

ORIGINAL CIVIL.

Before Mr. Justice Hill.

THOMPSON v. THE CALCUTTA TRAMWAY COMPANY,
LIMITED.*

1893
January 26.

Practice—Suit in formâ pauperis—Continuation in formâ pauperis of suit instituted in ordinary form—Civil Procedure Code (Act XIV of 1882), ss. 401—415.

A Court has power under Chapter XXVI of the Code of Civil Procedure to allow a suit instituted in the ordinary form to be continued *in formâ pauperis*.

THIS suit was instituted by the plaintiff in the ordinary form to recover damages from the Defendant Company. Some time after its institution and before it came to a hearing the plaintiff applied on petition to the Court for liberty to proceed with the suit *in formâ pauperis*. In his petition he stated that he had up to the date of his application paid his attorney the costs incurred by him out of pocket for court-fees and stamps, but that he had not been able to pay any of his attorney's own costs, and had managed with difficulty to get his attorney to carry on the proceedings as far as they had gone, but he stated that he was unable to do so any longer, and did not desire to encroach further on his attorney's good nature, and that he was not possessed of any means whatever, except certain articles specified in the schedule, and valued at Rs. 233-6, which were under pledge to his creditors for the sum of Rs. 500; that he was unable to carry on the suit in the ordinary way, and accordingly prayed that the court-fees might be remitted, and he be at liberty to proceed *in formâ pauperis*. Upon the presentation of this petition a notice was issued to the Defendant Company and to the Government Solicitor, fixing this day for the investigation of the allegations contained in the petition.

The petitioner appeared in person.

The Defendant Company was not represented.

The *Standing Counsel* (Mr. A. Phillips) on behalf of the Crown opposed the application.

* Original Suit No. 517 of 1892

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The *Standing Counsel*.—The Code of Civil Procedure only contains provision for liberty being given to a plaintiff to institute a suit *in formâ pauperis*, and does not contain any provision empowering a Court to allow a plaintiff who has once instituted his suit in the ordinary way to continue it *in formâ pauperis*. Section 401 provides for a suit being *brought* by a pauper. Sections 403 to 408 deal with matters connected with the application for leave to *sue* as a pauper prior to the hearing of such application on notice to the defendant and the Government, and Section 409 deals with the hearing. Then comes Section 410, which provides that the application, if granted, shall be numbered and registered and deemed the plaint in the suit. These sections, therefore, contain no provisions to empower a Court to allow a suit once instituted to be carried on *in formâ pauperis*, and the remaining sections in the Chapter do not affect the question. If this application be treated as one under Section 410, it must be treated as the plaint, if granted, but the plaint in this case is already on the file, and the present application discloses no cause of action, as it in no way refers to the subject-matter of the suit. There have been cases where I am informed orders similar to the one now asked for have been made, but I am not aware of the present objection having been taken, and I contend, as a matter of principle, that the Court is not authorised by the Code to grant this application, and that it therefore has no power to make the order asked for. [HILL, J.—I am referred to the case of *Reoji Patil v. Shakkaram* (1), which followed a decision of this Court in *Nirmul Chandra Mookerjee v. Doyal Nath Bhattacharjee* (2), and in which it was held that it was competent for the Court to make the order now asked for.] This Court will not, I submit, follow the Bombay Court if that Court be wrong. In the Calcutta case Pontifex, J., gives no reason for his decision, and if your Lordship is satisfied that the language of the Code is clear on the point, you are not bound to follow that decision. In *Doorga Churn Doss v. Nittokally Dossee* (3), Wilson, J., gave leave to a defendant to defend *in formâ pauperis*, although no provision is made in the Code to that effect. I submit, however, that the

(1) I. L. R., 8 Bom., 615.

(2) I. L. R., 2 Calc., 130.

(3) I. L. R., 5 Calc., 819; 6 C. L. R., 120.

granting of an application for leave to sue *in formâ pauperis* is not a matter in the discretion of the Court, as the Court is bound to grant it under certain circumstances, and that the power conferred on the Court by Chapter XXVI should not be extended. Moreover, the powers conferred on the Court by that Chapter are limited throughout by express words which show that the only kind of application contemplated by the Legislature is an application to institute a suit, and I submit that this Court has no power to entertain or grant any other application, or one like the present.

The petitioner was not heard.

The judgment of the Court was as follows :—

HILL, J.—This application for leave to continue the suit *in formâ pauperis* is opposed by the Standing Counsel on behalf of Government on the ground that the Code gives no power to allow an application for a suit not instituted in *formâ pauperis* to be so continued. But I think I ought to follow the decision in the case of *Nirmul Chandra Mookerjee v. Doyal Nath Bhattacharjee* (1), where Pontifex, J., in a similar case held that the power, which is undoubtedly in the Court of allowing a suit to be instituted *in formâ pauperis*, includes power to allow a suit not so instituted to be continued in that form. That case has been followed by the Bombay Court in *Reoji Patil v. Sakharam* (2), and in another case *Doorga Churn Doss v. Nittokally Dossee* (3), Wilson, J., in relation to an application made by a defendant to be allowed to defend *in formâ pauperis*, after taking time to consider granted the application, having previously expressed the opinion that though there is no provision in the Code, the defendant on showing his poverty might be allowed to defend the suit as a pauper. These are the only reported cases bearing on this question, but I understand that this application is in conformity with what has been understood to be the practice of the Court, and on the whole, I think, it ought to be granted. I therefore make the order asked for.

Application granted.

H. T. H.

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