

1911.

ABDULLA
HAJI
DAWOOD
BOWLA
ORPHANAGE,
In re.

conferred upon them by the will. The disposition was by the testator by the will and not by the trustees by this instrument. See *Bai Motivalu v. Bai Mamubai*⁽¹⁾. The instrument *qua* the Bowla funds is an appointment chargeable with a duty of Rs. 15 under Schedule I, Article 7.

Answer accordingly.

G. B. R.

(1) (1897) 21 Bom. 799.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Hayward.

1911.

July 11.

THE SECRETARY (OF STATE FOR INDIA IN COUNCIL (ORIGINAL APPLICANT), APPELLANT, *v.* NARAYAN KASHIRAM SHET (ORIGINAL OPPONENT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XXXIII, r. 13—Civil Procedure Code (Act XIV of 1883), section 412—Suit in forma pauperis—Settlement of suit out of Court—Court passing no order for payment of Court-fees—Government applying for the payment—Practice and procedure.

A suit for partition brought in *forma pauperis* was settled out of Court. On the 7th October 1908 the Court dismissed the suit, but made no order for the payment of Court-fees under section 412 of the Civil Procedure Code of 1882. At that date Government had ninety days' time within which to apply to the High Court under its extraordinary jurisdiction. Before the expiry of the period the new Civil Procedure Code came into force. The Government, thereupon, applied to the Court under O. XXXIII, r. 12, for an order as to payment of Court-fees, but the Court declined to make the order. On appeal:—

Held (1) that the order passed by the Court under O. XXXIII, r. 12, was an order within the meaning of section 47 and it was therefore appealable;

(2) that, before the expiry of the period within which the Government could have applied to the High Court under the old Code, the new Code had come into force, and by it the Government were enabled to apply to the Court for an order under r. 12 of Order XXXIII;

(3) that 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.

APPEAL from an order passed by G. B. Laghate, First Class Subordinate Judge of Ratnagiri.

* First Appeal No. 208 of 1910.

1911.

 SECRETARY
 OF STATE
 FOR INDIA
 &
 NABAYAN.

This was a suit for partition. It was filed in *forma pauperis*. The claim was valued at Rs. 25,800-12-0. The claim was settled out of Court. The Subordinate Judge passed an order on the 7th October 1908, dismissing the suit; but made no order under section 412 of the Civil Procedure Code of 1882.

The new Civil Procedure Code of 1908 came into force in 1909. On the 6th June 1910 the Government applied to the Court of the Subordinate Judge under Order XXXIII, rule 12, for an order as to payment of Court-fees by the plaintiff. The Subordinate Judge dismissed the application.

The Government appealed to the High Court.

At the hearing, a preliminary objection was raised that the appeal did not lie.

P. B. Shingne, for the respondent, in support of the preliminary objection:—No appeal lies. The case is governed by the Civil Procedure Code of 1882; and the remedy of the Government was to apply in revision.

L. A. Shah, acting Government Pleader, for the appellant:—Under the old Code of Civil Procedure the Government had ninety days within which to apply to the High Court. Before the expiry of that period the new Code of 1908 came into force, which gave the Government right to apply to the Court at any time (O. XXXIII, r. 13). And an order passed on such application is appealable.

Per Curiam.—The appeal lies.

L. A. Shah:—The lower Court ought to have made an order, inasmuch as there was a failure of plaintiff's case. See *Secretary of State v. Bhagirathibai*⁽¹⁾; and O. XXXIII, r. 12, of the Civil Procedure Code of 1908.

P. B. Shingne:—The case is governed by the old Civil Procedure Code of 1882. The rights which we have acquired under it cannot be taken away by the new Code. The case does not fall under O. XXXIII, r. 12.

(1) (1906) 31 Bom. 10.

1911.

SECRETARY
OF STATE
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CHANDAVARKAR, J.:—The circumstances, under which this appeal has been preferred by Government to recover the Court-fees in Suit No. 261 of 1903, 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 under section 412 of the Code of Civil Procedure (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 1903, 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 Code of Civil Procedure 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 appeals. It was urged that the appeal did not lie. But the appeal being against the order passed by the Subordinate Judge on an application made by Government under rule 12, Order XXXIII, for payment under rule 10 or 11 of the same Order, it is an order under section 47, and, therefore, appealable.

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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 was 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 had declined to make any order under section 412 of the Code of 1882 had 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*⁽¹⁾.

For these reasons the decree appealed from must be reversed and the decree in Suit No. 161 of 1903 must be amended, so far as it relates to the order under section 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.

Decree reversed.

R. R.

(1) (1906) 31 Bom. 10.