

APPELLATE CIVIL.

Before Biswas and Edgley J.J.

T. & J. BROCKLEBANK, LTD.

v.

NOOR AHMODE.*

1938

July 5.

Pauper suit—Appeal—Costs—Court-fees, No order for payment of, in the decree—Power of Court to order payment of court-fees subsequently—Code of Civil Procedure (Act V of 1908), O. XXXIII, rr. 10, 12.

Where in a suit by a pauper the plaintiff succeeds, O. XXXIII, r. 10, Code of Civil Procedure, not merely declares the right of the Government to recover the court-fees, but contemplates the Court making a distinct order in favour of the Government in this behalf. Such an order cannot be taken to be implied in the decree itself as made between the parties to the suit.

Where such an order is not made at the time the suit is disposed of, the Government have the right under O. XXXIII, r. 12, to apply for such an order at any time.

In making an order under O. XXXIII, r. 10, the Court has a discretion to direct which of the parties shall be liable for the payment.

Rohini Kumar Pal v. Kusum Kamini Pal (1) referred to.

In a suit by a pauper for damages the plaintiff valued his claim at Rs. 20,500. The trial Court passed a decree for Rs. 1,500. The defendant appealed, and the plaintiff also filed a cross-objection (as regards *quantum* of damages). The appellate Court did not accept the principle on which the trial Court had awarded damages, and allowed the appeal. It also allowed the cross-objection, and in the result gave the plaintiff a decree for Rs. 5,500 with interest and costs. The costs were ordered to be computed as on a claim for Rs. 5,500.

In decreeing the suit, the trial Court had made an order under O. XXXIII, r. 10 of the Code, in favour of the Government for recovery of the full amount of court-fee on Rs. 20,500 from the defendant. The appellate Court in modifying the decree left this part of the decree untouched. On a subsequent application by the defendant for amendment, the appellate Court deleted the order for payment of court-fees from the decree. The Government then applied under O. XXXIII, r. 12, for an order from the appellate Court for payment of court-fees.

Held that the application was competent and proper.

The defendant was ordered to pay court-fees (both on the plaint and on the cross-objection) on the basis of Rs. 5,500, and the plaintiff to pay the balance of the court-fees calculated on the total value of the claim.

*Application in Appeal from Original Decree, No. 238 of 1935.

APPLICATION by the Government for payment of court-fees.

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The facts of the case and the arguments in the application appear sufficiently from the judgment of Biswas J.

The amended decree referred to in the judgment is as follows:—

It is ordered and decreed in supersession of the decree of this Court, dated July 7, 1937, that the appeal by defendant No. 1 be and the same is hereby allowed and the decree as passed by the trial Court be and the same is hereby set aside. It is further ordered and decreed that the cross-objections preferred by the plaintiff in the suit, respondent in the appeal, be and the same are hereby allowed and that the defendant No. 1 do pay the plaintiff the sum of Rs. 5,550 only as damages with interest thereon at the rate of 6 per cent. per annum from the date of the decree of the lower Court until realisation. And it is further ordered and decreed that the defendant No. 1 appellants do pay the plaintiff respondent the sum of Rs. 780-4 only as being the amount of costs in this Court calculated on the basis of the claim of Rs. 5,500 with interest thereon at the rate of 6 per cent. per annum from this date until realisation. And it is further ordered and decreed that the said defendant do pay the said plaintiff the sum of Rs. 744-9-3 being the amount of costs in the lower Court on the basis of the claim of Rs. 5,500 with interest thereon at the rate of 6 per cent. per annum from the date of the decree of the said lower Court until realisation.

The Assistant Government Pleader, Ramaprasad Mukhopadhyaya, for the Government.

Nalini Ranjan Bhattacharya for the plaintiff, opposite party.

Fanindra Mohon Sanyal for the defendant No. 1, opposite party.

BISWAS J. This is an application on behalf of the Government for an order for recovery of court-fees in a pauper appeal which was disposed of by this Court some time ago. The application purports to be made under O. XXXIII, r. 12 of the Code of Civil Procedure which must be read for the present purposes along with O. XLIV, r. 1. The facts shortly stated are these:—

The plaintiff brought a suit in *formâ pauperis* for damages for breach of a contract and he assessed his claim at Rs. 20,500. The suit was decreed by the

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learned Subordinate Judge for a sum of Rs. 1,500 only. Against that judgment there was an appeal filed by the defendant No. 1, Messrs. T. & J. Brocklebank, Ltd., incorporated in Great Britain, and having their agency Office at 6, Lyons Range, Calcutta. The appeal was valued at Rs. 1,500. There was also a cross-objection on behalf of the plaintiff, which was valued at Rs. 19,000, being the difference between the amount claimed and the amount awarded by the learned Subordinate Judge as damages. The appeal and the cross-objection were heard by a Bench of this Court, with the result that the appeal was allowed and the cross-objection was also allowed in part. The learned Judges held that the plaintiff had made out his claim for damages to the extent of Rs. 5,500, though not on the ground which had been accepted by the learned Subordinate Judge in making the decree in the plaintiff's favour. In the result, their Lordships directed a decree to be drawn up in favour of the plaintiff for a sum of Rs. 5,500 with interest and costs. So far as the costs are concerned, the direction was that the costs of the appeal Court as well as of the trial Court should be computed on the basis of a claim of Rs. 5,500.

The learned Subordinate Judge in decreeing the claim for a sum of Rs. 1,500 had made an order that so far as the court-fees were concerned, the Government would be entitled to recover the full amount payable on the basis of Rs. 20,500 from the defendant company. In the decree of this Court, on appeal, as originally drawn up, this part of the decree of the learned Subordinate Judge was affirmed. That led to an application on behalf of defendant No. 1 for amendment of the decree, and this was allowed, with the result that all reference to the decree of the Subordinate Judge regarding the payment of court-fees was deleted. The decree as amended is set out in para. 2 of the present application which has been made on behalf of the Government. The position,

therefore, is that in the decree of this Court as it finally stands there is no order whatsoever for payment of court-fees to Government as contemplated by O. XXXIII, r. 10 of the Code. In view of this omission, the present application has been made under r. 12 of the same Order. This is a new rule and has been enacted for the purpose of making it clear that the Government's right to apply for an appropriate order for payment of court-fees to which it may be entitled in a pauper suit shall not be lost by reason of lapse of time.

Reading the words of r. 10 of O. XXXIII, it might appear as if the order for payment of court-fees under that rule was to be made on the basis of the decree already passed by the Court as between the parties to the suit. The rule is in these terms:—

10. 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 pauper; such amount shall be recoverable by the Provincial 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.

It is the words "any party ordered by the decree "to pay the same" which appear not to be free from ambiguity. Taking r. 10 by itself, there would be a good deal to be said in favour of the view that the words quoted contemplate or imply the existence of an order in the decree itself, as made between the parties to the suit, for payment of court-fees, and that the order which is to be made in favour of Government for recovery of the court-fees is to follow such order. On a careful reading of this rule, however, along with other relevant rules in O. XXXIII of the Code, such a construction does not appear to be justified. The terms of rr. 11 and 12 have to be referred to in this connection in order to understand the whole scheme which is provided for in respect of the Government's right to realise court-fees in pauper suits. Rule 10 deals with a case where the plaintiff ultimately succeeds in the suit. Rule 11 deals with a case where the plaintiff fails in the suit or is

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dispaupered or where the suit is withdrawn or dismissed on certain grounds specified therein indicating default on the part of the plaintiff. Then follows r. 12 which, as I have already pointed out, is a new provision made in the Code of 1908 and which provides that the Government shall have the right to apply to the Court at any time to make an order for payment of court-fees under r. 10 or r. 11. Rule 14 is also a new provision, and it enacts that where an order is made under r. 10, 11 or 12, the Court shall forthwith cause a copy of the decree to be forwarded to the Collector. There can be no doubt on a reading of r. 14 that the legislature clearly contemplated the making of a distinct order under each of the three rules referred to therein. So far as r. 11 is concerned, the matter is left in no uncertainty by reason of the language actually employed in it. So far as r. 12 is concerned, that also makes express reference to an "order" to be made by the Court. Rule 10 is not so clearly expressed, and that occasions the ambiguity to which I have already referred. But the reasonable way of reading r. 10, so as to make it consistent with the other rules in this Order, would be to hold that this rule also contemplates the making of a specific "order" for payment of the court-fees to Government. In other words, the effect of the concluding portion of r. 10 which I have quoted above is that it not merely declares the right of the Government to recover the court-fees, but also contemplates the Court making an order in favour of Government as to the party or parties from whom the court-fees are to be recovered. The words "from any party ordered by the decree to pay the same" would be equivalent to saying "from any party or parties against whom an order may be made in this behalf to pay the same, such order to be a part of the decree in the suit". If this is a correct reading of this rule, it follows that after the suit is disposed of, the Court is at liberty, whether the Government is represented or not before it at the time, to make an order in favour of Government for

payment of court-fees; and in making such an order, the Court will no doubt be entitled in the exercise of its discretion to direct which of the parties shall be liable for the payment of such court-fees. That the Court has a discretion in the matter was recognised in a decision of this Court in the case of *Rohini Kumar Pal v. Kusum Kamini Pal* (1).

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Now in this case, as already indicated, although an order in terms of O. XXXIII, r. 10, had been made by the learned Subordinate Judge when he passed the decree in favour of the plaintiff, no such order was made by this Court on appeal. That is why Government now seek to obtain such an order in their favour by the present application which is made under r. 12. We hold that the application is quite competent and that the Government's right to obtain an order for recovery of the court-fees is not lost, because there was no such order incorporated in the decree of the appellate Court at the time the appeal was disposed of.

The next question that arises is as to what the order should be. The total amount of court-fees payable on the plaint as framed, on the basis of the claim of Rs. 20,500, would be Rs. 1,241-4. On the plain wording of r. 10 it is quite clear that the Government will be entitled to recover the whole of this amount. The plaintiff does not dispute this, but contends that the whole of the amount should be made recoverable from the defendant. It is perfectly clear from the judgment of this Court that the defendant was made liable to pay the costs of the plaintiff, which would include the court-fees, only to the extent of a claim for Rs. 5,500. That being so, there is no justification whatever for saying that the defendant should be made liable to any greater extent. It would be quite proper in the circumstances to order and we make the order, that so far as the defendant company is

(1) (1927) I. L. R. 55 Cal. 488.

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concerned, it shall be liable to pay court-fees only on the basis of Rs. 5,500. It shall pay the court-fees on this basis not only on the plaint but also on the memorandum of cross-objections. The balance of the amount which will be due to Government in respect of the court-fees calculated on the total value of the suit, namely, the sum of Rs. 20,500, will be recoverable from the plaintiff. In effect, the plaintiff has failed to establish his claim to the extent of the difference between Rs. 20,500 and Rs. 5,500, and the order we make is quite in accord with the justice of the case. This order will be treated as supplementary to the decree already made in the appeal.

We make no order as to costs of this application.

Let the supplementary order as made to-day be printed in the paper book of the Privy Council appeal.

EDGLEY J. I agree.

Application allowed.

P. K. D.