
(1972) 10 KL CK 0018

In the High Court Of Kerala

Case No : A.S. No. 411 of 1966 and C.M.P. No. 13933 of 1972

Nelliyodan Balan Nair

APPELLANT

Vs

Pantheevati Kesavan Nambissan and Others

RESPONDENT

Date of Decision : 25-10-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 10
Kerala Court Fees and Suits Valuation Act, 1959 — Section 67

Citation : AIR 1973 Ker 133

Hon'ble Judges : T.S. Krishnamoorthy Iyer, J; P. Govindan Nair, J

Bench : Division Bench

Advocate : T.V. Ramakrishnan, for the Appellant; V. Bhaskaran Nambiar, for the Respondent

Judgement

Govindan Nair, J.—This matter has come up before us on the basis of an office note reading as follows:

"The Memorandum of Cross-objections in A.S. No. 411 of 1966 was filed in forma pauperis. There is no specific order in the judgment regarding realisation of court-fee by the State.

For orders."

The plaintiff who had filed a memorandum of cross-objections is the applicant in C.M.P. No. 13933 of 1972 and by that application he has claimed refund of the court-fee payable on the memorandum of cross-objections and he has further prayed that it may be directed by this Court in the event of its ordering payment of court-fees on the memorandum of cross-objections acting under Rule 10 of Order XXXIII of the Code of Civil Procedure, that the court-fee will not be recovered from him in view of Section 67 of the Kerala Court-fees and Suits Valuation Act, 1959 (hereinafter called the Act) under which it is claimed that he is entitled to a full refund of the entire court-fees payable on the memorandum of cross-objections.

2. The question is not free from difficulty. It is, however, clear that Rule 10 of Order XXXIII, in view of Rule 1 of Order XLIV of the Code of Civil Procedure, will apply to appeals and it is not disputed before us to memorandum of cross-objections as well. It is also clear that the plaintiff has succeeded in the memorandum of cross-objections, for the finding of the trial Court that he is not entitled to mesne profits from the third defendant has been set aside and the matter has been remanded to the Court below for a de novo consideration and decision.

3. It is contended by counsel for the plaintiff that for Rule 10 of Order XXXIII to apply there should be a decree directing the party to pay the court-fees and since there is no decree disposing of the cross-objections, the rule cannot apply. Rule 10 of Order XXXIII runs thus:

"10. Costs where pauper 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 a pauper; 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."

4. We do not think that it will be correct to read Rule 10 as applicable only to cases where the direction for payment of court-fees is contained in a decree. Rule 14 of Order XXXIII shows that the direction to pay court-fees can be by an order as well. And in cases where there is "remand" in appeal without deciding any question there will be only an order of remand and no decree. If it is too far-fetched, we think, to construe Rule 10 of Order XXXIII as inapplicable in such cases because there is only a direction in an order in such cases for payment of court-fees. We have to understand Rule 10 of Order XXXIII as providing for such cases too. The word "decree" occurring in Rule 10 on which so much reliance has been placed by counsel for the plaintiff has to be understood in the context as not a decree as defined in the CPC but as only containing the final decision of the Court directing the payment of court-fees.

5. By the judgment of this Court it was directed that the plaintiff who filed the memorandum of cross-objections and the defendants who were the opposite parties and who were respondents to the memorandum of cross-objections must bear their respective costs relating to the memorandum or cross-objections. In the light of the above, we have to direct the plaintiff to pay the court-fees that would have been payable on the memorandum of cross-objections had he not been permitted to file the memorandum of cross-objections in forma pauperis. This amount has also necessarily to be fixed as the court-fee payable on the amount which has been claimed in the cross-objections. That is, at Rs. 4,809.75. We fix the amount of court-fees payable on the memorandum of cross-objections at Rs. 4,809.75

6. On behalf of the plaintiff, it was contended on the basis of C.M.F. No. 13933 of 1972 that this Court would have directed refund of the entire court-fee paid on

the memorandum of cross-objections had it actually been paid in view of Section 67 of the Kerala Court-fees and Suits Valuation Act, 1959. In view of this, it is urged that no orders should be passed under Rule 10 of Order XXXIII directing the plaintiff to pay the court-fees payable on the memorandum of cross-objections or that if an order is passed it should also be directed that it will not be executed and the amount directed to be paid recovered. Section 67(1) of the Kerala Court-fees and Suits Valuation Act, 1959, is in these terms:

"67 (1). Where a plaint or memorandum of appeal which has been rejected by the lower Court is ordered to be received, or where a suit is remanded in appeal for a fresh decision by the lower Court, the Court making the order or remanding the appeal may direct the refund to the appellant of the full amount of fee paid on the memorandum of appeal, and, if the remand is on second appeal, also on the memorandum of appeal in the first appellate Court."

Section 67(1), we think, is attracted and if court-fee had been paid on the memorandum of cross-objections, the plaintiff would have been entitled to a direction for the refund under the section. But Sri K. S. Pari-poornan, Government Pleader, who at our request assisted us and assisted us ably, we should say, contended that this section will have application only in cases where the court-fee; had been paid on an appeal or memorandum of cross-objections and that the section would not be attracted at all to cases where there had been appeal memorandum and memorandum of cross-objections, instituted in forma pauperis on which no court-fee had been paid. We must say that a literal grammatical reading of the section fully supports this contention and there can be no question of Ordering refund u/s 67 when no court-fee had actually been paid. But as soon as payment is made according to the direction of this Court or the amount is recovered by the State, the section would be attracted. We do not think that if the payment had been only pursuant to an order under Rule 10 of Order XXXIII, no refund can be ordered u/s 67 of the Act. It was, however, urged that the section is applicable only when court-fees had been initially paid on the memorandum of appeal or cross-objection. We cannot accept this contention. So we are confronted with this position. We will have to pass an order under Rule 10 of Order XXXIII directing payment of court-fees. As soon as it is paid, we will have to order refund of the same court-fees u/s 67 of the Act. The Question is whether in such circumstances there should be realisation of court-fees first and then a refund of the court-fees or whether the Court can avoid this formality which serves no useful purpose as far as the State is concerned. Perhaps it will have the effect of embarrassing a litigant, particularly those placed on the plaintiff in this case who it had been held was not in a position to pay court-fees, and this should be done merely for the purpose of directing a refund and that immediately on payment. We do not think that such a situation should arise and we do not think that the Court is helpless in such cases. Though we are obliged to pass an order under Rule 10 of Order XXXIII we can direct that the amount ordered to be paid will not be recovered in view of Section 67 of the Act. Before we conclude we must advert also to another argument of counsel Sri Paripoornan

based on the second proviso to Section 67 of the Act.

7. It was suggested that the plaintiff had paid only a much lesser amount in the Court below in the suit than that payable in the memorandum of cross-objections in support of his claim for mesne profits and by virtue of the second proviso the plaintiff will be entitled only to a refund of court-fees paid in the Court below. We do not think this contention ran stand. The claim for mesne profits was for the whole period from the date from which it was claimed in the plaint. In the memorandum of cross-objections the full amount of mesne profits that had accrued till the date of the memorandum of cross-objections had been valued. This Court directed the investigation of the entire claim. So we have to take it that the entire claim for mesne profits which formed the subject-matter of the cross-objections and which was the entire subject-matter of the claim for mesne profits in the Court below is now under consideration by the Court below. So the proviso, we think, has no application. This is clear from the wording of the proviso itself because it speaks of "if the order of remand does not cover the whole of the subject-matter of the suit". "The whole of the subject-matter of the suit" must be understood as the whole of the subject-matter of the claim; in this case the entire claim for mesne profits. Even the latter part of the proviso makes this position clear. It speaks of the court-fees "originally payable" on that part of the subject-matter in respect whereof the suit has been remanded. That part of the subject-matter in respect of which the suit has been remanded in this case relates to the whole of the subject-matter of the claim for mesne profits. So even under the proviso the plaintiff will be entitled to the refund of the amount of fee payable on the memorandum of cross-objections had it been paid on the memorandum, of cross-objections.

8. We think the just order to pass in this case would be a direction that the plaintiff should pay the court-fees of Rupees 4,809.75 on the memorandum of objections but that this will not be recovered from the plaintiff in view of the liability to refund the same amount immediately by the State in view of Section 67 of the Act. We direct accordingly. This in effect is what has been done by the Gujarat High Court in the decision in *Mistri Parshottam Jinabhai Vs. Shah Motichand Shamji and Another*, relied on by counsel on behalf of the petitioner in C.M.P. No. 13933 of 1972.