

(1959) 03 AP CK 0012

In the Andhra Pradesh High Court

Case No : Second Appeal No. 62/2 of 1955

Lala Bhagwati Deen

APPELLANT

Vs

Mohamed Ismail

RESPONDENT

Date of Decision : 05-03-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 152, 35
Hyderabad Stamp Act, 1331 — Section 42(3)
Stamp Act, 1899 — Section 44, 44(3)

Citation : AIR 1959 AP 601

Hon'ble Judges : Mohd. Ahmad Ansari, J; Manohar Pershad, J

Bench : Division Bench

Advocate : Gopal Rao Tuljapurkar, for the Appellant; Venkat Rao Savarkar, for the Respondent

Final Decision : Allowed

Judgement

Manohar Pershad, J.—Our learned brother Srinivasa Chari J., has referred this case, which initially came before him, to a Bench having regard to the question of law involved in the appeal. The question involved is whether the present suit of the plaintiff for recovery of costs of the amount of penalty paid by him in the earlier suit could be maintained. In order to determine the question of law involved, a reference to the facts of the case is necessary.

2. The plaintiff-respondent herein filed a suit for recovery of Rs. 663/- on the basis of certain bonds which were insufficiently stamped. Subsequently, during the course of the trial, the plaintiff-respondent paid the stamp duty and penalty on those bonds. In that suit, the parties entered into a compromise, and on the basis of the compromise, a decree was passed on 5-9-1953 in favour of plaintiff for Rs. 638/- with costs. In the decree, the amount of stamp duty and penalty paid by the plaintiff was not included in the costs of the suit.

The plaintiff-respondent, therefore filed an application u/s 152 of the Code of Civil Procedure, praying that the amount of penalty and stamp duty paid by him

be included in the costs awarded under the decree. The Munsif passed an ex parte order directing the inclusion of the amount of penalty and amendment of the decree accordingly. The judgment-debtor on 27-10-1953 appeared and filed a petition, objecting to the inclusion of the penalty on the ground that that was not an arithmetical error or an omission that could be rectified in an application u/s 152, C. P. C.

The Munsif accepted the contention of the judgment-debtor and set aside the previous order directing the inclusion of the amount of penalty. This subsequent order of the Munsif became final as no revision appears to have been filed against that order. The plaintiff-respondent has now filed the present suit for the recovery of Rs. 137-6-0 being the amount of penalty paid by him. The appellant, who was the defendant in the trial Court, s pleaded that the suit was not maintainable.

The trial Court repelled the contention of the defendant and gave a decree to the plaintiff-respondent for the said amount. Aggrieved by the judgment and decree of the trial court, the defendant went in appeal. This appeal of the defendant has been dismissed by the appellate Court. The defendant came in second appeal to this Court which as stated earlier, initially came before our learned brother, Srinivasa Chari, J., who has made this reference.

3. The sole question that has to be determined in this appeal is whether the present suit of the plaintiff-respondent is maintainable. The contention of the appellant is that the present suit is not maintainable and action should have been taken in the original proceedings alone, whereas the contention of the respondent-plaintiff is that having regard to the provisions of the Hyderabad Stamp Act such a suit was permissible. In order to appreciate, the respective contentions of the learned counsel a reference to the relevant provisions of the Hyderabad Stamp Act in this regard is necessary. The relevant provision of the Hyderabad Stamp Act is Section 42 which corresponds to Section 44 of the Indian Stamp Act.

4. Section 42 of the Hyderabad Stamp Act reads as under:

"Section 42. (1) When a person has paid any duty or penalty u/s 33 or 35 or 38 or 39. and. by agreement or under the provisions of Section 27 or any other enactment in force at the time, obligation of providing the stamp duty lies on some other person, the first mentioned person shall be entitled to recover from such other person the duty or penalty paid.

(2) For the purposes of the action taken for the recovery of the amount under Sub-section (1), the certificate granted in respect of such instrument under this Act shall be conclusive evidence of the matters contained therein.

(3) Such amount shall be included in the costs of the suit or proceeding in which such instrument has been tendered in evidence and to which such persons are parties."

The corresponding provision in the Indian Stamp Act is Section 44 which runs thus:

"(1) When any duty or penalty has been paid u/s 35, Section 37, Section 40 or Section 41, by any person in respect of an instrument, and, by agreement or under the provisions of Section 29 or any other enactment in force at the time such instrument was executed, some other person was bound to bear the expense of providing the proper stamp for such instrument, the first mentioned person shall be entitled to recover from such other person the amount of the duty or penalty so paid.

(2) For the purpose of such recovery any certificate granted in respect of such instrument under this Act shall be conclusive evidence of the matters therein certified.

(3) Such amount may, if the Court thinks fit, be included in any order as to costs in any suit or proceeding to which such persons are parties and in which such instrument has been tendered in evidence. If the Court does not include the amount in such order, no further proceedings for the recovery of the amount shall be maintainable."

From the above provisions of the Hyderabad Stamp Act and the Indian Stamp Act, it would appear that so far as Clauses 1 and 2 of the above sections are concerned, there is no difference in the Hyderabad Stamp Act and the Indian Stamp Act. There is difference in Clause 3 of the Hyderabad Stamp Act; for in the Hyderabad Stamp Act, the words "no further proceedings for the recovery of the amount shall be maintainable," are not to be found. The question arises as to what is the effect of this omission. Clause (3) of Section 44, we may point out, has been a subsequent amendment to the Indian Stamp Act. In the earlier Stamp Act No. 1 of 1879, the corresponding provision to Section 44 was Section 41. But, in that Section, there was no such provision as has been enacted in Clause 3 of the present Act i.e., Act II of 1899. Questions therefore arose whether a separate suit for the recovery of the penalty paid was maintainable.

In the case of *Ishar Das v. Masud Khan*, ILR 6 All 70 identical question had arisen. That was a case in which the plaintiff in a suit upon a certain instrument not duly stamped was compelled to pay the amount of stamp duty and penalty. The defendant was the person bound to bear the expenses of providing proper stamp for such instrument. The plaintiff with reference to Section 41 of the Stamp Act, 1879, sued the defendant to recover such amount. It was held that such amount could not be regarded as part of costs in the suit in which, it was paid and a separate suit to recover it was maintainable. This ruling cannot be taken as authority now because Clause 3 has specifically been introduced in Section 44 of the Indian Stamp Act which was not so in Section 41 of the earlier Act.

The contention of the learned counsel for the plaintiff-respondent is that though Clause 3 has been introduced in the Indian Stamp Act and also in the Hyderabad

Stamp Act, since the words "no proceedings for the recovery of the amount shall be maintainable" are not found in the Hyderabad Stamp Act, it must be deemed that the legislature intended that subsequent proceedings for the recovery of the amount to be maintainable, and the case of ILR 6 All 70 (supra) would apply. We cannot accept the contention of the learned counsel for the respondent. It is not denied that in the Hyderabad Stamp Act IV of 1331F., also Clause 3 has been added, which was not there in the earlier Act 1298F. and some meaning has to be given to this amendment.

As stated earlier the amendment in Section 44 of the Indian Stamp Act by introducing Clause 3 was to reverse the result of the earlier decisions that a separate suit was maintainable, and such was the result of the earlier decisions of the Hyderabad High Court also under the Act of 1298F. Similar provision has been made in the Hyderabad Stamp Act and the intention of the legislature cannot be anything else than the same as in the Indian Stamp Act. If this was not the intention of the legislature, we fail to understand why there was any need at all for inserting Clause 3 in the Hyderabad Stamp Act. Therefore the same meaning has to be given to the Hyderabad Clause 3 also otherwise we are of the opinion that this insertion of the clause was necessary, and that could not be the legislative intention at all.

The learned counsel for the plaintiff-respondent has laid great stress on the word "shall" which is used in the Hyderabad Stamp Act and the word "may" used in the Indian Stamp Act. and contended that having regard to the mandatory provision of the Hyderabad Act the legislature may have intended that non-compliance by the Court would enable the plaintiff-respondent to recover the amount by further proceedings. This contention is equally devoid of force. The word "may" used in Section 44 of the Indian Stamp Act creates an obligation similar to that of Section 42 of the Hyderabad Stamp Act.

We may in this connection refer to a decision of the Supreme Court reported in Chief Controlling Revenue Authority v. Maharashtra Sugar Mills Ltd.. AIR 1950 SC 218. In that case their Lordships of the Supreme Court were considering the effect of the word "may" used in Section 57 of the Stamp Act and Section 66 of the Income Tax Act and held that the provision was mandatory. Whether the provision is mandatory or discretionary is not material. But the question would be what is the remedy in cases where the trial Court in the original suit does not include the amount of penalty in the costs, -- Whether a separate suit has to be filed or whether action had to be taken in the earlier suit alone.

This question depends upon whether the court in the earlier case had jurisdiction to pass an order as to costs. We are of the opinion that a subsequent suit to recover the costs incurred in an earlier suit and not awarded will be barred on the principle of *res judicata*. We may in this connection refer to *Pranshankar v. Govindlal*, ILR 1 Bom 467; *Kabir v. Mahadu*, ILR 2 Bom 360; *Referred Case 5 of 1867*, 3 Mad 341; *Mahram Dass v. Ajudhia*, ILR 8 All 452 and *Abdullah v. Mangal Sain*, AIR 1932 Lah 257. ILR 1 Bom 467 (supra) was a case where the plaintiff

Pranshankar obtained a decree, against Govindlal Purbhudas and got two houses attached.

Govinda Purbhudas applied to the court u/s 246, C. P. C. for removal of the attachment of the houses. The objection was allowed by the Subordinate Judge whereupon the plaintiff instituted a regular suit against the defendant which was decided in favour of the latter. Against this decision, the plaintiff appealed. Consequently, the plaintiff recovered the amount decreed. The plaintiff then sought in the suit to recover interest at 9 per cent. p. a., and the amount of costs that was paid by him to the defendant. The question arose whether such a suit was maintainable. It was held that a suit was not maintainable. In the case, their Lordships relied on Chengalvaraya Mudali v. Thangatchi Ammal, 6 Mad 192. An identical question had arisen in the Madras High Court in 3 Mad 341. In that case, the plaintiff got a decree but no costs were awarded to him. The plaintiff now brought a suit to recover the amount of costs alleged to have been incurred by him in the earlier suit. It was held:

"A suit cannot be maintained for costs incurred by the plaintiff in resisting a claim made by the defendant u/s 246 of the Code of Civil Procedure, the greater part of which was disallowed.

It is only when the costs are made a part of the order and then by execution under it, that a party can in such cases enforce the payment of costs."

The Allahabad High Court in the case of ILR S All 452 (supra) has taken a similar view. In this case their Lordships have followed AIR 1932 Lah 257 (Supra); ILR 1 Bom 467 (supra) and ILR 2 Bom 360 (supra). ILR 8 AH 452 (supra) has been followed in another case of the same High Court in Kadir Baksh v. Salig Rani, ILR 9 All 474

5. The Lahore High Court in the case of AIR 1932 Lah 257 (supra) has taken a similar view and it has been held that no suit lies for recovery of costs incurred in a former, litigation between the parties.

6. This view is supported by the English authorities also. We may at this stage refer to one or two cases. In *Grace v. Morgan*. (1836) 132 ER 208 identical question had arisen. This was an action brought by the plaintiff against the defendant for vexatious and excessive distress and the point urged was whether the plaintiff would be at liberty to add to the damages given by the jury the amount of extra costs in a former action of replay in which the plaintiff had brought in respect of his goods distrained and in which the proceedings had been stayed by consent and the amount of costs taxed have been received by the plaintiff from the defendant before the present action WAS commenced. It was held that the plaintiff was not entitled to recover the extra costs in a subsequent action,

7. The next case is *Jenkins v. Biddulph* (1827) 130 ER 729 and this case has been relied on in the case of (1836) 132 ER 208 (supra). This was also a case of

a false return of non est invents per quod. The plaintiff was outlawed. It has held that the plaintiff could not recover the extra costs of the outlawry.

8. The learned counsel for the plaintiff-respondent next relying on the case *Lalgir v. Chin Basappa*, 26 Deccan LR 890 contends that a Division Bench of the erstwhile Hyderabad High Court has held that the amount recovered by way of penalty under the Stamp Act could not be included in costs and therefore the plaintiff-respondent was entitled to file a separate suit and recover the said amount. There is no force in this contention either, it is true that in the case relied on by the learned counsel it has been so held, but there is in the case absolutely no discussion of the principle and no authorities have been cited. Moreover the observations of the Division Bench, with respect to the learned Judges, are contrary to the express provision of Section 42(3) of the Hyderabad Stamp Act and therefore we beg to differ.

9. In view of the above discussion, we are of the opinion that the present suit of the plaintiff for the recovery of the amount of the penalty paid by him and not included in the earlier suit is not maintainable. The plaintiffs action was by way of appeal or revision against the order of the trial court disallowing the inclusion of the amount of penalty paid. In this view of the matter, we cannot uphold the judgments and decrees of the courts below.

10. The appeal is allowed. The judgment and decree of the trial Court and those of the appellate Court are set aside and the plaintiffs suit is dismissed. Having regard to the facts of the case, we are of opinion that each party should bear its costs in all the courts and we order accordingly.