

## ORIGINAL CIVIL.

*Before Mr. Justice Macleod.*

1909.  
December 3.

FATMABAI, PETITIONER, *v.* DOSSABHOY RUSTOMJI UMRIGAR  
AND OTHERS, RESPONDENTS.\*

*Application to sue as pauper—Disqualification—Subject-matter of suit—Cause of action—Civil Procedure Code (Act V of 1908), Order XXXIII, rules 1, 2 and 5.*

A mortgagor applied for permission to institute a suit as a pauper for the setting aside of a sale of the mortgaged property, by the mortgagee, with an alternative claim for damages. The mortgagee, admitting there was a surplus due to the applicant after the mortgage-debt had been satisfied, paid Rs. 101 into Court, and contended that the applicant was not a pauper, and further that the applicant disclosed no cause of action.

*Held*, that the applicant was a "pauper" within the meaning of the Explanation to Order XXXIII, rule 1, of the Civil Procedure Code (Act V of 1908), but that the allegations contained in the application did not disclose a cause of action.

*Dwarkanath v. Madhavray*<sup>(1)</sup> not followed.

THIS was an application by one Fatmabai for leave to sue as a pauper under Order XXXIII of the Civil Procedure Code. In her petition she alleged that she had mortgaged certain property with the first respondent, and that the latter, acting fraudulently and collusively, had sold the property to the second respondent at a grossly inadequate price. She, therefore, prayed that the said sale should be set aside, and in the alternative claimed damages. The first respondent admitted that the sale proceeds left a surplus due to the applicant after the satisfaction of the mortgage-debt, and paid into Court a sum of Rs. 101. He then contended that the applicant, inasmuch as she was entitled to Rs. 101, was not a pauper within the meaning of the Order, and further that her petition disclosed no cause of action. The Prothonotary, following the case of *Dwarkanath v. Madhavray*<sup>(1)</sup>, rejected the application, and the question was, at the instance of the applicant, referred to the Judge in Chambers under rule 82 of the High Court. Macleod, J., adjourned the matter into Court.

\* Pauper Petition No. 17 of 1909.

(1) (1886) 10 Bom. 207.

*Robertson* showed cause for the respondents.

*Baptista* appeared in support of the application.

MACLEOD, J.:—The applicant presented this application to the Prothonotary under Order XXXIII of the Civil Procedure Code for leave to sue as a pauper. Under rule 2 her application was bound to contain all the particulars required in regard to plaints in suits, and was therefore bound to show a cause of action. Under rule 5, the Court shall reject an application for permission to sue as a pauper *inter alia* when the applicant is not a pauper or when his allegations do not show a cause of action.

The proposed suit was to set aside a sale to the second respondent effected by the first respondent as mortgagee. The applicant as the mortgagor alleged that the mortgagee had not properly advertised the sale and had acted in collusion with the purchaser. The first respondent admitted that there was a surplus due to the applicant after the amount due on the mortgage had been satisfied and paid into Court Rs. 101. He then contended (1) that the application disclosed no cause of action; and (2) that the applicant, being entitled to the sum of Rs. 101 paid in the Court, was not a pauper.

The Prothonotary rejected the application on the ground that the applicant was entitled to Rs. 101, following the decision in *Dwarkanath v. Madhavrav*<sup>(1)</sup>.

The applicant then applied, under rule 82 of the High Court Rules, for the matter to be adjourned to the Judge in Chambers and it came on for argument before me.

With all due respect to the learned Judge who decided the case of *Dwarkanath v. Madhavrav*<sup>(1)</sup>, I am of opinion that his decision should not be followed; otherwise, whenever an application for permission to sue as pauper is made the respondent can always get the application rejected by paying into Court Rs. 100 out of the amount claimed.

In construing an explanation to a section or rule it is necessary to refer to the section or rule itself. No doubt, in rule 5 (e) reference is made to the 'proposed' suit, whereas in the explana-

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tion to rule 1 the word 'proposed' has not been inserted. It is also clear that at the time an application is presented there is no suit in existence. But the only suit that can be referred to in the explanation to rule 1 is the suit which may be instituted under the rule, and to put any other interpretation on the term 'the suit' would make it meaningless. The words 'such suit' in the first part of the explanation clearly refer to the suit which may be instituted by a pauper as soon as his application to sue as a pauper has been accepted. As a matter of drafting, it was not necessary to use the word 'such' a second time. There was, therefore, no necessity to use the word 'proposed' in the explanation, though it was necessary in rule 5 (e). However, on the first ground which was not decided by the Prothonotary, I think the application must be rejected as the allegations contained therein do not show a cause of action. But the rejection will be without prejudice to the applicant's right to make another application which does show a cause of action. She must, however, as a condition precedent, pay the respondents' costs of opposing this application.

Attorneys for the petitioner:—Messrs. *Jehangir, Mehta and Somji.*

Attorneys for the respondents:—Messrs. *Mulla and Mulla.*

K. McI. K.

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## ORIGINAL CIVIL.

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*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

1910.  
 February 28.

BAPUJI SORABJI FRAMJI AND OTHERS, APPELLANTS AND PLAINTIFFS,  
 v. THE CLAN LINE STEAMERS, LIMITED, AND OTHERS, DEFENDANTS  
 AND RESPONDENTS.\*

*Stoppage in transitu—Ultimate destination of goods—Duration of transit—Pledgee of bill of lading—Measure of damages—Sale of Goods Act (56 and 57 Vic., c. 71), sections 45 and 47.*

The plaintiffs, a Bombay firm, imported hardware goods from M. & Co. of Manchester for sale on commission, the business being carried on and financed

\* Original Suit No. 366 of 1908.

Appeal No. 27 of 1909.