

(1960) 09 GUJ CK 0010
In the Gujarat High Court

Case No : Civil Application No. 531 of 1960 in First Appeal No. 281 of 1959

Ahmedmiya Haji Chhotumiya	Vs	APPELLANT
Fatmabu Abubuker and Others		RESPONDENT

Date of Decision : 26-09-1960

Acts Referred:

Bombay Court Fees Act, 1959 — Section 43, 43(2)
Civil Procedure Code, 1908 (CPC) — Section 151
Court Fees Act, 1870 — Section 13, 14, 15

Citation : AIR 1961 Guj 31

Hon'ble Judges : Shelat, J

Bench : Single Bench

Advocate : R.M. Shah, for the Appellant; B.R. Sompura, Asst. Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Shelat, J.

1.This application raises a question of some interest regarding the interpretation of Section 43 of the Bombay Court-fees Act, No. XXXVI of

1959. The question arises in the following manner :

The opponents-plaintiffs filed a suit No. 92 of 1957 in the Court of the 2nd Joint Civil Judge (Senior Division), Ahmedabad, against the petitioner-

defendant for the recovery of Rs. 12412-8-0 alleged to be due and payable under a promissory note executed in 1951 by the petitioner. The Trial

Court rejected the petitioner's plea of limitation and passed a decree in favour of the opponents-plaintiffs for a sum of Rs. 12,347-8-0. On the

17th of January 1957, the petitioner presented a First Appeal against the said decree. On the 7th of April 1959 that appeal was registered and

given a number, viz. No. 281 of 1959. Before the appeal could come up for admission, the learned advocate for the petitioner lodged a note before the office for the appeal to be placed on Board for withdrawal. In accordance with that note, the appeal then already numbered 281 of 1959 was placed on April 15, 1959 before the Division Bench of the then High Court of Bombay consisting of Tambe and Datar, JJ. The learned Judges granted liberty to the petitioner to withdraw the appeal and thereupon the appeal was withdrawn. The learned advocate for the petitioner thereafter filed a note before the office asking for a refund of the Court-fees paid by the petitioner at the time of the presentation of the appeal. The matter was placed before Mr. Justice Datar of the High Court of Bombay on the 7th of November 1959, when the learned Judge asked the petitioner's advocate to file a regular application. The learned advocate for the petitioner thereupon filed an application, being application No. 531 of 1960, praying therein for the refund of the entire Court-fees paid by the petitioner. As a result of the bifurcation, this application has come to be transferred to this Court.

2. Mr. Shah for the petitioner has contended that the petitioner is entitled to the refund of the court-fees by reason of the fact that the appeal was withdrawn even before it could come for admission. As I have said, liberty to withdraw the appeal was granted to the petitioner's advocate on 15th April 1959, long before the Bombay Court-fees Act of 1959, came into force. The new Act came into force on August 1, 1959. Mr. Shah has conceded that the only sections in the Court-fees Act, 1870, which provide for refund are Sections 13, 14, 15 and 31. There is no dispute that none of these sections provides for the refund of Court-fees in respect of an appeal which has been withdrawn in the circumstances in which the present appeal was withdrawn. Mr. Shah, however, contended that assuming that the Court-fees Act of 1870 applies, though none of the Sections 13, 14, 15 or 31 of that Act is applicable, this Court has inherent jurisdiction to order refund of the Court-fees as the appeal was withdrawn by the petitioner before it even came up for admission, Mr. Shah has relied upon certain observations made by Mulla in his commentary u/s 151 of the Code of Civil Procedure, 12th edition, where it is observed that a Court has inherent power to order refund of Court-fees paid by inadvertence, or

in cases which are not governed by Sections 13, 14 and 15 of the Court-fees Act, 1870. Relying on these observations Mr. Shah argued that I

should exercise the inherent power, u/s 151 and direct that the Court-fees paid by the petitioner should be refunded to him.

3. There are decisions of certain High Courts in which orders of refund of Court-fees though not falling u/s 13, 14 or 15 of the Court-fees Act,

1870, were passed. These are : AIR 1933 170 (Oudh) , Kumud Nath Das Saha and Others Vs. Government Pleader, , Firm Hari Ram and Sons

v. H. O. Hay, AIR 1939 Lah 257 , Ahmed Ebrahim Vorajee Vs. The Government of The Province of Bombay, Vishnuprasad Narandas Modi

Vs. Narandas Mohanlal Modi, , Indu Bhusan Roy Choudhury Vs. Secy. of State, and Chanamallappa v. Shrishailappa, an unreported judgment of

Mr. Justice Bavdekar of the High Court of Bombay, in Civil Appln. No. 53 of 1950 (F. A. No. 247 of 1950), D/- 29-6-1951. Except in the

decisions by the High Courts of Lucknow and Lahore, and the unreported judgment of Mr. Justice Bavdekar, the principle upon which the Courts

in the rest of these decisions exercised the inherent power u/s 151 of the CPC and ordered refund was that the party concerned had either paid the

court-fees where he was not liable to pay or that such a party has paid the court-fees in excess through mistake or inadvertence. In other words,

the principle upon which the Courts acted u/s 151 of the CPC was that if a party has paid Court-fees where he is not liable to pay, or has paid

court-fees more than what he is liable to pay through mistake or inadvertence, Government should not be allowed to take advantage of such

mistake or inadvertence and it would, therefore, be right to ask Government to take such court-fees as the Legislature by the Court-fees Act has

made the party liable to pay and no more. If, therefore, any excess of court-fees has been paid, or where there is no liability and yet a party

through mistake or inadvertence has paid such court-fees, it would be right for the Court to exercise its inherent power and pass an order of

refund. In AIR 1933 170 (Oudh) , the High Court had, however, ordered refund on the ground that the appeal filed in that case was wholly

unnecessary. That order undoubtedly was beyond the principle laid down in the aforesaid cases. Similarly, in AIR 1939 Lah 257, the Lahore High

Court passed an order of refund in a case where it found that the lower Courts had not decided the case on merits. The Lahore High Court took

the view that though the case did not strictly fall u/s 13 of the Court-fees Act, 1870, the case was analogous to one falling u/s 13 and therefore

passed an order for refund. In Civil Appln. No. 53 of 1950 (F. A. No. 247 of 1950), D/- 29-6-1951 (Bom.), Bavdekar, J. ordered refund of

Court-fees holding that the Court had inherent power to grant refund of court-fees irrespective of any limitation and that each case must be judged

upon its own merits. He took the view that as the appeal was withdrawn at the time of admission, the Court should order refund of Court-fees.

The learned Judge felt that applications to withdraw hopeless appeals should be encouraged as it would save unnecessary litigation. I may observe

that the grounds on which Mr. Justice Bavdekar made the order of refund of court-fees are almost similar to the ones existing in the present case.

If the judgment of Bavdekar, J. were to be good law, there is no doubt that Mr. Shah would be entitled to the refund of the entire court-fees paid

by the petitioner.

4. The question as to whether the Court has power u/s 151 of the CPC to pass an order of refund, although the case does not fall under any of the

sections in the Court-fees Act, 1870, dealing with the refund of Court-fees arose in Karfule Ltd. Vs. Arical Daniel Varghese, . The learned Chief

Justice sitting with Mr. Justice Gajendragadkar there held that the Court has no such power u/s 151 of the Civil Procedure Code, to circumvent

the provisions of law. If the Legislature has cast a particular obligation upon a citizen, it is not open to the Court u/s 151 to exonerate him from that

liability or to reduce the quantum of that liability. The law must be given effect to, and the Court cannot be a party to the circumvention of that law

by exercising its supposedly inherent power u/s 151. There an appeal to the High Court was compromised out of Court and the appellants then

applied for refund of court-fees on the ground that the appeal had been withdrawn before it was heard. The High Court held that it had no

Jurisdiction to order refund of the Court-fees which the appellants were in law liable to pay. The learned Chief Justice delivering the judgment of

the Bench analysed various decisions cited before them and in which orders of refund had been passed. Dealing with the decision of the High

Court of Lahore in AIR 1939 Lah 257 , the learned Judges held that that decision was not a correct one because if the Court had to give effect to

Section 13 of the Court-fees Act, 1870, it must give effect to the provisions of the section as framed by the Legislature and not upon the ground

that the case before them was apalogous to one which would fall u/s 13. Similarly, they held that the decision by the High Court of Lucknow in

AIR 1933 170 (Oudh) , did not lay down a correct principle. If an appellant chooses to file an appeal which ultimately turns out to be unnecessary

he is bound to pay Court-fees which the law requites him to pay. Such a case would not be one of those cases where he has paid Court-fees

which he was not legally liable to pay. So far as the decision of Mr. Justice Bavdekar was concerned, the learned Judges held that though they

were in agreement with the view of the learned Judge that unnecessary litigation should be discouraged they could not agree with him that it was for

the Court to give effect to that principle by really legislating contrary to the provision of the Court-fees Act, and that therefore that case was not

one where the inherent power of the Court could have been exercised u/s 151. The principle thus laid down in 54 Bom LR 664 Karfule Ltd. Vs.

Arical Daniel Varghese, , was that a Court has no power u/s 151 to circumvent the provisions of the Court-fees Act. If that Act casts a particular

obligation upon a litigant to pay certain Court-fees, it is not open to the Court u/s 151 to exonerate that citizen from that liability or to reduce the

quantum of that liability. If on the other hand, a litigant has paid Court-fees which he was not bound to pay under the Court-fees Act, or has paid

Court-fees in excess to what he was liable to pay under the provisions of that Act, the Court would be entitled to and it would be in fact right and

proper for the Court to exercise its inherent power u/s 151 and to order refund of the Court-fees or a part thereof paid by him in excess as the

case may be. But as I have said before, such an order would be passed on the principle that Government should not be allowed to retain the

court-fees which the Legislature has not thought fit to exact from the litigant. It is only on this principle that the Court can act u/s 151 of the Civil

Procedure Code. A case illustrative of this principle arose in Vishnuprasad Narandas Modi Vs. Narandas Mohanlal Modi, . The plaintiff in that

case had paid ad valorem duty in a suit for partition. After the suit was filed, a decision was given by the Full Bench of the High Court of Bombay

to the effect that in a partition suit ad valorem duty was not payable, but that what was payable was a fixed fee under Sch. II, Article 17, Clause

(vii), of the Court-fees Act. In view of that decision, the learned Judges who decided that case held that there was no liability upon the plaintiff to

pay ad valorem fees, and, therefore, ordered refund. The principle upon which the power u/s 151 of the CPC was exercised in this decision is

clear, viz. that there was no legal liability on the plaintiff in that case to pay ad valorem duty in a partition suit and he having paid such ad valorem

duty through mistake of law, he was entitled to refund of the fee paid by him in excess. This being the principle on which the inherent power u/s

151 can be exercised, Mr. Shah must fail in his contention.

5. Mr. Shah next contended that the petitioner would be entitled to an order of refund by virtue of a notification dated April 29, 1960 issued by the

Government of Bombay in exercise of the powers conferred upon them under Sub-section (2) of Section 43 of the Bombay Court-fees Act,

1959. The notification provides for the refund of the Court-fees in five cases enumerated in the schedule annexed thereto. There can be no doubt

that if the notification were to apply to the facts of this case, the petitioner would be entitled to a refund of at least half the court-fees under item (3)

or (4) of that schedule. The question is whether Section 43 of the new Act or the notification issued thereunder can apply to a case where there

has been a withdrawal of the appeal prior to the date when the Act came into force. As I have pointed out, liberty to withdraw the appeal was

granted to the petitioner on April 15, 1959, and the appeal was accordingly withdrawn on that day, that is to say, long before August 1, 1959 when

the new Act came into force. Mr. Shah's contention, however, was that by virtue of Sub-section (2) of Section 43 as also the fact that the

application for refund was made by him on January 7, 1960 i.e. after the Act came into force, the petitioner was entitled to the refund of at least

half the Court-fees. In my view, such a contention cannot be sustained.

6. Section 43 deals with repayment of fees in certain circumstances. Sub-section (1) of that section provides that when a suit is settled by

agreement of parties before any evidence is recorded or any appeal or cross objection is settled by an agreement of parties before it is called on

for effective hearing by the Court, half the amount of fees paid by the plaintiff appellant or respondent on the plaint, appeal or cross-objections as

the case may be, shall be repaid to him by the Court. There is a proviso to that

Sub-section but that is not relevant and therefore it is not necessary to decide it. It is clear from Sub-section (1) of Section 43 that the Legislature itself has provided for the refund of part of the Court-fees in the events specified in that sub-section, and therefore the Court can pass an order of refund by virtue of the provisions of that sub-section. It would seem, however, that besides providing for those events in which the Court can pass an order of refund, the Legislature under Sub-section (2) of that section gave certain powers to the State Government, empowering the State Government to provide by an order of repayment to a plaintiff or appellant or a respondent of any part of the fees paid by him on a plaint or appeal or cross-objections, in suits or appeals disposed of under such circumstances and subject to such events as may be specified in the order. It is by virtue of this power reserved to the State Government by Sub-section (2) of Section 43 that the notification referred to above was issued by the State Government. Mr. Shah argued that under Sub-section (2) the State Government can pass an order for refund in any circumstances that it deems proper. That is correct. The notification issued by the State Government does in fact provide for the refund of the Court-fees in certain circumstances. Mr. Shah argued that the petitioner, having withdrawn his appeal even before it came up for admission, that is to say, before any preliminary hearing, would be entitled to claim an order of refund from this Court. Section 43(2) which gives power to the State Government to issue an order providing for refund must be construed to be one which applies to matters which arise after the 1st of August 1959 when the Act came into force. For I find nothing in Section 43 or in the notification issued by the State Government thereunder to justify the view that that section or the notification would apply in the case of an appeal which was withdrawn long before the Act came into operation. It is true that an application for the refund was made on the 7th of January 1960 after the Act came into operation. But the fact that that application was made after the Act came into operation is hardly relevant. What is relevant is the date when the appeal was withdrawn. At that date the Court-fees Act, 1870, which has no provision for refund in such a case, was in operation. If, therefore, the petitioner was entitled to any order of refund of Court-fees, it would be under the Act which was applicable then and not the Act of

1959 which was not then in operation. The notification issued under powers reserved under Sub-section (2) of Section 43 therefore can apply only

to those matters which arise after the Act came into operation and not to matters which were disposed of or withdrawn as in this case long before

the Act came into operation.

7. For these reasons, the application must fail and is dismissed. The fair order of costs would be that there shall be no order as to costs.