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Court : Kolkata

Decided On : Jan-20-1926

Reported in : AIR1926Cal638

Appellant : Altap Ali

Respondent : Jamsur Ali

Judgement :

B.B. Ghose, J.

1. The question before me arises out of an application for review of a decision of this Court dismissing a second appeal under Order 41, Rule 11 of the Civil P.O. The suit out of which the appeal arose was one for partition and the plaint and the memorandum of appeal bore a Court-fee stamp of Rs. 15 as required by Article 17(vi) of Sch. II of the Court Fees Act as amended by the Bengal Act of 1922. The application was filed with a Court-fee stamp of Rs. 2, while the Stamp Reporter was of opinion that it should bear a Court-fee stamp of Rs. 15 under the provisions of Article 4 of Sch. I of the Act, as the application was presented after the 90th day from the decision of this Court. The Taxing Officer referred the question under Section 5 of the Court Fees Act and the Chief Justice has appointed me for deciding the matter.

2. I heard the arguments of the learned vakil for the petitioners as well as of the Government Pleader on both sides of the question. The contention on behalf of

the petitioner is that Section 4 of the Act directs the payment of fees as indicated either by the first or second schedule of the Act, and as the fee payable on the plaint in this case is under the second schedule which relates to 'fixed fees' you cannot look to the first schedule, which refers to 'ad valorem fees,' for the purpose of levying fees on an application in a proceeding arising out of a plaint such as this. The headings of the two schedules form parts of the enactment and they refer to two distinct classes of documents, and in order to find what fee should be payable on this application one must be confined to the second schedule. That being so, the only provision applicable to this document is that under Article 1(d)(ii) of the second schedule, which requires a fee of Rs. 2. It is further contended that a dismissal under Order 41, Rule 11, is not a judgment, but a mere order and as such it is not followed by a decree. Therefore, in any view, Article 4 of Sch. I has no application to this petition.

3. The last contention may be disposed of first. That the dismissal of an appeal under Order 41, Rule 11 by this Court is a decree does not seem to admit of any argument at this time of the day. It falls within the definition of a decree in Section 2(2) of the Civil P.C. It was held to be a decree in the case of *Uma Sundari v. Bindu Bashini* [1897] 24 Cal 759 with reference to the corresponding Section 551 of the Code of 1882, where the practice of not drawing up decrees in such cases by the High Court was referred to. It may also be pointed out that this case has been followed in *Muniswami v. Muniswami* [1898] 22 Mad. 293 and *Asma Bibi v. Ahmad Hussain* [1908] 30 All. 290 and in a number of cases in this Court, the latest of which I found reported in *Chandra Kanta v. Lakshman* 21 C.W.N. 430. The expression of opinion dismissing the appeal is a judgment, although as matter of practice such judgments are not pronounced in the form prescribed under Order 41, Rule 31. This contention of the petitioner is, therefore, in my opinion without substance. This application is one for review of judgment.

4. With regard to the first contention, Section 4 of the Court Fees Act provides:

No document of any of the kinds specified in the first or second schedule to this Act annexed, as chargeable with fees, shall be filed...in...any of the said High Courts...unless in respect of such document, there be paid a fee of an amount not

less than that indicated by either of the said schedules as the proper fee for such document.⁵ In order to determine what amount of fee is payable in respect of the document one must find whether any of its kind is specified in either the first or the second schedule of the Act. Such a document is clearly specified in Article 4, Sch. I of the Act. Prima facie then the Court-fee payable is under that article. There is no doubt that schedules annexed to an Act and the headings under which they are placed are parts of the enactment. But the same general rule which regulates the effect of the preamble applies also to these headings--namely, that they are not to be taken into consideration if the language of the enactment is clear: Craies on Statute Law, 3rd Ed., page 188. The learned Government Pleader also relies on the observation of the Privy Council in the case of Abdul Rahim v. Municipal Commissioner for City of Bombay [1918] 42 Bom. 462 that the heading to a group of sections cannot be pressed into a constructive limitation upon the exercise of the powers given by the express words of the Act. In this case, however, this rule of interpretation need hardly be referred to.

6. I am unable to appreciate the argument that in finding out what fee is payable on the document in question you must not look into the first schedule but must confine your attention to the second schedule. Why should this be so? The Act nowhere says (apart from the provisions of Article 4, Sch. I) that in finding what fee is payable on an application you must find out how the fee was payable with respect to the plaint. The argument of the petitioner in substance comes to this: you find in the third column against Article 4 of Sch. I that reference is made to the fee leviable on the plaint. You should then find under which schedule of the Act fee is leviable on the plaint, and you must then find whether this application is specifically provided for in that schedule. As in this case such a document is not specified in that schedule it must come under the general provision of 'application or petition' under Article 1 of Sch. II. I am unable to accept this argument. It seems to me that that would not be a natural construction of the Act. In my opinion on a proper construction of Section 4 of the Act this document directly falls within Article 4, Sch. I, and the fee leviable is according to the provision in the third column irrespective of the provisions relating to the levying of the fee on the plaint. The fee payable in respect of the application in question is, therefore, Rs. 15.

