MISCELLANEOUS CIVIL

Before Prem Chand Pandit and Bhupinder Singh Dhillon, JJ.

KRISHAN SARUP OBEROI,—*Petitioner.*

versus

RAM NIWAS,—*Respondent.*

CM No. 1762-C of 1973

In RFA No. 273 of 1965.

February 8, 1974.

Code of Civil Procedure (Act V of 1908)—Order 41 Rules 23 and 23-A—Court Fees Act (VII of 1870)—Section 13—Case remanded by the appellate Court under Rule 23-A of the Code—Section 13 of Court Fees Act—Whether applicable thereto—Court fee paid on the memorandum of appeal—Whether refundable.

Held, that when a case is remanded by Appellate Court, Section 13 of the Court Fees Act applies only if the grounds of remand are the same as under Rule 23, Code of Civil Procedure. Comparing the language employed in Rule 23 and Rule 23-A of the Code the remand under the former rule is not equivalent to the remand under the latter rule. No remand can be made under Rule 23 unless the trial Court has disposed of the *whole suit* and not a portion of it, on a preliminary point and the appellate court reverses that decree in appeal. So far as Rule 23-A is concerned, it comes into play only when the trial Court disposes of the entire case otherwise than on a preliminary point and that decree is reversed in appeal by the appellate Court and a retrial is considered necessary by it. It is thus apparent that the grounds of remand under the two rules are entirely different. Hence, when the case is remanded under Rule 23-A of the Code, the Court-fee paid on the memorandum of appeal is not refundable under Section 13 of the Court Fees Act.

Application under Section 13 of the Indian Court fees Act, 1870, read with Section 151 of the Civil Procedure Code praying that a certificate directing the refund of Rs. 1,564.00 paid as court fee in R.F.A. No. 273 of 1965 be granted.

(*Original Case No. 131 of 1964, decided by Shri Ranjit Singh Sood, Sub-Judge 1st Class, Jullundur, on 19th May, 1695*).

J. V. Gupta, Advocate, *for the petitioner.*

R. L. Aggarwal, and Amar Dutt, Advocates, and I. J. Malhotra, Advocate, for Advocate-General, Punjab, *for the respondent.*

JUDGMENT

PANDIT, J.—Ram Niwas brought a suit for the recovery of Rs. 16,000 on the basis of a pronote against Krishan Sarup Oberoi. This suit was decreed by the trial Judge. Against that decree the defendant came here in appeal and the same was heard by us. We reversed the decision of the trial Judge and directed the District Judge to nominate another Judge for hearing the arguments *de novo* and decide the case. We had made it clear that no further opportunity would be given to the parties to lead evidence.

(2) The appellant has made this application under section 13 of the Indian Court-fees Act, 1870, read with section 151 of the Code of Civil Procedure, for a certificate directing refund of the court-fee amounting to Rs. 1,564, which he had paid on the appeal filed in this Court and which we had disposed of as mentioned above. It was stated in the application that the case was remanded for no fault of the applicant and he was, therefore, entitled to the refund of the court-fee paid on the memorandum of appeal.

(3) On this application, we issued notice to the opposite party as well as the State of Punjab. This application is being opposed by the State of Punjab. The argument raised by the counsel for the State is that a refund can be ordered only if the case is covered by the provisions of section 13 of the Court-fees Act. The relevant portion of the said section reads: -

> "If an appeal or plaint, which has been rejected by the lower Court on any of the grounds mentioned in the Code of Civil Procedure, is ordered to be received, or if a suit is remanded, in appeal, on any of the grounds mentioned in section 351 of the same Code for a second decision by the lower Court, the Appellate Court shall grant the appellant a certificate, authorising him to receive back from the Collector the full amount of fee paid on the memorandum of appeal:
>
> Provided * * * *"

(4) The contention is that if the applicant can show that the case was remanded on any of the grounds mentioned in section 351 of the Code of Civil Procedure, 1859, then the refund of the court-fee can be ordered, otherwise not. It is common ground that section 351 of the

Code of Civil Procedure, 1859 is equivalent to order 41, rule 23 of the Code of Civil Procedure, 1908. The remand, in the instant case, has, admittedly, not been made under Order 41, rule 23.

(5) It is the case of the applicant, however, that this remand will be covered by the provisions of rule 23A of Order 41 and such a remand is equivalent to one under rule 23. Reference in this connection was made to a Bench decision of this Court in *Sohan Singh* v. *The Oriental Bank of Commerce* (1).

(6) Rule 23A was added by the Lahore High Court in 1938 under its rules making power given in section 122 of the Code of Civil Procedure and it reads:

> "Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point and the decree is reversed in appeal, and a retrial is considered necessary the appellate court shall have the same powers as it has under rule 23."

(7) It is contended by the learned counsel for the State that in the first instance, the remand in the present case will not be under rule 23A, but the same will be under section 151 of the Code of Civil Procedure, because, according to him, firstly, we had not *reversed* the decree of the trial Court as mentioned in the said rule, but had merely *set it aside*. Secondly, we had not ordered a *retrial* by the Court below, but had only directed it to hear the arguments *de novo* and decide the case on the same evidence which had already been recorded by it and this would not be covered by the word "retrial" in rule 23A. The second submission of the learned counsel in this behalf is that even if the remand was under the provisions of rule 23A, section 13 of the Court-fees Act would not be attracted and a remand under this rule cannot be one under rule 23 for the purposes of the said section, in as much as the grounds of remand, which are the necessary requirements of that section, under both the rules are entirely different.

(8) While supporting his first submission, learned counsel for the State contends that the "reversal" of a decree is only on merits, while it can be set aside on a technical ground without going into the merits of the case. In this connection, he referred to the amendments made

(1) A.I.R. 1956 Pb. 215.

by the various High Courts, e.g. Allahabad, Andhra Pradesh, Madras and Rajasthan, to rule 23 of Order 41. The Allahabad High Court had inserted the following after the words "and the decree is reversed in appeal" in the said rule :—

> "or where the Appellate Court while reversing or setting aside a decree in appeal considers it necessary in the interest of justice to remand the case, it"

Almost similar amendments were made by the other High Courts referred to above. In the said amendment, learned counsel submits that a distinction has been made between "reversing" and "setting aside" a decree, meaning thereby that the words are not synonymous and convey different meanings. As regards the word "retrial", learned counsel referred to the decision of the Supreme Court in *Ukha Kolhe* v. *The State of Maharashtra* (2), where it was observed that an order of retrial wiped out from the record the earlier proceedings. In the instant case, however, according to the learned counsel, we had asked the trial Court to decide the case afresh on the same material, which was before it at the time of first decision.

(9) It is needless to decide this contention of the learned counsel, because I am of the view that there is merit in his second submission that a remand under rule 23A cannot attract the applicability of section 13 of the Court-fees Act.

(10) Section 13 will apply, in the instant case, only if it can be shown that the grounds of remand in Order 41 rule 23 are the same as in rule 23A. When we compare the language employed in both these rules, it is not possible to say that the remand under the former rule is equivalent to the one under the latter, especially for the purposes of the said section. No order of remand can be made under rule 23, unless the trial Court has disposed of the *whole suit*, and not a portion of it, on a preliminary point and the Appellate Court reverses that decree in appeal. In that contingency, the Appellate Court may remand the case to the Court below and while doing so, direct what issue or issues shall be tried in the case so remanded. Rule 23 says:

> "Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if

(2) A.I.R. 1963 S.C. 1531.

it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand."

(11) So far as rule 23A is concerned, it will come in when the trial Court has disposed of the entire case otherwise than *on a preliminary point* and that decree is reversed in appeal by the Appellate Court and a retrial is considered necessary by it. In that contingency, the Appellate Court will have all those powers, which are mentioned in rule 23. It will, thus, be apparent that the grounds of remand in two rules are entirely different.

(12) Besides, section 122 of the Code of Civil Procedure only authorises certain High Courts to make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence. Rules made under this provision, e.g. rule 23A, cannot, however, amend other statutes, like the Court-fees Act. In section 13 of the said Act, reference is made to section 351 of the Code of Civil Procedure, 1859, and by virtue of section 158 of the Code of Civil Procedure, 1908, such reference shall, so far as may be practicable, be taken to be made to the latter Code and admittedly the said section is equivalent to Order 41, rule 23 of the Code of 1908. By making rule 23A, the Court-fees Act could not be amended by this Court and the said rule could not be inserted in section 13 along with rule 23 and thus another ground for the refund of court-fees added therein. It follows, therefore, that if we had remanded the case under rule 23, then, undoubtedly, the provisions of section 13 would have been attracted. But that section cannot be made use of by the applicant even if his contention is accepted that the remand by us was under rule 23A.

(13) Now coming to the decision in *Sohan Singh's case* relied on by the learned counsel for the applicant, there Kapur and Bishan Narain JJ. held:

"Where a remand is under Order 41, rule 23, Civil Procedure Code, a refund of court-fee paid on memorandum of appeal

is allowable under section 13, Court-fees Act. But refund can be ordered *ex debito justitiae also*. Thus where, there was no proper trial, in that, documents which should have been on the record were not taken and witnesses who should have been examined were not examined, and therefore the lower appellate Court could and did order the taking of additional evidence so as to be able to arrive at a proper decision, and further in order that neither of the two parties may be prejudiced, opportunity was given to both the parties to lead such other evidence which they thought fit:

Held, that this would fall under Order 41, rule 23-A and, therefore, even under the strict interpretation of section 13, Court-fees Act the remand was as if it was a remand under rule 23 and therefore the case would fall within section 13; even if it did not fall within section 13, Court-fees Act, the case had to be remanded for want of proper trial. Hence the appellant should have the certificate for obtaining refund of the court-fee."

(14) There is no manner of doubt that if this decision has to be followed, then the case will be covered by section 13 and the applicant will be entitled to the refund of the court-fee. This ruling, however, has not been approved by a Full Bench of this Court in *Jawahar Singh Sobha Singh* v. *Union of India and others* (3), where a contrary view was taken and it was held that the inherent power of a Court to remit or refund Court-fees was confined only to fees which had been illegally or erroneously assessed or collected, and does not extend to fees which had been paid or collected in accordance with the provisions of the Court-fees Act. It appears that there was an earlier Bench decision of this Court in *Discount Bank of India* v. *A. N. Mishra* (4), where A. N. Bhandari, C.J. and Dulat, J. had taken the view that the power of a Court to order refund of Court-fees was limited to three cases, namely, (i) when the refund was authorised by the Court-fees Act itself, (ii) when excess court-fees was paid as a result of a mistake and (iii) when the excess payment had been made as a result of a mistaken demand by the Court itself.

(3) I.L.R. 1958 Pb. 104=A.I.R. 1958 Pb. 38.

(4) A.I.R. 1955 Pb. 165.

(15) In view of the difference of opinion between the two Bench decisions of this Court in *Sohan Singh* and *Discount Bank of India's cases*, the following question of law was referred to a Full Bench:—

> "Is the power of a Court to remit or refund Court-fees confined only to fees illegally or erroneously assessed or collected or does it extend also to fees which have been paid or collected in accordance with the provisions of the Court-fees Act."

After referring to a number of decisions, the Full Bench gave the decision as already mentioned above.

(16) Faced with this Full Bench ruling, learned counsel for the applicant submitted that the Full Bench had disapproved of only one ground taken by the Division Bench in *Sohan Singh's case* and not the other one. It may be mentioned that in the Bench decision, the learned Judges had held (a) that a remand under rule 23A of Order 41, Code of Civil Procedure, was as if it was a remand under rule 23, Order 41; and (b) that even if a remand under Order 41, rule 23A did not fall under section 13, Court-fees Act, the refund of court-fees in such cases could be ordered under the inherent powers of the Court. It was the second ground which had been reversed by the Full Bench ruling. The Full Bench, however, had not observed anywhere that a remand under rule 23A of Order 41 would not amount to a remand under Order 41, rule 23. That being so, according to the learned counsel, the remand in the instant case, being under Order 41, rule 23A, would be taken to be a remand under rule 23 of Order 41, with the result that the case would be covered by the provisions of section 13 of the Court-fees Act and a refund of court-fees would, therefore, be justified.

(17) It is true that in the Full Bench case, it had not been held that a remand under rule 23A would not be equivalent to a remand under rule 23, because this precise matter was not before the learned Judges, but the following observations made in that authority, in my opinion, by implication overrule the Bench decision in *Sohan Singh's case*:—

> "But these decisions (include *Sohan Singh's case*) appear to have ignored certain fundamental legal principles. They have not taken account of the fact that all Governments in all countries, civilized or otherwise, have found it necessary to enact measures for the imposition, assessment and collection

of taxes and to provide safeguards of their own against mistake, injustice and oppression in the administration of its revenue laws. The Legislature has power to prescribe the manner and the circumstances in which taxes should be refunded regardless of the legality or illegality of the assessment or collection or recovery thereof. If a statutory enactment provides a remedy for protection against administrative aggression in the form of the illegal or erroneous exaction of a tax, that remedy must be regarded as exclusive and the Courts have no power to intervene.

If, however, the statutory enactment is silent and the system of corrective justice is not complete the inherent power of a Court to grant equitable relief will step in to fill the gap, for the inherent power of the Court is limited to the power of the Court to regulate and deal with such matters in the absence of legislation. The Court has no power to refund taxes as a matter of gratuity when they have been collected in accordance with the provisions of law *Discount Bank of India* v. *A. N. Misra* (4).

Secondly, it has failed to take into consideration the fact that it is the duty of the Court to ascertain the intention of the Legislature and to carry such intention into effect to the fullest degree even though such legislation appears to the Court to be unfair, inequitable or unjust. If the statute is ambiguous in its terms and fairly susceptible of two or more constructions, the Court will avoid a construction which would render the statute productive of injustice, unfairness, in convenience, hardship or oppression and will adopt a construction in favour of an equitable operation of the law and which will best subserve the ends of justice.

If, on the other hand, the language of the statute is plain and unambiguous and conveys a clear and definite meaning, the Courts have no power to give the statute a meaning to which its language is not susceptible merely to avoid that which the Court believes are objectionable, mischievous or injurious consequences. A Court has no power, inherent or otherwise, to nullify, destroy or defeat the intention of the Legislature by adopting a wrong construction or to take shelter behind the comforting thought that Courts of law have been established and ordained for the purpose of promoting substantial justice between the parties and that a technicality should not be permitted to override justice.

The Courts have no power to modify the provisions of law even if those provisions are not as convenient and reasonable as the Courts themselves could have devised. If there is a general hardship affecting a general class of cases, the hardship can be avoided by a change of the law itself and not by judicial action in the guise of interpretation. If there is a particular hardship from the particular circumstances of the case, it would be extremely dangerous to relieve it by departing from the provisions of the statute. In any case a Court has no power to circumvent the provisions of a statute, for whatever is prohibited by law to be done directly cannot legally be effected by an indirect and circuitous contrivance.

Thirdly, the Courts have failed to recognise the basic fact that although a Court possesses all the inherent or implied powers necessary to discharge the onerous duties imposed upon it by the Legislature, and although it is the duty of every Court to maintain its inherent jurisdiction vigorously, a Court is not wholly independent of the Legislature and cannot disregard the mandate issued by it in the form of a statute.

All inherent and implied powers must yield to the power of statutory enactments (*Brydonjabk* v. *State Bar*) (5), for no Court of Law possesses inherent power to dispense with the provisions of a statute: *Maqbul Ahmad* v. *Onkar Pratap* (6). Jurisdiction is not a matter of sympathy or favour (1919) 63 Law Ed. 313 at page 315, and it is not open to a Court by the exercise of inherent power to exonerate a litigant from an obligation imposed upon him by law; *Indu Bhushan Roy v. Secy. of State* (7), *and Karfule Ltd. v. Arical Daniel Varghese* (8).

The legal principles set out in the preceding paragraphs have been adopted and applied in a very large number of cases and Judges have taken the view that the power of a Court to grant refunds must be confined within the limits of statutory provisions. * * * Thus it has no power to order a refund of court-fees * * * when

(5) 66 Am. L.R. 1507.
(6) A.I.R. 1935 P.C. 85.
(7) A.I.R. 1935 Cal. 707.
(8) A.I.R. 1953 Bom. 73.

remand order is passed on any ground other than a ground mentioned under Order 41, rule 23 (*Umar Din* v. *Umar Hayat*) (9), *Chokkalingam Ambalam* v. *Maung Tin* (10) *** The Courts have resolutely refused to depart from the provisions of the statute even in cases of manifest hardship and oppression for it is well known that hard cases make bad law."

(18) In view of what I have said above and relying on the Full Bench decision in *Jawahar Singh Sobha Singh's case*, I am of the opinion that court-fees cannot be refunded in the instant case and consequently, the application filed by the appellant for that purpose is rejected, but with no order as to costs.

DHILLON, J.—I agree.

K.S.K.

REVISIONAL CIVIL

Before R. S. Narula, J.

M/S RUP CHAND DHARAM CHAND,—*Petitioner.*

versus

M/S. BASANT LAL BANARSI LAL,—*Respondent.*

Civil Revn. 856 of 1973.

February 12, 1974.

Code of Civil Procedure (Act V of 1908)—Sections 10 and 15—Application under Section 10—Whether entertainable before the filing of written statement in the suit—Order under Section 10—Revision petition against—Whether lies.

Held, that it is not the universal rule that an application under Section 10 of the Code of Civil Procedure cannot be entertained before filing witten statement in the suit sought to be stayed. Normally the Court would not allow a party to move an application under section 10 unless he has filed his written statement, the Court however, would entertain an application of the defendant for stay

(9) A.I.R. 1927 Lah. 886(1).

(10) A.I.R. 1936 Rangoon 208 (F.B.)