
(1957) 01 AHC CK 0043
In the Allahabad High Court
Case No : First Appeal No. 508 of 1946

District Board

APPELLANT

Vs

The Upper India Sugar Mills Ltd.

RESPONDENT

Date of Decision : 25-01-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33, Order 41 Rule 35, 105, 107(2), 96
Constitution of India, 1950 — Article 19(1), 19(5), 276(2)
Evidence Act, 1872 — Section 101, 104
Professions Tax Limitation (Amendment and Validation) Act, 1949 — Section 2
Professions Tax Limitations Act, 1941 — Section 2, 3B
Uttar Pradesh District Boards Act, 1922 — Section 108, 114

Citation : AIR 1957 All 527

Hon'ble Judges : Desai, J; Beg, J

Bench : Division Bench

Advocate : Jag Nandan Lal and Gopal Behari, for the Appellant; Janardhan Swarup Gupta, for the Respondent

Final Decision : Allowed

Judgement

Beg, J.—This is a defendant's first appeal arising out of a suit for declaration and injunction. The appellant in this appeal is the District Board of Muzaffarnagar, The suit out of which the present appeal arises was filed on behalf of the Upper India Sugar Mills Limited Khatauli, district Muzaffarnagar, as plaintiff. The plaintiff is limited concern carrying on the business of manufacturing sugar at Khatauli within the rural area of the district of Muzaffarnagar.

It appears that the District Board Muzaffarnagar levies a tax on circumstances and property of all persons residing or carrying on business within its rural area under the provisions of Sections 114 and H08 of the District Boards Act. By Notification No. 1509/IX-242, dated September 25, 1930, the Government have framed a rule authorising the imposition of a tax on circumstances and property by a District Board, provided that the total amount of this tax does not exceed a

sum of Rs. 2,000/-.

Acting under the said rule, the District Board, Muzaffarnagar, assessed the plaintiff to a tax of Rs. 2,000/- for the years 1942-43, 1943-44 and 1944-45. Rs. 2,000/- is the maximum amount of tax leviable under the said rule. The taxes for these years were paid by the plaintiff under protest. Subsequently, on the 18th of August, 1945, the plaintiff filed the present suit for declaration and injunction.

The case of the plaintiff as set out in the plaint, was that in order to implement the provisions of Section 142 of the Government of India Act, the Central Legislature had passed the Professions Tax Limitation Act (Act No. 20 of 1941). By Section 2 of the said Act the District Board was prohibited from realising any tax on professions, trades, callings or employments exceeding a sum of Rs. 50/- per annum after the commencement of the said Act. The Professions Tax Limitation Act, 1941 (Act No. 20 of 1941) came into force on the 26th November, 1941. The case of the plaintiff was that tax on circumstances and property was virtually a tax on trade and occupation, and was accordingly, hit by the Limitation imposed by Section 2 of the said Act. The plaintiff, accordingly sought a declaration in the present case to the effect that "the defendant is not entitled to charge plaintiff more than Rs. 50/- per annum as circumstances and property tax u/s 144 of the District Boards Act". The Plaintiff further prayed for injunction against the defendant--District Board, Muzaffarnagar--restraining it from realising more than Rs. 50/- as tax in future. The suit was resisted by the District Board, Muzaffarnagar, mainly on the ground that a tax on circumstances and property is not a tax in professions, trades or callings and the provisions of Section 2 of Act 20 of 1941 (The Professions Tax Limitation Act) are not applicable to it.

2. The trial court repelled the plea raised on behalf of the defendant holding that a tax on circumstances and property is virtually a tax on trade and occupation. It, accordingly, held that Section 3 of Act 20 of 1941 was applicable to the present case. In this view of the matter, the trial court decreed the plaintiff's suit for declaration and injunction with costs. Dissatisfied with the said judgment, this appeal was filed on behalf of the defendant in this Court

3. The judgment in the present case was pronounced on the 5th September, 1946. The appeal against the judgment of the trial court was filed on the 10th December, 1946. It has come up for hearing before us in January, 1957. The learned counsel for the appellant before us has not challenged the correctness of the judgment of the, date when it was pronounced, that is, on the 5th of September, 1946. He has in fact conceded before us that the judgment, as it stood on the date when it was delivered, was quite correct and valid. He has, however, invited our attention to a subsequent amendment of the original Act made by the Professions' Tax Limitation (Amendment and Validation) Act 1949 hereinafter called the "Amending Act" which came into force on the 28th of December, 1949. The effect of Section 3-B of the Amending Act was to exempt

from the operation of Section 2 of the original Act a tax on circumstances and property imposed under the District Boards Act, 1922, (U. P. Act X of 1922). Section 3A of the Amending Act provided a similar exemption in respect of a tax on circumstances and property imposed under the U. P. Municipalities Act U. P. Act No. II of 1916). Further, Section 3 of the Amending Act gave retrospective effect to this amendment and provided as follows:--"Notwithstanding anything to the contrary in any other law for the time being in force,--

(i) no tax on circumstances and property imposed before the commencement of this Act under Clause (ix) of Sub-section (1) of Section 128 of the United Provinces Municipalities Act, 1916 (U. P. Act II of 1916), or Clause (b) of Section 108 of the United Provinces District Boards Act, 1922, (U. P. Act X of 1922), shall be deemed to be, or ever to have been invalid merely on the ground that the tax imposed exceeded the limit of fifty rupees per annum prescribed by the said Act and the validity of the imposition of any such tax shall not be called in question in any Court; and

(ii) no Court shall entertain any claim for the refund of any portion of the tax referred to in Clause (1), merely on ground that such portion is in excess of the limit referred to therein or enforce any decree or order directing the refund on that ground of any portion of such tax,"

Section 2 of the Amending Act further provided that the amendment incorporated in Section 3-A and Section 3-B of the said Act "shall be inserted and shall be deemed always to have been inserted" in the Schedule relating to exemptions to Section 2 appended to the original Act. Relying on the aforesaid provisions of the Amending Act, the learned counsel for the appellant has argued that the position, as it emerges after the Amending Act came into force, was as if the exemption of the tax on circumstances and property had been enacted in the original Act itself.

The result, therefore, is that the law, as it stands at the date of the hearing of the appeal, has been altered or modified, and the effect of this alteration or modification has been to wholly validate a tax which was partially invalid at the date when the judgment was pronounced by the trial court. He, accordingly, asks us to give effect to this modification, and reverse the judgment of the trial court on this ground. On the other hand, the learned counsel for the respondent has argued that the rights of the parties were finally decided by the decree of the court dated the 5th September, 1946. The judgment of the trial court was admittedly correct on the date when it was pronounced.

The rights of the parties had merged in the decree of the court, and this Court has no jurisdiction to disturb the said rights on the ground that the modification of law had taken place subsequently. In this connection he has also argued that the Amending Act does not expressly contain any provision to the effect that it will be applicable to proceedings already pending in courts on that date or that its applicability would extend also to cases where the right of the parties have

already been decided by a court of law. In the absence of any such provision, he has argued that the Amending Act should not be applied by this Court to the present case.

4. Having heard the learned counsel for parties at length on this point, I find myself in agreement with the argument advanced On behalf of the appellant in this regard. If the Amending Act had come into force at the time when the suit was pending in the trial court, then there can be no manner of doubt that the trial court was bound to give effect to the modification of law as made by the Amending Act. In fact this position has been frankly conceded by the learned counsel for the respondent. He has, however, argued that because a decree has been passed by the trial court, therefore, the appellate court has no jurisdiction to take note of an event that happened subsequently, and give effect to the modification in law that has been brought about after the passing of the decree.

I find it difficult to accept this argument. The learned counsel for the respondent has been unable to point any provision in the CPC which would prohibit the appellate court from taking note of subsequent events in a situation like this. On the other hand, there are provisions in the CPC which would indicate that the powers of the appellate court are of the widest possible character. Section 107 of the CPC lays down that subject to the restrictions laid down therein, the appellate court would have the same powers and perform as nearly as may be, the same duties as are conferred and imposed by that Code on Courts of original jurisdiction in respect of suits instituted therein. Order 41, Rule 33, C. P. C. further provides as follows:--

"The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection."

(Provision not relevant.)

The provisions of the CPC also indicate that the appellate court has power to frame issues, to admit additional evidence in certain cases and to do other acts which are within the power of the Court of the Original Jurisdiction. The proceedings in the court of appeal are, therefore, in the nature of a rehearing. No doubt, there is an element of finality attaching to a decree passed by the trial court. Once, however, an appeal is filed from the decree of the trial court, and the case is heard on merits by the appellate court, the element of finality disappears and the whole case is re-opened before the Court of Appeal. The decree passed by the appellate Court in such a case finally supersedes the decree of the original court & wipes it out altogether. The appellate court is free to mould the relief according to the circumstances of the case and requirements of justice in a manner permissible under law.

5. The question whether an Amending Act will apply to proceedings pending in a court of law would depend upon the provisions of the Amending Act itself. It is not necessary that the Amending Act should contain an express provision to the effect that it would apply to proceedings pending in a court of law. If an examination of the provisions of the Amending Act shows that the object of the Act is that it should apply to pending proceedings, then the Court should give effect to the intention of the Act, and apply the modified law to pending cases irrespective of the question whether the cases are pending in the original court or the appellate court.

In the present case it appears to me that the intention of the Amending Act was to make it applicable also to cases where proceedings were pending in a court of law whether at the original stage or at the appellate stage. This would be borne out by the fact that in Section 2 of the Amending Act it was laid down that the amendment sought to be made were to be deemed to be always inserted in the Act. The effect of what may be termed as this deeming provision is to engraft the amendments in the original Act itself, and to make them a part and parcel of the same. Their Lordships of the Supreme Court had occasion to comment on the effect of such a provision of law in *The State of Bombay Vs. Pandurang Vinayak Chaphalkar and Others*, . In that case it was held that:

"When statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled "and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be Carried to its logical conclusions". (head-note).

If the Legislature enacted that the amendment should become a part of the original Act, it necessarily follows that the Legislature wanted that the retrospective effect of the Amending Act should begin from the date of the original Act itself. The result, therefore, of not applying it to the pending proceedings would be to exempt from the operation of the original Act, as amended by the Amending Act, cases in which proceedings were pending in a court of law. To exempt such cases would, therefore, have the effect of defeating the object of the Act. The Act itself was clearly a retrospective one, and full retrospective effect cannot be given to it by exempting cases- of a certain type from it.

6. Further, it appears to me that it is not quite correct to say that there is nothing in the Amending Act itself to indicate that the Legislature wanted to apply the Amending Act to pending proceedings. No doubt, there are no express words to that effect in the Amending Act, but the Amending Act does say that the validity of the imposition of any such tax shall not be called in question in any Court. Further, the Amending Act also lays down that no Court would entertain any claim for the refund of any portion of the tax, the imposition of which also stated that no Court would enforce any decree or order directing the refund on the ground that any portion of such tax was invalidly imposed.

The prohibition against enforcement of decrees already passed in favour of assesseees on the basis of the original Act clearly shows that even where the decree had already been passed, and had become final, the Amending Act interfered at the execution stage with a view to stop the realisation of sums payable thereunder. The above provisions indicate that the Amending Act was intended not only to apply to pending proceedings, but also to proceedings that had finally terminated. The stage of execution follows the stage of determination of a matter, and if the former was intended to be covered, the latter could not have been intended to be exempted.

7. In this connection it is significant to note that the Amending Act itself has defined its object in the clearest possible terms in the preamble appended to it. The, preamble to the Amending Act runs as follows:--

"Whereas it has been judicially held that the tax on circumstances and property imposed under Clause (b) of Section 108 of the United Provinces District Boards Act, 1922 (U. P. Act X of 1922), is subject to the limitation of fifty rupees per annum prescribed in respect of tax on professions, trades, callings or employments by Section 2 of the Professions Tax Limitation Act, 1941 (XX of 1941);

And whereas it is expedient further to amend the Professions Tax Limitation Act, 1941, for the purpose of excluding taxes on circumstances and property imposed in the United Provinces by municipal or district boards from the operation of Section 2 of that Act and to validate the imposition thereof before the commencement of this Act";

It is hereby enacted as follows:--It is, therefore, clear that the very purpose of the Amending Act was to get over interpretation which had been placed on Section 2 of the main Act by courts of law in cases decided by them. After reciting, the said object, the Amending Act states that its provisions shall be deemed to have been inserted in the original Act so as to have retrospective effect. It appears, therefore, that the object of the Act cannot be fully carried out unless it is applied to all cases whether proceedings in respect of them were pending in a court of law at the trial stage or at the appellate stage.

8. In this connection the observation made by their Lordships of the Supreme Court in a case reported in Shyabuddinsab Mohidinsab Akki Vs. The Gadagbetgeri Municipal Borough and Others, , are strictly relevant. In that case also the Amending Act contained a clause which may be described as a deeming clause. This deeming clause gave retrospective effect to the Amending Act, It was, however argued before their Lordships that the amendment having not been made applicable to pending proceedings, the Court could not give effect to its provisions. Examining the said argument, their Lordships observed that:

"In every case the language of the amending statute has to be examined to find out whether the legislature clearly intended even pending proceedings to be affected by such statute." (P. 320). It was further held that where the Amending

Apt is made to have retrospective effect, then there is an implication in favour, of its applicability to pending proceedings, for, to hold otherwise would render the Amending Act largely nugatory. In the absence of any saving clause in express or in plied terms in favour of pending proceedings, it should be held that the amendment was intended to apply to all cases.

9. As to the nature of the appellate proceedings in India and the extent to which it is open for Courts in India in such proceedings to give effect to subsequent legislative changes, their Lordships of the Federal Court have in AIR 1941 5 (Federal Court) , clearly held that the hearing of an appeal under the procedural law of India is in the nature of a re-hearing, and therefore, in moulding the relief to be granted in a case on appeal, the appellate Court is entitled to take into account facts and events which have come into existence after the decree applied against.

Consequently, the appellate Court is competent to take into account legislative changes since the decision in appeal was given, and its powers are not confined only to see whether the lower Court's decision was correct according to the law as it stood at the time when its decision was given. Other cases in support of the same view are reported in Niranjana Lal Bhargava Vs. Mt. Ram Kali Devi, , Shyam Manohar v. Pt. Anandi Din, AIR 1943 Oudh 271 (E), Shantiniketan Co-operative Housing Society Ltd. v. Madhavlal Amirchand, AIR 1936 Bom 37 (F), and Syed Unnisa Vs. Rahimathunissa and Others, .

10. The same principle was laid down in England in the case of Quilter v. Mapleson (1882) 9 QBD 672 (H). In this case it was held that where the Act is expressly retrospective in effect, it must in furtherance of the objects of the Act be held to apply to pending proceedings unless there is something in the word of the enactment to prevent the Court from doing so. It was further held [that according to the general orders governing the procedure of appellate Courts in England, a proceeding by way of appeal is in the nature of a re-hearing. The same principle seems to have been accepted in America also in the case of Gulf, Colorado and Santa Fe Ry. Co. v. W. R. Dennis (1911) 56 LEd. 860 (I). The following observations of Chief Justice Marshall were cited with approval in the said case:--

"It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied.In such a case the court must decide according to existing law; and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." (P. 862)

11. In an Australian case reported in The Victorian Stevedoring and General Contracting Co. Proprietary Ltd. v. Dignan 1931 W LR 73 (J), a contrary view

appears to have been taken. That was a case in which an accused had been convicted under a penal law which existed at the time of the delivery of the Judgment by the trial court. The convicted person filed an appeal. By the time the appeal came up for hearing, the penal law was repealed, and it was argued on behalf of the appellant that the judgment of the trial court should be set aside on that ground.

It was held in that case that a proceeding by way of appeal was not in the nature of a re-hearing, and it was not open to the appellate court to reverse a judgment which was right on the date on which it was delivered on the ground that the law under which the conviction was recorded was subsequently repealed. In India, however, this position would be met by Section 6 of the General Clauses Act, which prescribes that unless a different intention appears, the repeal of the law will not affect any penalty or punishment incurred by a party, in respect of any offence committed against the repealed enactment,

So far as the Australian case itself is concerned, it is enough to observe that the position in India is different. In India the matter is governed by a special statutory enactment which is embodied in the Code of Civil Procedure; and, therefore, the observations contained in the above case relating to law in respect of the matter obtaining in Australia would not be applicable to this country.

12. On behalf of the respondent, it is argued that an appeal is directed against the judgment of the lower court, and the memorandum of appeal is confined to objections against the judgment delivered by the lower court, hence all that the appellate court has to see is whether the judgment of the lower court was correct on the date on which it was actually pronounced. I find it difficult to accept this argument. It presents a rather narrow and rigid view of the functions of an appellate court, and may sometimes result in defeating the ends of justice, and proving a serious impediment in its path.

Strictly speaking, under the CPC the appeal is filed not against the judgment, but against the decree of the lower court (vide Section 96 and Order 41, Rule 1, C. P. C.). The grounds of objection in the memorandum of appeal are directed against the decree. The decree, however, merely contains the final adjudication of rights of parties as made by the court which tried the matter. It does not contain the reasons for the same.

The decree marks the culmination of the entire proceedings in a case, and a challenge of a decree by party embraces within its range not merely, the judgment on which the decree is founded, but the entire gamut of proceedings which have led up to it. The grounds of appeal may thus relate not only to the findings in the judgment, but also to any interlocutory order passed in the case or any proceedings taken therein. It may, for example, relate to an interlocutory order refusing to frame an issue, or rejecting a prayer to admit additional evidence, or to amend the plaint, or to implead a party or to adjourn the case and so on. Section 105(1) C. P. Code bars appeals from orders unless expressly

provided otherwise, and lays down that "where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal. Section 99, C. P., Code is not in conflict with Section 105, as the latter relates to matters not affecting the merits of the case, and the former relates to matters affecting the merits of the case, or the jurisdiction of the Court. u/s 96, C. P. Code every decree is appealable unless expressly provided otherwise. An appeal may cover not only the acts done or orders passed by the court, but also acts not done or omissions made by it. Thus for example, an omission to frame an issue on a certain point may also be agitated in appeal.

The appeal is against the decree because the decree marks the stage at which the jurisdiction of the court which has tried the matter ends, & the jurisdiction of the court to which the appeal is made begins. Moreover, the entire rights of the parties are merged in the decree. An appeal against the decree, therefore enables a party to open up for controversy before the appellate court the entire basis of the decree comprising all the stages of the case from the beginning to the end, and is not confined to judgment or to any particular proceedings of the case. In fact, some times an appeal is considered to be a continuation of the suit itself.

The decree passed in the appeal takes the place of the decree passed in the suit. The appellate court decrees or dismisses the suit or awards such relief in the suit as is, according to law, just and proper in the circumstances of the case before it. No doubt, in a second appeal the grounds of challenge are restricted to errors of law and procedure. That restriction, however, is the result of express limitation placed on the powers of the appellate court by Section 100 of the C. P. Code.

Even in second appeal the errors of law and procedure may cover the entire area of proceedings in a case. This fact, therefore, does not militate against the proposition that the essential nature of the remedial measure styled as appeal as conceived in the Indian Law is that of a rehearing. Even in a second appeal, u/s 103, C. P. Code, the High Court is empowered, if the evidence on the record is sufficient, to determine any issue of fact not determined by the lower appellate court or wrongly determined by such court by reason of errors mentioned in Sub-section (1) of Section 100.

13. Apart from the rights of the parties, the wide nature of the powers given to the appellate court also supports the same conclusion. Section 108 of Civil Procedure lays down that unless otherwise provided the provisions of Section 107 which extends the application of the provisions relating to the original court to the court of appeal and other provisions of Part VII would govern second appeals as well and Section 100, therefore, provides a restriction to the general power. It is also significant in this connection to note that Order 41, Rule 2, provides that the appellate court may give leave to the appellant to urge before it points not taken in the memorandum of appeal, and that, so far as its own powers are concerned, in deciding the appeal it is not confined to the points set

forth in the memorandum of appeal.

14. An appellate court possesses power to transpose and substitute parties (vide Order 1, Rule 10, and Order 22, Rules 3, 4, and 11). Under the old Code it was doubtful whether its provisions corresponding to Order 1, Rule 10 of the present Code were applicable to appeals. The amendment made under the new Code has, however, clarified this position with a view to make it applicable to appeals. The appellate court has also power to pass all such interlocutory orders as are necessary, in the ends of justice.

It can issue an order of temporary injunction. It can pass an order appointing a reliver. It can stay proceedings in the lower court and so on. An appellate court also possesses the power to allow withdrawal of a suit or abandonment of a part of the claim. It has also the power to record a compromise, to return a plaint for presentation to proper court, to strike out or amend any matter in pleadings which is unnecessary or scandalous, and expunge remarks from the judgment for minors in proceedings pending before it.

Under Order 6, Rule 17, the appellate court is empowered to allow either party to alter or amend his pleadings for the purpose of determining the real questions of controversy between the parties. Under the new Code, the limitation regarding the stage in the trial court upto which pleadings could be so altered or amended has been removed, and it has been clarified that such an amendment can be made "at any stage of the proceedings", with the result that amendment in pleadings can now be made at all stages of the case including even the stage of second appeal.

15. Under Order 41, Rule 4 C. P. C. where one of the plaintiffs or the defendants appeals from the whole decree, it is open to the appellate court to reverse and vary decree in favour of all the plaintiffs or the defendants where such a decree proceeds on any ground common to all of them. Order 41, Rule 20 lays down that

"where it appears to the court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent".

Order 41, Rule 21, specifies the circumstances in which there can be a rehearing of an appeal on the application of a respondent against whom ex parte decree has been made. Order 41, Rule 22 lays down that any respondent though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the court below, but also make cross-objections to the decree which he could have taken by way of appeal within the period provided therein. Order 41, Rule 22, Sub-rule (4) lays down that the withdrawal or dismissal of the original appeal will not affect the cross-objections, which may be heard and determined after such notice to the parties as the Court thinks fit. Order 41, Rule 23 lays down the circumstances in which it

is open to the appellate court to remand a case, and further direct what issue or issues shall be tried in the suit so remanded, where the case has been disposed of on a preliminary point by the lower court. Order 41, Rule 24 lays down that where the evidence upon the record is sufficient to enable the appellate court to pronounce judgment the appellate court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate court proceeds. Order 41, Rule 25 empowers the Appellate Court to frame issues, if necessary, for the determination of such question of facts as the lower court has omitted to determine. It also enables the Appellate Court to direct the lower Court to take additional evidence and to send it along with its findings to the Appellate Court. Order 41, Rule 26 provides that the findings of the lower court and the evidence taken by it shall form part of the record in the suit, and either party may, within a time to be fixed by the Appellate Court, file objections to it. Order 41, Rule 27, specifies the circumstances in which the Appellate Court is empowered to admit additional documentary and oral evidence in the case. Under Order 41, Rule 28 such evidence may be taken by the appellate court itself or on its direction by some other Court. Order 41, Rule 29 enables the Appellate Court to define the point or points on which additional evidence is directed or allowed to be taken.

Order 41, Rule 33, as observed above, enables the Appellate Court to pass any decree or order which ought to have been passed or made and to pass or to make such further or other decree or order as the case may require notwithstanding that the appeal is as to a part of the decree. This power may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection. Order 41, Rule 37 provides that a copy of the judgment and of the decree certified by the Appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed from, and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Appellate Court shall be made in the register of civil suits.

According to Order 42, Rule 1, the rules of Order 41 which apply to appeals are made applicable also to appeals from the appellate decrees, that is, to second appeals. A survey of the entire provisions of the CPC seems to show that the intention of the framers of the Code was to give the Appellate Court as far as possible powers analogous to that of the original court, so as to enable the Appellate Court to have ample control over the case in the matter of affording relief according to law and justice.

16. The width of the region in which the Appellate Court moves can perhaps be visualised more clearly if it is contrasted with the strictly limited scope of the other two remedies envisaged in the Code of Civil Procedure, namely, review and revision. In the case of review the court's powers are very restricted. The grounds of review are circumscribed within the narrow limits prescribed under

Order 47, Rule 1. A review is not a rehearing of the case. The case is opened up only on certain special grounds mentioned and specified in the Code and the application is to be moved before the same court that heard the case and not before a higher tribunal as in the case of appeal.

In the case of revision, the powers can only be exercised by the High Court, and the power of interference is confined to the limited question of jurisdiction. The power can be exercised only over the courts subordinate to the High Court. The relief cannot be claimed as of right by a party, and its grant is discretionary with the court. The strictly limited nature of the scope of these proceedings stands in marked contrast with wide scope of the proceeding styled as appeal in Indian Law.

17. On behalf of the respondent reliance is also placed on Clause 14 of the Letters Patent which lays down that the law of equity and the rule of good conscience to be applied by the High Court of Judicature at Allahabad to a case coming before it in exercise of its appellate jurisdiction shall be the law or equity and rule of good conscience

"which the Court in which the proceedings in such case were originally instituted ought to have applied to such case".

In my opinion, this provision does not bar the High Court from giving effect to a subsequent modification of law. It merely says that the law to be applied by the High Court is to be the law which the original court ought to have applied. It is conceded before us in this case that if on the date on which the appellate court heard the appeal, the trial court had been trying the case, it ought to have given effect to the modification in law. This clause does not contain a restriction to the effect that the law to be applied by the Appellate Court is the law which the original court ought to have applied to such case. On the date on which it pronounced its judgment

Further, it is open to the Appellate Court to remand a case, and if the Appellate Court remanded the case to the trial court, there is no doubt that the trial court would have to give effect to the subsequent modification in law. If the same result can be achieved by a remand of the case by the Appellate Court, there appears to be no reason why proceedings (sic) should be barred from doing it itself.

18. Further, Clause 35 of the Letters Patent provides that the provisions of Clause 14 of the Letters Patent are Subject to the powers of the Legislature. In the present case, as already held by me, according to the law enacted by the Legislature, effect is to be given to the amended law in all proceedings whether pending in the original court or in the Appellate Court. In this view of the matter, it can be said that in giving effect to the modification in the law, the Appellate Court is only enforcing the law itself.

From this aspect, therefore, the question as to what are the powers of the

Appellate Court, and whether the proceedings in appeal are in the nature of a rehearing or not, is not very material. It is enough to say that the law itself has laid down, that it should be applied to proceedings in appeal, and in applying the modified law, the Appellate Court is merely following the law and doing what it is in duty bound to do.

19 Two other arguments advanced on behalf of the respondent may now be dealt with. Firstly, it was argued that the rule authorising the imposition of a tax on circumstances and property exceeding an amount of Rs. 250/- would be hit by the provisions of Article 276(2) of the Constitution which puts a limitation of Rs. 250/- per annum on taxes on professions, trades and callings. In this connection it was further argued that a tax on circumstances and property was nothing but a tax on professions, trades and callings,

Reliance in this regard was placed on a Full Bench decision of the Allahabad High Court reported in *District Board of Farrukhabad Vs. Prag Dutt and Others*, . I, however, find myself unable to accept this argument. This argument seems to ignore the proviso which is appended to Article 276 of the Constitution.

According to this proviso, the limit of Rs. 250/-per annum imposed under the main para of Article 276(2) can be exceeded, provided that in the financial year immediately preceding the commencement of the Constitution there was in force in the case of any Board a tax of such a nature which exceeded Rs. 250/- per annum. This proviso would apply to the present case. The effect of the present case falling within the proviso would be that it would be saved from the bar which is imposed by the main para of Article 276.

20. Lastly, it was argued on behalf of the respondent that the rule authorising the imposition of tax on circumstances and property up to the maximum amount of Rs. 2,000/- is an infringement of Article 19(d) of the Constitution of India. In this connection it was argued that the imposition of this tax constitutes an unreasonable restriction on the right to carry on a trade or business. Whether a restriction of this nature is unreasonable or not would depend upon the facts and circumstances of each case.

Under Section 114 of the District Boards Act, 1922, a tax cannot be imposed on circumstances and property unless a person has resided or carried on business within the rural area of such board for a total period of at least six months in the year under assessment, and, further, unless his taxable income exceeds Rs. 200/- per annum. It further lays down that the tax shall not exceed four pies in the rupee on the total income, and the total amount of the tax imposed on any person shall not exceed such maximum (if any) as may be prescribed by rule.

The maximum prescribed by the rules in the present case is Rs. 2,000/-. In view of the aforesaid restriction imposed on the District Board on the levy of a tax of this nature, I find it difficult to hold that such a taxation was unreasonable. The imposition of the tax itself does not impose any direct restriction on the trade. The restriction, if any, is an indirect one. It comes into operation only after a

trade is carried on, and is a result of it.

It is not argued that the imposition of this restriction itself results in the destruction of the right to carry on the trade or that it has any such effect. The burden of making out the case that the restriction, if any, was an unreasonable one lay on the respondent. On behalf of the respondent, no materials have been placed before us to indicate that a restriction, which, on the face of it, appears to be reasonable, operated unreasonably or was likely to so operate. Under the circumstances, I am of opinion that this argument of the learned counsel is also devoid of all merits.

21. I would, accordingly, allow the appeal, set aside the judgment of the trial court and dismiss the plaintiff's suit. In view of the circumstances of the case, the costs of the appeal shall be borne by the parties, but the plaintiff shall be entitled to recover from the defendant costs decreed in its favour by the trial court,

Desai, J.

22. I agree with the proposed order but without the conviction that it is the correct order. The Amendment Act which came into force on 28-12-1949 has been given retrospective effect, but this statement does not solve the problem raised in this appeal. There are degrees of retrospectivity of a statute. The Amendment Act may be given retrospective effect in the sense that though it was passed on 28-12-1949 it may be deemed to have been passed in 1941, but it does not follow that all transactions closed and all decrees passed prior to its enactment on the basis of the law in force in 1941 are to be reopened and re-decided in the light of its provisions. If the old law had already been applied, with the necessary result that no question of applying it arises any more, its repeal and substitution by a new law even with effect from the date on which the old law was passed does not nullify the result of its application. The results of its application would have been nullified only if the new law contained a provision not only that it was deemed to have always been in force but also that all decrees and closed transactions would be liable to be reopened.

A law affecting substantive rights is not presumed to have retrospective effect, and as a corollary, a law cannot be presumed to be more retrospective than it expressly or impliedly purports to be. If a suit is dismissed on the ground that the plaintiff is not tender the law entitled to the relief asked for and he prefers an appeal, during the pendency of which the law is amended and now confers upon him the right to the relief, it is a matter for interpretation whether the amendment in the law is so retrospective as to justify the appellate court's granting him the relief. Take another instance.

If the plaintiff was wrongly refused the relief to which he was entitled under the law and he prefers an appeal, during the pendency of which the law is amended and he is no longer entitled to the relief, the appellate court cannot grant him the relief because it must enforce the law as it finds when it pronounces the

judgment. But the problem-is entirely different when a trial court grants a relief to which the plaintiff was entitled at the date of its judgment but during an appeal preferred by the defendant the law is amended and the plaintiff is no longer entitled to the relief. Even if the Amendment Act has been given retrospective effect, unless it contains words expressly or impliedly requiring even a decree to be reopened and corrected so as to be in conformity with it a decree already passed may not be reopened or set aside on the ground that on the date on which the appeal is decided such decree could not have been passed.

The Amendment Act in question, though it lays down that it would be deemed to have been always in force since the date of the enactment of the original Act, that no tax imposed before its commencement shall be deemed to be, or ever to have been, invalid merely on the ground that it exceeded the limit of Rs. 50/- per annum and that no court shall entertain any claim for refund of any portion of the tax imposed before the commencement of the Act merely on the ground that it is in excess of the limit of Rs. 50/- or enforce any decree or order directing the refund of any portion of the tax on such ground does not lay down that decree already passed for the portion in excess of Rs. 50/- shall be set aside on appeal. The Amendment Act is to be given retrospective effect but only after its enforcement; before its enforcement there could not possibly be any question of giving retrospective effect to it.

After 28-12-1949 the Act of 1941 must be read as if the limit of Rs. 50/- did not exist; but on 27-12-1949 and earlier the 1941 Act could not be so read and had to read with the limit of Rs. 50/-per annum. The trial Court decided this suit prior to 28-12-1949 and rightly decreed it. The appeal has come up before us after 28-12-1949. If the trial court had dismissed the suit (erroneously), in the face of the Amendment Act it would have been open to us to decree it because when we read the Act of 1941 at the time of deciding the appeal, we would be bound to read it as if the limit of Rs. 50/- never existed there. But we are being asked not to decree the suit but to set aside the decree already passed correctly.

There is nothing in the Amendment Act to suggest that we can do this. It may be that the decree cannot be executed, now, but this does not amount to the Legislature's intending that the appellate court must amend the decree so as to be in conformity with the Amendment Act even though it was passed correctly prior to 28-12-1949.

23. As regards the jurisdiction of an appellate court I find that Clause 14 of the Letters Patent lays down that the law to be applied by this Court in the exercise of its appellate jurisdiction "shall be the law..... which the Court in which the proceedings in such case were originally instituted ought to have applied to such case. "The law that was required to be applied by the trial Court was the law that was in force prior to the enactment of the Amendment Act and that is the law to be applied by this Court in deciding the appeal.

In other words, this Court must decide the appeal in accordance with the law

that was in force when the trial court decided the suit and not the law that has come into force subsequently. This is the nature of an appellate court's function according to Dixon J. in (1931) 46 CW LR 73 (J). The CPC does not contain anything to suggest that the appellate court has to redecide the matter in dispute and not merely to see whether the judgment of the trial court was correct or not. It has got all the powers of a trial Court, but this does not mean that it becomes a trial Court and redecides the matter in dispute. It can pass any order that the trial Court could have passed; this only means that it can pass any order that could have been legally passed by the trial Court on the date when it pronounced its judgment and not that the trial Court would be deemed to pronounce its judgment on the date on which the appellate Court disposes of the appeal.

The proceeding before an appellate Court is not a fresh or second hearing of the suit but an appeal from the decree or order of the trial Court. It has to review the decree of the trial Court on the materials placed before the trial Court, the materials consisting not only of the evidence but also of the law to be applied to it. An appellate Court has power to receive further evidence, but it is only in very limited circumstances and not at the instance of one party or the other. An appeal is filed through a memorandum which is required to contain the grounds of objection to the judgment, vide Order XLI, Rule 1; this shows that what is under trial before an appellate Court is the decree and the judgment and not the dispute between the parties. Section 100 dealing with grounds of appeal refers to the ground that the decision of the trial Court was contrary to law. A decision correct according to the law in force when it was given cannot be attacked u/s 100(a) on the ground of its being contrary to a subsequent law which replaces the law in force at the time when it was given. This confirms that all that an appellate Court has to see is whether the decision of the trial Court was correct; perforce it must judge its correctness according to the law that was in force when it was given. Section 99 providing that a decree shall not be reversed merely on account of any misjoinder of parties or causes of action or of any error, defect or irregularity in the proceedings suggests that the nature of the proceeding before an appellate Court is not the same as that of a proceeding before a trial Court. A trial Court is bound to correct the error or defect in the proceeding. If the proceeding before an Appellate Court were in the nature of a fresh or second hearing, it would also have been bound to correct the defect or error in the procedure and then re-decide the matter.

But since it is forbidden to reverse a decree merely on the ground of such an error or defect as is mentioned in Section 99, it means that what it has to see is the correctness or legality of the decree and is not so much concerned with the procedure as the trial Court would have been. There is nothing in the provision of Section 107 describing the powers of an appellate Court to suggest that it has to re-hear the whole matter and not merely to see whether that decree of the lower Court was correct and legal. The provisions of Sub-section (2) lend no support whatsoever to the contention that an appellate Court can reverse a decree, legal

according to the law in force when it was passed, simply on the ground that it is illegal according to the law coming into force subsequently, even if with retrospective effect. If the trial Court itself in the present case would have had no jurisdiction to review its judgment on the ground of the subsequent change in the law. Sub-section (2) does not give this power to the appellate Court. Finally, the well-established principle of not lightly differing from the appreciation by the trial Court of the evidence given before it by witnesses, which governs an appellate Court confirms that it does not re-decide the dispute.

24. The dispute before us now is about the correctness of the decree passed in the respondents' favour and there is no longer any question of applying any law. Whatever law was to be applied has been applied by the trial Court; we would have been required to apply the law only if the plaintiff's suit had been dismissed and he had come up in appeal. When the trial Court decided the dispute after applying the law applicable to the facts in controversy, the dispute came to an end. In appeal we have only to see whether the trial Court ascertained the facts correctly and applied the law correctly to them.

25. If the present appeal had been dismissed summarily, as it deserved to be, there would have been admittedly an end of the matter and on the passing of the Amendment Act on 28-12-1949 the appellants would not have got a right either to have the matter reopened before us or to apply to us for review. Instead of the appeal being dismissed summarily it was admitted and remained pending for more than three years with the consequence that in the meantime the law was amended and it has got an opportunity of contending that the appeal should be decided in accordance with the provisions of the amended law. It seems somewhat illogical that if this Court had acted correctly the appellant would have been without any redress but he becomes entitled to redress because this Court admitted the appeal which did not deserve to be admitted.

26. But the authorities seem to be against the view that I have advanced and I must yield to them. I only hope that the matter will be considered by the Supreme Court in near future and set right.