APPELLATE CIVIL.

Before Mr. Justice Divatia.

RAMABAI, WIDOW OF GOPAL BALWANT SANE (ORIGINAL PLAINTIFF), APPELLANT *v.* SHRIPAD BALWANT SANE (ORIGINAL DEFENDANT), RESPONDENT.* 1935 *July* 9

Civil Procedure Code (Act V of 1908), Order XXXIII, rule 15—Application to sue in forma pauperis *rejected with costs of opposite party—Suit on the same cause of action —Payment of costs, if condition precedent to action—Jurisdiction.*

The plaintiff applied to the Court for permission to sue in *forma pauperis*. Notices were issued to Government as well as the opposite party. At the hearing the petitioner was absent and the application was rejected with costs to be paid to the opposite party. Subsequently the plaintiff filed a regular suit on the same cause of action. The plaintiff, however, had not paid the costs of the opposite party in the pauper petition before instituting the suit as provided by Order XXXIII, rule 15, of the Civil Procedure Code, 1908. This defect was not noticed till after the case had gone on for some time. Immediately, however, the attention of the Court was drawn to it, the plaintiff deposited the costs payable to the opposite party in Court. It was contended that under these circumstances the Court had power to proceed with the hearing of the suit.

Held, that the provisions of Order XXXIII, rule 15 of the Civil Procedure Code, 1908, were imperative and the Court had no jurisdiction to proceed with the suit as the costs had not been paid before instituting the suit.

Mrinalini Debi v. *Tinkauri Debi*,[1] *Ranchod Morar* v. *Bezanji Edulji*[2] and *Rai Mahadeo Sahai* v. *Secretary of State for India*,[3] referred to.

SECOND APPEAL against the decision of K. M. Kumthekar, Assistant Judge at Satara, confirming the decree passed by B. G. Kadkol, Subordinate Judge at Patan.

Suit for maintenance.

The plaintiff was the widowed sister-in-law of the defendant. In 1919 she applied for permission to sue in *forma pauperis*. The application was rejected on March 20, 1920. By the terms of the order passed on that application, the plaintiff was bound to pay the costs of the opponent-defendant.

*Second Appeal No. 700 of 1931.

(1) (1912) 16 Cal. W. N. 641. (2) (1894) 20 Bom. 86.
(3) (1931) 54 All. 390.

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In 1927, the plaintiff filed a suit on payment of Court-fees stamp, to recover maintenance from the defendant at Rs. 300 per annum. The costs payable to the defendant in respect of the pauper petition were not paid by the plaintiff before the institution of the suit. Some time after the hearing of the suit had begun the defect was noticed by the Court. The plaintiff thereupon paid the amount of the costs into Court. The Subordinate Judge dismissed the suit. His reasons were as follows :—

"The costs are not paid by the plaintiff before the institution of this suit. The institution, the defendant contends, is therefore barred under Order XXXIII, rule 15, of the Civil Procedure Code.

The plaintiff submits that the suit should not be dismissed for default of payment of such costs unless demand for payment has been made. Reliance is sought in this respect on the decision in *Mrinalini* v. *Tinkarni* 16 Cal. W. N. page 641.

I am not in possession of the facts of the case relied upon by the plaintiff and it is not shown whether the case was decided after the Code of 1908 came into force. Order XXXIII, rule 15, is very clearly worded; the terms of the rule are very imperative. I do not think that they admit of any construction as is sought to be suggested by the plaintiff. The rule imperatively directs that the plaintiff must pay the costs incurred by the opposite party and Government before a subsequent suit was instituted. The fact that the plaintiff in the present case has paid the amount of costs in miscellaneous application No. 22 of 1919 some time after this suit does not cure the bar which is affected by Order XXXIII, rule 15."

The plaintiff appealed to the District Court.

The appeal was dismissed.

The plaintiff preferred a second appeal.

K. H. Kelkar, for the appellant.

A. G. Desai, for the respondent.

DIVATIA J. This is a plaintiff's appeal in a suit to recover from the defendant Rs. 300 per annum as her separate maintenance. It appears that previous to the institution of the suit the plaintiff had applied to the Court for permission to sue in *forma pauperis*. Notices were issued to the Government as well as to the opposite party, and at the hearing the petitioner was absent and so her application was rejected with costs. It appears that the Government did

not appear, and therefore costs were to be paid to the opposite party alone. Subsequently the present suit has been filed not as a pauper but on payment of the Court-fee stamp by the plaintiff on the same cause of action, but the plaintiff had not first paid the costs of the opposite party in the pauper petition before instituting the present suit as provided in Order XXXIII, rule 15, of the Civil Procedure Code. This defect was not noticed in this case for some time after the case was proceeded with, but the attention of the Court was at a late stage drawn to the defect, and the Court felt bound to take notice of it, because in its opinion it was a defect of jurisdiction. It, therefore, threw out the plaintiff's suit on the ground that the plaintiff had not complied with the provisions of Order XXXIII, rule 15, by first depositing the costs of the opposite party. That decree has been confirmed by the lower appellate Court, and hence this second appeal. It has been contended by the learned advocate on behalf of the plaintiff that although the rule contains the word "institute", still it does not mean that no payment of such costs could be made at a late stage, and that if such payment is made, the suit should be deemed to have been instituted at the time when that payment is made in the course of the suit. It is urged that the appellant was under the impression when the suit was filed that as the opposite party had not taken steps to recover the costs, they were remitted by him and that when the respondent took this objection the appellant deposited the costs in Court to be paid to him. The Court had then the power to proceed with the hearing of the suit. The learned advocate has referred to a decision of the Calcutta High Court on this point. It is reported in *Mrinalini Debi* v. *Tinkauri Debi*.[1] There it is held that under section 413 of the old Civil Procedure Code, which corresponds to Order XXXIII, rule 15, of the present Code, it was a condition precedent to the institution of the suit in the ordinary way by a person whose

[1] (1912) 16 Cal. W. N. 641.

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application to sue in *forma pauperis* had been rejected that he should first pay the costs incurred by Government in opposing that application, but some demand should be made upon the would-be plaintiff for such costs either by the Government or by the Court. Of course in that case the costs of Government only were to be paid, because under the old rule the payment was to be made only of the Government costs, while under the present rule the payment is to be made not simply for the costs of the Government, but for the costs of the opposite party as well. There the Court took the view that as the Government had not made any demand for the costs, the suit cannot be dismissed for non-payment of such costs when no demand for its payment was made at any time either on behalf of Government or by the Court. Now, no doubt, this decision is in the appellant's favour. It does not appear in the present case whether the opposite party had made any demand for its costs before the suit was filed. But even then I do not think that circumstance would exonerate the plaintiff from complying with the express provision of the law about first paying such costs before instituting the suit, and I think the Calcutta case does not give effect to this express condition. The word "*first*" in the rule must be given some meaning, and I think the only meaning which can be ascribed to it is that it is only when those costs are paid before the institution of the suit, that the Court can proceed with the suit, and that otherwise the Court has to reject it. On behalf of the appellant reliance has been placed on the case of *Ranchod Morar* v. *Bezanji Edulji*.[1] There the plaintiff had applied for leave to sue in *forma pauperis*, and he did not proceed with the application, and it was rejected. Then he again applied for leave to sue as a pauper for the same relief, and that application was granted, and was registered as a suit. Then when the suit had nearly come to an end, the Government Pleader intervened, and applied that it should not be allowed

[1] (1894) 20 Bom. 86.

to proceed further until the plaintiff had paid the costs incurred by the Government in opposing the first petition, but the plaintiff refused to do so, and thereupon the Subordinate Judge dismissed the suit. It was held that the order rejecting the plaintiff's application operated as a bar under the old section 413 to the entertainment of the second application, and that the bar being one to the jurisdiction of the Court, the Subordinate Judge was not only competent, but bound to take notice of it at any stage of the suit. It is true that there the plaintiff did not offer to pay the costs when the defect was discovered, and Mr. Justice Ranade has at one place in his judgment observed that (p. 98): "the appellant was badly advised in not following the suggestion made to him by the Subordinate Judge in the Court below," and there he refers to a suggestion made by the Court to make the payment at that stage. But at the same time the Court's opinion was that the bar was one of jurisdiction, and that even consent of parties would not confer jurisdiction. I do not think this case is an authority in the appellant's favour. On the other hand some of the observations on the point of jurisdiction are against him. There is a recent decision of the Allahabad High Court in *Rai Mahadeo Sahai* v. *Secretary of State for India*[1] that the provision of Order XXXIII, rule 15, of the Civil Procedure Code, is imperative, and that the costs are to be paid before instituting the suit. I think that view is in accordance with the wording of the rule and is, therefore, correct.

I agree with the lower appellate Court that this is a case of hardship on the plaintiff, whose suit may be dismissed even though the opposite party has taken no steps to recover the costs and who is even willing to pay them during the suit, but I think the remedy lies in the hands of the legislature

[1] (1931) 54 All. 390.

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and the Courts have got to give effect to the rule as it is worded. I think, therefore, the lower appellate Court was right in holding that the suit was not validly instituted as the plaintiff did not first pay the costs of the opposite party. The decree of the lower Court is, therefore, confirmed, and the appeal is dismissed with costs.

Appeal dismissed.

J. G. R.

APPELLATE CRIMINAL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice N. J. Wadia.

1935
August 18

MRS. D'CUNHA AND TWO OTHERS (ORIGINAL ACCUSED), APPLICANTS *v.* EMPEROR.*

Indian Penal Code (Act XLV of 1860), section 441—Criminal trespass—Intention to annoy—Intention to assert a supposed legal right and annoyance a mere consequence—No offence committed.

In order to establish a charge of criminal trespass it is essential for the prosecution to prove the intention laid down in the section. Such intention must always be gathered from the circumstances of the case, and one matter which has to be considered is the consequences which naturally flow from the act because a man is usually presumed to intend the consequences of his own act. But that is only one element from which the Court has to discover the intention of the party who trespasses.

The real intention may be to annoy, or it may be something else, and the annoyance a mere consequence, possibly foreseen, but not intended or desired. If it is the latter, there can be no offence of criminal trespass under section 441 of the Indian Penal Code.

In execution of a mortgage decree obtained by the complainant against the first accused the complainant obtained an order for delivery of possession of the property which was a bungalow and, on August 23, 1934, the official of the Court gave him possession. The children of the first accused raised a claim disputing the right of their mother to mortgage the property which they contended had belonged to their father and on their applying for a stay of execution, the Court, in which the complainant's matter was pending, granted on the same day an order staying execution. Later in the day, the accused arrived at the bungalow, occupied the verandah and eventually got inside the house which the complainant alleged constituted an act of criminal trespass.

* Criminal Application for Revision No. 203 of 1935.