forma pauperis*. Respondent (defendant) then objected that appellants (plaintiffs) had sufficient means to pay the Court fees. Subsequently at the request of the parties the appeal and application stood over, and eventually the case was compromised.

Appellants then applied to withdraw their appeal, and respondent agreed, not wishing any order as to costs, and not pressing the application

above mentioned. Then the Government Pleader intervened, applying for an order from this Court that the amount of Court fees payable by the original plaintiffs in the Court of first instance and also in this Court of appeal be paid [467] by the respondent, one of the terms of the settlement between the parties being that respondent-defendant should pay all the costs payable to Government for institution fees, &c., which the appellants would have had to pay if they had not been permitted to sue or appeal in *forma pauperis*. This application was opposed by the parties, so the Government Pleader then filed an application, under s. 414 of the Civil Procedure Code, praying that the appellants should be dispaupered on the ground that their means were such that they ought not to continue to sue in *forma pauperis*, and that they had entered into the agreements above mentioned, and that respondent had already prayed that appellants should be dispaupered. I am of opinion that the applications of the Government Pleader must be rejected.

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Certainly it is not open to this Court to order the respondent to pay any fees on the strength of any agreement between the parties. The appeal having been withdrawn, the decree of the First Class Subordinate Judge stands, and thus the right of Government to the Court fees payable in the Court of first instance is secured.

Appellants have not failed in their appeal, nor has it been dismissed in consequence of appellants' failure to cause notice of the appeal to be issued, or in consequence of the absence of both sides; therefore no order can be made under s. 412, unless the appellants are dispaupered under s. 414. But this latter section clearly contemplates the continuance of the suit (or appeal). Clause (a) admittedly does not apply; Clause (b) is not applicable, because appellants do not wish to continue the appeal. Clause (c) answers to cl. (d) of s. 407, and prevents the prosecution of a suit or appeal when the plaintiff or appellant has entered into a champerty or maintenance agreement for the prosecution of litigation. That is evidently not applicable to the present case, in which the parties have settled their differences in order to put an end to litigation. Section 414 is, therefore, not applicable to the present case; and thus no order can be passed under s. 412.

Appeal No. 82 of 1889 is withdrawn. No order as to costs. The same order as to application No. 293 of 1892.

[468] Applications Nos. 48 and 205 of 1893 are dismissed.

In application No. 205 the Government Pleader will get the costs of that application from appellants.

FULTON, J.—I concur. The withdrawal of an appeal cannot, consistently with the decision in *The Collector of Kanara v. Krishnappa Hegde* (1), the correctness of which the Government Pleader has not impugned, be treated as failure by the appellants within the meaning of s. 412. The application to dispauper them under s. 414 appears to me to fall to the ground with the withdrawal of the appeal. But as the determination of this application has been prevented by the action of the appellants, I think the Government Pleader is entitled to recover from them his costs in respect thereof. The withdrawal of the appeal and the dismissal of the Government Pleader's application will not, of course, affect any orders which the Court below may have made for the payment of the Court fees due to Government in that Court.

*Applications rejected.*