FULL BENCH

Before Mr. Justice Thom, Mr. Justice Iqbal Ahmad and Mr. Justice Rachhpal Singh

SHIAM SUNDAR LAL AND OTHERS (PLAINTIFFS) *v.* SAVITRI KUNWAR (DEFENDANT)* 1935 *April*, 17

Civil Procedure Code, order XXXIII, rule 15—Fresh suit after dismissal of application to sue as a pauper—Payment of costs incurred by Government and the opposite party in opposing that application—Condition precedent to institution of suit, if such costs were awarded by the court.

Where a person has been unsuccessful in an application for permission to sue *in forma pauperis* and the court has awarded costs to the Government and the opposite party in their opposition to the application, and such person subsequently institutes a suit in the ordinary manner, then these costs must be paid prior to the filing of the plaint which commences the suit, and where the costs have not been paid or deposited prior to the institution of the suit the court is bound to dismiss it. But where the court in dismissing the application for permission to sue *in forma pauperis* has either disallowed costs or made no order as to costs, he is entitled to maintain his suit as an ordinary litigant without making any payment to the Government or to the opposite party in respect of the costs incurred in opposing the application.

Dr. *N. P. Asthana* and Mr. *Baleshwari Prasad*, for the appellants.

Sir *Tej Bahadur Sapru* and Drs. *K. N. Katju* and *N. C. Vaish* and Mr. *Lakshmi Narain Gupta*, for the respondent.

THOM, IQBAL AHMAD and RACHHPAL SINGH, JJ.:—The question referred to this Bench for decision arises out of plaintiffs' appeal in a suit for redemption. In the trial court the plaintiffs succeeded. In the lower appellate court, however, the decision of the trial court was reversed. The learned Subordinate Judge, whilst finding upon the facts in favour of the plaintiffs, dismissed the suit upon the ground that the plaintiffs had

*Second Appeal No. 682 of 1933, from a decree of Lakshmi Narain Tandon, District Judge of Shahjahanpur, dated the 10th of March, 1933, reversing a decree of Prem Nath Agha, Additional Subordinate Judge of Shahjahanpur, dated the 31st of January, 1929.

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not complied with the provisions of order XXXIII, rule 15 of the Code of Civil Procedure.

Prior to the institution of the suit the plaintiffs had made an application craving for permission to sue *in forma pauperis*. This application was rejected, but in rejecting the application the court made no order as to costs. The plaintiffs filed the present suit without first paying the costs incurred by the defendants or the Government in opposing the application for permission to sue *in forma pauperis*. The lower appellate court dismissed the suit upon the ground that the payment of the costs incurred by the defendants and the Government in opposing the application to be permitted to sue *in forma pauperis*, prior to the institution of the suit was a condition precedent to the institution of the suit, and a condition with which the plaintiffs had not complied.

The question referred for our decision may be stated as follows: "On a sound construction of order XXXIII, rule 15 of the Code of Civil Procedure is a plaintiff, who has been unsuccessful in an application to be permitted to sue *in forma pauperis* and who has not in fact paid the costs of the Government and the opposite party in their opposition to the application, entitled to maintain his suit as an ordinary litigant?"

Order XXXIII, rule 15 is in the following terms: "An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper."

One general question has been submitted for our decision, but in fact two separate and distinct questions are involved, namely what is the effect of order XXXIII, rule 15, (i) where costs have been awarded and (ii)

where there has been no order as to costs or where costs have been disallowed? By the terms of the reference this Bench is invited to decide both these questions.

Learned counsel for the appellants contended that there has been substantial compliance with the terms of order XXXIII, rule 15, if the costs incurred by the Government or the opposite party in opposing the application to be permitted to sue *in forma pauperis* are paid at any time during the pendency of the suit and before the decision thereof. He urged that the legislature by the provision in question did not intend to limit or restrict the right of a litigant to prosecute his claim in the courts and that it would be contrary to the spirit of the law and of the enactment itself to refuse to entertain a suit merely because prior to its institution the costs of the Government and the opposite party had not been paid or deposited.

It was contended, on the other hand, for the defendants that under order XXXIII, rule 15 the payment of the costs incurred by the Government or the opposite party was a condition precedent to the institution of the suit and that unless the plaintiff had complied with this condition the court was bound to dismiss the suit and was not entitled to give the plaintiffs an opportunity after the institution of the suit of paying the costs of the Government or the opposite party incurred in their opposition to the application to be allowed to sue *in forma pauperis*.

Learned counsel for the appellants in support of his contention relied upon the decision of the Calcutta High Court in the case of *Mrinalini Debi* v. *Tinkori Debi* (1). The decision clearly supports the plaintiffs' contention. We find ourselves, however, unable to agree with the view of the law approved in that decision.

(1) (1912) 14 Indian Cases, 297.

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Quite clearly the interpretation for which the appellants contend would involve the reading out of the provision under consideration of the word "first". Now it is trite law that every word of a statutory enactment must be given its full meaning and effect. It may be contended that it is unreasonable to insist that the plaintiffs should be denied the opportunity of depositing the costs of the Government or the opposite party after the institution of the suit, but where the words of the statute are clear such considerations cannot justify a refusal to give effect to their plain meaning and intent. We would observe in this connection that order XXXIII, rule 15 is a provision in an enactment regulating procedure. Provisions such as order XXXIII, rule 15 are imperative and not merely directory. We refer in this connection to Maxwell on the Interpretation of Statutes, 6th edition, page 655. The question of the effect of such provisions regulating procedure was considered in a recent case in the Privy Council, *Ohene Moore* v. *Akesseh Tayee* (1). In that case it was decided that an appeal is a creature of statute and unless the statutory conditions as to the filing of appeals are fulfilled no jurisdiction is given to any court of justice to entertain them. Where the statute provided that an appeal would only lie by leave granted by the trial court and that the said leave was not to be granted unless the costs in the trial court shall have been paid in such court or shall have been deposited therein or in the court to which the appeal was being taken, and the trial court in granting leave by an oversight overlooked this provision of the statute, with the result that the costs of the trial court were not paid in cash either in the trial court or in the appellate court, it was held that the appeal was incompetent and the appellate court had no jurisdiction to entertain it and could not allow the costs to be deposited at a later date.

(1) [1935] A.L.J., 44.

The principle approved in this decision, in our view, clearly covers the question which we have to decide.

Learned counsel for the appellants contended that there was a clear distinction in principle between the provisions of order XXXIII, rule 15 and the provisions which the Privy Council was considering in the case above noted. He urged that in the latter case the statutory provision under consideration was to the effect that "leave to appeal . . . *shall not* be granted unless and until" a certain condition is complied with; whereas order XXXIII, rule 15 merely enjoins that "the applicant shall be at liberty to institute a suit in the ordinary manner. . . provided that he first pays" the costs, etc. It is true that in these *ipsissima verba* order XXXIII, rule 15 does not enjoin that no suit shall be maintainable unless the costs are first paid, but in our judgment this distinction is of no importance. We fail to see any real distinction between a provision denying a litigant a right to sue unless he complies with a certain condition and a provision which grants a litigant a right to sue, provided he first complies with that condition. Order XXXIII, rule 15 is to the effect that the litigant may sue provided he first pays certain costs and in our view this must mean that he will not enjoy the right to sue unless he first pays those costs. No other interpretation in our judgment would do justice to the plain provisions of the enactment.

Learned counsel for the appellants attempted to distinguish the present case from the one referred to above upon another ground. He contended that in the latter case the Privy Council were considering the right of a litigant to appeal and not the right of a litigant to maintain a suit. His argument was that the right to maintain the suit in the courts of justice was not merely a creature of statute but was inherent in the status of citizenship; it was a privilege of every citizen to resort to the courts of law for the vindication of his rights. We are unable to see any real distinction in principle between the right

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to appeal and the right to institute a suit where the question is one of the effect of a statutory restriction. Learned counsel was unable to point to any authority justifying the distinction which he attempted to draw. Furthermore the right to institute a suit is just as much governed by statute as the right to appeal. The right to institute a suit is governed by sections 9 and 80 of the Civil Procedure Code and the right to appeal by section 96. Both rights are regulated in the same statute and we can see no reason for placing the right to institute a suit upon a different plane from the right to prefer an appeal.

We would observe in this connection that order XXXIII, rule 15 is not the only provision which imposes a condition precedent to the institution of a suit. There is statutory provision, for example, that in certain instances two months' notice must first be given by the plaintiff before he may institute a suit against a public authority. This provision imposes a condition precedent to the institution of the suit and it is well settled that the provision must be complied with prior to the institution of the suit and omission to comply with it cannot be rectified subsequent to the institution of the suit.

The question we have discussed was considered by a Bench of this Court in the case of *Mahadeo Sahai* v. *Secretary of State* (1). In the judgment in that case it was observed that "We have already seen that the plaintiff had attempted to sue *in forma pauperis* but that his application had been dismissed with costs. Before instituting the present suit he had not paid the costs incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper. The provision of order XXXIII, rule 15 was imperative. The court below was therefore bound to dismiss the suit as being barred by order XXXIII, rule 15." These observations were clearly obiter and unnecessary for the

(1) A.I.R., 1932 All., 312.

decision of the case. We find ourselves in full agreement, however, with the principle enunciated.

In the result we hold that where a plaintiff has been unsuccessful in an application for permission to sue *in forma pauperis* and the court has awarded costs to the Government and the opposite party in their opposition to the application, these costs must be paid prior to the filing of the plaint which commences the suit and that where the costs have not been paid or deposited prior to the institution of a suit a court is bound to dismiss the suit.

We now proceed to consider the question of the effect of order XXXIII, rule 15 where there has been no order as to costs. In such circumstances clearly different considerations arise. Under the provision the costs which the plaintiff has to pay are the "costs (if any) incurred by the Government and the opposite party". It was conceded by learned counsel for the respondents that the words "costs incurred" could not be interpreted and applied in their ordinary literal sense. It was never the intention of the legislature to saddle a plaintiff, who had filed an application to be permitted to sue *in forma pauperis,* with the entire costs which the Government and the opposite party might in every case incur. Where the opposite party or the Government for example incurred costs in opposing the application quite unreasonable in amount and disproportionate to the importance of the occasion, it would be manifestly absurd to insist that before he could institute a suit the plaintiff should pay such sum in the name of costs. In interpreting the words "costs (if any) incurred", therefore, the court must insist upon some limitation. The question we have to decide is what the limitation should be.

Learned counsel for the respondent contended that the costs which the plaintiff must pay before he is permitted to maintain the suit should be the ordinary taxable party and party costs. He argued that this view

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was supported by the general scheme of order XXXIII. In support of this argument he referred to rules 7 and 16 of order XXXIII. Under rule 16 where the applicant has been successful and permission to sue as pauper has been granted, the costs of the applicant shall be costs in the suit. There being no reference to an order of the court fixing the amount of costs in rule 15, learned counsel contended that it must be assumed that the intention of the legislature was that the amount payable by the plaintiff prior to the institution of the suit should be the amount of costs taxable as between party and party. We are unable to accept this contention. The question of the costs is one which is entirely in the discretion of the court under section 35 of the Code of Civil Procedure. It is for the court to say upon a consideration of the entire circumstances whether full costs or modified costs should be awarded. If the contention of learned counsel for the respondents be accepted then the somewhat startling result would follow that where the court deemed it just and expedient to make no order as to costs, that is, not to call upon the plaintiff to pay the cost of Government or the opposite party, by the operation of order XXXIII, rule 15 the plaintiff would be mulcted in the full amount of taxable costs incurred by the Government and the opposite party. Learned counsel for the respondents pointed out that the fee of the Government Pleader in opposing the application to sue *in forma pauperis* was regulated by the rules of court and further that so far as the costs of the opposite party were concerned there is provision regulating the fees chargeable by the legal practitioners. But the fees payable to the Government Pleader or to the legal practitioner are not the only "costs" within the meaning of order XXXIII, rule 15. In opposing an application to sue *in forma pauperis* the Government may incur costs other than the fee of the Government Pleader and would be entitled to recover such costs

under an order from the court; so also the costs incurred by the opposite party and which he may be entitled to recover are not confined merely to the fee of the vakil or the pleader.

There appears to us to be only one reasonable interpretation which can be placed on the provision regulating the costs payable by a plaintiff who has failed in an application for permission to sue *in forma pauperis.* In our judgment costs incurred must be taken as meaning costs incurred for which the plaintiff is liable Now the plaintiff cannot be liable for the costs of the Government or the opposite party except by an order of the court. As already observed it is entirely within the discretion of the court to allow or disallow costs and in this connection we would observe that there is no real distinction between the case where the court makes no order as to costs and where the court specifically disallows costs. The successful party in a proceeding in court is not entitled to call upon the unsuccessful party to pay his costs except under the order of the court. If there is no order of the court awarding the successful party his costs against the unsuccessful party or if costs have been expressly disallowed, quite clearly, in no sense, is the unsuccessful party liable for these costs. Section 35 of the Code of Civil Procedure is clear and specific in its terms: "Costs of and incident to all suits shall be in the discretion of the court and the court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid." We can find no justification for holding that the legislature intended by order XXXIII, rule 15 to saddle a litigant with costs which the court refused to award against him in virtue of its powers under section 35.

Our decision is, therefore, that where a litigant has made an unsuccessful application to be permitted to sue *in forma pauperis,* but where the court in dismissing

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the application has either disallowed costs or made no order as to costs he is entitled to maintain his suit as an ordinary litigant without making any payment to the Government or to the opposite party in respect of the costs incurred in opposing the application.

MISCELLANEOUS CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Bajpai
And on a reference
Before Sir Shah Muhammad Sulaiman, Chief Justice

1934 *October*, 31
1935 *April*, 18

GOPINATH NAIK (APPLICANT) *v.* COMMISSIONER OF INCOME-TAX (OPPOSITE PARTY)*

Income-tax Act (XI of 1922), section 23(3) and (4)—Return of income incorrect and incomplete—Failure of assessee to produce evidence—Assessment, basis of—"Evidence"—Private inquiries not authorised—Assessment of previous year can be relied on—Income-tax Act, sections 13, 31, 37.

A return of income submitted by an assessee was found to be inaccurate and incomplete. Notice under section 23(2) of the Income-tax Act was issued and accounts called for; certain accounts were submitted which were found to be meagre and unreliable. Fresh notice under section 23(2) was issued, calling upon the assessee to attend and explain certain matters relating to the accounts and to furnish further information, but nothing was done by the assessee. Assessment was then made under section 23(3), the estimate being based *inter alia* on private inquiries made by the Income-tax Officer as to the extent of the assessee's money lending business, and on the assessment for the previous year which was a "best judgment" assessment under section 23(4). On appeal, the Assistant Commissioner of Income-tax made, in his turn, some private inquiries as to the extent of the money lending business, and reduced the assessment:

Held, (BAJPAI, J., *contra*), that the Income-tax Officer, or the Assistant Commissioner, was not authorised under section 13 of the Income-tax Act or otherwise to make private inquiries and to take the result of such inquiries into account in making the assessment; and the assessment, in so far as it was based on the private inquiries, was not based on such evidence as

*Miscellaneous Case No. 97 of 1933