A SECRETARY, GOVERNMENT OF MADRAS, HOME DEPARTMENT AND ANOTHER

v.

ZENITH LAMP & ELECTRICAL LTD.

November 10, 1972

B [S. M. SIKRI, C.J., A. N. RAY, D. G. PALEKAR M. H. BEG AND S. N. DWIVEDI, JJ.]

Madras Court Fees and Suits Valuation Act 14 *of* 1955—*High Court Fees Rules* 1956, *Rule* 1—*Enhancement of Court-fee on* ad valorem *basis—Validity of—Court fees whether fees or tax, factors to be taken into consideration for determining—Phrase "Fees taken in Court" in List I Entry* 77 *and List II Entry* 3 *of Seventh Schedule to Constitution of India,* C *meaning of.*

The respondent petitioners intended to file a suit in the Madras High Court on the original side valued at Rs. 2,06,552, against the Revenue. The petitioner filed a writ petition in the High Court on the question of court-fee payable in the intended suit praying that the High Court may be pleased to issue a writ of *mandamus* or other direction or order declaring Rule 1 of the High Court Fee Rules 1956 and the provisions of the D Madras High Court Fees and Suits Valuation Act 14 of 1955 to be invalid and *ultra vires* insofar as they related to the levy of fees on *ad valorem* scale. It was urged that the increase made in 1955 and 1956 in the court fees payable was unjustifiable in the light of the expenditure actually incurred in the administration of civil justice. In its counter-affidavit the State urged that the rates of fee prescribed under the Court Fees Act of 1955 were not excessive and that the levy did not amount to a tax on litigation. A supplemental affidavit was filed on behalf of the E State on October 11, 1966 in which various statements were given to show that the expenditure on the administration of justice was higher than the receipts. The petitioner objected that there were several inadmissible items which had been taken into account. The High Court struck down the levy found in Art. 1 of Schedule 1 of the Madras Court Fees and Suits Valuation Act 1955 in its application to the High Court. With certificate, appeal was filed in this Court. The Court had to consider whether the F "fees taken in court" in Entry 3 List II Schedule VII of the Constitution are taxes or fees or whether they are *sui generis.*

Allowing the appeal,

Held : (i) The history of court fees in England as well as in India shows that fees taken in court were not levied as taxes and the costs of administration was always one of the factors that was present.

G (ii) 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. 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 H within these Entries. It follows that "fees taken in court" cannot be equated to 'Taxes'. There is no essential difference between fees taken in Court and other fees. It is difficult 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. [982 A-C]

(iii) But even if the meaning is the same, what is 'fees' in a particular case depends on the subject-matter in relation to which the fees are imposed. The present case related to 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 certain types 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 pay, say for road building or education or other beneficial schemes that a State may have. There must be a correlationship between the fees collected and the cost of administration of civil justice. [982 F-H]

(iv) The phrase 'fees taken in court' cannot be interpreted to mean that it described fees which were actually being taken before the Constitution came into force. If that was the meaning, no fees could be levied in the Supreme Court because the Supreme Court did not exist before the Constitution came into force and no fees were being taken therein. This would render part of the Entry of List I nugatory. [983 A-B]

(v) The contention that fees taken in court are taxes because by virtue of Art. 266 all fees, being revenues of the State will be credited to the Consolidated Fund, could not be accepted. This Court has held that the fact that an item of revenue is credited to the Consolidated Fund is not conclusive to show that it is an item of tax. As Art. 266 requires that all revenues received by the State have to go to the Consolidated Fund, not much stress can be laid on this point. Fees and taxes are both revenue for the State. [983 C; 984 H]

(vi) The High Court rightly held in the present case that the fees taken in Courts are not a category by themselves and must contain the essential elements of the fees as laid down by this Court. The High Court was also right in holding that it is for the State to establish that what has been levied is court-fees properly so-called and if there is any enhancement the State must justify the enhancement. [988 D; 989 D]

(vii) The State had claimed in its supplementary affidavit that the State was not making any profit out of the administration of civil justice. Since this had been questioned by the respondents the case must be remanded to the High Court for determination of the question. Various items both on the receipts side and the expenditure side must be carefully analysed to see what items or portion of items should be credited or debited to the administration of civil justice. [989 C-D]

Case law considered.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 993 of 1967.

Appeal by certificate from the judgment and order dated March 31, 1967 of the Madras High Court in Writ Petition No. 1743 of 1964.

A *S. Govind Swaminandan,* Advocate-General of Tamil Nadu, *S. Mohan, N. S. Sivan, K. Rajendra Choudhry* and *K. R. Choudhry,* for the appellant.

R. Thiagarajan, for respondent No. 1.

K. R. Choudhry, for respondent No. 2.

B *A. R. Somnatha Iyer* and *S. Lakshminarasu,* for interveners Nos. 1-3.

V. M. Tarkunde and *B. D. Sharma* for interveners Nos. 1-3.

S. N. Choudhry, for intervener No. 5.

Syed Mahamud, and *A. G. Pudisssery,* for intervener No. 5.

C

K. K. Sinha, S. K. Sinha and *B. P. Sinha,* for intervener No. 7.

V. S. Raman and *Vineet Kumar,* for intervener No. 8.

S. V. Gupte, A. V. Diwan, P. C. Bhartari, J. B. Dadachanji,
D *O. C. Mathur* and *Ravinder Narain,* for intervener No. 9.

A. Subba Rao, for intervener No. 10.

The Judgment of the Court was delivered by

SIKRI, C. J.—This appeal, by certificate granted by the High Court, is directed against the judgment dated March 31, 1967 of
E the High Court of Madras, in *Zenith Lamps and Electricals Ltd.* v. *The Registrar, High Court, Madras*(1) given in Writ Petition No. 1743 of 1964 (and Writ Petition No. 3891 of 1965). Messrs Zenith Lamps and Electrical Limited, respondent before us and hereinafter referred to as the petitioner, intended to file a suit in the Madras High Court, on the original side, claiming a relief
F valued at Rs. 2,06,552, against the Revenue. The petitioner filed Writ Petition No. 1743 of 1964 on the question of court-fee payable on the intended suit, praying that the High Court may be pleased to issue a writ of *mandamus* or other direction order declaring Rule 1 of the High Court Fees Rules, 1956, and the provisions of the Madras Court Fees and Suits Valuation Act (Madras Act XIV of 1955) to be invalid and *ultra vires* insofar
G as they relate to the levy of fees on *ad valorem* scale. It was contended that Rule 1 of the High Court Fees Rules, 1956, was void and *ultra vires* because the Madras Court Fees and Suits Valuation Act (XIV of 1955) which had been applied in these Rules was void and *ultra vires.* Various reasons were given in the petition for alleging that the impugned Rule was void. It
H was stated *inter alia* that there was no justification at all for the increase of court-fees in 1955 and 1956 on the basis of civil

(1) I.L.R. [1968] 1 Mad. 247.

litigants being made to pay fees covering the expenditure on civil litigation. It was alleged that 'whenever an increase is contemplated, it is for the authority to justify by facts and figures such increase by showing that actual expenditure at the time exceeds the fee income. The petitioner alleged that "judged by this test, the increases of 1955 were without any legal or actual justification." It was further alleged that the State was proceeding on the basis that the court-fees had to compensate the Government both for the cost of civil as well as criminal administration, which was unwarranted. In ground D it was alleged :

> "From the figures of 1963-64 available from the budget for 1964-65, it is seen that the fees levied exceeds the cost of administration of civil justice. The figures have further to be scrutinised and amended so that in-admissible items such as fees of Government's Law Officers are eliminated as it is not the duty of litigant public generally to bear the expense of the State's Law Officers."

In ground E it was alleged that it was *ultra vires* and inequitable to levy an *ad valorem* fee without limit from the petitioner in a single proceeding.

Various other reasons were given but it is not necessary to set them out.

The State filed an affidavit in reply maintaining that Rule 1 of the High Court Fees Rules, 1956, and the Madras Court Fees and Suits Valuation Act, 1955 (Madras Act XIV of 1955) were legal and valid. It was stated that the rates of fees prescribed under the Court Fees Act of 1955 were not excessive and that the levy did not amount to a tax on litigants. The State gave figures to show that the expenditure on the administration of justice was higher during the year 1954-55 than the fees realised. The State rebutted the contention that the cost of criminal administration and the fees paid to Government Law Officer should not be taken into account in justifying court fees.

This affidavit was filed on March 6, 1965. It appears that a supplemental counter-affidavit on behalf of respondents 2 and 3 was filed on October 11, 1966. In this affidavit various statements were given to show that the expenditure on the administration of justice was higher than the receipts.

The petitioner took objection to the filing of the supplemental counter-affidavit at that stage because it was filed after the arguments had started. It was contended that the figures given in the counter-affidavit would require drastic scrutiny. It was also

A alleged that various inadmissible items had been taken into account; for example, the expenditure on law officers had been taken into consideration.

The High Court struck down the levy found in Article 1 of Schedule 1 of the Madras High Court Fees and Suits Valuation Act, B 1955, in its application to the High Court. As it was not contended before the High Court that the result of striking down article 1 of schedule 1 in its application to the High Court would necessitate the declaration of the invalidity of the entire Court Fees Act, it refrained from examining the position.

The State having obtained certificate of fitness filed the appeal C which is now before us. We may mention that the petitioner was not interested in pursuing the appeal and it prayed that if the appeal is decided against it no order may be made against it for costs in the circumstances of the case.

We issued notice to the Advocates-General and a number of States have appeared before us.

D The first question that arises out of the arguments addressed to us is : What is the nature of "fees taken in court" in entry 3 List II Schedule VII of the Constitution ? Are they taxes or fees or are they *sui generis* ? It is necessary that there should not correlationship between 'fees taken in Court' and the cost of administration of civil justice ? Dr. Syed Mohammed has on behalf E of the State of Kerala urged that fees taken in Court are taxes *simpliciter*. The Advocate-General of Madras had urged that they are *sui generis*, and that they are more in the nature of taxes than in nature of fees. Mr. Tarkunde has urged that it would be wrong to regard them as 'fees' of the same nature as fees in Entry 65 List II. The answer depends on the correct interpreta- F tion of various entries in the three Legislative Lists and several articles of the Constitution. In the background must be kept the history of fees taken in Courts in the past both in England and India.

Let us first look at the background. According to *Holdsworth*(1) the Judges, from the first, were paid salaries by the G Crown which in the course of years were increased. "But from the earliest times, the salaries of the Judges had not formed their only source of income. Though they did not hold their offices as their freeholds, though they could be dismissed by the Crown, they nevertheless drew a considerable part of their income from fees". "When the income of the Judges from fees was taken H away in 1826 their salaries were raised from £ 2400 a year to £ 5500."

(1) History of English Law—W.S. Holdsworth—Seventh Edn. vol., I, page 252-254.

As far as the officials of the courts were concerned "the earliest information which we get about the officials of the courts of common law shows that they were paid almost entirely by fees. In fact it would be true to say that the official staff of all the central courts (except the Lord Chancellor and the judges) was almost entirely self-supporting." "But probably the largest part of the remuneration of the official staff of the courts came from fees in connection with the very numerous acts that must be done to set and keep in motion the complicated machinery of the courts, from the issue of the original writ to the execution of final judgment." (Holdsworth—P. 256)

In the Dictionary of English Law by Earl Jowitt (Vol. 1 P. 791) it is stated;

> "Fees, perquisites allowed to officers in the administration of justice as a recompense for their labour and trouble, ascertained either by Acts of Parliament, by rule or order of court, or by ancient usage, in modern times frequently commuted for a salary, e.g. by the Justice Clarks Act, 1877."
>
> "Although, however, the officers of a court may be paid by salary instead of the fees, the obligation of suitors to pay fees usually remains, these fees being paid into the fund out of which the salaries of the officers are defrayed. In the Supreme Court they are collected by means of stamps under the Judicature Act, 1875, s. 26, and order of 1884, and the Supreme Court Fees Order, 1930 (as amended)."
>
> "The mode of collecting fees in a public office is under the Public Office Fees Act, 1879 (repealing and replacing the Public Office Fees Act, 1866), by stamps or money, as the Treasury may direct."

At present "the Lord Chancellor has also power, with the consent of at least three judges of the Supreme Court and the concurrence of the Treasury, to fix fees to be taken in the High Court and the Court of Appeal or in any court created by the commission. Under the powers referred to, the Rules of the Supreme Court, 1883 and the Supreme Court Fees Order, 1930, were made(1)."

The English history shows that a very close connection existed between fees and cost of administration of civil justice. In the beginning, they were directly appropriated by the court officials. The existing law shows that fees are not taxes. It is not usual to delegate taxing powers to judges.

(1) *vide* Halsbury's Laws of England, Vol. 9 p. 422—423.

A In India according to the Fifth Report on East India Affairs Vol. 1 (1812), chapter, 'The civil courts of Justice', "the chouthay or fourth part of the value of property recovered in a court of judicature, seems to be considered in most parts of the Indian Peninsula as the compensation or fee due to the ruling power for the administration of justice." This was abolished on the acces-
B sion of the British power to the Government of Bengal, and in lieu of it, the introduction of a small percentage on the institution of a suit has been noticed.

The first legislative measure which has been brought to our notice is the Bengal Regulation XXXVIII of 1795. In the preamble, it is stated that the establishing of fees on the institution
C and trial of suits, and on petitions presented to the courts was considered the best method of putting a stop to the abuse of bringing groundless and litigious suits. There are various sections of the Regulation which allow fees to be appropriated by the Judges.

In section 11(4) it was laid down :

D

> "The Munsiffs are to appropriate the fees they may collect under this section, to their own use, as a compensation for their trouble and an indemnification for the expense which they may incur in the execution of the duties of their office".

E Similarly under section III(6), the "Register" was entitled to appropriate the fees, collected under this section. Similarly subsection (7) of section III enabled the Commissioners to appropriate the fees. But fees under section IV to be paid on the trial of suits, tried in the first instance by the Judges of the Zillah and City Courts or by their Registers were to be carried to the account of Government. Similarly various other fees were
F carried to the account of Government.

In the preamble to Bengal Regulation VI of 1797, the object is stated to be to discourage litigations, complaints and the filing of superfluous exhibits and the summoning of unnecessary witnesses on the trial of suits and also to provide for deficiency which
G would be occasioned in the public revenue by abolition of the police tax as well as to add eventually public resources, without burdening individuals. The same object of discouraging litigation is stated in clause 1 of the Bombay Regulation VIII of 1802.

In the Statement of Objects and Reasons for the Court Fees Bill, 1869, it is stated that "the experience gained of their (stamp
H fees) working during the two years in which they have been in force, seems to be conclusive as to "their repressive effect on the general litigation of the country". "It is, therefore, thought expedient to make a general reduction in the rates now chargeable on

the institution of Civil suits, and to revert to the principle of a maximum fee which obtained under the former law." A

Later it is stated :

"As some measure of compensation for the loss of revenue which is expected to result from the general reduction of fees, it is proposed to discontinue the refund of any portion of the amount levied on the first institution of suits, and also to raise the fees heretofore chargeable on probates and letters of administration granted under the Indian Succession Act, and on certificates issued under Act XXVII of 1860, to the *ad valorem* rates leviable under the English law in like cases". B

The Bill was designed to contain in one enactment the whole of the existing law relative to fees leviable in all Courts of Justice, whereas previously fees were leviable under various acts. C

This brief resume of the history shows that the court fees were levied sometimes with the object of restricting litigations; sometimes with the object of increasing revenue. But there is no material to show that when the latter was the objective whether the cost of administration of civil justice was more than the fees levied and collected. D

The constitutional question with which we are concerned could not arise before the enactment of the Government of India Act, 1935, because even if fees taken in courts were taxes on litigation, there was no bar to the levy of taxes on litigation. E

Various judges have spoken about the nature of court fees. In the judgment under appeal(1), reference has been made to their observations but those Judges were not faced with the constitutional problem with which we are concerned. Some described fees as one form of taxation, some regarded it as taxes for services rendered by the court or work done by the court or as price payable to Government for the trial of the suit. F

This background does not supply a sure touchstone for the determination of the question posed in the beginning of the judgment, but it does show that fees taken in court were not levied as taxes and the cost of administration was always one of the factors that was present. In its origin in England fees were meant for officers and judges. In India indeed section 3 of the Court Fees' Act, 1870 mentions "fees payable for the time being to the clerks and officers". Section 15 of the Indian High Courts Act, 1861, also spoke of fees to be allowed to sheriffs,..... and all clerks and officers of Court". We will therefore have to interpret the relevant Entries and various Articles of the Constitu- G H

(1) I.L.R. [1968] 1 Mad. 247, 311-315.

A tion in order to ascertain the true nature of Court fees. The relevant Entries of the Constitution are :

"List I Entry 77 : Constitution, organisation, jurisdiction and power of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practise before the Supreme Court".

B

"List I Entry 96 : Fees in respect of any of the matters in this List, but not including fees taken in any Court".

"List II Entry 2 : Administration of justice; constitution and organisation of all courts, except the Supreme
C Court and the High Court, officers and servants of the High Court; procedure in rent and revenue courts; fees taken in all courts except the Supreme Court."

"List II Entry 66 : Fees in respect of any of the matters in this List, but not including fees taken in any court.

D

"List III Entry 13 : Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration".

"List III Entry 47 : Fees in respect of any of the
E matters in this List, but not including fees taken in any court".

It will be noticed that the 'fees taken therein *i.e.* in Supreme Court' in List I Entry 77 have been excluded from List I Entry 96. Similarly the 'fees taken in all courts' included in List II
F Entry 3 have been excluded from List II Entry 66. In List III Entry 47 'fees taken in any court' have been excluded. What is the significance of this exclusion ? Does the Constitution regard 'fees taken in court' as being different from 'fees leviable under List I Entry 96, List II Entry 66 and in List III Entry 47' ?

It seems to us that the separate mention of 'fees taken in court'
G 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
H 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.

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 their 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 on the nature of 'fees' were reviewed in *The Indian Mica and Micanite Industries Ltd.* v. *The State of Bihar and others*(1) by Hegde, J. and the 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".

But even if the meaning is the same, what is 'fees' in a particular case depends on the subject-matter in relation to which fees 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 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.

(1) A.I.R. 1971 S.C. 1182 at p. 1186.

A We may now dispose of other arguments addressed to us. We are not able to interpret the phrase 'fees taken in court' to mean that it described fees which were actually being taken before the Constitution came into force. If this was the meaning, no fees could be levied in the Supreme Court because the Supreme Court did not exist before the Constitution came into force and no fees B were being taken therein. This would render part of the Entry of List I nugatory.

It was urged that various Articles in the Constitution show that fees taken in Courts are taxes. For instance, by virtue of Article 266 all fees, being revenues of the State, will have to be credited to the Consolidated Fund. But this Court has held that C the fact that one item of revenue is credited to the Consolidated Fund is not conclusive to show that the item is a Tax. In *The Commissioner, Hindu Religious Endowments, Madras* v *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*(1), it was held :

> "A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is D not payment for services rendered.
>
> It is not possible to formulate a definition of fees that can apply to all cases as there are various kinds of fees. But a fee may generally be defined as a charge for a special service rendered to individuals by some E governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases such expenses are arbitrarily assessed.
>
> The distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common F burden, while a fee is a payment for special benefit or privilege"

Our attention was invited to Art. 199(2) which provides that a bill shall not be deemed to be a Money Bill by reason only that it provides for.....the demand or payment of fees for licences or fees for services rendered. It was suggested that as G Court fees were not for services rendered they would have to be levied by means of a Money Bill. It seems to us that this argument proceeds on an assumption that fees taken in court are not for services rendered. Reference to Art. 277 and Art. 366(28) does not throw any light on the problem before us.

In *The Commissioner, Hindu Religious Endowments, Madras* H v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*(1), reference was made by Mukherjea, J. to Essays in Taxation by Selig-

(1)[1954] S.C.R. 1005 at p. 1006.

man. We may here refer to some other passages which have reference to court fees. A

> "The distinction between fees and taxes, although sometimes ascribed to Rau, is really much older. Adam Smith already speaks of certain expenses "which are laid out for the benefit of the whole society". "It is reasonable, therefore", he adds, "that they should be defrayed by the general contribution of the whole society, all the different members contributing as nearly as possible in proportion to their respective abilities". These, as he afterward explains, are taxes. On the other hand, he speaks of certain outlays, as for justice, for "persons who give occasion to this expense," and "who are most immediately benefited by this expense." The expenditure, therefore, he thinks, "may very properly be defrayed by the particuar contributions of these persons", that is, by fees of court. And he extends this principle to tolls of roads and various other expenses." B C D

> "This point of view helps us out of a difficulty as to the line of cleavage between fees and taxes. Thus, if a charge is made for the cost of judicial process, the payment is a fee, because of the special benefit to the litigant. If no charge is made, the cost of the process must be defrayed by general taxation; and the litigant pays his share in general taxes. If the charge is so arranged as to bring in a considerable net revenue to the government, the payment by the litigant is a tax—not a general tax on all taxpayers, but a special tax on litigants, like the tax on law suits in some of our Southern Commonwealths. The character of fees disappears only secondarily because the principle of cost is deviated from, but primarily because the special benefit to the litigant is converted in the first case into a common benefit shared with the rest of the community, and in the second case into a special burden. The failure to grasp the basis of this distinction, which is equally true of other fees, has confused many writers." E F G

A great deal of stress was laid by Mukherjea, J. at p. 1044 on the fact that the collections in that case went to the Consolidated Fund. He, however, said that that in itself might not be conclusive. But as Art. 266 requires that all revenues received by the State have to go to the Consolidated Fund, not much stress can be laid on this point. H

Reliance was placed on two cases decided by the Privy Council. In *Attorney-General for British Columbia* v. *Esquimalt and*

A *Nanaimo Railway Company & Ors.*(1), a case from Canada, question (7) was put thus :

> "Is the Esquimalt and Nanaimo Railway liable to tax (so-called) for forest protection imposed by s. 123 of the 'Forest Act' (later corrected to sec. 121) of the Forest Act.....in connection with its timber lands in
B the island railway belt acquired from Canada in 1887 ? In particular does the said tax (so called) derogate from the provisions of section 22 of the Act of 1883" ?

The Privy Council observed :

> "The question is a short one. The exemption conferred by section 22 is given in the words "the lands...
C shall not be liable to taxation". There is no context to give the word "taxation" any special meaning and the question comes to this : "Is the impost charged by s. 124 of the Forest Act 'taxation' within the ordinary significance of that word ?"

D After examining the provisions of Pt. XI of the Act, consisting of ss. 95 to 127, which dealt with what is described as "Forest Protection", the Privy Council observed :

> "The levy has what are, undoubtedly, characteristics of taxation, in that it is imposed compulsorily by the State and is recoverable at the suit of the Crown."

E This case is distinguishable because the Privy Council did not have to deal with fees and taxes but interpreted the word 'taxation' in section 22 of the Act to mean a compulsory levy by the State. Whether it was fees or taxes did not matter. The only question was whether it was a compulsory levy.

F In *Bachappasubran* v. *Shidappa Vankatrao*(2) before the Privy Council for the first time objection was raised that the suit, out of which the appeal arose, was not triable by the First Class Subordinate Judge. It was argued that this was the result of provisions contained in the Court Fees Act 1870 and the Suits Valuation Act, which, it was said, imposed notional value on the property as distinct from its real value and that this notional
G value was less than Rs. 5000/-. It was in this context that the Privy Council observed :

> "Their Lordships are of opinion that they would not be justified in assisting an objection of this type, but more than that, they hold that even the technicality on which the defendant relies cannot prevail.

H The Court-Fees Act was passed not to arm a litigant with a weapon of technicality against his oppo-

(1) [1950] A.C. 87, 120, 121. (2) I.L.R. 43 Bom. 507.

nent, but to secure revenue for the benefit of the State. This is evident from the character of the Act, and is brought out by section 12, which makes the decision of the First Court as to value final as between the parties and enables a Court of appeal to correct any error as to this, only where the First Court decided to the detriment of the revenue.

The defendant in this suit seeks to utilise the provisions of the Act, not to safeguard the interest of the State, but to obstruct the plaintiff; he does not contend that the Court wrongly decided to the detriment of the revenue, but that it dealt with the case without jurisdiction".

We are unable to appreciate how this case assists the appellant. Fees and taxes are both revenue for the benefit of the State. At any rate the Privy Council was not concerned with the interpretation of legislative Entries, where a sharp distinction is drawn between fees and taxes.

Two High Courts have upheld the levy of increased court fees and the learned Advocate-General strongly relied on them. In *Khacharu Singh* v. *S.D.O. Khurja*(1), a petition under Art. 226 was presented with a fee of Rs. 5/-, while by virtue of the Court Fees (Uttar Pradesh Amendment) Act, 1959, the fee leviable was Rs. 50/-. The latter fee was held to fall within Entry 3 List II. Mootham C. J. held that because court fees were not appropriated for any specific purpose but formed part of the general revenues of the State, these were neither tax nor fees as defined in *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*(2) and *Mahant Sri Jagannath Ramanuj Das* v. The State of Orissa(3). He observed :

"It is not an exaction imposed without reference to any special benefit conferred on the payers, for it is imposed only on those persons who wish to file documents, the filing of the document or the obtaining of the copy being of direct benefit to the person concerned. It would appear therefore not to be a tax as so defined."

He went on to observe, and here, with respect, he made a mistake : "Nor clearly is it a fee as so defined if only for the reason that the moneys realized have not been set apart but have merged in the public revenue of the State". Mukherjea, J. in *The Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*(2) had said that this fact was not conclusive and in view of Art. 266 of the

(1) I.L.R. [1960] 1 All. 429.
(2) [1954] S.C.R. 1005.
(3) [1954] S.C.R. 1046.

A Constitution, it could not be conclusive. Mootham, C.J. in *Khacharu Singh* v. *S.D.O. Khurja*(1) observed :

> "It clearly follows, I think, from the fact that the fees or other money taken by the Supreme Court or a High Court are to be credited to the Consolidated Fund that such fees cannot be fees of the kind which
B the Supreme Court had under consideration; for an essential characteristic of such a fee is that it shall be set apart and not merged in the general revenue of the State. It accordingly appears that there exists another class of imposition, also called a fee in the Constitution which differs from the type of fee which the Supreme
C Court had under consideration and that the definition of fee to be found in the three Supreme Court decisions of 1964 is not exhaustive".

With respect, the fees taken in courts and the fees mentioned in Entry 66 List I are of the same kind. They may differ from each other only because they relate to different subject matters
D and the subject matter may dictate what kind of fees can be levied conveniently, but the overall limitation is that fees cannot be levied for the increase of general revenue. For instance if a State were to double fees with the object of providing money for road building or building schools, the enactment would be held to be void. Dayal J. correctly observed in *Khacharu Singh*
E v. *S.D.O. Khurja*(1) :

> "The expression "the fees taken therein" in item No. 77 of List I and "fees taken in all courts except the Supreme Court" in item No. 3 of List II need not be interpreted to refer to such fees which must be credited to a separate fund and not to the general fund of India
F or the State. It follows therefore that the Constitution did not contemplate it to be an essential element of a fee—that it be credited to a separate fund and not to the Consolidated, Fund."

But the High Court in *Khacharu Singh* v. *S.D.O. Khurja*(1) did not meet the argument of the learned counsel that "as the
G State Government was already making a very large profit out of court fees, the entire amending Act of 1959 increasing those fees is *ultra vires*". It seems to us that whenever the State Legislature generally increases fees it must establish that it is necessary to increase court fees in order to meet the cost of administration of civil justice. As soon as the broad correlationship
H between the cost of administration of civil justice and the levy of court fees ceases, the imposition becomes a tax and beyond the competence of the State Legislature.

(1) I.L.R. [1960] 1 All. 429, 445.

The Bombay High Court in *The Central Province Sindicate (PR) Ltd.* v. *The Commissioner of Income-tax, Nagpur*(1) also fall into the same error. V. S. Desai, J. held that one of the essential elements laid down by the Supreme Court as the requisite of a fee, namely, that it must be appropriated to a separate fund earmarked to meet the expenses of the services has never been true of the court fees at any time and is also not true of the court fees levied after the constitution . . . . . The learned Advocate General, in our opinion, is right in saying that the levy of court fees for general revenues has been authorised by the relevant Entries in the Legislature." What impressed the High Court was that "there was however no monetary measure of the fees charged for the services rendered and the levy of the fees could also not be said to be in proportion to the services rendered".

We agree with the Madras High Court in the present case that the fees taken in Courts are not a category by themselves and must contain the essential elements of the fees as laid down by this Court. We also agree with the following observation(2) :—

> "If the element of revenue for the general purposes of the State predominates, then the taxing element takes hold of the levy and it ceases to have any relation to the cost of administration of the laws to which it relates; it becomes a tax. Its validity has then to be determined with reference to its character as a tax and it has to be seen whether the Legislature has the power to impose the particular tax. When a levy is impugned as a colourable exercise of legislative power, the State being charged with raising a tax under the guise of levying a fee, Courts have to scrutinize the scheme of the levy carefully, and determine whether, in fact, there is correlation between the services and the levy, or whether the levy is excessive to such an extent as to be a pretence of a fee and not a fee in reality. If, in substance, the levy is not to raise revenues also for the general purposes of the State, the mere absence of uniformity or the fact that it has no direct relation to the actual services rendered by the authority to each individual who obtains the benefit of the service, or that some of the contributories do not obtain the same degree of service as others may, will not change the essential character of the levy.

The next question that arises is whether the impugned impositions are fees. The learned Advocate-General contended

(1) I.L.R. [1962] Bom. 208.
(2) I.L.R. [1968] 1 Mad. 247 at p. 340-341.

A that the State of Madras does not make a profit out of the administration of civil justice. On the contrary it spends money on the administration of civil justice out of general revenues.

He relied on the supplemental counter affidavit filed on October 11, 1966. Objection was taken on behalf of the respondent in the connected civil appeals that this counter-affidavit
B should not be taken into consideration because it was filed in the course of arguments and they had no opportunity to meet the affidavit.

It seems to us that we cannot dispose of this appeal without giving opportunity to the respondents to file an affidavit or affidavits in reply to the supplemental counter affidavit dated
C October 11, 1966 because if we take the figures as given and explained by the Advocate-General we cannot say that the State is making a profit out of the administration of civil justice. Various items both on the receipts side and the expenditure side have to be carefully analysed to see what items or portion of items should be credited or debited to the administration of
D civil justice.

It is true, as held by the High Court, that it is for the State to establish that what has been levied is court-fees properly so-called and if there is any enhancement the State must justify the enhancement.

E We are accordingly constrained to allow the appeal and set aside the judgment passed by the High Court and remand the case to it. We direct that the High Court should give an opportunity to the writ petitioners to file an affidavit or affidavits in reply to the affidavit dated October 11, 1966. The High Court shall then decide whether the imugned fees are court fees or taxes on litigants or litigation.

G.C. *Appeal allowed.*