cannot claim maintenance on the same principles and on the same scale as disqualified heirs and females who have become members of the family by marriage. In fixing, however, the compassionate rate of maintenance for the plaintiff, regard, no doubt, should be had to the interest of his deceased father in the joint family property and the position of his mother's family. We think that Rs. 25 per mensem during his life (from date of suit) will be a fair amount to be awarded under the circumstances and there is no reason to disallow to the plaintiff arrears of maintenance at the same rate for the period of nine years prior to the suit, as claimed by him (*Raja Varlagadda Mallikarjuna Prasada Nayadu* v. *Raja Varlagadda Durga Prasada Nayadu*(1)).

The plaintiff having succeeded only in part and the defendants having unsuccessfully impugned plaintiff's status as the illegitimate son of Chidambaram Chetti, each party will bear his own costs throughout.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice.

AMIRTHAM (PETITIONER), PETITIONER,

v.

ALWAR MANIKKAM AND OTHERS (COUNTER-PETITIONERS), RESPONDENTS.*

1903. January 20, 21.

Civil Procedure Code—Act XIV of 1882, *ss.* 407, 408, 409—*Suit in* formâ pauperis.

Sub-section (*c*) of section 407 of the Code of Civil Procedure does not refer solely to a question of jurisdiction. Under it, an applicant must make out that he has a good subsisting *primâ facie* cause of action capable of enforcement. *Kamrakh Nath* v. *Sundar Nath*, (I.L.R., 20 All., 299), followed.

Section 409, which provides that "the Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence the applicant is or is not subject to any of the prohibitions specified in section 407," enables the parties to argue the question if they so desire, but does not preclude the Court, if no argument is offered, from considering that question.

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(1) I.L.R., 24 Mad., 147 at p. 154.

* Civil Revision Petition No. 259 of 1902, presented under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of S. Raghava Ayyangar, District Munsif of Srivilliputtur, in Miscellaneous Petition No. 313 of 1902, dated 8th April 1902.

AMIRTHAM v. ALWAR MANIKKAM.

APPLICATION for leave to sue *in formâ pauperis*. The District Munsif passed an order under section 408 of the Code of Civil Procedure appointing a day for the hearing of the application. The applicant appeared at the hearing of the application, but the defendants did not and the Court was not addressed on the question whether on the face of the application and of the evidence the applicant was or was not subject to any of the prohibitions specified in section 407. The Munsif made an order under section 409 dismissing the application on the ground that on the face of the plaint the petitioner appeared to have no right to sue.

The applicant preferred this civil revision petition.

A. S. Balasubrahmanya Ayyar for petitioner.

M. R. Ramakrishna Ayyar and *A. K. Sundaram Ayyar* for respondent.

JUDGMENT.—This is a revision petition against an order of a District Munsif dismissing an application for leave to sue *in formâ pauperis*. The Munsif made an order under section 408 of the Code of Civil Procedure appointing a day for the hearing of the application. The application duly came on for hearing under the provisions of section 409 of the Code and the District Munsif made an order under that section dismissing the application. He dismissed it upon the ground that the petitioner on the face of the plaint did not appear to have a right to sue. On the hearing of the application the petitioner appeared, but the defendants did not appear, and no argument was addressed to the Court with reference to the question whether, on the face of the application and of the evidence, the applicant was or was not subject to any of the prohibitions specified in section 407 of the Code. It has been argued before me that it was not competent for the District Munsif to dismiss the application upon the ground taken by him, and the argument was based upon the opening words of section 408 'if the Court sees no reason to refuse the application on any of the grounds stated in section 407' and on the second paragraph of section 409 'the Court shall also hear any argument which the parties may desire to offer,' etc. The argument was that the Court would not make an order under section 408 fixing a day for the hearing of the application, unless it was satisfied that there was no reason to refuse the application on any of the grounds stated in section 407, and, that being so the Court could not, where there had been no argument upon the point at the hearing, go into the

question again when the hearing took place under section 409. To adopt the construction which I was invited on behalf of the petition to adopt with reference to section 409 would, it seems to me, be placing too narrow a construction upon the words of paragraph 2. Paragraph 2 says 'The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in section 407'. It enables the parties to argue the question, if they so desire, and requires the Court, if any argument is offered, to consider the argument, but, as it seems to me, it does not preclude the Court if no argument is offered when the matter comes on for hearing under section 409 from considering whether the applicant is subject to any of the prohibitions specified in section 407, and if the Court is of opinion that he is, from dismissing the applicati n. It does not follow, because, at the time when the Court acting under section 408 fixes a day for the hearing of the application, it then sees no reason to refuse the application on any of the grounds stated, that at a later stage when exercising the powers conferred by section 409 it is not open to the Court to consider whether the applicant is subject to any of these prohibitions. All that section 408 means is that the Court at that stage of the proceedings must be of opinion that, on the materials then before the Court, there is no reason to refuse the application on any of the grounds stated in section 407. It is also the duty of the Court when the hearing takes place at a later stage, under section 409 to consider whether or not the applicant is subject to any of the prohibitions specified.

It has also been argued that paragraph C of section 407 refers to a matter of jurisdiction and not to the question whether or not a good cause of action is disclosed in the application. No doubt the concluding words of the paragraph "sue in such Court" lend some support to the argument that the paragraph refers to the jurisdiction of the Court and not to the cause of action disclosed in the application. I do not think the point is altogether free from doubt, but it has been carefully considered by the Allahabad High Court in two cases, and I am prepared to follow these decisions. In the later case of *Kamrakh Nath* v. *Sundar Nath*(1)

(1) I.L.R., 20 All., 299.

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the decision is to the effect that paragraph C of this section does not refer solely to a question of jurisdiction, but that the applicant must make out that he has a good subsisting *prima facie* cause of action capable of enforcement.

The third point relied upon on behalf of the petitioner is that the plaint, on the face of it, discloses a right to sue. As to this I see no reason to differ from the conclusion at which the Munsif has arrived.

That being my view with regard to the three points raised on behalf of the petitioner, I hold that it has not been shown that the District Munsif failed to exercise a jurisdiction vested in him by law or that he acted illegally or with material irregularity.

I dismiss the petition with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1903. January 21.

PANDU PRABHU (DEFENDANT No. 1), APPELLANT,

v.

JUJE LOBO (PLAINTIFF), RESPONDENT.*

Transfer of Property Act—IV of 1882, *ss.* 86, 87—*Order absolute for foreclosure without notice to defendant in foreclosure suit—Application to set order aside.*

A plaintiff in a foreclosure suit obtained a decree for foreclosure under section 86 of the Transfer of Property Act, and, the time limited for redemption by the defendant having expired without being extended, the plaintiff obtained, under section 87, but without notice to the defendant, an order absolute debarring the defendant from redeeming, and also for delivery of possession of the mortgaged property. On the contention being raised, on appeal, that the order was null and void for want of notice to the defendant:

Held, that the view of the majority of the Court in *Mallikarjunudu Setti* v. *Lingamurti Pantulu*, (I.L.R., 25 Mad., 244), which related to proceedings under section 89 was applicable to proceedings under section 87, and that such proceedings are proceedings in execution of the decree passed under section 86. In the present case, the application had been made within one year of the date of

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* Appeal against Appellate Order No. 37 of 1902, presented against the order of J. W. F. Dumergue, District Judge of South Canara, in Appeal Suit No. 301 of 1901, presented against the order of T. V. Anantan Nair, District Munsif of Mangalore, on Regular Miscellaneous Petition No. 1205 of 1901 (in Regular Suit No. 283 of 1901).