Gujarat High Court
Mistri Parshottam Jinabhai vs Shah Motichand Shamji And Anr. on 19 March, 1962
Equivalent citations: AIR 1963 Guj 277, (1963) GLR 187
Author: P Bhagwati
Bench: P Bhagwati
ORDER P.N. Bhagwati, J.

1. A short question relating to Court-fees arises for determination in this case. Respondents Nos. 1 to 6 filed a suit againt the appellant to recover a sum of Rs. 4,35,000 at the foot of a mortgage executed by the appellant in favour of respondents Nos. 1 to 6. The suit resulted in a decree for Rs. 5,35,428/- together with interest thereon at the rate of six per cent per annum from the date of the decree till payment and costs of the suit. The decree was passed on 7th November 1959. The appellant being aggrieved by the decree filed an appeal against the same in the High Court of Bombay and on the bifurcation of the State of Bombay, the appeal was transferred to this Court. The appellant's contention in the appeal was that respondents Nos. 1 to 6 who were mortgagees in possession had not rendered proper accounts of the mortgaged property and that if proper accounts were taken the appellant would be entitled to credit for Rs. 1,75,625/-against respondents Nos. 1 to 6. The relief which the appellant claimed in the appeal, therefore, was that the amount of the decree passed against the appellant should be reduced by Rs. 1,75,625/-. This being the position II is apparent that the value of the subject-matter of the appeal was Rs. 1,75,625/- and if the appellant had not been allowed to file the appeal in 'forma pauperis', the appellant would have had to pay Court-fees on the basis of the value of the subject-matter of the appeal being Rs. 1,75,625/-. The appellant was, however, allowed to file the appeal in 'forma pauperis' and no court-fees were, therefore, paid by him at the time of the filing of the appeal. On 19th January 1962, the appellant and respondents Nos. 1 to 6 settled the dispute between them and it was, 'inter alia', agreed between the parties that a sum of Rs. 5,71,000 should be declared as due and payable by the appellant to respondents Nos. 1 to 6 at the foot of the mortgage. It appears that there was a second mortgage created by tht appellant in favour of another party and that other party was, therefore, added as respondent No. 7 and his claim also formed the subject-matter of the compromise. The terms of settlement duly signed by all the parties were presented before me and I was requested to pass a decree in accordance with those terms. Since the compromise was a lawful compromise arrived at between the parties, I passed a decree in accordance with the terms of compromisi reserving, however, the question as regards payment ol court-fees. Notice was thereafter ordered to be Issued to the Government Pleader since the question Involved related to payment of court-fees and Mr. A. D. Desai, the learned Assistant Government Pleader appearing on behalf of the State, put forward the point of view of the State in regard to this question.

2. Now it was not disputed -- and In fact it could not be disputed -- that the provisions of Order 33 apply also in relation to an appeal which has been allowed to be filed in 'forma pauperis' under the provisions of Order 44. The contention of Mr. J. R. Nanavaty, learned Advocate appearing on behalf of the appellant, however, was that once the application of the appellant to file the appeal in 'forma pauperis' was granted, the appellant was entitled under Order 33, Rule 8 to continue the appeal without payment of any court-fees unless the appellant was dispaupered under Order 33, Rule 9 or the appellant's case on the disposal of the appeal fell within the provisions of either Rule 10 or Rule

11 of Order 33. It was nobody's case that the appellant was at any time dispaupered under Order 33, Rule 9, and Mr. J. R. Nanavaty, therefore, contended that the appellant could not be directed to pay any court-fees unless the case could be brought either within Rule 10 or within Rule 11 of Order 33. The learned Assistant Government Pleader did not rely on Order 33, Rule 11, and the only question which, therefore, remained for consideration was whether the appellant's case fell within the provisions of Order 33, Rule 10. According to Mr. J. R. Nanavaty, the provisions of Order 33, Rule 10 did not apply to the facts of the appellant's case because it could not be said that the appellant had succeeded in the appeal. Mr. J. R. Nanavaty contended that the crucial words in Order 33, Rule 10 were "where the plaintiff succeeds in the suit"

and adapting the provisions of that rule to an appeal, it was clear that those provisions could not apply unless it could be said that the appellant had succeeded in the appeal. The appeal ended in a consent decree but, argued Mr. J. R. Nanavaty, the consent decree could not be said to constitute the success of the appellant in the appeal. It was not disputed by Mr. J. R. Nanavaty that by the consent decree the appellant benefited to the extent of Rs. 86,100/- inasmuch as the appellant's liability under the decree passed by the Trial Court would have been Rs. 6,57,100/- as on 19th January 1962 whereas .instead of that liability the appellant was by the consent decree held liable to pay to respondents Nos. 1 to 6 the lesser sum of Rs. 5,71,000/-. Mr. J. R. Nanavaty, however, contended that this benefit could not be said to be success in the appeal, so as to attract the applicability of Order 33, Rule 10. This contention of Mr. J. R. Nanavaty, was opposed by Mr. A. D. Desai and Mr. A. D. Desai contended that since the consent decree was passed in the appeal and as a result of the consent decree the appellant obtained benefit to the extent of Rs. 86,100/- it was plain that the appellant had succeeded in the appeal to the extent ot Rs. 86,100/- and that the provisions of Order 33, Rule 10, therefore, applied to the facts of the case. Thesa were the rival contentions urged on behalf of the parties and I shall now proceed to examine the validity of these contentions.

3. It is obvious that the decision of the case must turn on the construction to be pieced on the language of Order 33, Rule 10. That Rule runs as follows :

"Rule 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 a pauper; such amount shall be recoverable try the State 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 would also be convenient to set out Order 33, Rule 11 though I am not directly concerned with the provisions of that Rule for the purpose of deciding the present controversy between the parties. That Rule is in the following terms :

"Rule 11. Where the plaintiff fails in the suit or is dispaupered, or where the suit Is withdrawn or dismissed,--

(a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, or

(b) because the plaintiff does not appear when 'the suit is called on for hearing, the Court shall order the plaintiff, or any person addad as a co-plaintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper."

It is clear that both these Rules deal with the situation which may arise on the disposal of a suit. The provisions of Order 33, Rule 10 apply where the plaintiff succeeds in the suit while the provisions of Order 33, Rule 11 apply where the plaintiff fails in the suit or is dispaupered or where the suit is withdrawn or dismissed. Both these rules refer to the result of the suit and make provision accord-ing as the result of the suit is one way or the other. Where the plaintiff succeeds in the suit, the Court is empowered to calculate the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to file the suit in 'forma pauperis' and the Court can in such a case pass a decree for payment of the same against any party and the amount so decreed to be paid would be a first charge on the subject-matter of the suit. Now obviously this rule would apply where the plaintiff succeeds either wholly or in part in the suit. Even if the plaintiff succeeds partly in the suit, it can certainly be said of the plaintiff that he has succeeded in the suit. It is only when the plaintiff does not succeed at all in the suit that the provisions pf Order 33, Rule 10 would not apply and in that event since the plaintiff would have failed in tha suit, the provisions of Order 33, Rule 11 would apply. Failure in the suit would mean total absence of success in the suit. So long as there is even a modicum of success. It cannot be said that the plaintiff has failed in the suit. This view has been taken by a Division Bench ef tha High Court of Bombay in Secretary of State v. Narayan Balkrishna, ILR 29 Bom 102, where Batty J., considering the question whether the withdrawal of a suit by a pauper plaintiff with permission to bring a fresh suit could be said to be tantamount to failure of the plaintiff In the suit within the meaning of Section 412 of the Code of Civil Procedure, 1882, corresponding to the present Order 33, Rule 11, ob-served :

"Failure of the plaintiff in the particular suit withdrawn is all that the section requires. The next question is whether withdrawal under Section 373 amounts to failure. The phrases 'failure' and 'success' in relation to a suit, we understand to be used in Sections 411 and 412, not as mere opposite terms but as contradictories. Failure is a universal and not a particular negative of success. Any modicum of success would prevent tha result of a suit from being a failure within the meaning of Section 412. An entira absence of success Is failure. When a suit is compromised, the plaintiff cannot be said to have failed within the meaning of the section. The fact that he his obtained an agreement which he is willing to accept prevents the resuit of his suit from depriving him entirely of all success. But if there is absolutely nothing gained by the suit, so that the result is to leave the plaintiff in 'ststos. quo ante', or as here, by reason of his liability for costs, in a worse position, it would, we think, be a strain at language to say that the plaintiff had obtained any success of any kind or degree by his suit, And as already remarked the tolal and entire absence of success in a suit must, we think, be regarded as failure therein . . . ."

This decision laid down that the withdrawal of a suit by a pauper plaintiff with liberty to file a fresh suit amounted to failure of the plaintiff in the suit since so far as the suit was concerned, the plaintiff did not gain anything, the suit resulting in nothing but withdrawal. The withdrawal of a suit by a pauper plaintiff unconditionally without any liberty to bring a fresh suit was also considered by a Full Bench of the High Court of Bombay in Secretary of Stall v. Bhagirathibai, ILR 31 Bom 10 (FB),

as failure of the plaintiff in the suit even though the plaintiff in that case obtained considerable advantage as a result of a compromise outside the suit. These two decisions emphasize that what has to be considered by the Court in deciding whether a particular case does or does not fall within the provisions of Order 33, Rule 10 or Order 33, Rule 11 is : What is the result in the suit? Does the resuit in the suit constitute success of the plaintiff either wholJy or in part or dots it constitute failure of the plaintiff in the sense that the plaintiff has not succeeded at all in the suit? Now obviously this can be decided only by considering the decree or order passed in the suit. Of course the question would not present any difficulty when there Is a decree adjudicating upon the merits of the suit. In such an event if the plaintiff has obtained any relief as a result of the decree, it can always be said that the plaintiff has succeeded in the suit to the extent of the relief obtained by him; and if the suit is dismissed, it can be said that the plaintiff has failed in the suit. If the suit is withdrawn, it is clear, having regard to the two decisions of the High Court of Bombay to which I have just referred, that the plaintiff has failed in the suit. I may mention at this stage that some other High Courts had taken a view different from that taken by the High Court of Bombay in the above two decisions and the Legislature, therefore, amended Order 33, Rule 11 so as to include specifically within the scope and ambit of that rule, the case of withdrawal of a suit. The question, however, remains as to what is the position when the suit is disposed of by a consent decree and the plaintiff obtains a certain benefit as a result of the consent decree?

4. I on my part do not see any distinction between the disposal of a suit by an adjudication on merits and the disposal of a suit fly a consent decree. When a suit is disposed of by a consent decree and the plaintiff obtains as a result of the consent decree a part of the relief claimed by him in the suit, I do not see why It cannot be said that the plaintiff has succeeded in the suit. If the plaintiff can be said to have succeeded in the suit when he obtains a part of the relief claimed by him as a result of an adjudication by the Court, there is no reason why the plaintiff cannot be said to have succeeded in the suit when the plaintiff obtains the same relief as a [esult of a consent decree. There is neither principle nor authority to support any such distinction. Whether the decree be a decree as a result of an adjudication or a consent decree, it disposes of the suit and embodies the result of the suit. A consent decree has no less efficacy than a decree after adjudication and merely because the plaintiff obtains the relief which he seeks in the suit without adjudication, such adjudication being rendered unnecessary by reason of the defendant consenting to the plaintiff obtaining such relief, it cannot be said that the plaintiff has not succeeded in the suit. Take for example a case where the defendant admits the plaintiff's claim to the relief in the suit and a decree is passed in favour of the plaintiff on the admission of the defendant. Can it be said in such a case that the plaintiff has not succeeded in the suit within the meaning of Order 33, Rule 10? It is of course obvious that the plaintiff has sutceeded in the suit because the suit has resulted in a decree in his favour. The decree may have been passed on admission but it is yet a decree which embodies the success of the plaintiff. In the same manner a consent decree also embodies the success of the plaintiff to the extent to which it is in favour of the plaintiff and embodies the failure of the plaintiff to the extent to which it is against the plaintiff. It is not necessary in order to attract the applicability of Order 33, Rule 10 or Order 33, Rule 11, that there should be an adjudication by the Court and that the plaintiff should succeed or fail in the suit as a result of sirch adjudication. If an adjudication were necessary in order to bring the case within either Order 33, Rule 10, or Order 33, Rule 11, the withdrawal of a suit by a pauper plaintiff with liberty to file a fresh suit could not have been considered failure of the plainliff in the

suit within the meaning of Order 33, Rule 11 by the Division Bench of the" High Court of Bombay in ILR 29 Bom 102 (supra) and equally the withdrawal of a suil by a pauper plaintiff unconditionally also could not have been considered by the Full Bench of the High Court of Bombay in ILR 31 Bom 10 (FB) (supra), as failure of the plaintiff in the suit within the meaning of the same rule. I am, therefore, of the opinion, that the success or failure in the suit contemplated by Order 33, Rule 10 or Order 33, Rule 11 is not necessarily success or failure as a result of an adjudication but may also result from a consent decree. If 33 a result of the consent decree the plaintiff secures some benefit which he claimed in the suit, the plaintiff can certainly be said to have succeeded in the suit to the extent of such benefit and correspondingly if the plaintiff does not get any benefit at all as a result of the consent decree, the plaintiff can certainly be said to have failed in the suit.

5. Now, as I have already pointed out above, though the language used in Rules 10 and 11 of Order 33 refers to a suit, these Rules apply equally to an appeal by reason of the provisions of Order 44, Rule 1. This being the position it is clear that the appellant has suceeded in the appeal to the extent of Rs. 86,100/- and the provisions of Order 33, Rule 10 must, therefore, apply to the facts of the present case. The appellant claimed relief to the extent of Rs. 1,75,625/- out of which the appellant succeeded to the extent of Rs. 86,100/- but failed as regards the balance of Rs. 89,525/-. The appellant would, therefore, be liable to pay court-fees on Rs. 89,525/- while respondents Nos. 1 to 6 would be liable to pay court-fees on Rs. 86,100/-. Since the appeal is settled by agreement of parties, the appellant if he had not been allowed to file the appeal in 'forma pauperls' and had paid the amount of court-fees required to be paid on the appeal, would have been entitled to refund of half the amount of such Court-fees under Section 43 (1) of the Banbay Court-fees Act, 1959. The State would have in that event got only half the amount of the court-fees payable on the appeal. I am, therefore, of the opinion that the appellant must be directed to pay only half the amount of Court-fees on Rs. 89,525/-and respondents Nos. 1 to 6 must also be similarly directed to pay only half the amount of court-fees on Rs. 86,100/-.

6. I, therefore, direct under Order 33, Rule 10 that the appellant shall pay half the amount of court-fees on Rs. 89,5257- and respondents Nos. 1 to 6 shall pay half the amount of court-fees on Rs. 86,1007-- There will be no order as to costs.