
(1925) 08 BOM CK 0003

In the Bombay High Court

Case No : O.C.J. Appeal No's. 38 and 51 of 1925

Parashuram D. Shamdasani

APPELLANT

Vs

The Tata Industrial Bank Ltd.

RESPONDENT

Date of Decision : 07-08-1925

Acts Referred:

Citation : AIR 1926 Bom 18 : (1925) 27 BOMLR 1195 : (1926) ILR (Bom) 69

Hon'ble Judges : Norman Macleod, J;Coyajee, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Norman Macleod, Kt., C.J.—These appeals arise from the taxation of the bills of costs of the first and sixth defendants which were ordered to be paid by the plaintiffs under the decree in Suit No. 3643 of 1923 and can be dealt with in one judgment.

2. The plaint was declared on August 29, 1923. The first defendant and defendants Nos. 2 to 5 filed their respective written statements on September 21. The sixth defendants filed their written statement on September 20, The first and sixth defendants filed their affidavit of documents on September 22, 1923. Thereafter, on October 1, the plaintiffs took out a summons returnable on October 3, for a supplemental affidavit.

3. The suit had already been fixed for hearing for October 3, so the Chamber Judge directed that the summons should be dealt with by Pratt J. on whose board the suit had been placed for hearing. The summons was not adjourned for hearing in Court. When the suit was called on Pratt J. first disposed of the plaintiffs' application for further discovery, and delivered judgment rejecting the application on October 8, The suit was then adjourned as part-heard to November 12. It came on again on November 19 and was heard on various days until November 29 when judgment was reserved. It was delivered on December 14.

4. The first and sixth defendants brought in their bills of costs for taxation.

5. The items relating to the summons for further discovery, including items for counsel's fees, were placed in a separate column, and an argument arose before the Taxing Officer on the question whether the fees to counsel could be allowed as casts of the summons as counsel had not been certified, under Rule 505. The Taxing Officer held that the Chamber Judge did not dispose of the summons but referred it to the trial Judge. Various other objections were raised and disposed of, but before the allocators were signed the plaintiffs applied for a review under Rule 529, The plaintiffs' objections were then heard and the Taxing Officer issued his certificate on September 20. The plaintiffs' application for a review of taxation came on before Kemp J. on February 16, 1924, when counsel for the defendants agreed to apply to Mr. Justice Pratt to certify for counsel on the chamber summons. The other objections of the plaintiffs were then heard, judgment being reserved until the application to Pratt J. had been heard. On March 12, counsel appeared before Pratt J. on a notice of motion issued by defendants Nos. 1 to 6. The Judge said : "There is no question that the summons was a fit one for counsel. Accordingly I make the motion absolute with costs. The costs payable under the judgment shall include costs of counsel." On April 9, 1925, Kemp J. delivered judgment on the review of taxation. The first objection of the plaintiffs was with regard to the allowance of re-freshers to counsel at the hearing of the summons. The Judge held that the Taxing Officer had no power to allow such refreshers, but against this disallowance he increased the brief fee of twenty gold Mohurs allowed by the Taxing Officer to thirty. The costs of one conference with counsel held on November 26, 1923, were disallowed. All the other objections raised by the plaintiffs were disallowed. The plaintiffs were ordered to pay four-fifths of the costs of the first and the sixth defendants respectively. The plaintiffs have appealed against the order of Pratt J. passed on March 12 and against the order of Kemp J. passed on April 9.

6. The Taxing Officer was right in allowing fees to counsel for arguing the questions involved in the summons of October 1. But it seems strange that the position, when a summons is adjourned to be dealt with by the Judge at the hearing of the action, has not been understood. The summons became merged in the hearing, and the question whether the defendants should file a further affidavit of documents was a question to be dealt with as one of the questions arising at the hearing. The costs relating to such question were at the discretion of the trial Judge. There was no necessity to draw up a separate order, as the defendants were not ordered to make further affidavits, the costs relating to the question of discovery could have been dealt with in the decree.

7. I think then that Kemp J. was wrong in allowing the defendants to make an application to Pratt J. He should have held that the Taxing Officer was right in allowing counsel's fees as part of the costs of the summons. There is no necessity, therefore, to consider whether the order of Pratt J. was wrong; only as the motion before him should never have been made, the appeal against that

part of the order which directs the plaintiffs to pay the costs of the first and sixth defendants must be allowed with costs.

8. The defendants have not cross-objected to the decision of Kemp J. disallowing refreshers to counsel when the question of further discovery was argued. But on the footing that costs were payable as costs of a summons the Judge was wrong in increasing the brief fee from twenty to thirty gold Mohurs, thus diminishing the effect of his disallowance of the refreshers by ten gold Mohurs. No increase of charges can be allowed on a review of taxation over those charged in the bill of costs. As a matter of fact to allow twenty-five gold Mohurs on the brief plus twenty as fee for brief on the summons was wrong. All that should have been allowed was twenty-five gold Mohurs on the brief and fifteen for a refresher on the 9th and the taxation must be altered accordingly. There is another minor objection of the plaintiffs to the allowance of the charges for instructing counsel in Chambers on October 1. Strictly speaking, these costs could not be allowed as counsel was not certified. If Kemp J. had realised the effect of his order which put an end to the proceedings as proceedings in Chambers he might have certified counsel for the application before him instead of making the costs costs in the summons, but considering the order passed by Pratt J, I am not prepared to hold that those charges should be disallowed. With regard to the fees allowed to counsel on the brief for hearing which were allowed at thirty and twenty-five gold Mohurs for senior and junior counsel respectively with refreshers of fifteen and thirteen gold Mohurs, the plaintiffs object to refreshers above ten and eight gold Mohurs being allowed. It certainly appears to us that the fees to counsel have been allowed on a very liberal scale. The case was no doubt of considerable importance to the defendants, but as I shall point out later it cannot be possibly said that it was a case of extra difficulty. Still we are not prepared to differ from the Judge on this point.

9. I now come to the plaintiffs' objection to the three items charged for instructions in both bills :

- (1) Rs. 125 allowed on the brief to show cause against the notice of motion.
- (2) Rs. 300 allowed on the brief to show cause against the, chamber summons.
- (3) Rs. 3,000 allowed on the brief for the hearing.
- (4) (5) and (6). Similar items in the bill of the sixth defendants.

10. The defendants object to our dealing with those items in any way on the ground that we have no jurisdiction in questions of quantum.

11. It would be very strange if the Court had no jurisdiction at all to deal with discretionary charges. Even the Judge admits that it is open to a party objecting to show that the Taxing Officer erred on a question of principle or has omitted to take, into consideration all those matters which he is required to take into consideration. I should go further and say that the Taxing Officer is not at liberty to lay down a scale for discretionary charges which is out of all proportion to the

work done. High Court Rule 521 (1) says : -

No costs are to be allowed on taxation which do not appear to the Taxing Officer to have been necessary or proper for the attainment of justice or defending the rights of the party of which appear to the Taxing Officer to have been incurred through over caution, negligence, or mistake, or merely at the desire of the party.

That must apply to taxation between party and party only.

12. Rule 522 says :-

In dealing with fees or allowances, which are discretionary, the Taxing Officer in exercise of such discretion shall take into consideration the other fees and allowance to the attorney and counsel, if any, in respect of the work to which any such allowance applies, the nature or importance of the suit or matter, the amount involved, the interest of the parties, the fund or persons to bear the coats, the general conduct and cost of the proceeding and all others circumstances.

13. In the table of fees for attorneys and parties attached to the High Court Rules at p. 397 instructions for brief (including perusing papers and examining witnesses) whether on final disposal at first hearing, settlement of issues, final trial or on motion are discretionary. Now, it has been generally recognised that the Courts in India will follow the decisions of the English Courts in matters of taxation and it follows that the Taxing Officer should follow as far as it can be ascertained the practice observed in England. From the precedents of bills of costs in Bannehr & Porter's Guide to Costs it can be seen that instructions for brief are only discretionary in witness actions. They are principally intended to cover the trouble and expense incurred in collecting evidence for the trial of an action Nothing beyond a nominal charge is allowed for instructions in matters which are heard on affidavit. The reason is that all the materials for preparing the brief have already been charged for. It may be said that under our table of fees the charge for instructions on motion is discretionary, but the charge for instructions in Chamber matters is certainly not discretionary. It is not easy to find in the reports cases in which the quantum of discretionary charges are mentioned and considered, but in *The Duke of Beaufort v. The Earl of Ashburnham* (1863) 7 L. T. 710 13 C. B. N. S. 598 the Court thought that a charge of ? 105 for instruction even in an action in which thirty witnesses had been summoned and intricate questions were involved was unusually high, considering that ?121 had been allowed for making abstracts and copies of documents which in reality formed the instructions in the brief, but after consulting the Taxing Master, it refused to interfere. In *Hill. v. Peel* (1870) L. 11. 6 C. P. 112 and two other cases, the taxation of the costs in three Parliamentary petitions was considered. In two cases the Master allowed 100 guineas for instructions for brief and in the third, the *Penryn* case, 150 guineas including preliminary expenses. The report mentions that in the *Southampton* case, the brief was very voluminous and contained instructions for the examination of

eighty-five witnesses and the Master was asked to reconsider his taxation on the ground that the allowance was insufficient. In the other cases the decision of the Taxing Master was upheld. The important point to notice is that in such a heavy matter as a Parliamentary petition, in which a large number of witnesses had to be collected and their proofs taken, far less was allowed to the solicitors for instructions than in the case before us.

14. In *Slingsby v. Attorney-General* [1918] P. 236 a petition was presented by a Charles Eugene Slingsby, an infant, by his next friend seeking to establish that he was the lawful child of C. H. R. Slingsby and Dorothy Slingsby, and that he was therefore tenant in tail male in remainder expectant on the death of his father of the Slingsby Estates. The petitioner was successful at the trial, but the judgment, in his favour was reversed by the Court of Appeal which decided that the costs of the parties cited in both Courts should be paid by the next friend. The bill of costs brought in for taxation by the solicitors of the parties cited contained (inter alia) two items to which objection was taken. One was an item of ₹ 1,365 which was brought in as a lump sum in respect of "instruction for brief" and the other was an item of ₹ 8,890 in respect of payments to American lawyers. The Registrar had allowed ₹ 6785 for the first item and ₹ 1,993 for the second. The next friend took out a summons to review the taxation which was heard before Coleridge J. who affirmed the decision of the Registrar. The next friend appealed.

15. Swinfen Eady L. J. said at p. 238 :-

The Registrar has dealt with that (the item of ₹1365) ,. by allowing ₹735 as a lump sum for the charges. Objection is taken to his taxation, and he deals with it in this way in his answer: " I have carefully considered this case which, in my opinion, was an extremely difficult and complicated one, and I am of opinion that the sum I have allowed is a proper figure." That is the whole answer to the objection. I think it is well settled that the Court will not interfere with the exercise of a discretion by a Taxing Master when he has not acted upon any wrong principle or applied any wrong consideration. The allowance to be made for " instructions for brief is a matter peculiarly within the discretion of the Taxing Master, and, as was said by Buckley L J. in *In the Estate of Ogilvie* [1910] P. 243 "On questions of quantum the decision of the Taxing Master is generally speaking final. It must be a very exceptional case in which the Court will even listen to an application to review his decision. That is the practice. The decision of the Taxing Master is not absolutely final even on a question of quantum. For instance, a large sum might be allowed, but from the very fact of the amount the Court might see that the Master, in arriving at so large a sum, must have acted on a wrong principle or have taken some thing into consideration which he ought not to have done. It doubtless requires an exceptional case to call for the interference of the Court, but exceptional cases do occasionally arise. In the present case, in my opinion, the bill has been improperly made out, and the registrar has not had before him the proper materials upon which he could

reasonably exercise his discretion.

16. Then at p. 240, the learned Lord Justice says :-?

In my opinion, the heading " Instructions for Brief is intended to cover those items, the nature of which is thus stated by Master King in his book on Costs on the High Court Scaly, at pp. H7, 3S : " A summary statement in the bill carried in for taxation of the details of the matters to which regard is to be had under this item...greatly facilitates the task of arriving at a proper allowance." Then he refers to Hill v. Peet (1870) L. R. 5 C. P. 172. "The length of the documents perused (in cases in which perusal has not previously been charged), the names of the witnesses who have neon attended, the places to which journeys have been made, with the time occupied in each, and the amount of the travelling expenses, should be stated." If those details are given in the bill it enables the Master to form a considered judgment as to the sum which is proper to be allowed under the heading " Instructions for Brief.

17. And Bankes L. J. said (p. 244):-

If I could be satisfied that the registrar had dealt with these questions on the right principle I would not for one moment interfere or attempt to interfere with the exercise of his discretion, however much J. disagreed with the result at which he had arrived, but it appears to me manifest on these materials that the registrar has proceeded. upon an entirely wrong principle....The next point is this : The bill under the heading of " instructions for Brief " is made out in a way which did not present to the registrar materials upon which he could, in my opinion, properly exercise his discretion.

18. Then, after pointing out, that the bulk of the work had been done in America by American lawyers which had been separately paid for, the judgment proceeds (p. 246):-

Any work that remained to be done in this country by the solicitors, either in respect of the necessary preparation for the taking of the evidence on commission, or after that evidence had been returned in relation to the preparation for trial, would properly be matters which the registrar was entitled to take into consideration if he was directing himself properly, if I may use that expression, which is, I suppose, another way of saying if he was acting on a right principle If these were the only matters it seems to me very difficult for him to have come to the conclusion that the case was an extremely difficult and complicated one; and that again leads me to the conclusion that he has not had the material which would enable him to direct his mind to the real points, but that, in the absence of the materials which would have kept him within a right principle, he has allowed himself to consider generally the nature and the importance and, from some points of view, the complicated character of the case.

19. It would appear that the answer of the registrar to the objection to his charges for instructions, which was in much the same terms as the answer of the

Taxing Officer in this case, was not considered satisfactory.

20. So, in order to enable the Taxing Officer to exercise his discretion, where large sums are charged for instructions, it is necessary that attorneys should give him all the necessary particulars so that he may be able to decide what is reasonable to be allowed. The particulars given in the bills before us can afford but little information.

21. The next question is whether the Taxing Officer has made a proper attempt in this case to exercise his discretion. We have consulted the Taxing Master and the Assistant Taxing Master to ascertain the practice in the office and explain the figures in the margin of the bills. It appears that the bills are first checked with regard to out of pocket expenses charged for and are then taxed provisionally in the taxing office by a taxing clerk. Apart from the charges which are according to scale he also taxes provisionally in pencil the discretionary charges. We do not think this practice is to be commended. Now in these bills it is a most remarkable coincidence that in all the discretionary charges the Taxing Officer has adopted the suggestions of the taxing clerk. The taxing clerk evidently works on some preconceived rule of knocking off a certain proportion of all charges for instructions. It is impossible to conceive that the Taxing Officer, if he had approached the taxation with an independent mind and duly made himself acquainted with the particulars of the case and the necessary work to be done for defending the rights of the parties, should have come to exactly the same conclusion as the taxing clerk who was not capable of estimating what was a proper charge and deducted two-fifths by some rough and ready method of his own from the amounts charged by the attorneys. It is essential that the Taxing Officer should deal himself at first hand with discretionary charges, and that he should discourage any tendency on the part of attorneys to enter in their bills amounts far in excess of what they expect to be allowed, because they are afraid that whatever they charge, a reduction will be made. The practice under our rules that bills should be taxed between party and party and between attorney and client at the same time is a departure from the English practice, and enables an attorney to get an allocator against his client without running the risk of the costs of taxation being disallowed under Rule 534, and it may be a question for consideration whether this rule should not be altered. We also gathered that it was not the usual practice to allow between attorney and client a portion of the charges for instructions disallowed between party and party, but there seems to be no reason why an attorney should not be allowed such a charge if the Taxing Officer considers that at the request of the client work has been done which does not come within the terms of Rule 521 (1).

22. I shall now point out what the Taxing Officer should consider in this case, in order to satisfy himself that the charges made by the attorneys for defendants Nos 1 and 6 were reasonable. There is the date of the services of the summons when the attorneys first had notice of the suit, which seems to have been September 6. Briefs were delivered on October 2. So the work charged for

preparing the briefs must have been done between those days, Then there are the questions arising from the plaint. From the judgment it appears that the plaintiffs really raised only two points :-

(1) That the notice of July 5, 1923, convening the meeting was defective

(2) That he had not been properly treated at the meeting.

23. In their written statements the defendants deny that the notice was invalid and set out what occurred at the meeting.

24. Then there are the documents disclosed in the affidavit of documents and the documents put in at the hearing. It should be considered whether as a matter of fact there was any of those documents the contents of which were not fully known and which had not been fully considered by the attorneys for the two banks, while the negotiations for their amalgamation had been going on. The oral evidence would only relate to what took place at the meeting, particulars of which would also be with the solicitors. The preparation then of the brief would not require much more than indexing the documents which should be placed before counsel. The instructions in the brief were short, and rightly so, and are charged for according to scale.

25. Now, turning to the judgment, the Judge deals with the points raised by the plaintiffs against the validity of the notice. He says the first five points refer merely to the details of the calculation (about these basic figures 200 lakhs of assets of the vendor company and 80 lakhs of the assets of the purchaser company were arrived at). The attorneys of the two banks were perfectly acquainted with the details before the suit was filed. The same may be said with regard to points Nos. 6 to 9. The rest of the judgment deals with the events at the meeting. Now, although it was of the greatest importance that the attempt of the plaintiffs to upset the amalgamation should be defeated, there was nothing of any extra difficulty in the defence. As the Judge pointed out the plaintiffs carried on a hopeless struggle. There does not seem any reason why an individual who files a suit against a powerful and wealthy corporation like a bank or a railway company should have to pay costs on a higher scale simply because his opponents are wealthy and powerful, and defeat would be more disastrous to them than if they had been companies of little importance. To some extent, I admit the importance of the result of the action may affect the question of costs, but then proper attention must be paid to the difficulty or triviality of the points raised, and the existing means of knowledge in the hands of the defendants to meet the attack. The Taxing Officer must have some sense of proportion, and must form some idea of the actual work done and the actual time taken by the attorneys in preparing the brief, with a view to awarding them reasonable remuneration for the work done, having regard also to the other charges made in the bill for particular items of work.

26. The Taxing Officer should then have noticed that the amounts he was allowing in these bills for instructions were far too high, so high that, in the

words of Swinfen Eady L. J., "either he acted on a wrong principle or took something into consideration which he ought not to have done "

27. His answer to the plaintiffs' objections was: " In a suit of this magnitude and with the enormous issues at stake, the length of the trial, etc. I think the amount fair and reasonable," Granting that these are factors which should be taken into consideration, they are not absolute but relative. The foundation for the charge is the preparation for the brief. The magnitude of the suit, the issues at stake, are reasons for increasing the scale of the charge, but the length of the trial will not necessarily correspond with the work done in the preparation of the brief. A case in which a large number of witnesses have to be examined will probably result in a lengthy trial unless it is settled, but a trial may last several days without much evidence being taken or much preparation being required, and the present case is an excellent illustration of that.

28. We must, therefore, remit these bills to the Taxing Officer to review his taxation in the light of our remarks. The appellants will get their costs in this Court and in the Court below.

Coyajee, J.

29. I concur.