

REFERENCE
UNDER
COURT
FEES ACT,
1870

Mahomed Khan and others(1) which is in conflict with the recent decision of the Allahabad High Court.

As to the appeal by the defendant the mortgagee I agree that one rule should apply in both cases, but it seems to me that, as a question of construction of the Act, the right rule to apply is that laid down in the case in *Nepal Rai v. Debi Prasad*(2) which so far as an appellant mortgagee is concerned, is in accordance with the opinion expressed by Sir John Edge in the case in *Pirbhu Narain Singh v. Sita Ram*(3).

I think in the case of both appeals, the fee is to be calculated with reference to the value of the subject-matter in dispute in appeal.

S.R. No. 13337 of 1905.

For the reasons stated above, I think the fee is to be calculated with reference to the subject-matter in dispute in the appeal.

SUBRAHMANIA AYYAR, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Moore.

1906.
February 15.

PERIA MUTHIRIAN AND OTHERS (RESPONDENTS, PLAINTIFFS),
APPELLANTS,

v.

KARAPPANNA MUTHIRIAN AND ANOTHER (FIRST AND THIRD
DEFENDANTS, FIRST AND THIRD RESPONDENTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 373—Court has power to extend time for payment of costs.

Where a party has been permitted to withdraw from a suit with liberty to bring a fresh suit if he should pay costs within a named date under section 373 of the Code of Civil Procedure, the Court has power to extend the time for payment when it is absolutely impossible for the party to pay such costs on or before the day so fixed.

(1) I.L.R., 10 Bom., 41 at p. 45.

(2) I.L.R., 27 All., 447.

(3) I.L.R., 13 All., 94.

* Appeal No. 74 of 1905, under section 15 of the Letters Patent presented against the order of Mr. Justice Boddam in Civil Revision Petition No. 84 of 1905.

THE facts are sufficiently stated in the judgment of the learned Judge which is as follows:—

FERIA
MUTHIRIAN
v.
KARAP-
PANNA
MUTHIRIAN.

I think the order of the District Munsif cannot be supported. An order was made, on the 14th June 1904, giving the plaintiffs leave to withdraw their suit and bring a fresh suit if they paid certain costs within a date named, but, if they did not, the suit should stand dismissed.

The plaintiffs did not pay within the time named and by the order passed their suit stood dismissed.

More than a month afterwards the plaintiffs applied for an extension of time to pay the costs and the District Munsif held that they were entitled to a review and extended the time to seven days from the date of his order.

This order he had no jurisdiction to make. By the previous order the suit stood dismissed and the District Munsif had no power to review that order under section 623 of the Civil Procedure Code or to extend the time unless the order was varied or set aside. I, therefore, allow the Revision Petition and set aside his order with costs in this and in the lower Court.

S. Krishnamachariar for appellants.

The Hon. Sir V. C. *Desikachariar* for the Hon. Mr. P. S. *Sivaswami Ayyar* for respondents.

JUDGMENT.—The order of the District Munsif was that costs were to be paid on or before the 24th June 1904. It was not however till the 11th July that the amount of the costs was ascertained and even then the amount was incorrect and it was not till the 29th July that the correct figures were given. Application for extension of time in which to pay was made on the 30th July. We must hold that the District Munsif exercised a sound discretion in extending the time for payment inasmuch as it was absolutely impossible for the plaintiffs to pay the amount of costs into Court on or before the date originally fixed, *i.e.*, the 24th June. We allow this appeal, set aside the order of the learned Judge and restore that of the District Munsif with costs before Mr. Justice Boddam and in this Court.