

1933  
 BIRADENAI  
 LODHA  
 v.  
 COMMISSIONER OF  
 INCOME-TAX

Assistant Commissioner refused, in these circumstances, to investigate this belated and inconsistent claim. He had a discretion to do so; and no error of law can be imputed to him. In this view I answer the fifth question in the affirmative.

I agree with my learned brother as regards costs.

BY THE COURT:—Questions Nos. 1, 2 and 4 are answered in the negative, and questions Nos. 3 and 5 in the affirmative. The assesseees will pay three-fourths of the costs of the opposite party, who will pay one-fourth of the costs of the assesseees. The fee of the counsel on either side is assessed at Rs.400 (four hundred) including fees payable on application under section 66(3) for statement of a case.

### FULL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice, Justice Sir Lal Gopal Mukerji and Mr. Justice King*

1933  
 November, 7

KAUL PATI KUAR AND ANOTHER (PLAINTIFFS) v. KASHI PRASAD SINGH AND OTHERS (DEFENDANTS)\*

*Court Fees Act (VII of 1870), section 13—Refund of court fees on remand—Second appeal remanded by High Court, except as against merely pro forma respondents—Right to refund not affected thereby—No refund of court fees paid in lower appellate court, which dismissed the appeal.*

A suit was decreed against defendants 1 to 3, but dismissed against defendants 4 to 6. The plaintiffs appealed as against defendants 4 to 6, and made defendants 1 to 3 *pro forma* respondents. The appeal was dismissed, and plaintiffs filed a second appeal to the High Court against defendants 4 to 6, and made defendants 1 to 3 *pro forma* respondents. The High Court remanded the case back to the first court through the lower appellate court for trial as against defendants 4 to 6.

*Held*, that the plaintiffs were entitled, under section 13 of the Court Fees Act, to a refund of the court fees paid in the High Court. The circumstance that the appeal was not allowed and the case was not remanded as against the *pro forma* respondents did not affect the right to a refund; no claim was made against them in the appeal, the plaintiffs having already obtained a decree against them; accordingly the whole appeal was allowed

\*Application in Second Appeal No. 1810 of 1928.

by the High Court and the order of remand covered the whole of the subject-matter in dispute in the appeal. *In the matter of Bhagwanti* (1), distinguished.

*Held*, also, that no refund could be claimed of the court fees paid in the lower appellate court; that court had dismissed the appeal and not passed any order of remand. Section 13 could apply only in respect of the court which passed an order of remand.

*Dr. K. N. Katju*, for the applicants.

The opposite parties were not represented.

SULAIMAN, C.J., MUKERJI and KING, JJ.:—This is an application for the refund of court fees paid in this Court, and there is an oral prayer that the court fee paid in the lower appellate court should be refunded.

The trial court dismissed the suit against defendants 4, 5 and 6 and decreed the claim against defendants 1, 2 and 3. The plaintiffs appealed to the District Judge claiming that a decree should be passed in their favour against defendants 4, 5 and 6 also. They made defendants 1, 2 and 3 *pro forma* respondents. The District Judge dismissed the appeal. On second appeal to this Court the plaintiffs wanted a decree against the defendants 4, 5 and 6 and also made the defendants 1, 2 and 3 *pro forma* respondents. The appeal was in substance directed principally against the defendants 4, 5 and 6. The High Court came to the conclusion that the case should be tried on the remaining issues against these defendants 4, 5 and 6 by the trial court. It accordingly allowed the appeal and set aside the decree of the lower appellate court as well as that of the first court and sent the case back to the first court through the lower appellate court for trial as against defendants 4, 5 and 6.

The plaintiffs now claim that the court fees paid by them should be refunded. The office has reported that inasmuch as the appeal was not allowed as against some of the *pro forma* respondents no refund should be ordered. The office relies on *In the matter of Bhagwanti* (1). This report in our opinion is not correct.

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The case relied upon is distinguishable, because in that case there was a decree dismissing the appeal as against one of the respondents with costs. In the present case the defendants 1, 2 and 3 were mere *pro forma* respondents and no claim was made against them, because the plaintiffs had already obtained a decree against them. The whole appeal accordingly was allowed by the High Court when the case was remanded. In our opinion the order of remand covers the whole of the subject-matter in dispute in the appeal and the plaintiffs are therefore entitled to a refund, under section 13 of the Court Fees Act.

It is equally clear that inasmuch as the whole case was referred to the Full Bench and disposed of by us, it is this Court alone which can order the refund.

The learned counsel for the plaintiffs further contends that inasmuch as the decree of the first court has also been set aside and the case remanded to the first court through the lower appellate court, his clients are entitled to the refund, not only of the court fees paid in the High Court but also of the court fees paid in the lower appellate court. It is, however, clear that the lower appellate court disposed of the appeal completely by dismissing it. It did not pass any order of remand. It is only the High Court which on second appeal passed the order of remand under which the case was sent back to the lower court. Section 13 can apply only when the suit is remanded in appeal and this happened only in the High Court and not before the lower appellate court.

We further find that the practice in this Court has been not to allow a refund of the court fees paid in the lower court when the High Court remands a case. The case of *Kanhaiya Lal v. Mahadei* (1) in our opinion is in conformity with the language of section 13, which contemplates an order for refund by the appellate court which remands the appeal.

(1) (1932) I.L.R., 54 All., 523.

We accordingly direct that a certificate be granted to the plaintiffs appellants authorising them to receive back from the Collector the full amount paid on the memorandum of appeal filed in the High Court.

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## REVISIONAL CRIMINAL

*Before Mr. Justice Kendall*

EMPEROR *v.* SUKHLAL AND ANOTHER\*

1933

November, 7

*Criminal Procedure Code, sections 403(4) and 437—Alleged acts constituting a major offence and a minor offence—Both offences entered in police charge-sheet—Magistrate framed charge on minor offence and acquitted accused—Silence of Magistrate about the major offence—“Discharge”—Revision—Competency of Sessions Judge to direct the commitment of the accused on the major charge.*

The police report or charge-sheet on which a case was instituted in the court of a Magistrate quoted sections 307 and 326 of the Indian Penal Code as applying to the accused. In the course of the trial the Magistrate framed a charge under section 326, and in the end he acquitted two of the accused and convicted two others. No express order of discharge in respect of an offence under section 307 was recorded or pronounced, and there was nothing in the order of the Magistrate to show that he had consciously considered whether section 307 would be applicable to the accused. The complainant applied in revision against the order of acquittal to the Sessions Judge, who ordered that the persons acquitted should be committed to sessions on a charge under section 308 of the Indian Penal Code. *Held*, in revision from this order, that the order was valid. The offence under section 307 was on the charge-sheet forwarded by the police, and although the prosecution may or may not have pressed for a charge under section 307 or 308 being framed, nevertheless there was a case before the Magistrate under section 307 for decision or inquiry, and although he did not pass any orders in regard to that part of the case, it must be held that an order of discharge was implied. As an offence under section 307 was triable exclusively by a court of session, the Sessions Judge had jurisdiction under section 437 of the Criminal Procedure Code to direct that the two accused who had been impliedly discharged of that offence should be

\*Criminal Revision No. 632 of 1933, from an order of Harish Chandra, Sessions Judge, Bareilly, dated the 22nd of August, 1933.