
(1911) 07 BOM CK 0010
In the Bombay High Court
Case No : First Appeal No. 208 of 1910

Secretary of State

APPELLANT

Vs

Narayan Kashiram Shet

RESPONDENT

Date of Decision : 11-07-1911

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 12

Citation : (1911) 13 BOMLR 686 : 12 Ind. Cas. 29

Hon'ble Judges : N.G. Chandavarkar, J;Hayward, J

Bench : Division Bench

Judgement

N.G. Chandavarkar, J.—The circumstances under which this appeal has been preferred by Government to recover the Court-fees in Suit No. 261 of 1906 are shortly these. That was a suit for partition and it appears it was settled by the parties out of Court. The Court dismissed the suit upon their joint application, throwing the costs on the parties. It was a pauper suit, and the Subordinate Judge directed that there should be no order u/s 412 of the CPC (Act XIV of 1882), i. e., no provision made for the Court-fees to which the Government were entitled. It is stated by the Government Pleader before us that no copy of the decree dismissing the suit was sent to the Collector, as required by Civil Circular No. 65 of the High Court Civil Circulars. Whether that was so or not, the suit having been dismissed in October 1908, Government had the right to come up to the High Court and ask this Court, in the exercise of its power under the Extraordinary Jurisdiction, to revise the order of the Subordinate Judge and make due provision for the payment of the amount of the Court-fee. That was the only remedy open to Government under the law then in force; and Government had according to the rules of this Court, ninety days from the date of the Subordinate Judge's order. But before these ninety days expired, the new CPC had come into force, and Rule 12 of Order XXXIII thereof gave the remedy to Government to apply at any time to the Court to make an order for the payment of the Court-fees under Rule 10 or Rule 11. The order made by the Subordinate Judge in the decree dismissing the suit had been made without the knowledge of

Government, and it was competent for the latter, therefore, to make an application to the Subordinate Judge under Rule 12. That was done by the Collector. The Subordinate Judge held, however, that he had no jurisdiction to pass a fresh order. It is against this order that Government now appeal. It was urged that the appeal did not lie. But the appeal being against the order passed by the Subordinate Judge under Rule 12, Order XXXIII, on an application made by Government under Rule 12 of the same Order, it is an order u/s 47, and therefore appealable.

2. As to the merits of the case, there can "be no doubt that, although at the time the suit was dismissed, the only remedy open to Government was to come up to this Court for the exercise of its power under the Extraordinary Jurisdiction, yet, before the period prescribed for Government to avail itself of that remedy could expire, a new law had come into force; the law was one of procedure. The right had been kept intact as it had been under the old law, but a new remedy was given, and that was under Rule 12, Order XXXIII. Therefore it was quite open to Government to make an application and ask the Subordinate Judge to pass a proper order according to law. The Subordinate Judge who declined to make any order u/s 412 of the Code of 1882 clearly committed an error in 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. That was the proper order to make : see *Secretary of State v. Bhagirathibai* ILR (1906) 31 Bom. 10 ; 8 Bom, L.R. 689.

3. For these reasons the decree appealed from must be reversed and the decree in suit No. 261 of 1906 must be amended so far as it relates to the order u/s 412 of Act XIV of 1882 by deleting the order of the Subordinate Judge and substituting for it the following: " That Government do recover from the plaintiff the amount of Court-fee, which would have been paid by the plaintiff, if he had not been allowed to sue as a pauper." The costs of this appeal and of the application to the lower Court must be upon the respondent.