APPELLATE CIVIL.

Before Mr. Justice Batty and Mr. Justice Aston.

1904. October 11.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, APPLICANT, *v.* NARAYAN BALKRISHNA KULKARNI (ORIGINAL PLAINTIFF), OPPONENT.*

Civil Procedure Code (Act XIV of 1882), sections 373, 412—Pauper—Suit—Withdrawal of a suit with permission to bring fresh suit—Failure in the Suit—Adjudication—Court fees, payment of.

Where a pauper plaintiff withdraws a suit with permission to bring a fresh suit he is liable to pay to Government the court fees which would have been paid by him if he had not been permitted to sue as a pauper.

The words "if the plaintiff fails in the suit" in section 412 of the Civil Procedure Code (Act XIV of 1882) apply to the withdrawal of a suit under the provisions of section 373 of the Code.

APPLICATION under section 622 of the Civil Procedure Code (Act XIV of 1882) against the decision of V. D. Joglekar, Subordinate Judge of Saundatti.

The plaintiff filed a suit (No. 834 of 1901) in the Court of the Subordinate Judge of Saundatti and obtained permission to sue as a pauper.

In the course of this suit the plaintiff by his guardian applied for permission to withdraw with liberty to bring a fresh suit.

The Subordinate Judge granted this application and passed an order to the following effect: "the suit to be withdrawn with permission to bring a new suit. The plaintiff's next friend to pay the costs of defendant 2." But the Subordinate Judge made no order as regards the amount due to Government on account of court fees, apparently on the ground that there was no adjudication of the plaintiff's claim in the case.

The Secretary of State for India in Council applied to the High Court, contending that (1) on a proper construction of sections 411 and 412 of the Civil Procedure Code Government is entitled to court fees in every suit which is disposed of without reference to the mode in which it is brought to a termination. (2) It is wrong to hold that the success or failure mentioned in the above sections means an adjudicated success or adjudicated failure, for this is

* Civil Application No. 181 of 1904.

equivalent to introducing into the sections a qualification which was not contemplated by the Legislature. (3) It would be wrong to suppose that the Legislature could have intended to benefit a pauper plaintiff to the detriment of Government revenue when in a similar case the ordinary plaintiff is not treated with any such leniency. (4) It is undisputed that no refund of the court fee stamp is allowed to an ordinary plaintiff in case he withdraws his suit under section 373 of the Civil Procedure Code. (5) The Court below having moreover directed the plaintiff to pay the costs of some of the defendants who contested the plaintiff's claim was bound to make an order in respect of the court fees due to Government.

Scott (Advocate General), with *Vasudeo J. Kirtikar*, Government Pleader, for the applicant:—The cases of *Collector of Kánara* v. *Krishnappa*[1] and *Bai Chandaba* v. *Kuver Saheb Bapu Saheb*[2] were cases of compromise, and are thus distinguishable from the present case. In these cases the opinion is no doubt expressed that "failure" implies an adjudication on the merits. The case of *Collector of Vizagapatam* v. *Abdul Kharim*[3] is in our favour.

K. H. Kelkar, for the opponent (plaintiff):—When a suit is allowed to be withdrawn the plaintiff is relegated to the same position in which he was before filing the suit. Failure in the suit implies an adjudication on the merits. The case of *Collector of Vizagapatam* v. *Abdul Kharim*[3] is a case of dismissal and is therefore distinguishable. It is submitted that the point is covered by *Bai Chandaba* v. *Kuver Saheb Bapu Saheb*.[2]

BATTY, J.:—This is one of a series of nine applications presented on behalf of the Secretary of State for India in Council under section 622 of the Code of Civil Procedure objecting to the omission by the Subordinate Judge of Saundatti to pass an order under section 412 of the Code for the plaintiff to pay the court fees which, if he had not been permitted to sue as a pauper, would have been paid by him, in suits in which the plaintiff was

(1) (1890) 15 Bom. 77. (2) (1893) 18 Bom. 464.
(3) (1897) 21 Mad. 113.

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permitted so to sue and which have been withdrawn by him under section 373 of the Code.

The Hon'ble the Advocate General urges that the words in section 412 "if the plaintiff fails in the suit" are applicable to withdrawals under section 373; that so far as the suit withdrawn is concerned, the plaintiff has by its withdrawal completely failed therein whatever may be the result of any fresh suit which he may hereafter bring; that the decisions in the *Collector of Kánara* v. *Krishnappa*[1] and *Bai Chandaba* v. *Kuver Saheb Bapu Saheb*[2] dealt with cases settled by agreements or compromises in which the plaintiff may have gained something, and that the Madras decision in the *Collector of Vizagapatam* v. *Abdul Kharim*[3] supports the view that failure by adjudication is not indispensable in order to attract the operation of section 412. The pleader for the opponent contends that the suit being withdrawn, the plaintiff cannot be said to have failed in it as no suit remains, an argument which does not appear to merit serious consideration.

The question involved apparently turns upon the meaning to be placed on the phrase "If the plaintiff fails in the suit." We think there is no alternative to the contention of the Advocate General that the phrase does not refer to the ultimate success or failure of the plaintiff in any subsequent suit which he may bring.

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 the result of a suit from being a failure within the meaning of section 412. An entire 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 has obtained an agreement which he is willing to accept prevents the result of his suit from depriving him entirely of all success. But if there

(1) (1890) 15 Bom. 77. (2) (1893) 18 Bom. 464.
(3) (1897) 21 Mad. 113.

is absolutely nothing gained by the suit, so that the result is to leave the plaintiff in *statu quo ante*, or as here, by reason of his liability for costs, in a worse position, it would, we think, be a strain of language to say that the plaintiff had obtained any success of any kind or degree by his suit. And as already remarked the total and entire absence of success in a suit must, we think, be regarded as failure therein. The case of the *Collector of Kánara* v. *Krishnappa Hedge*[1] does not appear to us to be on all fours with the present. For there the plaintiff had come to an amicable arrangement with the defendant. It is true that the reason there given was that no adjudication had been arrived at. But as that particular case was one decided by amicable settlement, it was not necessary for the purposes of that suit to decide that immunity should extend to any cases except cases decided by amicable settlement. The ruling so far as it purports to cover cases of failure without formal adjudication is therefore, we think, *obiter dictum*. The case of *Bai Chandaba* v. *Kuver Saheb*[2] is similarly a case of withdrawal by agreement after compromise. The case did not end in failure, for it was on the strength of the agreements entered into, that the Government Pleader contended that the appellants should be dispaupered. We therefore think that neither of the above authorities governs a case in which a plaintiff withdraws from the suit under section 373 with permission to bring a fresh suit. Such permission necessarily implies failure in the suit withdrawn, and manifestly is intended only to be given on that understanding, for no Court could give a plaintiff permission to bring a second suit in respect of any relief which he had already succeeded in obtaining. We think that by applying under section 373 for permission to bring a fresh suit in respect of the same subject-matter, a plaintiff by necessary implication admits that with regard to that subject-matter he has—in the suit so withdrawn—failed entirely, and we think that he cannot be permitted to allege the contrary. The case would be different no doubt where only a part of the claim was abandoned, for then only partial failure would follow as a necessary inference from his application. But when the failure in the suit is complete—as it must be in order to obtain the permission

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to bring a fresh suit on the whole of the same subject-matter—no adjudication is in our opinion necessary to establish the fact that so far as that suit is concerned, he has failed within the meaning of section 412. Any other view would, we think, lead directly to the encouragement of fraud and dishonest evasion. In the course of argument some reference was made to the difference of language in section 373 and in section 412: the former section referring to "the suit failing" and the latter to "the plaintiff failing in the suit." This slight variance in the phrases used appears to us due only to the exigencies of the draftsman in framing the sentences. We do not think there can be any substantial distinction between a plaintiff's suit failing and the plaintiff failing in his suit.

We think the rule should be made absolute and that the plaintiff should be ordered to pay the court fees which would have been paid if he had not been permitted to sue as a pauper. We would also direct that the plaintiff do pay the costs of this application.

The decision in the other eight applications will follow the decision in this.

Mr. Kelkar on delivery of this judgment asks that the minor's estate be declared liable for the payment directed, and suggests that such an order should not be made in Revision.

There is no object in directing that the mother should pay. The court fees are to be recoverable from the minor's estate. We make no order binding against the minor plaintiff personally.

Mr. Kelkar asks for one set in the nine appeals. We are unable to direct this, but make no order as to costs in the other applications.

R. R.

Rule made absolute.