

(1940) 09 AHC CK 0015
In the Allahabad High Court
Case No : Application No. 121 of 1938

Mujawir Husain

APPELLANT

Vs

Mst. Kishwar Jehan Begam (alias) Abida Begam and Another

RESPONDENT

Date of Decision : 20-09-1940

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 152

Citation : (1940) 09 AHC CK 0015

Hon'ble Judges : Yorke, J

Bench : Single Bench

Advocate : S.M. Rafi, for the Appellant; P.N. Bhatt for Opposite Party No. 1 and Asst. Govt. Advocate for Opposite Party No. 2, for the Respondent

Final Decision : Dismissed

Judgement

Yorke J.

1. This is an application in revision against an order purporting to be an order u/s 152 of the CPC made by the Munsif North Lucknow, ordering amendment of the decree so that the defendant should be required to pay advalorem court-fee on Rs. 1,000 instead of a sum of Rs. 7-8-0 only.

2. The matter has arisen out of a pauper suit. Mst. Kishwar Jahan Begam instituted a suit in forma pauperis to recover a dower debt claimed to amount to Rs. 1,000. The suit was decreed on the 27th April, 1937, for Rs. 100 and proportionate costs, and a further clause was added in the operative order as follows :

The court-fees shall be paid by the defendant." The court-fees payable on Rs. 1,000 amounted to Rs. 107-8-0, but, whether by mistake or how does not appear, the amount taxed against the defendant was only Rs. 7-8-0 that being the court-fee taxable on Rs. 100. At a date considerably later an application was made by the U. P." Government through the Additional Government pleader of Lucknow u/s 152 asking for an amendment of the decree with a view to the

plaintiff being made liable for the balance of the ad valorem court-fee. The learned Munsif thereupon referred to the judgment of his predecessor and the decree prepared, and he took the view that the decree was not in conformity with the judgment, and he proceeded to amend the decree so as to tax Rs. 107-8-0 against the defendant instead of Rs. 7-8-0 on account of the court-fee payable in the suit. It is against this order that the present application is filed u/s 115 on the ground that the learned Munsif had no jurisdiction to amend the decree because the decree was already in conformity with the judgment.

3. A preliminary objection is taken to the maintainability of the present application on the ground that it has been held by the High Court at Madras that the amended decree was appealable u/s 96 of the Code of Civil Procedure. It is therefore contended that as the present applicant had another remedy available to him, he should not be permitted to rely upon Section 115. On the other hand learned Counsel for the "applicant has pointed to the fact that the view that an appeal lies from the amended decree is not held by all the High Courts, and the further fact that in numerous cases applications have been entertained by this Court u/s 115 against orders of amendment of decrees made u/s 152 In my opinion there is no substance in the preliminary objection.

4. Coming to the merits of the application learned Counsel for the applicant has referred to *Ganga Dahal Rai and Another Vs. Musammat Gaura*, the head note of which runs as follows:

In a suit brought in forma pauperis, the plaintiff succeeded only in part and failed as to the rest of the claim; the lower Court ordered the defendant to pay the entire costs incurred by the plaintiff including the amount of Court-fees which would have been payable on the plaint Held that the Court-fees payable on the plaint should be apportioned under the provisions of Rules 10 and 11 of Order XXXIII of the Code of Civil Procedure.

5. This case was referred to and followed in *S. Srinivasa Ayyar v. Lakshmi Ammal* AIR 1928 Mad. 216, in which it was held that

under Order XXXIII Rules 10 and 11 of the CPC it is not open to the Court to direct the defendant to pay Court fees exceeding the amount which is payable on that portion of the plaintiff's claim which is successful and the plaintiff should be asked to pay the Court-fee on the excess.

6. Relying on these decisions learned Counsel contends that the trial Court must be understood to have intended by its operative order nothing more than that the defendant would be liable for the proportionate amount of Court-fee payable on that amount of the plaintiff's claim for which she had been successful. On the other hand the learned Assistant Government Advocate has referred me to *Rohinikumar Pal Vs. Kusum Kamini Pal and Others*, , in which it was held that

it is not illegal to lay upon the defendant in such a pauper suit a larger proportion of the Court-fee payable from the plaintiff than would have been payable by the

plaintiff if the claim had been limited originally to that portion which was successful.

7. There can, of course be no doubt that the court-fee payable in the case is the court-fee leviable upon the plaint, and in the light of this decision there was nothing improper in the trial Court ordering the defendant to pay the whole of the court-fee leviable upon the plaint if in the circumstances of the case the Court thought that that was a proper order. If the defendant thought the order unjust, he could appeal against that portion of the order. The learned Judges of the Calcutta High Court considered the decision in the Allahabad case and did not agree with the view of the Allahabad High Court. They considered that the discretion given to the Court under rule 10 of Order XXXIII was quite sufficient for the purpose, and that the Court might, in the exercise of its discretion having regard to the circumstances of the case, mould its decree according to what the justice of the case requires with reference to the court-fees payable, and they went on to refer to the concluding words of the rule which provides that "such amount shall be recoverable by the Government from any party ordered by the decree to pay the same."

8. The applicant asks me to hold that the lower Court had no jurisdiction to amend the decree. That could only be the case if the decree was already in conformity with the judgment. What therefore learned Counsel is really asking me to hold is that the decree as originally prepared was already in conformity with the judgment because that part of the wording of the decree must be interpreted according to the view taken in the Allahabad case. In my opinion there is no force in this contention. Had the trial Court intended to tax the defendant only in accordance with the Allahabad view, it would have said nothing further after decreeing the plaintiff's claim with proportionate costs. The trial Court deliberately added that the defendant would be liable to pay the court-fee, that is to say the court-fee leviable upon the plaint. The decree as originally prepared was not in conformity with this operative order and the lower Court undoubtedly had jurisdiction to amend it and it cannot be said that the lower Court acted in the exercise of its jurisdiction illegally or with material irregularity. It follows that there is no force in the present application which therefore fails and is dismissed with costs to the Government.