

(2004) 03 KL CK 0014

In the High Court Of Kerala

Case No : IT Appeal No. 18 of 2003 and Zita No's. 29, 110 and 281 of 1998, 2, 149 and 265 of 1999, 14 of 2001 and 139 of 2003

Commissioner of Income Tax

APPELLANT

Vs

A.M. Habeeb

RESPONDENT

Date of Decision : 08-03-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Income Tax Act, 1961 — Section 249(1), 253(6), 260A, 260A(2), 260A(7)
Kerala Court Fees and Suits Valuation Act, 1959 — Section 52A
Wealth Tax Act, 1957 — Section 27A

Citation : (2004) 188 CTR 100 : (2004) 2 ILR (Ker) 450 : (2004) 268 ITR 344 : (2004) 2 KLT 202

Hon'ble Judges : Kurian Joseph, J;G. Sivarajan, J

Bench : Division Bench

Advocate : P. Balachandran, Amicus Curiae, P.K.R. Menon and George K. George, V.K. Beeran and Georgekutty Mathew, for the Appellant;

Judgement

G. Sivarajan, J.—An important question as to the retrospective effect of Section 52A of the Kerala Court Fees and Suits Valuation Act, 1959 (hereinafter referred to as "the Act") inserted by the Kerala Court Fees & Suits Valuation (Amendment) Act, 2003 providing for Court fee payable on memorandum of appeal filed before the High Court against the orders of the Tribunal, both under the IT Act and under the WT Act calls for determination in all these cases.

2. The question arises this way. All these appeals are filed by the CIT, Kochi against the orders of the Tribunal, Cochin Bench, after the coming into force of Section 52A of the Act. Only a Court fee of Rs. 10 was paid on all these appeals. The office has raised objection stating that in all appeals filed after the insertion of Section 52A of the Act, Court fee has to be paid as provided u/s 52A r/w sub-item (c) of item (iii) of Article 3 of Schedule II to the Act. The standing counsel for the IT Department filed objection and maintained that only a Court fee of Rs. 10 is to be paid on the appeals. The appellants took the stand that they have a

vested right of appeal u/s 260A of the IT Act from 1st Oct., 1998; once an assessee files an appeal before the first appellate authority on or after 1st Oct., 1998, as against an assessment the law with regard to the appeal and Court fee should be as on the date on which a vested right is inherited in a party from the commencement of the action in the Court of first instance and such right cannot be taken away except by an express provision or by necessary implication. The Revenue has also relied on the decision of the Supreme Court in *Hoosein Kasam Dada (India) Ltd. Vs. The State of Madhya Pradesh and Others*, and in *State of Bombay Vs. Supreme General Films Exchange Ltd.*, . It is stated that in the light of the principles laid down by the Supreme Court in the above decisions, since, at the time of introduction of Section 260A on 1st Oct., 1998, the Revenue was exempted from payment of Court fee, the vested right of the Revenue to file an appeal without payment of Court fee continues till its culmination. It is also stated that the liability of the Revenue to pay Court fee could arise only in cases where the appeals are filed by the assesseees before the first appellate authority on or after 6th March, 2003. The Revenue had accordingly sought for a declaration that the liability of the Revenue for payment of Court fee both under the IT Act and under the WT Act would arise only in such cases where first appeals are filed by the assesseees on or after 6th March, 2003.

3. In view of this objection raised by the appellants, an order was passed on 2nd June, 2003, in unnumbered ITA of 2003 arising out of ITA No. 110/Coch/1998 of the Tribunal, Cochin Bench, as follows :

"After reading the objection, we are of the view that the question regarding payment of Court fee, in the circumstances, requires consideration. Hence we order notice on this question to the Advocate General. We also request Sri. P. Balachandran, Advocate, to look into the matter and assist the Court".

4. Subsequently the Government Pleader for the State has filed a statement. It is stated therein that Section 52A inserted in the Kerala Court Fees and Suits Valuation Act, 1959 by the Kerala Court Fees and Suits Valuation (Amendment) Act, 2003 (Act 2 of 2003) applies to all appeals covered by the said section w.e.f. 26th Oct., 2002. It is also stated that the wording of Section 52A itself indicates the above intention since the words employed are "memorandum of appeal filed". It is further stated that judicial verdicts holding that in respect of proceedings initiated before the amendment Court fee on the basis of unamended provisions alone need be paid in spite of amendment providing for higher Court fee, have been rendered on an interpretation of Section 52 of the Principal Act but Section 52A is notwithstanding anything contained in Section 52 of the Principal Act and such being the position, Court fee at the enhanced rate is payable on all appeals falling u/s 52A of the Act filed after 26th Oct., 2002.

5. On behalf of the CIT a reply to the said statement is filed stating that the use of the word "notwithstanding" is intended to deny the availability of the benefit of payment of one-third of the Court fee before the admission in civil appeal to appeals filed under the IT Act and WT Act before the High Court and that the

word "filed" just like the word "altered" used in *Namdeo Lokman Lodhi Vs. Narmadabai and Others*, and the words "entertained" or "instituted" in *United Bank of India, Calcutta Vs. Abhijit Tea Co. Pvt. Ltd. and Others*, does not make the provision retrospective. The non-conferment of appeal originally or conferment of appeal at a later stage does not in any way alter the vested right. The decision of the Supreme Court in *Special Military Estates Officer Vs. Munivenkataramiah and another*, was also relied on. It is also stated that in the light of Article 254(1) of the Constitution, the amendment is void and alternatively in the absence of presidential assent being obtained under Article 254(2) the Court Fees and Suit Valuation (Amendment) Act, 2003 cannot be enforced since the same has not become law.

6. Sri. Balachandran, learned counsel appearing as amicus curiae has also filed a reply to the statement filed by the State. It is stated that the assessee gets a vested right to file appeals from the moment a lis commences, that the Supreme Court considered the amended provision of Section 22 of the CP and Berar Sales-tax Act, 1947 wherein the words used were "in respect of which the appeals have been preferred", that in 3957 SCR 488 the Supreme Court considered the language of Article 133 of the Constitution of India and repelled the arguments that it impliedly takes away the right of appeal and that the same view was also taken by the Supreme Court in *United Bank of India, Calcutta Vs. Abhijit Tea Co. Pvt. Ltd. and Others*, . The counsel also pointed out that as per the amended provisions of the Court Fees Act the fee on memorandum of appeal filed before the High Court is 1 per cent of the assessed income subject to a maximum of Rs. 10,000, that the very premise on which the fee for appeal provided u/s 260A of the IT Act was omitted by the Finance Act, 1999 is virtually resurrected in the Court Fees Act and that unlike under the very scheme of the Court Fees Act where Court fee is levied only on the relief claimed, so far as appeals filed before this Court under the IT Act and WT Act, Court fee is payable on assessed income and not on the disputed income which is arbitrary. An illustration is also pointed out where the assessed income is Rs. 10 lakhs and the disputed amount is only Rs. 10,000 the Court fee payable is Rs. 10,000 which is the maximum payable. It is stated that this is arbitrary. It is also stated that earlier there was only a fixed Court fee but now it is computed on a different basis. It is stated that the right to pay a fixed Court fee without reference to any computation of monetary claim was a vested right in the hands of the litigant under the old Act.

7. We have heard Sri. P.K.R. Menon, learned senior counsel, Government of India (Taxes) appearing for the IT Department, Sri. V.K. Beeran, learned Addl. Advocate General for the State and Sri. P. Balachandran, learned counsel acting as amicus curie. All of them have relied on the decisions of the Supreme Court and the decisions of the High Courts in support of their respective contentions.

8. Before resorting to adjudicate upon the issue involved, it is necessary to bear in mind the facts and circumstances obtained at the time of insertion of Section 52A in the Kerala Court Fees and Suits Valuation Act by Act 2 of 2003, both

under the IT Act, 1961 and under the WT Act, 1957. Provisions regarding appeals, reference, etc. under both the above enactments are similar and hence further discussion hereinbelow is with reference to the provisions of the IT Act only. Ever since the commencement of those two enactments the assessee had a right of appeal against the assessment order before the first appellate authority [Section 249(1)] and if aggrieved a ... further appeal to the Tribunal [Section 253(6)] and if the assessee is aggrieved by the appellate order of the Tribunal they can file application before the Tribunal for reference of questions of law arising from the said appellate order for decision by the High Court u/s 256(1) of the IT Act. The Court fee payable on a reference application was Rs. 200 only. If the questions of law are referred by the Tribunal then the matter comes up before the High Court as an Income Tax referred case.

No separate Court fee is payable in such referred cases in the High Court. If the assessee is aggrieved by the decision of the High Court in such a reference he can file an appeal before the Supreme Court on a certificate being issued u/s 261 of the Act. If the certificate is refused by the High Court, then SLP under Article 136 of the Constitution of India can be filed before the Supreme Court.

9. The Revenue has no right of appeal against the order of the AO though a suo motu revision in certain circumstances is provided u/s 263 of the IT Act to the CIT. However, if the Revenue is aggrieved by an order passed by the first appellate authority it has got a right of appeal to the Tribunal [Section 253(2)]. No Court fee is payable by the Revenue on such appeal. Similarly if the Revenue is aggrieved by an appellate order of the Tribunal it can also file application [Section 256(1)] before the Tribunal seeking for reference of the question of law arising from the said order to the High Court for decision. No Court fee was payable on such reference application also. If the Tribunal refers the questions of law sought for by the Revenue the matter comes up before the High Court by way of Income Tax referred case. There also no Court fee is payable. The Revenue has also got a right of appeal to the Supreme Court provided the High Court issues a certificate u/s 261 of the Act.

10. From the above, it is clear that no appeal was provided against the order of the Tribunal before the High Court. Only a reference lay as already stated. The right of appeal to the High Court was conferred for the first time against the order of the Tribunal both to the assessee and to the Revenue only by the insertion of Section 260A in the IT Act w.e.f. 1st Oct., 1998. u/s 260A(2)(b) a fixed Court fee of Rs. 10,000 had to be paid on the appeal memorandum if the appeal was filed by the assessee. Similarly Court fee of Rs. 5,000 was payable for filing appeal in wealth-tax cases filed by the assessee. No Court fee was payable by the Revenue in its appeals. However Clause (b) of Sub-section (2) of Section 260A was omitted by the Finance Act, 1999 w.e.f. 1st June, 1999. In the memo explaining the provisions of the Finance Bill, 1999 in Clauses 87 and 96 it is stated that the fee for filing appeal to the High Court shall be such fee as may be specified in the relevant law relating to Court fees for filing appeals to the

High Court Dr. K.L. Batra Vs. Commissioner of Income Tax, . Thus, though fees for appeal to the High Court against the orders of the Tribunal was provided from 1st Oct., 1998, u/s 260A(2)(b) in the case of appeals filed by the assesseees the said provision, since omitted by the Finance Act, 1999 w.e.f. 1st June, 1999, no Court fee was payable on appeals filed by the assessee from 1st June, 1999. So far as Revenue's appeal was concerned no fees was payable even u/s 260A as originally enacted. This position continued till the insertion of Section 52A and sub-item (c) of item (iii) of Article 3 of Schedule II in the Kerala Court Fees and Suits Valuation (Amendment) Act of 2003. However a Court fee of Rs. 10 was being paid under art, 3(iii)(A)(1)(b) of Schedule II to the said Act. The Kerala Court Fees and Suits Valuation Act was initially amended by an ordinance dt. 26th Oct., 2002 and later it was replaced by the Kerala Court Fees and Suits Valuation (Amendment) Act, 2003 w.e.f. 26th Oct., 2002, inserting Section 52A.

11. Now let us see the provisions of Section 52A inserted by the Amendment Act 2003. Section 52A reads thus :

"52A Fee on memorandum of appeal against the order of Income Tax Tribunal or Wealth-tax Tribunal--Notwithstanding anything contained in Section 52, the fee payable on a memorandum of appeal filed before the High Court against the order of Tribunal or the Wealth-tax Tribunal, under the IT Act, 1961 (Central Act 43 of 1961) or the WT Act, 1957(Central Act 27 of 1957), as the case may be, shall be at the rates specified in sub-item (c) of item (iii) of Article 3 of Schedule II".

Sub-item (c) of item (iii) of Article 3 of Schedule II reads as follows:

"(c) From an order of the Appellate Tribunal under the IT Act, 1961 or the WT Act, 1957 (a) Where the total income of the assessee as Five hundred rupees computed by the AO, in the case to which the appeal relates is one lakh rupees or less (b) Where such income exceeds one lakh rupees One thousand and five but does not exceed two lakh rupees hundred rupees (c) Where such income exceeds two lakh rupees One per cent of the assessed income, subject to a maximum of ten thousand rupees (d) Where the subject-matter of an appeal relates Five hundred rupees" to any matter, other than those specified in Sub-clauses (a) to (c) above

The Statement of Objects and Reasons for insertion of this section reads thus:

"The requirement of payment of fees for Income Tax appeals and Wealth-tax appeals to the High Court was done away with by the Finance Act, 1999 and it is provided that w.e.f. 1st June, 1999, the fee for filing an Income Tax or Wealth-tax appeal to the High Court shall be such fee as may be specified in the relevant law relating to Court fees for filing appeals to the High Court. Hence Government have decided to introduce Court fees for the appeals filed in the High Court against the orders of Income Tax Tribunals and Wealth-tax Tribunals by incorporating a new section, viz., Section 52A and by amending Article 3 of Schedule II of the Act".

12. The contention of the Revenue as well as the assessee in these cases is that the right of appeal is not merely a matter of procedure and that it is a matter of substantive right, that this right of appeal from the decision of an inferior Tribunal to a superior Tribunal becomes vested in a party when proceedings are first initiated in and before a decision is given by the inferior Court. Such a vested right, according to the parties, cannot be taken away except by express enactment or by necessary intendment. It is also their contention that the intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such intention be clearly manifested by express words or necessary implication. According to the parties the assessment proceedings in all these cases were initiated long before the Amendment Act and that even the orders of the Tribunal impugned in the appeals were also passed before the said date. According to them since Section 52A has not been expressly made retrospective the said section has got only prospective operation and has got application only in respect of the assessment proceedings under the IT Act/WT Act commenced after the coming into force of the amendment Act. The further contention of the Revenue, as already noted, is that the right of appeal conferred u/s 260A did not provide for any Court fee in an appeal filed by the Revenue and that such a right cannot be taken away unless there is express words giving retrospective effect to the amended provision, or unless such an intention be clearly manifested by necessary implication. According to the State, Section 52A in clear terms provides for payment of Court fee both by the assessee and by the Revenue as and when appeals are filed after 26th Oct., 2002, i.e., the date w.e.f. which Section 52A was brought into force, irrespective of the date of initiation of the assessment proceedings relating thereto. In support of the said contention they relied on the expression "notwithstanding" and "memorandum of appeal filed" occurring in Section 52A.

13. Now let us see the principles regarding vested right in respect of appeal. The Privy Council in *Colonial Sugar Refining Co. Ltd v. Irving* (1905) AC 369(A) considered a question as to whether taking away the right of appeal from the Supreme Court to the Privy Council as per the Order-in-Council of 1860 by the Judiciary Act, 1903 subsequently will deprive a party whose appeal related to a period prior to the Judiciary Act. Lord Macnaghten who delivered the judgment of the Privy Council observed thus:

"As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed.

The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is Was the appeal to His Majesty in

Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior Tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new Tribunal, in either case, there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested".

14. The Supreme Court in *Hoosein Kasam Dada (India) Ltd. v. State of Madhya Pradesh* (supra) observed that the principles of the above decision was applied by the Privy Council in subsequent decision in AIR 1927 242 (Privy Council) also and the same was applied by the Full Bench of Lahore High Court in *Kirpa Singh v. Rasalldar Ajaipal Singh* AIR 1928 Lah 627 . The Supreme Court then observed that "it was therefore regarded as settled that the right of appeal was not a mere matter of procedure but was. a vested right which inhered in a party from the commencement of the action in the Court of first instance and such right could not be taken away except by an express provision or by necessary implication". In that case the Supreme Court was concerned with the provisions of Section 22(1) of the Central Provinces and Berar Sales-tax Act. As per Section 22(1) of the Act as originally passed any dealer aggrieved by an order under this Act may, in the prescribed manner, appeal to the prescribed authority against the order. As per the proviso no appeal against an assessment order shall be entertained by the said authority unless it is satisfied that such amount of tax or penalty or both as the appellant may admit to be due from him has been paid. However this proviso was amended subsequently as per which an appeal can be admitted only if the appeal memorandum is accompanied by a satisfactory proof of the payment of the tax, with penalty, if any, in respect of which the appeal has been preferred. The contention of the assessee was that as the amendment has not been made retrospective its right of appeal under the original Section 22(1) remained unaffected and that accordingly as it does not admit anything to be due it was not liable to deposit any sum along with its appeal and the authority had no jurisdiction or power to reject it on the ground that it had not been accompanied by any proof of payment of the tax assessed against the appellant as required under the amended proviso. The Supreme Court noted that the amendment has placed a substantial restriction on the assessee's right of appeal cannot be disputed, for the amended section requires the payment of the entire assessed amount as a condition precedent to the admission of the appeal and observed that the question is whether the imposition of such a restriction by amendment of the section can affect the assessee's right of appeal from a decision in proceedings which commenced prior to such amendment and which right of appeal was free from such restriction under the section as it stood at the time of the commencement of the proceedings. The Supreme Court advertent to various decisions including two decisions of the same Court observed that those

decisions formally established the principle that a right of appeal is not merely a matter of procedure; it is a matter of substantive right; this right of appeal from the decision of an inferior Tribunal to a superior Tribunal becomes vested in a party when proceedings are first initiated in and before a decision is given by, the inferior Court; such a vested right cannot be taken away except by express enactment or necessary intendment; an intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such intention be clearly manifested by express words or necessary implication.

15. A Constitution Bench of the Supreme Court in *Garikapatti Veeraya Vs. N. Subbiah Choudhury*, had reiterated the principles laid down by the Supreme Court in *Dada India Ltd.'s case* (supra). Here, it must be noted that the decisions in both these cases were rendered by the same learned Judge S.R. Das, C.J. (in the earlier case as a puisne Judge). The Constitution Bench has extracted the principles laid down by the Privy Council in *Colonial Sugar Refining Co.'s case* (supra) which we have already extracted in this judgment and observed that "this proposition of law has been firmly established in English jurisprudence and this decision is accepted as sound and cited with approval in leading text books. As will be presently seen, it has been followed and applied in numerous decisions in England and India and its correctness or authority has not been questioned by any of the learned counsel appearing before us on the present occasion". The Supreme Court applied the above principles in *State of Bombay v. S.G. Films Exchange* (supra) (three Judges Bench) where it is observed that an impairment of the right of appeal by putting a new restriction thereon or imposing a more onerous condition is not a matter of procedure only; it impairs or imperils a substantive right and an enactment which does so is not retrospective unless it says so expressly or by necessary intendment. It was also observed that where a suit is filed prior to 1st April, 1954, on which the Court Fees (Bombay Amendment) Act, 1954 levying enhanced Court fees, came into force, in the absence of provisions giving retrospective effect to the amendments, the Court fees payable on the memorandum of appeal filed after the relevant date are payable according to the law in force at the date of filing of the suit (which was prior to the relevant date) and not according to the law in force at the date of the filing of the memorandum of appeal (which was after the relevant date). The Supreme Court in *Special Military Estates Officer v. Munivenkataramiah and Anr.* (supra) held that the right of appeal is a substantive right conferred on a party by the statute; the conferring of right of appeal is not circumscribed by the right being available at the time of the institution of the cause in the Court of the first instance; the right of appeal in a given situation may already be available at the institution of the cause in the Court of the first instance or may even be subsequently conferred; in either situation, without any distinction, such right is conferred by statute. The Supreme Court in *United Bank of India v. Abhijit Tea Co. (P) Ltd. and Ors.* (supra) had observed that in some statutes the legislature no doubt says that no suit shall be "entertained" or "instituted" in regard to a particular subject-matter; it has been held by the

Supreme Court that such a law will not affect pending actions and the law is only prospective. But, if the law states that after its commencement no suit shall be "disposed of" or "no decree shall be passed" or "no Court shall exercise powers or jurisdiction", then the Act applies even to pending proceedings and has to be taken judicial notice of by the civil Courts.

16. Now it is settled by the decisions of the Supreme Court mentioned above, that the right of appeal is not a matter of procedure and that it is a substantive right. Thus the right of appeal is a vested right which is vested in the litigants at the commencement of the lis and these rights cannot be taken away or cannot be impaired or imperilled or made more stringent or onerous by any subsequent legislation unless the subsequent legislation said so either expressly or by necessary intendment. An intention to interfere with or impair or imperil a vested right cannot be presumed unless such intention be clearly manifested by express words or necessary implication.

17. Two Division Benches of this Court [Usha v. Food Corporation of India 1997 (1) KLT 264 and Abdulla Vs. State of Kerala, in the context of payment of enhanced Court fee under the Kerala Court Fees and Suits Valuation Act, relying on the decisions of the Supreme Court discussed above have held that in the absence of retrospectivity given expressly or impliedly the vested right will survive. A different note struck by another Division Bench in Kochappu v. Somasundaran Chettiar 1991 (1) KLT 657 was distinguished stating that the Division Bench decided that, in appeals filed after 5th Dec., 1990, the Court fee payable is to be calculated, only on the basis of the new Schedule brought into force along with the promulgation of the ordinance but in that case, the Court fee payable was reduced by the ordinance and the amendment Act and the Division Bench held that by reducing the Court fee the right of appeal is not imperilled or impaired by the imposition of a more onerous condition. What is conferred under the new Act is only an additional benefit or advantage to the litigant public.

18. The legislature has got the power to impair, imperil or even to take away vested rights by making express provisions in that regard is not at all in dispute. The difficulty arises only when there are no express provisions impairing, imperilling or taking away such vested rights. In such cases the attempt is to find out whether the legislature by necessary intendment had impaired, imperilled or taken away such vested rights. This has to be gathered after examining the relevant provisions of the Act by which Court fee on appeals is levied.

19. The question as to the point of time at which an assessment proceedings can be treated as a "lis" in order to find out as to when the right to file appeal accrues was also considered by the Supreme Court in H.K. Dada (India) Ltd.'s case (supra) and observed that "for the purposes of the accrual of the right of appeal the critical and the relevant date is the date of initiation of the proceedings and not the decision itself".

20. We have already referred to the provisions of Section 260A of the IT Act

under which a provision for an appeal against the order of the Tribunal was inserted in the Act. u/s 260A inserted w.e.f. 1st Oct., 1998, an appeal shall lie to the High Court from every order passed in appeal by the Tribunal. Of course the High Court is to be satisfied that the case involves a substantial question of law. Under Sub-section (2) thereof, the Chief CIT or the CIT or an assessee aggrieved by any order passed by the Tribunal may file an appeal to the High Court. Clause (b) of Sub-section (2) provided that such appeal shall be accompanied by a fee of Rs. 10,000 where such appeal is filed by an assessee. Here, it must be noted that no Court fee was payable in an appeal filed by the Chief CIT or the CIT against the order of the Tribunal. Even this requirement of paying the fee in an appeal filed by the assessee was only for the period from, 1st Oct., 1998 to 31st May, 1999. Section 260(A)(2)(b) prescribing the fee was omitted w.e.f. 1st June, 1999, by the Finance Act, 1999. Consequent on the omission with effect from the said date a new Sub-section (7) in Section 260A was inserted applying the procedure of the CPC, 1908 relating to appeals to the High Court to appeals u/s 260A also. By virtue of the insertion of Sub-section (7) the Court fee as applicable for filing second appeal u/s 100 of the CPC, 1908 has to be paid for filing an appeal u/s 260A. It is in this background the State legislature has amended the provisions of the Kerala Court Fees and Suits Valuation Act and has inserted Section 52A and by amendment to Schedule II sub-item (iii) to item (c) of Article 3 providing for Court fee on appeals filed before the High Court against the orders of the Tribunal. The statement of objects and reasons for the insertion of Section 52A and Schedule II Article 3, item (iii) sub-item (c) which we have already extracted earlier also is relevant. It is also relevant to note in this context the memorandum explaining the provisions of Finance Bill, 1999, for omission of Section 260A(2)(b) of the IT Act which stated that a debatable issue has arisen about the nature of the payment of the fees mentioned in the above provision as to whether it is a tax on litigation or a Court fee which necessitated the omission. The provisions of Section 52A and Schedule II Article 3 sub-item (c) of item (iii) were inserted only with effect from 6th March, 2003. Thus in between 1st June, 1999 and 6th March, 2003, there was no specific provision for payment of fees for an appeal filed either by the Chief CIT or the CIT or by an assessee before this Court against the order of the Tribunal. The provision for Court fee was inserted only by the Ordinance in the first instance w.e.f. 26th Oct., 2002 and later replaced by the Amendment Act, 2003 on 6th March, 2003.

21. Section 52A of the Court Fees Act as inserted by the Court Fees and Suits Valuation (Amendment) Act, 2003 has already been extracted in para 11 supra. The said provision has not been specifically made retrospective. However, the said provision provides that notwithstanding anything contained in Section 52 the fee payable on a memorandum of appeal filed before the High Court ---- shall be at the rates specified in sub-item (c) of item (iii) of Article 3 of Schedule n. Is there any significance to the expressions "Memorandum of appeal filed" ? Whether the said expressions convey the meaning that irrespective of whether the appeal relates to a lis commenced prior to the insertion of Section 52A or

not, Court fee has to be paid u/s 52A on all appeals filed after the said date ? Whether the said expressions only refer to the mere act of filing of the appeal without any other consequences in which case the vested right acquired by a party will not be affected? Here, it must be noted that when Section 260A of the IT Act providing for an appeal against the order of the Income Tax Tribunal was inserted, Sub-section (2)(b) thereof provided for a fee of Rs. 10,000 in such appeals. Similarly in the WT Act also in an appeal filed by an assessee u/s 27A of the said Act Sub-section (2) thereof provided for a fee of Rs. 5,000. True, no Court fee was payable by the Chief CIT/CIT in his appeal. So it is not as if that a fee for appeal before the High Court against the order of the Tribunal was provided for the first time. The provision for fees in Section 260A(2)(b) was omitted so as to enable the State Government to decide the Court fee payable on appeals filed before the High Court against the order of the Tribunal. Needless to say, it is for the legislature to decide as to whether the Court fee has to be paid on appeals filed by the State or the Central Government. In the instant case the State legislature has not made any distinction between an appeal filed by the Central Government or by an assessee in the matter of Court fee. The Court fee is uniform irrespective of whether the appeal is filed by the assessee or by the Department. Here, it must also be noted that till the Kerala Court Fees and Suits Valuation Act (Amendment) Act, 2003 under which a new Section 73A was inserted in the Court Fees Act both the State and the other litigants had to pay Court fees on appeals, etc. As per Section 73A where a suit, appeal, revision/review/or other pleadings or documents is filed or presented by or on behalf of the Government or its officers in their official capacity before any Court, no Court fee is chargeable in respect of such suit, appeal, revision, review or other proceedings or documents under the provisions of the Act. The reason for the insertion of Section 73A is stated in the Statement of Objects and Reasons as follows:

"In accordance with Schedules I & II of the Kerala Court Fees and Suits Valuation Act, 1959, Government have to pay proper Court fee for filing plaint, Memorandum of appeal, petitions, other pleadings and all other documents before Courts. Government have noticed that much difficulties are being experienced by the office of the Advocate General and offices of Government Pleaders in meeting the expenditure towards the Court fees on plaints, petitions, etc. presented on behalf of the State before Courts. Government have examined the matter in detail and decided to exempt the Court fees under this Act by inserting a new section, namely, Section 73A."

22. It is relevant to note in this context that the validity of the provisions of Section 52A or Schedule II Article 3 item (iii)(c) thereof is not in challenge. The only contention of the IT Department is that the provisions of Section 52A and Schedule II Article 3 item (iii)(c) inserted by the Kerala Court Fees and Suits Valuation (Amendment) Act, 2003 w.e.f. 26th Oct., 2002, cannot be applied to appeals filed before the High Court in respect of the proceedings commenced prior to such insertion. In other words, according to the Revenue Section 52A

and the Schedule cannot have any retrospective operation so as to cover appeals arising from assessment orders/first appellate orders passed prior to the insertion of Section 52A. To put it differently nobody has got a complaint regarding the prospective operation of Section 52A of the Court Fees Act and Schedule II Article 3 item (iii)(c) thereto as at present.

23. The fact that the right of appeal is a vested right which accrues to a party from the date of initiation of the assessment proceedings which is the date of commencement of the lis can no longer be disputed. The fact that such vested right can be interfered with or imperilled by the legislature is also not in dispute. However, such vested right can be imperilled or taken away only by express words or by necessary implication and such intention must be clearly manifested. As already noted, whether the expressions "Memorandum of appeal filed" occurring in Section 52A can be understood as expressly taking away the vested right or at any rate as clearly manifesting an intention to take away such right by necessary implication is the question to be considered.

24. The contention of the senior counsel for the Revenue is that if the legislative intent was to give retrospective operation to the provisions of Section 52A provisions similar to Sections 249(1) and 253(6) of the IT Act should have been enacted. Section 249(1) which prescribes the form of appeal and limitation states (every appeal under this Chapter shall be in the prescribed form and shall be verified in the prescribed manner and shall in the case of an appeal made to the CIT(A) on or after the 1st day of October, 1998, irrespective of the date of the initiation of the assessment proceedings relating thereto be accompanied by a fee of.... (the rest not relevant and hence not extracted). Similarly Section 253(6) provides that (an appeal to the Tribunal shall be in the prescribed form and shall be verified in the prescribed manner and shall in the case of an appeal made on or after the 1st day of October, 1998, irrespective of the date of initiation of the assessment proceedings relating thereto, be accompanied by a fee of...(the rest not relevant and hence not extracted) (emphasis, italicized in print, supplied). Here it must be noted, that the bracketed portion in Section 249(1) and Section 253(6) mentioned above were inserted by the Finance (No. 2) Act, 1998, i.e., the very same amendment by which Section 260A was inserted. The aforesaid two provisions are very clear in that by express provisions the incidents attached to the vested right has been taken away, for the section itself clearly says that an appeal made after 1st Oct., 1998, irrespective of the date of initiation of the assessment proceedings relating thereto the appeal must be accompanied by the fees prescribed in the section. Here, it is important to note that prior to 1st Oct., 1998, no fee was payable on appeals filed before the Tribunal either by the assessee or by the Revenue. Provision for payment of fee on appeals was provided only by the Finance Act, 1998 from 1st Oct., 1998. In order to take away the vested right inhered in a party, the device employed by the legislature was to use the expressions "appeal made on or after 1st Oct., 1998" and "irrespective of the date of initiation of the assessment proceedings relating thereto" [both in Section 249(1) and in Section

253(6)]. If such stipulations were there in Section 52A of the Court Fees Act there would not have been any scope for any dispute as to whether the vested right acquired by a party is taken away or not. Admittedly Section 52A does not contain such a clear stipulation. However, it is to be noted that Section 62A uses the expression "fee payable on memorandum of appeal filed". So the question to be considered is whether the intention to have "the effect of the expressions used in Section 249(1) and in Section 253(6) is manifested from the expressions "appeal filed" occurring in Section 52A.

25. Sri. Balachandran took us to the decision of the Supreme Court in *Dada India Ltd.*'s case (supra) where the Supreme Court was considering the expression "entertained" occurring in Section 22(1) proviso of the CP and Berar Sales-tax Act and the expression "admitted" occurring in the proviso to Section 22(1) after amendment. It was held in the said decision that the amendment has placed a substantial restriction on the assessee's right of appeal, for the amended section requires payment of the entire assessed amount as a condition precedent to the admission of its appeal. In that context the Supreme Court considered the contention of the counsel for the appellant that the expression "admitted" by necessary implication applies to an appeal from an assessment order made before the date of amendment as well as an appeal from an order made after that date. The Supreme Court in that context referred to a Calcutta Special Bench decision in *Sadar Ali and Others Vs. Doliluddin Ostagar*, where Rankin C.J. observed that "unless the contrary can be shown, the provision which takes away jurisdiction is itself subject to the implied saving of the litigant's right". The Supreme Court observed that the said observation is apposite and applies to the case before them and stated that the true implication of the above observation as of the decisions in the other cases referred to above is as follows; "The pre-existing right of appeal is not destroyed by the amendment if the amendment is not made retrospective by express words or necessary intendment. The fact that the pre-existing right of appeal continues to exist must, in its turn, necessarily imply that the old law which created that right of appeal must also exist to support the continuation of that right".

26. Section 52A of the Court Fees Act clearly says that the fee payable on a memorandum of appeal filed before the High Court against the order of the ITAT or Wealth-tax Tribunal under the IT Act, 1961 or the WT Act, 1957 as the case may be, shall be at the rates specified in sub-item (c) of item (iii) of Article 3 of Schedule II. The crucial reference is to the act of filing the appeal. It makes no distinction between an appeal relating to an assessment proceedings initiated earlier to such insertion or otherwise. The date of filing of the appeal is the crucial date to determine the Court fee payable on such appeal. The situation would have been different had the legislature not used the word "filed" since even without the said expression the provisions would have conveyed sense and in which event the argument advanced by the Revenue could have been appreciated. We are of the view that the legislature when it used the expression "appeal made on or after 1st Oct., 1998".... be accompanied by a fee in Sections

249(1) and 253(6) it had the effect of taking away the vested right even without the further use of the expressions "irrespective of the date of initiation of the assessment proceedings relating thereto". These expressions were also used, according to us, only to put the matter beyond any controversy. The State legislature by using the expression "fee payable on memorandum of appeal filed" without anything more clearly intended that the Court fee as per Section 52A r/w sub-item (c) item (iii) of Article 3 of Schedule II has to be paid on all appeals filed after the section has come into force. From the above it is clear that the intention of the legislature is clearly manifested by necessary implication that the legislature wanted to imperil the vested right acquired by a party by making the party liable to pay Court fee as provided u/s 52A r/w Schedule II Article 3 item (iii)(c) of the Court Fees Act. In that view of the matter the contention of the counsel for the IT Department that they are liable to pay the Court fee at Rs. 10 only in respect of the appeals arising from assessment proceedings initiated prior to the insertion of Section 52A cannot be sustained.

27. Though it is not necessary to deal with the matter any further since the parties have relied on the non obstante clause in Section 52A of the Court Fees Act some clarification is required. Section 51 of the Court Fees Act deals with "fee" on memorandum of appeal against order relating to compensation under any Act for the time being in force for the acquisition of property for public purposes and provides that the fee shall be computed on the difference between the amount awarded and the amount claimed by the appellant. Section 52 says that the fee payable in an appeal shall be the same as the fee that would be payable in the Court of first instance on the subject-matter of the appeal. Of course the second proviso gives the facility of paying the Court fee on the appeal or second appeal; one third at the stage of admission and the balance subsequently, in case the appeal is admitted. The fee payable in the appeal is the same as the fee that would be payable on the relief in the Court of first instance. u/s 51 also the Court fee is payable on the relief claimed. Coming to Section 52A of the Act the basis for Court fee is totally different. u/s 52A, Court fee is not based on relief claimed. It is based on the income assessed. For example, income assessed is Rs. 1,00,000 but the relief claimed is only Rs. 10,000 Court fee u/s 52A has to be paid on Rs. 1,00,000. Secondly the Court fee payable u/s 52 is the same as in the Court of first instance. u/s 52A it is not so. In the assessment proceedings there is no Court fee. In the first appeal the Court fee is only Rs. 200. Court fee u/s 52A is on ad valorem basis. u/s 52 only one third of the Court fee need be paid at the time of filing the appeal. It is not so u/s 52A. Probably, it is due to these distinguishing features only Section 52A starts with the expressions "notwithstanding anything contained in Section 52". Section 52A is a special provision different from the very scheme of the Court Fees Act as it stood then providing for Court fees in tune with the provision for fees contained in Section 260A of the IT Act. Section 260A(2)(b) of the IT Act provided for a fixed Court fee of Rs. 10,000 on appeal filed by an assessee. There was a debatable issue about the nature of the fees mentioned in the above provision as

to whether it is a tax on litigation or a Court fee which resulted in the omission of the above provision for fee for appeal. Now by Section 52A the fixed Court fees has been changed to ad valorem Court fees. Here it must be noted that the harshness of the provision for fee in appeal against the orders of the Tribunal has been considerably diluted. Under Schedule II sub-item (c) of item (iii) of Article 3 from an order of the Tribunal, under the IT Act, 1961 or the WT Act, 1957, under Sub-clause (a) where the total income of the assessee as computed by the AO, in the case to which the appeal relates is one lakh rupees or less Court fee payable is rupees five hundred only under Sub-clause (b) where such income exceeds one lakh rupees but does not exceed two lakh rupees, Court fee payable is rupees one thousand and five hundred, under Sub-clause (c) where such income exceeds two lakhs rupees, Court fee payable is one per cent of the assessed income subject to a maximum of ten thousand rupees and under Sub-clause (d) where subject-matter of an appeal relates to any matter, other than those specified in Sub-clauses (a) to (c) above, Court fee payable is five hundred rupees. Here it must be noted that the provisions of Section 52A r/w sub-item (c) item (iii) Article 3 of Schedule II did not in any way increase the liability of an assessee from what was provided in Section 260A(2)(b) of the IT Act. It only gives some relief to the assessee while avoiding the debatable issue as to whether the fee on appeal is a tax on litigation or a Court fee. To put it differently, this is not a case where the vested right has been imperilled or in any way adversely affected from the point of view of an assessee. There may be some difference in the matter of wealth-tax where the maximum Court fee payable u/s 27A of the WT Act was only Rs. 5,000 but in the Court Fees Act the maximum payable was enhanced to Rs. 10,000.

28. However, so far as the IT Department is concerned it is no solace. In the IT Act throughout we will find that fees is not provided for appeal, reference, etc. filed by the Revenue. u/s 260A also no fee was payable on appeal by the IT Department. The Parliament in its wisdom thought that so far as appeals to the High Court against the orders of the Tribunal both under the IT Act and under the WT Act are concerned the question of levy of fee shall be such fee as may be specified in the relevant law relating to Court fees for filing appeals to the High Court. Here it must be noted that the Parliament was very well aware that under the Kerala Court Fees and Suits Valuation Act, Court fee on appeal was payable by all those who file appeal irrespective of whether the appellant is the State or Central Government or a private litigant. Having left the matter of Court fees on appeal by the Revenue also to the State legislature and when the State legislature provided for Court fees on appeal filed by the Central Government also, having regard to the fact that the State legislature is competent to do so, it cannot be said that the levy of Court fees in an appeal filed by the IT Department is bad.

29. The vested right pleaded by the Revenue also is of no avail since no right of appeal was provided under the IT Act at any time prior to the introduction of Section 260A in the said Act w.e.f. 1st Oct., 1998. The assessment in these cases

were long prior to the said date. However, as held by the Supreme Court in *Munivenkataramiah's* case (supra) the conferring of the right of appeal is not circumscribed by the right being available at the time of the institution of the cause in the Court of first instance, the right of appeal in a given situation may even be subsequently conferred and in either situation, without any distinction, such right is conferred by the statute, In the present case even if the principles laid down by the Supreme Court in the above case is applied, it is doubtful as to whether any such vested right can be pleaded against the State legislature in the circumstances of the case.

30. As we have already held, the State legislature had clearly manifested its intention by the use of the expressions "fee payable on a memorandum of appeal filed" in Section 52A. The vested right of appeal subsequently conferred u/s 260A of the IT Act in so far as payment of Court fee is concerned is taken away by necessary implication. In other words, the provisions of Section 52A of the Court Fees and Suits Valuation Act inserted by the Amendment Act of 2003 in that sense has retrospective operation thereby affecting the earlier assessments also.

31. We accordingly hold that in all appeals filed by the CIT or in any appeal to be filed either by the Revenue or by the assessee under the IT Act and under the WT Act against the orders of the Tribunal from 26th Oct., 2002, Court fee is payable and has to be paid u/s 52A r/w Schedule II Article 3 item (iii) sub-item (c) of the Kerala Court Fees and Suits Valuation Act, inserted by the Kerala Court Fees and Suits Valuation (Amendment) Act, 2003. The view expressed in the office note is sustained and the objection raised by the appellant to the contrary is overruled. We place on record our deep appreciation for the valuable assistance rendered by Sri. V.K. Beeran, learned Additional Advocate General, Sri. P.K.R. Menon, learned senior standing counsel for the Revenue and Sri. P. Balachandran, who has been specially requested by the Court for assistance.

32. Before parting with the matter, we would like to point out something about legislative draftsmanship in enacting Section 52A and Schedule II Article 3 item (iii) sub-item (c) particularly to the Schedule portion inserted by the Kerala Court Fees and Suits Valuation (Amendment) Act, 2003. Section 52A provides for the Court fee payable on the memorandum of appeal filed before the High Court against orders of the Tribunal under the IT Act and the WT Act. Under the IT Act, tax is on the total income assessed whereas under the WT Act tax is on the net wealth assessed. Schedule II Article 3, item (iii) sub-item (c) though refers to both the enactments Court fee is based on the "total income" of the assessee as computed by the AO. How can it apply to appeals filed under the WT Act where "total income" has nothing to do with in the matter of assessment? Can any Court fee be demanded in a wealth-tax appeal based on the said schedule entry? Is there not an ambiguity in this regard?

33. Further, though the legislature has got the power to fix the Court fee on appeal on some reasonable basis, in a third appeal (appeal before the High Court) from the point of view of the assessee, second appeal from the point of

view of the Revenue what is the significance for the total income assessed? The total income assessed by the AO may or may not survive at the time when the appeal is filed before the High Court. There may not even have any dispute with regard to the total income assessed but varied. Still, what is the logic in fixing the Court fee on appeal based on the total income? It is something like, in a civil appeal filed by a party, Court fee is fixed on the entire value of the assets held by that party though the subject-matter of the appeal is only a small item of the assets. Under the Kerala Court Fees and Suits Valuation Act (Section 51 and 52 Expln. I) Court fee is payable on the relief claimed in the appeal. What is the reason for this change in Section 52A ? Was it the intention of the legislature that in respect of appeal against penalty orders where huge stakes are involved, Sub-clauses (c), (b) and (a) of sub-item (c) of item (iii) of Article 3 of Schedule II is to be made applicable or irrespective of the reliefs sought, a fixed Court fee of Rs. 500 under Sub-clause (d) of sub-item (c) of item (iii) of Article 3 of Schedule II alone need be paid? These are all matters which require urgent attention of the State Government and if it is considered necessary appropriate amendment has to be made urgently to make the provision beyond any doubt. Now that the State legislature by inserting Section 73A by the Amendment Act, 2003, exempted State and its Officers from the payment of Court fees in official matters whether such a treatment can be extended to the Central Government and its officials in official matters consistent with the Scheme of the IT Act and the WT Act is also a matter for consideration by the State Government.