

necessary to make a loan for a term of years reasonably secure, until he has ascertained not only their present market price, but their intrinsic value, apart from those trading considerations which give them a speculative and it may be a temporary value."

If the proposed change of investment were sanctioned upwards of 12 out of the minor's 14 lacs would be invested directly or indirectly in house property, the greater part of it without any margin for contingencies. I do not think there is any necessity for this. The duty of guardians is primarily to preserve, not to add to the property of the minor.

The application is therefore rejected.

Application rejected.

Attorneys for the applicant :— *Messrs. Payne & Co.*

W. L. W.

APPELLATE CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr.
Justice Beaman.*

KRISHNABAI KOM JANARDAN SUNDUR THAKUR (ORIGINAL PLAINTIFF),
APPELLANT, v. MANOHAR SUNDURRAO (ORIGINAL DEFENDANT,
RESPONDENT.*

1906.
July 17.

Civil Procedure Code (Act XIV of 1882), section 401—Application to file a suit in formâ pauperis—"Other than his necessary wearing apparel and the subject-matter of the suit"—Construction.

The applicant applied for leave to file a suit *in formâ pauperis* alleging that after her husband's death, her husband's brother possessed himself of her property including the ornaments that she ordinarily was accustomed to wear. She sued to recover these ornaments. The Subordinate Judge rejected her application on the ground that she must have had these ornaments which she had been accustomed to wear.

Held, that the Subordinate Judge had failed to perceive that the point he had to consider was whether the applicant at the time at which the application was made, was possessed of sufficient means to enable her to pay the fees prescribed by law for the plaint.

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The words "other than his necessary wearing apparel and the subject-matter of the suit" in the explanation to section 401 of the Civil Procedure Code, 1882, do not qualify that part of the explanation which requires that the person should not be possessed of sufficient means to enable him to pay the fee prescribed by law, but only the condition that the applicant is not entitled to property worth Rs. 100.

THIS was an application filed under section 622 of the Civil Procedure Code (Act XIV of 1882).

The applicant, who was the widow of one Janardan Sundur, applied to file a suit *in forma pauperis* against the defendant, who was brother of her deceased husband. She alleged that after husband's death, taking advantage of her absence from her house, the defendant removed all ornaments and valuables belonging to her from the house. She prayed to recover these ornaments, which were her *stridhan*. The applicant further stated that the value of her wearing apparel which was the only property in her possession was Rs. 10, and that she had no means to pay the required Court-fee stamp on her claim.

The Subordinate Judge held that the applicant should not be allowed to sue *in forma pauperis* as she was not a pauper. The grounds of his judgment were as follows:—

"This much I can at present say with some degree of certainty that the applicant's story that there is nothing left with her and that she has no means to pay the stamp duty is not true. It is not probable that she had no ornaments of daily use on her person when she went to her mother's house at Yeola in the month of Kartik and after her return here. They must have been all along on her person when she left her husband's house after his death whether under compulsion or voluntarily. They must have been with her. The value of these ornaments is more than the amount required for the payment of the Court-fees."

The applicant thereupon applied to the High Court.

N. V. Gokhale, for the applicant:—The learned Subordinate Judge holds that some ornaments of daily use must be with the applicant. That is deciding a point which will be the subject of regular investigation after the application to sue as a pauper has been registered as a suit. It was not competent to the lower Court under section 401 of the Civil Procedure Code to decide at

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this stage whether the applicant or the opponent was in possession of the applicant's ornaments. These very ornaments are the subject-matter of the suit and cannot be taken into consideration in the determination of the question relating to the applicant's pauperism. Otherwise the parties as well as the Courts would be placed in a very false position by an adjudication on a main point at issue between the parties in the disposal of a mere application for leave to sue as a pauper. There is really speaking no distinction between the first and the second part of the explanation appended to section 401. The wording is no doubt different. But in both the classes of suits contemplated by the explanation "the subject-matter of the suit" must be excluded from the calculation, as such property is presumably out of the petitioner's reach and cannot be made use of by him for purposes of his litigation: *Dwarkanath Narayan v. Madhavrav Vishvanath*.⁽¹⁾ On principle there is no reason why the Legislature should have laid down different conditions as to pauperism in the two classes of suits. If "the subject of the suit" is excluded from the scope of the inquiry into pauperism, all difficulties disappear and one uniform principle can be consistently applied to all cases. The English Practice is in accord with this contention. *Vide* the *Annual Practice*, 1906, vol. 1, Rule 22 at p. 171. Besides the lower Court has acted upon mere assumptions and surmises and has failed to ascertain the exact value of the property alleged to be in the possession of the applicant and to determine whether the applicant was possessed of sufficient means to enable her to pay the Court-fee prescribed by law: *Muhammad Husain v. Ajudhia Prasad*.⁽²⁾

B. N. Bhajekar, for the opponent:—The concluding portion of the explanation "other than his necessary wearing apparel and the subject-matter of the suit" do not govern its first part. The punctuation makes this perfectly clear. Besides if an applicant actually came into Court with some of the property in suit, the Court cannot exclude it from its consideration. He is evidently *possessed* of it and it must be taken into account in deciding the question of pauperism. The conditions of pauperism

(1) (1886) 10 Bom. 207 at pp. 209, 210. (2) (1888) 10 All. 467.

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in the two classes of suits referred to in the explanation are different, and in the first case Courts are not precluded from considering the fact that the applicant is possessed of the whole or part of the subject-matter in suit. The lower Court has found as a fact on evidence that some ornaments are in the possession of the applicant, and that she is in a position to pay the requisite Court-fee, and therefore this Court has no jurisdiction to interfere under section 622, Civil Procedure Code.

N. V. Gokhale, in reply:—Punctuation is no part of a statute (Maxwell page 589) and cannot be allowed to stand in the way of reasonable construction of its terms. If a petitioner actually came into Court with the property in suit, on principle the same difficulty arises in dealing with the second class of suits as with the first class, *i. e.*, in excluding it from consideration in the one case and taking it into account in the other. When a wrong course of inquiry is applied that is a material irregularity and a ground for interference under section 622. *Rao Balwant Singh v. Ranikishori*.⁽¹⁾ Similarly when Courts fail to determine an essential question of fact, it is competent to this Court to interfere in revision on the ground of material irregularity. *Muhamrad v. Ajudhia*⁽²⁾; *Lakhma v. Gulabchand*.⁽³⁾

JENKINS, C. J.:—This is an application to us under section 622 of the Civil Procedure Code on the ground that the applicant has been improperly denied the right she claims to sue as a pauper under Chapter XXVI of the Code of Civil Procedure.

The case made by her is that after the death of her husband his brother possessed himself of her property including the ornaments that she ordinarily was accustomed to wear, and that he still retains them and refuses to return them to her.

She applied for leave to sue as a pauper to recover, among other things, these particular ornaments, alleging that she was not possessed of sufficient means to enable her to pay the fees prescribed by law for the plaint.

The Subordinate Judge has rejected her application on the ground that she must have had, at the times mentioned in

(1) (1898) 2 Cal. W. N. 273 at p. 274.

(2) (1888) 10 All. 467.

(3) (1888) P. J. p. 215.

his judgment, these ornaments, which she had been accustomed to wear.

Before us it is urged that the Subordinate Judge was not entitled to take those ornaments into consideration; for that even if they had been in her possession they should have been treated as excluded by the concluding words of the Explanation to section 401 of the Civil Procedure Code, "other than his necessary wearing apparel and the subject-matter of the suit."

In our opinion, however, those words do not apply here. We do not think that they qualify that part of the explanation which requires that the person should not be possessed of sufficient means to enable him to pay the fee prescribed by law, but only the condition that the applicant is not entitled to property worth Rs. 100.

In our opinion the Subordinate Judge has failed to perceive that the point he had to consider was whether the applicant at the time at which the application was made, was possessed of sufficient means to enable her to pay the fees prescribed by law for the plaint, and thus his investigation is vitiated by an irregularity in the exercise of his jurisdiction, entitling us to interfere under section 622.

Where it is sought to make out that what the plaintiff claims in the suit as being in the possession of the defendant, is really in the plaintiff's possession, the clearest evidence should be adduced.

If it be found that a part of the subject-matter of the suit is in the applicant's possession, then it should be distinctly determined how far the possession of that part can be regarded as possession of sufficient means to enable the applicant to pay the fees prescribed by law for the plaint.

The result then is that we make the rule absolute and send back the case in order that it may be determined by the Judge in the light of these remarks.

Costs will be reserved to be dealt with on the final determination of the pauper application.

Rule made absolute.

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