APPELLATE CIVIL.

FULL BENCH.

Before Sir Charles Sargent, Knight, Chief Justice, Mr. Justice Bayley, Mr. Justice Kemball, Mr. Justice West, and Mr. Justice Pinhey.

JETHA' MULCHAND (ORIGINAL PLAINTIFF), APPELLANT, *v.* GULRA'J JASRUP (ORIGINAL DEFENDANT), RESPONDENT.*

1884 *February* 5.

Civil Procedure Code (XIV of 1882), Secs. 220 and 412—Costs—Pauper plaintiff ordered to pay defendant's costs—Pauper suit in the Mofussil—Pauper appeal—Unsuccessful plaintiff—Successful defendant.

Section 412 and chapter xxvi of the Code of Civil Procedure (XIV of 1882), of which section 412 forms a part, do not deal with the costs of a successful defendant in a pauper suit. The costs of a defendant in such a suit are to be dealt with under section 220 of the Code, and the Court of Original or Appellate Jurisdiction has full power to give and apportion costs in any manner it thinks fit.

THIS was an appeal against the decision of Ráv Bahádur Mungeshráo Balwant, Subordinate Judge (First Class) of Násik, rejecting the plaintiff's claim with costs.

The plaintiff sued as a pauper to recover property left by his maternal uncle, one Davlatrám, under a will dated 26th September 1877.

The defendant denied the will, and asserted that, at best, it was an unregistered deed of gift under which no title passed to the plaintiff.

The Subordinate Judge rejected the claim with costs.

The plaintiff appealed to the High Court.

Shámráv Vithal for the appellant.—The Code of Civil Procedure makes special provision as to costs payable by a pauper. Section 412 makes him liable for the court fees; and, if his suit is frivolous or vexatious, he is liable to be punished with fine not exceeding Rs. 100, or with imprisonment for a term which may extend to a month or both. Over and above this liability he should not be called upon to pay the costs of the successful defendant. He cannot do so. He is a proved pauper. Chapter xviii as to costs does not apply to a pauper.

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Nagindás Tulsidás for the respondent—Chapter xxvi of the Code (Act XIV of 1882) is a special chapter dealing specially with the subject of suits by paupers. It does not touch the subject of costs generally which is dealt with by chapter xviii. Even this chapter xxvi, which is relied upon by the plaintiff, contains indications in sections 410, 411, 412, 413 and 415 that an unsuccessful pauper plaintiff is not exempted from the payment of costs as provided by the general section 220 of chapter xviii. Its wording is: "The Court shall have full power to give and apportion costs of every application and suit in any manner it thinks fit." There is no exception here in favour of unsuccessful pauper plaintiffs. Chapter xxvi gives certain privileges to pauper plaintiffs, but that does not exempt them from the operation of the general section 220. The inability of the unsuccessful pauper has been relied upon. The defendant, however, should have his chance of recovering his costs. If Government is allowed the chance of recovering the court fees there is no reason why a successful defendant should not have the chance of recovering his costs. The plaintiff may possibly commence trade, and the defendant may within the time allowed him by law recover his costs. If the plaintiff is unnecessarily harrassed, the insolvency provisions of the Code will give him relief. The practice has been uniform from 1827 until now. Regulation VI of 1827, sec. 9, is quite clear on the point. That provision has been re-enacted by all the Civil Procedure Codes, *viz.*, Act VIII of 1859, Act X of 1877, and Act XIV of 1882. Not a single case has been cited where this Court on its appellate side has held that an unsuccessful plaintiff should not pay the costs of a successful defendant if the circumstances of the case warranted.

The Court (Bayley, C. J. (Acting), and Pinhey, J.) referred it to a Full Bench with the following observations :—

PINHEY, J.—We are agreed as to the merits of this case that the decree of the Court below must be confirmed. We are also agreed that as plaintiff was allowed to sue and to appeal as a pauper, he must, under section 412 of the Code of Civil Procedure, be ordered to pay the court fees which would have been paid by him if he had not been permitted to sue as a pauper.

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But we differ as to the costs of the defendant. In my opinion, section 412 and the chapter of which it forms a part do not deal with the costs of a successful defendant in a pauper suit. I think the costs of a defendant in such a case are to be dealt with under section 220 of the Code of Civil Procedure. The Chief Justice, however, considers that a Court has no power to order a pauper plaintiff to pay the defendant's costs, or to make any other order as to costs in a pauper suit in which the plaintiff fails, except under section 412. As my opinion is in accordance with the usual practice on this side of the Court, I think it will be well to refer the question for the decision of a Full Bench: for I understand from the Chief Justice that the practice on the Original Side is different, and that on the Original Side a pauper plaintiff who has failed is never ordered to pay the costs of the defendant in the suit.

BAYLEY, C.J. (Acting).—I agree to the reference to a Full Bench as framed by Mr. Justice Pinhey, and will merely add that I have on several occasions sat with the late Chief Justice, Sir M. R. Westropp, in appeals from decrees in suits brought without success by paupers on the Ordinary Original Civil Jurisdiction Side of the High Court, and that, differing from the opinion of the Judge in the Court below, we always varied the order in the decree by which the pauper plaintiff had been made to pay the costs of the defendants, considering that the court had no power to make a pauper plaintiff pay the same, and we merely ordered, under section 412, the plaintiff to pay the court fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper.

The reference was argued before Sargent, C. J., Bayley, Kemball, West, Pinhey and Birdwood, JJ., on the 15th of January 1884.

The arguments sufficiently appear in the following judgments:—

SARGENT, C. J.—The question referred for our decision is whether, on appeal from a decree of a Mofussil Court, this Court can order a plaintiff, who has been allowed to sue and appeal in *formâ pauperis*, to pay the defendant's costs, whether of the suit or of the appeal. Chapter XXVI of the Civil Procedure Code of

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1882, which deals with suits by paupers, after providing (by sections 403 to 409, both inclusive,) for the procedure to be followed on applications for leave to sue in *formâ pauperis*, directs by section 410 that after such application has been granted, it shall be deemed to be the plaint in the suit, and that the suit shall proceed in all other respects as a suit instituted under Chapter V (which deals with suits in general) with the exception "that the plaintiff shall not be liable to court fees in respect of any petition, appointment of a pleader, or other proceeding connected with the suit." Lastly, sections 411 and 412 determine who is ultimately to pay those costs (from which the pauper plaintiff has been in the outset relieved) according as such plaintiff succeeds or fails in his suit. With the above exception and the provision contained in section 415 that the costs of an application to sue as a pauper and of the enquiry into pauperism are to be costs in the suit, the chapter is silent as to the costs of suits.

The special provisions or rules as they are termed in section 401 (subject to which suits in *formâ pauperis* are to proceed like other suits) being thus confined to a particular class of costs, all other costs of such suits must, in the absence of any other provision in the Code leading to a different conclusion, fall under section 220, which deals with costs in suits in general, and leaves them to be disposed of by the Court in any manner it thinks fit. It was said, however, that the introduction of the penal clause at the end of section 412 of the Civil Procedure Code can only be explained on the supposition that a pauper plaintiff could not be ordered in any case to pay the defendant his costs, as otherwise, it was urged, that a pauper plaintiff who brought a vexatious suit would be in a worse position than one who was not a pauper and who did likewise. This clause is found in section 53 of the Regulation IV of 1827 where it is made applicable to all plaintiffs alike. In Regulation VI of 1827, which provided the law relating to pauper suits in the Mofussil when the Civil Procedure Code of 1859 was passed, it is expressly provided by section 9 that if the decree is against the pauper plaintiff, the defendant, if payment of costs is awarded, may proceed against the plaintiff under the ordinary rules for enforcement of decrees, which clearly shows that it was in the power of the Court to order the plaintiff to

pay defendant his costs, and at the same time it is provided by section 14 that a pauper plaintiff is not exempted by the provisions of that regulation from the penalties enacted in section 53 of Regulation IV of 1827. The clause is omitted from the Civil Procedure Code of 1859, but is re-enacted with respect to pauper plaintiffs in section 412 of the Civil Procedure Code Act X of 1877, which is identical with section 412 of the new Code (XIV of 1882). Such being the history of the clause from 1827 down to the present time, the inference to be drawn from its re-enactment in the Code of 1877 is not, in my opinion, that pauper plaintiffs are exempt from the payment of costs, but that it was deemed necessary to provide a special protection to defendants against being harrassed and vexed by persons who, *ex hypothesi*, are not likely to be influenced by the fear of having to pay costs. As appellate Courts have the same powers given them by section 582 of the Civil Procedure Code of 1882 as are conferred by the Code on Courts of original jurisdiction, the above conclusion is equally applicable to this Court sitting as a Court of appeal from the Mofussil. I think, therefore, that the provisions of the Civil Procedure Code, assisted by the past history of the law relating to pauper suits in the Mofussil, lead to the conclusion that the question referred to us should be answered in the affirmative.

PINHEY, J.—We have had the point referred to this Full Bench very fully argued, and we have had our attention drawn to every law of procedure bearing thereon since the Elphinstone Code of 1827. Nothing, however, has been said or read to us which leads me to think that the opinion expressed by me on the 27th August, when my brother Bayley and I referred the case, is wrong, or that the practice which has prevailed certainly in the Mofussil Courts and (so far as my experience goes) in the Sadar Court and on the Appellate Side of the High Court for fifty-six years should be varied. In the Code of 1827 there was a special provision for the recovery by a successful defendant of his costs from an unsuccessful pauper plaintiff, and the Courts in the Mofussil have always held that a successful defendant can recover his costs from an unsuccessful pauper plaintiff from the passing of the Code of 1827 down to the 7th August, 1882, the date of the judgment against which this appeal was filed. The Subordinate Judge in this case

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rejected the plaintiff's claim and saddled him with the defendant's costs. In the memorandum of appeal no objection is taken as to this award of costs by the Subordinate Court.

I adhere to the opinion, which I have already expressed, that section 412 and the chapter of which it forms a part do not deal with the costs of a successful defendant in a pauper suit. Chapter xxvi of the Code of Civil Procedure of 1882 in its earlier sections prescribes rules under which a would-be plaintiff, who can show that he is a pauper, and can also show that he has a *primâ facie* good ground of action, may proceed to trial without first paying the institution fee and other court fees which a plaintiff who is not a pauper must pay before he can in the first place file his suit and afterwards carry it on. The institution fee and other court fees which a pauper plaintiff is thus excused from prepaying are *fees payable to Government*. Sections 411 and 412 prescribe how those *fees payable to Government* are to be eventually recovered in any case, whether the pauper succeeds or whether he fails. If the pauper succeeds, those fees are under section 411 recoverable from the defendant. If the pauper fails, they are under section 412 recoverable from the pauper plaintiff. I cannot, however, find anything in either of these sections or in any other part of chapter xxvi which can be held to apply to the costs incurred by the successful defendant when the pauper fails. Therefore, I still hold that the costs of a successful defendant should be dealt with under sections 219 and 220 of chapter xviii of the Code —a chapter which expressly provides for the costs of *parties inter se*. If the law intended that in no pauper suit should a successful defendant recover his costs, as is contended for the present appellant, or that the costs of a successful defendant in such a suit were not to be in the discretion of the Court, I should expect to find such words as "except in pauper suits" at the beginning of section 219 and after the words "every application and suit" in section 220. No such words, however, are to be found in either section, and section 220 distinctly says in the most unmistakeable language: "The Court shall have *full power* to give and apportion costs of *every application and suit* in *any manner* it thinks fit." To my mind the language is too clear to admit of any interpretation other than that which I put upon it. I say so with

all deference to the other members of the Court who may take a different view and whose judgments I have not seen.

It was argued, and I think some members of the Court were inclined to assent to the argument, that the second clause of section 412 indicated an intention on the part of the Legislature to free a pauper plaintiff, who had failed, from liability for the costs of the successful defendant. The second clause of section 412 enacts that if the Court "find that the suit was frivolous or vexatious, it may also punish the plaintiff with fine not exceeding one hundred rupees or with imprisonment for a term which may extend to a month or with both." It was contended that as no plaintiff, save a pauper plaintiff, is liable to punishment for bringing a frivolous or vexatious suit, the Legislature can never have intended that he should pay his adversary's costs as well, and that his liability to punishment must have been intended as a substitute for the ordinary liability of an unsuccessful plaintiff to pay the defendant's costs. I am, however, quite unable to see the force of this argument. I cannot see the connection between the liability of the pauper plaintiff to punishment for having imposed upon the Court by obtaining from the Court leave to prosecute *in formâ pauperis* a suit which on formal investigation has been found to be frivolous or vexatious, and the right of the defendant to be recouped, if he can be recouped, for moneys out of pocket, moneys which the plaintiff has compelled him to expend. Speaking generally, a defendant who has successfully resisted an unjust claim has a right to be reimbursed for the expenses to which he has been put in resisting such unjust claim and to be reimbursed by the person at whose instance he has been compelled to incur those expenses. It would be no answer to a defendant who had spent Rs. 500 in resisting an unjust claim to tell him that the man who has compelled him to spend the Rs. 500 has been punished with a fine of Rs. 100, or with a month's imprisonment. What the defendant wants is to get back his money, and the punishment of his adversary, whether by fine or imprisonment, however much it might gratify his feelings, will not put the money which he has spent back into his pocket.

Then it was contended, if this be so, if the liability of a pauper

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plaintiff to punishment if he bring a frivolous or vexatious suit be not intended to be substituted for liability for the defendant's costs, why did the Legislature prescribe any punishment for pauper plaintiffs only, and not for other plaintiffs who harass their adversaries by bringing frivolous or vexatious suits against them? I do not know that it is necessary for this question to be answered in order that the present case may be disposed of. I find that the Legislature *has* determined that a plaintiff who is allowed to file a suit as a pauper shall be liable to punishment, if the suit be found to be frivolous or vexatious. The answer, however, is not far to find. The reason, as it seems to me, is sufficiently obvious why the law should say that a pauper plaintiff shall be liable to punishment if he bring a frivolous or vexatious suit, and yet leave an ordinary plaintiff free from such liability.(1) An ordinary plaintiff gives some kind of guarantee that he at least believes that his suit is neither frivolous nor vexatious by commencing his suit with a heavy institution fee and by paying process fees and other court fees at every step he takes. Not so a plaintiff who can first persuade the Court that he has a good ground of action, and, next, that he is a pauper. He pays no institution fee. He pays no court fees. And he can drag his opponent possibly through years of costly litigation free from cost to himself. If at the end of the trial the Court finds that the suit is really a frivolous or vexatious one, I think the Legislature has properly clothed the Court with the power to punish the plaintiff, not merely because he has wasted the time of the Court, for a plaintiff not admitted to sue as a pauper may do that, but because he has for a time at least defrauded the State out of its revenues, which, moreover, in the end may never be recovered, however much the Court may order him to pay up, and also because the plaintiff must have been guilty of a very grave contempt of Court when either by suppression of fact or suggestion of falsehood he induced the Court to allow him to sue as a pauper.

In my opinion, this case should be remitted to the Division

(1) As a fact every plaintiff who brought a frivolous or vexatious suit was, under Regulation IV of 1827, sec. 53, liable to a fine of Rs. 500, or three months' imprisonment.

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Bench with the opinion of this Full Bench, that the costs of a successful defendant in a pauper suit are, as in all other cases, in the discretion of the Court under section 412 of the Code of Civil Procedure of 1882.

The other Judges concurred.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

July 9.

TUKA'RA'M AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* SUJANGIR GURU (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation—Adverse possession—Attachment of vatan lands—Peshwá's Government—Resumption by British Government—Restoration—Inability to sue during attachment and resumption—Bombay Act I of 1865, Sec. 34—Contra non valentem agere non currit præscriptio, application of.

In the year 1806-7 the Peshwás attached certain *vatan* lands belonging to the plaintiff's family. The attachment continued till the year 1866, when the British Government made them *khálsa*, or resumed them. The defendant in the meanwhile entered upon them as tenant to the Government, and paid assessment thereon.

In the year 1871 the lands were ordered to be restored to the plaintiffs. After this order of restoration the plaintiffs brought a suit against their co-parceners for partition, and obtained a decree. In the execution of this decree they were obstructed by the defendant, who claimed the lands as his own. The plaintiffs thereupon brought a suit against the defendant in 1881 to eject the defendant and to obtain possession of the lands. The Court of first instance held the plaintiffs entitled merely to such assessment as might remain after payment of *judi* to Government. It further held that the defendant's possession had become adverse to the plaintiffs, as the latter did not bring their suit within twelve years from the resumption of the lands by Government in 1866, since which time the defendant was to be considered as tenant or occupant under Government. From this decree the plaintiffs appealed, and the lower Appellate Court was of opinion that by the order of restoration the plaintiffs were restored to the right of such assessment as was left after deduction of *judi*, and that their claim to that even was barred, as it was brought after twelve years from the date of resumption. On appeal to the High Court,

Held, restoring the decree of the Court of first instance, that the claim of the plaintiffs was not barred. After the attachment of the lands in dispute the Peshwá's Government held the same as constructive trustees for the plaintiffs, and when that Government was succeeded by the British Government the same relation continued. The British Government, having succeeded to the trust,

* Appeal, No. 24 of 1884.