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to him to purchase at the sale, because any purchase made by him would be for the benefit of the family of which the manager of the infant defendant is one of the members; and it would in fact be a purchase by an agent of the property of his principal, a purchase which this Court cannot recognize. Under the circumstances, we think the appellant should have the costs of this appeal.

Appeal allowed.

Before Mr. Justice Morris and Mr. Justice Prinsep.

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May 10.

SHAMA SOONDARY (PLAINTIFF) *v.* HURRO SOONDARY AND OTHERS (DEFENDANTS).*

Valuation of Suit—Duty of Appellate Court—Court Fees Act (VII of 1870), s. 12—Civil Procedure Code (Act X of 1877), s. 578.

A suit was instituted and tried on the merits in the Court of a Subordinate Judge without any objection being taken, either by the defendants or by the Court, that the plaint was insufficiently stamped. The defendants appealed on the merits, and the District Judge, being of opinion that the stamp on the plaint was inadequate, called upon the plaintiff to pay the additional fee which would have been payable, had the objection been taken and the question rightly decided in the Court of first instance.

Held, on second appeal, that the order of the Judge was properly made under s. 12, cl. ii of the Court Fees Act, VII of 1870.

Kala Chand Sen v. *Anund Kristo Bose* (1) dissented from. Section 578 of the Civil Procedure Code, explained.

IN this case the plaintiff sued to obtain from the defendants certain *nikas*, or general adjustment papers and account books of a business, which the plaintiff alleged had been carried on by the defendants on behalf of the plaintiff's deceased husband. The plaint was stamped with a ten-rupee stamp, though the plaint stated that "the presumed loss for not rendering to me the account papers sought for may amount to more than

* Appeal from Appellate Decree, No. 917 of 1879, against the decree of J. C. Geddes, Esq., Judge of Tippera, dated the 6th January 1879, reversing the decree of Baboo Kally Dass Dutt, Second Subordinate Judge of that district, dated the 16th May 1877.

(1) 22 W. R., 433.

Rs. 4,000." No objection was taken that the plaint was insufficiently stamped, and the Court of first instance decided the case on the merits in favour of the plaintiff. The defendants appealed, and the Judge, *suo motu*, held, that before he could go into the merits of the case, he must, under s. 12, Act VII of 1870 (the Court Fees Act), require the plaintiff to pay in such an additional amount as would make up the fee payable on a suit valued at four thousand rupees. The plaintiff appealed to the High Court.

Baboo *Sreenath Das* and Moonshee *Serajul Islam* for the appellant.

Mr. *Branson* and Baboo *Byhunt Nath Das* for the respondents.

The judgment of the Court (MORRIS and PRINSEP, JJ.) was delivered by

MORRIS, J.—The plaintiff, as a member of a partnership concern, brings this suit against her co-partners and certain persons, who have acted as servants of the concern, to obtain from them certain account papers which she specifies. She estimates the loss arising from the defendants not rendering these accounts to her at Rs. 4,000, but she values the suit at Rs. 10 only, as she seeks to obtain a simple declaratory decree, and intimates her intention of bringing a further suit for account after she has received the account papers which she requires.

The first Court framed certain issues, none of which had reference to the valuation of the suit, and finally gave a partial decree in favour of the plaintiff. Against this judgment the defendants appealed, and their memorandum of appeal was engrossed on a stamp of like valuation. The District Judge, on taking up the appeal, was of opinion that the plaint bore an inadequate stamp, and under the proviso in the 1st clause of s. 12 of the Court Fees Act, VII of 1870, called upon the plaintiff to make good the stamp due upon the full amount of her claim, *viz.*, Rs. 4,000. As she failed to do this within the required time, the District Judge set aside the decision of the

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Subordinate Judge "as void for want of jurisdiotion." Against this order a special appeal has been preferred to this Court, and the ground taken is, that the District Judge has erred in law in the construction which he put upon the 12th section of the Court Fees Act; in other words, that, as no question relating to valuation for the purpose of determining the amount of fee chargeable on the plaint was decided by the Court of first instance, the Appellate Court was not competent, under the 2nd clause of s. 12, to raise the point of its own motion and require an additional fee to be paid. In support of this contention, the case of *Kala Chand Sen* v. *Anund Kristo Bose* (1) is referred to, in which, in a case presenting somewhat similar circumstances, a Division Bench of this Court expressed the opinion that "the object of the proviso," (to s. 12) "was no doubt to enable the Appellate Court to interfere for the protection of the revenue in a case where a question of that sort might be raised and improperly decided. In the present case, even if it be assumed that the stamp originally paid was, what it really was not, insufficient, there was no question raised in the Court of first instance. It seems to us, therefore, that the Subordinate Judge ought not to have allowed to be raised on this occasion a question which neither had been raised in the first Court, where, if necessary, the amount of additional stamp might have been at once paid, nor in the grounds of appeal."

We observe that, in that case, the Court held that the stamp originally paid was not insufficient, and therefore this expression of opinion relative to s. 12 of the Court Fees Act taking the form of an *obiter dictum* cannot be regarded as an authoritative declaration of the law.

It appears to us that the words "every question relating to valuation . . . on a plaint . . . shall be decided by the Court in which such plaint is filed, &c.," do not carry with them the meaning that a distinct question or issue relating to valuation must be raised and a formal decision thereon passed by the Court of first instance before a Court of appeal can interfere. The law, s. 54, Code of Civil Procedure, directs that a plaint shall be rejected if the relief sought is undervalued, and the plain-

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tiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so; or if the relief sought is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so.

No plaint can be accepted and registered until these preliminary questions of valuation and sufficiency of stamp have been determined by the Court, and therefore it seems to us that it would be straining the language of s. 12 to say, that the question relating to valuation therein mentioned has only reference to a question raised as a distinct issue, and decided by the Court of first instance in the presence of, and as between, the parties to the suit.

If then the Court of appeal should, as in the case now before us, consider that the plaint has been admitted "to the detriment of the revenue," the law declares that it "shall require the party by whom such fee has been paid to pay as much additional fee as would have been payable had the question been rightly decided,"—that is, in the present case, that the plaintiff (respondent) shall pay the additional fee on his plaint. If he does not do so, "the provisions of s. 10, para. ii, shall apply," or "the suit" (*i. e.*, the appeal) "shall be stayed until the additional fee has been paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed." From this we understand, that, unless the plaintiff submits to the order of the superior Court, he loses any advantage that he may have obtained on his improperly-stamped plaint. This is exactly what the District Judge has done in the present case, though the terms of his order that the suit is "void for want of jurisdiction" are not exactly in accordance with law. We understand him, however, to mean, that as the plaint was not properly admitted, the lower Court could not try the suit, and that, therefore, it must be dismissed on that ground, and not on its merits.

But it is next contended, that an Appellate Court could not consider this matter, because s. 578 of the Code of Civil Procedure declares that "no decree shall be reversed, &c., on

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account of any error, defect, or irregularity not affecting the merits of the case or the jurisdiction of the Court." This provision is a re-enactment of s. 350, Act VIII of 1859. But while the Act of 1859 was in force, the Court Fees Act of 1870 was passed, and s. 12 of that Act just quoted clearly made it the duty of a superior or Appellate Court to take action for the protection of the revenue, and to dismiss the suit, if the party in default did not pay in the deficient court-fee.

That was clearly an exception to s. 350, Act VIII of 1859. The Code of 1877 has merely followed in the steps of the Act of 1859. Section 12 of the Court Fees Act is still in force, and must be read with s. 578 of Act X of 1877 in the same manner as it was read with s. 350, Act VIII of 1859. We are, therefore, of opinion, that the judgment of the Court below is right, and we dismiss this special appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Prinsep.

1881
June 3.

IN THE MATTER OF THE PETITION OF RIASAT ALI, *alias* BABU MIYA, *alias* BODIUZZUMA.

THE EMPRESS *v.* RIASAT ALI, *alias* BABU MIYA, *alias* BODIUZZUMA.*

Forgery—Attempt to commit Forgery—Indian Penal Code (Act XLV of 1860), ss. 465 and 511.

A person cannot be convicted of an attempt to commit an offence under s. 511 of the Indian Penal Code, unless the offence would have been committed if the attempt charged had succeeded.

A prisoner who was charged with attempting to commit forgery of a valuable security, was found guilty by the jury of attempting to commit forgery. The jury explained their finding by saying that the prisoner had ordered certain receipt forms to be printed similar to those used by the Bengal Coal Company, and that one of these forms had actually been printed and the

* Criminal Appeal, No. 61 of 1881, against the order of W. H. Page, Esq., Officiating Sessions Judge of Burdwan, dated the 9th December 1880.