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are charged per tree. This at least is the explanation of the "patta" sentences given by the respondent, and I am not prepared to say that it is wrong. I therefore agree with my learned brother that, as at present advised, we cannot say that the planting of coconuts on the suit lands is an improvement within the meaning of section 3 (4) (*f*).

N.R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Wallace.

1926, March 9.

In re PUNYA NAHAKO AND THREE OTHERS (DEFENDANTS—RESPONDENTS IN S.A. No. 641 OF 1921), PETITIONERS.*

Madras Court Fees Act (V of 1922)—Review—Change in the Court Fees Act before date of review—Subject matter of review and court-fee thereon—Arts. 4 and 5 of Schedule I of the Court Fees Act (VII of 1870).

A petition for review of an original or appellate decree must be valued on the reliefs prayed for in the petition as if the petitioner were then filing a plaint or memorandum of appeal for those reliefs. (1872) 7 M.H.C.R., Appendix, page 1 and *In re Manohar G. Tambekar*, (1880) I.L.R., 4 Bom., 26, followed; *Nandilal Agrani* v. *Jogendra Chandra Dutta*, (1923) 28 C.W.N., 403, not followed.

If between the date of the plaint or the appeal and the date of filing the petition for review, there has been a change in the Court Fees Act increasing the fee payable *ad valorem*, the petitioner must pay at the increased rate.

A defendant who wishes to file a review of a decree in a second appeal filed by the plaintiff, which allowed in favour of the plaintiff a suit for land and three years' mesne profits prior to date of suit, must pay court-fee not only on the same but also on mesne profits between the date of the plaint and the date of filing the second appeal. *Brahmayya* v. *Lakshminarasimham*,

* Civil Miscellaneous Petition No. 140 of 1925.

(1893) I.L.R., 16 Mad., 310 and *Balarama Naidu* v. *Sangan Naidu*, (1922) I.L.R., 45 Mad., 280, followed.

PETITION under Order XLVII, Rule 1, Civil Procedure Code, praying the High Court to review the decree and judgment, dated 29th February 1924, passed in Second Appeal No. 641 of 1921 preferred against the decree of the District Court of Ganjām in Appeal Suit No. 282 of 1919 preferred against the decree of the Principal District Munsif's Court of Berhampur in Original Suit No. 598 of 1917.

This was a suit filed in 1917 for certain lands and for mesne profits for three years prior to suit. The suit was allowed *in toto* by the trial Court but was dismissed *in toto* on appeal. Thereupon the plaintiff who filed a second appeal in 1921 in the High Court got on 29th February 1924 the decree of the District Munsif restored *in toto*. On 7th July 1924 the defendants filed a petition for review of the whole decree valuing the petition as if it was one only for the lands and three years' mesne profits prior to suit and paying court-fee according to the old Court Fees Act. The Registrar of the High Court wanted the petitioners to pay also for mesne profits for four years between the date of the plaint and the date of filing the second appeal, and at the higher rate according to the Madras Amended Court Fees Act (V of 1922). The question of court-fee payable was posted before a Bench.

C. Sambasiva Rao for the petitioner argued that the petitioner was not bound to include future mesne profits and that even if he was, according to *Nandilal Agrani* v. *Jogendra Chandra Dutta*(1), the court-fee leviable on the review is that paid on the second appeal, viz., at the lower rate.

Government Pleader (*C. V. Anantakrishna Ayyar*) for Government.—As the decree has awarded mesne profits and as they have been ascertained even by the first Court, the petitioners

(1) (1923) 28 C.W.N., 403.

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who are under the decree liable to pay mesne profits and who wish to get rid of the same by this petition must pay court-fee also on mesne profits subsequent to the suit; *Brahmayya* v. *Lakshminarasimham*(1), *Balarama Naidu* v. *Sangan Naidu*(2). The fee payable on a review by the defendants must be calculated on the reliefs prayed for in the review and not on the reliefs prayed for in the second appeal filed by the plaintiff, who is not obliged in law to include subsequent mesne profits in his memorandum of second appeal. As on the date of the review the new Court Fees Act (Madras Act V of 1922) had come into force, the petitioners must pay on the valuation in the second appeal and on mesne profits subsequent to the plaint at the increased rate according to the new Act; see 7 M.H.C.R., Appendix, page 1, which has not been dissented from till now and *In re Manohar G. Tambekar*(3).

JUDGMENT.

ODGERS, J. ODGERS, J.—I agree with the opinion of my learned brother. I see no valid reason why the decision of this Court in 1872 to be found in 7 M.H.C. Reports, Rulings Appendix, page 1, which has stood since 1872 should be dissented from. The interpretation put upon the articles in question in *Nandilal Agrani* v. *Jogendra Chandra Dutta*(4) seems to me to work an obvious injustice. This Court's interpretation of the rule seems also to have found acceptance in Bombay [*In re Manohar G. Tambekar* (3)].

I also agree with my learned brother's remarks on the question of mesne profits.

The fee levied by the office is right.

WALLACE, J. WALLACE, J.—The point for decision in this reference is what is the proper stamp fee to be levied on the review application (C.M.P. No. 140 of 1925). This was an application for review of a judgment in second appeal. The judgment in that appeal was passed before the increase in the court-fees under the amended court-Fees Act of

(1) (1893) I.L.R., 16 Mad., 310. (2) (1922) I.L.R., 45 Mad., 280.
(3) (1882) I.L.R., 4 Bom., 26. (4) (1923) 28 C.W.N., 403.

1922 came into force. The review application was put in after that amended Act had been passed. The first question is whether the rate of fee to be levied is under the old Act or under the amended Act. Under Schedule 1, articles 4 and 5, the court-fee for application for review of judgment is either the whole or half of "the fee leviable on the plaint or memorandum of appeal," and the decision turns on the interpretation of that phrase.

It may be construed in at least four different ways :—

(1) as the fee actually levied on the plaint or memorandum of appeal when admitted,

(2) as the proper fee to be levied on the plaint or memorandum of appeal at the time of presentation thereof,

(3) as the fee which would have been properly levied on the plaint or memorandum of appeal if that had been put in at the time of the presentation of the application for review, and

(4) as the proper fee to be levied if the applicant for review were then putting in a plaint or memorandum of appeal for the same relief.

As to (1) it seems clear that it is not a proper construction of the phrase. In the case of a suit or appeal in *forma pauperis* no fee is actually levied on admission. Again the Court of appeal may, in certain circumstances, increase or decrease the fee actually paid, and it is clearly more reasonable to suppose that the legislature meant the fee which was the proper fee to be levied and not the fee actually levied.

As to (2), an adherence to this construction would mean that, even though the review application only relates to a small portion of the relief asked for in the plaint or memorandum of appeal, the applicant for review would have to pay the full stamp paid on the plaint or

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memorandum of appeal. This again seems to me hardly acceptable. This view however has found favour in the Calcutta High Court [*Nandlal Agrani* v. *Jogendra Chandra Dutta*(1)] which refuses to follow an earlier decision of this Court, 7 Madras High Court Reports, Appendix, page 1, to which I shall allude later on. Such a construction would in this Court at least make an application for review much more expensive than an appeal.

As to (3), it would imply that where an applicant for review is the defendant and the appeals have been by the plaintiff all through, and the review application is thus the first motion of his for any relief, his application would have to be valued not on any sums paid by himself for the relief sought for by him but on the stamp paid by the opposite party for the relief sought for by it, which may obviously have no sort of relation to the relief which the review applicant wants. This again seems hardly a reasonable construction of the phrase.

Construction (4) implies that the applicant pays not for the relief sought for by any one else over which he has no control, but on the relief sought by himself, and he thus pays naturally and equitably on that relief as if it were a plaint or memorandum of appeal by himself for that relief. This appears to be the most reasonable interpretation of the phrase and it is the interpretation put upon the phrase by this Court so long ago as 1872 (see 7 Madras High Court Reports, Rulings Appendix, page 1), and this interpretation has been practically followed ever since by this Court. The Bombay High Court has taken a similar view in *In re Manohar G. Tambekar*(2). It follows therefore that the court-fee will be the court-fee payable as if, on the date when the

(1) (1923) 28 C.W.N., 403.

(2) (1882) I.L.R., 4 Bom., 26.

review application was put in, the applicant was filing a plaint or memorandum of appeal for the same relief, i.e., in the present case the court-fee leviable will be the court-fee which falls to be levied under the amended Court Fees Act calculated as if the application for review were a plaint or memorandum of appeal for the relief sought for.

The next point is whether court-fee must be paid on the mesne profits up to the date of the review application. Now it is plain that in this matter the review application has to be considered as if it were a memorandum of appeal, and on such a memorandum of appeal there is no doubt that the applicant who seeks to be relieved from the payment of such mesne profits must pay court-fee on such mesne profits up to the date of his appeal memorandum; see *Brahmayya* v. *Lakshminarasimham*(1) and *Balarama Naidu* v. *Sangan Naidu*(2). When the mesne profits have been ascertained, the court-fee is payable on the ascertained rate. Where the mesne profits have not been ascertained the fee is chargeable on the valuation of mesne profits in the plaint. The petitioner therefore must pay on the mesne profits which in this case are payable on the ascertained rate, calculated up to the date of the application.

The last point is, at what rate, the old rate or the new rate, must the fee on these mesne profits be levied. The answer to point (1) answers this point also. It must be paid as if the applicant was now putting in a memorandum of appeal and he must therefore pay according to the new scale.

The court-fee levied by the office is quite right.

N.R.

(1) (1893) I.L.R., 16 Mad., 310. (2) (1922) I.L.R., 45 Mad., 280.