

NAGPUR HIGH COURT

Arjuna Govinda

Vs

Amrita Keshiba

Second Appeal No. 117 of 1954

(Hidayatullah, C.J. and R. Kaushalendra Rao, J.)

12.10.1953. 22.09.1955

JUDGMENT

Hidayatullah, C.J.

1. The plaintiff-appellant had filed a suit for partition and separate possession of his half share in survey No. 159 which is assessed to revenue. He was neither in actual nor constructive possession of the field. He therefore valued his claim under section 7(v)(b), Court-fees Act. His suit was decreed by the trial Court but was dismissed by the lower appellate Court. On the memorandum of appeal presented on 23-1-1954, a court-fee of Rs. 15/- as on the plaint was paid. On the objection of the Stamp Reporter that the court-fee should have been paid under section 7(v)(b) as amended by the Madhya Pradesh Act 9 of 1953, which came into force during the pendency of the appeal in the lower appellate Court, the appellant paid the additional court-fee of Rs. 29/- under protest with, a note that if it is held that the court-fee is payable according to the provision before the amendment the excess court-fee may be refunded to him. Thereafter, in *Bisan Parushram v. Ganpat Sakharam*¹, the Taxing Judge held that the provisions amended by Act 9 of 1953 were not retrospective and that court-fee on appeals could not be demanded under the amended provisions where plaints were filed before the amendment came into force.

2. The appellant has therefore applied for refund of the excess court-fee of Rs. 29/- paid by him. This application is opposed by the office relying on *Raoji v. Collector, Amraoti*², where it was held that a Court cannot order refund where the plaint is admitted and the stamps are cancelled and that in such a case the question of refund has to be determined by the Collector who alone has power to grant refund. It is said that the Court has no jurisdiction to order a refund apart from Sections 10 to 15, Court-fees Act.

3. No litigant should be prejudiced by the mistake of the Court or its officers *Ranjanlal v. Shankerlal*³, *Vishnuprasad v. Narandas*⁴, *Munna Lal v. Ram Chandra*⁵, (1), *Thammayya v. Venkataramanamma*⁶, and *Abodh Bala v. Radharani*⁷. There can be no doubt that under section 115, Civil Procedure Code the Court has inherent power to do the real and substantial justice for the administration of which alone it exists. In exercise of this power refund of court-fee may be ordered.

(a) where there is an excess payment by mistake or inadvertence of the party on account of mistaken view of law *Munna Lal v. Ram Chandra (cit. sup.) Indu Bhusan v. Secretary of State*⁸ and *Harihar Guru v. Ananda Mahanty*⁹, and

(b) where the party is compelled to pay excess court-fee in whole or in part on account of the mistake of the Court *C.T.A.M. Chettyar Firm v. Ko Yia Gyi*¹⁰, *Thammayya v. Venkataramanamma, (cit. sup.)* and *Karfule Ltd. v. A.D. Varghese*¹¹, Here the appellant paid the court-fee under protest to comply with the objection of the Stamp Reporter. That objection is erroneous if the view of the Taxing Judge in Second Appeal No. 127 of 1954 is correct. If so, the appellant is in fairness entitled to a refund of the excess court-fee demanded of him. 31 Nag LR 82 : AIR 1934 Nagpur 263 (A1), therefore requires reconsideration.

4. The question for decision therefore is whether the decision of the Taxing Judge is correct Relying on *Colonial Sugar Refining Co., Ltd. v. Irving*¹², and *Delhi Cloth and General Mills Co., Ltd v. Income-tax Commr. Delhi*¹³ which have recently been relied on with approval by the Supreme Court in *Hoosein Kasam Dada (India) Ltd. v. State of M.P.*¹⁴, the learned Judge held that the amendment could not have a retrospective effect. Relying on *Manohar v. Manoramabai*¹⁵, the learned Judge further held that the court-fee payable on a memorandum of appeal is to be determined by a reference to the court-fee leviable on the plaint. The learned Judge also relied on *Firm Hazi Fazulla v. State of V.P.*¹⁶,

5. It is no longer open to debate that the right of appeal is a substantive right and is not a mere matter of procedure though the right may have been conferred by the Code of Civil Procedure. Section 154 of the Code expressly provided that :

"Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement."

In Hoosein Kasam Dada's case their Lordships were construing the proviso to Section 22(1), C.P. and Berar Sales Tax Act which was amended during the pendency of the assessment proceedings. Under the unamended proviso the appellant had to satisfy the authority that the tax and penalty admitted by the assessee to be due was paid. In default of compliance the appeal was liable to be rejected in limine. Under the amended proviso he had to satisfy the appellate authority that the tax and penalty according to the assessment order were deposited. Their Lordships held that the amended provision which restricted the right of appeal had no retrospective operation.

6. *Manohar v. Manoramabai (cit. sup.)* does not lay down a general rule that the court-fee on a memorandum of appeal is to be determined by reference to the court-fee leviable on the plaint. The Full Bench was interpreting Article 17 of Schedule II of the Act which provides for a fixed court-fee on plaint or memorandum of appeal in each of the following suits :

(vi) Every other suit where it is not possible to estimate at a money value the subject-matter in dispute, and which is not otherwise provided for by this Act."

As already pointed out, here the court-fee was payable under section 7(v)(b) and not under Schedule II, Article 17(vi). *Manohar v. Manoramabai (N)*. (*cit. sup.*) is therefore not an authority for the contention that the court-fee on an appeal from a decree in a suit where court-fee was payable under section 7(v)(b) shall be the same.

7. Section 4, Court-fees Act so far as is material for this case runs thus :-

"No document of any of the kinds specified in the first or second schedule to this Act, annexed, as chargeable with fees, shall be filed in,...or shall be received.... by, any of the said High Courts in any case coming before such Court....in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence....unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document." The Court-fees Act is a taxing statute and should be interpreted strictly. The subject must not be held liable to tax unless the language of the statute clearly imposes the obligation. In a taxing Act one has to look merely at what is clearly stated. As observed by Bose, J. in *Sobhagmal v. The New East India Company Ltd.*, Taxing Decisions p. 103 at p. 106, the Act is artificial and no question of principle is involved. In *Attorney General v. Carlton Bank*¹⁷, it was observed at page 164 :

"The Court must no doubt ascertain the subject-matter to which the particular tax is by the statute intended to be applied, but when once that is ascertained, it is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardship or of business convenience or the like."

In *Mt. Mohri Kunwar v. Keshri Chand*¹⁸, it was observed :

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

8. There is support for the view that court-fee on a plaint or memorandum of appeal is payable according to the Court-fees Act in force on the date the plaint or memorandum of appeal is presented and a change of law during the pendency of the suit or appeal will not affect the court-fee payable. *Chunnilal v. Kishandas Ramdas*¹⁹, *Tara Prasanna v. Nrisingha Moorari*²⁰, *Abubaker Tarmahomed v. Fatmabai*²¹, and *Gulam Husain v. Nanhubeg*, Taxing Decisions p. 100 . In the Goods of Gasper', ILR 3 Cal 733 it was held that court-fee must be paid according to the specific provisions of the Court-fees Act. That was a case where probate was obtained on payment of a fixed court-fee. That executor having died, a second application for probate of the same will was made. At that time the Court-fees Act was amended and ad valorem court-fee became payable, it was held that ad valorem court-fee

was payable on the probate. It was no doubt held that the court-fee on an application for review of a judgment in a suit or appeal had to be paid according to the Court-fees Act in force on the date the plaint or appeal as the case may be was presented. The reason is that under Article 5 of Schedule I to the Act court-fee equal to one-half of that leviable on the plaint or memorandum is paid i.e. leviable on the date of the plaint or memorandum was presented. *Nandi Ram v. Jogendra Chandra Dutta*²², and *Parmeshar v. Bakhtawar*²³

9. In *Fagan v. Chunder Kant*²⁴, it was held that a court-fee on a cross-appeal has to be paid according to the law in force when the cross-appeal was heard. A similar view as regards the cross-objection was taken in *Meharban Khan v. Muhboob Khan*²⁵, In *Mt. Bhugabutty Kooer v. Mt. Kustooree Kooer*²⁶, it was held that a stamp duty on appeal has to be paid according to the law in force at the time though the suit was valued according to an early Act.

10. My attention is drawn to *Mansing v. Sakharam*²⁷, Nag where a view similar to the taxing decision in S.A. No. 127 of 1954, D/-10-3-1954 : AIR 1955 Nagpur 46 was taken.

11. In my view the decision of the taxing Judge in Second Appeal No. 127 of 1954 AIR 1955 Nagpur 46 and that of Mudholkar, J. in Civil Revn. No. 653 of 1953 (Nag) require reconsideration. This is a matter of general importance and of almost daily occurrence. *Raoji v. Collector Amroati (Al)* (*cit. supra.*) also requires reconsideration. I therefore refer the following questions for decision by a Division Bench :-

"(1) Whether the court-fee payable on a memorandum of appeal is payable according to the Court-fees Act in force on the date of its presentation or according to the Act in force on the date the plaint was presented.

(2) Whether *Raoji v. Collector, Amraoti (All)* (*supra*) was correctly decided."

Let the papers be placed before the Honourable the Chief Justice for orders. The case being referred to a Division Bench consisting of Hidayatullah, C.J. and Kashalendra Rao, J., the Court delivered the following : ORDER - The questions referred to the Division Bench are :

(1) Whether the court-fee payable on a memorandum of appeal is payable according to the Court-fees Act in force on the date of its presentation or according to the Act in force on the date the plaint was presented?

(2) Whether 31 Nag LR 82 : AIR 1934 Nagpur 263 (A1) was correctly decided?

12. The facts giving rise to the questions are found stated in the order of Deo, J. and 'may briefly be adverted to. The appellant-plaintiff instituted his suit prior to Madhya Pradesh Act 9 of 1953 which came into force on 15-4-1953. The Act enhanced the court-fees payable on the memorandum of appeal. The appellant paid court-fees as required by the Act prior to the amendment. He was however called upon to pay the enhanced fees by the Stamp Reporter which he did under protest.

13. In Second Appeal No. 127 of 1954 D/-10-3-195-4 : AIR 1955 Nagpur 46 and in Civil Revn. No. 653 of 1953, D/-11-8-1954 (Nag) (23) two learned Single Judges, Bhutt, J. and Mudholkar,

J. took the view that the memorandum of appeal was liable to be charged in accordance with the court-fees payable under the Act prior to the amending Act. Deo, J. was of opinion that the two decisions required reconsideration because of Section 4, Court-fees Act and decisions to the contrary like 15 Suth WR 272 (2) (22).

14. In our view the first question falls for consideration in the light of the principles emerging from the decision of the Full Bench of the Court in *Radhakrishan v. Shridhar*²⁸, and the implications of the decision of the Supreme Court in 1953 SCR 987 approving the decision of the Full Bench.

15. According to the decision of the Full Bench, in *Radhakishan v. Shridhar, (24) (supra.)*, in general when an Act is altered during the pendency of an action the substantive rights of the parties remain unaffected and are decided according to the law as it existed when the action was begun, unless the new amendment is made retrospective either expressly or by necessary implication. Further, according to that decision, where a statute as altered merely deals with procedure and does not affect the substantive rights of the parties, it is held to apply prima facie to all actions, pending as well as future. For the purpose of this rule of interpretation an appeal is a continuation of the original action initiated by the filing of a plaint. The legal pursuit of a remedy, suit, appeal and second appeal, are really but steps in a series of proceedings connected by intrinsic unity.

16. It is true, as has been observed in ILR (1941) All 558 : AIR 1941 Allahabad 298, no suitor has a vested right to insist that during the pendency of a litigation which a suitor has started the enactment relating to court-fee shall not be changed and the fee leviable shall not be increased or reduced either with regard to future applications or with regard to future appeals. But the question here is not about the right to any such insistence or a limitation on the power of legislature to increase the court-fees so as to affect even pending proceedings. The question is whether the legislature has evinced the necessary intention merely by enacting a measure enhancing the fees. What is involved in the present case is a rule of construction for the Court, not a limitation on legislative competence. There is nothing in the amending Act to indicate that the enhanced fees govern pending cases. So the normal rule of construction laid down by the Full Bench must prevail. If the right of appeal is not a mere matter of procedure but a substantive right, the new statute cannot having regard to the normal rule of construction be held to govern cases commenced prior to it so as to fetter or clog the appeal or cast a heavier burden on it than before. We do not regard Section 4, Court-fees Act as laying down that an appeal in all cases would be chargeable with the fees for the time being in force when the memorandum of appeal comes to be presented. In the case before the Supreme Court the amending law (proviso to Section 22(1) as amended by the C.P. and Berar Sales Tax (Second Amendment) Act, 1950 (Act 57 of 1949) imposed a new condition on the right of appeal by providing that no appeal against an order of assessment shall be admitted by the authority unless such appeal was accompanied by a satisfactory proof of the payment of the tax. The argument that in view of the terms of the proviso the authority had no option or jurisdiction to admit the appeal unless it was accompanied by the assessed tax as required by the amendment was regarded as overlooking the fact of the existence of the old law for the purpose of supporting the pre-existing right and really amounted to begging the question. In view of this clear pronouncement of their Lordships, the argument that the memorandum of appeal cannot in view of section 4 be 'filed' or 'received' unless the fee indicated in the schedule as the proper fee for the document under the Amending Act is paid

ignores the fact of the existence of the old schedule for the purpose of an appeal arising out of a suit commenced prior to the Amending Act.

17. We are accordingly of opinion that the view taken by the two learned Single Judge, if we may say with due respect, is correct. But we agree with, Deo, J. that ILR (1952) Nag 457 : AIR 1952 Nagpur 350 (FB), has little bearing in the present context. The answer to the first question is that in the absence of a contrary intention the fee payable on a memorandum of appeal is according to the Court-fees Act in force on the date of the presentation of the plaint and not according to the Act subsequently enhancing the fees.

18. The second question arises because the appellant was required by the Stamp Reporter to pay the additional court-fees which in view of the answer to the first question must be held to have been not leviable at all. Actus curiae neminem gravabit. One of the first and the highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors. In adhering to that duty, the Court, if necessary, may correct the mistakes of its own officer. In AIR 1950 Bombay 4 excessive court-fee was paid because earlier decisions of the Court had wrongly treated the appeals in suits for partition as falling under section 7(v), Court-fees Act. It was held that the Court could under its inherent power, apart from Sections 13, 14 and 15, Court-fees Act, grant a certificate entitling the appellant to a refund of the excess amount paid. To the same effect are the decisions in AIR 1932 Madras 438 and *Abdul Majid Mridha v. Amina Khatun*²⁹,

19. The facts in 31 Nag LR 82 : AIR 1934 Nagpur 263 are distinguishable from the facts of the instant case. In Raoji's case there was no mistaken action taken by the litigant because of any order of the Court or an act of its officer as in the present case.

But if that decision is invoked as laying down the proposition that the Court cannot order refund of court-fees apart from Sections 10 to 15, Court-fees Act, it cannot be

regarded as correct. The Court can in a case like the present act under its inherent powers to order refund. We agree with Deo, J. that the appellant is entitled to a certificate of refund. The decision in *Raoji v. Collector, Amraoti, (Al) (supra.)* cannot come in the way of the grant of such a certificate.

20. The case will now be placed before the appropriate bench for disposal.
Order accordingly.

Cases Referred.

¹ SA No. 127 of 1954, D/-10-3-1954 : AIR 1955 Nag 46

² 31 Nag LR 82 : AIR 1934 Nag 263 (Al)

³ 1953 Nag LJ 383 : AIR 1953 Nag 330

⁴ AIR 1950 Bom 4

⁵ AIR 1930 All 471

⁶ AIR 1932 Mad 438

⁷ 55 Cal WN 417

⁸ AIR 1935 Cal 707

⁹ 40 Cal 365

¹⁰ AIR 1929 Ran 158

¹¹ AIR 1953 Bom 73

¹² 1905 AC 369

- ¹³ AIR 1927 PC 242
¹⁴ AIR 1953 SC 221
¹⁵ ILR (1952) Nag 457 : AIR 1952 Nag 350 (FB)
¹⁶ AIR 1954 Vind Pra 5
¹⁷ 1899-2 QB 158
¹⁸ ILR (1941) All 558 : AIR 1941 All 298
¹⁹ AIR 1926 Nag 71
²⁰ AIR 1924 Cal 731
²¹ AIR 1933 Sind 354
²² AIR 1924 Cal 881
²³ AIR 1933 All 20
²⁴ 7 Suth WR 452
²⁵ 7 Suth WR 462
²⁶ 15 Suth WR 272
²⁷ Civil Revn. No. 653 of 1953, D/-11-8-1954
²⁸ ILR (1950) Nag 532 : AIR 1950 Nag 177 (24)
²⁹ ILR (1942) 2 Cal 253 : (AIR 1942 Cal 539)