

(1965) 06 CAL CK 0023
In the Calcutta High Court

Case No : Full Bench Ref. No. 1 of 1961 in Civil Order No. 3732 of 1958 in First Appeal Tender No. 762 of 1957

Eagle Plywood Industries Private Ltd. APPELLANT

Vs

Amulya Gopal Majumdar and Others RESPONDENT

Date of Decision : 04-06-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Citation : AIR 1966 Cal 267 : 69 CWN 1025 : (1966) 1 ILR (Cal) 1

Hon'ble Judges : P. Chatterjee, J;G.K. Mitter, J;D.N. Sinha, J

Bench : Full Bench

Advocate : Barindra K. Ghosh and N.C. Chakraborty, Govt. Pleader, for the Appellant; Nani Coomer Chakraborty, J.N. Halder and Kanika Banerjee, for the Respondent

Judgement

Sinha, J.—The facts in this case are briefly as follows : The plain tiff-respondent Amulya Gopal Majumdar filed a mortgage suit against the defendant-appellant Eagle Plywood Industries Private Ltd., and defendant-respondents Nos. 2 to 5, being Suit No. 117 of 1954 in the Seventh Court of the Subordinate Judge at Alipore. On the 30th April, 1956 the plaintiff-respondent obtained preliminary decree in the said mortgage suit for Rs. 52,074-4-6. Against the said decree, the defendant appellant preferred an appeal in this Court being F. A. T. 1509 of 1956. The appeal was filed with a court-fee of Rs. 100 with a deficit of Rs. 2,000. On the same day, the defendant-appellant filed an application praying for an extension of time to put in the balance court-fee till one day after the reopening of the Court after the long vacation The Court reopened on the 19th November. 1956. On the 10th September, 1956 the application of the defendant-appellant was granted by the Registrar as prayed for, that is to say, within one day after the reopening of the court after the long vacation. The lime was further extended upto the 20th November, 1956. As the deficit court-fees was not put in even on the 20th November 1956 the matter was placed before the Registrar on the 23rd November. 1956. The Registrar granted one week for the making of an

application for further extension of time. The application was not made within the time granted by the Registrar. The matter was placed before the Registrar on the 6th December, 1956 and as there was no application for extension, an order was made that the extension could not be granted. On the 10th December, 1956 the defendant-appellant made an application for further extension of time to put in the deficit court-fees. The Registrar referred it to Court for orders. On the 18th December, 1956 the matter was placed before a Division Bench consisting of Lahiri and Sen JJ. who passed an order rejecting the memorandum of appeal. On the 3rd May, 1957 the defendant-appellant filed an application for review of the said order rejecting the memorandum of appeal. On the 10th May, 1957 the application for review was rejected. On the 17th May, 1957 the defendant-appellant presented a fresh memorandum of appeal from the original decree dated 30th April 1956 upon payment of the full court-fees of Rs. 2,100 together with an application u/s 5 of the Indian Limitation Act for condonation of the delay. A rule was issued by P. N. Mookerjee and P. K. Sarkar JJ. On the 26th June, 1958 the rule came up for hearing before Lahiri and Sen JJ. and the said rule was discharged with cost. Thereupon, the defendant-appellant made an application on the 30th August, 1960 purporting to be u/s 151 of the CPC and Section 13 of the Court-fees Act (Act VII of 1870) for an order that a certificate should be granted authorising it to receive back from the Collector the full amount of fee paid on the memorandum of appeal. This application came up for hearing before a Division Bench consisting of P. N. Mookerjee and N. K. Sen JJ. The learned Judges stated that it had been conceded by the defendant-appellant that Section 13 of the Court Fees Act was not applicable to the facts of the present case. It was contended, however, that the defendant-appellant was entitled to refund of (he court-fees under the inherent powers of the court as may be exercised u/s 151 of the Code of Civil Procedure. The learned Judges pointed out that the question, therefore arose as to whether under such circumstances the court had any such inherent power in the matter or whether the court's power of refunding the court-fees was limited to the provisions contained in that behalf in the Court Fees Act. The learned Judges pointed out that upon this point there were two directly conflicting Bench decisions of this Court. In J.C. Galstaun Vs. Janaki Nath Roy and Others, a Division Bench presided over by Mallik J. held that where a memorandum of appeal had not been registered on the ground that it was out of time and the delay had not been caused by any lack of bona fides on the part of the appellant, he was entitled to a certificate for refund of the court-fees paid, such certificate being granted in exercise of the inherent powers of the Court. In Abodh Bala Ghosh v. Sm. Radharani Dasi (1951) 55 Cal WN 417, a subsequent Division Bench of this Court presided over by Das, J. held exactly to the contrary namely, that under such circumstances the court had no inherent power to direct the refund of court-fees. The learned Judges noticed the case of J.C. Galstaun Vs. Janaki Nath Roy and Others, and dissented from the same, but somehow or other did not refer the matter to a Full Bench, although according to the rules, they should have done so. The Bench considering the application for refund in the instant case, noticed

this conflict in the two Bench judgments of this court mentioned above and has referred the matter to a Full Bench for its opinion the following point of law, under Rule 3 of Chapter VII of the Appellate Side Rules of this Court :--

" Whether, when an application u/s 5 of the Indian Limitation Act is rejected, the appellant can, in any circumstances, get refund of the court-fees, paid on the accompanying memorandum of appeal, u/s 151 of the Code of Civil Procedure. "

2. A large number of authorities were cited before us on the question as to under what circumstances an application lay for refund of court-fees. The precise point, however, which we have to consider is as to whether, when a memorandum of appeal is presented with proper court-fees but out of time with an application for condonation of the delay, if the delay is not condoned, the court could under its inherent power give a certificate for refund of the court-fees paid. I shall first of all deal with the cases which are apposite upon this point.

3. The first case to be considered is the case of J.C. Galstaun Vs. Janaki Nath Roy and Others, . The facts in that case were as follows : On the 13th June, 1938 the petitioner presented to the High Court a memorandum of appeal from the appellate decree passed by the learned Additional District and Sessions Judge, 24-Parganas, in Title Appeal No. 60 of 1931. The said memorandum of appeal was not registered by the office as it was out of time. Thereupon, the petitioner made an application u/s 5 of the Limitation Act for condonation of the delay. The application was rejected, with the result that the appeal remained unregistered. The petitioner thereupon made an application praying for a certificate that the appeal had not been registered and for return of the memorandum of appeal and the stamps filed therewith together with a certificate for refund of the value thereof. The learned Judges held that the matter did not come within the purview of Section 13 of the Court Fees Act, but that Section 13 was not exhaustive and that the High Court in suitable cases may exercise its inherent powers vested in it by Section 151 C. P. C and order refund of court-fees paid. It was held that it was a fit case where this inherent power should be exercised in favour of the petitioner u/s 151 of the Code of Civil Procedure. The petition was accordingly allowed and the court directed the return of the memorandum of appeal with the certificate prayed for. Although the learned Judges mentioned that previous decisions of this court existed, regarding the exercise of inherent powers, none were cited in the judgment The next case to be considered is a Bench decision of this Court. (1951) 55 Cal WN 417. The facts in that case were as follows. On 22nd May, 1950 the petitioner filed a memorandum of appeal being F.A. T. 227 of 1950 with full court-fees. As the appeal was filed out of time the petitioner made an application u/s 5 of the Indian Limitation Act for extension of time to file an appeal and obtained a rule. The rule was discharged and the time was not extended On the 17th August, 1950 an application was made for refund of the court-fees. The petitioner relied on the case of J.C. Galstaun Vs. Janaki Nath Roy and Others, noticed above. The respondent relied on the case of Indu Bhusan Roy Choudhury Vs. Secy. of State, . I have already referred to J.C. Galstaun Vs.

Janaki Nath Roy and Others, above. In the case of Indu Bhusan Roy Choudhury Vs. Secy. of State, a Division Bench of this court presided over by Nasim Ali J., dissented from the decision in J.C. Galstaun Vs. Janaki Nath Roy and Others, . In that case, the petitioner instituted a suit for rent in the first court of the Subordinate Judge at Khulna The plaint was insufficiently stamped and was rejected Then the petitioner applied to pay the deficit court-fees and the suit was restored to the file by an order purporting to be made under the inherent jurisdiction of the court u/s 151 C. P. C. Subsequently this order restoring the suit to the file was set aside, whereupon the petitioner made an application for a certificate authorising him to receive back from the Collector the value of the stamp paid on account of court-fees. It was held that even apart from the provisions of Sections 18, 14 and 16 of the Court Fees Act, the court had issued a certificate for refund of court fees in suitable cases u/s 161 of the Code of Civil Procedure. Nasim Ali J., said as follows :--

" The present application admittedly is not covered by Sections 13, 14, 15 of the Court Fees Act. We are asked, however, to issue a certificate under the inherent power of the Court, The learned senior Government Pleader contends that the Court has no power to issue certificate apart from the provisions of the Court Fees Act. The reported cases, however, show that this court as well as other High Courts have issued certificate under the inherent power of the court in cases (1) where excess court-fees have been paid by inadvertence. In the matter of Grant (1870) 14 Suth WR 47 .Harihar Guru v. Ananda Mahanty. (1913) ILR 40 Cal 365 and In the matter of Mul Chand and Another Vs. Official Receiver and Others where a litigant has made excess payments under an erroneous view of the provisions of the Court Fees Act, Thamayya Naidu v. Venkataramanamma ILR Mad 641 : (AIR 1932 Mad 438), Vijayalakshmi Ammal v Shri-niyasa Ayyangar ILR Mad 542 : (AIR 1934 Mad 84) Chaudra Hari Singh and Others Vs. Tipan Prosad Singh and Others, and Mahammad Reza v. Rajballabh Nath Singh (1928) 9 Pat LT 240 , (3) where the court has realised excess court-fees on an erroneous interpretation of the section of the Court Fees Act Girish Chandra Mali and Another Vs. Girish Chandra Dutta and Others, . The principle underlying these cases seems to be that Government should not profit by the mistake of a litigant or of Court as to the amount of court-fees payable under the Court Fees Act, and in cases of such mistake the court should order refund for ends of justice This is an intelligible principle Government cannot reasonably object to refund the excess as it is not legitimately due under the statute. The present case does not come within the principle. "

4. Coming back now to Abodh Bala"s case (1951) 65 Cal WN 417 (supra) G. N. Das J. said as follows:

" The powers of the Court to direct a refund of court-fees on a Memorandum of Appeal or on an application for review of judgment are expressly provided for in Sections 13 to 15 of the Court Fees Act. The contention that the above sections define the extent of such power of the Court, has been negated by the different

High Courts It is now well settled that in appropriate cases, the courts may direct a refund of court-fees in the exercise of their inherent jurisdiction even in cases outside Sections 13 to 15 of the Court Fees Act. Such inherent jurisdiction is founded on the principle that every court has inherent power to act *ex debito justitiae*, i.e., to do that real and substantial justice for the administration of which alone it exists. The power is subject to the qualification that there is no room for the application of the inherent power where there is an express provision negating the claim or where the party has neglected to adopt the prescribed remedy *Abdul Karim Abu Ahmad Khan Ghuzanavi v. Allahabad Bank Ltd.* 21 Cal WN 877 : (AIR 1917 Cal 44) (FB)."

5. The learned Judge disagreed with the view expressed in *J.C. Galstaun Vs. Janaki Nath Roy and Others*, and held that the application for refund could not be allowed because of the following reasons : Section 6 of the Court Fees Act requires that the memorandum of appeal cannot be filed in court or received by the officer concerned unless there has been paid the proper fee payable under the schedules of the Act. In Bengal, the Court may receive a memorandum of appeal in respect of which an insufficient fee has been paid, under certain conditions. Section 30 of the Act further provides that the court-fee stamp must be cancelled before the memorandum is filed. Order 41 Rule 1, Civil Procedure Code, requires that every appeal shall be preferred in the form of a memorandum, Rule 12, Part II, Chapter V of the Appellate Side Rules of this Court provides that the memorandum of appeal shall be presented to the court in the manner prescribed therein and the date of such presentation for the purpose of limitation shall be the date when it is so presented. An application u/s 5 of the Indian Limitation Act cannot be made without the preliminary steps required by Rules 12, 13 and 17. The affixing of the court-fee stamps on the Memorandum of Appeal is accordingly an essential pre-requisite to the filing of the application u/s 5 of the Indian Limitation Act. The fact that such an application did not succeed is immaterial in deciding the question of refund. A refund cannot be asked for because an application made or proceedings instituted have failed. If that were so every unsuccessful litigant would be entitled to ask for refund of the court-fees paid. This would be an impossible situation. The learned Judge also pointed out that *J.C. Galstaun Vs. Janaki Nath Roy and Others*, had been dissented from a number of cases e.g. In *Re: Chidambaram Chettiar, Indu Bhusan Roy Choudhury Vs. Secy. of State, and Siddheswar Chandra v. Satya Kishore* (1937) 41 Cal WN 1184. According to Das J. the real test was whether payment of court-fees was necessary for the initiation of the proceedings, irrespective of the fact whether the said proceedings succeeded or not. The application for refund was rejected. The only other case which is similar to the instant case upon facts is a decision of the Nagpur High Court, *Ranjan Lal v. Shankar Lal* AIR 1953 Nag 330. In that case, a memorandum of appeal in Second Appeal No. 78 of 1952 was filed after payment of court-fees but as the appeal was beyond time, an application was made u/s 5 of the Limitation Act for condonation of the delay. The application for condonation was rejected, and the appeal was dismissed as

barred by time. Thereupon, an application was made for refund of the court-fees. It was argued that the appeal had not been dismissed upon merits but upon a technical ground of limitation and, therefore, in law and equity it was just and proper to refund the court-fees. This application was rejected. The appellant in that case relied on *Keratali Vs. Emperor*, (supra) and the learned Judge distinguished it on the ground that in the *Nagpur* case the appeal was itself heard and dismissed on the ground of limitation whereas in *Keratali Vs. Emperor*, the Memorandum of Appeal was not even registered. It was stated, however, that the fact that after hearing the parties the appeal was dismissed on the question of limitation, did not make any difference on the principles to be applied. Like *Das J.* the learned Judge noted that under the circumstances of the case, the memorandum had to be filed, and the full stamps required had to be affixed. Simply because the litigant was unsuccessful, it did not follow that equity required the court-fees to be refunded. The learned Judge cited an observation of *Chagla C. J.* in *Karfule Ltd. Vs. Arical Daniel Varghese*, as follows :-- " But the principle which is clearly deducible from these cases is that, as there was no legal obligation to pay the court-fees or the excess which was paid by the party, the Court orders, in substance, the law to be carried out, and not to increase the liability upon the litigant. But this principle cannot be extended in support of a litigant who has paid the court-fees for which, in law, he was liable, but who, because of certain circumstances, feels that equitable considerations require that he should not be asked to pay either the full, court-fees or part of the court-fees. If once this principle is understood and appreciated, then the large number of decisions which were cited at the bar become perfectly clear."

The application for refund was rejected.

6. I next come to the provisions of the Court Fees Act. The Court Fees Act as its name implies, is an Act primarily passed for the purpose of prescribing the fees which are to be paid in respect of documents to be used in Court, as observed by the Privy Council in *Rachappa v. Shidappa* 46 Ind App 24 : (AIR 1918 PC 188). It is an Act passed in order to secure revenue for the benefit of the State. It is, however, a fiscal Act having for its primary object the protection of revenue and not to coerce the subject--see *Chandramani Koer v. Basdeo Narain Singh* 4 Pal LJ 57 : (AIR 1919 Pal 270) The provision as to refund of fees paid on a memorandum of appeal is contained in Section 13 of the Court Fees Act. That provision is as follows :--

" If an appeal or plaint, which has been rejected by the lower Court on any of the grounds mentioned in the CPC is ordered to be received, or if a suit is remanded in appeal, on any of the grounds mentioned in Section 351 of the same Code for a second decision by the lower Court, the Appellate Court shall grant the appellant a certificate, authorising him to receive back from the Collector the full amount of fee paid on the memorandum of appeal :

Provided that if, in the case of a remand in appeal, the order of remand shall not cover the whole of the subject-matter of the suit, the certificate so granted shall

not authorise the appellant to receive back more than so much fee as would have been originally payable on the part or parts or such subject-matter in respect whereof the suit has been remanded."

7. Where of course, the circumstances of a case fall within the express wording of the section, the provision must be applied strictly. The question is what would happen if the matter did not come within the four corners of Section 13. The general principle to be applied in such cases has been succinctly laid down by Willes, J. in the leading case of *Wolverhampton New Waterworks Co. v. Hawkesford* (1859) 6 CB (N. S.) 336. The learned Judge said as follows :--

" There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law : there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, and the party suing has his election to pursue either that or the statutory remedy The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy; there the party can only proceed by action at common law. But there is a third class--viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it.

The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted, and adhered to.""

8. In the present case, it is argued that the liability to pay court-fees is not a common law liability but the liability which is the creation of a statute namely, the Court Fees Act. Therefore, a refund can only be ordered where the statute says so and there cannot be any inherent power of the court to order a refund. In my opinion, the law on the subject may be summarised as follows :--

1. The powers of the court to direct a refund of court-fee on a memorandum of appeal or on an application for review of judgment are expressly provided for in Sections 18 to 15 of the Court Fees Act (Act VII of 1870).

2. It has, however, been held by a consensus of opinion of different High Courts in India that the above sections are not exhaustive.

3. Where the matter falls within the scope of Sections 13 to 15 of the Court Fees Act, the provisions must be strictly applied.

4. In matters outside the scope of Sections 18 to 16, the court has in certain circumstances an inherent jurisdiction to order refund of court-fees, on the principle that every court has Inherent power to act *ex debito justitiae* i.e., to do real and substantial justice for the administration of which alone it exists. Such powers have been exercised in the following cases :--

- (a) where excess court-fees have been paid by oversight, mistake or inadvertence;
- (b) where a litigant has made excess payment under an erroneous view of the interpretation of the Court Fees Act;
- (c) where the court has realised excess Court-fees on an erroneous interpretation of the law.

5. Where there is no legal obligation to pay the court-fees, the court orders in substance, the law to be carried out, so as not to increase the burden of the litigant. But this principle cannot be extended in favour of a litigant who has paid the court-fees, for which, in law, he was liable; but who, because of certain circumstances, feels that equitable considerations require that he should not be asked to pay court-fees on a part thereof. The fact that he has instituted legal proceedings which have failed is no ground for granting the equitable relief of a refund of court-fees.

9. Lastly, we must consider a decision of the Supreme Court-- *Om Prakash Gupta Vs. The State of Uttar Pradesh*, . The facts in that case were as follows : The appellant was a member of the United Provinces Civil (Executive) Service. In August, 1944 he was suspended from service and a departmental proceeding was instituted. by an order dated 25-11-54 the United Provinces Government dismissed the appellant. He filed a suit for a declaration that the order of dismissal was wrongful and that he still continued to be a member of the Civil Service and for arrears of salaries. In the alternative, he prayed for a declaration that the order of dismissal was wrongful and claimed damages for Rs. 1,20,000. He paid the requisite court-fees on the valuation of Rs. 1,20,000. Later on the alternative claim was deleted from the plaint as a result of an amendment, having regard to a subsequent decision of the Privy Council which held that a person illegally dismissed from Government service could only get a declaration that the order was inoperative and that he still continued to be a member of the service. A decree was made in favour of the appellant by the Civil Judge declaring that his order of dismissal was illegal and that he still continued to be a member of the United Provinces Civil (Executive) Service. The Civil Judge, however, declined to pass a decree for arrears of salary. Against this, the appellant appealed to the High Court but his appeal was dismissed, from which an appeal was preferred to the Supreme Court. The two questions which had to be considered by the Supreme Court were firstly, whether the appellant was entitled to a decree for arrears of salary and secondly, whether he was entitled to a refund of the excess court-fees paid by him. On the first point, it was held that he was entitled to arrears of salary On the second point. Imam J. said as follows:--

" It seems there is no merit in the submission made by the Advocate. The court-fee had been paid on Rs. 1,20,000 which was claimed as damages.

At the time the suit was instituted the law as then understood permitted such a

claim to be made. The decision of the Privy Council, however, made it clear that no such claim could be made and all that a Government servant could ask for was a declaration that the order of dismissal was illegal and that he still continued to be a member of the Civil Service. The decision of the Privy Council clarifying the position could not be ground for refund of court-fee when at the time it was paid was in accordance with the law as then understood. Indeed the appellant did not appeal or file an application against the order of the Civil Judge refusing to pass an order of refund.

In the High Court he did not ask for this relief on the basis of any statutory provision. He invoked the inherent powers of the High Court. The Court Fees Act contains certain provisions for refund of court-fees paid by a party but admittedly the present case is not covered by any of those provisions. It seems, therefore, that the High Court in the circumstances of the present case rightly refused to order a refund of the excess court-fee paid by the appellant. It also does not appear that the civil Judge acted illegally in refusing to order a refund."

10. In my opinion, the Supreme Court was not altering the existing law which enables the court in certain circumstances to exercise its inherent powers. Indeed, the learned Judge went into the merits of the matter and came to the conclusion that there was no equity in favour of the appellant. Perhaps certain decisions which have allowed the exercise of inherent jurisdiction of the court in cases where the court made an erroneous interpretation of the law, might have to be revised in view of the Supreme Court decision, e.g. *Girish Chandra Mali and Another Vs. Girish Chandra Dutta and Others*, where the appellate court relied on a certain decision of this High Court and made an order for the payment of court-fees but it was found that this view had subsequently been dissented from and a refund was ordered. We are not however, concerned in this case with such a situation. The facts of this case are, that a memorandum of appeal was filed out of time, together with an application u/s 5 of the Limitation Act for condonation of the delay. In order to make the application u/s 5, it was necessary to affix stamps of the full value upon the memorandum of appeal. Without affixing such stamps, the application u/s 5 could not be entertained. The petitioner moved that application and lost it. He had taken the risk of either being successful or losing the said application. Applying the tests stated above, it cannot be said that any equitable considerations arise for making the order of refund. He paid the stamp fees which in law he was liable to pay. Simply because the application u/s 5 became unsuccessful is no reason for exercising the inherent powers of the court for making an order for refund of the stamp fees affixed on the memorandum of appeal.

11. In our opinion, *J.C. Galstaun Vs. Janaki Nath Roy and Others*, was wrongly decided and should be overruled and (1961) 55 Cal WN 417 was rightly decided and should be followed. The point of law referred to us should be answered in the negative. The matter will, therefore, go back to the referring court for being disposed of in accordance with law. The petitioner should pay the cost.

12. The hearing fee is assessed at two Hold mohurs each for the two sets of appearing respondents.

Mitter, J.

13. I agree.

Chatterjee, J.

14. I agree.

,