
(2003) 07 KL CK 0020

In the High Court Of Kerala

Case No : C.M.P. No. 1223/03 in A.S. 156/94

Dev, R.V.

APPELLANT

Vs

Chief Secretary, Government of Kerala and Others

RESPONDENT

Date of Decision : 11-07-2003

Acts Referred:

Civil Procedure Code, 1882 — Order 33 Rule 10, Order 33 Rule 11, Order 33 Rule 11A,
Order 33 Rule 12, Order 33 Rule 14
Civil Procedure Code, 1908 (CPC) — Order 33 Rule 11

Citation : (2003) 07 KL CK 0020

Hon'ble Judges : P.R. Raman, J;K.A. Mohamed Shafi, J

Bench : Division Bench

Advocate : Govindh K. Bharathan, for the Appellant; Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Mohamed Shafi, J.—This petition is filed by the Plaintiff Appellant under Sections 151 and 152 of the CPC seeking correction of the Judgment and Decree passed by this Court dated 13th September 2002 in A.S. 156/1991 by deleting the direction to the District Collector to recover the court fee payable by the Appellant since he is not liable to pay court fee and he has no means to pay the same.

2. The Petitioner filed the above suit in O.S. 67/88 before the Subordinate Judge's Court, Cherthala as indigent person against the State claiming damages of Rs. 10 lakhs. That suit was dismissed by the lower court by Decree and Judgment dated 30th July 1991. The above appeal in A.S. 156/94 is also preferred by the Petitioner against that Decree and Judgment as indigent person. The appeal was dismissed by this Court by Judgment dated 13th September 2002 confirming the Decree and Judgment passed by the lower court. In the Judgment this Court directed the Registry to send a copy of the Judgment and Decree to the concerned District Collector for realisation of the court fee payable

on the plaint and memorandum of appeal.

3. The Petitioner has filed the above petition to delete the direction against him to pay the court fee payable on the plaint and memorandum of appeal. The Petitioner has contended that under Order 33 Rule 10 of the CPC only when the Plaintiff or the Appellant succeeds in the suit or appeal, the court fee payable on the plaint or memorandum of appeal has to be calculated and the Government can recover the same from any party ordered by the decree to pay the same. Therefore, he contended that in view of the fact that he did not succeed in the suit and appeal, he is not liable to pay court fee payable on the plaint and the memorandum of appeal which were permitted to be filed as indigent person since he continues to be an indigent person and he is not dispaupered.

4. We heard the Counsel for the Petitioner and the Govt. Pleader in extenso.

5. Order 33 of the CPC deals with suits by indigent persons. Order 33 Rule 10 provides for costs when an indigent person succeeds which reads as follows:

10. Costs where indigent person succeeds. -- Where the Plaintiff succeeds in the suit, the Court shall calculate the amount of court fees which would have been paid by the Plaintiff if he had not been permitted to sue as an indigent person; such amount shall be recoverable by the State Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit.

6. Order 33 Rule 11 deals with the procedure where an indigent person fails which reads as follows:

Procedure where indigent person fails. -- Where the Plaintiff fails in the suit or the permission granted to him to sue as an indigent person has been withdrawn, or where the suit is withdrawn or dismissed,

(a) because the summons for the Defendant to appear and answer has not been served upon him in consequence of the failure of the Plaintiff to pay the court fee or postal charges (if any) chargeable for such service or to present copies of the plaint or concise statement, or

(b) because the Plaintiff does not appear when the suit is called on for hearing, the Court shall order the Plaintiff, or any person added as a co-Plaintiff to the suit, to pay the court fees which would have been paid by the Plaintiff if he had not been permitted to sue as an indigent person.

7. The Counsel for the Petitioner submitted that since a person who is permitted to sue as an indigent person continues to be as such till he is dispaupered, there is no question of payment of court fee payable on the plaint, etc. when he did not succeed in the suit. According to him, while provisions of Order 33, Rule 10 deals with costs where indigent person succeeds in the suit etc., Rule 11 deals with the payment of court fee when he is dispaupered, or the suit is withdrawn or the suit is dismissed for default due to the contingencies mentioned in Clauses

(a) and (b) of Order 33, Rule 11. According to him, in order to attract the provisions of Rule 11 of Order 33, failure of the suit should be by withdrawal or dismissal because the summons for the Defendant has not been served upon him due to the failure of the Plaintiff to pay court fee or postal charges for the service or to produce copies of the plaint or concised statement or because the Plaintiff did not appear when the suit was called on for hearing. He strenuously submitted that the failure of the suit on merits is not at all attracted by the provisions of Rule 11 of Order 33. He submitted that when Rule 10 of Order 33 provided for costs which takes in court fee also when the indigent person succeeds in the suit, there is absolutely no reason or scope for providing for payment of court fee on the failure of the indigent person on merits in the suit or proceeding. He submitted that the very benevolent provisions under Order 33 with regard to indigent persons or persons who do not possess sufficient means to pay court fee will be rendered redundant or nugatory if a person who filed suit as indigent person failed in the suit or proceeding on merits and continues to be indigent person is directed to pay court fee payable on the plaint, etc.

8. The Counsel for the Petitioner also submitted that the provisions of Rule 10 and Rule 11 of Order 33 should be interpreted harmoniously so as to achieve the benefit intended by the Legislature in favour of indigent persons in filing suits, appeals, etc. and therefore, the clause where the Plaintiff fails in the suit occurring at the beginning of Rule 11 of Order 33 can be applied only to cases where permission granted to sue as indigent person is withdrawn or where the suit is withdrawn or when the suit is dismissed as provided under Clauses (a) and (b) of the rule, in cases the suit is dismissed for default for not complying with any of the requirements mentioned in those clauses.

9. A plain reading of Rules 10 and 11 of Order 33 explicitly reveals that those two rules deal with two different contingencies, Rule 10 dealing with the Plaintiff suing as indigent person succeeding in the suit and Rule 11 dealing with his failure in the suit.

10. Various High Courts in India have considered the question of payment of court fee on dismissal of a suit filed in forma pauperis or by indigent person and uniformly held that the Plaintiff suing in forma pauperis or as indigent person is liable to pay the court fee if his suit is dismissed with or without contest.

11. In ILR 21 1898 Mad 113 Collector of Vizagapatnam v. Abdul Kharim Sahib a Division Bench of the Madras High Court after considering the analogous provisions of Sections 412 and 622 of the CPC of 1882, dealing with the above question has observed as follows:

The Bombay case relied on by the District Judge has been dissented from by this Court in Lakshmikantam v. Lakshmiddevamma. Sri T. Muttusami Ayyar there observed: -- "The words in the sections are "succeeds" and "fails in the suit" and they refer to the ultimate decision or the result of the suit and not to the mode in which the decision is arrived at. I should be doing violence to the

language of the section if I introduced into them the words "after contest" which I do not find in them." We see no reason to dissent from this view.

We accordingly allow the petition and direct that the Plaintiffs in the suit do pay the Collector the stamp duty payable on the plaint and the costs of this application.

12. In that case the question considered was that when suit was dismissed without contest whether the Plaintiff who sued in forma pauperis is liable to pay court fee payable on the plaint. In that context the Division Bench of the Madras High Court has observed as above.

13. In the decision reported in ILR (1911) 35 Bom. 448 Secretary of State for India v. Narayan a Division Bench of the Bombay High Court considered the question whether the Plaintiff in a suit filed in forma pauperis is liable to pay court fee when the suit was dismissed as settled out of court. The Division Bench has observed as follows:

The Subordinate Judge, who had declined to make any order u/s 412 of the Code of 1882 had clearly committed an error of law. The suit had been dismissed. It may be that was because the parties had settled the matter out of Court, but the Court had nothing to do with that, nor had the Court to do anything with the fact that the dismissal of the suit was upon the joint request of the parties. Whether it was upon the request of the parties or not, the suit had been dismissed, and the suit having been dismissed, there was a failure of it, and the right accrued to Government to have the court fee from the party defeated. The party defeated was the Plaintiff.

14. In the decision reported in AIR 1953 KER 159 Prabhakara Menon v. Chief Secretary to Government of Travancore-Cochin a Division Bench of the Travancore-Cochin High Court considered the applicability of the provisions of Rule 10 and Rule 11 of Order 33 of CPC and observed as follows:

It is only in cases in which the Plaintiff totally fails in the suit that Order 33, Rule 11 will apply. In cases coming under Rule 10, the Court may order any party to the suit to pay the court fee due to the State and it will also be a first charge on the subject-matter of the suit. In cases coming under Rule 11 only the Plaintiff can be made liable for the court fee payable to the State. So far as the suit in this case is concerned, we have no doubt that Rule 10 applies to the case and that the State is entitled to a first charge on the B schedule property for the court fee due to the State in the suit.

15. In the decision reported in AIR 1960 KARN 95 State of Bombay, now the State of Mysore v. Dattatraya Narasingrao Udipi a Division Bench of the Mysore High Court has considered the issue when the suit brought in forma pauperis was dismissed the next friend can be ordered to pay court fee under Order 33, Rule 11 of the C.P.C and observed as follows:

This is a case where the pauper Plaintiff has failed in the suit and, therefore, an

order under Rule 11 for the payment of the court fees could be made. But the said order under the said rule can only be made against a Plaintiff or any person added as a co-Plaintiff to the suit.

16. In the decision reported in (1953) 65 P&H LR 618 Shila Devi v. Mohan Lal a Division Bench of the Punjab High Court has observed as follows:

The provisions of Rule 11 of Order XXXIII are quite clear. Where the Plaintiff fails in the suit, the Court shall order the Plaintiff to pay the court fee which would have been paid by the Plaintiff if he had not been permitted to sue as a pauper. Mr. Raj Kumar has pointed out that this rule further provides for certain eventualities, namely, where the suit is withdrawn or dismissed, and he contends that it is only in those eventualities that the Plaintiff can be obliged to pay the court fee and not if the suit is dismissed on the merits. This contention is clearly untenable and is not supported by any authority. The first part of the rule i.e. "where the Plaintiff fails in the suit" is without any qualification and apparently applies to dismissal on the merits and the other eventualities which are given in Clauses (a) and (b) of this rule appear to have been added merely as a matter of abundant caution so that it may not be argued that if the suit fails on account of default of the Plaintiff such as not paying the postal charges or not appearing when the suit was called for hearing, then the Plaintiff shall not be liable to pay the court fee which would have been paid by him if he had not been permitted to sue as a pauper. In the circumstances the application is allowed and we order that the Plaintiff-Appellant shall be liable to pay the court fee on the amount of Rs. 10,732.7 for which she had filed an appeal in this Court.

17. In the decision reported in 1991 (2) KLT 724 Andrew v. State of Kerala a Division Bench of this Court has held that Rule 14 of Order 33 will not come into play until an order under Order 33, Rule 12 of CPC in regard to payment of court fee under Rule 10, 11 or 11A of Order 33, as the case may be, is passed.

18. It is clear from the above rulings of the various High Courts and this Court that a person who is permitted to sue as indigent person is liable to pay the court fee which would have been paid by him if he was not permitted to sue as indigent person, if he fails in the suit after trial or without trial since the ultimate decision or the result of the suit and not the manner or mode in which the decision is arrived is envisaged under Rule 11 of Order XXXIII of the Code of Civil Procedure.

19. The Counsel for the Petitioner submitted that in view of the scheme of Order 33 of the Code of Civil Procedure, failure in a suit cannot be equated with the dismissal of the suit since dismissal has been dealt with separately under Clauses (a) and (b) of Rule 11. According to him, failure should be a total failure of the entire claim in the suit and the suit should be devoid of any merit, any rhyme or reason without possessing a modicum of success. He argued that in this case the Petitioner-Appellant failed in the suit due to lack of evidence and since the suit is dismissed for insufficiency of evidence, it cannot be treated as failure as

contemplated in Rule 11 of Order 33 of the CPC He further argued that in the Judgment passed by this Court in appeal this Court merely dismissed the appeal and has not held that the Plaintiff has failed in the suit. Therefore, according to him, Rule 11 of Order 33 is not attracted at all in this case.

20. The above submissions made by the Counsel for the Petitioner though attractive, cannot be countenanced. It is clear from the decisions referred to above that failure of the suit contemplated in Rule 11 of Order 33 of the CPC take in the dismissal of the suit. Therefore, the above submissions made by the Counsel for the Petitioner are devoid of any merits.

21. The Counsel for the Petitioner also argued that when the Plaintiff partly succeeds and partly fails in a suit, the provisions of Rule 10 or Rule 11 of Order 33 will not apply and the question of payment of court fee has to be dealt with u/s 35 of the CPC since it forms part of the cost in the suit to be awarded, which is within the discretion of the court,

22. The above argument advanced by the Counsel for the Petitioner is of no substance.

23. The question whether the Plaintiff suing as a pauper is liable to pay court fee when he succeeds in respect of part of the claim made by him in the suit was considered and settled by the Madras High Court way back in the year 1891. In the decision reported in ILR (1891) 14 Mad 163 Chandrareka v. Secretary of State for India a Division Bench of the Madras High Court held that the Plaintiff in that partition suit who obtained a decree for Rs. 100 being a moiety of the property claimed is liable to pay court fee with regard to the sum of Rs. 100 and the 1st Defendant who contested the suit is liable to pay court fee for the balance amount u/s 411 of the CPC of 1882.

24. In the decision reported in Ganga Dahal Rai and Another Vs. Musammat Gaura, a Division Bench of the Allahabad High Court has held as follows:

Under Rule 10 of Order 33 of the CPC the Legislature deals with the case of a pauper Plaintiff who succeeds in the suit and under Rule 11 with the case of a pauper Plaintiff who fails in the suit. There is no separate provision for a case like the present, in which a pauper Plaintiff has partly succeeded and partly failed.

Presumably the Court is intended to deal with such a case by combining the provisions of the two rules.

25. In the decision reported in AIR 1930 Pat 353 Badrinath v. Jagdip Sahay a Division Bench of the Patna High Court has held that if a suit filed in forma pauperis is compromised, court fee should be apportioned having regard to the success and failure and equities,

26. In the decision reported in AIR (29) 1942 Bom 274 Government of the Province of Bombay v. Bai Baiba Kandhabhai a Single Judge of the Bombay High Court held that where in a pauper suit the Plaintiff has failed in some and

succeeded in other respects, an order directing the Plaintiff to pay the whole amount of the court fees cannot be said to offend Order 33, Rules 10 and 11.

27. In the decision reported in AIR 1963 Guj 277 Parshottam v. Motichand a Single Judge of the Gujarat High Court has observed as follows:

Even if the Plaintiff succeeds partly in the suit, it can certainly be said of the Plaintiff that he has succeeded in the suit. It is only when the Plaintiff does not succeed at all in the suit that the provisions of Order 33, Rule 10 would not apply and in that event since the Plaintiff would have failed in the suit, the provisions of Order 33, Rule 11 would apply. Failure in the suit would mean total absence of success in the suit. So long as there is even a modicum of success, it cannot be said that the Plaintiff has failed in the suit.

28. In the decision reported in Charla Satya Venkata Subbalakshmi Vs. Collector of West Godavari District at Eluru and Another, a Single Judge of the A.P. High Court has held that though there is no express provision made in the Code for the case of a Plaintiff succeeding in part, and failing in part, the Court has necessarily to deal with the case by giving effect to both Rules 10 and 11 (Andh. Pra.) and apportioning the liability for the court fee between the Plaintiff and the Defendant, depending upon the success of each party.

29. Therefore, it is clear that if the Plaintiff who is permitted to institute the suit as an indigent person succeeded in part in a suit, the court fee payable by him on the plaint or memorandum of appeal has to be apportioned between the Plaintiff and the Defendant in proportion to the success of each party. Therefore, the liability of the Plaintiff who sued as indigent person or in forma pauperis to pay the court fee if he succeeds entirely in the suit and to pay the court fee in proportion to the success if he succeeds partly in the suit under the provisions of Rule 10 and to pay the entire court fee if he fails in the suit under Rule 11 of Order 33 of the present CPC of 1908 and under the analogous provisions of the previous Code is well established.

30. Therefore, the argument advanced by the counsel for the Petitioner relying upon the decision of a Single Judge of the Patna High Court reported in Ram Saran Singh and Others Vs. State of Bihar and Others, that court fee forming part of costs awarded in a suit, the provisions of Section 35 of the CPC applies to the case of this nature wherein the Plaintiff did not succeed in the suit instituted as indigent person, is not sustainable. Section 35 of the CPC vests with the court the discretion to award costs in a suit or proceedings. In the above decision relied upon by the Counsel for the Petitioner the Patna High Court has considered the question of payment of court fee by indigent person in case of his succeeding partly and failing partly. In this case the question to be considered is whether in case of failure of the Plaintiff in the suit or appeal court fee is payable on the plaint or memorandum of appeal. Therefore, the facts and circumstances of this case and the facts obtaining in the above reported case before the Patna High Court are entirely different. We have already found that in case the Plaintiff suing

as indigent person succeeds in part and fails in part, he is liable to pay court fee in proportion to his success under Rule 10 of Order 33 of the CPC Therefore, the argument advanced by the counsel for the Petitioner has to be rejected.

31. Hence the Petitioner who is the Plaintiff in the suit and Appellant in the appeal cannot escape from his liability to pay the court fee payable on the plaint and on the memorandum of appeal in this case as he failed in the suit and appeal by merely contending that he still continues to be an indigent person and a man of no means.

32. The questions whether the indigent Plaintiff is liable to pay the court fee on his failure in the suit and whether the State could recover or realise the court fee payable by him under due process of law are separate and distinct matters to be considered independently. We are not called upon to pronounce on the issue as to whether the State will be able to realise the court fee payable on the plaint and memorandum of appeal by the Petitioner in this case under due process of law.

33. It is also pertinent to note that the Petitioner herein by filing the above petition purporting to be for correction of the Judgment and Decree under Sections 151 and 152 of the CPC in fact seeks review of the Judgment and Decree passed by this Court in the above appeal which is not permissible under law.

34. In view of what is stated above, we find that the Petitioner who was permitted to institute the above suit and appeal as indigent person is liable to pay the court fee payable on the plaint and memorandum of appeal under Rule 11 of Order 33 of the CPC as he failed in the suit and appeal since both are dismissed by the trial court and this Court. His contention that he is not liable to pay court fee since he continues to be indigent person is not sustainable.

Therefore, the petition is dismissed.