

CASE NO.:
Appeal (civil) 2536 of 2007

PETITIONER:
R.V. Dev @ R. Vasudevan Nair

RESPONDENT:
Chief Secretary, Govt. of Kerala & Ors

DATE OF JUDGMENT: 15/05/2007

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 2536 of 2007
[Arising out of S.L.P. (C) No. 13885 of 2004]

S.B. SINHA, J.

1. Leave granted.

2. Interpretation of the provisions of Order XXXIII Rule 10 and Order XXXIII Rule 11 of the Code of Civil Procedure as amended in the State of Kerala is in question in this appeal which arises out of a judgment and order dated 11.7.20003 passed by the High Court of Kerala at Ernakulam in CMP No. 1323 of 2003 in A.S. No. 156 of 1994. Appellant herein filed a suit for damages against the State of Kerala inter alia on the premise that he had lost an eye having been a victim of violence of political vendetta as he had suffered facial injury as a result of throwing of an acid bulb on his face. The said suit was filed in terms of Order XXXIII of the Code of Civil Procedure as he claimed himself to be an indigent person. The persons accused of throwing acid bulb on the face of the appellant, however, stood acquitted by a judgment dated 18.2.1981.

3. He filed a suit for damages in the year 1988. The State denied and disputed its vicarious liability for payment of any damages suffered by the appellant. The suit was dismissed by the learned subordinate Judge Cherthala by a judgment and decree dated 30.7.1991 inter alia holding :-

- (i) The suit was barred by limitation.
- (ii) Appellant had not established that the Police was duty bound to give protection to him.

4. An appeal was preferred thereagainst in the year 1994. The said appeal was also allowed to be filed by him as an indigent person. The said appeal was dismissed by the High Court by a judgment and decree dated 13.9.2002 inter alia holding that the suit was rightly held to be barred by limitation. It was furthermore directed:-

"16. Hence we find that the above appeal is devoid of any merits. Therefore the appeal is dismissed confirming the judgment and decree passed by the lower court."

5. A miscellaneous application was filed by the appellant in the said suit purported to be for clarification of the said direction of the High Court contained in its judgment dated 13.9.2002. The High Court by reason of the impugned judgment refused to do so relying on some decisions relied on by the parties before it stating:-

"18. It is clear from the above rulings of the various High Courts and this Court that a person who is permitted to

sue as indigent person is liable to pay the court fee which would have been paid by him if he was not permitted to sue as indigent person, if he fails in the suit after trial or without trial since the ultimate decision or the result of the suit and not the manner or mode in which the decision is arrived is envisaged under Rule 11 of Order XXXIII of the Civil Procedure Code.

19. The counsel for the petitioner submitted that in view of the scheme of Order 33 of the C.P.C. failure in a suit cannot be equated with the dismissal of the suit since dismissal has been dealt with separately under clauses (a) and (b) of Rule 11. According to him, failure should be a total failure of the entire claim in the suit and the suit should be devoid of any merit, any rhyme or reason without possessing a modicum of success. He argued that in this case the petitioner-appellant failed in the suit due to lack to evidence and since the suit is dismissed for insufficiency of evidence, it cannot be treated as failure as contemplated in Rule 11 or Order 33 of the C.P.C. He further argued that in the judgment passed by this Court in appeal this Court merely dismissed the appeal and has not held that the plaintiff has failed in the suit. Therefore, according to him, Rule 11 of Order 33 is not attracted at all in this case."

It was further held:-

"23. The question whether the plaintiff suing as a pauper is liable to pay court fee when he succeeds in respect of part of the claim made by him in the suit was considered and settled by the Madras High Court way back in the year 1891. In the decision reported in I.L.R. (1891) 14 Madras 163 (Chandrareka V. Secretary of State for India) a Division Bench of the Madras High Court held that the plaintiff in that partition suit who obtained a decree for Rs. 100/- being a moiety of the property claimed is liable to pay court fee with regard to the sum of Rs. 100/- and the 1st defendant who contested the suit is liable to pay court fee for the balance amount under Section 411 of the C.P.C. of 1882."

It was opined:-

"31. Hence, the petitioner who is the plaintiff in the suit and appellant in the appeal cannot escape from his liability to pay the court fee payable on the plaint and on the memorandum of appeal in this case as he failed in the suit and appeal by merely contending that he still continues to be an indigent person and a man of no means.

32. The questions whether the indigent plaintiff is liable to pay the court fee on his failure in the suit and whether the State could recover or realize the court fee payable by him under due process of law are separate and distinct matters to be considered independently. We are not called upon to pronounce on the issue as to whether the State will be able to realize the court fee payable on the plaint and memorandum of appeal by the petitioner in this case under due process of law.

33. It is also pertinent to note that the petitioner herein by filing the above petition purporting to be for

correction of the judgment and decree under Sections 151 and 152 of the C.P.C. in fact seeks review of the judgment and decree passed by this Court in the above appeal which is not permissible under law."

6. Appellant is, thus, before us.

7. Mr. A. Raghunath, learned counsel appearing on behalf of the appellant in support of this appeal submitted that Order XXXIII Rule 11 of the Code of Civil Procedure will have no application unless the conditions precedent laid down therefor are satisfied. It was urged that a person despite dismissal of a suit and an appeal filed by him in forma pauperis may continue to be an indigent person and the Scheme of the Act will be defeated if a direction is issued to recover the amount of court fee from him.

8. Order XXXIII of the Code of Civil Procedure deals with suits by indigent persons whereas Order XLVI thereof deals with appeals by indigent persons. When an application is filed by a person said to be indigent, certain factors for considering as to whether he is so within the meaning of the said provision is required to be taken into consideration therefor. A person who is permitted to sue as an indigent person is liable to pay the court fee which would have been paid by him if he was not permitted to sue in that capacity, if he fails in the suit of the trial or even without trial. Payment of court fee as the scheme suggests is merely deferred. It is not altogether wiped off. Order XXXIII Rule 10 of the Code of Civil Procedure provides for the consequences in regard to the calculation of the amount of court fees as a first charge on the subject matter of the suit.

9. For calculation of court fee, there does not exist any distinction between a situation attracting Rule 10 on the one hand and Rule 11 on the other. The court fee is to be calculated on the amount claimed and not on the amount decreed. For the said purpose, what is relevant is the final decision taken by the court in this behalf. Rule 11 directing the pauper plaintiff to pay the court fee can be made in the four different situations.

- (i) When the plaintiff failed in the suit.
- (ii) Where the plaintiff is dispaupered.
- (iii) Where the suit is withdrawn.
- (iv) Where the suit is dismissed under the circumstances specified in clause (a) or clause (b).

10. When, therefor, the plaintiff fails in the suit or plaintiff is dispaupered, the same has nothing to do with dismissal of the suit under the circumstances specified in clauses (a) and (b).

11. Submission of Mr. A. Raghunath, learned counsel for the appellant that clauses (a) and (b) would attract all the four situations contemplated by Order XXXIII Rule 11 in our opinion is misconceived. Clauses (a) and (b) would be attracted only when the suit is inter alia dismissed by reason of the contingencies contained in clauses (a) and (b). Clauses (a) and (b) will have no bearing and/or relevance, when a suit is dismissed on merit or when the plaintiff is dispaupered.

12. For the purpose of construction of the aforementioned provisions, it is necessary to give effect to all the conditions mentioned therein. As in three out of the four contingencies in the Rule, the order has to be passed when the suit comes to an end, it will be a fair construction to hold that clauses (a) and (b) refer to the fourth condition. We fail to see as to how the same can be held to be attracted even in the former case. Each situation as referred to hereinbefore is distinct and different. The word "or" is disjunctive and thus must be given effect to independent of the other cases.

13. Reliance placed on a decision of the learned Single Judge of the Patna High Court in Ram Saran and Others v State of Bihar and Others [AIR 1959

Patna 384], in our opinion does not advance the case of the appellant inasmuch as therein the Court was concerned with a situation where a question arose as to what would happen if the suit is decreed in part. It was held:-

"8. From rules 10 and 11 of Order 33, it follows, therefore that if the plaintiff's suit is dismissed, the court has no discretion or option in the matter, but to order the plaintiff or any added co-plaintiff to pay the court fee. In such a case, the court cannot direct the court fee to be paid by the defendants. It must be paid only by the plaintiff, or the co-plaintiff as the case may be, and by none else. If, however, the plaintiff succeeds in the suit, the court has been given a discretion to direct from which party the court fee shall be payable. In such a case, the court has been given a wide discretion.

It can direct the entire court fee to be paid either by the plaintiff, or the defendant, or both. On the facts and circumstances of each particular case, the court can exercise its discretion, and direct the court fee to be payable accordingly. But to a case like the present, where the suit has been decreed in part, that is, the plaintiff's claim has been partly allowed and partly disallowed, there is no provision in the Code which in terms applies. The Code has not laid down anywhere the procedure which is to be followed by the court in such a case. Obviously, therefore, to such a case neither rule 10, nor rule 11, in terms, would apply."

14. The decision relied on by the learned counsel therefore is itself an authority for the proposition that in a case where Rule 11 of Order XXXIII is attracted, the Court cannot direct the defendant to pay the court fee and it must be paid by the plaintiff or the co-plaintiff.

15. We, therefore, are of the opinion that there is no infirmity in the impugned judgment. The appeal is dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.