## APPELLATE CIVIL—FULL BENCH.

*Before Sir Charles Arnold White, Chief Justice, Mr. Justice Munro and Mr. Justice Sankaran Nair.*

S. VISWESWARA SARMA (PLAINTIFF) APPELLANT,

*v.*

T. M. NAIR AND ANOTHER (DEFENDANT) RESPONDENTS.*

1911. January 19. March 12.

*Civil Procedure Code, Act V of 1908, order 7, rule 10—Plaint returned for presentation to proper Court—Court to which such plaint is represented, bound to give credit for the fee levied by the Court to which the plaint was first presented.*

Where a Court after receiving a plaint and cancelling the stamp affixed thereto returns the plaint for presentation to the proper Court under order 7, rule 10, of the Civil Procedure Code of 1908 the latter Court to which the plaint is represented is bound to give credit to the fee already levied by the former Court.

This is the existing practice in this Presidency and there is nothing in the new Code of Civil Procedure in the Presidency Small Cause Courts Act or in the City Civil Courts Act to indicate that the legislature intended to interfere with such practice.

*Prabhakarbhat* v. *Viswambhar Pandit*, [(1884) I.L.R., 8 Bom., 313], followed.

CASE stated under section 69 of the Presidency Small Cause Courts Act, XV of 1882, and rule 482 of the Rules of Procedure of the Presidency Small Cause Court of Madras by the Chief Judge of that Court in Suit No. 3067 of 1910 on the file of that Court.

This case came on for hearing before KRISHNASWAMI AYYAR and AYLING, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH (KRISHNASWAMI AYYAR, J.).—This is a reference by the learned Chief Judge of the Presidency Small Cause Court. The question stated is one of far-reaching importance. The Judge of the City Civil Court returned a plaint for presentation to the proper Court under order 7, rule 10, of the Code of Civil Procedure. The plaint has been represented to the Presidency Small Cause Court under the authority of that rule. The question is whether the plaintiff is entitled to credit for the court-fee levied in the City Civil Court. Section 9 of the Madras City Civil Court Act,

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1892, directs the value to be ascertained for the purposes of court-fee in the manner provided by the Court-fees Act, section 7, clause (v), if the suit is for land or a house or a garden. Section 6 of the Court-fees Act renders the first schedule applicable to a plaint filed in the City Civil Court. Section 25 of the Court-fees Act provides that all fees referred to in section 3 or chargeable under the Act, shall be collected by stamps. Section 26 directs that the stamps used to denote any fees chargeable under the Act, shall be impressed or adhesive or partly impressed and partly adhesive, as the Governor-General in Council may direct. By section 27 the Local Government is empowered to make rules for regulating among other things the renewal of damaged or spoiled stamps. Section 30 provides that no document requiring a stamp *under this Act* shall be filed or acted upon in any proceeding in the Court or office until the stamp has been cancelled. The rest of the section deals with the mode of cancellation.

In this case the stamp used for the plaint in the City Civil Court was cancelled in accordance with the provision of section 30 and the instructions issued by the Government of India (see Appendix VI to Jagannada Iyer's Court-fees Act). Now the plaint comes again into Court with the cancelled stamp and an additional stamp to make up the deficiency in the court-fee required for the plaint in the Small Cause Court in pursuance of the Government Notification under section 75 of the Presidency Small Cause Courts Act (see page 276 of Bakewell's Presidency Small Cause Courts Act). There is no doubt that the identical plaint returned by the City Civil Court is properly presented to the Presidency Small Cause Court under order 7, rule 10, of the Code of Civil Procedure. A plaint presented in the Small Cause Court is chargeable with a fee under section 71 of the Presidency Small Cause Courts Act, not exceeding that which is specified in that section. Under section 75 of the same Act the Local Government may from time to time by notification in the Official Gazette vary the amount of the fee under section 71. The Government of Madras has fixed the fee under this section by a notification dated the 23rd January 1883. These two sections of the Act together with the notification only determine the fee, but make no provision as regards the mode in which that fee is to be

paid. By section 77 it is enacted that sections 3, 5 and 25 of the Court-fees Act shall remain unaffected by anything contained in Chapter X, *i.e.*, for our present purpose, by sections 71 and 75 of the Presidency Small Cause Courts Act. The result of the saving is that by virtue of section 3 the fees chargeable in the Presidency Small Cause Court shall be collected in manner thereinafter appearing in the Court-fees Act, and that by section 25 the court-fee chargeable in the Presidency Small Cause Court, which is referred to in section 3, though it is not leviable under the Court-fees Act, shall be collected by stamps. Section 26 appears to have no application to the nature of the stamps which may be used for court-fees in the Presidency Small Cause Court, as they are not chargeable under the Court-fees Act. Section 28, which is applicable to the Presidency Small Cause Court because the court-fees referred to in section 3, are payable in stamps under section 25, declares that no document which ought to bear a stamp under this Act, shall be of any validity unless and until it is properly stamped. Can it be said that a plaint which bears a cancelled stamp is properly stamped within the meaning of section 28 of the Court-fees Act? There is no definition of the words "properly stamped" in the Act. If a stamp which has been properly cancelled in accordance with the requirements of section 30 may be used again in payment of a court-fee chargeable, there is no provision limiting such user to the mere case of a plaint returned. In *Prabhakarbhat* v. *Vishwambhar Pandit* (1) the question referred to the Full Bench was whether a plaint could be returned, where in Second Appeal a suit was held to have been filed in the wrong Court. In the course of a judgment of the Full Bench it is incidentally observed "where a Court fee on the institution of a suit has been paid in a Court which cannot possibly afford the relief sought, it does not seem consistent with sound principle that the plaintiff should be condemned to lose the fee thus paid, or that he should not be allowed to ask without paying a second fee for an adjudication from a Court which can really give one." There is no reference in the judgment to the provisions of section 30 of the Court-fees Act as regards cancellation of a stamp or of section 28 as to the requirement of a proper stamp. Stress was laid on the provision contained in

(1) (1884) I.L.R., 8 Bom., 313.

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section 30, of the Court-fees Act in the decision in *Jagjivan Javherdas Seth* v. *Magdum Ali*(1) as precluding the presentation of a plaint returned with a cancelled stamp without new stamps being affixed to it. In the case of *In re Bai Amrit* (2) the same learned Judges who decided the case of *Jagjivan Javherdas Seth* v. *Magdum Ali* (1) declined to accept the decision of the Full Bench in *Prabhakarbhat* v. *Vishwambhar Pandit* (3) as binding upon them. One of the Judges, Mr. Justice PINHEY, points out at page 390, that the decision of the Full Bench was silent on one of the grounds on which the decision in *Jagjivan Javherdas Seth* v. *Magdum Ali* (1) was based, viz., the futility of returning a plaint after the court-fee stamps have been cancelled, because cancelled court-fee stamps can no more be used a second time than cancelled postage stamps can be so used.

The argument in favour of the opposite view can only be that the cancelled stamps must be treated as uncancelled because the Court which returned the plaint for want of jurisdiction had no jurisdiction to cancel the stamp. But that is evidently not the effect of section 30 of the Court-fees Act which requires cancellation of the stamp before the plaint is filed or acted upon. The Court must consider the allegations in the plaint and the relief asked for before determining the question of jurisdiction. On the foregoing considerations the result must be that the plaint returned to be presented to the proper Court, will have to be stamped anew without reference to the cancelled stamps. Section 29 of the Court-fees Act, which makes a special provision in the case of amendment of the document that it shall not necessitate the affixing of a fresh stamp, appears to strengthen the above view. A cancelled stamp does not also appear to fall under the head of damaged or spoiled stamps with reference to the renewal of which the Local Government has power to make rules. The rules made by the Local Government under section 27, clause (*c*) which refer to plaints written on stamps and not filed in any Court, do not extend to the case of a cancelled stamp returned.

But the matter does not appear to rest here. The learned Chief Judge points out that section 21 of the Civil Procedure Code of 1882, section 14 of the Madras City Civil Court Act, 1892, and section 19A and 40 of the Presidency Small Cause

(1) (1883) I.L.R., 7 Bom., 487. (2) (1884) I.L.R., 8 Bom., 380.
(3) (1884) I.L.R., 8 Bom., 313.

Courts Act, 1882, make special provision for the deduction of the court-fee paid in one Court from the fee payable in another to which a plaint returned by the first is represented or a suit is transferred from the first in the circumstances referred to in those sections. Where the transfer of the suit or the representation of the plaint is to the High Court on the Original Side there may be a special need for a specific provision as regards the deduction of the fee already paid, as the system of charging court-fees is essentially different under the Rules of Practice applicable to the Original Side. But it is not easy to explain why a special provision for deduction was made in section 21 of the old Code of Civil Procedure where a suit is stayed in one Court under section 20 and the plaint is returned and presented to another under section 21. It must, however, be noted that sections 20 and 21 have not been reproduced in the Civil Procedure Code of 1908. On a full consideration of the various provisions of the several enactments to which our attention has been drawn, I feel constrained to agree with the learned Chief Judge of the Small Cause Court. But the practice not only in the Small Cause but throughout the Presidency, has been, in such cases as the present, to accept the original stamp affixed to the plaint in one Court as good so far as it goes in the second Court to which the plaint is represented. As the question is one of great importance and the view we are at present inclined to take is against the established practice, we refer the question stated to the Full Bench.

AYLING, J.—I am not prepared to dissent from the view of the law expounded by my learned brother; but it cannot be denied that its adoption will not only alter the general practice both in the Presidency and mofussil Courts, but (what is of more importance) will inflict considerable hardship on many litigants who have in perfect good faith taken their case to the wrong Court. I doubt very much whether this was the intention of the legislature. I therefore agree in the proposed reference to a Full Bench.

This case again came on for hearing in due course before the Full Bench constituted as above.

*C. K. Mahadeva Ayyar* for plaintiff.

*C. Venkatasubramiah*, *V. V. Srinivasa Ayyangar* and *M. Kunjunni Nair* for defendants.

The CHIEF JUSTICE.—I do not think we ought to interfere with an established practice in this Presidency unless we are

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fully satisfied that the practice is contrary to law. In this case, on the facts stated in the Order of Reference, I am not so satisfied.

The plaint presented to the Small Cause Court is the same plaint as that which was presented to the City Civil Court and returned by that Court under order 7, rule 10 of the first schedule to the Code of Civil Procedure. The amount actually paid on the plaint is an amount which satisfies the requirements of sections 71 and 75 of the Presidency Small Cause Courts Act, 1882, and the notifications under the latter section. No doubt the stamp on the plaint when it was presented to the City Civil Court was cancelled by the City Civil Court in pursuance of section 30 of the Court-fees Act, because the Court purported to "act upon" it by returning it. But I do not find anything in the Court-fees Act which compels me to hold that the plaint when presented to the Small Cause Court was unstamped *quoad* the cancelled stamp. The analogy of the cancelled postage stamp suggested by *In re Bai Amrit* (1) does not seem to me to be in point. If it were, it might be pointed out that the postal regulations do not require a new stamp when a letter is re-addressed and re-delivered. The provision in section 28 of the Court-fees Act that no document which ought to bear a stamp under that Act shall be of any validity unless it is properly stamped affords us no assistance on the question whether, on the facts stated, the plaint was properly stamped when presented to the Small Cause Court. The provision in the same section that when a document is amended in order to correct a mistake, a fresh stamp is not necessary, no doubt on the "*expressio unius*" principle, lends some support to the conclusion that the document in question in the present case, was not properly stamped. The same observation may apply to the last paragraph of section 19A and section 40 (3) of the Presidency Small Cause Courts Act. But as pointed out in the Order of Reference "Where the transfer of the suit or the representation of the plaint is to the High Court on the Original Side there may be a special need for a specific provision as regards the deduction of the fee already paid, as the system of charging court-fees is essentially different under the Rules of Practice applicable to the Original Side." Sections 20 and

(1) (1884) I.L.R., 8 Bom. 380, at p. 390.

21 of the old Code of Civil Procedure, as the Order of Reference points out, have not been reproduced in the present Code.

The observation of the Full Bench of the Bombay High Court in *Prabhakarbhat* v. *Vishwambhar Pandit* (1) "Where a Court fee on the institution of a suit has been paid in a Court which cannot possibly afford the relief sought, it does not seem consistent with sound principle that the plaintiff should be condemned to lose the fees thus paid, or that he should not be allowed to ask without paying a second fee for an adjudication from a Court which can really give one" is no doubt *obiter*, but, in the absence of express statutory provision the other way, I am prepared to apply it to the facts of the present case. In so doing I am upholding what is admittedly the settled practice in this Presidency and what would seem to be, though I have no information as to this, the settled practice in Bombay.

I would answer the question in the affirmative.

MUNRO, J.—I agree that the question whether the Small Cause Court is bound to give credit for the fee levied by the City Civil Court should be answered in the affirmative. I think this result can be deduced from order 7, rule 10 of the Civil Procedure Code of 1908, which lays down that the plaint shall at any stage of the suit, be returned to be presented to the Court in which the suit should have been instituted. If the plaint as returned is not a document which the Court to which it is to be presented, is bound to receive as it stands—assuming the same scale of court-fees is in vogue in both Courts—I am unable to find any sufficient reason for the enactment of the rule. The return of the plaint does not by itself save limitation. So far as limitation is concerned the plaintiff would be in the same position if he tore up the plaint which had been returned to him, and drew up and presented a fresh one; for whether the original plaint is presented or a fresh one, the plaintiff, if he wishes to call in aid section 14 of the Limitation Act, must show that he comes within its terms. I do not think that a Court when returning a plaint under this rule can be said to be acting upon it within the meaning of section 30 of the Court-fees Act. It is conceivable that the fact that the Court had no jurisdiction to entertain the plaint might be noticed before anything was done to the stamps. In such a case the plaint could, and should, be returned

(1) (1884) I. L. R., 8 Bom., 313.

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without cancelling the stamps. A plaintiff who had acted *bonâ fide* should not be in a worse position because the Court did not find out its want of jurisdiction before the stamps were cancelled, and, as the rule for the return of plaints makes no distinction between cases where the plaintiff has acted *bonâ fide* and cases where he has acted otherwise, the same principle is clearly meant to apply in all cases.

SANKARAN NAIR, J.—A plaint was presented to the City Civil Court on the 21st January 1910 written upon a stamp paper of the value of Rs. 75. The stamp was cancelled by an officer of the Court on 22nd January 1910.

The Judge of the City Civil Court was of opinion that the suit should have been instituted in the Small Cause Court and returned it on 22nd February for presentation to that Court. The same plaint was presented to the Small Cause Court with the stamp of Rs. 75 which had been already cancelled and further adhesive stamps for Rs. 9-12-0 which were required to make up the fee of Rs. 84-12-0 chargeable on the plaint in the Small Cause Court under section 71 of the Presidency Small Cause Courts Act. The learned Chief Judge of the Small Cause Court Mr. Justice AYLING with some hesitation and Mr. Justice KRISHNASWAMI AYYAR are of opinion that the 75-rupee stamp having been rightly cancelled when the plaint was first presented to the City Civil Court has lost its force and the plaint when presented to the Small Cause Court must be taken to bear only a stamp of Rs. 9-12-0.

Section 71 of the Presidency Small Cause Courts Act provides that an *ad valorem* fee shall be paid on the plaint in every suit and that no plaint shall be received until such fee has been paid. Section 28 of the Court-fees Act also states that no document requiring a stamp under that Act shall be of any validity unless and until it is properly stamped. If therefore the plaint when presented to the Small Cause Court bears, in law, only a stamp of Rs. 9-12-0, the plaint cannot be received or acted upon.

The question referred to the Full Bench for decision is whether the stamp cancelled has lost its force in the circumstances above stated and whether the plaint must again be stamped with a stamp of equal value. I am clearly of opinion that the plaintiff need not affix the stamp again to his plaint.

There is no difference between this case and similar cases in the mofussil Courts where plaints are returned by one Court for

presentation to the proper Court. There was a doubt entertained for some time under the old Code of Civil Procedure whether a plaint should not be returned before it was filed; or whether it might be returned at any stage of the suit. The Bombay and the Madras High Courts took the latter view, which has been embodied in order 7, rule 10 of the present Code of Civil Procedure, that the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been first instituted. The return of a plaint for presentation to a proper Court is to enable the plaintiff to present that document without paying the stamp over again. It was on the ground that "where a Court fee on the institution of a suit has been paid in a Court which cannot possibly afford the relief sought, it does not seem consistent with sound principle that the plaintiff should be condemned to lose the fee thus paid, or that he should not be allowed to ask without paying a second fee for an adjudication from a Court which can really give one," that it was held by the Full Bench of the Bombay High Court that a plaint might be returned at any stage of a suit to enable the plaintiff to present the same plaint without paying over again that fee to the proper Court—*Prabhakarbhat* v. *Vishwambhar Pandit*(1). Order 7, rule 10 of the Code of Civil Procedure, 1908, now embodies that rule, and it would be thus defeating the very object of the legislature in directing the return of a plaint to levy the fee over again when it is again presented.

The decision of the Bombay High Court was passed in 1884 and the practice in the Bombay Presidency may be presumed to be in accordance with that decision. In this Presidency it has been the practice to accept the original stamp in the second Court to which the plaint is presented. The legislature has not interfered with that decision or the practice. It has obviously accepted this view.

Section 14 of the Madras City Civil Courts Act and sections 19A and 40 of the Presidency Small Cause Courts Act provide that credit shall be given to the plaintiff in cases of return of plaints to be presented to the High Court for the court-fee paid in such Court. This was apparently due to the doubt raised by the system of the court-fees levied on the Original Side of the

(1) (1884) I.L.R., 8 Bom., 313.

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High Court being different in principle from the Court-fees Act. Sections 20 and 21 of the Civil Procedure Code of 1882, not reproduced in the present Code, enact a similar provision. But they deal with the re-institution of the suit and this may have created some doubt. These provisions certainly indicate the tendency of legislation and, taken with the omission to deal with the cases under consideration, with the prevailing practice and the Full Bench decision of the Bombay High Court before the legislature, can lead only to one conclusion.

It is then said that a stamp which has been defaced and cancelled by proper authority has lost its force and cannot be used again. There is, it appears to me, a fallacy in this argument. It loses sight of the fact that a document does not cease any the less to be a properly stamped document by the cancellation of the stamp. It continues to be properly stamped. By cancellation the stamp cannot be used again, but when the same document, which was the plaint in one Court, is rightly presented in another Court as a plaint in another Court, the stamp is not being used again. It is only the same document that is being used in another Court; otherwise, it might with equal force be argued that a plaint with its stamp cancelled, when filed as an exhibit in another case, must be stamped again.

I am further of opinion that the cancellation in such cases must be taken to be set aside by reason of the subsequent order returning the plaint. Section 30 of the Court-fees Act runs thus :—

"No document requiring a stamp under this act shall be filed or acted upon in any proceeding in any Court or office until the stamp has been cancelled.

"Such officer, as the Court or the head of the office may from time to time appoint, shall, on receiving such document, forthwith effect such cancellation by punching out the figure head so as to leave the amount designated on the stamp untouched, and the part removed by punching shall be burnt or otherwise destroyed."

In the course of the argument I was inclined to think that under the second clause of this section, the court-fee stamp on a plaint has to be cancelled on its presentation. This does not appear to be so. Under section 48 of the Code of Civil Procedure of 1882, the plaint has to be presented to the Court or to such officer as may be appointed to receive it. Section 57 provided that, if on the presentation of a plaint it appears that the Court has no jurisdiction

to try the cause, the plaint shall be returned to be presented to the proper Court. The first clause of section 30 of the Court-fees Act only requires that the stamp shall be cancelled before the document is filed or acted upon. It does not require the cancellation on presentation. The second clause only requires the officer appointed on that behalf, who will be a different person from the Judge himself or who may be a different person from the one appointed to receive plaints, to cancel the stamps when—as I read the clause—he receives it for that purpose, preliminary to its being filed or acted upon. The obvious intention and what these sections lay down is that, when a plaint is received, and before it is acted upon or filed, the Judge has to decide whether it has been presented to the proper Court and according to his opinion return it for that purpose or otherwise give it to the proper officer for cancellation before it is acted upon or filed. He may act upon it without filing it by rejecting it for certain reasons, for instance if the plaintiff fails to supply within a given time the requisite stamp paper to meet the deficiency if any. In these cases he may file a new suit but not present the same plaint. When the Court at a later stage or the Appellate Court directs the return of a plaint, it is only doing what the Court of first instance should have done before the cancellation of the stamp. The important alteration in the present Civil Procedure Code allowing the return of the plaint at any stage only strengthens the argument, as already pointed out. It was enacted to enable the Courts to do at any stage of the suit what should properly be done on presentation of the plaint before it is acted on or filed. It does not affect the interpretation of section 30 of the Court-fees Act. The final order returning the plaint, even if passed only in second appeal, therefore relates back to a stage of the suit before it is acted upon or filed, as a preliminary to which alone the stamp has to be cancelled under section 30 of the Court-fees Act. The final decision directing the return is an order that the Court should not have acted on or filed the plaint. It follows therefrom that the cancellation of the stamp was unnecessary under section 30 of the Court-fees Act. The plaintiff is in such cases relegated by the order of the position he would occupy if the plaint had been returned before having been acted upon. A Court which has no jurisdiction to

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entertain a plaint ought to return it immediately. It cannot act upon it, though it may be necessary to make an enquiry to decide the question of jurisdiction. This is not acting upon it but only deciding whether it should act upon it. A party is not to be prejudiced if possible by an act of Court afterwards found improper; and cancellation is therefore of no greater effect than the other proceedings including decrees which may have been passed before the final order was passed to return the plaint.

I therefore answer the question whether the Small Cause Court is "bound to give credit for the fee levied by the City Civil Court" in the affirmative.

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## APPELLATE CIVIL.

*Before Mr. Justice Benson and Mr. Justice Sundara Ayyar.*

1911. March 22, 23, 29.

MAHAMED KASIM SAHIB (PLAINTIFF), APPELLANT,

*v.*

PANCHAPAKESA CHETTI (DEFENDANT), RESPONDENT.*

*Civil Procedure Code*, s. 503—*Receiver appointed under section, powers of—cannot recover from third parties whose rights date prior to his appointment.*

A receiver appointed under section 503 of the Code of Civil Procedure, in respect of any moveable or immoveable property is entitled to take possession of it from the parties to the suit, to manage it, etc. He is not entitled to recover possession from a third party, stranger to the suit whose rights date prior to his appointment. Such a receiver has no right to recover property sold before his appointment by the judgment-debtor on the ground that the sale is voidable as against the creditors on the principle embodied in section 53 of the Transfer of Property Act.

SECOND APPEAL against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 21 of 1909 presented against the decree of V. K. Dasika Chariar, Subordinate Judge of Nagapatam, in Original Suit No. 31 of 1907.

The facts for the purpose of this case are fully set out in the judgment.

The Hon. the Advocate-General for appellant.

*S. Guruswami Chetti* for respondent.

JUDGMENT.—The suit in this case was instituted by a receiver appointed by the Subordinate Court of Negapatam in execution of

* Second Appeal No. 1663 of 1909.