

(1979) 12 GUJ CK 0003

In the Gujarat High Court

Case No : Civil Revision Application No. 1413 of 1979 and First Appeal No. 872 of 1977

Shantaben Jerambhai Chavda and Others

APPELLANT

Vs

Lallubhai Jerambhai Chavda

RESPONDENT

Date of Decision : 11-12-1979

Acts Referred:

Bombay Court Fees Act, 1959 — Section 15

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, Order 41 Rule 23A, 122

Citation : AIR 1980 Guj 152

Hon'ble Judges : S.H. Sheth, J

Bench : Single Bench

Advocate : Suresh M. Shah, for the Appellant; H.M. Kadri, Asstt. Govt. Pleader, for the Respondent

Judgement

1. This civil revision application has been filed by the appellants in the First Appeal against the-order of the Taxing Officer refusing the refund of court-fees u/s 15 of the Bombay Court-Fees Act, 1959.

2. The plaintiff filed the suit for partition and accounts against his brothers and mother. The learned trial Judge passed preliminary decree in the suit, Thereafter accounts were taken and final decree was passed by the trial Court. It was challenged by the defendants in First Appeal No. 872 of 1977. By its final order, this Court remanded the case to the learned" trial Judge for deciding afresh on merits. The defendants-appellants thereafter made an application u/s 15 of the Bombay Court Fees Act, 1969, for refund of court-fees paid by them on the memorandum of appeal. The Taxing Officer dismissed the application. It is that order which is challenged u/s 4 of the Bombay Court-Fees Act, 1959, in this civil revision application.

3. u/s 15 of the Bombay Court-Fees Act, f959, refund of court fees paid on the memorandum of appeal can be ordered, inter alia, only if the plaint has been rejected by the lower, Court on any of the grounds mentioned in the Code of Civil

Procedure, 1908, or if a suit is remanded in appeal on any of the grounds mentioned in Rule 23 of Order 41 in the First Schedule to the CPC for a second decision by the lower Court. In the instant case, the plaint was not rejected by the lower Court on any of the grounds mentioned in the Civil Procedure Code. The first part of S. 15, therefore, is not attracted to the instant case.

4. Mr. Shah has argued that the order of remand made by this Court should be deemed to have been made under Order 41, Rule 23. It is not in dispute before me that the suit was decided by the learned trial Judge on all issues and that his findings were set aside by this Court on all issues and the suit was remanded for a fresh decision on all issues. Order 41, Rule 23 specifies a suit, which has been finally decided on a preliminary point and if the decree passed on such preliminary point is reversed in appeal. Since the present suit was not decided on a preliminary point but was decided on all issues, the second alternative condition specified in Order 41, Rule 23 is not "satisfied. Ex facie, therefore, O. 41, Rule 23 is not attracted to the instant case.

5. Rule 23A, which has been inserted by Parliament in 1976, provides for remand in other cases. It provides as follows:

"23-A. Where the court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23."

Mr. Shah has argued that since under Rule 23A the Appellate Court has the same powers as it has under Rule 23, Section 15 of the Bombay Court-Fees Act, 1959 which is linked with Rule 23 of Order 41 should be deemed to have been linked with Order 41, Rule 23A. Sec. 15 of the Bombay Court-Fees Act, 1959 specifies only Rule 23 of Order 41 and not Rule 23A of Order 41. Rule 23 and Rule 23A contemplate remands of suits or appeals to lower Courts on altogether different grounds. Rule 23 is attracted where the suit has been decided by the lower Court on a preliminary point without recording any finding on merits of the case. Rule 23A contemplates decision of a suit on all issues including the preliminary issue, if there is any, and further contemplates the remand of the suit after setting aside all those findings. These are two different kinds of remands. One is not inter-changeable for the other. Therefore, unless Section 16 of the Bombay Court-Fees Act, 1959, is amended so as to embrace within its sweep Rule 23A of Order 41, by a fiction, the benefit conferred by Section 15 cannot be conferred in cases falling under R. 23A of Order 41.

6. Reference has been made to a few decisions in this behalf. In *Sri Sri Sushilamala Patta Mahadevi Vs. Joya Deman Sumantho*, to which reference has been made by Mr. Shah, the principle which has been laid down is that where several issues remain undecided by the first Court, a remand by the appellate Court of the suit must be deemed to fall within the purview of Order 41, Rule 23. The fact that the appellate Court purported to remand the suit under S. 151, C.

P. Code, is not conclusive. It has been further held: "If an order of remand can be deemed to have been on any of the grounds mentioned in O. 41, R 23, Civil P. C., the appellant is entitled to a refund certificate under S. 13 court-fees Act." In that case, it appears that several issues remained undecided and therefore, the remand of the suit to the lower Court became necessary. That is not the situation in the instant case. In the instant case, all issues were decided by the learned trial Judge. Therefore, the principle laid down by- the Madras High Court in that decision has no application to the instant case. It is, not necessary for me to enter into any further discussion of the principle laid down in that decision.

7. Next decision to which my attention is invited is in Sohan Singh Vs. The Oriental Bank of Commerce, . It is the decision of a Division Bench in which what has been laid down can be slightly marshalled in favour of the proposition advanced by Mr. Shah. However, it is not necessary to examine in details that decision because in Jawahar Singh Sobha Singh Vs. Union of India (UOI) and Others, , a Full Bench of the Punjab High Court has overruled the decision in Sohan Singh's case (supra). In the Full Bench decision, the principle which has been laid down is that an inherent power is confined only to fees which have been illegally or erroneously assessed or collected and does not extend to fees which have been paid or collected in accordance with the provisions of the Court-fees Act.

8. Mr. Kadri who appears on behalf of the State has invited my attention to the decision in Krishan Sarup Oberoi Vs. Ram Niwas, . It appears from that decision that a rule similar to Rule 23A was in force in Punjab at the time when all the three Punjab cases referred to above were decided. I am told that what was in force at the relevant time in Punjab has now been incorporated in Rule 23 A of Order 41. The principle, which has been laid down, is that Section 122 of the CPC authorizes certain High Courts to make rules regulating their own procedure. By making Rule 23A, the Punjab High Court could not amend Section 13 of the Court-fees Act. It has also been laid down that Section 13 of the Court-fees Act, 1870 which is *pari materia* with Section 15 of the Bombay Court-Fees Act, 1959 will be applicable to a case in which it is shown that a suit was remanded on the grounds specified in Order 41, Rule 23 and not on grounds specified in Order 41, Rule 23A. The grounds of remand in both these rules are different.

9. In my opinion, therefore the appellants are not entitled to refund court fees under Sec. 15 of the bombay Court fees Act, 1959 read with Order 41, Rule 23 of the Gujarat legislature amends Sec 15 of the Bombay Court fees Act, 1959 in cases if this type ,the appellants have no remedy in so far as the refund of the court fees is concerned .

10. The revision application fails and is dismissed with no order as to costs.

Notice is discharged

11. Revision dismissed