

the plaintiff complains. I argee, therefore, that the appeal must be allowed.

Attorneys for the plaintiff: *Messrs. Crawford, Brown & Co.*

Attorneys for the defendant: *Messrs. Ardshir, Hormasji Dinshaw & Co.*

*Appeal allowed.*

H. S. C.

1911

MUNICIPAL  
COMMIS-  
SIONER  
FOR THE  
CITY OF  
BOMBAY  
v.  
MUNCHEERJI  
PESTONJI.

## ORIGINAL CIVIL.

*Before Mr. Justice Macleod.*

BAI LAXMI, PLAINTIFF, v. HARJIVAN NATHU AND OTHERS,  
DEFENDANTS.\*

1911  
September 9.

*Civil Procedure Code (Act V of 1908), Schedule I, Order XXV, rule 1, and Order XXXIII, rule 1—Order for security for costs—Leave granted to continue suit as a pauper—Practice.*

An order to give security for costs obtained in a suit filed in the ordinary course must cease to operate as regards antecedent costs if leave is given to continue the suit as a pauper, provided the leave is granted before the time limited for giving security has expired.

### PROCEEDINGS in Chambers.

This was a suit filed by one Bai Laxmi on 12th April 1911 against the executors of the will of her deceased husband Jamnadas Vallabhdas, praying (*inter alia*) that the will should be declared void, and that the estate of the said Jamnadas should be administered by and under the directions of the Court.

On the 8th July an order was obtained that the plaintiff should within one month deposit Rs. 500 as security for the defendants' costs, and that in default the suit should be set down for dismissal. On 14th August, the plaintiff having failed to deposit security, the suit was set down for dismissal. The plaintiff, however, applied for an extension of time, on the ground that she had filed an application on 31st July for leave to continue the suit as a pauper. An extension was granted, and within

\* Suit No. 311 of 1911.

1911

BAI LAXMI  
v.  
HARJIVAN  
NATHU.

the time so extended the Prothonotary gave leave to continue the suit as a pauper. The matter was then adjourned to the Judge in Chambers on the defendants' application under rule 82 of the High Court Rules.

*Devidas* of Messrs. *Motichand* and *Devidas*, appeared for the defendants.

*Thakoredas A. Gandhi*, attorney, appeared for the plaintiff, and referred to *Mussamat Hafizan v. Abdul Karim*<sup>(1)</sup> and *Willé v. St. John*<sup>(2)</sup>.

MACLEOD, J. :—The plaintiff in this suit applied for leave to continue the suit as a pauper and such leave was granted by the Prothonotary. On the application of the defendant the question has been adjourned to the Judge under Bombay High Court Rule 82.

On the 8th July an order was made in Chambers directing that the plaintiff should deposit Rs. 500 in Court as security for defendants' costs within a month, and that in default the suit was to be set down for dismissal. On the 31st July the plaintiff applied for leave to continue the suit as a pauper.

On the 14th August the suit was set down for dismissal as no security was given, but as it was represented to the Court that an application to continue the suit as a pauper had been filed, an extension of time for giving security was granted. Applications to sue as a pauper are only made after notice to the defendant and not *ex parte* as under the Rules of the Supreme Court in England and hence the delay. The order for leave to continue the suit as a pauper was obtained within the extended time.

It was contended before the Prothonotary and before me that there was no cause of action disclosed in the plaint, but the Judge who admitted the plaint must be taken to have decided that *prima facie* there was a cause of action and even if I was of a different opinion I doubt whether I could dismiss the petition on that ground. Then it was contended that the application could not be considered until the order for depositing security

(1) (1907) 12 C. W. N. 163.

(2) [1910] 1 Ch. 701.

for costs had been complied with. I have not been referred to any direct authority on this point.

In *Willé v. St. John*<sup>(1)</sup>, the Full Court of appeal decided that an order to give security for costs of an appeal ceased to operate if within the time limited for giving security the appellant obtained an order for leave to prosecute the appeal *in forma pauperis*. It seems difficult to differentiate between an order to give security for costs of an appeal and an order to give security for the costs of a suit, though at first I left considerable doubts whether the order for security should not be enforced with regard to the costs already incurred in that suit by the defendant. In England until 1883 paupers were, by the provisions of 23 Henry VIII c. 15, completely exempt from the payment of costs, but leave given to sue as a pauper was not retrospective and if obtained after the commencement of the suit did not exempt the plaintiff from paying the defendants' costs incurred antecedently. *Doc d. Ellis v. Owens*<sup>(2)</sup>.

The statute of Henry VIII was repealed by 46 and 47 Vic. c. 49 and proceedings by or against paupers are regulated by the rules of the Supreme Court, Order XVI, rule 22, *et seq.* Under rule 25 a person admitted to sue or defend as a pauper shall not be liable to any court-fee, but nothing is said as to his being exempt from payment of costs.

This was the procedure already adopted in India under the Civil Procedure Code and in *Jetha Mulchand v. Gulraj Jasrup*<sup>(3)</sup>, a Full Bench decided that the costs of a successful defendant in a pauper suit were, as in all other cases, in the discretion of the Court under section 412 of the Civil Procedure Code of 1882. As the Court will not order a pauper to give security for costs, an order to give security for costs obtained in a suit filed in the ordinary course must cease to operate as regards antecedent costs if leave is given to continue the suit as a pauper, provided the leave is granted before the time limited for giving security has expired. Otherwise it is

(1) [1910] 1 Ch. 701.

(2) (1842) 10 M. & W. 514.

(3) (1884) 8 Bom. 577.

1911

BAI LAXMI  
v.  
HARJIVAN  
NATHU.

1911  
 BAI LAXMI  
 v.  
 HARIJIVAN  
 NATHU.

obvious that, although the plaintiff has proved that he is not possessed of more than a hundred rupees, there would be a denial of justice, since the leave to sue as a pauper would not save him from having his suit dismissed under the order for giving security.

In my opinion, therefore, the order of the Prothonotary was rightly made and is confirmed.

The costs of this application will be costs in the cause.

Attorneys for the plaintiff: *Messrs. Motichand & Devidas.*

Attorney for the defendants: *Mr. Thakoredas A. Gandhi.*

K. McI. K.

## ORIGINAL CIVIL.

*Before Mr. Justice Heaton.*

1911 MOORJI MANECK, PLAINTIFF, v. PASSU PARBHAT AND OTHERS,  
 November 18. DEFENDANTS.\*

*Bombay High Court Rules, rules 81, 321 and 323—Delegation of powers under rules 321 and 323 to the Prothonotary—Power of the Prothonotary to deal with applications to give short service of notice of motion.*

The plaintiff filed a suit against the defendants claiming *inter alia* the appointment of an *interim* receiver and an *interim* injunction. The plaintiff obtained from the Prothonotary leave to give the defendants short notice of a motion in the said suit under rules 321 and 323 of the Bombay High Court Rules. The defendants objected that the Prothonotary had no power to shorten the time for notice.

*Held* that the Prothonotary had such power.

THE plaintiff filed a suit against the defendants claiming that a partnership between himself and the defendants should be dissolved and wound up, that necessary accounts should be taken, that the shares of the parties should be ascertained and paid to them, the appointment of an *interim* receiver and an *interim* injunction against the defendants, costs and other relief. The plaintiff gave the defendants notice of a motion for the appointment of an *interim* receiver and for an *interim* injunction as prayed for in the plaint. The plaintiff obtained

\* Suit No. 972 of 1911.