1951

CALTEX (INDIA), LTD., *v.* COMMISSIONER OF INCOME-TAX, BOMBAY

Chagla C. J.

At the instance of Sir Jamshedji we raise a further question No. 6, viz., "Whether the provision of s. 42 of the Indian Income-tax Act to the extent that it concerns income, profits and gains accruing or arising indirectly is *ultra vires* of the Legislature? Having raised that question we answer it by saying that it is unnecessary to answer that question. Strictly the question does not arise out of the order made by the Tribunal, but as Sir Jamshedji challenges the validity of the very provisions under which the tax has been charged, the question is implicit in the order of the Tribunal. Sir Jamshedji says that this point was urged before the Tribunal although no reference has been made to it in the judgment. Having raised this question, in our opinion it is unnecessary to decide it on the facts of this case.

Assessee to pay the costs of the reference. No order on the notice of motion; no order as to the costs of the notice of motion.

Attorneys for applicant: *Crawford, Bayley & Co.*

Attorney for respondent: *N. K Petigara.*

Answer accordingly.

A. J. P.

APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Gajendragadkar.

1952

Jan. 15

KARFULE LIMITED *v.* ARICAL DANIEL VARGHESE.*

Court-fees Act (VII of 1870)—Civil Procedure Code (Act V of 1908), s. 151—Appeal compromised out of Court before being heard—Appellant's application for refund of Court-fees paid on appeal—Whether Court has power to order refund—Exercise of inherent powers under s. 151.

An appeal to the High Court was settled out of Court. The appellant applied to the High Court for refund of Court-fees paid on the appeal or such part thereof as the Court deemed fit, on the ground that the appeal was withdrawn before it was heard.

Held, that the only power of the Court to order a refund of the Court-fees arises under ss. 13, 14 and 15 of the Court-fees Act, 1870, and the appellant's case did not fall under any of these sections.

Held, further that the Court has no power under s. 151 of the Civil Procedure Code, 1908, to circumvent the provisions of law. Law must

* Civil Application No. 1779 of 1951.

be given effect to and the Court cannot be a party to the contravention of that law by exercising its supposedly inherent powers under s. 151. Therefore, there being a legal obligation upon the appellant to pay the Court-fees on appeal, the mere fact that the appeal was settled out of Court and having been withdrawn was not heard by the Court, did not entitle the appellant to claim refund of the whole or part of the Court-fees paid.

Mohammad Sadiq Ali Khan Nawab Mirza v. *Saiyid Ali Abbas,*[1] *Firm Hari Ram* v. *H. O. Hay,*[2] and *Chanmallappa Rachappa Hosmani* v. *Shrishailappa Basalingappa Hosmani,*[3] dissented from.

In the matter of Kumud Nath Das Saha,[4] *Ahmed Ebrahim* v. *Government of Bombay,*[5] *Vishnuprasad Narandas* v. *Narandas,*[6] *Indu Bhushan* v. *Secretary of State,*[7] *Chidambaram Chettiar, In re.,*[8] *In re. Kappini Gowder,*[9] *In re V. K. P. Chockalingam Ambalam* v. *Maung Tin,*[10] and *In the matter of Chaube Munna Lal,*[11] referred to.

One Arical Daniel Varghese (plaintiff) obtained a money-decree against Karfule, Ltd. (defendants) in the City Civil Court, Bombay. The defendant preferred an appeal to the High Court and the appeal was admitted on September 27, 1951, but before anything beyond the service of the notice of appeal on the respondent, was done, the matter in dispute was settled between the parties out of Court and it was agreed that the defendants should withdraw the appeal.

The defendants then applied to the High Court for permission to withdraw the appeal and for refund of the Court-fees paid by them on the appeal.

The application was heard.

J. H. Pandya with *Gorwalla & Co.,* for the Petitioner.
V. S. Desai, for the State.

CHAGLA C. J. This is an application for refund of court-fees. An appeal was preferred to this Court from a decree of the City Civil Court, and the appeal was compromised out of Court. The appellants have now applied for refund of court-fees, and the question is whether we have the jurisdiction to order the refund.

(1) (1932) 7 Luck. 588
(2) (1939) A. I. R. Lah. 257.
(3) (1951) Civil Application No. 53 of 1950 (in F. A. 247 of 1950), decided by Bavdekar J. on June 29, 1951 (unrep.).
(4) (1935) 39 C. W. N. 1074.
(5) (1942) 44 Bom. L. R. 912.
(6) (1948) 51 Bom. L. R. 602.
(7) [1935] A. I. R. Cal. 707.
(8) (1934) 57 Mad. 1028.
(9) [1938] A. I. R. Mad. 67.
(10) (1936) 14 Ran. 173, F. B.
(11) (1930) 52 All. 546.

1952

KARFULE LTD.,
v.
ARICAL DANIEL

Chagla C. J.

Now, the only power of the Court to order a refund of court-fees arises from ss. 13, 14 and 15 of the Court-fees Act, and it is not disputed that the case of the appellant does not fall under any of these three sections. The contention put forward by Mr. Pandya is that we should exercise our inherent power under s. 151 of the Civil Procedure Code and order the refund. The refund is sought on the ground that the appeal was withdrawn before it was heard by this Court, and that the judicial machinery which functions when a litigant comes to this Court did not function fully; and therefore, to put it in substance, the argument is that the court-fees were not earned by Government and it is but just that a part of the court-fees should be refunded. The argument put that way is very attractive; but the question is whether we have the power to order refund under circumstances of the present case. Now, we think, as a general principle of law, it cannot be disputed that a Court has no power under s. 151 to circumvent the provisions of law. If the Legislature has cast a particular obligation upon a citizen, it is not open to the Court under s. 151 to exonerate the citizen from that liability or to reduce the quantum of that liability. Law must be given effect to, and the Court cannot be a party to the contravention of that law by exercising its supposedly inherent powers under s. 151. Therefore, if there was a legal obligation upon the appellant to pay the court-fees before they could prefer an appeal to this Court, the mere fact that the appeal was compromised out of Court and was withdrawn, and not heard by this Court, cannot exonerate the appellants from paying the court-fees, nor can they contend that they are liable to pay less court-fees than what the law lays down is the proper court-fees. Undoubtedly, the Court has, as we shall presently point out, exercised inherent jurisdiction under s. 151 to order refund of court-fees in cases not covered by ss. 13, 14 and 15. But when we look at the principle underlying these cases, the principle is clear in all of them. There may be cases where a litigant pays court-fees which he is not liable to pay under the Court-fees Act. The payment may be made either by inadvertence, oversight or mistake. Under these circumstances, the Court orders the revenue authorities to refund either the whole of the court-fees or the excess which was more than what the law required. But the principle which is clearly deducible from these cases is that, as there was no legal obligation to pay the court-fees or the excess which was paid by the party,

1952

KARFULE LTD., v. ARICAL DANIEL

Chagla C. J.

the Court orders, in substance, the law to be carried out, and not to increase the liability upon the litigant. But this principle cannot be extended in support of a litigant who has paid the court-fees for which, in law, he was liable, but who, because of certain circumstances, feels that equitable considerations require that he should not be asked to pay either the full court-fees or part of the court-fees. If once this principle is understood and appreciated, then the large number of decisions which were cited at the bar become perfectly clear.

The case most strongly relied upon by Mr. Pandya is *Mohammad Sadiq Ali Khan Nawab Mirza* v. *Saiyid Ali Abbas*[1]. In that case, a refund was ordered because the Court took the view that the appeal in that case was wholly unnecessary. Now, the facts in that case are not stated, and we are not able to judge as to why a particular appeal in that case was wholly unnecessary. But even so, in our view, this case goes beyond the principle which, we think, is the right principle, and, with respect, we do not agree with the view taken by the Lucknow High Court. If an appellant chooses to file an appeal which ultimately turns out to be unnecessary, he is bound to pay the court-fees which the law requires him to pay. That is not a case where he pays court-fees which he was not legally liable to pay. Then the other case is *In the matter of Kumud Nath Das Saha.*[2] That is a case which falls within the principle we have enunciated, because the Calcutta High Court points out that it was a case of obvious injustice as the appellant had paid court-fees in excess of the legal requirements. The third decision on which Mr. Pandya places reliance is a judgment of a single Judge of the Lahore High Court reported in *Firm Hari Ram* v. *H. O. Hay*[3] That was a case where the Court held that the two lower Courts had not decided the case on merits, and, therefore, ordered a remand. Now, this case did not strictly fall under O. XLI, r. 33, and, therefore, s. 13 of the Court-fees Act strictly had no application. But the Lahore High Court took the view that the case was analogous to one which fell within s. 13, and, therefore, made an order for refund of court-fees. With respect, in our opinion, the decision is not a correct decision, because, if the Court has to give effect to s. 13, it must give effect to the provisions of that section as framed by the

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[2] (1935) 39 Cal. W. N. 1074.
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1952

KARFULE LTD., v. ARICAL DANIEL

Chagla C. J.

Legislature. It is not open to the Court to legislate and to extend the principle of s. 13 to other analogous cases. Section 13 is strictly confined to a case of remand under O. XLI, r. 33, and it is not open to the Court to say that, although the Legislature decided that the court-fees should be refunded only in a case where a remand is ordered under O. XLI, r. 33, the Court should order refund in other cases of remand similar to orders of remand under O. XLI, r. 33.

Then we have two cases of the Bombay High Court. One is a case reported in *Ahmed Ebrahim* v. *Government of Bombay*.[1] That was a judgment of a divisional bench consisting of Mr. Justice N. J. Wadia and Mr. Justice Divatia. In that case, the petitioner had paid court-fees in respect of certain property situated in England, and it was clear that he was not liable to pay court-fees in respect of that property. This was a case where the petitioner had applied for a succession certificate under s. 380 of the Indian Succession Act. On those facts, the Court came to the conclusion that the ignorance of law on the petitioner's part did not prevent the Court from exercising its inherent power under s. 151 of the Civil Procedure Code, as it was clear that the certificate was infructuous for the purpose for which it was obtained and that the petitioner was entitled to a refund of the amount paid by him by mistake or inadvertence. Therefore, it was a case of mistake or inadvertence, and there was no legal liability upon the petitioner to pay court-fees for a succession certificate in respect of property situated in England. Then there is a more recent judgment reported in *Vishnuprasad Narandas* v. *Narandas*[2] to which my brother Mr. Justice Gajendragadkar was a party. The plaintiff in that case had paid *ad valorem* duty in a suit for partition. After the suit was filed, a decision was given by a full bench of this Court that in a partition suit *ad valorem* duty was not payable, but what was payable was a fixed fee under sch. II, art. 17, cl. (*vii*), of the Court-fees Act. In view of that decision, the division bench held that there was no liability upon the plaintiff to pay *ad valorem* fees, and, therefore, ordered a refund. Here again, there is a clear case where there was no legal liability, as determined by this Court, upon the plaintiff in a partition suit to pay the fees which he had paid.

Turning to the other High Courts, we have a decision of the Calcutta High Court reported in *Indu Bhusan* v. *Secy. of*

(2) (1942) 44 Bom. L. R. 912. (3) (1948) 51 Bom. L. R. 602.

State[1] The Calcutta High Court has emphatically asserted the principle that s. 151 does not confer any new power on the Court and that the inherent power under s. 151 should only be exercised when the Court comes to the conclusion that there has been a mistake by a litigant and the Government should not be permitted to profit by the mistake of the litigant. They have also laid down the principle that the Court cannot exonerate a litigant from an obligation imposed upon him by statute. The same principle is enunciated in *Chidambaram Chettiar*, In re[2] which was a case of withdrawal of appeal; and in *In re Kappini Gowder*[3] which was a case of compromise of appeal, as in the present case. Then we have a full bench decision of the Rangoon High Court in *In re V. K. P. Chockalingam Ambalam* v. *Maung Tin*,[4] which follows the principle laid down in *Indu Bhusan* v. *Secretary of State*. The decision In *In the matter of Chaube Munna Lal*[5] also lays down the same principle, and in that case it was held that the power of the Court under s. 151 is exercised because the court-fees had been paid by inadvertence. Mr. Justice Bavdekar in *Chanamallapa Rachappa Hosmani* v. *Shrishailappa Basalingappa Hosmani*[6] ordered refund of court-fees under s. 151 of the Civil Procedure Code, holding that the Court had inherent power to grant refund of court-fees irrespective of any limitation, and that each case must be judged upon its own merits. In that particular case, the learned Judge took the view that, as the appeal was withdrawn at the time of admission, the Court should order refund of court-fees, and the learned Judge felt that applications to withdraw hopeless appeals should be encouraged as it would save unnecessary litigation. Now, we are entirely in agreement with the view of the learned Judge that unnecessary litigation should be discouraged. But, with respect, we do not agree with him that it is for the Court to give effect to that principle by really legislating contrary to the provision of the Court-fees Act, and, with very great respect, we do not think that the case which came before him was a case where the inherent power of the Court could have been exercised under s. 151.

[1] [1935] A. I. R. Cal. 707.
[2] (1934) 57 Mad. 1028.
[3] [1938] A. I. R. Mad. 67.
[4] (1936) 14 Ran. 173, F. B.
[5] (1930) 52 All. 546.
[6] (1951) Civil Application No. 53 of 1950 (F. A. No. 247 of 1950), decided by Bavdekar J. on June 29, 1951 (unrep.).

1952

KARFULE LTD., v. ARICAL DANIEL

Chagla C. J.

Before we dispose of this matter, we would like to say that Government should realise the very great desirability of encouraging litigants not to indulge in unnecessary litigation and of putting an end to such litigation as soon as possible. One of the ways of doing this is to induce litigants to withdraw suits or appeals, or to compromise suits or appeals; and one way of helping them to do so is by tempting them by the return of court-fees. We find that this policy has been given effect to in various pieces of legislation. Section 73 of the Presidency Small Cause Courts Act, s. 11 (*1*) of the Bombay City Civil Court Act, rr. 14 (*4*) and 15 (*3*) of the Bombay Rents, Hotel and Lodging House Rates Control Rules, 1948, all give effect to this principle. Government have also framed rules under s. 11 (*2*) of the City Civil Court Act, wherein a refund is ordered when compromises are effected in the City Civil Court, and the refund is regulated by the stage at which the compromise is brought about. It is only in the Court-fees Act that we find a complete omission to give effect to this principle. We would, therefore, strongly recommend to Government that they ought to amend the Court-fees Act and bring it into line with the other Acts to which we have just drawn attention. But pending the amendment of the Court-fees Act, we would suggest to Government that they have ample power under s. 35 of the Act to refund court-fees, and they could instruct the revenue officers to accede to the applications of litigants for refund when they find that the applications fall within their own policy as enunciated by them in the Acts to which reference has been made and also in the rules which have been made under s. 11 (*2*) of the City Civil Court Act. The result, therefore, is that this application fails and the rule is discharged.

No order as to costs.

Rule discharged.

K. B. S.