

GAHC010095322018



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : WP(C)/2919/2018

PRAFULLA GOVINDA BARUAH,
S/O- LT RADHA GOVINDA BARUAH,
R/O- H/NO. 47, NABAGIRI ROAD,
GUWAHATI-781004.

.....**Writ Petitioner**

---VERSUS---

1.THE STATE OF ASSAM AND ANR.,
REP. BY THE CHIEF SECRETARY TO THE GOVT. OF ASSAM,
DISPUR, GUWAHATI-781006.

2:THE SECRETARY CUM LEGAL REMAMBRANCER,
JUDICIAL DEPTT., GOVT. OF ASSAM,
DISPUR, GUWAHATI- 781006.

.....**Respondents**

Linked Case : WP(C)/283/2024

ANVEEKSHA VARMA,
D/O- LATE PP VARMA,
R/O- A 153, DEFENCE ENCLAVE,
KANKARKHERA, MEERUT,
UTTAR PRADESH, PIN- 250001.

.....**Writ Petitioner**

---VERSUS---

1.THE STATE OF ASSAM AND ANR,
REPRESENTED BY THE CHIEF SECRETARY TO THE GOVERNMENT OF
ASSAM, DISPUR, GUWAHATI-781006.

2:THE SECRETARY CUM LEGAL REMEMBRANCER,
JUDICIAL DEPARTMENT,
GOVERNMENT OF ASSAM,
DISPUR, GHY-781006.

..... **Respondents**

- BEFORE -

**HON'BLE THE CHIEF JUSTICE MR. VIJAY BISHNOI
HON'BLE MR. JUSTICE N. UNNI KRISHNAN NAIR**

For the Petitioner(s) : Mr. P. Sinha, Advocate assisted by Mr. R. Dubey, Advocate for the petitioner in WP(C) No.2919/2018.

: Mr. R. Choudhury, Advocate (through Video Conferencing) assisted by Mr. N. Gautam, Advocate for the petitioner in WP(C) No.283/2024.

For the respondent(s) : Mr. D. Nath, Senior Government Advocate, Assam assisted by Ms. R.B. Bora, Junior Government Advocate, Assam and Mr. N. Kalita, Government Advocate, Assam.

Date of Hearing : 08.05.2024

Date of Judgment : 14.05.2024.

JUDGMENT & ORDER (CAV)

[Vijay Bishnoi, CJ]

These two writ petitions are preferred by the petitioners under Article 226 of the Constitution of India challenging the constitutional validity of Article 11 of Schedule 1 of the Court Fees Act, 1870 (Assam Amendment) brought into effect by the Assam Court Fees (Amendment) Act, 1950 in respect of levy of Court fee for grant of probate or letter of administration at the rate of 7% *ad valorem*

where the value of properties exceeds Rs.5,00,000/- without there being any upper limit fixed.

2. Since both the writ petitions question validity of above referred provisions of law, the facts of the writ petition, WP(C) No.2919/2018 are taken into consideration for the sake of convenience.

3. On 17.05.2010, late Tulsi Govinda Barua, brother of the petitioner in WP(C) No.2919/2018, who expired on 17.11.2012, executed his last Will and Testament, and the petitioner, being named as the Executor in the Will, applied for grant of probate before the learned District Judge, Kamrup, Guwahati. Vide order dated 18.11.2013, the learned District Judge, Kamrup, Guwahati granted probate of the last Will subject to the payment of due Court fees on the present value of the property likely to come in the hands of the beneficiaries. As per the valuation of the properties involved, the same came around Rs.3 Crores and the Court fees on the said value is required to be paid which is more than Rs.28 Lakhs.

4. Learned counsel for the petitioner in WP(C) No.2919/2018 has submitted that the petitioner is above 90 years of age and he is simply an Executor and not the beneficiary and as a huge amount of Court fees was required for getting the probate, the petitioner could not pay the Court fee. The petitioner was suggested various options from different sources but none seemed to be feasible option for him and recently, he has been advised that the provisions regarding the levy of Court fee can be challenged and, therefore, he has filed this writ petition under Article 226 of the Constitution of India challenging the constitutional validity of levy of Court for grant of probate under Article 11 of Schedule 1 of the Court Fees Act, 1870 (Assam Amendment) brought into effect by the Assam Court Fees (Amendment) Act, 1950 at the

rate of 7% of properties exceeding Rs.5,00,000/- without there being any upper limit fixed.

5. Similarly, as the amount of Court fee required to be paid for getting probate being the executor of one of the properties mentioned in the last will of her father is huge, the petitioner in WP(C) No.283/2024 has approached this Court by filing the writ petition challenging the impugned Article 11 of Schedule I of the Court Fee (Amendment) Act, 1950 in respect of levy of Court fee for grant of probate or letter of administration at the rate of 7% *ad voleram* where value of properties exceeds Rs.5,00,000/- being *ultra vires* of the Constitution of India.

6. Learned counsel for the petitioners have argued that the Court Fees Act is a measure to regulate the fees taken in course of public offices and fees taken in respect of certain matters in the State. It is a charge taken in return of services rendered and such charge should be commensurate to the services given in exchange. It is argued that persons who go to the Civil Courts claiming decrees are not required to pay Court fees in excess of Rs.11,000/- in the State of Assam though the suits and the other proceedings are more complex in nature in comparison to the Testamentary proceedings. The Testamentary proceedings are simple in nature involving less time and less strain upon the Courts vis-à-vis the other types of litigations which the Courts have to handle. It is contended that despite all these, the impugned Article 11 prescribes an ascending scale of fees for persons desirous of obtaining probate or letter of administration. The fees ranges from 2% to 7 % -even charge leviable goes on increasing from slab to slab, without there being any upper limit fixed though in almost all such cases, there is no contest as such. It is argued that the discrimination embodied in the impugned Article 11 of the Court Fees Act, 1870

(Assam Amendment) brought into effect by the Assam Court Fees (Amendment) Act, 1950 is violative of Article 14 of the Constitution of India.

7. Learned counsel for the petitioners have invited our attention to the provisions of Maharashtra Court Fees Act, 1959 and has argued that Section 29(1) of the said Act stipulates that when the amount of the value of the property in respect of which grant of probate or letter of administration is claimed exceeds Rs.3 lakhs, the Court fees would be 7½% of the valuation subject to the maximum of Rs.75,000/- in the State of Maharashtra. It is further argued that the Karnataka Court Fees and Suits Valuation Act, 1958 prescribes fees to be given on probate maximum up to Rs.30,000/- and similar provisions are also there in Kerala Court Fees and Suits Valuation Act, 1959 Tamil Nadu Court Fees and Suits Valuation Act, 1965 and West Bengal Court Fees Act, 1970.

8. It is submitted by the learned counsel for the petitioners that the impugned Article 11 prescribes an ever increasing percentage of fee payable in the Court which cannot be equated to taxes. It is submitted that fees recoverable under the Court Fees Act are Court fees and such Court fees are free and distinct from taxes.

9. In support of the above contentions, learned counsel for the petitioners have placed reliance on the decisions of the Hon'ble Supreme Court rendered in
(i) ***The Secretary, Government of Madras, Home Department & Anr. Vs. Zenith Lamp and Electrical Ltd.***, reported in **(1973) 1 SCC 162**;
(ii) ***P.M. Ashwathanarayana Setty & Ors. Vs. State of Karnataka & Ors.***, reported in **1989 Supp (1) SCC 696** and (iii) ***Secretary to Government of Madrass Vs. P.R. Sriramulu & Anr.***, reported in **(1996) 1 SCC 345**.

10. Opposing the writ petitions, learned counsel appearing for the State has argued that the matter relating to Court fees for grant of Probate was referred to the Finance Department and the Finance Department is of the view that upon calculating such *ad valorem* fee, the Government of Assam has prepared the Receipt Budget. It is submitted that in case of any rebate on such fee, it may lead to drastic reduction of Receipt Budget which in turn may lead to serious destabilization of expenditure estimated in the Annual statement of Expenditure of the Government causing financial constraints for undertaking various developmental activities in important sectors, like- health, education, agriculture etc.

11. It is contended by the learned counsel for the State that any rebate on such fee from other States cannot be imposed in the State of Assam as different States have different financial conditions of revenue generations and expenditure on developmental activities. It is contended that in such circumstances, the Finance Department decided to stick to the present prevailing rate of *ad valorem* fee of 7% on the value of property for obtaining probates.

12. It is further argued by the learned counsel for the State that the essential character of impost is that some special service is intended or envisaged as a “*quid pro quo*” to the class of citizens which is entitled to be benefited by the service and there is a broad and general correlation between the amount so raised and the expenses involved in providing the service, the impost would partake the character of a “fee” notwithstanding the circumstance that the identity of the amount so raised is not always kept distinguished but is merged in the general revenues of the State. It is therefore prayed that the Article 11 of Schedule 1 of the Court Fees Act, 1870 (Assam Amendment)

brought into effect by the Assam Court Fees (Amendment) Act, 1950 is not violative of any of the provisions of the Constitution of India and therefore, no case for interference is made out.

13. Now, it is well settled that the Court fees taken in the Courts are not the taxes. In the various pronouncements of the Hon'ble Supreme Court, it is clearly held that before any levy can be upheld as a fee it must be shown that the levy has reasonable correlation with the services rendered by the Government. It must be provided to have a "*quid pro quo*" for the services rendered. It is held that fee must have relation to the administration of civil rights while levying fees the appropriate Legislature is required to take into account all relevant factors.

It is also held that the legislature cannot compel the litigants to contribute in increasing the Government coffers to be used for roads, building, education and other schemes launched for general benefit.

14. The Hon'ble Supreme Court in ***Zenith Lamp and Electrical Ltd.*** (supra), has held as under:

"29. It seems to us that the separate mention of 'fees taken in court' in the Entries referred to above has no other significance than that they logically come under Entries dealing with administration of justice and courts. The draftsman has followed the scheme designed in the Court Fees Act, 1870 of dealing with fees taken in court at one place. If it was the intention to distinguish them from fees in List II, Entry 66, surely some indication would have been given by the language employed. If these words had not been separately mentioned in List I, Entry 77 and List II, Entry 3, the court-fees would still have been levied under List I, Entry 96 and List II, Entry 66.

30. It seems plain that 'fees taken in court' are not taxes, for if it were so, the word 'taxes' would have been used or some other indication given. It seems to us that this conclusion is strengthened by two considerations. First, taxes that can be levied by the Union are mentioned in List I from Entry 82; in List II taxes that can be imposed start from Entry 45. Secondly,

*the very use of the words 'not including fees taken in any court' in Entry 96, List I, and Entry 66, List II' shows that they would otherwise have fallen within these Entries. It follows that 'fees taken in Court' cannot be equated to 'Taxes'. If this is so, is there any essential difference between fees taken in Court and other fees.? We are unable to appreciate why the word 'fees' bears a different meaning in Entries 77, List I and Entry 96, List I or Entry 3 List II and Entry 66, List II. All these relevant cases of the nature of 'fees' were reviewed in **The Indian Mica and Micanite Indus tries Ltd. v. The State of Bihar and others, (1971) 2 SCC 236**, by Hegde, J. and he observed :*

"From the above discussion, it is clear that before any levy can be upheld as a fee, it must be shown that the levy has reasonable correlationship with the services rendered by the Government. In other words, the levy must be proved to be a quid pro quo for the services rendered. But in these matters it will be impossible to have an exact correlationship. The correlationship expected is one of a general character and not as of arithmetical exactitude".

31. But even if the meaning is the same, what is 'fees' in a particular case depends on the subject-matter in relation to which fee are imposed. In this case we are concerned with the administration of civil justice in a State. The fees must have relation to the administration of civil justice. While levying fees the appropriate Legislature is competent to take into account all relevant factors, the value of the subject- matter of the dispute, the various steps necessary in the prosecution of a suit or matter, the entire cost of the upkeep of courts and officers administering civil justice, the vexatious nature of a certain type of litigation and other relevant matters. It is free to levy a small fee in some cases, a large fee in others, subject of course to the provisions of Art. 14. But one thing the Legislature is not competent to do, and that is to make litigants contribute to the increase of general public revenue In other words, it cannot tax litigation, and make litigations (sic litigants) pay, say for road, building or education or other beneficial schemes that a State may have. There must be a broad correlationship with the fees collected and the cost of administration of civil justice."

(Emphasis Supplied)

- 15.** The said decision rendered by the Hon'ble Supreme Court in **Zenith Lamp and Electrical Ltd.** (supra) has also been taken into consideration in the later decisions of the Hon'ble Supreme Court rendered in **P.M.**

Ashwathanarayan Setty (supra) and **P.R. Sriramulu** (supra).

16. The State Government in its counter affidavit has justified in not fixing the upper limit in the cases of grant of probate by stating that the Finance Department has not thought it fit to grant relief to the seekers of probate despite the fact that the persons seeking decrees through civil suit are getting the benefit of such an upper limit because fixing any upper limit of Court fees in probate case may result in financial constraints which may affect the developmental works undertaken by the Government in sectors like health, education, agriculture etc.

In our view the stand of the State Government cannot be approved in view of the above authoritative pronouncements of the Hon'ble Supreme Court.

17. The Hon'ble Supreme Court in **P.M. Ashwathanarayan Setty** (supra) had occasion to examine the provisions of the Bombay Court Fees Act, 1959, wherein applications for grant of probate and letter of administration *ad valorem* Court fees was required to be paid without the benefit of upper limit.

18. In para 31(d) of the above judgment, the Hon'ble Supreme Court has framed the question and answered the same in following manner:

“31.

31.(d) Whether, insofar as the provisions of Section 29(i) read with entry 20 Schedule I of the ‘Bombay Act’ are concerned, singling out of a class of litigation viz., applications for grant of probate and letters of administration for levy of ad valorem court fee without the benefit of the upper limit of Rs.15,000 prescribed in respect of all other suits and proceedings, as declared by the High Court, exposes that class of litigants to a hostile discrimination and is violative of Article 14 of the Constitution.”

.....
“Re Contention (d)

90. In the appeal of the State of Maharashtra arising out of the

Bombay Court Fees Act, 1959, the High Court has struck down the impugned provisions on the ground that the levy of court fee on proceedings for grant of probate and letters of administration ad valorem without the upper limit prescribed for all other litigants--the court fee in the present case amounts to Rs.6,14,814--is discriminatory. The High Court has also held that, there is no intelligible or rational differentia between the two classes of litigation and that having regard to the fact that what is recovered is a fee, the purported classification has no rational nexus to the object. The argument was noticed by the Learned Single Judge thus:

Petitioners next contend that the impugned clause discriminates as between different types of suitors and that there is no justification for this discrimination. Plaintiffs who go to civil courts claiming decrees are not required to pay court fees in excess of Rs.15,000. This is irrespective of the amounts claimed over and above Rs.15 lakhs. As against this, persons claiming probates have no such relief in the form of an upper limit to fee payable.

91. This contention was accepted by the learned Single Judge who has upheld the appeal. Indeed, where a proceeding for grant of probate and letters of administration becomes a contentious matter, it is registered as a suit and proceeded with accordingly. If in respect of all other suits of whatever nature and complexity an upper limit of Rs.15,000 on the court fees is fixed, there is no logical justification for singling out this proceeding for an ad valorem impost without the benefit of some upper limit prescribed by the same statute respecting all other litigants. Neither before the High Court--nor before us here--was the impost sought to be supported or justified as something other than a mere fee, levy of which is otherwise within the State's power or as separate 'fee' from another distinct source. It is purported to be collected and sought to be justified only as court fee and nothing else.

92. The discrimination brought about by the statute, in our opinion, fails to pass the constitutional muster as rightly pointed out by the High Court. The High Court, in our opinion rightly, held:

There is no answer to this contention, except that the legislature has not thought it fit to grant relief to the seekers of probates, whereas plaintiffs in civil suits were thought deserving of such an upper limit. The discrimination is a piece of class legislation prohibited by the guarantee of equal protection of laws embodied in Article 14 of the Constitution. On this ground also item 10 cannot be sustained.

93. We approve this reasoning of the High Court and the decision of the High Court is sustained on this ground alone. In view of this any other ground urged against the constitutionality of the levy is unnecessary to be examined.

94. Contention (d) is accordingly held an answer against the appellant and the appeals preferred by the State of Maharashtra are liable to be and are hereby dismissed."

19. In view of the above settled position of law, if we examine, it is clear that Article 11 of Schedule 1 of Court Fees Act, 1870 (Assam Amendment) brought into effect by the Assam Court Fees (Amendment) Act, 1950 provides levy of Court fees for grant of probate or letter of administration at the rate of 7% *ad valorem* where the value of the properties exceeds Rs.5,00,000/- without there being any upper limit, whereas a person, who approaches the Civil Court claiming decrees, is required to pay Court fees not excess of Rs.11,000/- in the State of Assam.

It cannot be denied that the proceedings for grant of probate and letters of administration are also registered as suits and proceeded with accordingly but in respect of other suits an upper limit of Rs.11,000/- on the Court fee is fixed in the State of Assam, whereas in the case of grant of probate, where the value of properties exceeds Rs.5,00,000/-, no upper limit Court fees is fixed. In our view, it cannot be justified to single out the proceedings for grant of probate or letter of administration for an *ad valorem* without the benefit of any upper limit though it is prescribed in the very same statute for all other litigants.

In such circumstances, we have no hesitation in holding that Article 11 of Schedule I of Court Fees Act, 1870 (Assam Amendment) brought into effect by the Assam Court Fees (Amendment) Act, 1950 in respect of levy of Court fee for grant of probate or letter of administration at the rate of 7% *ad valorem* where the value of properties exceeds Rs.5,00,000/- without there being any upper

limit fixed is *ultra vires* to the Article 14 of the Constitution of India and the same is held as such.

20. The Hon'ble Supreme Court in the case of **P.R. Sriramulu** (supra) has observed as under:

“22. Before parting with these matters, we may point out that it could not be disputed that the administration of justice is a service which the State is under an obligation to render to its subject. There can be no two opinions that the amount raised from the suitors by way of way of fee should not normally exceed the cost of the administration of justice because, possibly there could be no justification with the State to enrich itself from high court fees or to secure revenue for general administration. The total receipts from the court fees should be such as by and large can cover the cost of administration of justice. There should also be some measure of uniformity in the scales of court fees throughout the country as there appears to be a vast difference in the scales of court fees in various States of the country. The feasibility of a fixed maximum chargeable fee also deserves serious consideration.”

21. In our view, it is high time for the State Government to take into consideration the matter regarding levy of court fees and to make effort to bring rationalization on levy of court fees in the proceedings filed before the Courts.

22. With the above observations and directions, the present writ petitions stand disposed of.

JUDGE

CHIEF JUSTICE

Comparing Assistant