

State of Uttar Pradesh

Vs

Pt. Chandra Bhushan Misra

Civil Appeal No. 2614 of 1969

(R.S. Sarkaria, O. Chinnappa Reddy JJ)

06.11.1979

JUDGMENT

CHINNAPPA REDDY, J. –

1. A second appeal under Section 100 of the Code of Civil Procedure, 1908 was allowed by the Allahabad High Court and the matter was remanded to the lower appellate Court for fresh disposal in accordance with law. The order of remand was made under the provisions of Order 41 Rule 23 of the Civil Procedure Code, 1908, as amended by the Allahabad High Court filed an application under Section 13 of the Court Fees Act, 1870 claiming a refund of the Court fee paid in the second appeal. The application came before G. C. Mathur, J., who entertained a doubt whether Section 13 of the Court Fees Act applied to a case of remand under the provisions of Order 41 Rule 23, Civil Procedure Code as amended by the High Court and referred the question for consideration of a Full Bench. Thereafter the application was heard by the Full Bench consisting of Jagdish Sahai, Pathak and Kirty, JJ. Pathak and Kirty, JJ., took the view that refund of court fee could be ordered under Section 13 of the Court Fees Act, even where the remand was made under the amended provisions of Order 41 Rule 23. Jagdish Sahai, J. dissented. In accordance with the opinion of the majority, the court fees paid by the appellant before High Court was directed to be refunded. The State of U.P. obtained a certificate under Article 133(1)(c) of the Constitution and has preferred this appeal.

2. Section 13 of the Court Fees Act, 1870, insofar as it is material is as follows :

If an appeal or a plaint, which has rejected by the lower court on any of the grounds mentioned in the Code of Civil Procedure is ordered to be received, or if a suit is remanded in appeal, on any of the grounds mentioned in Section 351 of the same Code for a second decision of a lower court, the lower court shall grant to the appellant a certificate, authorising him to receive back from the Collector the full amount of fee paid on the memorandum of appeal.

Section 13, thus speaks of a suit remanded in appeal on any of the grounds mentioned in Section 351 of the same Code, i.e. the Code of Civil Procedure which of then in force. Section 351 of the Code of Civil Procedure, 1859 provided for the remand of a case by the appellate Court to the lower court for a decision on the merits of the case, where "the lower court shall have disposed of the case upon any preliminary point as to exclude any evidence of fact which shall appear to the appellate Court essential to the rights of the parties", if the decision on the preliminary point was reversed by the appellate Court. The Code of 1859 was repealed and replaced by the Code of 1877. Section 562 of the 1877 Code was substantially in the same terms as Section 351 of the 1859 Code. The Code of 1882 was repealed and replaced by the Code of Civil Procedure, 1908. Order 41 Rule 23 of the

1908 Code also provided for the remand of a case to the lower court by the appellate Court where the suit had been disposed of upon a preliminary point and the decision of such preliminary point was reversed in appeal by the appellate Court. In exercise of the powers vested in it under Section 122 of the Code of Civil Procedure, 1908, the Allahabad High Court amended the provisions of Order 41 Rule 23 so as to provide for the remand of a case by the appellate Court to the trial Court, not only when the suit had been decided upon a preliminary point and the decision was reversed in appeal, but also whenever the appellate Court considered it necessary in the interest of justice. The question for consideration in this appeal is whether the power to grant refund of court fees under Section 13 of the Court Fees Act, 1870 was attracted to a case where the appellate Court remanded the case to the lower court in the interest of justice as provided by the provisions of Order 41 Rule 23 as amended by the High Court of Allahabad.

3. In order to answer the question a reference is necessary to Section 158 of the Code of Civil Procedure, 1908. It was as follows :

158. In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any chapter or section of Act 8 of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding part, order, section or rule.

It follows from Section 158 that reference in Section 13 of the Court Fees Act, 1870 to Section 351 of the Code of Civil Procedure, 1859 has to be read as reference to Order 41 Rule 23 of the Code of Civil Procedure, 1908. The submission of the learned Counsel was that the reference to any provision of the Code of Civil Procedure, 1908 pursuant to Section 158 of the Code must be to a provision occurring in the body of the main Code consisting of the provisions from Section 1 to Section 158 and not to the provisions of the rules in the first schedule. He further submitted that even if reference to the rules in the first schedule was permissible it should only be to the rules as enacted by the legislature itself and not as amended by the High Court. The first part of the submission of the learned Counsel has to be rejected straightway having regard to the express reference to 'order' and 'rule' in Section 158 of the Code of Civil Procedure, 1908. The second part of the submission requires a slightly closer examination. Section 2(1) of the Code of Civil Procedure, 1908 defined "Code" as including "rules". Section 2(18) defined "rules" as meaning "rules and forms contained in the first schedule or made Section 122 or Section 125". Section 121 of the 1908 Code declared that the rules in the first schedule shall have effect "as if enacted in the body of the Code until annulled in accordance with the provisions of Part X of the Code" (Sections 121 to 131). Section 122 enabled the High Court to make rules, from time to time "regulating their own procedure or the procedure of the Civil Code subject to their superintendence, and made by such rules, annul, alter or add to all or any of the rules in the first schedule". Section 126 made the rules made by the High Court subject to the previous approval of the government of the State. Section 127 provided that the rules as made and approved shall have the same force and effect as if they had been contained in the first schedule. The provisions make it abundantly clear that the rules made by a High Court altering the rules contained in the first schedule as originally enacted by the legislature shall have the same force and effect as if they had been contained in the first schedule and, therefore, necessarily became part of the Code for all purposes. That is the clear effect of the definition of the expressions "Code" and "rules" and Sections 121, 122 and 127. It does not appear to be necessary to embark upon a detailed examination of each one of these provisions, since the position appears to us to be very clear. We, therefore, agree with the view expressed by Pathak and Kirty, JJ., in *Chandra Bhushan Misra v. Smt. Javatri Devi* (AIR 1969 All 142), regarding the effect

of Section 158 of the Code of Civil Procedure and Sections 2(1) to 2(18), 121, 122 and 127.

4. Jagdish Sahai, J., was inclined to the view that the amendments made by the High Court were only fictionally embodied in the Code and that the reference to Section 351 of the Code of 1859 in Section 13 of the Court Fees Act was to be construed as a reference only to the provisions of Order 41 Rule 23, as originally passed by the legislature and not as amended by the High Court. In our opinion the view of Jagdish Sahai, J. does not give full effect to Section 127 of the Civil Procedure Code, 1908 which provided that the rules made by the High Court shall have the same force and effect as if they had been contained in the first schedule.

5. We are of the view that the question was rightly answered by the Full Bench of the Allahabad High Court and the appeal is, therefore, dismissed.

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