

APPELLATE CIVIL.

Before Mookerjee and Cuming JJ.

RADHA KANTA SAHA

v.

DEBENDRA NARAYAN SAHA.*

1922

Feb. 15.

Court-fee—Mortgage—Sale—Personal decree—Court Fees Act (1870) s. 7, cl. (v), sub-cl. (a) and cl. (iv), sub-cl. (c), applied—Civil Procedure Code (Act V of 1908), O. VII, r. 11, procedure under.

In a suit, (i) to set aside a sale of certain properties on the ground that owing to a previous adjustment of the decree it was not liable to be legally executed, that the sale was null and void and did not affect the plaintiffs' title thereto; and (ii) for a declaration that a personal decree passed under O. XXXIV, r. 6, of the Civil Procedure Code, 1908, was inoperative against the plaintiffs :

Held, that as the plaint disclosed the suit to be one substantially for possession of land and not one merely to obtain a declaratory decree and consequential reliefs, for the purposes of court-fees it fell within the meaning of s. 7, cl. (v), sub-cl. (a) and not within s. 7, cl. (iv), sub-cl. (c) of the Court Fees Act, 1870.

Ganesh Bhagat v. Saroda Prosad Mookerjee (1) distinguished.

The provisions of O. VII, r. 11, of the Code of Civil Procedure, 1908, are mandatory, and they require that when a plaint is written upon paper insufficiently stamped, the Court is bound to give the plaintiff time to make good the deficiency.

Achut v. Nagappa (2) ; *Ram Sahay v. Kumar Luchmi* (3) followed.

The fact that objection is heard at a time subsequent to the registration of the suit is immaterial, because the provisions of this rule can be brought into operation at any stage of the suit.

* Appeal from Original Decree, No. 45 of 1921, against the decree of Pasupati Bose, Subordinate Judge of Dacca, dated Jan. 20, 1921.

(1) (1914) I. L. R. 42 Calc. 370. (2) (1913) I. L. R. 38 Bom. 41.

(3) (1917) 2 Pat. L. J. 74.

Brahmamoyi v. Anuli Si (1), *Padmanand v. Anant Lal* (2) and other cases followed.

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Suit by plaintiffs Radha Kanta Saha and others to set aside a sale of certain properties which was comprised in a mortgage security executed by the plaintiffs in favour of first two defendants. A mortgage decree was passed on the 31st August 1916 which on appeal to this Court was dismissed in March 1918. Plaintiffs' case is that after the disposal of the appeal, there was an adjustment of the decree and in contravention of such adjustment the decree was fraudulently executed with the result that the mortgaged properties were brought to sale. Subsequently in June 1920, a personal decree under O. XXXIV, r. 6 of the Civil Procedure Code was also passed against the plaintiffs.

The plaintiffs in this suit seek to have a two-fold declaration, *viz.*, (i) that their title to the mortgaged properties has not been affected by the execution proceedings; (ii) that if this view be correct, no personal decree could have been passed against them.

The Subordinate Judge dismissed the suit on the ground that it was barred by limitation as also by the provisions of O. XXI, r. 92 of the Civil Procedure Code. He also held that the suit was not properly valued and that proper court-fees have not been paid. He, however, did not call for the deficit court-fee stamps. In deciding this issue, the Subordinate Judge stated in his judgment:

"I find this issue against the plaintiff, but as I am about to find that the suit is otherwise barred by specific rule of law, I do not call for deficit Court-fee."

Hence this appeal by the plaintiffs.

(1) (1899) I. L. R. 27 Calc. 376.

(2) (1906) I. L. R. 34 Calc. 20.

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Babu Amarendranath Bose (for *Dr. Sarat Chandra Basak*) and *Babu Satish Chandra Chowdhury*, for the appellants.

Babu Gopal Chandra Das, *Babu Suresh Chandra Talukdar* (for *Babu Kamini Kumar Sircar*), for the respondents.

Cur. adv. vult.

MOOKERJEE AND CUMING JJ. The subject-matter of the litigation which has culminated in this appeal is immovable property of considerable value comprised in a mortgage security executed by the plaintiffs in favour of the first two defendants. A decree was made on the basis of the mortgage on the 31st August 1916 and an appeal to this Court was dismissed on the 22nd March 1918. The case for the plaintiffs is that, after the disposal of the appeal, there was an adjustment of the decree and that in contravention of such adjustment the decree was fraudulently executed with the result that the mortgaged properties were brought to sale. It is asserted that they were purchased by the decree-holders in the name of the fourth defendant. Subsequently, on an application made on the 21st January 1920, a personal decree was made in due course on the 17th June 1920. The plaintiffs seek to have a two-fold declaration, namely, first, that their title to the mortgaged properties has not been affected by the execution proceedings which they contended were void and no better than a nullity; and, secondly, that, if this view be correct, no personal decree could have been made against them. One of the objections taken by the defendants is that the suit has not been properly valued and that proper court-fees have not been paid on the plaint. The Subordinate Judge has held that this objection is well-founded. But though he has found this issue against the

plaintiffs, he has not called for deficit court-fees, as, in his opinion, the suit is otherwise barred by specific rule of law. He has proceeded to hold that the suit is barred by limitation as also by the provisions of section 47 and Order XXI, rule 92, Civil Procedure Code. In this view he has dismissed the suit. The plaintiffs have appealed against this decree.

We are of opinion that the view taken by the Subordinate Judge that the suit has not been properly valued and that proper court-fees have not been paid cannot be supported. When we look at the plaint, the suit appears to us to be substantially a suit for possession of land within the meaning of section 7, clause 5, sub-clause (a) of the Court Fees Act, 1870. Under that provision of the law, in a suit for possession of land, the amount of court-fee payable is according to the value of the subject-matter, and where the subject-matter is land which forms an entire estate or a definite share of an estate paying an annual revenue to the Government and such revenue is permanently settled, the value is deemed to be ten times the revenue so payable. The plaintiffs allege in their plaint that although the estimated market value of the subject-matter of the litigation is Rs. 16,673; ten times the revenue payable is Rs. 794-5-3 and they have paid court-fees on this sum. It has been argued, however, on behalf of the respondents that the suit falls within the description of a suit to obtain a declaratory decree where consequential relief is prayed for, within the meaning of section 7, sub-section (4), clause (c) of the Court Fees Act, 1870, and in support of this contention reference has been made to the case of *Ganesh Bhagat v. Saroda Prosad Mookerjee* (1). In our opinion, this contention is not well-founded.

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The plaintiffs do not seek to set aside the decree nor do they seek to obtain a declaratory decree with consequential relief. Their contention is,—it is not necessary for us to express an opinion upon the question whether such a contention may be established in fact or in law—that although the decree was validly made, the circumstances which led up to the sale held at the instance of the decree-holders could not in law pass their title to the execution purchaser ; and on this basis, they seek to recover possession of the property. No doubt, they seek a declaration that the personal decree could not have been made against them. This declaration, however, can only be consequential to the success of their substantial claim in the suit. Their contention is that a personal decree can be made under Order XXXIV, rule 6 of the Code, only if there has been a valid and operative sale which has led to a partial satisfaction of the amount due under the mortgage decree. We hold accordingly that the suit was properly valued and that the plaint was adequately stamped.

We desire to point out that even if the view taken by the Subordinate Judge had been well-founded, the course pursued by him was contrary to the provisions of Order VII, rule 11, Civil Procedure Code. The provisions of this rule are mandatory, and they require that where a plaint is written upon paper insufficiently stamped, the Court is bound to give the plaintiff time to make good the deficiency: *Achut v Nagappa* (1) and *Ram Sahay v. Kumar Luchmi* (2). The fact that the objection is heard at a time subsequent to the registration of the suit is immaterial, because the provisions of this rule can be brought into operation at any stage of the suit: *Kishore v. Sabdal* (3)

(1) (1913) I. L. R. 38 Bom. 41.

(2) (1917) 2 Pat. L. J. 74.

(3) (1889) I. L. R. 12 All. 553.

Venkatesa v. Ramasami (1), *Brahmomoyi v. Andi Si* (2) and *Padmanand v. Anant Lal* (3). In this view, it follows that as soon as the Subordinate Judge held that the plaint was not adequately stamped, he should have proceeded to act in accordance with the provisions of Order VII, rule 11; upon the failure of the plaintiffs to carry out his order, he should have rejected the plaint and not dismissed the suit.

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The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remitted to him for trial on the merits. In view of the grave allegations made in the plaint, we direct that the facts be first investigated on the evidence, before the questions of law are considered. Costs will abide the result. We direct, under section 13 of the Court Fees Act, that the court-fees paid on the memorandum of appeal be returned to the appellant.

S. M. M.

Appeal allowed; case remanded.

(1) (1895) J. L. R. 18 Mad. 338. (2) (1899) I. L. R. 27 Calc. 376.

(3) (1906) I. L. R. 34 Calc. 20.