ALLAHABAD HIGH COURT

S. Wajid Ali

Vs.

Isar Bano Urf Isar Fatma

Second Appeal No. of 1950

(Malik, C.J. Wanchoo, Agarwala, P.L. Bharghava and Mushtaq Ahmed, JJ.)

26.09.1950

JUDGMENT

Agarwala, J.

1. The memorandum of appeal in the above case was presented before a Bench of this Court on 24-2-1950 with a stamp report that the appeal was within time till 25-2-1950 and that there was a deficiency in the court-fee paid to the extent of Rs. 295/14/-. The amount of court-fee paid on the memorandum of appeal was Rs. 19/12/- only. Mr. Jagdish Sahai, counsel for the appellant, who filed the appeal, requested the Bench to grant one month's time for making good the deficiency. As the Bench considered that the question whether time could be granted for making good the deficiency in the court-fee extending beyond the period of limitation as a matter of course or under certain circumstances only, was a question of sufficient importance to merit consideration by a larger Bench, they referred the following four questions to this Bench :

> "1. Whether Section 4, Court-fees Act, is subject to, or controlled by, the provision of, and principles underlying, Section 6 (2) of that Act ?
> 2. Whether the provisions of Section 4, Court-fees Act, override the provisions of Section 149, Civil Procedure Code, so far as the power of the High Court to extend time for making good the deficiency in court-fee is concerned?
> 3. In view of the long standing practice of this Court, should not the words "in its discretion" in Section 149, Civil Procedure Code, continue to receive a liberal interpretation?
> 4. Should poverty or inability to pay full court-fee at the time of filing an appeal be regarded as a sufficient ground for the exercise of the discretion of the Court in extending time under Section 149, Civil Procedure Code, or under Section 6 (2), Court-fees Act, if the latter is applicable to High Courts ?"

2. The charging sections in the Court-fees Act for purposes of levying court-fee on documents in different Courts are divided into two chapters. Chapter II consisting of Sections 3-5 deals with fees in the High Courts and in the Courts of Small Causes at the Presidency towns; and Section 6 of chap. III deals with fees in other Courts and public offices.

3. Section 3 of the Act refers to levy of fees in the High Courts in the exercise of their ordinary original civil jurisdiction and in the Courts of Small Causes at the Presidency towns. Section 4 deals with fees on documents filed in the High Courts in the exercise of their extraordinary original civil jurisdiction or extraordinary original criminal jurisdiction or in the exercise of their appellate jurisdiction or as Courts of reference and revision. Section 5 then lays down the procedure in cases of difference as to the necessity or amount of fee payable on documents filed in a High Court. If there is such a difference, the matter is to be referred to the Taxing Officer whose decision thereon shall be final, except in certain circumstances not necessary to be dealt with here. If a difference arises in any Court of Small Causes in the Presidency town, the matter is referred to the clerk of the Court whose decision shall be final except in certain circumstances. This procedure in dealing with a case of difference as to the necessity or amount of court-fee as payable on documents in the High Courts and Small Cause Courts in the Presidency towns, is different from that provided for documents to be filed in other Courts.

4. Section 6 (in chap. III) is the charging section in this chapter and, before its amendment in U. P. laid down that no documents filed in Courts other than those mentioned in Sections 3 and 4 and in public offices shall be filed, exhibited or recorded unless proper court-fee has been paid. This section was amended in U. P. by Act II [2] of 1936, Act XIX [19] of 1938 and Act IX [9] of 1941. After the amendment it reads as follows :

> "6". (1) Except in the Courts hereinbefore mentioned, no document of any of the kinds specified as chargeable in the first or second schedule to this Act annexed shall be filed, exhibited, or recorded in any Court of justice, or shall be received or furnished by any public officer, unless in respect of such document, there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document :
>
> Provided that where such document relates to any suit, appeal or other proceedings under the United Provinces Tenancy Act, 1939, or the United Provinces Land Revenue Act, 1901, the fee payable shall be three quarters of the fee indicated in either of the said schedules except where the amount or value of the subject-matter of the suit, appeal or proceeding to which it relates exceeds Rs. 500 :
>
> Provided further that the fee payable in respect of any such document as is mentioned in the foregoing proviso shall not be less than that indicated by either of the said schedules before 1-5-1936.
>
> (2) Notwithstanding the provisions of sub-section (1), a Court may receive a plaint or memorandum of appeal in respect of which an insufficient fee has been paid but no such

plaint or memorandum of appeal shall be acted upon unless the plaintiff or the appellant, as the case may be, makes good the deficiency in court-fee within such time as may from time to time be fixed by the Court.

(3) If a question of deficiency in court-fee in respect of any plaint or memorandum of appeal is raised by an officer mentioned in Section 24A the Court shall, before proceeding further with the suit or appeal, record a finding whether the court-fee paid is sufficient or not. If the Court finds that the court-fee paid is insufficient, it shall call upon the plaintiff or the appellant, as the case may be, to make good the deficiency within such-time as it may fix, and in case of default shall reject the plaint or memorandum of appeal :

Provided that the Court may, for sufficient reasons to be recorded, proceed with the suit or appeal if the plaintiff or the appellant, as the case may be, gives security to the satisfaction of the Court, for payment of the deficiency in court-fee within such further time as the Court may allow. In no case, however, shall judgment be delivered unless the deficiency in court-fee has been made good, and if the deficiency is not made good within such time as the Court may from time to time allow, the Court may dismiss the suit or appeal.

(4) Whenever a question of the proper amount of court-fee payable is raised otherwise than under sub-section (3) the Court shall decide such question before proceeding with any other issue.

(5) In case the deficiency in court-fee is made good within the time allowed by the Court, the date of the institution of the suit or appeal shall be deemed to be the date on which the suit was filed or the appeal presented.

(6) In all cases in which the report of the officer referred to in sub-section (3) is not accepted by the Court, a copy of the finding of the Court together with a copy of the plaint, shall forthwith be sent to the Chief Inspector of Stamps."

5. It is urged on behalf of the appellant that Section 6 (2) of the Act applies not only to memo of appeals presented in the lower appellate Courts but also to those presented in the High Courts and, as such, the Court is bound to give time for making good the deficiency in court-fee at least once. In my opinion, this section does not apply to memo of appeals presented in the High Courts.

6. It will be noticed that Section 6(1) is identically the same, as Section 6 of the unamended Court-fees Act. It applies to Courts other than Courts mentioned in Sections 3 and 4, namely, Courts other than High Courts and Courts of Small Causes in the Presidency Towns. Then sub-section (2) is an exception to Section 6 (1). The words "notwithstanding the provisions of sub-section (1)" clearly point to this conclusion and the word "Court" in that section clearly refers to Courts mentioned in sub-section (1), that is, Courts not being Courts mentioned in Section 3 or Section 4. If it were intended that sub-section (2) applied even to Courts mentioned in Sections 3 and 4, then sub-section (2) would have read: "notwithstanding the provisions of sub-section (1) and of Sections 3 and 4." By the omission of any reference to Sections 3 and 4, sub-section (2) clearly indicated that it was referring to cases of Courts to which Section 6 (1) applied. This

conclusion is strengthened when we look at sub-section (4) of Section 6, and to Sections 6a and 6B.

7. Under sub-section (4), in cases other than those mentioned in sub-section (3) whenever a question of the proper amount of court-fee payable is raised, it is the Court which is required to decide the question. This, however, is contrary to the provisions of Section 5 which is applicable to High Courts under which the question of deficiency of court-fee has to be decided by a Taxing Officer and not by the Court except when the Taxing Officer himself refers the matter to the Chief Justice or such Judge as the Chief Justice may have appointed in that behalf.

8. Again, under Section 6a any person called upon to make good a deficiency in court-fee may appeal against such order as if it were an order appealable under Section 104, Civil Procedure Code. This rule cannot apply to an order by a single Judge or a Bench of the High Court. Section 6B empowers the Chief Inspector of Stamps to file a revision against an order passed under sub-section (3) of Section 6. This section also cannot refer to a revision against an order of a single Judge or a Bench of the High Court.

9. It was urged by learned counsel for the appellant that under the practice of this Court, the first proviso to Section 6 (1) is applied to memo of appeals presented in this Court under the U. P. Tenancy Act, 1939, or the U. P. Land Revenue Act, 1901, and three quarters of fee is considered to be sufficient, except where the amount or the value of the subject-matter of the suit or appeal exceeds Rs. 500: and that therefore, if the first proviso to Section 6 (1) applies to High Courts there is no reason why sub-section (2) should not similarly apply to the High Courts. Assuming that there is such a practice-prevailing in the Court, as was suggested by the learned counsel, a wrong practice cannot override the law, as was pointed out by Sir John Edge in *Bal Karan Rai v. Gobind Nath*[1].

10. It was next urged by learned counsel for the appellant that since by an amendment of Section 2 the U. P. Legislature has defined the word 'suit' as including a second appeal or a Letters Patent appeal, Section 7, et seq, of the Court-fees Act, which fall under chap. III, include appeals presented in the High Court and that, therefore, if Section 7; et seq, can apply to High Courts in spite of the heading of chap. III - Fees in other Courts and in public offices - Section 6 (2) might also apply to High Courts. The argument is unsound. It is true that by the inclusion of of second appeals and Letters Patent appeals in the definition of word 'suit' Section 7, et seq, apply to appeals presented in the High Courts, but from this it does not follow that Section 6 (2) also applies to High Courts. The language of Section 6 read as a whole clearly points to the conclusion that it does not apply to High Courts and Court of Small Causes in the Presidency towns.

11. The observation of Sir Shah Sulaiman in *Shahzadi Begam v. Alakh Nath*[2], to the effect that court-fee on a memo of appeal presented in the High Court was payable under Section 6, Court-

fees Act, is the result of an oversight. What his Lordship must have meant to say was Section 4 and not Section 6. For all these reasons, I hold that Section 6 (2) does not apply to documents presented in the High Courts or Courts of Small Causes in the Presidency towns.

12. It was next urged that the Court is bound to give time under Order 7, Rule 11, read with Section 107, Civil Procedure Code. The argument was that under Section 107 an appellate Court including the High Court has the same powers and the same duties as are conferred or imposed on Courts of original jurisdiction in respect of suits instituted therein, and that since the Court of original jurisdiction is bound under Order 7 Rule 11, to grant time to make good the deficiency on a plaint so also an appellate Court is bound to grant time in respect of a memo of appeal. Order 7, Rule 11 refers to powers of a Court of original jurisdiction in respect of a deficiently stamped plaint. By reason of Section 107 an appellate Court has the same powers in respect of plaints. If it finds that the plaint is insufficiently stamped, then it will follow the same procedure as a trial Court would have done. But that does not mean that a memo of appeal shall be treated likewise. However that may be, so far as a memo of appeal presented in a High Court is concerned, the matter is covered by the Full Bench decision of this Court in Bal Karan Rai's case, 12 ALL. 129: (1890 A. W. N. 39 F.B.). The view of the Full Bench in regard to this matter

[1]12 ALL. 129 : (1890 A. W. N. 39 F. B)

[2]1935 A.L.J. 681 : (AIR 1935 All 620 F.B)

has not been questioned in this Court or in any other Court in India. The changes in the language of Section 106, as compared to Section 582 of the old Code, and in the language of Order 7, Rule 11, as compared to Section 54 of the old Code, are not material so far as the matter under discussion is concerned.

13. This brings us to a consideration of Section 149, Civil Procedure Code. The Court-fees Act, before its amendment in U. P., did not provide for giving time for making good the deficiency in court-fee on documents which were insufficiently stamped when presented. Indeed, upon a strict construction of the rule contained in Sections 3, 4 and 6, no question of giving any such time could arise. There was, no doubt, provision in Sections 10, 11 and 12 for an enquiry into the correctness of the valuation of suits and appeals to be made after they had been filed in Court and for the manner in which the correct valuation was to be ascertained and deficiency to be realized. There was also provision in Section 28 for cases in which a document insufficiently stamped had been received or exhibited by mistake or inadvertence. But there was no provision for giving time for making good the deficiency when the deficiency was discovered initially at the time of the presentation of the document.

14. In Bal Karan Rai's case, 12 ALL. 129: (1890 A. W. N. 39 F.B.), it was held that the Court could not grant time for making good the deficiency when a memo of appeal insufficiently stamped was presented in the High Court, because under Section 4, Court-fees Act, the Court was bound not to receive such a document.

15. After the above decision the Legislature amended the Code of Civil Procedure of 1882 by adding Section 582A therein. By this section, the Court was directed to give reasonable time to make good the deficiency if a memo of appeal or an application for review of judgment was presented within the prescribed period of limitation but insufficiently stamped, provided that the insufficiency of the stamp was caused by a mistake on the part of the appellant or the applicant as to the amount of the requisite stamp. This section applied to memo of appeals presented in the High Court. The addition of this section removed the hardship caused by the Full Bench ruling.

16. When the Code of Civil Procedure of 1908 was enacted, Section 582A was replaced by Section 149. It extended the power of the Court which was conferred upon it under Section 582A in several respects. Section 149 applies not only to memo of appeals and applications for revisions but also to every other document; it empowers the Court to allow the deficiency in court-fee to be made good "at any stage;" and this power may be exercised even though the deficiency was not caused by a "mistake" of the party in calculating the amount of court-fee payable, but was caused otherwise. Section 149, however, does not make it obligatory on a Court to give time for the payment of deficiency in court-fee in every case. It requires a Court to act in its discretion."

17. Both the Code of Civil Procedure and the Court-fees Act deal with matters relating to procedure-one deals with the procedure to be followed when a suit or other proceeding is instituted, and the other deals with the amount of court-fee payable on documents presented in a suit or proceeding. They are in pari materia and it is a well recognized principle of interpretation that statutes in pari materia ought to be read as parts of one whole and as supplementing each other.

18. Section 149, Civil Procedure Code, has, therefore, to be read as a proviso to Section 4, Court-fees Act, in order to avoid contradiction between the two sections. As a result of reading the two sections together in this light, the law may be stated thus : (1) Ordinarily a document insufficiently stamped is not to be received, filed, exhibited or recorded in a Court. (2) When, however, an insufficiently stamped document is presented to the Court, the Court has to decide whether it will exercise its discretion in allowing time to the party presenting the document to make good the deficiency. (3) If it decides that time should not be granted, it will return the document as insufficiently stamped. (4) If it decides that time should be granted, it will give time to the party to make good the deficiency, and in order to enable the party to make good the deficiency within the time allowed, the Court will tentatively for that limited purpose receive the document. (5) If the deficiency is made good within the time fixed, the document is to be deemed to have been presented and received on the date on which it was originally filed. (6) If the deficiency is not so made good, the document is to be returned as insufficiently stamped by virtue of Section 4 of the Act.

19. Section 149 empowers the Court to grant time for making good the deficiency 'in its

discretion.' The discretion must be a judicial discretion and cannot be arbitrary. The phrase in its discretion" or "according to its discretion" has been the subject-matter of discussion in numerous cases. As observed by Lord Halsbury:

> "When it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion; Book's case, (1598) 5 Co. Rep. 99b at page 100a, according to law and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular:" *Sharp v. Wakefield*[3],

Jessel M. B. laid down :

> "Like every other power given to a Judge, the discretion of the Judge is to be exercised on judicial grounds not capriciously, but for substantial reasons:" *In re Taylor*[4],

20. It follows, therefore, that no amount of liberal construction of the words "in its discretion" can make the discretion exercisable as a matter of course because in that case it ceases to be a discretion and becomes a right of a party.

21. In question No. 3, referred to us, there is an assumption that there is a long-standing practice of this Court by which the words "in its discretion" have received a liberal interpretation. So far as members of this Bench are aware, no uniform practice in the interpretation of the aforesaid words has been followed in this Court. Some Judges have interpreted the expression very strictly while others have interpreted it too liberally. For a strict interpretation : vide *Brijbhukhan v. Tota Ram*[5], followed recently by a Bench of this

[3](1891) A. C. 173 at p. 179.
[4](1876) 4 Ch. 157 at p. 160.
[5]50 ALL. 980 : (AIR 1929 All 75)

Court in *Sri Krishna v. Saraswati,*[6]

22. In other Courts as well there does not seem to be any uniformity in construing the words "in its discretion." In *Jagat Ram v. Misar Kharaiti Ram*[7], the Bull Bench of the Lahore High Court was inclined to take a liberal view of Section 149. Dalip Singh with whom other Judges agreed observed :

> "It seems to me that the discretion conferred on the Court by Section 149, Civil Procedure Code, is normally expected to be exercised in favour of the litigant except in cases of contumacy or positive mala fides or reasons of similar kind. The question of bona fides in this connexion should be construed in the sense that the word is used in the General Clauses Act and not as used in the Limitation Act. A thing should be presumed to be done bona fide, if it is done honestly whether it is done negligently or not for the purposes of judging whether the discretion under Section 149 should or should not be exercised in

favour of the litigant."

But the Patna High Court, in *Ram Sahay Ram v. Lahshmi Narain Singh*[8], was inclined the other way. Chamier C.J. with whom Mullick J. agreed, observed :

> "In my opinion, Section 149 should not be construed in such a way as to nullify the express provisions of Section 4, Court-fees Act. When the amount of the court-fee payable is open to doubt or the amount of the fee cannot be ascertained by the Court till the record is received or it appears that the appellant has made an honest attempt to comply with the law, the Court may properly receive the appeal and allow time for the deficiency, if any, to be made good. In the cases before us the appellants have deliberately and to suit their own convenience paid on their appeals insufficient court-fees, in fact they have paid only a small fraction of the fees which they admit are payable by them. In such cases the Court is not, in my opinion, bound to receive the appeal and give the appellants time to make good the deficiency."

In the last mentioned case it was held that the difficulty in procuring court-fee stamps could be taken into consideration if an application under Section 5, Limitation Act were filed, but was no ground for presenting an insufficiently stamped memo of appeal.

23. In my opinion, where an insufficiently stamped document has been received, filed or used in a Court, through mistake or inadvertence, time will ordinarily be granted for making good the deficiency.

24. Where the deficiency is discovered at the time of the presentation of an insufficiently stamped document, no hard and fast rule can be laid down as to the circumstances in which the discretion under Section 149 will be exercised by a Court. Each case will have to be decided upon its own facts. All that can be laid down is that : (a) where insufficiency in court-fee is due to a bona fide mistake in calculating the amount payable, or to circumstances beyond the control of the party concerned, e. g. robbery, non-

[6]1950 A. L. J. 269 : (AIR 1950 All 499) [8] AIR 1917 Pat 26: (3 Pat. L. J. 74)
[7] AIR 1938 Lah 361 : (175 I. C. 699 F.B)

availability of court-fee stamps etc., the Court will, no doubt, use its discretion in favour of the litigant; and (b) where a litigant is able to pay full court-fee and yet presents a document insufficiently stamped either because he expects a compromise in the case or he wants to await the result of some other litigation, or because he negligently failed to bring sufficient money with him for paying the court-fee, or for any similar reason ; or where he is guilty of contumacy or mala fides, e. g. when he wants to harass the other side by continuing a litigation, time will not be granted.

25. There may be cases lying between these two extremes. But no general rule can be laid down about them and they will have to be decided according to their own circumstances.

26. The question whether poverty or inability to pay full court-fee at the time of filing an appeal be regarded as a sufficient ground for the exercise of the discretion of the Court in extending time under Section 149, can be answered only with reference to the facts of a particular case. The general rule was laid down in *Khatumannessa Bibi v. Durjyodhan Ray*[9], where it was held that mere inability to raise funds was not in itself a sufficient ground which would entitle the Court to exercise the discretion vested in it under Section 149. To this rule there are exceptions : In *Souresh Chandra v. Gosta Behari Dutt*[10], it was held that the rule that inability to procure funds was not a sufficient ground for extension of time under Section 149, Civil Procedure Code, for payment of deficit court-fees had reference to normal conditions, but was subject to an exception in cases where an acute famine was prevailing in the area where the appellant lived and where the sources of his income lay. Again, in *Sonba Keshao v. Jouquim Nasciments Rodrigues*[11], it was held :

> "Where the appellant has paid a substantial court-fee and is unable at the time to pay the balance, the Court has discretion to allow him further time."

27. It would thus appear that a mere allegation that a party was unable to pay court-fee on the date when he presented an insufficiently stamped document is not enough for the exercise of discretion in his favor. If, however, further circumstances are shown which satisfy the Court that the inability to pay court-fee has been caused by circumstances beyond the litigant's control, or if substantial amount of court-fee has been paid and a comparatively small amount remains to be paid thus showing the bona fides of the litigant, time may be extended.

28. My answers to the questions referred to us, therefore, are as follows :

> (1) No.
> (2) No.
> (3) In view of the fact that there is no long standing practice of the Court, the question does not arise.
> (4) Poverty or inability to pay full court-fee at the time of filing an appeal can be regarded as a sufficient ground for the exercise of the discretion of the Court in special circumstances but not otherwise.

Malik, C.J.

29. I fully agree with the answers proposed and have nothing to add.

Wanchoo, J.

30. I agree and have nothing to add.

P. L. Bhargava, J.

31. I also agree that the questions referred to the Full Bench be answered as proposed.

Mustaq Ahmad, J.

32. I concur.

33. By the Court. -The questions referred to the Full Bench are answered as follows :

1. No.
2. No.
3. In view of the fact that there is no long standing practice of the Court, the question does not arise.
4. Poverty or inability to pay full court-fee at the time of filing an appeal can be regarded as a sufficient ground for the exercise of the discretion of the Court in special circumstances but not otherwise.

Answers accordingly.

[10]40 C. W. N. 1294
[11] AIR 1938 Nag 322: (177 I. C. 505)