

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Shephard.

SITARAMAYYA (DEFENDANT), APPELLANT,

and

VENKATRAMANNA (PLAINTIFF), RESPONDENT.*

1888.
April 6.

Transfer of Property Act, ss. 67, 83, 84—Suit by mortgagee instituted before payment into Court—Right of mortgagee to a decree and to full costs.

In a suit to recover money due on a mortgage, defendant paid the money into Court and a notice was issued to the mortgagee under s. 83 of the Transfer of Property Act. The mortgagee filed his suit before notice was served on him, and it was not proved that the mortgagee was aware of the fact of the payment into Court when he filed his suit :

Held that the plaintiff was not debarred by s. 67 of the Transfer of Property Act from obtaining a decree, and that under the rules of Court the pleader's fee was properly assessed as in a contested suit and not as in a case where there is a confession of judgment.

APPEAL from the decree of Venkata Rangayyar, Subordinate Judge at Ellore (Godávári), confirming the decree of O. S. R. H. Krishnamma, District Munsif of Ellore, in suit No. 185 of 1886.

Plaintiff sued to recover Rupees 1,172-7-6 due under a bond, whereby certain property was hypothecated as security for a loan.

Defendant pleaded tender on 5th September 1886 and alleged that the sum due had been deposited in Court on 6th September, and that on 7th September a notice had been issued to plaintiff under s. 83 of the Transfer of Property Act, 1882.

On the same day, but before service of notice, which took place at 4 P.M., the plaint was filed.

The Munsif found no tender had been made on 5th September and decreed for plaintiff.

On appeal this decree was confirmed.

Defendant appealed on the following grounds, *inter alia*,

- (1) The admitted fact that defendant deposited the amount in Court under the provisions of the Transfer of Property Act on 6th September 1886 being a day previous to the

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institution of the suit disentitles the plaintiff to any costs.

- (2) The observations of the Court of first instance not questioned by the lower appellate Court virtually show that plaintiff had knowledge of the money raised to pay his debt and the deposit made.
- (3) At any rate the vakil's fee ought not to have been calculated upon the full amount of the debt which was not questioned, but only upon the amount of costs which was only the point of dispute.
- (4) The lower appellate Court failed to record its finding on the material point, namely, whether or not plaintiff had knowledge of the fact of the deposit made before he actually instituted the suit.
- (5) Under the circumstances of the case the defendant is entitled to his costs in both the courts below.

Ramachandra Rau Sahib for appellant.

Bhashyam Ayyangar for respondent.

The Court (Muttusami Ayyar and Shephard, JJ.) delivered the following

JUDGMENT:—The first objection taken in appeal is that the deposit of what was due to the plaintiff in Court precluded him from instituting the suit whether he was aware of such deposit or not, and reliance is placed on s. 67 of the Transfer of Property Act. We are of opinion that this objection cannot be supported. Reading s. 67 together with ss. 83 and 84, we do not consider that it was intended to take away the plaintiff's right of suit before there was a notice to him or knowledge on his part of the deposit. Another contention is that no issue was recorded with reference to the plea that the plaintiff had knowledge of the deposit. The second issue was sufficient to enable the appellant to prove the knowledge, if any, which he imputed to the respondent. It is next urged that, inasmuch as the liability to pay costs was the only matter in contest, the case must be treated, for the purpose of assessing the vakil's fee, as one in which there was confession of judgment. This is clearly not a case in which the appellant confessed judgment, and we are not prepared to hold that it is governed by the rule framed with reference to such cases.

We dismiss this second appeal with costs.