

MISCELLANEOUS CIVIL.

Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah.

KANHAIYA LAL (APPLICANT) v. MAHADREI AND OTHERS
(OPPOSITE PARTIES).*

1932
January, 22

Court Fees Act (VII of 1870), section 13—Refund of court fees on remand—Remand to first court by High Court on second appeal—Refund of court fees paid on second appeal.

Where on a second appeal the High Court remanded the suit for re-trial to the court of first instance, it was held that the expression "lower court" in section 13 of the Court Fees Act includes the court of first instance in cases where the appellate court is the High Court, and so the court fee paid on the memorandum of appeal to the High Court was refundable under that section.

Mr. H. P. Sen, for the applicant.

Mr. M. N. Kaul, for the opposite parties.

MUKERJI and NIAMAT-ULLAH, JJ.:—This is an application to refund the court fee paid on the memorandum of appeal by the appellant under section 13 of the Court Fees Act. The office report is in favour of the applicant, but we have considered the provisions of section 13 in view of the rather complicated case before us.

It appears that the suit was brought against six defendants for recovery of a certain sum of money by sale of property. The suit was dismissed *in toto* by the court of first instance. On appeal to the lower appellate court, the latter held that the defendants Nos. 3 to 5 were liable, but the defendants Nos. 1, 2 and 6 were not liable. The lower appellate court accordingly sent back the case to the court of first instance for adjudication of the liability of the defendants Nos. 3 to 5.

The plaintiff was dissatisfied with this order of the lower appellate court and filed a second appeal. Here this Bench held that the defendants Nos. 1 and

*Application in Second Appeal No. 270 of 1930.

1932

KANHAIYA
LAL
v.
MAHADEI.

6 were equally liable, and passed the following order :
“We modify the decree of the court below and remand the suit to the court of first instance for trial in its entirety.”

Now the question is whether this is a case which is covered by section 13, paragraph 1.

If we read the words “lower court” as including the court of first instance where the appellate court is the High Court, no difficulty would arise in granting the appellant the relief he asked for. In the last line of section 13, paragraph 1, the words “memorandum of appeal” would mean the memorandum of appeal filed in the High Court.

We do not see why we should give the expression “lower court” a restricted meaning. This being a fiscal enactment, it should be read, as far as possible, in favour of the subject, and we therefore decide that the words “lower court” would include the court of first instance.

Then comes the proviso for our consideration. The whole of the subject matter of the suit has not been remanded by us and, therefore, the certificate to be granted should authorise the appellant to receive only so much of the fee as would have been originally payable on the part of the subject matter of the suit remanded. This, we take it, is the fee which has been paid by the appellant in his memorandum of appeal to this Court, because he was appealing only against the order which was in favour of the defendants Nos. 1 and 6.

In the circumstances the whole fee paid by the appellant is refundable as reported by the office. We order accordingly.