

(1955) 01 CAL CK 0006

In the Calcutta High Court

Case No : Appeal from Original Order No. 166 of 1953

Messrs. Tara Chand Ghanshyamdas

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 12-01-1955

Acts Referred:

Constitution of India, 1950 — Article 227(3)
Court Fees Act, 1870 — Section 13, 14, 15, 6
Government of India Act, 1935 — Section 226
Presidency Small Cause Courts Act, 1882 — Section 39, 40

Citation : 59 CWN 550

Hon'ble Judges : Chakravartti, C.J.; Lahiri, J

Bench : Division Bench

Advocate : S. Banerjee, for the Appellant; S.M. Bose, Advocate-General and A.K. Sen, Junior Standing Counsel for the State of West Bengal, for the Respondent

Final Decision : Dismissed

Judgement

Chakravartti, C.J.—The question involved in this appeal has been described by the learned trial Judge as a very important question. It is not important in the sense of being a difficult or a serious question, but, it has become important, because certain assumptions have come to be attached to it which have caused this Court, in certain instances, to exercise a power where neither the power, nor any occasion for its exercise really existed. The answer to the question, however, appears to be plain. We are able to reach that answer without much difficulty, because the learned Senior Standing Counsel, who appeared for the appellant made no serious attempt to argue the unarguable. The facts are simple. The appellants, Messrs. Tarachand Ghanshyam-das, brought a suit in the Court of the Subordinate Judge, Berhampore against Sree Radhakrishna Sugar Mills Ltd., (In Liquidation), and certain other parties for the enforcement of a charge, alleged to have been created by a certain Debenture of Trust Deed and some other reliefs. The suit was valued at Rs 15,00,000 and the ad valorem duty of Rs. 10,000, payable on the plaint under Article 1, Schedule 1 of the Court-fees Act, was paid.

Thereafter, the defendant-company, by its Liquidator, applied to this Court for the transfer of the suit to its Extraordinary Original Civil Jurisdiction, under clause 13 of the Letters Patent. On that application, an order transferring the suit was made. If the suit had been instituted on the Original Side of this Court the fee initially payable by the plaintiff-appellants would have been Rs. 22-8-0 under items 2, 11 and 12 of the First Schedule to Rule 74 of Chapter 36 of the Original Side Rules or rather it would have been Rs. 18, since the fee payable on the Power of Attorney under item 11 cannot properly be said to be a fee paid on the plaint. The appellants took the view that since the suit had been transferred to this Court immediately on its institution and was being tried here, they were liable to pay only such fees as were chargeable under the Rules of this Court and that the amount they had paid at Berhampore in excess of Rs. 22-8-0 had been over-paid. Accordingly, they made an ex parte application for a certificate of excess payment, enabling them to obtain a refund of the excess-fee paid by them. As the question was of some importance and affected the revenues of the State, the learned trial Judge directed notice of the application to be given to the State Government. In pursuance of that notice, the learned Advocate-General appeared to oppose the application and after hearing him as also the appellants' Counsel, the learned Judge dismissed it.

2. The learned Judge in his judgment has referred to four cases, all of them unreported, in which an application for a certificate was made in similar circumstances. In two of them, decided respectively in 1943 and 1952, a certificate was granted. In one decided in 1910, a certificate was refused and an earlier application made in the same case also met with a refusal. In the fourth case, decided in 1905, a middle course appears to have been chosen and it was directed that in the taxation of fees chargeable in this Court, the plaintiffs should be given credit for the institution fee paid by them in the Court from which the suit had been transferred.

3. After pointing out by reference to these instances that the practice of the Court had not been uniform and that no reason for either the grant or the refusal of a certificate had been given in any case, the learned Judge referred to the absence of any provision, either in the Court-fees Act or in the Letters Patent or in any other law, authorising this Court to grant a refund of Court-fees where a suit was transferred from a Civil Court to its Extraordinary Original Civil Jurisdiction. The absence of a statutory provision was admitted before him, but it was argued that the Court could grant a certificate in exercise of its inherent power and had done so in the past. In connection with that contention, the learned Judge made an extensive survey of decisions on the Appellate Side of this Court where the Court had either exercised or disclaimed jurisdiction to exercise its inherent power in cases not covered by any statutory provision. In some of those cases, the principles governing the exercise of inherent power were explained and the categories of cases where such power could be exercised had been enumerated. The learned Judge held that the case of a suit, transferred under clause 13 of the Letters Patent, did not come under those principles or

categories.

4. In the appeal, as filed, the bank and certain other parties, apparently the defendants in the suit, were impleaded as respondents. The order appealed from, however, as drawn up, showed the State of West Bengal as a party and it was drawn up as if the State had been formally a party to the application, although the learned Advocate-General had intervened only in compliance with a notice issued to the State. In those circumstances and also because the question was one affecting the revenues of the State, we directed the State of West Bengal to be made a party-respondent and also directed that no notice of the appeal need be served on the remaining respondents, who were private parties and had no interest in the matter. The memorandum of appeal was accordingly amended and the State of West Bengal appeared before us by the learned Advocate-General and the learned Junior Standing Counsel.

5. The learned Senior Standing Counsel, who appeared on behalf of the appellants, addressed an argument before us in two branches. He admitted that he could not point to any statutory provision which authorised this Court to grant a certificate for a refund of Court-fees in respect of suits transferred under clause 13 of the Letters Patent. All that he could contend, he said, was that in such cases the plaintiff was entitled to a refund of the excess amount paid in the lower Court *ex debito justitiae* and the practice which had grown up in this Court of granting a certificate for refund in such cases, apparently in exercise of the inherent power, ought to be adhered to and followed. Turning from the fees paid in the original Court to the fees that were being charged in this Court after the transfer, the learned Standing Counsel contended that, in any event, the fees leviable in this Court after the transfer could only be those prescribed by the Court-fees Act and the different and higher fees prescribed by the Rules of the Original Side could not properly be demanded or levied.

6. The second point is not within the scope of the appeal, as the learned Standing Counsel admitted, but I shall say a few words about it hereafter. The first point is a wholly untenable one and the learned Standing Counsel did not seriously dispute that it was so.

7. Court-fees are the price levied by the State from persons litigating before it for the services rendered to them in connection with their causes. They are fees by which the State reimburses itself for the costs incurred by it in maintaining a judicial system. Such fees are levied under the sanction of statutes in which the Legislature has laid down on what documents or transactions a fee shall be levied by the State and what its rate shall be. Thus the Legislature, being minded to provide the State with finances to maintain the judicial system, has authorised the levy of a revenue in the shape of what may be called a judicial tax and has specified both the chargeable items and the quantum of the levy. In doing so, it has chosen such items as it has considered proper and fixed such rates as it has considered reasonable, presumably with the quantum of the funds required by the State present to its mind. Whether or not the State should in effect sell

justice is a question of policy with which the Court is not concerned. All that the Court need and can take into consideration is that revenue in the shape of Court-fees has been provided for and secured by statutes. The Legislature seems to have applied its mind to the question whether the fee levied in the first instance should be retained in all cases and has specifically indicated the occasions on which the fee should be refunded. That being so, it cannot possibly be within the jurisdiction of a Court of Law to modify or add to the provisions of the taxing statute and interfere indirectly with the revenues of the State by purporting to make what it considers to be equitable adjustments of the Court-fee in exercise of its inherent power. To do so would be to interfere with the revenues of the State in the face of the statutes. The only cases where the Court can properly grant relief in the exercise of its inherent power are cases where there has been a payment or over-payment, not required or warranted by the relevant statute, but which are not covered by the specific provisions for a refund contained in the Court-fees Act or elsewhere. In, such cases, if the Court directs a refund, the statutes are not disregarded, but they are applied and what happens is that upon a finding that a party has made a payment, which was not warranted by the provisions applicable, but there is no specific provision which entitles him to claim a refund, the Court grants a certificate in exercise of its inherent power, declaring thereby that the State has received a payment to which it was not entitled under the law and therefore the State must not retain it. Before any question of the exercise of inherent power can arise, it must be found that there has been a payment not required by law or a payment in excess of what is enjoined by the charging statute and that there is no specific provision for a refund of the unwarranted payment which makes the exercise of the inherent power necessary. Those, in my view, are proper cases for the exercise of the inherent power, because the Court resorts to that power in aid of and by way of implementing its judicial decision that a party has made a payment not required by or in excess of what is required by law.

8. Judged by the above test, there can be no question of this Court granting a certificate for a refund of court-fees in exercise of its inherent power in the case of a suit transferred under clause 13 of the Letters Patent. In such a case, there is no excess payment. The court-fee paid in the original Court at the time of the institution of the suit was the fee properly payable under the Court-fees Act. Indeed, unless that fee and the whole of it was paid, the Court would be debarred from taking cognizance of the plaint by reason of the provisions of section 6 of the Act. It is true that the Bengal amendment of the section provides for the reception of an insufficiently stamped plaint, but the amendment only permits some time to be given for making good the deficiency. Until the deficiency is made good, there is no validly instituted suit and if there be no validly instituted suit, there can be no question of transferring anything under clause 13 of the Letters Patent. In the case of *Ledgard v. Bull* (1) (L.R. 13 IndAp 134), the Privy Council held that a superior Court could not make an order for the transfer of a case, unless the court from which the transfer was sought to be

made, had jurisdiction to try it. It is true that their Lordships were dealing with jurisdiction in respect of the subject-matter of the suit and based their decision to a certain extent on the terms of section 25 of the CPC of 1877. But I am unable to see why the principle stated by their Lordships should not apply to the present case. As their Lordships pointed out, the first step in the maintenance of a suit is its due institution. Till the proper court-fee has been paid on a suit, it is not duly instituted and when there is no validly instituted suit, there is nothing on which an order for transfer can operate. The Court cannot transfer a suit which has no legal existence. It thus follows that in order that there may be an order of transfer under clause 13 of the Letters Patent, the suit, in which the order is made must be one on which the proper court-fee prescribed by the Court-fees Act has been paid. The initial payment made in the original Court is thus not an excess payment in any sense of the term. Does then an excess payment come into existence by reason of the transfer, because if the suit had been instituted in the first instance on the Original Side of this Court, the fee payable would have been considerably smaller? The answer must clearly be in the negative. When a suit is transferred under clause 13 of the Letters Patent, it does not become a suit instituted in this Court. The institution in the original Court is not extinguished by the transfer, nor is an institution in the High Court substituted. The suit remains a suit of the Court, where the plaint was filed and clause 20 of the Letters Patent expressly provides that the law or equity and rule of good conscience which would have been applicable to the suit in the local Court shall continue to apply. It therefore follows that the fee paid on the plaint in the Court of institution, in accordance with the provisions of the Court-fees Act, must continue to remain paid. If so, the case is not one of excess payment, either at the time of the original institution or at any subsequent stage of the suit and consequently there can be no question of exercising the Court's inherent power in order to relieve the plaintiff from any over-payment.

9. The learned Standing Counsel contended that where nothing had been done in the original Court of institution and the whole trial took place in this Court, it was hard on the plaintiff, if he was, nevertheless, required to pay the higher institution fees payable in the original Court. I can see no hardship, at least on the facts of this case. This is not a case, where by reason of the transfer the plaintiff is losing any right of appeal. If the suit had continued to remain in the Berhampore Court, there would be a First Appeal to this Court on its Appellate Side. Upon the transfer of the suit to this Court, there will still be an appeal to the same Court, although it will be before a different Bench. The only difference made by the order of transfer is that instead of a Subordinate Judge, the trial will take place before a Judge of this Court which, it is presumed, cannot be a matter of hardship or for complaint. But even where a suit of small valuation is transferred to this Court and thereby an intermediate appeal is eliminated, there can be no question of the payment of this initial fee causing a hardship. That fee could not buy for the plaintiff the right of the intermediate appeal for which a separate fee would have to be paid, and therefore it cannot be said that if the

excess amount is not refunded, the plaintiff is prejudiced, or that he loses anything for which he has already paid. The learned Standing Counsel appeared to think that the institution fee realised under the Court-fees Act was on account of all fees and costs payable in the course of the suit and therefore he argued that unless the difference between that fee and the initial fee payable in this Court was refunded, there would be a double taxation of the plaintiff and thereby a hardship would be caused to him. The premise on which the learned Standing Counsel proceeded was entirely mistaken, because the institution fee prescribed by the Court-fees Act is charged for the institution alone. Other fees and costs are to be paid at subsequent stages just as they have to be paid in the High Court. No right to a refund of the so-called excess payment *ex debito justitiae* can therefore be made out even on the merits.

10. It may, however, be said on considerations of a general character that where the whole suit is in fact tried in the High Court, there is no good reason for retaining the higher fees realised in the original Court of institution. Conceding that the contention is a reasonable one, the matter is one for the Legislature and not for the Court. In one case at least, the Legislature appears to have thought that in similar circumstances the plaintiff should be given credit for the payment made in the Court from which the suit is transferred. Section 39 of the Presidency Small Cause Courts Act provides for the removal to the High Court of suits valued at over Rs. 1,000 at the instance of the defendant and section 40 provides that in every case so transferred, credit shall be given to the plaintiff for the amount of Court-fee paid in the Small Cause Court in respect of the plaint against fees leviable according to the law and practice prevailing in the High Court. There is no such provision in the case of a transfer under clause 13 of the Letters Patent. Indeed, the fact that such a specific provision was considered necessary in the case of the Small Cause Court Act rather suggests that, but for such specific provision, the Court would not be in a position to give relief to the plaintiff by way of exercising its inherent power. If a bill is mooted in the Legislature for giving similar credit to the plaintiff of a suit transferred under clause 13 of the Letters Patent, section 40 of the Presidency Small Cause Court Act will furnish a strong argument in its favour. But till such a law is passed, there will be no power in the Court to grant a certificate for a refund or direct credit to be given to the plaintiff for the institution fee paid by him in the original Court against fees chargeable in the High Court, I can imagine that in a case where the defendant asks for a transfer of a suit under clause 13 of the Letters Patent, the plaintiff can perhaps say at that stage that if the suit is going to be transferred from the forum of his choice to a forum which the defendant has chosen, the defendant should be put on terms and that he should pay to the plaintiff the difference between the fee chargeable in the lower Court and that chargeable here. Whether such a contention will be accepted or not, I do not know, but as the law stands, it seems to me that the only way in which the plaintiff can perhaps try for getting back a part of the money which he has expended is by insisting on the defendant applicant for a transfer being put on

terms.

11. I must say, however, that section 4 of the Court-fees Act on which the State appears to have relied before the learned trial Judge has no bearing on the present question. That section provides that no document of the kind specified in the first or second schedule to the Court-fees Act shall be filed, exhibited or recorded in, or shall be received or furnished by any of the High Courts in any case coming before such Court in the exercise of its extraordinary original civil jurisdiction, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document. It appears to have been argued that not only has the Court-fees Act made no provision for a refund of court-fees in the case of suits transferred under clause 13 of the Letters Patent, but section 4 has also specifically laid down that, in the case of such suits, no document shall be received, unless the fee chargeable under the Court-fees Act has been paid. If that argument meant that section 4 required the plaint of the transferred suit to be stamped with the fees prescribed by the Court-fees Act, it was entirely mistaken. Some reliance appears to have been placed on the word "received" occurring in section 4. It appears to me that when a suit is transferred under clause 13 of the Letters Patent, it is transferred under an order of the Court and there can be no question of the High Court receiving the plaint in the sense contemplated in section 4 of the Court-fees Act. The succession of words used in section 4, namely, "filed exhibited, recorded, received" suggests to my mind that what the section has in view is a document sought to be brought on the record at the instance and by the act of the parties, as for example where a party seeks to produce a particular document Compulsory transfers by an order of the Court do not seem to me to be within the ambit of the section. Indeed, if an insufficiently stamped plaint cannot be received in the High Court by reason of the provisions of section 4, it would affect not the plaintiff, but the defendant and therefore it seems to me that the defendant can hardly set up section 4 to any purpose. I have already held that where the fee prescribed by the Court-fees Act has not been paid on the plaint of a suit, there cannot be any transfer under clause 13 of the Letters Patent, but that is not on account of anything contained in section 4.

12. At one stage of his argument, the learned Advocate-General suggested that there could be no room for the exercise of the Court's inherent power in respect of the refund of Court-fees, because there could be no case of a refund outside sections 13, 14 and 15 of the Court-fees Act. I am unable to agree. The scope of sections 13, 14 and 15 is well defined and a limited scope. Section 13 relates to a case where, by reason of an erroneous decision of the Court rejecting a plaint or a memorandum of appeal or by reason of an erroneous decision on a preliminary point, an appeal is necessitated.

13. The section directs a refund of the Court-fee paid on the successful appeal. Similarly, section 15 relates to a mistake of the Court and directs the refund of the Court-fee paid on a successful application for a review, where the success is

not secured by the production of fresh evidence which could have been produced in the original Court. Section 14 which comes in between is in the nature of a concession. It relates to a case where an application for a review is filed on or after the ninetieth day and provides that if the delay was not caused by any laches on the part of the applicant, he may be granted a refund of half of the Court-fees paid because if the application had been filed before that ninetieth day, only half Court-fee would have to be paid. These are not cases of overpayment, because in each case the appellant or the applicant got the services of the Court for the fee paid. The Legislature has, however, provided for a refund in such cases and the three sections, to my mind, illustrate a somewhat unusual and surprising recognition of the principles of equity by a taxing statute. It is undoubtedly remarkable that the Act has made no provision for a refund of fees overpaid. Perhaps the Legislature thought that when it laid down that a certain fee was to be paid in a certain case, it laid down impliedly that no higher fee would have to be paid and that if nevertheless, a higher fee was paid, the Court could give relief in respect of the over-payment in exercise of its judicial powers. There can be no doubt that where there has been an over-payment even according to the provisions of the Court-fees Act, the Court can decide judicially that such over-payment has been made. Such a decision does not require the exercise of any inherent power, but occasion for the exercise of an inherent power arises if the Court is to make an actual order for a refund. While the Court can always decide whether or not there has been an over-payment in exercise of its statutory powers as a judicial tribunal, it cannot make an order for a refund in exercise of those powers because there is no specific provision in that behalf and therefore it requires the aid of its inherent power in order to implement its judicial decision.

14. Some question was raised as to whether a certificate issued by the High Court was mandatory or recommendatory and whether there was not a risk of the Revenue authorities disregarding it, if they thought that the certificate had been wrongly issued. I do not think that there is any real risk of the Revenue authorities disregarding a certificate granted by this Court, but assuming that there may be such a risk, I think it can arise only when the High Court has not found that there has been an excess payment not required by law and has yet purported to adjust the Court-fees between the parties in the exercise of its inherent power and in accordance with what it considered to be the equities of the case. Where a certificate is issued on a finding of over-payment, its effect, in my view, is not recommendatory but mandatory. The language in sections 13, 14 and 15 of the Court-fees Act is that the Court shall issue a certificate to a particular party "authorising him to receive back from the Collector" the fee directed to be refunded. That language is certainly the language of a mandate. It appears to me that when the Court issues a certificate on a finding of over-payment, it may properly use similar language and the effect of such a certificate will be exactly the same.

15. The learned trial Judge has referred to the provisions of the Government of

India Act of 1935, to the effect that the High Court shall have no original jurisdiction in respect of matters concerning the revenue and he has expressed some difficulty in understanding how, in the face of that provision, certificates for a refund were granted in the past. With great respect, it appears to me that when this Court decided what fees were payable in respect of a matter pending before it, it was not exercising an original jurisdiction in respect of revenue in the sense contemplated by section 226 of the Government of India Act, 1935. It was only deciding an issue in a matter pending before it, although that issue concerned the payment of duty. The Court-fees Act itself contains provisions, for example in section 5, for the taxing officer of this Court or the Chief Justice, on a reference, deciding disputed questions of Court-fees in respect of cases, whether in this Court or in a subordinate Court.

16. Although section 4 appears to me to have no relevancy to the question and although, there seems to me to be no statutory bar at least now to the High Court granting a certificate in respect of a refund of Court-fees and although there is room for exercise the Court's inherent power outside the provisions of sections 13, 14 and 15 of the Court-fees Act, it must be held, for the reasons I have already given, that no such certificate can issue and there can be no exercise of inherent power in respect of suits transferred under clause 13 of the Letters Patent.

17. The second branch of the learned Standing Counsel's argument was that if the appellants were not entitled to a refund of any part of the Court-fee paid by them at Berhampore, neither were they liable to pay the higher fee prescribed by the Rules of this Court at the subsequent stages of the suit. It was contended that the table of fees prescribed by Rule 74 did not apply to suits tried in the Extraordinary Original Civil Jurisdiction of the Court, because the heading of the First Schedule to the Rule 74 is "Original Civil Jurisdiction" without the qualifying word "Extraordinary." In the second place it was contended that if the Schedule was intended to apply to suits transferred under clause 13 of the Letters Patent, it was to the extent of such intended application ultra vires, because section 4 of the Court-fees Act specifically provided that the fees payable would be those prescribed by the Court-fees Act. In support of the second contention reference was made to the proviso to Article 227(3) of the Constitution and to a decision of the Madras High Court in the case of C. Abdul Hakim Sahib and Another Vs. Chattranadha Aiyar and Others, . As I have said, this point is not within the scope of the appeal. The only prayer made by the appellants in their application was for a refund of the so-called excess amount paid in the Berhampore Court. They did not also pray that they should be charged during the subsequent stages of the suit only such fees as were chargeable under the Court-fees Act and not other or higher fees, if any, prescribed by the Rules of this Court. Nor did they ask for a refund of any excess amount they had paid in this Court, if their liability to pay fees and costs during the progress of the suit was limited by the provisions of the Court-fees Act. In those circumstances, the second branch of the learned Standing Counsel's argument must await decision in a case, where it will

properly arise.

18. For the reasons given above, this appeal fails and is dismissed. In view of the practice to which I have referred and which must have encouraged the appellants' application. I shall make no order as to costs. Lahiri, J.

I agree.