

(1942) 04 BOM CK 0006
In the Bombay High Court
Case No : O.C.J. Suit No. 1056 of 1939

Sir Byramji Jeejeebhoy

APPELLANT

Vs

The Province of Bombay (No. 2)

RESPONDENT

Date of Decision : 14-04-1942

Acts Referred:

Citation : AIR 1942 Bom 312 : (1942) 44 BOMLR 687

Hon'ble Judges : Blackwell, J

Bench : Single Bench

Judgement

Blackwell, J.—This is a chamber summons taken out by the plaintiff for a review of taxation which has been adjourned into Court. I have stated how the matter arises in my judgment on the summons taken out by the 1st defendants to review the taxation, and for this purpose that judgment may be referred to.

2. The main argument centred round the second objection, which is to the allowance of the fees of three counsel. The Taxing Master in his judgment said that in the exercise of his discretion he had allowed the fees of three counsel as the matter was of very considerable importance.

3. The first point taken by Mr. Kolah for the plaintiff was that this was a long caused to which High Court Rule 548 (ii) (h) applies, and that as the Court had not sanctioned more than one counsel the fees of only one counsel should have been allowed. As this point had not been taken in the objections, Mr. Kolah applied for leave to amend. The application was resisted, and I refused leave to amend. Mr. Kolah asked me however to decide the point, contending that it would be open to him to raise it if the matter for any reason should be sent back to the Taxing Master, as the allocatur has not been issued. I shall accordingly do so.

4. Before developing his argument on the rule Mr. Kolah referred to Esmail Ebrahim v. Haji Jan Mahomed ILR (1908) 33 Bom. 475. In that case Scott C.J. said that the rule of allowing the costs of two counsel on each side on taxation

was introduced by the Judges shortly after the establishment of the High Court when several Divisional Courts sat simultaneously on the Original Side, and that the rule was introduced in order to obviate the dislocation of the business which might result from cases being called on at the same time in two or more Courts in which the same counsel was engaged. Mr. Kolah submitted that the rule in this High Court was originally one counsel only, that two counsel were allowed upon the change to which Scott C.J. referred, that it was never contemplated that three counsel should be allowed in this High Court, and that the English practice in this connection should not be followed. Mr. Kolah also referred to *Banoo Begum Vs. Mir Aun Ali (No. 2)*, , where Davar J. said that a party was at liberty at any time if he or she chooses to employ a third counsel, or for that matter a dozen counsel, but that the right of employing counsel must not be allowed to work a hardship on the losing opponent. Mr. Kolah invoked these observations in support of his argument that the allowance of three counsel had never been contemplated by the Bombay High Court as between party and party. I do not agree with him. The case of *Esmail Ebrahim v. Haji Jan Mahomed* no doubt explains how the fees of two counsel came to be allowed in Bombay, but there is nothing either in this case or in *Banoo Begum*'s case to suggest that the discretion given to the Taxing Master by the English practice to allow three counsel should not also apply in Bombay, seeing that the English practice does apply except so far as it is affected by our rules: see *Parashuram D. Shamdasani Vs. The Tata Industrial Bank Ltd.*, .

5. Coming to Rule 548 (ii) (h) Mr. Kolah argued that he was resisting a claim for Rs. 6,300 odd, being the aggregate amount of the urban Immovable property tax which he had been called upon to pay, and that the rule applied. He conceded that no sum was claimed by the plaintiff, but he argued that the rule applied if the plaintiff involved resistance to a claim below Rs. 10,001. He further argued that the claim in dispute being in respect of a tax, it was a claim in respect of or relating to moveable property of a lower value than Rs. 10,001 and that the rule applied upon this ground also. I do not agree with him. The prayers of the plaintiff are for a declaration that Part VI of the Bombay Finance Act, 1932, incorporated therein by the Bombay Finance (Amendment) Act, 1989, is ultra vires of the Bombay Provincial Legislature and is invalid, inoperative and void, for a declaration that the urban Immovable property tax purporting to be levied by Section 22 forming part of the said Part VI of the Bombay Finance Act 1932 is illegal and void, for a declaration that the demand made for payment of the tax is illegal and invalid, for a declaration that the notices served were invalid and for certain consequential injunctions. Rule 93 of the High Court Rules requires that if the suit falls as to value within Rule 548 (ii) (h) the plaintiff should also contain a statement to that effect. There is no such statement in the plaintiff. Having regard to the prayers in the plaintiff this suit in my opinion does not fall within Rule 548 (ii) (h).

6. According to the English practice, which I think is applicable, the Taxing Master has a discretion to allow the fees of more than two counsel, but it is an

unusual expense, and in the words of Malins V.C. in *Smith v. Buller* (1875) L.R. 19 Eq. 473 "it requires a very strong case to induce the Court to sanction the fees of more than two counsel as between party and party." Many of the authorities upon the matter are collected in the *Annual Practice* (1941), at page 1528, and in *Porter and Wortham on Costs*, 13th edition, at page 904. The test appears to be whether "the case was one in which a reasonable and prudent man, acting with ordinary prudence, would not have ventured to come into Court without three counsel": see *Kirkwood v. Webster* (1878) 9 Ch. D. 239. In *Peel v. London and North Western Railway Company* (No. 2) [1907] 1 Ch. 607, the question being an important question of law arising on the construction of Statutes, Parker J. refused to sanction the fees of more than two counsel there being no dispute as to the facts. In *Attorney-General v. Munro* (1849) 1 Mac. & G. 213, Cottenham L.C. observed (page 215):--

I have always found, for the purpose of argument, that two counsel are sufficient, and in the House of Lords no more than that number are allowed to be heard. No doubt this is an important case; but it is not one which I think warrants the introduction of a third counsel;

7. In *Great Western Railway v. Carpalla United China Clay Company, Limited* (No. 2) [1909] 2 Ch. 471, the fees of three counsel were allowed, but the case raised complicated questions of fact as well as of law. A number of other authorities were cited but not one in which the fees of three counsel were allowed on a question of law only.

8. Applying the principle established by the cases I have to determine whether the case was such that the 1st defendants acting with ordinary prudence would not have ventured to come into Court without three counsel. There was no dispute as to the facts, and the brief consisted of only 179 folios. The observations consisted of 425 folios, but in this connection Rule 562 (iii) must be borne in mind, the Taxing Master being directed when allowing costs for the drawing and copying of observations to counsel to disallow the costs of detailed comments on any question of law or the discussion of the authorities in point. The Advocate General drew my attention to the arguments on behalf of the plaintiff as they appear in the report of this case in 42 Bom. L.R. 10, and to the fact that they lasted two and a half days, and the argument of the whole case twenty-three hours. He submitted that a very complicated question of law was involved, and that the 1st defendants could not with prudence go into Court with only one counsel. The judgments, however, are comparatively short, and as the Chief Justice said in his judgment at page 45, "the question to be determined comes back to the short one, whether the impugned act is a tax on income." I think that the Taxing Master was wrong to allow the fees of three counsel merely upon the ground that the matter was of very considerable importance, and that he failed to take into consideration that there was no dispute as to the facts, and that though the point of law was important it was within a comparatively narrow compass. This objection therefore succeeds.

9. The first objection is to the allowance of counsel's fees as being excessive and out of proportion looking to the nature of the work done. The fees marked on the briefs of the senior and junior counsel were respectively fifty and forty-seven gold Mohurs, and the fees allowed were thirty-five and thirty-two gold Mohurs. Mr. Kolah submitted that as the question involved was a pure question of law, the fees were upon the face of them excessive. He said that as far as the experience of the attorneys instructing him went a fee as large as thirty-five gold Mohurs had never before been allowed by the Taxing Master. I consulted the Taxing Master, and was informed by him that this was by no means the case. In his judgment the Taxing Master refers to his judgment upon the 1st defendants' objections where he said, "As the importance of the matter cannot be over-estimated the course I have adopted is to allow substantial fees to three counsels." The matter was of course a question of law of great importance and I think that this is a pure question of quantum in which the Court ought not to interfere with the discretion of the Taxing Master.

10. The third objection is to the refresher fees as being excessive and out of proportion. Twenty-two G. Ms., and twenty G. Ms. per day were allowed to the senior and junior counsel. The Taxing Master justified the allowance having regard to the importance of the matter. Again I think that this is a question of quantum, and that the Court should not interfere.

11. I send the matter back to the Taxing Master with a direction to disallow as between party and party the third counsel. As I stated in my judgment upon the 1st defendants' objections, it will be open to the Taxing Master to reconsider the amount of fees allowed to the senior and junior counsel if he thinks proper to do so.

12. As the plaintiff has failed on objections 1 and 3, but has succeeded upon objection 2 upon which most of the time on the argument was spent, I think that the 1st defendants should pay to the plaintiff two-thirds of the costs of this summons.