

**Bhatia Brothers, Industrial Area-B and another v. I.T.C. Limited
(an existing Company) and another (R. N. Mittal, J.)**

Shiromani Gurdwara Parbandhak Committee, Amritsar (supra) on a number of objections being raised before the learned Judge hearing the matter on a difference, he thought it safer that the surviving questions in the appeal as well as the third question as to whether this reference could be heard by a Single Judge might be decided by a Full Bench of this Court. The Full Bench proceeded to decide the case on merits but did not advert to the question, whether the reference could be heard by a Single Judge or not. Again in *Mahant Budh Dass and Mahant Purna Nand v. The Shiromani Gurdwara Parbandhak Committee, Amritsar*, (supra), on a difference betwixt the Judges constituting the Division Bench the matter had to be placed before a Full Bench because of the express recommendation made by the Judges composing the Bench that the case should be referred to a larger Bench.

9. It would be evident from the above that it was merely for reasons of safety, propriety and in view of the importance of the issue involved in the said cases that these were referred by the third Judge for decision by a larger Bench. Obviously there is and cannot be any bar in such a situation for the matter to be considered and decided by a larger Bench—may be of three, five or even seven Judges. The real issue herein is whether the hearing by a third Judge alone on a difference of opinion is not warranted by law. None of the aforesaid three judgments laid down anything even remotely on that point. It appears to me that these authorities are plainly wide of the mark.

10. Both on principle and precedent I would, therefore, return the answer to the question formulated at the outset in the negative and hold that the hearing of this appeal by a Single Judge on the point of difference betwixt the learned members of the Division Bench composing the same is perfectly in accordance with law.

H. S. B.

Before R. N. Mittal, J.

BHATIA BROTHERS, INDUSTRIAL AREA-B and another,—
Petitioners.

versus

I. T. C. LIMITED (AN EXISTING COMPANY) and another,—
Respondents.

Regular First Appeal No. 907 of 1977.

September 9, 1980.

Court Fees Act (VII of 1870)—Section 13—Code of Civil Procedure (V of 1908)—Order 41, Rules 23 and 23-A—Appellate Court

remanding a case under Order 41 Rule 23 or 23-A to the trial Court for deciding the matter afresh—Appellant—Whether entitled to the refund of court fee fixed on the memorandum of appeal.

Held, that from a reading of section 13 of the Court Fees Act, 1870 it is evident that if a case is remanded under Order 41 Rule 23 or 23-A, the appellant becomes entitled to the refund of court fee affixed on the memorandum of appeal. (Para 4).

Application under section 13 of the Court Fees Act, 1870, read with section 151, C.P.C. 1908, praying that this Hon'ble Court be pleased to issue a certificate authorising the appellant-petitioners to receive back the full amount of court fee affixed on the memorandum of appeal in the abovenoted regular first appeal from the Collector.

Ujagar Singh, Advocate, for the Petitioners.

O. P. Arora, Advocate, for the Respondents.

JUDGMENT

Rajendra Nath Mittal, J. (Oral).

(1) This order will dispose of Civil Miscellaneous Nos. 594|C-I and 505|C-I of 1980 which contain the same question of law. The facts in the order are being given from C.M. No. 594|C-1 of 1980.

(2) M|s. I.T.C. Limited respondent No. 1 instituted a suit for recovery of rupees 25 lacs and odd against the petitioners and J. L. Bhatia, respondent No. 2 in the Court of Sub-Judge 1st Class, Ludhiana. The suit was decreed against the petitioners on the ground that Mr. Gordhan K. Bhatia failed to appear in pursuance of the order of the Court. The petitioners came up in appeal against the judgment and decree of the trial Court to this Court which was accepted by me,—*vide* judgment, dated January 29, 1980 and the case was remanded to the trial Court for deciding the matter afresh after recording the statement of Mr. Bhatia. The petitioners have now filed an application under section 13 of the Court Fees Act (hereinafter referred to as the Act) for issuing a certificate authorising them to receive back from the Collector the full amount of court fee stamp paid on the memorandum of appeal.

(3) It is contended by the learned counsel for the petitioners that the case was remanded by this Court Order 41, Rule 23-A of

**Bhatia Brothers, Industrial Area-B and another v. I.T.C. Limited
(an existing Company) and another (R. N. Mittal, J.)**

the Code of Civil Procedure, 1908 (hereinafter referred to as the Code) for deciding the matter afresh. According to him, the petitioners are entitled to the refund of the court fee under section 13 of the Act as the case has been remanded by this Court.

(4) I have given due consideration to the argument of the learned counsel for the petitioners and find force in his contention. Section 13 of the Act relates to refund of fee paid on memorandum of appeal. Its relevant portion reads as follows:—

“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 451 of the same Code for a second decision by the lower Court, the Appellate Court shall grant to the appellant a certificate, authorising him to receive back from the Collector the full amount of fee paid on the memorandum of appeal.”

From a reading of the section it is evident that if a case is remanded under section 351 of the Code the appellant becomes entitled to the refund of the Court-fee. The Code of Civil Procedure which was in force at the time of enactment of the Court Fees Act was that of 1859. The equivalent provisions of section 351 in the Code of Civil Procedure in force now are Order 41, Rules 23 and 23-A. Therefore, if case is remanded under Order 41, Rule 23 or 23-A, the appellant is entitled to refund of the court-fee under section 13 of the Act.

(5) In the aforesaid view, I am fortified by the observations of the Supreme Court in *State of Uttar Pradesh v. Chandra Bhushan Misra* (1). That appeal was against a decision of the Allahabad High Court. The Allahabad High Court had amended Rule 23 of Order 41 and had incorporated in it that if the appellate Court while reversing or setting aside the decree under appeal considered it necessary in the interest of justice to remand the case, it may do so. The amended Rule reads as follows:—

“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, or where the appellate Court, while reversing or setting aside the decree under appeal, considers it necessary in the interest of justice to remand

(1) A.I.R. 1980 S. C. 591.

the case, it may by order remand the case." (emphasis supplied).

The Supreme Court held that the amendment of the Rule shall be deemed to be an amendment in the Code and the appellant shall be entitled to the refund of the court-fee even though the remand has been made under the amended portion of the Rule. The relevant observations of O. Chinnappa Reddy, J., speaking for the Bench are as follows:—

"Refund of Court-fee paid in appeal can be ordered under section 13 of the Court Fees Act even where the remand is made in the interest of justice as provided by the provisions of O.41, R. 23 as amended by the High Court of Allahabad. The provisions of sections 2(1), 2(18), 121, 122 and 127, C.P.C. make it abundantly clear that the rules made by a High Court altering the rules contained in the first schedule as originally enacted by the legislature shall have the same force and effect as if they had been contained in the first schedule and therefore, necessarily became part of the Code for all purposes. That is the clear effect of the definitions of the expressions 'Code' and 'Rules' and sections 121, 122 and 127. Therefore, it cannot be said that the reference to any provision of the Code of Civil Procedure, 1908 pursuant to section 158 of the Code must be to a provision occurring in the body of the main Code consisting of the provisions from section 1 to section 158 and not to the provisions of the rules in the first schedule. It cannot also be said that even if reference to the rules in the first schedule was permissible it should only be to the rules as enacted by the legislature itself and not as amended by the High Court."

After the amendment of the Code of Civil Procedure, 1908 by the Code of Civil Procedure (Amendment) Act, 1976, Rule 23-A has been incorporated in the Code, which is to the same effect as was the amendment incorporated by the Allahabad High Court under Rule 23 of Order 41. Order 41, Rule 23-A reads as follows:—

"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 re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23."

Maruti Limited v. B. G. Shirke and Co. and others (P. C. Jain, J.)

Similar amendment was made by this Court and Rule 23-A had earlier been incorporated in the Code of 1908. In view of the observations by the Supreme Court if section 13 of the Act is read along with Rule 23-A of the Code of 1908, the appellants are entitled to refund of the court-fee because the decree was reversed by the appellate Court and retrial was considered necessary by it. A contrary view had been taken by this Court in *Jawahar Singh Sobha Singh v. Union of India and others* (2), and *Krishan Sarup Oberoi v. Ram Niwas* (3). The aforesaid judgments, however, are impliedly overruled by the Supreme Court in *Chandra Bhushan Misra's case* (supra).

(6) No other argument was raised in Civil Miscellaneous No. 595|C-I of 1980.

(7) For the aforesaid reasons, I accept the petitions and direct that necessary certificate authorising the petitioners to receive back from the Collector the full amount of court-fee on the memorandum of appeal as contemplated by section 13 of the Act, be issued to them. No costs.

Before P. C. Jain & B. S. Dhillon, JJ.

MARUTI LIMITED,—Petitioner.

versus

B. G. SHIRKE AND CO. and others,—Respondents.

C. A. No. 93 of 1978 in

C. P. No. 60 of 1978.

September 11, 1980.

Companies Act (I of 1956)—Sections 9 and 446(2)—Arbitration Act (X of 1940)—Sections 34—Agreement to refer disputes to arbitration executed by a Company—Such Company ordered to be wound up—Arbitration agreement—Whether continues to bind the company after the winding up order.

(2) A.I.R. 1958 Punjab 38.

(3) A.I.R. 1975 Punjab and Haryana 22.