
(1976) 04 J&K CK 0004
In the Jammu And Kashmir High Court
Case No : Civil First Appeal No. 17 of 1974

Collector, Land Acquisition and Another	APPELLANT
Vs	
Dina Nath Mahajan and Others	RESPONDENT

Date of Decision : 21-04-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 107, 141, 149
Court Fees Act, 1870 — Section 4, 6
General Clauses Act, 1897 — Section 3
Limitation Act, 1963 — Section 2(7)

Citation : (1976) 04 J&K CK 0004

Hon'ble Judges : M.R.A. Ansari, C.J.; Adarsh Sein Anand, J

Bench : Division Bench

Advocate : O.N. Tikku, for the Appellant; S.P. Gupta, for the Respondent

Judgement

M.R.A. Ansari, C.J.—In this appeal filed by the Collector, Land Acquisition Jammu, and the State of Jammu and Kashmir, against the

judgment and decree of the District Judge. Jammu, in file No. 13 dated 26-9-74, an application has been filed by the appellants u/s 149 of the

Civil P.C. for condonation of delay in paying the deficit court-fees. The application has been opposed by the respondents.

2. Before considering the question of condonation of delay in paying the deficit court-fees, a few relevant facts have to be stated.

3. The judgment and decree of the District Judge Jammu was passed on 26-9-74. The last date for filing the appeal against the said judgment and

decree was 3-1-75. The appeal was actually filed on 23-12-74, i.e. well within the time for filing the appeal, but the appeal was filed with court-

fees of Rs. 460/-whereas the proper court-fees payable was Rs. 2952.50. The Registry of this Court made an endorsement on the appeal on 24-

12-74 pointing out that deficiency in the court-fees and asking the counsel for the appellants to make up the deficiency. No date was however

fixed by the Registry within which the deficit court-fees had to be paid. The deficiency was not made up till 24-2-75 on which date the Registry

again made the following note on the memorandum of appeal:

Court-fee in the appeal has not been paid by the counsel for the appellant as yet. Issue notice to the counsel for the appellant, asking him to make

good the deficiency in the court-fee at once. Put up before the D.R. on 10-3-75.

On 10-3-75 the Registry again made the following note:

Counsel for the appellant is present He seeks time to make up the deficiency in the court-fee. Put up tomorrow.

Then the following note appears on 11-3-75:

Counsel for the appellant is present. He has made good the deficiency in the court-fee, i.e. Rs. 2491 only. Now the court-fee is correct. Put up for

admission.

4. As a matter of fact the deficit court-fees was paid on 10-3-75 itself.

5. On 2-7-75 the Registry made a note to the effect that deficit court-fees had been paid after a period of more than two and a half months after

filing the appeal and that no application had been filed on behalf of the appellants for condonation of delay in paying the deficit court-fees. The

Registry further noted that respondent No. 2 had made an application that before passing any order he may be afforded an opportunity of being

heard. An application dated 19-11-75 was filed on behalf of the appellant u/s 149 of the Civil P.C. for condonation of delay in making up the

deficiency in the court-fees. This application was supported by an affidavit of Shri P.S. Kotwal, P A to the Advocate-General, Jammu, stating the

reasons for not paying the requisite court-fees at the time of filing the appeal and also for the delay in making up the deficiency in the court-fees.

This application was resisted by the respondents and objections were filed by Shri D.N. Mahajan, respondent No. 2 supported by an affidavit. In

view of the above controversy, this Court passed an order on 24-12-75 calling upon the parties to adduce evidence. In accordance with this

order, evidence has been adduced by both the parties which would be discussed at a later stage.

6. Section 149 of the Civil P.C. under which the appellants have filed the application reads as follows:

Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid

the court may, in its discretion at any stage, allow the person, by whom such fee is payable to pay the whole or part, as the case may be, of such

court fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had

been paid in the first instance.

7. The learned Advocate-General appearing for the appellants has contended that Section 149 of the Civil P.C. has to be read along with Order 7,

Rule 11 and Sections 107 and 141 of the Civil P.C. and that when so read it is incumbent upon the court to give an opportunity to the appellants

to pay the deficit court-fees within a time by it, and that it is not open to the court to straightway reject the appeal on the ground that requisite

court-fee has not been paid on the date of filing the appeal.

8. The relevant provisions of Order 7 Rule 11 of the Civil P.C. reads as follows:

The plaint shall be rejected in the following cases:

(c) where the relief claimed is 'properly valued, but the plaint is written' upon paper insufficiently stamped, and the plaintiff on being required by the

court to supply the requisite stamp paper within a time to be fixed by the court, fails to do so.

9. The relevant portion of Section 107 of the Civil P.C. is as follows:

(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power....

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred

and imposed by this Code on courts of original jurisdiction in respect of suits instituted therein.

10. Section 141 of the Code states: ""The procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable,

in-all proceedings in any court of civil jurisdiction.

11. The contention of the learned Advocate-General based upon Section 149 read with Order 7, Rule 11 and Sections 107 and 141 of the Civil

P.C. does find support from the decisions of some of the High Courts.

12. In *Sarjug Prasad Sahu and Others Vs. Surendrapat Tewari and Others*, a Division Bench of the Patna High Court held that the provisions of

Order 7, Rule 11 are applicable to appeals also and that being so where the memorandum of appeal is insufficiently stamped, the court must afford

the appellant an opportunity of making good the deficiency in the court-fee payable on the memorandum of appeal.

13. Another Division Bench of the same High Court in *Ramgati Singh Vs. Shitab Singh and Another*, has held that "a memorandum of appeal not

sufficiently stamped cannot be rejected summarily on that ground unless an opportunity is given to the appellant to explain or make good the,

deficiency within a stated time," and in so holding, the learned Judges invoked Order 7, Rule 11 and Section 107 of the Civil P.C.

14. This view was reiterated by a single Judge of the same High Court in *Mahabir Ram and Another Vs. Kapildeo Pathak and Others*, where it

was held "that the provisions of Order 7, Rule 11 are applicable to appeals also and that being so, where the memorandum of appeal is

insufficiently stamped, the court must afford the appellant an opportunity of making good the deficiency of the court-fee payable on the

memorandum of appeal and that it was therefore clear that a memorandum of appeal not sufficiently stamped cannot be rejected summarily on that

ground, unless an opportunity was given to the appellant to explain or to make good the deficiency within the stated time.

15. The Judicial Commr. of Tripura has also expressed the same view in *H.C. Sarkar v. Jyoti Bala Chakraborty* AIR 1970 Tripura 26.

16. But there are decisions of other High Courts which have taken a contrary view.

17. A Division Bench of the Lahore High Court in *Jagat Ram v. Kharaiti Ram* AIR 1938 Lah 361 (FB) expressed the view that even under Order

7, Rule 11, Civil P.C. it was not incumbent upon a court of justice to allow the plaintiff an opportunity to make good the deficiency in court-fee. In

the words of Din Mohd. J. "It is not an enabling provision and has nothing to do with the power of the court to have the deficiency made up. It is

on the other hand a disabling provision, enjoining the court to reject a plaint if deficiency is not made good as ordered by the court. The authority

to issue the order lies in Section 149 and the penalty for default in Rule 11 of Order 7. Interpreted in this manner, every provision of law becomes

intelligible and harmonious and our first effort should be to find harmony and concord in the variant enactments and not disharmony and discord.

18. The Division Bench referred the matter to a Full Bench, but the Full Bench did not think it necessary to decide the question referred to it and

decided the appeal on the basis that Section of the Civil P.C. gave sufficient discretion to the court to condone the delay in paying the deficit court-

fees in appeals.

19. In *Jabar Singh (Died) and Others Vs. Shadi (died) and Others*, a single Judge of that Court held that the provisions of Order 7; Rule 11 do not

apply to appeals and the appellate court is entitled to reject an appeal if full court-fee is not paid without calling upon the appellant to pay deficient

court-fee, inasmuch as the memorandum of appeal is concerned. express provision has been made in Order 41, Rule 3 for its rejection on the

grounds stated in that rule.

20. With respect we are not inclined to accept the view expressed in some of the decisions cited above that Section 149 has to be read along with

Order 7, Rule 11 of the Civil P.C. and that the court cannot reject an appeal when it is filed without the requisite court-fee and that the court can

reject the appeal only when the appellant does not make good the deficiency in court-fee, after an opportunity is given to him to make up the

deficiency within a particular time; Order 7, Rule 11 specifically applies to a plaint in a suit. It is no doubt true that by virtue of Sections 107 and

141 of the Civil P.C. the appellate court has all the powers as well as the duties of the trial Court, but Section 149 is a special provision which is

applicable to appeals which are presented with deficit court-fee. It is well established that a special law takes precedence over a general law. We

have, therefore, to confine ourselves to the provisions of Section 149, Civil P.C. in order to determine whether or not the delay in paying the deficit

court-fee may be condoned Section 149 of the Code in specific terms gives power to an appellate court to give an opportunity to the appellant to

pay the deficit court-fee within a specified time and also provides that if such deficiency is made good within a specified time or within any further

time allowed by the court in its discretion then court-fee, must be deemed to

have been paid at the time of presentation of the appeal. The discretion which is vested in a court of appeal u/s 149 has, however, to be exercised judiciously and the appellant has no right to ask for time for payment of the deficit court-fee. As observed by Bombay High Court in *Basawwa Dada Mali Vs. Limbawwa Dada Mali*, . In respect of the payment of court-fees, Section 149 which read with Section 107 of the Code gives discretion to the court to permit making up the deficit in the court-fee on the memorandum. This discretion has to be exercised judiciously and not automatically merely for the asking. In exercising its discretion u/s 149 of the Civil P.C. the court has to consider whether the appellant acted in good faith in not paying the full court-fee at the time of the presentation of the appeal. u/s 3(22) of the General Clauses Act 'a thing shall be deemed to be done in 'good faith' where it is in fact done honestly, whether it is done negligently or not', But u/s 2(7) of the Limitation Act 'good faith' has been defined as follows:

Nothing shall be deemed to be done in good faith which is not done with due care and attention.

21. There is an obvious difference in the definition of 'good faith' under the two Acts mentioned above. The question is which definition should be adopted for the purpose of exercising the court's discretion u/s 149 of the Civil P.C.

22. We shall now proceed to refer to some decisions which indicate the manner in which the discretion has to be exercised by the court u/s 149, Civil P.C. and how good faith has to be understood in exercising such discretion. In *Jagat Ram v. Khairati Ram* AIR 1938 Lah 361 (FB) (supra)

Dalip Singh J. speaking for the Full Bench has indicated in the following terms the manner in which the discretion has to be exercised by the court:

It seems to me that the discretion conferred on the court by Section 149, Civil P.C. is normally expected to be exercised in favour of the litigant

except in cases of contumacy or positive mala fides or reasons of a similar kind. The question of bona fides in this connection should be construed

in the sense that the word is used in the General Clauses Act and not as used in the Limitation Act. A thing should be presumed 'to be done bona

fide, if, it is done honestly whether it is done negligently or not for the purposes of judging whether the discretion u/s 149 should or should not be

exercised in favour of the litigant.

23. In the *The State of Punjab Vs. Nand Kishore*, a Division Bench of that court has made the following observations:

Section 149 of the Code caves out an exception to the general rule contained in Sections 4 and 6 of the Court-fees Act (About no document or

proceedings filed in court amounting to a legal institution or legal presentation of it if it is not affixed with the court fees chargeable on it) by giving to

the court concerned a power to permit a litigant to pay the requisite fee at any stage of the proceeding after the deficiently stamped document has

been filed therein and by further providing that on the deficiency being so made up within the time allowed by the court the subsequent payment of

the deficient court-fees should have the same effect as if proper and full court-fees had been paid in the first instance. If discretion u/s 149 of the

Civil P.C. is exercised by the court a petition of appeal on which insufficient court-fees has been paid, would not become barred by time if it was

within time when originally instituted provided full fee leviable on it is paid with the leave of the court even after the expiry of the period of limitation.

An order under this section can be passed by the court suo motu in the peculiar circumstances of any case even without a formal application being

made for the purpose.

24. The Division Bench again observed at page 334:

No suit or litigant in a free country should be non-suited on a technical matter like if there is no want of bona fides on his part and if the appeal had

in fact been presented within time and there has been some insignificant delay in making up the deficiency in court-fees on account of reasons

beyond the control of the appellant.

25. In *Union of India, Delhi Vs. Roshan Lal and Another*, a Division Bench of that court expressed the view that the discretion conferred on a

court by Section 149, Civil P.C. is normally expected to be exercised in favour of the litigant except in cases of contumacy, of positive mala fides

or reasons of similar kind. It was further observed that the question of bona fides in this connection is to be construed in the sense used in the

General Clauses Act and not in the Limitation Act. A thing is accordingly to be presumed to be done bona fide if it is done honestly, whether it is

done negligently or not for the purposes of judging whether the discretion u/s

149, Civil P.C. should or should not be exercised in favour of the litigant.

26. A single Judge of the Punjab and Haryana High Court has, however taken a contrary view in *Amar Kaur Vs. Iqbal Singh and Others*, wherein he has held that in deciding whether the appellant acted in good faith, the words 'good faith' cannot be construed as defined in Clause (22) of Section 3 of the General Clauses Act but as defined in Section of the Limitation Act.

27. With respect, we are unable to agree with the view taken by the learned single Judge of the Punjab and Haryana High Court. As already observed, Section 149 of the Civil P.C. does not prescribe any limitation for payment of court-fee and therefore the meaning of the word 'good faith' as defined in the Limitation Act cannot be applied to cases falling u/s 149 of the Civil P.C. It is the meaning given to these words in the General Clauses Act that has to be applied.

28. Finally it has to be noticed as observed by the Supreme Court in *Mahasay Ganesh Prasad Ray and Another Vs. Narendra Nath Sen and Others*, "that the question of payment of court-fees is primarily a matter between the Government and the person concerned and the other party cannot attack the order on the ground that it takes away his valuable right to plead the bar of limitation.

29. The position that emerges from the above discussion is (1) that Order 7, Rule 11 of the Civil P.C. does not apply to appeals and the appellant need not be given any opportunity to pay the deficit court-fee before rejecting the appeal; (2) that for the purposes of an appeal filed with insufficient court-fee, resort has to be had only to Section 149 of the Civil P.C. and under that section the court has a discretion to give opportunity to the appellant to pay the deficit court-fee with-in a specified time; (3) that the discretion has, however, to be exercised judiciously; (4) that such discretion may generally be exercised in favour of the appellant if. the court is satisfied that the appellant had acted in good faith; (5) that 'good faith' has to be construed as defined in the General Clauses Act and not as defined in the Limitation Act and (6) that payment of court-fee is a matter that primarily concerns the Government and the appellant and the opposite party cannot plead the bar of limitation.

30. We shall now proceed to consider the evidence in this case in the light of the legal position as stated above. The appellants have examined

three witnesses on their side, namely, (1) Th. Phulel Singh, P.A. to the Advocate-General, (2) Nand Lal, stamp vendor and (3) Dwarika Nath,

another stamp vendor, and the respondents have examined only one witness. viz., Shri Kewal Krishan, Gupta Treasury Officer, Jammu.

31. Mr. Phulel Singh has stated that in response to a requisition by the Advocate-General, the entire amount of court-fee was made available by

the department concerned before the date on which the appeal was filed. The part of the evidence of this witness has not been challenged by the

respondents. Therefore so far as the appellants are concerned, they provided; the court-fee within the time for filing the appeal. The appellants

themselves have thus not been negligent and no blame can be attached to them for the appeal being filed with deficit court-fee and for the delay

that was actually caused for making up the deficiency. Phulel Singh has then proceeded to give an explanation why the full court-fee was not paid

at the time of filing of the appeal, why the court-fee of Rs. 460/- only was paid at the time of filing the appeal and why the deficit court-fee was

paid after a delay of about two. and a half months. According to him he requested witness, Nand Lal, stamp vendor, to supply court-fee stamps

for the entire amount of Rs. 2900/- but the stamp vendor expressed his inability to supply stamps of the entire amount and said that he could

supply him stamps only of a lesser value. He has further stated that this stamp vendor then took him to another stamp vendor, namely Dwarika

Nath and asked him to supply stamps for the remaining amount The latter also expressed his inability to supply stamps of the remaining amount to

the witness and said that he could supply him stamps of a lesser value. Phulel Singh has stated that he has been purchasing stamps from these two

stamp vendors from time to time and when ultimately the requisite stamps were available, he made up the deficiency in the court-fee on 10-3-

1975.

32. The evidence of Mr. Phulel Singh is corroborated to some extent by that of the two stamp vendors. Nand Lal and Dwarika Nath, who have

stated that Phulel Singh had come to them for the supply of stamps of a big amount which they could not supply as according to the rules they

could not sell stamps of the value of more than Rs. 100/- to a single party on a single day. They also stated that Phulel Singh was obtaining stamps from time to time.

33. There are no doubt certain discrepancies in the evidence of Phulel Singh on the one hand and Nand Lal and Dwarika Nath stamp vendors on the other regarding the amount which Phulel Singh is alleged to have left with Nand Lal. In our view these discrepancies are not of a material nature inasmuch as there is no suggestion made to Phulel Singh that he had kept the balance of the amount with himself for his own private purpose. The statements of the two witnesses Nand Lal and Dwarika Nath that under rules they could not sell stamps of the value of more than Rs. 100 to one person on the same day are supported by the evidence of Mr. Kewal Krishan Gupta, Treasury Officer, Jammu, who has been examined on behalf of the respondents.

34. The main criticism against the evidence of Phulel Singh is that even if he could not get the stamps of the full value from the stamp vendors, he ought to have purchased them from the treasury. It has also been brought out in the evidence that as a matter of fact Phulel Singh had purchased stamps of the value of Rs. three thousand and odd from the treasury on 5-12-74 for the purpose of court-fee in another appeal filed by the Advocate-General. Mr. Kewal Krishan Gupta, Treasury Officer, Jammu, has also proved the fact that stamps of the value of several lacs of rupees were available in the treasury during December 1974 and January 1975. It is true that Phulel Singh could have obtained from the treasury all the stamps that he wanted for payment of the requisite court-fee in this appeal and that he ought not to have waited for the stamp vendors to supply the stamps to him within the limitation placed upon them under the rules. The worst that can be said about Phulel Singh is that he was guilty of negligence, but we are unable to hold that his failure to pay the full court-fee at the time of filing the appeal or the delay in making up the deficiency in the court-fee was either deliberate or mala fide.

35. We have already referred to the fact that when the Registry pointed out the deficiency in the court-fee on 24-12-74 to the counsel for the appellants and when the latter was requested to make up the deficiency, no time was fixed by the Registry for paying the deficit court-fee. Even on

24-2-75 when the Registry directed the issue of a notice to the counsel for the appellants asking him to make good the deficiency in court-fee at

once, the notice itself was issued on 6-3-75. There is a note to this effect on the order sheet itself. After the receipt of the notice the deficit court-

fee was paid on 10-3-75.

36. Taking all these circumstances into consideration, we are of the view that the appellants had acted in good faith and that it is necessary in the

interest of justice to condone the delay in paying the deficit court-fees. The application is, therefore, allowed.