

# BOMBAY HIGH COURT

In Re Reference under section 5, Court-Fees

Vs.

State (Bombay)

Civil Ref. No. 16 of 1954

(Chagla, C.J.)

28.10.1954

## JUDGMENT

### **Chagla, C.J.**

1. This is a reference made to me under Section 5, Court-fees Act by the Taxing Officer, Appellate Side, of this Court. It raises a very interesting and important question as to whether a certain provision of Bombay Act 12 of 1954 is retrospective. The question that I have to decide is, what are the proper Court-fees to be paid by the appellant in F.A. No.5474 of 1954, by the appellant in F.A. No.6140 of 1954; and by the respondent in Cross-Objection No.6102 of 1954. As the matter in controversy is common to both the appeals and the cross-objections, one reference has been made in respect of all the three.

2. Now, these two First Appeals and the Cross-Objections arise out of suits filed for partition and these suits were filed prior to 1-4-1954, when Bombay Act 12 of 1954 came into force. When these suits were filed, the Court-fees paid were Rs. 18-12-0 and that was on assumption that suits for partition by a coparcener when he is in constructive possession of joint family property fall under Schedule II, Article 17 (vii), Court-fees Act. At one time this Court had taken the view that suits for partition fell under Section 7(v) and the Court-fees must be paid on an 'ad valorem' basis. But a different view was taken by a Full Bench of this Court in a decision in - '*Shankar Maruti v. Bhagwant Gunaji*', and after this decision the court-fees are payable on the basis that suits for partition, where the plaintiff is in constructive possession of joint family property, fall under Article 17 (vii) of Schedule II. Now, Act 12 of 1954 by Section 6 added a new sub-clause to Section 7 which is sub-cl: (vi-a). That sub-clause dealt with suits for partition and it provided:

"In suits for partition and separate possession of a share of joint family property or of joint property, or to enforce a right to a share in any property on the ground that it is joint family property or joint property whether or not the plaintiff is in actual or constructive

possession of the property of which he claims to be a coparcener or co-owner, according to the value of the share in respect of which the suit is instituted."

<sup>1</sup> AIR 1947 Bom 259 (FB)

Therefore, the effect of this amendment is to override the decision of this Court to which I have made reference, and it is not disputed that if this amendment applies to the appeals and cross-objections filed, then court-fees would have to be paid on the basis laid down in this amendment and not in accordance with the decision in - '*Shankar Maruti v. Bhagwant Gunaji*' .

3. Now, it is clear that if this amendment had not been passed, the appellants would have had to pay on the memorandum of appeal and on the cross-objections the court-fees of Rs. 18-12-0, the same court-fees which were paid on the plaint in the suit. If, on the other hand, the court-fees are to be calculated on the basis of the amendment, then the court-fees to be paid would be much more and the burden upon the litigant who wishes to come to this Court in appeal would be considerably increased. What is urged by Mr. Gokhale who appears for the respondent in the cross-objections and which is also the argument for the appellants in the two appeals is that the right of appeal or the right to cross-objection which the appellants or the respondent had was a substantive right which right cannot be taken away or impaired by any legislation passed subsequent to the filing of the suit unless the right is taken away or impaired expressly or by necessary intendment. Now, there are certain principles with regard to appeals which are beyond all controversy. The first and the most important principle is that a right of appeal is not a procedural right. It is a substantive right; it is a right vested in the litigant who files the suit. An appeal is a continuation of the suit, and when a litigant files a suit, he has the right to continue the suit up to the final Court of appeal, and that substantive or vested right cannot be taken away unless the Legislature expressly intends that it should be so taken away. As I shall presently point out, it is not merely that a right of appeal cannot be taken away by a procedural enactment which is not made expressly retrospective, but the right cannot even be impaired or imperilled, nor can new conditions be attached to the filing of the appeal, nor can a condition already existing be made more onerous or more stringent. Apart from the authorities, the position that arises for my consideration is whether in increasing the court-fees the Legislature has made it more difficult for the appellant to appeal to this Court and whether it has made a condition which already existed for the filing of the appeal more onerous and more stringent. Mr. Gokhale's contention on this point is that obviously it has become more difficult for a litigant to come to this Court by reason of the increase of the court-fees. When he filed the suit he knew that he could prosecute the appeal in the event of his losing in the suit by paying certain court-fees. It was on that assumption that he filed the suit and that right which he has to file the appeal on payment of smaller court-fees has been impaired by the Legislature increasing the amount of court-fees. As against that Mr. Desai on behalf of the Government contends that no litigant has a vested right in procedure and according to Mr. Desai the payment of court-fees is a matter of procedure and no litigant can say that he will only pay the court-fees which he was liable to pay at the date of the filing of the suit and he will not pay Court-fees which have been increased after the suit was filed and before

the appeal was preferred. It is the further contention of Mr. Desai that court-fees are payable at the date when the appeal is preferred and it is for the State to regulate what are the proper fees which a litigant shall pay when he prefers the appeal. It is the further contention of Mr. Desai that the payment of court-fees is not a condition for preferring the appeal, and in increasing the court-fees the state has neither imposed a new condition upon the appellant for preferring his appeal nor has it in any way made an existing condition more burdensome or onerous.

4. There is a decision of the Supreme Court which is very much to the point, and that decision is reported in - '*Hoosein Kasam Dada (India) Ltd. v. The State of Madhya Pradesh*<sup>2</sup>', In that case under Section 22 (1), Central Provinces and Berar Sales Tax Act, 1947, it was provided that no appeal against an order of assessment should be entertained by the prescribed authority unless it was satisfied that such amount of tax as the appellant might admit to be due from him had been paid. This section was amended on 25-11-1949, and the amended section provided that no appeal should be admitted by the said authority unless such appeal was accompanied by a satisfactory proof of the payment of the tax in respect of which the appeal had been preferred. On 28-11-1947, the appellant submitted a return to the Sales Tax Officer who referred the case to the Assistant Commissioner as the turnover exceeded 2 lacs and the Assistant Commissioner made the assessment on 8-4-1950. The appellant preferred an appeal on 10-5-1950 without depositing the amount of tax in respect of which he had appealed. The Board of Revenue rejected the appeal. The Supreme Court held that the appellant had a vested right to appeal when the proceedings were initiated, i.e., in 1947, and his right to appeal was governed by the law as it existed on that date, and therefore his appeal could not be rejected for non-payment of the tax in respect of which the appeal was preferred. The Supreme Court in its judgment first refers to the well known cases which lay down that the right of appeal is not a procedural right but a vested or substantive right and that to disturb an existing right of procedure is not a mere alteration in procedure. Therefore, such a vested right cannot be taken away except by express enactment or necessary intendment. It will be noticed that although the Supreme Court refers to cases where the right of appeal was taken away, in the case before the Supreme Court the right to appeal was not taken away, but an additional condition was imposed before the right of appeal could be exercised, and at p.224, the Supreme Court deals with the argument on behalf of the State of Madhya Pradesh that the requirement as to deposit of the amount of the assessed costs does not affect the right of appeal itself which still remains intact, but only introduces a new matter of procedure, and the answer given by the Supreme Court is that the onerous condition may in a given case prevent the exercise of the right of appeal, for the assessee may not be in a position to find the necessary money in time, and the Supreme Court refers with approval to the decision of the Calcutta High Court in - '*Nagendra Nath Bose v. Mon Mohan Singha*<sup>3</sup>', In that case a judgment-debtor applied to set aside a sale which was held in execution of the decree against him. The application was dismissed and he preferred an appeal. Before he had preferred the appeal but after the decision of the Court refusing to set aside the sale, a new provision of the law had come into force and that was under the Bengal Tenancy Act, and the provision was that before an appeal could be preferred the amount recoverable in execution of the decree had to be deposited, and the Calcutta High Court held that this new provision could not affect the right of

the judgment-debtor to appeal under the old law as his application had been made before the amendment had come into force, and this is what Mitter, J. at p.101 of that judgment says:

".....that right was unhampered by any restriction of the kind now imposed by Section 174 (5) (Proviso of the Bengal Tenancy Act). The Court was bound to admit the appeal whether appellant deposited the amount recoverable in execution of the decree or not. By requiring such deposit as a condition precedent to the admission of the appeal, a new restriction has been put on the right of appeal, the

<sup>2</sup> AIR 1953 SC 221

<sup>3</sup> AIR 1931 Cal 100

admission of which is now hedged in with a condition."

5. Now, in my opinion, it is difficult to see why the principle of this judgment does not also apply to the case before me. If in the case before the Supreme Court the assessee might not have been in a position to find the necessary money required for the deposit provided by the amendment of the Central Provinces and Berar Sales Tax Act, similarly here the appellant may not be in a position to find the additional court-fees required by the amendment of the court-fees Act. It may be said that in such a case he can file an appeal 'in forma pauperis'. But the right of a pauper to file an appeal is not the same as the right of a litigant who files the appeal in his own right and without being declared a pauper. Mr. Desai has attempted to distinguish this case by pointing out that Section 22 (1), Central Provinces and Berar Sales Tax Act itself provided for a right of appeal and it was that law which was amended by imposing a condition upon the right of appeal, and Mr. Desai says that in the case before me the right of appeal is provided by the Civil Procedure Code, that right has not been in any way affected by an amendment of the Civil Procedure Code and it is the fiscal statute which has increased the court-fees payable by the appellant. Now, in the first place, I see no principle which can support the distinction between the right of appeal being taken away or impaired by the very law which confers the right of appeal and the case where the right of appeal is taken away or impaired by a different law. As a matter of fact, in the Calcutta case on which the Supreme Court relied, the right of appeal was given by the Civil Procedure Code, and it was impaired by a different law, viz., the Bengal Tenancy Act. It is true as Mr. Desai says that the Supreme Court was not dealing with a fiscal statute. It is equally true that all the cases referred to in the judgment are not cases of the amendment of the Court-fees Act, but what I have to try and do is to deduce from the judgment of the Supreme Court the principle on which that judgment was given, and in my opinion the clear principle that emerges is that if a litigant has a right of appeal when he files a suit, that right of appeal is a substantive right which he enjoys and that right can neither be taken away nor made so onerous as to make it difficult for him to exercise it under certain circumstances. If the judgment of the Supreme Court was confined to a case of depriving a litigant of the right of appeal, Mr. Desai would be right that the present case does not deprive him of the right of appeal. He can pay the higher Court-fees and prosecute his appeal. But the very condition that he has got to pay higher Court-fees in order to prosecute the appeal clearly shows that the right of appeal which he had when he filed the suit is not the same right which he would now be exercising under the amended Court-fees Act. The

right which he had was a right to come to this Court on payment of a certain amount of Court-fees. The right which he now enjoys under the amended Court-fees Act is that he can only come to this Court provided he takes upon himself a heavier burden, viz., the payment of higher Court-fees.

6. There is a direct decision on the Court-fees Act itself and that is the judgment of the Madras High Court in - '*R.M. Seshadri v. Province of Madras*<sup>4</sup>', In that case a certain suit was filed on the Original Side of the Madras High Court for a declaration that the termination of the service of the plaintiff as a member of the Indian Civil Service was 'ultra vires', and the plaintiff paid a Court-fee of Rs. 935 on the plaint. The suit was dismissed by the trial Judge on March 25, 1952. On 20-8-1952, the plaintiff preferred an appeal and he paid the same Court-fee on the memorandum of appeal viz., Rs. 935. The High Court, before the appeal was preferred, amended the High Court Fees Rules by

<sup>4</sup> AIR 1954 Mad 543

providing that an appellant shall pay the same fees as are payable in appeals from decrees and orders of a District Court. This rule came into force on 27-6-1950, and according to this rule the Court-fee payable by the appellant was Rs. 2832-7-0 as against Rs. 935 under the rules before amendment, and the question was whether the plaintiff was liable to pay additional Court-fees or Court-fees of Rs. 935. The Madras High Court held that the amendment was not retrospective and there was no obligation on the appellant to pay the higher Court-fees, and Subha Rao J., who delivered the judgment of the Court, says this (p.548):

".....But can it be said that the amendment is such that it places a substantial restriction on the plaintiff's right of appeal? Under the rules as they stood at the time when the suit was filed, the court fee payable was only Rs. 935. Under the amended rule the court-fee is Rs. 2832-7-0 i.e., about three times the original rate. This sudden increase in the burden could not have been anticipated by the plaintiff. Had he known that he would be asked to pay such heavy court fee for preferring an appeal it is problematical whether he would have filed the suit at all. At the time he filed the suit he must have been under the impression that with the payment of an additional court fee of Rs. 935 he could pursue the suit to its appellate stage.

The right of appeal that vested in him at the time when he instituted the suit was certainly and seriously curtailed by the unexpected heavy burden thrown on the appellant. It is a well established principle that an Act or rule imposing a burden has always to be construed strictly. On a fair construction of the language used in the rule we cannot hold that the amendment is retrospective in operation. The court fee prescribed thereby cannot apply to the appeal preferred by the plaintiff." Now this observation applies fully to the facts of this case and I see no reason why I should take a different view from the view taken by the Madras High Court when it was dealing with a question of increased Court-fees. It should be noted that the Madras High Court considered the judgment of the Supreme Court and applied the principle to a case where Court-

fee had been increased and it imposed an additional burden upon the litigant.

7. Mr. Desai has drawn my attention to an earlier judgment of the Madras High Court, which is a judgment of a single Judge, Krishnaswami Ayyangar J., reported in - 'In re Ghosh Beevi', AIR 1944 Madras 406. It is true that in that case the learned Judge took the view that the appellant was liable to pay the Court-fees on the memorandum of appeal according to the rate prevailing at the date when the appeal was preferred, although at the date when the suit was filed the rate was different, and the learned Judge takes the view that with regard to Court-fee a litigant has no vested right. This judgment has been expressly dissented from in the later judgment of the Madras High Court, to which reference has just been made.

8. Mr. Desai also relied on judgment of the Allahabad High Court reported in - '*Mohri Kunwar v. Keshri Chandra*'<sup>5</sup>, In that case what the Allahabad High Court had to consider was whether the amendment of the Court-fees Act, by which a right of appeal was created against the decision of the Court as to what were the proper Court-fees payable, was a procedural law or it affected any vested right of the parties, and what the Allahabad High

<sup>5</sup> AIR 1941 All 298

Court held was that the right of appeal given under the amended section was a part of the procedure relating to the determination of Court-fees which is purely a matter in which the Crown is interested and in which neither the plaintiff nor the defendant has such a vested right as cannot be affected by a subsequent enactment. Now, this decision really does not help me in any way in deciding the point before me. But what Mr. Desai relies on is the observation in the judgment at p. 300 and the observation is to the following effect:

".....No suitor has a vested right to insist that during the pendency of a litigation which a suitor has started the enactment relating to court fee shall not be changed and the fee livable shall not be increased or reduced either with regard to future applications or with regard to future appeals and he would be entitled to carry on proceedings on the basis of the law as it stood when the plaint was filed even though the law is different when he comes to file an appeal or to make an application."

This observation undoubtedly supports Mr. Desai, but it is equally clear that the observation is 'obiter' and as against this 'obiter' I have a carefully considered judgment of the Madras High Court, to which I have made reference, which has taken the contrary view.

9. Mr. Desai also relied on a passage in Maxwell on Interpretation of Statutes (p.225):

".....He has only the right of prosecution or defense in the manner prescribed for the time being, by or for the court in which he sues, and if an Act of Parliament alters that mode of procedure, he has no other right than to proceed according to the altered mode."

Now, there is no dispute as to the correctness of this statement of the law, but the question is whether the payment of Court-fees is a matter of procedure which regulates the proceedings in Court. In my opinion, if Court-fees impose a heavier burden upon the appellant than before, the legislation which imposes this heavier burden is not a legislation that regulates the proceedings of the Court, but interferes with the substantive right of the party with regard to his appeal.

10. Mr. Desai has also contended that it is always open to the Legislature to increase the Court-fees and to permit an appeal only on the payment of such fees as the Legislature thinks proper. Mr. Desai says that it is not open to any litigant to say that he will come to this Court in appeal and yet not pay the Court-fees which the Legislature thinks he should pay before he has a right to prosecute his appeal. Now, nobody disputes the power of the Legislature to impose any tax or to increase or enhance any particular tax. But what I have to consider is whether in enacting Section 6 and incorporating a new Sub-Clause (vi-a) in Section 7, Court-fees Act the Legislature intended that the higher tax should be paid not only by a litigant who files the suit after the amendment came into force, but also by a litigant who had already filed a suit and who has the right to prosecute the suit till the final stage of appeal. There was nothing to prevent the Legislature from giving retrospective effect to this amendment, but in the absence of any such clear words giving retrospective effect to the amendment, I must assume that the Legislature did not intend by this amendment to affect the vested right of appeal. Therefore, in deciding as I am doing I do not suggest for a moment that the Legislature has not the competence in a properly drafted legislation to compel an appellant to pay the higher Court-fees even though the suit from which the appeal arises was filed before the amendment came into force.

11. My attention is drawn to Section 6 of the Court-fees Act and it is pointed out that there is a statutory obligation upon the officer of the Court not to admit a memorandum of appeal unless the proper fees under the Court-fees Act have been paid, and Mr. Desai says that the duty of the officer is to determine what is the Court-fee payable under the Court-fees Act as amended upto that date, and unless such fee is paid, he must reject the memorandum of appeal. In my opinion that argument really begs the question. What the officer has got to determine is what is the proper fee under Section 6, and if the proper fee is the fee under the old law and not the new law, then that is the fee that he has to charge.

A similar argument was also advanced before the Supreme Court and the Supreme Court points out that as the old law continued to exist for the purpose of supporting the pre-existing right of appeal, that old law must govern the exercise or enforcement of that right of appeal, and there can then be no question of the amended provision preventing the exercise of the right of appeal. Therefore, the unamended Court-fees Act continues to exist for the purpose of supporting the right of appeal of the appellant which existed prior to the coming into force of the new law. I must frankly confess that there is force in Mr. Desai's contention that the amendment of the Court-fees Act must be looked at from a different point of view from the amendment of the provision of the law which confers a right of appeal. But if there is any doubt in my mind as to how I should decide, that doubt must be resolved in favour of the tax payer, and in coming to the

conclusion that I do I am further strengthened by the view taken by the Madras High Court. As the only considered view on this question is that of the Madras High Court and as no other decision has been pointed out to me which is directly in point, as I said before, I see no reason why I should take a different view from that taken by the learned Judges of the Madras High Court, especially as that view supports the tax payer as against the claim of the revenue.

12. There is one further point before I finish. With respect to the learned Taxing Officer, I do not see the distinction that he has drawn between the changing of the original classification of suits and the increase of Court-fees in the same classification. The view taken by the Taxing Officer is that although the Court-fees cannot be imposed under the amended Section 7, the higher Court-fees should be paid under Schedule II, Article 17(vii) because it may be pointed out that by Act 12 of 1954 the Court-fees in respect of a memorandum of appeal falling under Article 17 (vii) of Schedule II has been raised from Rs. 18-8-0 to Rs. 30, and the view taken by the Taxing Officer is that the appellants and the respondent should pay court-fees not at the rate of Rs. 18-8-0 but at the rate of Rs. 30.

Now, if I am right in the view that I am taking, then to make the appellants pay Rs. 30 instead of Rs. 18-8-0 is casting a heavier burden upon them and that cannot be permitted on the same ground on which they cannot be made liable to pay Court-fees under the amendment to Section 7 of the Court-fees Act.

13. Therefore, I hold that the proper Court-fees which the appellants and the respondent are liable to pay are the same Court-fees as they were liable to pay on appeal when the respective suits were filed, and that, it is not disputed, is Rs. 18-12-0. No order as to costs.

Answer accordingly.