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Court : Mumbai

Decided On : Mar-13-1929

Reported in : (1929)31BOMLR841

Judge : Shaw, ;Tomin and ;Lancelot Sanderson, JJ.

Appellant : Faizullah Khan

Respondent : Mauladad Khan

Disposition : Appeal allowed

Judgement :

Shaw, J.

1. This is a consolidated appeal from an order dated May 7, 1925, in the Court of the Judicial Commissioner of the North-West Frontier Province, Peshawar, which set aside a decree of the Honorary Subordinate Judge of Dera Iamail Khan dated March 24, 1924.

2. Stated generally, the case between the parties had reference to the rendering of accounts and the settlement of the sums due thereon in connection with a partnership of a firm of contractors for supply and transport and military works. The partnership is now dissolved.

3. In the suit, brought on March 29, 1923, Faizullah Khan and Sherdad Khan, plaintiffs and appellants, valued their suit at Rs. 3,000 for the purpose of Court fees, and asked for a rendering of accounts and a decree for Rs. 3,000 with the statement 'if more than Re, 3,000 be found due to the plaintiffs they will pay an additional Court fee.' In his pleas Mauladad Khan, the first defendant, asked for a decree in his own favour for Rs. 29,000, and he challenged the shares as given by the plaintiffs and asked for dismissal of their suit. As stated in the appellant case:-

6. The suit was tried by the Honorary Subordinate Judge, First Class, Dera Ismail Khan, who on October 22, 1923, passed a preliminary decree determining the respective shares of the parties in the partnership, and ordering accounts to be taken according to the directions given by him. There was no appeal against this decree which has therefore become binding on the parties,

4. On March 24, 1924, the Honorary Subordinate Judge passed a final decree with costs and interest. Under that decree Rs. 19,991 were declared to be due to Mauladad Khan, the first defendant, by plaintiffs-appellants. No sum was found due to the appellants under their claim for Rs. 3,000.

5. This judgment was appealed from by both parties. The position of the plaintiffs still remained the same, namely, that they challenged the decree against them for over Rs. 19,000 and maintained that that sum in whole or in part should be disallowed, and that their own claim of Rs. 3,000 or less or more should be granted in their favour. It is plain that any substantial inversion of liability under the respective decrees would result in all likelihood in the sums awarded on appeal to both parties being much within 19,000 rupees awarded to one. In these circumstances the appeal was taken, and the claim in the appeal to the Court of the Judicial Commissioner was expressly as follows :-

Claim in Appeal-For reversal of the decree against the appellants and for granting a decree in their favour for such amount as may be found due, Value for purposes of Court fee of Appeal Rs. 19,991.

6. This appeal was duly received and the copy of the office endorsement upon it states: 'Presented by Lala Sham Das, agent of appellants. Is within time. The

Court fee is correct and necessary copies are attached.'

7. It is only necessary to observe that this applied to a valuation of the appeal in its entirety, that is to say, both for the purpose of reversing the decree against the appellants and for granting the decree in their favour.

8. The Court fee due upon the appeal valued as an entirety as thus stated was Rs. 975, and that was duly paid.

9. Their Lordships find no reason for treating that payment either as upon an under value or a split value. Their Lordships think, with much respect to the Judicial Commissioner, that it was a mistake to treat the payment of Rs. 975 as a fee made only on the amount of the decree passed against the appellants. That amount, as already stated, may be not only in full but argely in excess of the true sum of relief at which a sound valuation could in the present circumstances be said to reach covered the appeal as a whole, including that sum on the one hand and a much smaller figure of Rs. 3,000 on the other.

10. Their Lordships are clearly of opinion that the memorandum of appeal in the present case did state in terms of the Act the Khan amount at which the relief was sought, This determines the reference may be added to the results which would have followed from the course adopted below.

11. The Judicial Commissioner found that a remand should only be granted as to the Rs. 19,000. The result of this would be that although accounts were taken on the remand and the Rs. 19,000 was largely reduced and the sum of Rs. 3,000 or more or less than that sum were found due to the plaintiffs, no remedy could be granted for the latter event because according to the judgment only a sectional and not a fee covering all the relief sought had been paid, and therefore one item and claim for Rs. 3,000 had finally dropped out of the case. The learned Counsel for the respondents frankly argued the case on this footing, declaring that the appeal in so far as it could be held to refer to the Rs. 8,000 had gone, and must be dismissed as a nullity. For the reasons stated, their Lordships cannot accept this argument; the extraordinary consequences figured accordingly do not arise. But upon a second point-an important point of procedure-their Lordships think it right

to add the following :_ Granted that a fee had been paid which was insufficient in amount what was the duty of the Court?

12. In such a case as the present it appears to be pre-eminently one for the exercise by the judicial authority of the discretion for giving an opportunity to add to the amount lodged the extra 70 or 80 rupees required or for deferring the question of the amount of fee under the Court Fees Act until final value was ascertained. The provisions of the Court Fees Act which are in place (Act VII of 1870), Section 7, head (iv)(f) for 'accounts,'...'according to the amount at which the relief sought is valued in the plaint or memorandum of appeal.' Even accordingly if the mistake insisted on had been made, this, in the opinion of the Board, was a plain case for rectifying that situation if it could be done, and the Courts are fortunately furnished with an easy method of doing so (Section 149, C.P.C.) :-

Where the whole or any part of any fee prescribe or any document by the law for the time being in force relating to Court fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee payable, to pay the whole or part, as the case may be, of such Court fee; and upon such payment the document in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

13. It will be observed that that discretion extends to the whole or any part of any fee prescribed and can be exercised at any stage in the case, while finally, upon the extra payment being made, then the document is to have the same effect as if it had been paid in the first instance.

14. This also answers the argument presented under the Indian Limitation Act. The dates are as follows:-The decree of the Subordinate Judge was dated March 24, 1924, the first appeal was on May 27 and the second on June 2, bringing before the Appeal Court the respective claims of each suitor. The time for limitation of the appeal is ninety days, and it is thus seen that both appeals were within time. They were not a nullity. On the contrary, they were documents duly presented to and accepted by the Court, and as to the fee thereon, should the valuation be unsatisfactory or in the end insufficient, that is validated by the additional payment, the result of which payment is that the document, namely, the

memorandum of appeal, stands good from its date, The appeals are accordingly not time barred.

15. Their Lordships will humbly advise His Majesty to allow this appeal, to set aside the order of the Judicial Commissioner dated May 7, 1925, and to remit the case to the Court of the Subordinate Judge for a fresh trial and decision on the merits. The appellants will have the costs incurred in the Court of the Judicial Commissioner and of this appeal. The costs incurred in the Court of the Subordinate Judge will abide the result of the new trial.

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