

(1945) 08 AHC CK 0012
In the Allahabad High Court

Case No : Civil Miscellaneous Applications No's. 1192 and 1193 of 1944

Bhaiya Mohd. Azim Khan

APPELLANT

Vs

Raja Saadat Ali Khan and Others

RESPONDENT

Date of Decision : 10-08-1945

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Court Fees Act, 1870 — Section 13
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Civil Procedure Code, 1908 (CPC) — Section 151
Court Fees Act, 1870 — Section 13

Citation : (1945) 08 AHC CK 0012

Hon'ble Judges : Thomas, C.J; Ghulam Hasan, J

Bench : Division Bench

Advocate : Niamat Ullah and M.K. Seth, for the Appellant;

Final Decision : Dismissed

Judgement

Thomas, C.J. and Ghulam Hasan, J.—These applications for refund of court-fees paid on behalf of the appellant are made u/s 13 of the Court Fees Act read with Section 151 of the Code of Civil Procedure.

2. It is conceded on behalf of the applicant that neither Section 1 nor any other provision of the Court Fees Act is applicable "to the case and refund is sought under the inherent powers of this Court for which reliance is placed on two cases of this Court in Swatni Dnyal v. Mohammad Sher Khanl and AIR 1925 39 (Oudh) and a Calcutta case reported in J.C. Galstaun Vs. Janaki Nath Roy and Others, .

3. The facts are these : The applicant filed two suits claiming the Nanpara and the Utraula estates. These were dismissed by a learned Judge of this Court on the original side on the 22nd December, 1930. No appeal was filed before the Bench. An application for leave to appeal to the Privy Council was filed instead and this was refused by a Bench of this Court on the 21st September,. 1931. In

this application it was further asked that if leave was refused the application may be treated as an appeal to the Bench, but this prayer was not pressed as the applicant was unable to pay the court-fee. On the 9th March, 1932, an application /or special leave to His Majesty in Council. was filed and was granted on the 9th April with liberty reserved to the respondents, in whose absence the application was heard, to raise the question at a future hearing. Their Lordships of the Judicial Committee refused to entertain the appeal and revoked the certificate. The case is reported in *Bhaya Mohammad Azim Khan v. Saadat Ali Khan* (1939) 66 IA 160 : 1939 OA 497: AWR (P C) 76. Their Lordships did not decide the "question whether the applicant had a right of appeal direct to the Privy Council without first preferring an appeal to the Bench and rested their decision on the ground that the provisions of the Code did not affect the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever and declined to entertain the appeal, with the result that the certificate was revoked (See S. 112 C. P. C), Their Lordships, however, observed that the right of the applicant to file an appeal before a Bench of this Court was not prejudiced.

4. Accordingly on the 12th July, 1939, an appeal was filed before the Bench .with an application for leave to appeal in forma pauperis. There was also an application under Sections 5 and 11 of the Indian Limitation Act for condoning the delay in filing the appeal. On the 18th November, 1940, a court-fee of Rs. 10,000 was paid in one case and Rs. 6,730 was paid in another. In these circumstances the application for leave to appeal in forma pauperis was dismissed and as regards the other application a Bench of this Court on the 12th February, 1941, dismissed the application under Sections 5 and 14 of the Limitation Act holding that the applicant was not actuated by good faith in prosecuting the proceedings before the Privy Council.

5. The present applications for refund of the aforesaid court-fees were made as late as the 14th November, 1944. The Government Advocate at the hearing informed the Court that he did not oppose the applications on behalf of Government and withdrew. We heard arguments in support of the application and after the arguments were concluded the Government Advocate filed an application stating the circumstances under which he was misled in stating to the Court that he did not oppose the application on behalf of Government.

6. He has asked the Court to hear him on behalf of Government before passing final orders but we do not till: k it necessary to do so, as we have arrived at the conclusion after hearing the applications should be dismissed.

7. It is argued before us that the applicant in preferring the appeal to the Privy Council acted under the advice of the Counsel and was actuated by good faith. We do not wish to traverse the ground over again in view of; the order of the Bench dated the 12th February "by which it was definitely held that good faith was not established and the applicant was not entitled to exclusion of time. This order could have been made the subject-matter of appeal to the Privy Council

but the applicant acquiesced and took no further steps. More than three years later he filed the present applications for refund of court-fee. In the two Oudh cases to which reference has been made above jurisdiction was exercised in favour of the appellant on the ground that the appeal filed by him was wholly unnecessary. In the first case an appeal was already pending from the preliminary decree and the result in that appeal would have governed the final decree as well. An appeal against the final decree was held to be wholly unnecessary and therefore the court-fee paid thereon was refunded. It is not denied that on the facts these cases are not parallel and the appeal to the Bench in the present case was absolutely necessary. In the Calcutta As was held that the delay in filing the memorandum of appeal was not due to negligence on the part of the appellant but to some gross negligence on the part of his legal adviser and under these circumstances the Court held it to be a fit case for the exercise of the inherent power. The order of the Bench dated the 12th February, 1941, does not exonerate the applicant from the charge of negligence and absence of bona fides. This case, therefore, also affords no assistance to the applicant. It is, however, argued that every case must be determined upon its special facts and no hard and fast rule can be laid down as to which cases are fit for the exercise of inherent power and which do not justify such exercise. This is no doubt true but we are unable to hold that the circumstances of the present case show that it is a fit case for the exercise of inherent powers. On the other hand, in view of the Bench order the applicant is clearly disentitled to relief on the ground that it would not be expedient in the interest of justice to pass an order of refund in his favour.

8. We hold that there is no force in these applications, which are dismissed.

Appeal dismissed.