

## APPELLATE CIVIL.

Before *M. C. Ghose and Mukherjea J.J.*

UMESH CHANDRA DE

*v.*

MAHIM CHANDRA SHAHA\*.

1936

Nov. 10, 12.

*Practice—Custody-fees, Refund of—Inherent powers of civil Courts—Court-fees Act (VII of 1870), ss. 13, 14, 20—Civil Rules and Orders of High Court for Guidance of Subordinate Courts, para. 790, note (3)—Code of Civil Procedure (Act V of 1908), O. XLVI, r. 1.*

The Court can order refund of custody-fees deposited into Court by a decree-holder at the time of his filing the application for execution of the decree by attachment of the moveables of the judgment-debtor upon non-prosecution of his application where such money remain unspent. And the procedure laid down in para. 790, note (3) of the Civil Rules and Orders of the High Court for the Guidance of the Subordinate Courts has to be followed in such cases for quick realisation of such custody-fees.

Apart from any rule directly bearing on the point the Court can order refund in such cases in exercise of its inherent powers.

In the matter of *Kumud Nath Das Saha* (1) and *Indu Bhusan Roy Chaudhury v. Secretary of State for India in Council* (2) referred to.

REFERENCE by the Second Subordinate Judge of District Tippera under O. XLVI, r. 1 of the Code of Civil Procedure for refund of custody-fees.

*The Senior Government Pleader, Sarat Chandra Basak, and Sir Saadullah* supporting the Reference.

The material facts of the case and the arguments appear in the judgment.

*Cur. adv. vult.*

MUKHERJEA J. This is a Reference made by the Subordinate Judge, second Court, Tippera, under O. XLVI, r. 1 of the Code of Civil Procedure and involves determination of a short point of law. There was an execution proceeding started by a decree-holder wherein he prayed for attachment of certain

\*Reference No. 3 of 1936, made by Dwarka Nath De, Second Subordinate Judge of Tippera, dated Feb. 7, 1936.

(1) (1935) 39 C. W. N. 1074.

(2) (1935) 40 C. W. N. 309.

moveables belonging to the judgment-debtor. In that execution case a sum of Rs. 7-8 was paid by the decree-holder as custody-fees, and these fees are always realised in advance under the rules framed by this Court under s. 20, Court-fees Act. Ultimately the decree-holder did not proceed with the execution case and the amount remained unspent. The decree-holder then prayed for refund of this amount and the controversy centres round the short point as to whether this claim for refund is tenable. As the amount was not spent at all, there is apparently no justification for refusing the claim for refund; and the learned Senior Government Pleader appearing in support of the Reference has fairly stated that the claim cannot be resisted on any ground of justice or equity. The Subordinate Judge seems to be of the same opinion and there is a specific provision in para. 790, note (3) of the Civil Rules and Orders issued by this Court for the guidance of the Subordinate Courts, which lays down the procedure for obtaining such refund. The learned Subordinate Judge, however, felt difficulty in granting the application for refund, because of a letter, being General Letter No. 43 (Civil) of 1935, dated December 19, 1925, issued by this Court, by which all District Judges were informed that refund of poundage-fees was *ultra vires* of this Court, as s. 20 of the Court-fees Act gives power to fix fees only and not to refund them. The letter obviously does not touch the present point, as it relates to poundage-fees which are invariably realised after the sale and cannot remain unspent as is the case with custody-fees, but as the matter is put on the larger ground that the rules are *ultra vires* of this Court, the learned Subordinate Judge entertained reasonable doubt as to whether or not the same principle would hold good with regard to custody-fees also. It is necessary, therefore, to examine the matter a little more in detail in order to find out whether the General letter issued by this Court does really stand in the way of granting a refund in this case.

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Now, s. 20 of the Court-fees Act empowers the High Court to make rules *inter alia* relating to fees chargeable for serving and executing processes, *etc.*, issued by civil Courts. Custody-fees come undoubtedly within the purview of the section, as they are charges levied upon the decree-holders to meet costs of the person or persons sent out to ensure safe custody of the moveables attached in execution proceedings. Under the rules of this Court framed under the said section, the custody-fees are payable at the time of obtaining the processes and the minimum amount prescribed is Rs. 7-8, being the remuneration of a custody peon for fifteen days, at the rate of 8 annas per diem (Part II, Art. 3 of the Rules). There is no rule framed by the High Court under s. 20 of the Court-fees Act relating to the refund of such fees, but there is provision for refund of poundage-fees under Art. 7 of the Rules, if the execution sale is afterwards set aside. Now poundage-fees are paid invariably after the sale and constitute a sort of percentage or commission upon the gross amount realised by the sale. There would be no question of their being spent or not spent, and it may be said that s. 20 of the Court-fees Act did not authorize the High Court to legislate through the rules, as to under what circumstances the auction-purchaser could demand back these fees. The case of custody-fees, however, stands on a different footing; they are taken in anticipation, and if the anticipated circumstances do not happen there is a clear duty to refund on the plainest and most elementary principles of law. There is no rule framed by the High Court relating to the custody-fees, under s. 20 of the Court-fees Act and no question of *ultra vires* at all arises. The provision in para. 790, note (3) of the Rules and Orders issued by this Court, is not framed under s. 20 of the Court-fees Act. It comes under the heading of "Payment of Money" in Chap. XXX, and simply lays down the procedure for quick realisation of these deposits, if lying

unspent. This paragraph does not create the right to get refund, but presupposes it to be already existing. But apart from any rules—and we may assume that there is no provision directly bearing on the point—we think that the Court has inherent jurisdiction to grant refund in such cases, and the decision in *Indu Bhusan Roy Chaudhury v. Secretary of State for India in Council* (1), referred to by the Subordinate Judge, does not say anything which militates against this view. The decision reiterates what was held in many previous cases, *e.g.*, In the matter of *Kumud Nath Das Saha* (2), that there can be a refund of Court-fees under the inherent powers of the Court, apart from the provisions of ss. 13 and 14 of the Court-fees Act; but that the power is limited to cases where fees not warranted by the statute has been paid or realised by mistake or inadvertence. We may say at once that the present case is quite different and here, strictly speaking, no question of refund of Court-fees payable under the Court-fees Act arises. The Court-fees Act provides for payment of Court-fees in respect of documents described in the schedules to the Act. Custody-fees might be paid in Court-fee stamps as a matter of convenience, but they are not Court-fees prescribed for any particular document under the Act. The money was legally payable in advance and hence no question of mistake or inadvertence comes in. The payment was a contingent payment, and, if the contingency does not happen, the purchaser is entitled to get the money. In our opinion the answer to the question referred to us would be that the unspent amount of custody-fees can be refunded, and the procedure laid down in para. 790, note (3) of the Rules and Orders should be followed.

M. C. GHOSE J. I agree.

A. K. D.

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