

MANU/BH/0153/1921

Equivalent Citation: 62Ind. Cas.43, 62Ind. Cas.43

IN THE HIGH COURT OF PATNA

Decided On: 26.04.1921

Appellants:**Babu Hitendra Singh and Ors.**

Vs.

Respondent:**Maharaja Sir Rameshwar Singh**

Hon'ble Judges/Coram:

Thomas Fredrick Dawson Miller , C.J. B.K. Mullick and John Bucknill , JJ.

JUDGMENT

Thomas Fredrick Dawson Miller, C.J.

1. The question submitted for decision in this case relates to a matter of practice about which there appears to have been a lack of uniformity in the past. The question for determination is, at what point of time the Court of Appeal should take action when it appears that the Court-fee paid in the lower Court by the appellant has been wrongly estimated to the detriment of the revenue. During the course of the argument a question arose as to whether the case was strictly one of the nature contemplated in Chapter V of the High Court Rules relating to references to a Full Bench, Rule 3 providing that in the case of an appeal from an original decree or order (which this is) questions of law alone shall be referred for the opinion of the Full Bench, where as the question here involved is one of convenience of procedure rather than a question of law As, however, the question has been argued before us and involves a consideration of certain sections of the Court Fees Act, I think it is desirable that we should in the circumstances express an opinion on the question submitted rather than refuse to hear it on a mere technical ground.

2. The appellants instituted the suit before the District Judge of Darbbanga for recovery of possession of certain property and also asked for certain declarations which went to establish their title. For the purposes of jurisdiction they valued the property at Rs. 6,00,000 and for the purposes of Court-fees at ten times the Government revenue, namely, Rs. 11,500, treating the case as one falling under Section 7(v) of the Court Fees Act. The suit having been dismissed, they appealed to this Court and valued the appeal as in the Court below, paying a Court-fee on the lower valuation. The Taxing Officer held that the case was one falling under Section 7(iv)(c) and not under Section 7(v) of the Court Fees Act and that an ad valorem Court-fee was payable on the valuation of the property, and ordered the appellant to make good the deficit fee on the memorandum of appeal, which amounted to the sum of Rs. 2,427-8-0. This sum has since been paid. He further considered that there was a like deficit on the plaint, but as he had no power to deal with that question under Section 5 of the Court Fees Act, he admitted the appeal on payment of the deficit on the memorandum and ordered the case to be placed before a Division Bench for orders as to the realisation of the deficit Court fee on the plaint. The Bench before which the case same considered that there had been a difference of opinion as to the proper procedure to be followed in each cases, the point in some cases haying been deferred until the hearing of the appeal and in others having been determined immediately upon the matter being brought to the Court's notice. In this state of

affairs they thought the point of practise should be dealt with by a Full Bench of the Court.

3. Although it is not definitely stated in the order of the Division Bench, the learned Judges who made the order presumably thought that the case was one which the Court has jurisdiction to deal with under the Court Fees Act. It was assumed before us in argument that this was so, and no question was raised as to whether the Court had power to deal with the matter either under one of the sections of the Court Fees Act or under its inherent powers. Moreover, it has been settled, so far as the practice of this Court is concerned, by the decision in *Narain Prasad v. Kameshwar Persad Singh* 43 Ind. Cas. 489 : 3 P.L.J. 101 that it is the duty of the Court to see that Court fees are paid both in this Court and the Courts below from which cases have come. Dealing with the question on this hypothesis, I think that as a general rule it is desirable that where the Appellate Court has to deal with the question of recovering a deficit fee payable by the appellant in the lower Court or Courts, the matter should be dealt with at the earliest possible moment after the deficit is discovered, so that the parties may not be kept in suspense upon this question See *Sundar Mal Marwari v. J.C. Murray* 16 Ind. Cas. 963 : 16 C.L.J. 375. The determination of the question may influence the appellant in deciding whether he thinks it worth while to appeal. It is also desirable that the expense of printing the paper book should not be incurred until this preliminary question has been determined. It generally requires little or no evidence to enable the Court to arrive at a decision, even where it forms one of the issues in the case. There may, however, be special circumstances which render it more convenient to have the whole of the evidence before the Court to enable it to deal with the matter, or it may involve the consideration of questions which the Court is not in a position to deal with in a summary manner. Probably such cases would not be of frequent occurrence and it is desirable to follow the general rule above indicated, but that rule must be subject to the discretion of the Court to postpone the determination of the point in exceptional cases. I further think that in all cases where the question of recovering the deficit in the lower Court arises on appeal, the appeal should first be admitted before the point is decided, so that no question may arise as to the Court's jurisdiction. In any case, whether the point is determined on motion at an early stage or upon the hearing of the appeal, it is desirable that it should be decided before the other issues in the case, so that the Court may, if it decides against the appellant, be in a position to stay the further hearing until the appellant has complied with the obligation to make good the deficit. This appears to me to be consistent with the provisions of Sections 12 and 10 of the Court Fees Act and in accordance with the spirit of the law laid down in these sections. Where the case falls under Section 12, that section provides that the Court shall require the party in default to pay the additional fee and that the provisions of Section 10, paragraph 2, shall apply. The last-mentioned paragraph provides that the suit shall be stayed until the additional fee is paid and, in default of payment within the time fixed by the Court, that the suit shall be dismissed. Until the deficit is paid, the Court is not bound to try any other issue and it would be a waste of time to do so before it is known whether the party in default intends to comply with his obligation. The same considerations appear to me to apply with equal force, whether the Court acts under the provisions of the Court Fees Act or under its inherent powers. With these directions I think the case should be referred back to the Division Bench to deal with the matter in the particular circumstances of the case.

B.K. Mullick, J.

4. I would return the case to the Division Bench with the following observations.

5. In every case the Trial Court has to decide, firstly, in which category the suit is to be classed and, secondly, whether or not there should be a valuation for the purpose of computing the amount of Court fee payable. In every case, therefore, the Court decides a question relating to valuation and the decision is final, except so far as Section 12 of the Court Fees Act permits interference by the Court of Appeal.

6. If this view is correct, then failure to pay deficit Court-fees entails the dismissal of the suit under Section 10 of the Act.

7. But though this, in my opinion, is the correct view and though it was adopted in the Bombay High Court by Sarjent, C.J., in *Bai Anope v. Mulchand* 9 B. 356 : 5 Ind. Dec. 236 and by a Full Bench in *Vithal Krishna v. Balkrishna* 10 B. 610 : 5 Ind. Dec. 795, the weight of authority in the other High Courts seems to favour the exclusion of decisions on the question of category from the operation of Section 12 of the Act, and as this has been the fettered practice of the Calcutta High Court, I think we must adopt it wherever it is possible to do so.

8. Therefore, where there has been a mistake as to the category, the Appeal Court, if it desires to levy deficit Court-fee, must act under the general powers conferred by the Civil Procedure Code on Courts of Appeal and adopt the procedure provided by Section 149 and Order VII, Rule 11, of the Code and Section 28 of the Court Fees Act.

9. The penalty for non-compliance in such a case will be not the dismissal of the suit but the rejection of the plaint, and if the Court can decide the question without deciding the other matters involved in the appeal, clearly it should do so as early as possible.

10. It is perhaps an unsatisfactory result that after a case has been tried out the defaulting plaintiff should be accorded an opportunity of bringing a fresh suit on the same cause of action, but if Section 12 of the Court Fees Act is not applicable it would seem that the result cannot be avoided.

John Bucknill, J.

11. I do not think that it is necessary for me to say much with regard to this matter, I venture to doubt whether it is one which is strictly capable of reference to the Full Bench, but, no doubt, it is desirable that an expression of opinion should be given with regard to the procedure which should be adopted in a matter of this kind. The practical difficulty is, however, that it seems impossible to lay down any very definite suggestion for guidance beyond stating that it is doubtless desirable that a matter of this kind should be dealt with as early as is possible. There are no doubt many cases in which the amount which should have been paid in connection with the plaint by way of stamp fees in the original Court can easily be settled by this Court as a preliminary point before the appeal comes up for hearing and, I think, that whenever this can be done it should be done. On the other hand, there are no doubt cases in which it may not be possible or convenient for this Court to decide whether the plaint in the original Court was properly stamped, unless and until the appeal itself comes before this Court; in such cases impossibility or inconvenience would of course justify a delay in deciding the matter. I think, therefore, that the decision in this case should be referred back to the Court which has sent it to this Full Bench for decision, so that that Court can, if it is possible, decide the matter, now or if it is not possible or is inconvenient then to defer the decision of the matter until such a time as circumstances permit of a decision or even, if necessary, until the hearing of the

appeal itself.

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