BOMBAY HIGH COURT

Central Provinces Syndicate (Private) Ltd

Vs.

Commissioner of Income-tax

I.T. Appln. No.30 of 1959 with I.T. Applns. Nos.1/60, 6/60, 7/60, 14/60 15/60, 16/60, 17/60, 19/60 20/60, 21/60, 22/60, 23/60, 24/60, 25/60, 26/60, 27/60, 28/60, 2/61 4/61, 5/61, 6/61 and 7/61

(Tambe and V.S. Desai, JJ.)

09.03.1961

JUDGMENT

V.S. Desai, J.

1. This is a group of Income-tax applications, requesting this Court to direct the Income-tax Appellate Tribunal to draw up a statement of the case and to refer to this Court certain specified questions of law. In some of these applications, the aforesaid relief is claimed only under Section 66(2) of the Indian Income-tax Act, while in others, the said relief is also claimed in the alternative by an appropriate writ or direction under Article 226 of the Constitution. All these applications have been filed after the Bombay Court-fees Act of 1959 (Bombay Act XXXVI of 1959) came into force on the 1st August 1959. Article 16 of the First Schedule of the said Act, hereinafter called the New Act has prescribed a fee to be paid on applications by the assessee under Section 66 of the Indian Income-tax Act. Article 1(f) of the Second Schedule of the New Act has provided for fees to be paid on petitions or applications under Section 45 of the Specific Relief Act, under Articles 226 and 227 of the Constitution and for other petitions and applications not otherwise provided for in the Act. In all these applications, contentions are raised as to the constitutional validity of the provisions of Article 16 of the First Schedule in the new Act, and also as to the applicability of the new Act to the present, applications. In view of the importance of the questions raised, and, in view of the fact that these questions are likely to arise in a large number of other applications also, we have set these applications for hearing only on those contentions. As we are not concerned with the merits of all these cases at the present stage, it is not necessary to state the fact out of which the applications arise. It may, however, be mentioned that the assessment proceedings out of which these applications arise had commenced a long time before the new Act was enacted and came into force.

2. In view of the contentions raised, notices were issued to the Advocate-General in some of these applications. The learned Advocate General has appeared and has requested that the State of Maharashtra should be added as party to these applications, and the affidavit which the State wants to file should be taken on record in reply to the contentions raised in the petition with which the State is concerned. In the other applications, in which notices have not been issued to the Advocate General, so far, the petitioners have undertaken to have such notices issued, and the learned Advocate General has stated that he would waive the service of the notices and appear in those cases also. He has made a request that in those matters also the State of Maharashtra should be made a party. It is also agreed that the affidavit which has been filed on behalf of the State of Maharashtra in some of the matters should be read as the affidavit in all the other matters also. During the course of the hearing, an affidavit n rejoinder has been filed by the petitioners, and a surrejoinder by the State. We have been requested to take these affidavits on records. We have granted all these requests and made orders accordingly.

3. Under the Income-tax Act, an advisory jurisdiction has been conferred on the High Court in connection with questions of law arising on certain orders passed by the Appellate Tribunal. Thus, where the Appellate Tribunal hears and decides an appeal which is preferred to it under Section 33(1) of the Income-tax Act, and passes an order and communicates the same to the assessee and the Commissioner under Section 33(4) of the Act, both the assessee and the Commissioner are entitled, under Section 66, sub-section (1), to make an application to the Appellate Tribunal, within 60 days of the date on which notice of the order under section 33(4) is served on them, requiring the Appellate Tribunal to refer to the High Court any question of law arising out of such order, and where such questions of law exist, the Appellate Tribunal is bound to draw up a statement of the case and refer it to the High Court Under the provisions of this sub-section, when the application is at the instance of the assessee, it has got to be accompanied by a fee of one hundred rupees. If the Appellate Tribunal takes the view that no questions of law arise out of its order, and refuses to state the case and the assesses is content with this refusal, he is entitled to withdraw his application, in which case, the fee of one hundred rupees paid by him is refunded to him. Under Section 66 sub-sec.(2), if the assessee or the Commissioner, as the case may be, is not satisfied with the Tribunal's refusal to state the case to the High Court, he is entitled to make an application to the High Court, requesting the High Court to direct the Tribunal to draw up the case and refer it to the High Court, and, if on such application, the High Court is not satisfied of the correctness of the decision of the Appellate Tribunal in refusing to state the case it may require the Appellate Tribunal to state the case and to refer it to the High Court. Section 66, sub-section (3) provides for cases where the Tribunal rejects applications made to it under Section 66(1) on the ground that they are time-barred. In such cases, the assessee or the Commissioner, as the case may be, is entitled to apply to the High Court and if the High Court ii not satisfied with the correctness of the Appellate Tribunal's decision as to limitation, it may require the Appellate Tribunal to treat the application as made within time and deal further with it. It will thus be seen that the applications which the assessee or the

Commissioner can make to the High Court under Section 66 of the Indian Income-tax Act are the applications contemplated by the provisions of Section 66(2) and Section 66(3). In the applications under section 66(2), the only question involved is whether any question of law arises on the order passed by the Tribunal under Section 33(4) of the Act and the only relief claimed is that the Tribunal should be directed to draw up the statement of case and refer it to the High Court. In the applications under Section 60(3), the only question involved is whether the Tribunal was right or wrong in rejecting the application on the ground of limitation, and the relief claimed is that the Tribunal should be directed to deal with the application treating it as filed within time. The merits of the questions of law or determination of those questions are not involved in dealing with the applications under Section 66(2) or section 66(3). Under the Court-fees Act of 1870, which applied to all applications under section 66(2) or Section 66(3) of the Income-tax Act, until the said Act was repealed by the new Court-fees Act on the 1st August 1959, all such applications fell under Article 1(d) of the Second Schedule in the Court-fees Act of 1870. That Article was as follows:

1. Application or Petition "(d) When presented to a High Court

(i) under section 45 of the Specific Relief Act, 1877 or for directions, orders or writs under Article 226 of the Constitution.....Ten Rupees
(ii) in any other case.....Five rupees.

These applications fell under item (ii) of Article 1(d), namely, "in any other case" and were, therefore, liable to pay a Court-fee of only five rupees. Under the new Act the applications by an assessee under Section 66 of the Indian Income-tax Act are governed by Article 16 of the First Schedule. At the material time when these applications were filed the said article read as follows:

1	2	3
"16.	Application or petition made by any assessee to the High Court under Section 66 of the Indian Income-tax Act, 1922.	One half of ad valorem fee leviable on the amount in dispute (namely, the difference between the amount, actually assessed and the amount admitted by the assessee as assessable), subject to the minimum fee of fifty rupees."

By a subsequent amendment, the portion of the article in the third column was amended, and the said amended article now reads as follows:

1	2	3
"16.	Application or petition made by any assessee to the High Court	One half of ad valorem fee leviable on the amount in dispute (namely, the difference between the amount of

under Section 66 of the Indian Income-tax Act, 1922.	tax actually assessed and the amount of tax admitted by the assessee as payable by him), subject to the minimum fee of fifty rupees."

The provision corresponding to Article 1(d) in the Second Schedule of the old Act is now to be found in the Article 1(f) of the Second Schedule in the New Act. The said provision is the new Act reads as follows:

* * * * * *

1. Application or Petition

"(f) When presented to the High Court-

(i) under section 45 of the Specific Relief Act, 1877 or for directions, orders or writs under Article 226 of the Constitution for any purpose other than the enforcement of the fundamental rights conferred by Part III thereof;	Fifty rupees.
(ii) for directions, orders or writs under Article 226 for the enforcement of any of the fundamental rights conferred by Part III of the Constitution or for the exercise of its jurisdiction under Article 227 thereof;	Twenty rupees.
(iii) in any other case not otherwise provided for by this Act.	Five rupees.

Under the new Act, therefore, applications by the assessee under section 66 of the Income-tax Act have been separated from the other applications with which they were formerly treated under the old Court-fees Act, and have been separately provided for under Article 16 in the Ad Valorem Schedule, and made liable to pay Court-fee ad valorem on the amount in dispute subject to the minimum fee of fifty rupees. There can be no doubt whatever that the burden of court-fee thrown on these applications under the new Act is considerably greater than what it was under the old Act.

4. It is contended for the petitioners that the levy imposed by Article 16 is not a fee, but in reality a tax, and therefore, beyond the competence of the State Legislature. The next contention urged is that the said levy is discriminatory and offends against Article 14 of the Constitution. The third contention is that the right of the petitioners to make an application to the High Court under Section 66 of the Income Tax Act is a substantive right which is vested in them when the assessment proceedings, out of which the application arises is commenced. This right of the petitioners cannot foe taken away and cannot be impaired or imperiled, nor can it be made more stringent or more onerous by a subsequent legislation unless the said legislation stated so either in express words or by necessary intendment. The new Court-fees Act does not do so either expressly or by necessary intendment. The present applications of the petitioners, therefore, must be governed by the law relating to Court-fees which existed at the time when the assessment proceedings were first commenced and their vested rights came into existence. The provisions of the new Act, therefore, cannot be applied to the present petitions and the petitioners will be

entitled to pay the same court-fee as was required to be paid by them under the Old Court-fees Act. The last contention raised is as to the correct interpretation of the entry as it stood at the time when the applications were filed.

5. As to the first contention, it is pointed out that the only entry in the Legislative List of the State under which the State Legislature may have power to make law levying court-fee is entry No.3 in List II, in the Seventh Schedule in the Constitution. The only other entry relating to fees in the State list is entry No.66, but it does not include fees taken in any court. The levy cannot be justified under any other entry of this list. There is no entry even in List III, under which the levy can fall and entry No.47 in the III list also does not include fees taken in any Court. Now, entry No.8 in list II only empowers the levying of a fee. In other words, the levy imposed under this entry must have the necessary characteristics of a fee and cannot be a tax. If the present imposition has not got the characteristics of a fee, but has, on the other hand, all the characteristics of a tax, it would be a tax and not a fee, and cannot therefore be justified under entry No.3 in List II. It is contended that the Constitution has made a clear distinction between a tax and a fee, and when the Constitution permits the levying of fees, it cannot he said that it has permitted the levy of a tax. If the present levy, therefore, is a tax, it can fall only under entry 96 in list I in Schedule VII or under Article 248(1) of the Constitution. But in either of these cases, it will be only within the competence of the Parliament to impose such a levy, and not within the competence of the State Legislature.

6. In support of the submission that the levy in the present case is a tax and not a fee reliance is placed on the distinction between a tee and a tax pointed out by the Supreme Court in some of its decisions, and the tests which these decisions have laid down for determining whether a given levy is a tax or a fee. The first of these decisions is in the case of *Commr., Hindu Religious Endowment, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[1], In that case, the Supreme Court was considering the constitutional validity of Section 76 of the Madras Hindu. Religious and Charitable Endowments Act, which had authorised the levy of an annual contribution on all religious institutions, the maximum of which was fixed at five per cent of the income derived by them. The enactment in that case fell under entries 10 and 28 of List III, and the fee levied was under entry 47 in List III. A contention was raised before Their Lordships that the levy imposed by section 76 was not a fee, but a tax, and therefore, beyond the competence of the State Legislature. In dealing with that contention, Their Lordships dealt with the difference between a tax and a fee. observed as follows:

> "A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered. This definition brings out the essential characteristics of a tax as distinguishable from other forms of imposition which in a general sense, are included within it. The essence of taxation is compulsion, that is to say, it is imposed under statutory power without the tax-payer's consent and the payment is enforced by law. The second characteristic of tax is that it is an imposition

made for public purpose without reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected, forms part of the public revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is no element of 'quid pro quo' between the tax payer and the public authority. Another feature of taxation is that as it is a part of the common burden, the quantum of imposition upon the tax-payer depends generally upon his capacity to pay".

As to fees, Their Lordships observed:

> "'A fee is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay. These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases".

Having thus mentioned the essential characteristics of a tax and a fee, Their Lordships observed

> "the distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of the common burden, while a fee is payment for a special benefit or privilege. Fees confer a capacity, although the special advantage, as for example in the case of registration fees for documents or marriage licences, is secondary to

[1] AIR 1954 SC 282

> the primary motive of regulation in the public interest. Public interest seems to be at the basis of all impositions, but in a fee it is some special benefit which the individual receives. It is the special benefit accruing to the individual which is the reason for payment in the case of fees; in the case of a tax the particular advantage if it exists at all is an incidental result of State action. As fee is a sort of return or consideration for services rendered it is absolutely necessary that the levy of fees should, on the face of the legislative provisions, be correlated to expenses incurred by Government in rendering the services. If the money thus paid is set apart and appropriated specifically for the performance of such work and is not merged in the public revenues for the benefit of the general public, it could be counted as fees and not a tax. There is really no generic difference between the tax and fees and the taxing power of a State may manifest itself in three different forms known respectively as special assessments, fees and taxes".

Applying these tests to the levy in question in that case, Their Lordships held that the impugned levy was not a fee but a tax. The same principles were stated by Their Lordships of the Supreme Court in the case of *Ratilal Panachand Gandhi v. State of Bombay*[2], After having stated the main

characteristics of a tax and a fee, their Lordships observed:

> "Fees are payments primarily in the public interest, but for some special service rendered for some special work done for the benefit of those from whom the payments are demanded. Thus in fees there is always an element of quid pro quo which is absent in a tax. It may not be possible to prove in every case that the fees that are collected by the Government approximate to the expenses that are incurred by it in rendering any particular kind of services or in performing any particular work for the benefit of certain individuals. But in order that the collections made by the Government can rank as fees, there must be correlation between the levy imposed and the expenses incurred by the State for the purpose of rendering such services. This can be proved by showing that on the face of the legislative provision itself, the collections are not merged in the general revenue but are set apart and appropriated for rendering these services. Thus two elements are essential in order that a payment may be regarded as a fee. In the first place, it must be levied in consideration of certain services which the individuals accepter either willingly or unwillingly, and in the second place the amount collected must be earmarked to meet the expenses of rendering these services and must not go to the general revenue of the State to be spent for general public purposes".

In ***Sri*** *Jagannath Ramanuj Das v. State of Orissa*[4]*,* Their Lordships observed:

> "There is no generic difference between a tax and a fee and both are different forms in which, the taxing power of a State manifests itself. Our Constitution however, has made a distinction between a tax and a fee for legislative purposes and while there are various entries in the three lists with regard to various forms of taxation, there is an entry at the end of each one of these lists as regards fees which could be levied in respect of every one of the matters that are included therein. A

[3]56 Bom LR 1184; (AIR 1954 SC 388)

[4] AIR 1954 SC 400

> tax is undoubtedly in the nature of compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law. But the essential thing in a tax is that the imposition is made for public purposes to meet the general expenses of the State without reference to any special benefit to be conferred upon the payers of the tax. The taxes collected are all merged in the general revenue of the State to be applied for general public purposes. Thus, tax is a common, burden and the only return which the tax payer gets is the participation in the common benefits of the State. Fees, on the other hand, are payments primarily in the public interest but for some special service rendered or some special work done-for the benefit of those from whom payments are demanded. Thus, in fees there is always an element of 'quid pro quo' which is absent in a tax. Two elements are thus essential in order that a payment may be regarded as a fee. In the first place, it must be levied in consideration of certain services which the individuals accepted either willingly or unwillingly. But this by itself is not enough to make the imposition a

fee, if the payments demanded for rendering of such services are not set apart or specifically appropriated for that purpose, but are merged in the general revenue of the State to be spent for general public purposes".

In the case reported in 56 Bom L.R. 1184 , to which we have referred above, their Lordships were considering the contribution levied under section 58 of the Bombay Public Trusts Act, and in the Orissa case, the contribution imposed under section 49 of the Orissa Hindu Religious Endowments Act. In both those cases, the Supreme Court held that the contributions levied were fees and the levy, therefore, fell within the purview of entry 47 in List III in Schedule VII of the Constitution. Mr. Kolah for the petitioners has argued that both the elements which are required to be present in an imposition to justify it as a fee according to the Supreme Court decisions are absent in the present impugned levy. In the first place the fees charged cannot be said to be in consideration for the services rendered for they are not commensurate with the services rendered and in the second place the amounts collected are not earmarked to meet the expenses of rendering such services but they go to the general revenue of the State to be spent for general public purposes. He has argued that not only that the levy has not the requisites of a fee, but it has on the other hand, all the essential characteristics of a tax. It is in the nature of a compulsory exaction of money, because section 5 of the Court-fees Act makes it obligatory on any suitor to pay the court-fee prescribed, by providing that unless such a fee has been paid, no document shall be filed, exhibited or recorded in any court of justice. It is collected as a general source of revenue to meet the general expenses of the State without reference to any special advantage to be conferred upon the payers of the tax. There is no element of quid pro quo in the levy and the imposition appears to have been levied in view of the capacity of the payers to bear the burden and pay the same. According to Mr. Kolah the impugned levy is a tax and not a fee, and therefore, beyond the competence of the State Legislature.

7. Now, as we have pointed out earlier, the applications under section 66(2) of the Income-tax Act arise when the Appellate Tribunal has refused to state the case to the High Court and the only question which the High Court is called upon to decide on such an application is whether any question of law does or does not arise on the order of the Appellate Tribunal under section 33(4) of the Income-tax Act. Applications under section 66(3) are only limited to an enquiry into the question of limitation. Under section 66(1), if questions of law arise on the order of the Appellate Tribunal the Appellate Tribunal is bound to draw up the statement of the case and refer it to the High Court cither at the instance of the assessce or the Commissioner. Where the Appellate Tribunal refuses to make a reference, and the aggrieved party comes to the High Court, what the aggrieved party wants the High Court to do is to direct the Appellate Tribunal to perform its obligatory duty to draw up the statement and refer the case to the High Court. The merits of the questions of law which arise on the order arc not required to be considered at that stage, nor is the High Court; required to adjudicate upon them at that stage. An application for such relief, according to Mr. Kolah is not in essence or substance different from an application under Section 45 of the Specific Relief Act or under Article 226 of the Constitution. If receiving, entertaining

and deciding an application by the Court of law is regarded as service rendered to the applicant the service that is required to be rendered in dealing with an application, under Section 66(2) of the Income-tax Act is not very different from that which is required to be rendered in an application under Section 45 of the Specific Relief Act or under Article 226 of the Constitution. The applications under Section 66(3) are only confined to the correctness or otherwise of the Tribunal's decision on the question of limitation. According to Mr. Kolah the service required to be rendered on such applications is even much less than on an application under Section 66(2). Now, according to Mr. Kolah, the applications under Section 45 of the Specific Relief Act and those under Article 226 of the Constitution which are practically on a par with the applications under Section 66(2) of the Income-tax Act, are required to pay a much smaller court-fee as provided in Article 1(f) of the Second Schedule to the new Court-fees Act. If the court-fee required to be paid on these applications is regarded as a proper charge for the service rendered, the court-fee levied under Article 16 of the First Schedule of the new Act on applications under Section 66 of the Income-tax Act is wholly out of proportion to the service rendered. It cannot therefore be said to be charged in consideration of rendering any service and cannot therefore be said to have an element of 'quid pro quo' in it. The levy of court-fee is not co-related with the expenses incurred in rendering the services for which it is purported to be charged. The Court-fee collected under the Court-fees) Act is not earmarked to meet the expenses for rendering the service, but goes to the general revenue of the State to be spent for general public purposes. Mr. Kolah argues that the levy of Court-fee as fees for the administration of justice cannot be justified unless the fees charged are adjusted and utilised so as to meet the administration of civil justice only. The class of litigants on whom this levy is imposed is the class of civil litigants. If the fee is imposed for rendering a service to this class of litigants, the fee levied has to be correlated with the expenses incurred in the administration of civil justice. If the civil litigants are also required to bear the burden of the administration of criminal justice in the State, the imposition on them will be in the nature of a tax and not a fee. According to Mr. Kolah the fees collected from the civil litigants are far in excess of the costs incurred by the State in the administration of civil justice, the fees charged as court-fees are therefore not in consideration of the services rendered to the payees of the fees but with a view to raise a general source of revenue. Mr. Kolah argues that the administration of justice is one of the primary functions of the State, and the expenses incurred by the State for the fulfilment of this primary function cannot be recovered by levying a fee from only a section of the litigating public, namely the civil litigants. In support of his contention that the fees collected by way of court-fees are not earmarked but go to the general revenue to be used for general public purposes. Mr. Kolah has referred to the affidavit put in on behalf of the State, where it has not been denied that the court-fees are not collected in a separate fund and earmarked only for meeting the expenses of the administration of justice. He has invited our attention to the stand taken by the State in its affidavit that the court-fee is capable of being levied as a general source of revenue.

8. Now, if the fee permitted to be levied under Entry 3 in List II of the Schedule VII of the Constitution must possess both the elements which the Supreme Supreme Court has laid down as

the essential elements of a 'fee' it will have to be held that the impugned levy does not possess the said elements not at any rate both of them. In as much as the court-fee is taken from suitors who want to litigate their cases in the Court of law the fee charged can be regarded as in consideration of the service which the litigants obtain from the courts and the first element can be said to be satisfied. Even then there is considerable force in the submission of Mr. Kolah that the fees charged are not reasonably related to the services rendered as proper charge for the services rendered either to the individual payer or to the class of the payers taken as a whole. As to the other element it is undoubtedly not present in the court-fees since the fees charged and collected are not earmarked to meet the expenses of rendering the services but go to the general revenue of the State to be spent for general public purposes. If the validity of the legislation levying the court-fee is to depend upon whether the fee levied there under or satisfied the tests laid down by the Supreme Court decisions the legislation will have to be held as invalid and beyond the competence of the State Legislature,

9. The learned Advocate General has argued that the court-fees do not belong to the class of fees with which the Supreme Court was dealing in the cases which have been referred to by Mr. Kolah. The court-fees are and have always been treated on a different footing from all other fees. The element of quid pro quo hast never been present in the court-fees ever since the court-fees have been imposed. The imposition of ad valorem court-fees on money claims is not on the basis of the services rendered in adjudicating the said claims. For instance, a suit on Negotiable instrument like a promissory note of a considerable value, in which a considerable amount of court-fee is required to be paid, will not require as much time and effort in disposing it of as may be required in a suit of a much smaller claim where complicated questions of law arise. The court-fee leviable in Probate proceedings will also show that the levying of the court-fees; is not dependent upon the service rendered to the litigant. That the court-fee was imposed as a general source of revenue has always been the feature of the Court-fee all along. There is intrinsic evidence in the Act itself for instance, in section 12, that the Court-fee was a measure for raising the revenue of the State. He has in that connection invited our attention to the observations of the Privy Council in the case of *Rachappa Subrao v. Shidappa Venkatrao*[5], where Their Lordships have observed as follows:

> "The Court-fees Act was passed not to arm a litigant with a weapon of technicality against) his opponent but to secure revenue for the benefit of the State. This is evident from the character of the Act, and is brought out by Section 12, which makes the decision of the First Court as to value final as between the parties, and enables a Court of Appeal to correct any error as to this, only where the First Court decided to the detriment of the revenue."

[5] ILR 43 Bom 507

That the revenue raised by the levy of Court-fees goes to the general revenue of the State has also been true of the Court-fees all along. The learned Advocate General pointed out that even under the Constitution, Articles 146 and 229 will show that fees or other moneys taken by the Court

shall form part of the consolidated fund, and shall not, therefore, be earmarked as a separate specific purpose. It is also pointed out that the distinction between court fee and the other kinds of fee is to be found in the Legislative lists themselves. In each of these lists there is an entry providing for the levy of fees, but each of these entries is careful in pointing out that the fees in the said entry will not include fees taken in any Court. The learned Advocate General has urged that not only the legislative practice has always treated the court-fees in a distinct and separate category by itself, but the judicial decisions also have always recognized this difference between court-fees and the other fees. In this connection, he has referred to the observations of Wanchoo C.J. of the Rajasthan High Court, in the case reported in *Maharaja Shri Umaid Mills Ltd. v. State of Rajasthan*[6], The learned Chief Justice after having pointed out that the levy by way of a fee is not meant to augment the general revenue of the State, but is fixed generally at such a level as to meet the expenses of the services rendered by the State in connection with the matters for which the fee is levied, further observed:

> "This distinction, however, is not always kept in mind rigorously in legislative enactments, and many a time what is called a fee is really a tax meant for raising revenues. So far as fees are concerned, they have to be divided into two parts. There are some fees which are really taxes though they are called fees. In their case, all the incidents of a tax apply, and the limitations to which fees are subject do not apply. As an example of this kind mention may be made of Court-fees under the Court-tees Act."

In a recent case from the Allahabad High Court, reported in *Khacheru Singh v. S.D.O. Khurja*[7], in which the levy of court-fee on a writ application to the High Court was challenged as being a tax and not a fee on the ground that the levy did not satisfy the two essential conditions laid down by the Supreme Court decisions as the requisites of a fee, Their Lordships of the Allahabad High Court observed

> "the definition of fee to be found in the Supreme Court cases is not intended to be exhaustive. The provisions of Article 146(3) and Article 229(3) show that there exists another class of imposition also called a fee in the Constitution, which differs from the type of fee which the Supreme Court had under consideration. Though the fees realised under the Court-fees Act are not appropriated for any specific purpose but form part of the general revenues of the State, it would fall within the expression 'fee' in the Constitution."

10. In our opinion, there is considerable substance in the submissions which are urged by the learned Advocate General. The only feature of the court-fee which distinguished it from a tax was that unlike the tax, which was an imposition made for public purposes without any reference to any special benefit to be conferred upon the payers of the tax, the court-fee was imposed on persons who wanted to file documents in Court or obtain certified copies from the Court and, the imposition could thus be said to have reference to

[6] AIR 1954 Raj 178
[7] AIR 1960 All 462 (FB)
the special benefit of getting documents filed or receiving copies which was obtained by the persons from whom payment was asked. There was, however, no monetary measure of the fees charged for the services rendered, and the levy of the fees could also not be said to be in proportion to the services rendered. As to second element, namely, that the fees collected had to be earmarked to meet the expenses for rendering the services and must not go to the general revenue of the State to be spent for general public purpose's the said element was never present in the court fees levied and collected. The fees collected under the Court-fees Act were always considered as raised for general revenue and went to the general public revenue. That the Court-fees Act was a measure for raising public revenue was held by the Privy Council in ILR 43 Bom 507 , to which the learned Advocate General referred. That the Court fees Act was in essence a taxing statute and that the fees collected under the Act were for the purposes of raising general public revenue has been the view expressed about the enactments in several judicial decisions. Under the Government of India Act, 1935, the Federal Court was empowered to make rules as to the fees to be charged in respect of the proceedings in that Court. Under item 53 of the Federal Legislative List of the 7th Schedule in the Act, the Federal Legislature was given power to legislate with regard to the jurisdiction and powers of all courts except the Federal Court, and, under Entry 59, which gave power to levy fees in respect of any of the matters contained in the Federal Legislative List, the fees taken in any court were excluded from the exercise of that power. In the legislative list of the State, the Entry No.1 empowered the State Legislature to legislate with reference to administration of justice, constitution and organization of all Courts except the Federal Court and the fees taken therein. Entry No.54 in this list which provided for fees in respect of any of the matters mentioned in the list, excluded again the fees taken in any Court. Entry No.36 in the Concurrent Legislative List which gave power to levy fees, similarly excluded the power to levy fees. It will thus be seen that the Legislative lists under the Government of India Act, 1935, made a distinction between the court-fees and the other fees. Sections 216 and 228 of the Government of India Act, 1935, will also indicate that the feature of the fees that they must be earmarked as a separate fund to meet the expenses of the services which were to be rendered to the payers of such fees was not to hold good of the fees levied in Courts. Under Section 216, the fees and the other moneys taken by the Federal Court were to form part of the revenues of the Dominion, and under Section 228, the fees or other moneys taken by the Courts in the States were to form part of the revenue of the provinces. It will thus be seen that under the Government of India Act, 1935 distinction between court fees and the other fees was recognized and maintained and the availability of the court fees as the general source of revenue was not done away with. We find the same position maintained under the Constitution also. Entry No.77 in List No.1 in the 7th Schedule, which is the Union List, empowers the Parliament to levy fees in Supreme Court. Entry No.96, which gives power for the imposition of fees with regard to matters in the list, excludes fees taken in any Court. In entry No.3 of the II list, which is the State List, the State-Legislatures are empowered to legislate with regard to fees taken in all Courts except the Supreme Court. The fee taken in any Court is excluded from entry No.66 which provides for the levying of fees in any of the matters in the second list. Entry No.47

in the III list, which is the Concurrent List, again excludes the court-fees from the categories of fees with reference to which that entry empowers the State Legislatures to make laws. As in the Government of India Act, 1935, under the Constitution also, a distinction has been made between court-fees and the other fees. Article 149 and Article 229 again provide that the fees levied in Courts are to form part of the general revenue of the Union or the State, as the case may be. Thus under Article 146(3), any fees or other moneys taken by the Supreme Court are to form part of the Consolidated Fund of India. Article 229 provides that fees or other moneys taken by the High Court will form part of the Consolidated Fund of the State. It is, therefore, clear that one of the essential elements laid down by the Supreme Court as the requisite of a fee, namely, that it must be appropriated to a separate fund earmarked to meet the expenses of the services, had never been true of the court-fees at any time and is also not true of the Court-fees levied after the Constitution. We agree, therefore, with the learned Advocate General that the court-fee does not fall in the category of fees with which Their Lordships of the Supreme Court were dealing in the cases which are referred to by Mr. Kolah and the levy of the Court-fee therefore, cannot be declared to be unconstitutional because it does not possess the requisites which the Supreme Court held as being essential of the fees with which they were dealing. The learned Advocate General, in our opinion, is right saying that the levy of court-fee for raising the general revenue has been authorized by the relevant entries in the Legislative lists under the Constitution, and the challenge, therefore, to the validity of such fees on the ground that they are not earmarked as a separate fund for the purposes of meeting the expenses of the services rendered, cannot be sustained. The first contention, therefore, which Mr. Kolah has urged with reference to the constitutional validity of the court-fees fails.

11. The next attack is on the basis of Article 14 of the Constitution. This attack is founded on two grounds. Firstly, it is stated that inasmuch as Article 16 of the First Schedule of the Court Fees Act imposes a court-fee only on the application which the assessee wants to make, but does not require such court-fee to be paid by the Commissioner on similar applications, the article discriminates between the Commissioner and the assessee and gives an unfair advantage to the Commissioner. It is urged that so far as applications under Section 66(2) or 66(3) are concerned, the assessees and the Commissioner are persons similarly situated, and the provision, therefore, which makes a distinction between persons similarly situated is discriminatory and offends against Article 14. The second ground of attack is that, while for the same kind of relief in substance, if not in form the other applicants are treated favorably and allowed to make their applications on payment of a much smaller court-fee, the assessees making applications under Section 66(2) or 66(3) of the Income-Tax Act are required to pay much larger amount of court-fee. The provision, thereplicants are treated favourably and allowed to make their applications on payment of a much smaller court-fee, the assessees making applications under Section 66(2) or 66(3) of the Income-Tax Act are required to pay much larger amount of court-fee. The provision, thereplicants are treated favourably and allowed to make their applications on payment of a much smaller court-fee, the assessees making applications under Section 66(2) or 66(3) of the Income-Tax Act are required to pay much larger amount of court-fee. The provision, therefore is

discriminatory as it subjects only the asseasees to a higher burden and thus puts them in a more unfplicants are treated favorably and allowed to make their applications on payment of a much smaller court-fee, the assessees making applications under Section 66(2) or 66(3) of the Income-Tax Act are required to pay much larger amount of court-fee. The provision, therefore is discriminden and thus puts them in a more unfavourable position.

12. In our opinion, neither of the two objections raised is sustainable. It is true that, while the assessee is required to pay a substantial court-fee, the Commissioner is not saddled with any such burden. The provision, undoubtedly, makes a distinction between the assessees and the Commissioner, and is in that sense, discriminatory. But the mere existence of a distinction unless it is a distinction between persons, who are similarly situated, is not sufficient to make it a discrimination which offends against Article 14 of the Constitution. There is not the slightest doubt, in our opinion, that the assessee and the Commissioner are not persons similarly situated. The Commissioner, when he, makes an application under Section 66(2) or 66(3), is representing the Union Government, and the applications which he makes are not in his private interest, but in the interest of Union. The object of the Commissioner in making applications before the Court is with a view to obtain a proper collection of the Income-tax under the Income-tax Act. In the application which an assessee makes, the assessee is concerned with his own individual interest. The attitude of the Commissioner in making applications under Section 66(2) or 66(3) is totally different. What he wants is that the points arising under the Income-tax law should be properly decided, because the adjudication affects not only the particular matter, but all other similar matters to follow. A proper adjudication of the points arising under the Income-tax law is essential for the due administration of the said taxing Statute and for enabling the Union to obtain the tax for the benefit of the revenue, in which the entire nation, including the tax-payers, are interested. In our opinion, therefore, the clarification of the Commissioner as belonging to a distinctly different class from the assessee is perfectly reasonable and justifiable.

13. It is however argued that it is not enough that the classification is founded on a rational basis but what is further required is that the classification must have a rational relation to the object sought to be achieved by the Act. It is urged that the object of the Court-fee Act is to raise revenue for the State. The Commissioner who is exempted from the payment of the court fee is not the representative of the State but of the Union and the court-fee which he has to pay is not from the funds of the State but from the funds of the Union. No justification therefore exists why exemption should be granted to him to the detriment of the State revenue. It is pointed out in this connection that it is not as if the policy of the legislature is always to exempt the State Government or the Union Government from the payment of court-fees. When suits are required to be filed by the Government court-fee is always required to be paid. Even the Commissioner, if he files a suit, is not exempted from the payment of court-fee. There is no justification why an exception should be made in his case when he comes to file an application under Section 66(2) or 66(3) of the Income-tax Act. It is therefore argued that the classification made by the Court-Fees Act is not reasonably related to the object to be achieved by the act and therefore amounts to

discrimination offending against Article 14 of the Constitution.

14. In our opinion this argument also is not well founded. In the first place the exemption allowed to the Commissioner is in the interest of the public revenue in which the entire nation is interested. In matters relating to public revenue it is not uncommon or even unreasonable or irrational to treat the Government as entitled to special facilities or special favor in legislative enactments. Such distinction in favor of Government is justifiable as in public interest. Secondly in the tax collected under the Income-tax Act by the Union the State is interested as a sharer in the total net collection. The object of the State in saving the income-tax collected and in helping in its proper realization by allowing facilities to the Commissioner in matter of payment of court-fees is to augment its share of the net tax collected and thus increase its revenue. The exemption allowed to the Commissioner therefore can-not be said to be not reasonably related to the object sought to be achieved by the Act. In our opinion therefore the first ground of discrimination urged on behalf of the petitioners cannot be upheld.

15. As to the second ground of objection, what is argued on behalf of the petitioner is that the substantial relief which is prayed for by the assessee on an application under Section 68(2) is a direction to the Appellate Tribunal to do its statutory duty of referring points of law arising out of its order to the Court. It is contended that the relief claimed on such an application is, in substance, not different from that claimed under an application under Section 45 of the Specific Relief Act or under Article 226 of the Constitution. It is pointed out in this connection that under the Income-tax Act of 1918, a provision corresponding to that contained in Section 66(2) of the Act of 1922, was not there. Under Section 51 of the Act of 1918, the assessee and the Commissioner were entitled to apply to the Chief Revenue Authority to draw up the statement of case and refer points of law arising on the decision of the Chief Revenue Authority to the High Court. That was a provision which was similar to Section 66(1) of the Act of 1922. If the Chief Revenue Authority, however, refused to make a reference, there was no provision similar to Section 66(2) of the Act of 1922 enabling the assessee or the Commissioner to apply to the High Court, requiring it to direct the Chief Revenue authority to make a reference. It was, however, held Under the Act of 1918 by the Privy Council that, even though there was no provision in the Income-tax Act. an application could still be made to the High Court by the aggrieved party under Section 45 of the Specific Relief Act, and the High Court was competent to exercise that power and direct the Chief Revenue authority to refer the case to the High Court, This was on the ground that the High Court in making such an order was only compelling the Chief Revenue Authority to do its statutory duty, and was not exercising its original jurisdiction in a matter concerning the revenue so its to be excluded by Section 6(2) of the Government of India Act of 1915 (See *Alcock Ashdown and Co. Ltd. v. Chief Revenue Authority Bombay*[8], Mr. Kolah for the petitioners has urged that what the Legislature has done by enacting Section 66(2) of the Income-tax Act, 1922, is to give statutory recognition to the power of the High Court to call upon the Appellate Tribunal to do its statutory duty. According to Mr. Kolah, therefore, the applications under Section 66(2) are in no way different from the applications under Section 45 of the

Specific Relief Act or under Article 226 of the Constitution. For all those applications under Section 45 or under Article 226, the new Court-fees Act has made provision under Article 1(f) of the Second Schedule, and the fees prescribed there are far lower than those prescribed under article 16 of the First Schedule for applications under Section 66. There is thus a clear distinction made between the assessses and the other applicants. There is no reasonable basis or justification for such a classification, and the distinction therefore is discriminatory. Now, it must be understood that although the result on the success of an application under Section 66 of the Indian Income-tax Act 1922 may in substance be the same as on the success of an application under Section 45 of the Specific Relief Act or Article 220 of the Constitution the remedy provided under the former provisions is different in character from that provided under the latter. It is a remedy available as of right and is also dealt with on that footing. Applications under Section 45 of the Specific Relief Act or under Article 226 of the Constitution stand on a different footing, and the entertainment of those applications and the principles on which they are decided are also different from those that apply to applications under Sections

[8]50 Ind App 227

66(2) and 66(3) of the Income-tax Act. It cannot be said that where two different kinds of remedies exist for obtaining a relief which in substance is similar, the remedies must be treated alike for the purpose of the imposition of court-fees as otherwise there will be a case of discrimination under Article 14. It may also be noticed that if the assessee felt that there was no difference in the remedy provided under Section 66(2) or 66(3), or under Section 45 of the Specific Relief Act, or under Article 226 of the Constitution, nothing would prevent him from making his applications under the latter provisions and thus save the burden of court-fees imposed upon him under Article 16 of the First Schedule. In our opinion, therefore, the second ground of objection against the Constitutional validity of the court-fee levied under Article 16 of the First Schedule of the New Act under Article 14 of the Constitution cannot be sustained.

16. Before proceeding to the next contention which relates to the retrospective, operation of the new Act, we will dispose of one further argument which was advanced before us relating to the invalidity of the impugned levy. That argument proceeds on the basis that the levy of court-fee contemplated by the wording of the impugned article as it stood on the date when the present applications were filed would in certain cases be totally destructive of the rights sought to be enforced or of the advantage sought to be obtained and would thus be unjustifiable and in violation of the fundamental rights of the petitioners. We do not feel it necessary to discuss this contention in any great detail because the interpretation which we give to the wording of the article as it stood on the date when the present petitions were filed can in no case amount to a total destruction of the rights sought to be enforced or of the benefit sought to be obtained. According to us, even on the wording of this article as ft stood before the amendment, the correct interpretation, was nothing different from what has been clearly and unambiguously brought out by the subsequent amendment. In other words the court-fee required to be paid under the article even in its amended form was one half of ad valorem fee leviable on the amount in dispute, namely, the difference between the amount of tax actually assessed and the amount of tax

admitted by the assesaee as assessable. There was, therefore, no question of the imposition being totally destructive of the right sought to be enforced.

17. Another aspect of the argument that the imposition of the ad valorem levy under Article 16 of the 1st Schedule of the New Act infringes the petitioner's rights under Article 19 of the Constitution has been sought to be urged by Mr. Rajgopal who appears for the petitioner in one of the present group of petitions. The contention proposed to be urged by the learned counsel so far as we have been able to understand is as follows: The Income-tax Act interferes with a person's right under Article 19(1)(f) and 19(1)(g) by subjecting him to a compulsory exaction in respect of his total income. This interference in order to be justifiable has got to be strictly in conformity with the act and any interference otherwise than as permitted under the Act or contrary to its provisions will be in violation of the said fundamental rights. The main purpose of an application under Section 66 of the Income-tax Act is to bring before the Court the petitioner's complaint that the tax imposed on him is not in accordance with law and therefore his fundamental rights under Article 19(1)(f) and 19(1)(g) are affected. The imposition of an ad valorem court-fee on such applications makes the remedy provided under Section 66(2) or 66(3), so onerous or stringent as to be virtually unavailable in a large number of cases and thus denies the assessee the benefit of the safeguard provided for protecting his fundamental rights.

18. Now prima facie the contention does not appear to us to be well-founded. The grievance as we understand it is that ad valorem fee should not have been imposed on applications under Section 66(2) and Section 66(3). The question before by however is not whether court-fees as levied under the Court-fees Act are proper the question is whether the levy is within the legislative competence of the State Legislature. If it is we cannot strike it down as invalid because in our view such heavy court-fees should not have been imposed. We do not however propose to discuss the contention raised in any great detail because it was not raised in the petition or in the affidavit filed in support thereof and the State therefore had no notice of it and had no opportunity to put in a reply to it. If Mr. Rajgopal was serious about the contention he should have raised it at the proper stage and in a proper manner, we have not been very technical in dealing with the present application. We have allowed the petitioners to amend the petitions or to put in further affidavits in clarification of the contentions raised during the course of the hearing. Mr. Rajgopal has sought to such permission at the proper stage but has remained content with raising the point only when he rose to supplement the main arguments which were raised by Mr. Kolah. We do not think we will be justified in entertaining this belated contention at this stage. The contention therefore is not entertained by us.

19. We now come to the question of the retrospective operation of the new Court-fees Act. Now, the question as to retrospective operation of the new Act and its applicability to appeals arising out of matters which were instituted before the new Act came into force, had come up for decision before a Division Bench of this Court of which I was a party in *Shantabai Mathuradas v. Municipal Corporation, Greater Bombay*[9], We held in those cases that under the old Court-

Fees Act, which was applicable when the suits, out of which the appeals arose, were filed, the litigants had a right to have the claim in litigation computed in the manner provided in the said Act and to pay court-fees as prescribed in the said Act. These were vested rights which were vested in the litigants at the commencement of the list and these vested rights could not be taken away or could not be impaired or imperiled or made more stringent or onerous by any subsequent legislation unless the subsequent legislation said so either expressly or by necessary intendment; and after examining the relevant provisions of the New Act, we came to the conclusion that it affected the said vested rights only to the extent of the rates of fees prescribed. In our view, the right to have the claim computed under the old Act was not affected under the new Act. We held in those cases, therefore, that in determining the amount of court-fees to be paid under the new Act in appeals arising out of suits which were commenced before the coming into force of the new Act while the claim had to be computed under the provisions contained in the old Act, payment of court-fee on the same computed claim had to be made under the rates as prescribed under the new Court Fees Act. In the present case, Mr. Kolah for the petitioners as well as the learned Advocate General for the State have urged that the view taken by this Court in the earlier case requires reconsideration. While both the sides agree that the view requires reconsideration, their contentions as to the retrospective effect of the new Act are entirely different. According to Mr. Kolah, the Act is only prospective and in no way retrospective, while the learned Advocate General has contended that the Act is wholly retrospective and saves no vested rights. Although

[9] Civil Revn. Applns. Nos.373 and 1182 of 1960, D/-23-2-1961

the question raised is already decided by a Division Bench of this Court, in view of the importance of the matter, we have heard the arguments which the petitioners and the State wanted to advance in order to consider whether, in view of the fresh arguments advanced, it was necessary to refer the matter to a larger Bench.

20. Now, Mr. Kolah has agreed that the retrospective operation of the new Act has to be gathered from the provisions of Section 49 of the new Act. He has also agreed with the view taken by us in the earlier case that the first part of the first proviso to Section 49 which saves the previous operation of the repealed Court-fees Act, would by itself save the vested rights brought into existence by the said previous operation. In the earlier case, however, we took the view that although the first part of the first proviso, which saved the previous operation of the repealed Act. Would by itself, if nothing else was said, have preserved the vested rights coming into existence by the previous operation of the repealed Act, there was something further said in the second proviso, which had the effect of curtailing the said vested rights and the combined effect of the two provisos was that while the vested right of getting the claim computed under the provisions of the Act was saved the right to pay the court-fee on the said computed claim at the rates prescribed under the old Act was done away with and fees had to be paid at the rates prescribed under the new Act. It is here that Mr. Kolah has a quarrel with the view that we have taken in the earlier case. According to him, the purpose and the effect of the second proviso is not to curtail the vested rights, which are saved in the first part of the first proviso. According to him, the

purpose of the second proviso is to make provision for certain cases which may conceivably arise under Section 4 of the new or under the corresponding provisions contained in Section 5 of the old Act. Mr. Kolah argues that, the principle of construction is that vested rights are intended to be saved. It is only when there is either an express provision or necessary intendment to the contrary that vested rights can be regarded as not saved. According to him, therefore, if the explanation which he has given was to the purpose and effect of the second proviso is a good explanation, no necessary intendment to affect the vested rights can be inferred from the second proviso.

21. Now, we do not think the explanation which Mr. Kolah has given with regard to the purpose and effect of the second proviso can be accepted, because, we do not agree with him with regard to what he has said about the provisions of Section 4 of the new Act, or Section 5 of the old Act. Section 4 occurs in Chapter II, which contains provisions which apply only to the High Court and to the Court of Small Causes at Bombay. Section 3 which occurs in this Chapter, provides that "the fees payable for the time being to the clerks and officers (other than the sheriffs and attorneys) of the High Court; or chargeable in that Court under No.10 of the first, and Nos.11, 14, 17, 20 and 21 of the Second Schedule to this Act annexed; and the fees for the time being chargeable in the Court of Small Causes at Bombay and its office, shall be collected in manner hereinafter appearing." Section 4, sub-section (1) provides that "when any difference arises between the Officer whose duty it is to see that any fee is paid under this Chapter and any suitor or attorney, as to the necessity of paying a fee or the amount thereof, the question shall when the difference arises in the High Court, be referred to the taxing officer, whose decision thereon shall be final, subject to revision in the manner provided in the section. Sub-section, (2) of Section 4 makes a similar provision with regard to such differences when they arise in the Court of Small Causes at Bombay. Section 5 appears in Chapter III, which deals with computation of fees, and applies to all Courts in the State including the High Court but excluding the Court of Small Causes at Bombay. Sub-section (2) of Section 5 provides that when any difference arises between the officer whose duty it is to see that any fee is paid under this Act and any suitor or his pleader, as to the necessity of paying a fee or the amount thereof, the question shall when the question arises in the High Court, be referred to the taxing officer whose decision thereon shall be final, subject to revision as provided in the section. In the old Court-fees Act namely the Court-fees Act of 1870 Chapter II related to the fees in the High Court and in the Court of Small Causes at the presidency towns and provisions corresponding to Sections 3 and 4 of the new Act were contained in Sections 4 and 5 respectively which occurred in Chapter II of the old Act. The provision corresponding to Section 5(2) in Chapter III of the new Act was contained in Section 6(2) of Chapter III of the old Act. In view of the similar language used in Sections 4(1) and 5(2) of the new Act and in the first part of Section 5 and Section 6(2) of the. old Act Mr. Kolah's argument is that Section 4(1) of the new Act and the corresponding provision contained in the first part of Section 5 of the old Act applied to differences arising before the document was presented while the provisions of Section 5(2) of the new Act or Section 8(2) of the old Act provided for cases where such differences arose after the document was presented. Thus

according to him under Section 4(1) of the new Act or under the corresponding provision contained in Section 5 of the old Act a suitor who intended to file a document was entitled to go to the taxing officer on a difference arising between him and the officer whose duty it was to see that a fee is paid on the document as to the necessity of paying a fee or the amount thereof and have a decision obtained from the taxing officer which would have the attribute of finality. New it is possible that after such a decision is obtained but before the document is actually presented there may be a change in the rates of fees presented by an amendment of the Act. It is also possible that when such a decision was obtained the old Court-fees Act might have been in force but when the document comes to be presented the new Act may be in operation. In such cases says Mr. Kolah a question may arise because of the finality attached to the decision of the taxing officer as to whether the court-fee to be paid or the document is according to the decision of the taxing officer or according to the rates which are in force at the date when the document is actually presented. It is to remove this difficulty that the second proviso has provided that the rates which will apply will be the rates which are in operation on the date of the presentation of the document. According to Mr. Kolah, therefore, the second proviso to Section 49 is only intended to apply to that limited class of cases where there is no question of a vested right in the litigant, but only the question of the finality attached to the decision of the taxing officer under Section 4 of the new Act or under Section 5 of the old Act. We are not inclined to accept this submission of Mr. Kolah. According to us the existence of Section 4(1) in the Court-fees Act is referable to the position which once obtained that the Court-fees Act did not apply to the Original Side of the High Court. The fees leviable in matters coming before the High Court on the Original Side were regulated by the table of fees prepared by the High Court. It was only after 1954 that the Court-fees Act became applicable to the Original Side also. It still did not, however apply to matters which had been commenced before the Act was made applicable to the Original Side. The Court-fees Act was not applicable to the Court of Small Causes at Bombay also. Provision had been made, however, in Chapter II of the old Act for fees to be collected under the Court-fees Act. A provision similar to Section 4(1) in the new Act which existed under Section 5 in the old Court-fees Act was made for the purpose of deciding differences and disputes relating to the proper fee to be paid in matters arising on the Original Side of the High Court. The present existence of Section 4(1) in the new Court-fees Act can have application only so far as the High Court on its Original Side is concerned, to the matters arising before 1954. We do not accept Mr. Kolah's submission that the provision of Section 4(1) is to enable the suitor to seek advice from the taxing officer as to the correct payment of fees or to obtain a determination as to the correct fee to be paid even before the document was presented in Court. The wording of the said section speaks of a difference arising between the officer whose duty it is to see that proper fee has been paid and the suitor, and, in our opinion such a difference can only arise when the document is presented in Court. The explanation given by Mr. Kolah as to the purpose and effect of the second proviso to Section 49 not being acceptable his contention that the new Act is wholly prospective cannot be sustained.

22. The learned advocate General has, on the other hand, argued that the first part of the first

proviso which saves the previous operation of the repealed law has not the effect of saving the vested right brought into existence by the said operation. According to the learned Advocate General, if such was the intention, the first part of the first proviso which is negative in terms, would not have stopped at merely borrowing the provision of clause (b) of Section 7 of the Bombay General Clauses Act, but would have also further borrowed the provisions of clause (c) or Section 7. For his contention that the expression "previous operation of the repealed law" cannot have the effect of saving the vested rights, he has relied on the decision of the Supreme Court in *Indira Sohanlal v. Custodian of Evacuee Property, Delhi*[10]. Now, it may be pointed out that in the earlier case, which was decided by this Court, his case was considered, and the principle laid down in this case was applied in arriving at the proper meaning of the first proviso to Section 49 of the new Act. The learned Advocate General, however, has argued that the result which follows from the application of the principle decided in this case would be different from the result to which we have arrived in the earlier case. Now, the view that we took in the earlier case was that in accordance with the principle laid down in this case, since the saving clause in the repealing suction in the new Act purported to indicate the effect of the repeal on previous matters by provision for the operation of the previous law in part and in negative terms as also for the operation of the sew law in the other part and in positive terms, the said provision may well be taken to be self-contained and indicative of the intention to exclude operation of Section 7 of the Bombay General Clauses Act. In gathering the effect of the repeal we had therefore to look to the provisions of Section 49 and the two provisos to the said Section. So far the learned Advocate General agrees with the view that we have taken. In construing the provisions however our view was that the approach had to be on the principles governing interpretation namely that vested rights were intended to be saved and the line of inquiry therefore had to be whether what was contained in the new provision took away the vested rights. Construing the first proviso to Section 49 in the light of these principles we took the view that since it saved the previous operation of the repealed law the vested rights which come into existence as a consequence of the said previous operation must necessarily be saved. In our opinion the old Court-fees Act operated on the list the moment it was commenced and determined the rights of the litigants to have the claim computed according to its provisions and to pay the court-fees according to the rates prescribed therein upto the stage of final appeal in the litigation. These rights which resulted from the previous operation of the repealed act were saved as result of the saving of the previous operation of the repealed law under the

[10] AIR 1956 SC 77

saving clause. We also took the view that that would be the effect of the language used in the first part of the proviso was also indicated by the second proviso because by the said second proviso the Legislature has enacted that of the rights that could be regarded as saved under the first proviso the right of paying at the rate under the old. Court-fees Act is taken away and the fees will have to be paid at the rates which will be in force on the date when the document is or was presented. It is here that the learned Advocate General quarrels with the view that we have taken in the earlier case. According to him once we exclude the operation of Section 7 of the Bombay General Clauses Act and regard the saving clause as a self contained provision what is saved has

to be found from the terms of the clause itself. It is not then permissible to go to the general principles governing interpretation or to the line of inquiry that is to be followed in gathering the effect of repeal. Now what the section saves is the previous operation of the repealed law. This expression means in the context the previous operation of the repealed law in respect of anything done or any action taken. The expression used does not save the future operation of the previously repealed law. If the previous operation of the repealed law has brought into existence vested rights, these rights unless expressly saved will not be available and the repealed law will not exist for their exercise unless so provided by the saving clause. His complaint is that while trying to follow the principle laid down in the Supreme Court decision we have erred in its application and read in the saving clause some further provisions of Section 7 of the Bombay General Clauses Act which the saving clause itself does not contain. In support of his submission that this is the proper effect of the decision of the Supreme Court, the learned Advocate General has invited our attention to the following observations of the Supreme Court:

> "Indeed a comparison of the wording of Section 58 of Act 31 of 1950 with the wording of Section 6 of the General Clauses Act would show that if the legislature intended either that pending proceedings were to be continued under the previous law or that anything in the nature of vested right of finality of determination or some right akin thereto was to arise in respect of such pending proceedings, the negative portion of Section 58(3) would not have stopped short with saving only the 'previous operation' of the repealed law.

It would have borrowed from out of some portions of the remaining sub-ss.(c), (d) and (e) of Section 6, General Clauses Act and provided in express terms for the continuance of the previous law in respect of pending proceedings." In our opinion, the observations to which the learned Advocate General has referred must be read in the context of the facts of the case. On the facts of that case, it was not a case of vested rights at all because their Lordships had held that there could not be vested rights for obtaining a decision, with the attributes of finality, and they had also further held that no finality had also been obtained at the time when the enactment was repealed, because such finality would only come into existence on the making of the order and the order was not even made at that time. In these circumstances, if the legislature had intended that anything in the nature of vested right of finality of determination or some right akin thereto was to arise in respect of a pending proceeding, the saving clause could not be intended to have it left to be comprised in the expression 'previous operation of the repealed law' but would have borrowed certain further specific provision from Section 6 of the General Clauses Act, enacting that even such rights were intended to be saved. In our opinion, the right which was being claimed as vested right in that case was not capable of being regarded as having arisen or accrued by the previous operation of the repealed Act. We do not, therefore, think that the authority, on which the learned Advocate General relied, supports the contention that vested rights even though they might have been brought into existence by the previous operation of the repealed law, would not be saved unless the saving clause, states so in express terms. On the other hand the view that we have taken gets support from the following observations of their Lordships in

the said case:

> "Without attempting to be meticulously accurate, it may be stated in general terms, that the scheme underlying Section 58(3) appears to be that every matter to which the new Act applies has to be treated as arising and to be dealt with under the new law except in so far as certain consequences have already ensued or acts have been completed prior to the appeal, to which it is the old law that will apply".

It seems to us. therefore, that if consequences have ensued as a result of the previous operation of the law, such consequences are intended to be saved and capable of being governed by the old Act in view of what their Lordships have observed in the case.

23. After having carefully considered the further argument, which have been advanced before us in the present case relating to the retrospective operation of Section 49, we have come to the conclusion that the said arguments do not require us to reconsider the decision which has been arrived at in the previous case. In our opinion, therefore the retrospective effect of the new Act is as stated by this Court in the previous decisions, namely, that the new Act is retrospective only with reference to the rates to be charged. But is not retrospective with regard to the computation of the claim.

24. The next question then is whether on the view that we have taken of the retrospective effect of the new Act, article 16 of the First Schedule of the Court-fees Act is applicable to the petitions before us. In order to decide that question, what we have to consider is whether that article provides only an enhanced rate of court-fee or also affects the right relating to computation. If the new provision does not affect, in any way, the right of computation, but only prescribes a rate, it will certainly be applicable to the present petitions. If, on the other hand the new provision has the effect of obliging the assesses to have the claim computed in a manner different from that in which he was entitled to have it computed under the old Act and make the rate dependent on the said computation the question will have to be further considered whether the article 16 in the new Act can apply to the present applications either wholly or at any rate to the extent of the rate prescribed thereunder

25. Mr. Kolah for the petitioner has urged that under the old Court-fees Act, such applications were provided for in the Second Schedule, which related to fixed fees. In items which were enumerated in the Second Schedule, a litigant was not required to have the claim computed and reduced to a money value according to any arbitrary rules. All that he was required to pay was a fixed court-fee. The fee fixed under the Court-fees Act was always in the nature of a burden. This burden under the old Court-fees Act was adjusted without reference to any computation of claim in case of items on which fixed court-fee was fixed and the litigant therefore had the right to have the burden adjusted on that basis. Now, the new Court-fees Act varies this burden by providing that the claim will be ascertained and computed in a certain arbitrary manner. Mr.

Kolah says that in applications which are filed under Section 66(2) or 66(3), there is no question of any monetary claim at all. The only dispute in an application under Section 66(2) is whether the Tribunal's order raised any question of law or not. In the applications under Section 66(3), the only question arising is whether the decision of the Tribunal on the question of limitation is correct or not. In neither of these cases the dispute raised involves a money claim. To give the dispute in such applications a money value by prescribing an arbitrary method of computation is prescribing a fresh method of computation. Mr. Kolah therefore, argues that article 16 is not merely a matter of fixing a rate, but involves essentially a computation of the claim and first requires the assessee to accept that computation and then pay a court-fee on the basis of the said computation. The learned Advocate General, on the other hand, has argued that what we have held in the previous case is that the vested right of the petitioner to have his claim computed under the old Court-fees Act is not affected under the new Act. A litigant in the first place, must have a vested right to have the claim computed in a particular manner. It is only then that his right will be saved. If, under the old Act, there was no question of the computation of the claim, the litigant could not be said to have a vested right to have the claim computed in a particular manner. If there was a vested right under the old Court-fees Act, that would undoubtedly be saved except as to rate. But if there was no vested right at all as to computation and the new Act provides for the computation for the first time, the new Act being applicable at the time when the computation is required to be made the provisions of the new Act must apply.

26. In our opinion, the new provision does affect the vested right relating to computation under the old Court-fees Act. The right to pay a fixed court-fee without reference to any computation of the claim, on an arbitrary basis was a right vested in the litigant under the old Court-fees Act. The provision of article 16 which requires the claim to be computed on a certain arbitrary basis prescribes a new rule for computation under the new Act. It changes the classification of the item and shifts it from the schedule of fixed fees to the schedule of ad valorem fees. It is not a mere matter of enhancing the existing rate of fees but it involves a change in the basis of the imposition. The change in the law introduced by the new Act relates to computation of the claim because the fee payable is made dependent on the computation. Such a change which introduces a new method of computation where none existed before is as much a change relating to computation as when an existing rule of computation is replaced by another. A change of such a nature in the law brought about by the new Act is not made retrospective under the new Act. According to us, therefore article 16, in so far as it prescribes a new method of computation of the claims in applications by the asisessee under Section 66 of the Income-tax Act cannot apply to the present applications.

27. If the rule of computation of the claim provided by Article 16 of the first schedule of the new Act cannot apply to the present applications, the rate prescribed by the said article cannot also apply to them. The rate that is fixed by this article can only apply when the computation, according to the rule prescribed in the new Act. is arrived at. If the rule as to computation under the new Act is not available to be applied in the case of the present petitions, the rate, whose

application only depends on the availability of this computation, will obviously not apply. In our opinion, therefore, the present petitions will not be governed by article 16 of the First Schedule of the new Act, but will continue to be governed by the old Court-fees Act.

28. We may also mention one further argument which was advanced by Mr. Kolah relating to the difficulty in applying the provisions of article 16 of the First Schedule. Mr. Kolah pointed out that under this Article, the court-fee that is required to be paid is one-half of the ad valorem fee leviable on the amount in dispute calculated in a certain manner. In several of the applications, which may be filed under Section 69 of the Income-tax Act, even the order of the Appellate Tribunal may not involve a dispute with regard to the amount of tax. In such cases the method provided for arriving at the money value of the claim will fail. We do not wish to deal with this submission of Mr. Kolah in the present petitions in none of which such a difficulty arises. In an appropriate case, where such a difficulty arises it may be dealt with and decided.

29. In view of our conclusion that the present applications are not governed by article 16 of the new Act, the further question which relates to the correct interpretation of the said article as it stood when the present applications were filed, does not remain to be considered. We have, however, expressed our view on this question earlier in the judgment while dealing with one of the arguments relating to the constitutional validity of the article. According to us even under the article as it stood when the applications were filed the fee payable was one half of the ad valorem fee leviable on the difference between the amount of tax actually assessed and the amount of tax admitted by the assessee as assessable.

Order accordingly.