

to be void within the meaning of section 65 is the date of the agreement, viz., the 13th September, 1922: See *Annada Mohan Roy v. Gour Mohan Mullick* (1).

Their Lordships are of opinion that this appeal should be allowed and that the decree of the 14th of May, 1929, should be set aside and that in lieu thereof a decree should be made dismissing the application of the liquidators with costs: and they will humbly advise His Majesty accordingly. The respondents must pay the appellants' costs of this appeal.

Solicitors for appellants: *W. W. Bow & Co.*

Solicitors for respondents: *Cardew Smith & Ross.*

FULL BENCH.

Before Mr. Justice Banerji, Mr. Justice King and Mr. Justice Niamat-ullah.

SHANTI LAL (APPLICANT) *v.* AGHA DOST MUHAMMAD KHAN AND OTHERS (OPPOSITE PARTIES).*

Court Fees Act (VII of 1870), section 13—Refund of court fees on remand—Remand under order XLI, rule 23, in second appeal—"Suit" includes proceedings in appeal.

Where a court of second appeal has remanded a case to the lower appellate court on any of the grounds mentioned in order XLI, rule 23 of the Civil Procedure Code, the appellant is entitled under section 13 of the Court Fees Act to a refund of the court fee paid on the memorandum of appeal.

The word "suit" in that section should not be understood in a too narrow and restricted sense so as not to include proceedings in appeal and second appeal which are successive stages of the suit. In the Court Fees Act the word "suit" has been given a wide meaning and an appeal is treated as a proceeding in a suit.

The case was referred to a Full Bench upon the following referring order:

SEN and NIAMAT-ULLAH, JJ. :—The point raised in this case is one of general importance. We do not know whether this

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*Application in Second Appeal No. 264 of 1929.

(1) (1923) I.L.R., 50 Cal., 929; L.R., 50 I.A., 239.

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point was ever raised in any case before this Court and what decision was arrived at; but the point may very frequently arise. We have not been referred to any decision of this Court. The only case that we have been referred to is that of *Bansi Lal v. Jhamman Shah* (1). We feel considerable difficulty in endorsing the reasoning in support of the judgment. Section 13 of the Court Fees Act provides for a case where a "suit" is remanded and not an "appeal". It has been contended that the remand of an appeal is virtually the remand of the suit. The applicant invites the aid of order XLII, and order III, rule 4 (3), of the Code of Civil Procedure. It is questionable how far it is permissible to refer to these provisions in having to construe section 13 of the Court Fees Act. Mr. Panna Lal argues that an appeal is a proceeding in the suit and points out that a fiscal enactment should be generously construed. In view of the importance of the question we would refer this case to a larger Bench.

Let the case be put up before the Hon'ble Chief Justice with the recommendation that he may constitute a larger Bench for the hearing of the question.

Mr. Panna Lal, for the applicant.

Mr. U. S. Bajpai (Government Advocate), for the Crown.

BANERJI, KING and NIAMAT-ULLAH, JJ. :—The question of law which has been referred to this Full Bench may be stated as follows :—When a court of second appeal has remanded a case to the lower appellate court under order XLI, rule 23 of the Civil Procedure Code, is the appellant entitled under section 13 of the Court Fees Act to a refund of the court fee paid on the memorandum of appeal?

For the purpose of this reference we assume that the remand does not merely purport to have been made under order XLI, rule 23, and that the remand was in fact made "on any of the grounds mentioned" in order XLI, rule 23. On this assumption the appellant is clearly entitled to a refund if it is held that the "suit" has been remanded to the lower appellate court. The word "suit" has not been defined for the purposes of

(1) A.L.R., 1930 Lah., 441.

the Court Fees Act, nor is there any definition of that word in the Code of Civil Procedure. The argument of the stamp reporter implies that a "suit" terminates when the trial court passes a decree, and that further proceedings by way of appeal are not proceedings *in the suit*. On this view it is the *appeal*, and not the *suit*, which has been remanded to the lower appellate court and consequently section 13 does not in terms apply. We think that this view gives too narrow a meaning to the word "suit" and that proceedings in appeal may be regarded as proceedings in the suit. When an appeal is admitted against the trial court's decree the suit becomes *sub judice* again. The appellate court's decree does no doubt decide the appeal, but it also decides the suit. The appellate court frequently, in so, many words, "decrees the suit" or "dismisses the suit" as the case may be. On this view the proceedings in first appeal and in second appeal are merely successive stages of the suit, and the suit does not terminate so long as any appeal is pending.

There are indications in the Court Fees Act that the word "suit" has been given a wide meaning and that an appeal is treated as a proceeding in a suit. In schedule II, articles 4, 5 and 17, we find the expression "memorandum of appeal in a suit". The appeal may of course be a second appeal. So even a second appeal is spoken of as an "appeal in a suit", implying that it is a proceeding in a suit. Section 12 (ii) speaks of a *suit* coming before a court of appeal. This also indicates that in the contemplation of the legislature the appellate court deals with the suit, and that the appeal is only a proceeding in, or stage of, a suit. In *Dyal Singh v. Ram Rakha* (1) it was expressly held by a Full Bench of the Punjab Chief Court that in sections 10(ii) and 12(ii) of the Court Fees Act the word "suit" includes an appeal, so that the appeal of a defaulting appellant must be dismissed on his failure

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(1) [1912] P. R., no. 109.

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to make up the deficiency in court fees when called on to do so. Our own Court has, by implication, taken a similar view in *Narain Singh v. Chaturbhuj Singh* (1), in which it was held that "If it were the appellant who was in fault and failed to pay the full court fee due from him in the lower court, this Court certainly could stay the hearing of his appeal and, if the deficient fees were not paid, could dismiss his appeal, and no doubt would do so." This decision was approved and followed in the Full Bench ruling, *Mohan Lal v. Nand Kishore* (2). There is, therefore, clear authority for the view that in the Court Fees Act the word "suit" can be given a wide meaning so as to include proceedings in appeal.

There is nothing in the subject or context of section 13 showing that the word "suit" is to be understood in any specially restricted sense so as not to include a suit at the stage of first appeal. On the contrary it would be anomalous and unreasonable if the court fee were refundable in the case of a remand to the trial court, and not refundable in the case of a remand to the lower appellate court,—assuming of course that the requirements of order XLI. rule 23, are strictly fulfilled in each case.

We hold that the "suit" has been remanded, within the meaning of section 13 of the Court Fees Act, and the court fee is refundable if the remand has been made upon the grounds mentioned in order XLI, rule 23. Let this answer be laid before the Hon'ble Judges who made the reference.

(1) (1898) I.L.R., 20 All., 362. (2) (1905) I.L.R., 28 All., 276.