BOMBAY HIGH COURT

Sawaldas Madhavdas

Vs.

Arati Cotton Mills Ltd

O.C.J. Appeals Nos.89 and 96 of 1954

(Chagla, C.J. and Dixit, J.)

24.11.1954

JUDGMENT

Chagla, C.J.

1.These are two applications which claim a refund of court-fees paid on appeals filed on the Original Side of this Court and the refund is claimed under Section 151, Civil Procedure Code on the ground that the higher court-fees were paid by mistake or inadvertence. It is also stated in these applications that the applicants were not liable in law to pay the higher court-fees which in fact they have paid.

2. Now, the suits from which these appeals arise were filed before 1-4-1954. In both cases the appeals are by the defendants and the court-fees which the appellants paid were the court-fees regulated by the amendment to the Court-fees Act which came into force on 1-4-1954. As it is well known, on that date the whole system of charging court-fees in the High Court on the Original Side was altered and instead of a fixed fee to be payable on the plaint 'ad valorem' fees became livable as in the districts. The contention of the applicants is that at the date when the suits were filed the court-fee livable was a fixed fee. At that date they had a vested right of appeal and that vested right has been impaired by a higher burden being thrown upon them for preferring an appeal to this Court. It is urged that if they had paid the court-fees on the basis of the fees payable when the suit was filed, the amount would have been much less than what it is today, and therefore in increasing the burden the right of appeal has been impaired. It is, therefore, urged that the Court-fees Act should not be given a retrospective effect and the amended Court-fees Act should only apply to appeals which are preferred in suits filed after 1-4-1954.

3. An identical question came up for consideration before me in 'Reference under Section 5, Court-fees. Act AIR 1955 Bombay 287.' That question arose on the Appellate Side, but the

contentions there raised by the appellants and the manner in which the contentions were sought to be resisted are the same as the contentions raised here by the applicants and the manner in which those contentions have been sought to be resisted by the Advocate General on behalf of the State. In that case a partition suit was filed in the district and at that time a certain fixed amount was payable on the plaint in a partition suit. After the decree was passed in the partition suit, the amended Court-fees Act of 1-4-1954, also increased the court-fees payable on a partition suit and when the appellant preferred the appeal here the new Act was in force and therefore the question that arose was whether the appellants were liable to pay increased court-fees on the appeal in accordance with the amendment or they were only liable to pay the court-fees which they would have been liable to pay if the court-fees had been payable under the old law. It will be noticed that the question raised in that Civil Reference and the question raised in these applications is identical. In both cases the question was whether a retrospective effect should be given to the amended Court-fees Act and also whether the additional court-fees constituted a burden upon the appellant which impaired his right of appeal.

4. Now, we have heard the elaborate arguments of the Advocate General and we are of the opinion that the decision given in 'Reference under Section 5, Court-fees Act (A)' should stand. We will only refer to two or three new authorities that have been cited by the Advocate-General. It is unnecessary in our opinion to set out in full all the arguments and our views on those arguments because they are ail to be found in the judgment in 'Reference under Section 5, Court-fees Act (A)'.

5. The first decision to which the Advocate-General has referred is a decision of this High Court in 'Civil Reference No.2 of 1886', (1886) Bom P.J. 25 (B). It is a judgment of Sir Charles Sargent and Mr. Justice Nanabhai Haridas and a judgment which undoubtedly is entitled to the highest respect. There a notification was issued in 1880 by which Government under Section 35 remitted the fees payable on plaints under Section 16 of the Dekkhan Agriculturists' Relief Act. A subsequent notification of 1881 also remitted the fees payable on documents filed in suits under the Dekkhan Agriculturists' Relief Act.
Then came the notification which came up for consideration which was in 1885 and that notification provided that the court-fees in respect of both plaints and documents should be reduced to one half. An appeal was filed after this notification came into force and a reference was made by the District Judge of Satara to which this notification was applied as to whether the court-fees payable on this appeal should be governed by the notification of 1885 or whether it should be governed by the earlier notification, inasmuch as when the suit was filed from which this appeal arose, the earlier notification was in operation, and the learned Chief Justice and Nanabhai Haridas J. held that the object of the notification of 1885 was to deprive the district of Satara of the benefit conferred by the earlier notification of 1881, and had there been any intention to reserve the benefit of that notification to documents in suits preferred before 1-12-1885, when the notification came into force, they would have expected to find a distinct reservation to that effect. Now, the Advocate-General argues that this decision is directly in point,

and although at the date when the suit was filed the plaintiff would have had the right of appeal without paying any court-fees at all, when he actually came to file the appeal he became liable to pay half the court-fees, and the Court decided that his liability must be adjudicated as at the date when the appeal was preferred and not at the date when the suit was filed. Now, the very simple answer to this decision is that this was a case of remission of court-fees under Section 35 of the Court-fees Act. It was a concession granted to litigant or a benefit conferred upon a litigant and it cannot be suggested that a litigant has any right to concession or a benefit. Section 35 itself provides that any order with regard to remission or reduction of court-fees may be cancelled by Government, and therefore all that happened was that a benefit or a concession which was given at a particular time was cancelled at a later date and therefore the litigant could not say that he had a right to that concession when he filed the suit. Our High Court was not considering a case of the payment of court-fees which is a legal obligation cast upon the litigant, and the question of, increasing that legal obligation by additional court-fees.

6. The next judgment undoubtedly is more to the point and that is an earlier judgment of the Madras High Court reported in 'Madras High Court Rulings, Appellate Side', 5 Mad H.C.R. XLIV .

7. The question that was considered in that case was the valuing of an appeal preferred since the introduction of Act VII of 1870 (Court-fees Act), the original suit from which the appeal was preferred having been filed under Act XXVI of 1867, and the High Court of Madras in a very brief judgment say (p. xliv):

> "The High Court are of opinion that the valuation of an appeal must be according to the Act in force at the time of its presentation, and that the original valuation under a law obsolete at the period of appeal can have no influence on the decision."

With very great respect, we are unable to agree with this opinion. It is not a reasoned decision, and it seems to us that it is in conflict with the decision of the Supreme Court which is referred to in 'Reference under Section 5, Court-fees Act', (A). Dealing with what the Madras High Court calls the obsolete law, the Supreme Court points out that the old law continued to exist for the purpose of supporting the pre-existing right of appeal and the old law must govern the exercise or enforcement of that right of appeal, and relying on that observation of the Supreme Court - *('Hoosein Kasam Dada (India) Ltd. v. The State of Madhya Pradesh*[1]*'),* I have said in this judgment that (p. 185):

> ".....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."

8. The third judgment referred to by the Advocate-General is a judgment again of the Madras

High Court in *'Punya Nahako v. King Emperor*[2]*',* The question that Odgers J. and Wallace J. had to consider in that case was: What were the proper court-fees payable on a petition for review of a decree? and the court-fees payable under Schedule I, Articles 4 and 5 of the Court-fees Act were either the whole or half of the fees livable on the plaint or memorandum of appeal. Now, when the appeal was filed certain court-fees were levied, when the application for review was made the court-fees had been increased, and the question was whether on the application for review the court-fees should be on the basis of the court-fees payable on the appeal when the appeal was filed or payable on the appeal at the date when the application for review was filed, and Wallace J. in his judgment points out at p. 361 that the court-fee will be the court-fee payable as if, on the date when the review application was put in, the applicant was filing a plaint or memorandum of appeal for the same relief, i.e., in the present case the Court-fee leviable will be the Court-fee which falls to be levied under the amended Court-fees Act calculated as if the application for review were a plaint or memorandum of appeal for the relief sought for. In our opinion there is a vital distinction between an application for

[1] AlR 1953 SC 221

[2] AIR 1927 Mad 360

review and an appeal. An appeal is a vested right and that right is a substantive right.

There is no vested right in a litigant to prefer an application for review, and therefore when an application for review is filed, it is an independent proceeding which is initiated by the litigant and therefore the Court-fees which are payable on an application for review are the Court-fees which are livable in law at the date when that application for review is filed.

9. The question has also been discussed as to what is the position of a defendant who files an appeal against a decree which has been passed against him. It was suggested by the Advocate General that whatever the position of the plaintiff may be, the position of the defendant is different. According to the Advocate General the right of the defendant to prefer an appeal only arises when the decree is passed. Now, in both the applications decrees were passed after 1-4-1954, and therefore the Advocate General contends that at least in these two cases the appellants are liable to pay Court-fees leviable on 1-4-1954. In our opinion there is no distinction between the case of a plaintiff and the case of a defendant. The right of appeal vests both in the plaintiff and in the defendant at the date when the proceedings are initiated or the suit is filed. Whether the right of appeal is exercisable by the plaintiff or the defendant would depend upon the decision of the suit, but the right accrues or arises at the date of the suit, and therefore although the written statement might be filed after April 1, 1954, and even though the decree might be passed after 1-4-1954, the relevant date to consider is when the suit was filed, out of which the appeal arises. The position with regard to a set-off or a counterclaim does not present any difficulty. A set-off or counter-claim must be looked upon as a fresh suit and the Court-fee leviable upon a set off or counter-claim would be such as was livable at the date when the set off or counter-claim was filed, and an appeal arising out of the set-off or the counter-claim would also be liable to pay Court-fees which were livable at the date when the set-off or counter-claim was filed. It is unnecessary to point out that the right of appeal in respect of a set-off or counter-claim would not be regulated by the date of the suit. The setoff or counter-claim must be looked upon as a fresh

suit. Therefore no difficulty arises with regard to a question of set-off or counter-claim.

10. The result is that in both these applications we will make an order under Section 151 and direct that any excess paid by the appellants over and above the Court-fees payable on these appeals when the respective suits from which these appeals were filed should be refunded. No order as to costs of these applications. The excess Court-fees paid not to be refunded till 10-1-1955.

Applications allowed.