REVISIONAL CIVIL.

1888
April 6.

Before Mr. Justice Mahmood.

MUHAMMAD HUSAIN (PETITIONER) *v.* AJUDHIA PRASAD AND OTHERS (OPPOSITE-PARTY)*.

Civil Procedure Code (Act XIV of 1882) s. 401, Explanation,—s. 622—High Court's powers of revision—Practice—Suit in formâ pauperis—"Pauper"—Inquiry into pauperism.

On an application to sue *in formâ pauperis* the Court is required to deal with the question of the applicant's pauperism with reference to the definition of that word as given in the Explanation to s. 401 of the Code of Civil Procedure, and in deciding it to ascertain the exact property, its market value and the title thereto and then to deal with the case under s. 407 of the Code, irrespective of any surmises as to the reason why the applicant has valued his claim at a high figure.

All orders passed under s. 407 of the Code of Civil Procedure are not excluded from the exercise of revisional powers of the High Court under s. 622 of the Code, *Chatterpal Singh* v. *Raja Ram* (1) notwithstanding.

In the exercise of revisional powers it is not the duty of the High Court to enter into the merits of the evidence; it has only to see whether the requirements of the law have been duly and properly obeyed by the Court whose order is the subject of revision, and whether the irregularity as to failure or exercise of jurisdiction is such as to justify interference with the order.

The facts of this case are stated in the judgment of the Court.

The applicant appeared in person.

Pandit *Bishambar Nath* for the opposite party.

MAHMOOD, J.—This is an application made under s. 622 of the Civil Procedure Code, invoking the revisional powers of this Court in the interests of justice within the meaning of that section.

The application relates to an order passed by the lower Court under s. 407 of the Civil Procedure Code disallowing the petitioner's prayer to be allowed to sue *in formâ pauperis* under the special provisions of Chapter XXVI of the Code.

The facts out of which the application has arisen may be briefly stated to be the following:—

The petitioner, Muhammad Husain, by a deed executed by him on the 6th August, 1881, usufructuarily mortgaged certain villages belonging to him to Shah Kirpa Dayal and others who are the

* Miscellaneous Application No. 235 of 1887.

(1) I. L. R., 7 All., 661.

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opposite party to the application. Under the terms of the mortgage a certain date, that is three years, was mentioned to be the period when the mortgage was either to be extinguished or to be liquidated. Similarly, on the 23rd December, 1881, the aforesaid Muhammad Husain executed another usufructuary mortgage-deed in respect of certain other property under terms and conditions similar to those of the previous mortgage, the rate of interest again being 12 per cent. per annum.

It is admitted before me by the petitioner Muhammad Husain in person and by Pandit *Bishambar Nath* on behalf of the opposite party that, whilst under the terms of the two mortgages themselves the opposite party would be entitled to obtain possession as usufructuary mortgagees of the property, by certain transactions subsequent to the mortgages, namely, on the 23rd September, 1881, and on the 6th June, 1882, the mortgagees accepted from the present petitioner Muhammad Husain *kabuliats* either leaving him in possession or replacing him in possession in lieu of payments of certain sums of money which were to be paid by the mortgagor to the mortgagees as money due under the *kabuliats*, the money being probably equivalent to such usufruct as the mortgagees would be entitled to take from the property in lieu of interest at 12 per cent. per annum.

Upon the statement of the main allegations between the parties, into the merits of which allegations I am not required to enter, the present petitioner came into Court alleging (to put the matter in the broadest terms) that the defendants, as mortgagees and also as the executants of the *kabuliats* abovementioned, had infringed the terms of those contracts; that they had wrongfully ousted the plaintiff from the possession of the mortgaged property and had committed acts of waste; and upon these allegations the petitioner alleged that he was entitled not only to possession of the mortgaged property, but also to a considerable sum of money which he claimed as compensation or damages which had accrued to him by the wrongful acts of the defendants.

The suit began, as it should have done, under s. 401 of the Civil Procedure Code, that is, by an application such as s. 403 of the Code requires. The application appears to have been registered,

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not as a suit, but, as an application to be allowed to sue *in formâ pauperis*.

The application was resisted by the defendants mainly upon the grounds that the petitioner's allegation as to pauperism was not true, and that he could sue in the proper form.

The issue having been so raised the learned Judge of the lower Court appears to have allowed the parties to produce evidence of witnesses upon the issue. Having examined the witnesses he has recorded a judgment, the main portion of which may be quoted to be in the following terms:—

"On a consideration of the statements of the witnesses for the parties, this Court is of opinion that the applicant is not a pauper, inasmuch as it appears from the mode in which the claim has been made and the objections taken thereto by the opposite party, the allegation with which the claim has been made, and the form in which it has been brought, are not such as to render the suit fit for being heard or decided *in formâ pauperis*."

The learned Judge, after making these observations, goes on to surmise that the claim of the plaintiff may be taken to be extravagant and, as such, unfit for being dealt with *in formâ pauperis*.

The first question which I have to deal with here has arisen out of the preliminary objection taken by Pandit *Bishambar Nath* on behalf of the opposite party, namely, that upon the findings of the lower Court, it is not open to this Court, as a Court of revision, to interfere under s. 622 of the Code, and in support of this contention the learned pleader has relied upon the Full Bench ruling of this Court in *Chatterpal Singh* v. *Raja Ram* (1), and also upon various other rulings of this Court which, according to the learned pleader's contention, restrict and limit the revisional powers of this Court. So far as the ruling in the Full Bench case is concerned, all I need say is, that the facts of the case were vastly different from those to which this application relates; that the learned judges who signed the judgment of the majority of this Court, did not lay down any *general* principle of law applicable to the matter; and that, so far as I am concerned, I, in delivering my judgment, guarded myself against being understood

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to exclude all orders under s. 407 from the exercise of the revisional powers of this Court. A similar question has been quite recently considered by me in the case of *Ali Hamza* v. *Ahsan Ali* (1) Pandit *Bishambar Nath* further relies upon the other rulings of this Court under s. 622. I think nearly all these rulings were considered and cited by me in the case of *Dhum Singh* v. *Basant Singh* (2), where I gave expression fully to my views as to what I understood to be the effect of the Privy Council ruling in *Amir Hassan Khan* v. *Sheo Baksh Singh* (3) and the Full Bench ruling in *Badami Kuar* v. *Dina Rai* (4) and the other cases. Adhering as I do to the views I then expressed, I cannot but hold, consistently with those views, that in this case there has been a wrong exercise of jurisdiction by the lower Court, and that the application can be entertained in revision.

Now, in the present case, I am far from being satisfied that the learned Judge of the lower Court had consulted the exact definition of the word pauper as contained in the *Explanation* to s. 401 of the Civil Procedure Code, nor am I satisfied that, in dealing with the weight of evidence in the case, he was clear as to the exact person upon whom the *onus probandi* as to pauperism lay in a case such as this, or as to the requisites of legal proof before an alleged pauperism, supported as it must necessarily be by a duly verified statement, can be held not to have been made out. Further, I am not satisfied that the learned Judge did not mix up considerations as to the likelihood or the chance of the plaintiff's success in the suit as an element in guiding his decision as to whether or not the petitioner was a pauper.

The plaintiff's statement that he had no property other than that which he had mentioned in the application could, no doubt, be contradicted by other evidence; but before that evidence could be trusted as sufficient to disallow the petitioner the privilege of suing *in formâ pauperis* it was necessary to find clearly whether such additional property as might be proved to belong to the plaintiff was sufficient to pay the fee prescribed by law within the meaning of the *Explanation* to s. 401. The manner in which the learned

(1) Weekly Notes for 1888, p. 150.
(2) I. L. R., 8, All., 519.
(3) I. L. R., 11, Calc., 6.
(4) I. L. R., 8, All., 111.

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Subordinate Judge has dealt with the case shows that he did not consider it necessary to ascertain either the exact amount of court-fees which would be due upon plaintiff's plaint or the exact nature or value of the property which was alleged to belong to the petitioner over and above the subject-matter of the suit. Indeed no attempt in that direction appears to have been made, because the judgment of the learned Subordinate Judge does not even specify the property which he held the petitioner to be possessed of, much less is there the smallest trace of any issue as to the value of the property. General and vague statements as to the petitioner who comes into Court to sue *in formâ pauperis* cannot be regarded by me as adequate to divest him of a remedy which on proof of pauperism the law would award him, and I cannot hold that there is any finding in the judgment to show that the plaintiff is possessed of means which would enable him to maintain the action in the usual form.

The learned Pandit, whilst conceding that there is no documentary evidence to prove the title of the petitioner as to the property alleged to belong to him, has asked me to go into the merits myself and to adjudicate upon the exact effect of the oral evidence of witnesses produced by his clients, and to determine, upon the record as it now stands, questions as to the title and value of the various properties the ownership whereof was attributed by the witnesses to the petitioner. I have no hesitation in laying down the rule that if, as I have frequently said before, in second appeals it is not the duty of this Court to enter into the merits of the evidence, *a fortiori*, it is not the duty of this Court to enter into the merits of the evidence in cases of revision. I may add that any other view would impose upon Courts of revision duties not dissimilar to those of the Courts of first appeal. All that this Court as a Court of revision is required to do is to see whether the requirements of the law have been duly and properly obeyed by the Courts whose orders are subjected to revision, and whether the irregularity as to failure or exercise of jurisdiction is such as would justify interference by this Court.

I am of opinion that this is one of those cases in which those revisional powers should be exercised, and without prejudice to

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either party to the litigation the order which I think is necessary to make in the case is, to set aside the order of the learned Judge of the lower Court, to require him to deal with the question of pauperism with reference to the definition contained in the *Explanation* to s. 401 and, in deciding the question, to ascertain the exact property, its market value, and the title thereto, and then to deal with the case under s. 407, irrespective of any surmises as to the reason why the plaintiff has valued his claim at such a high figure. In dealing with the case under that section the learned Subordinate Judge will, of course, be at liberty to decide whether, even if the petitioner's pauperism is established, his case falls under any of the other clauses of the enactment.

I have considered it necessary to go into the matter so fully because, whilst I hold that pauper suits when frivolously brought should not be encouraged, I also hold that enough has already been done by the Legislature in the Code of Civil Procedure, not only in s. 407 but also in later sections, to provide checks upon such litigation. But it is equally clear that if these checks are too severely administered, in the sense of the various requirements of the law not being duly carried out before a pauper is kept out of Court, the effect will be far from what the Legislature aims at. Courts of Justice should be open alike to the rich and the poor. This is a revision case, and all that I am required to do is to allow the petition, and setting aside the order of the learned Judge of the lower Court to require him to dispose of the case again with reference to the observations which I have made.

Costs will abide the result.

Cause remanded.

APPELLATE CIVIL.

1888
April 6.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

SAKINA BIBI (PLAINTIFF) *v.* AMIRAN AND OTHERS (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Pre-emptor out of possession of his own share—His own share lost by him pending appeal—Muhammadan Law.

The plaintiff instituted this suit to enforce her right of pre-emption in respect of a share in a village of which she alleged to be a co-sharer with the vendors. The

* Second appeal No. 51 of 1887 from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 22nd December, 1886, modifying a decree of Lala Manmohan Lal, Subordinate Judge of Azamgarh, dated the 12th June, 1886.