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cases where it was assumed, without discussion, that the High Court acting under section 12, clause (ii), has power to require the plaintiff to bring the additional fee payable in the lower Court even where its decision was as to category as distinguished from computation.

Our answer to the question is therefore in the affirmative.

G.R.

APPELLATE CIVIL.

Before Sir M. Venkatasubba Rao, Kt., *Officiating Chief Justice, and Mr. Justice Horwill.*

1936, August 31.

In re KANTHEESWARAM EKANTHALINGASWAMI KOIL THROUGH ITS TRUSTEE M. VEDANAYAGAM PILLAI (FIRST RESPONDENT), PETITIONER.*

Court-fee—Appeal in High Court—Future mesne profits claimed by plaintiff-respondent in his memorandum of objections filed in—Court-fee on—Payable, if—Decision of Taxing Officer that court-fee is payable—Revision of—Jurisdiction of High Court as to—Court Fees Act (VII of 1870), *ss.* 5, 7 *and* 11—*Applicability and effect of.*

In a suit for possession the plaintiff omitted to claim in his plaint future mesne profits. He subsequently applied for permission to amend his plaint by including a claim for such profits. The lower Court, which passed a decree in his favour for possession, rejected that application. Against the decree for possession, the defendants filed an appeal in the High Court and in the memorandum of objections which the plaintiff filed, a claim was again put forward to future mesne profits. A difference arose between the plaintiff's Advocate and the Court Fee Examiner as to the necessity of paying a court-fee on the memorandum of objections. That difference was referred to the Taxing Officer, and he held that an *ad valorem* fee was payable.

* Civil Miscellaneous Petition No. 5722 of 1933.

Held that the decision of the Taxing Officer was wrong and that no court-fee was payable on the memorandum of objections.

Doraiswami v. *Subramania*, (1917) I.L.R. 41 Mad. 188 (F.B.), *Srinivasa Row* v. *Ramaswami Chetti*, (1900) 10 M.L.J. 144, and *Kandunni Nair* v. *Raman Nair*, (1930) I.L.R. 53 Mad. 540, referred to.

Held, however, that under section 5 of the Court Fees Act the decision of the Taxing Officer became final and was not revisable by the High Court and that therefore the court-fee paid could not be ordered to be refunded.

Ranga Pai v. *Baba*, (1897) I.L.R. 20 Mad. 398, *Kasturi Chetti* v. *Deputy Collector, Bellary*, (1898) I.L.R. 21 Mad. 269, *Swaminatha Aiyar* v. *Guruswami Mudaliar*, (1927) 53 M.L.J. 457, and *Kandunni Nair* v. *Raman Nair*, (1930) I.L.R. 53 Mad. 540, followed.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a certificate for the refund of the excess court-fee paid on the memorandum of cross-objections in Appeal Suit No. 211 of 1928 preferred to the High Court against the decree of the Court of the Subordinate Judge of Tinnevelly in Original Suit No. 18 of 1923 (Original Suit No. 6 of 1924, Additional Sub-Court, Tinnevelly).

T. R. Venkatarama Sastri for *K. R. Rama Ayyar* for petitioner.

Government Pleader (*K. S. Krishnaswami Ayyangar*) for Government.

Cur. adv. vult.

ORDER.

VENKATASUBBA RAO OFFG. C.J.—The plaintiff omitted to claim in his plaint future mesne profits and subsequently applied for permission to amend his plaint by including a claim for such

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profits. The lower Court, which passed a decree in his favour for possession, rejected that application. Against the decree for possession, the defendants filed an appeal in this Court and in the memorandum of objections which the plaintiff filed, a claim was again put forward here to future mesne profits. Two questions have been argued and they arise in this way. The plaintiff contended that on his memorandum of objections no court-fee was payable, as the claim which he preferred in appeal in this Court could not in principle differ from any claim he might have put forward in the Court of first instance. This contention was overruled by Mr. White, the then Taxing Officer, who held that an *ad valorem* court-fee was payable on the amount claimed. Two questions have been argued : first, is the decision of the Taxing Officer revisable by the High Court ? and secondly, is his decision on the merits right ?

On the first question, we are constrained to hold that under section 5 of the Court Fees Act the decision of the Taxing Officer has for every purpose become final. It is unnecessary to deal with the cases cited by Mr. Venkatarama Sastri bearing on the other sections of the Act such as section 12. For instance, he strongly contended that, in spite of the use of the word "final" in section 12, the High Court, in the exercise of its revisional jurisdiction, set aside, at the instance of the aggrieved plaintiffs, the orders of the lower Courts regarding the court-fee payable by them on their plaints [*vide* observations in *Muhamad Ellaiyas* v. *Rahima Bee*(1), *Kattiya Pillai* v. *Ramaswamia Pillai*(2) and *Secretary of State for*

(1) (1928) 56 M.L.J. 302. (2) (1929) 56 M.L.J. 394.

India v. *Raghunathan*(1)]. The question here, however, turns on the specific wording of section 5 which prescribes that when a particular procedure is followed the decision given becomes final. In this case, a difference arose between the plaintiff's Advocate and the Court Fee Examiner as to the necessity of paying a court-fee on the memorandum of objections. That difference was referred to the Taxing Officer who held that an *ad valorem* fee was payable. The requirements of section 5 are thus fulfilled and we must, giving the words of that provision their plain and natural meaning, hold that the decision of the Taxing Officer has become final and cannot be impeached before us. It will be observed that, in the matter of the adjudication being final, the section makes no difference between the decision of the Taxing Officer and that of the Taxing Judge to whom he may refer the question. To be consistent, the plaintiff must go the length of contending that the decision of the Taxing Judge can be no more final under the section than that of the Taxing Officer ; the anomaly of this position is obvious. Apart from my interpretation of the section, the settled practice of the Court has been, dating back to the years 1897 and 1898, to treat the adjudication of the Taxing Officer as final and on a matter of this sort it is desirable not to depart from the established practice ; *Ranga Pai* v. *Baba*(2) and *Kasturi Chetti* v. *Deputy Collector, Bellary*(3) ; *see* also *Swaminatha Aiyar* v. *Guruswami Mudaliar*(4) and *Kandunni Nair* v. *Raman Nair*(5). While on this subject, I may usefully

(1) (1933) I.L.R. 56 Mad. 744.
(2) (1897) I.L.R. 20 Mad. 398.
(3) (1898) I.L.R. 21 Mad. 269.
(4) (1927) 53 M.L.J. 457.
(5) (1930) I.L.R. 53 Mad. 540.

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point out that this section, like several other sections of the Court Fees Act, is undoubtedly defective, as it makes no provision for the Taxing Officer being compelled to refer the question to the Judge of the Court.

Although this conclusion should be sufficient to dispose of the matter, we have thought it proper to deal with the second contention, as the point raised is one of considerable importance. In dealing with this question, it is important to bear in mind the procedure prescribed by the Code of Civil Procedure in determining the amount of past and future mesne profits. As regards past mesne profits, the Court has the option either to pass a decree fixing the amount (that decree in a sense is "final", though the term is inappropriate, there being a single decree) or to pass a preliminary decree directing a enquiry as to the quantum of the profits and postponing the passing of the final decree till the enquiry is held. But, as regards future mesne profits, the Court has no such option but is bound in the first instance to pass a preliminary decree directing an enquiry. Then, turning to Order VII, rule 2, Civil Procedure Code, there can be no question that in the very nature of things it applies to past mesne profits alone, for it enacts that the amount of the claim shall be stated approximately and it is obvious that future mesne profits are incapable of being estimated, depending, as they do, upon an uncertain element, namely, the period of time which would intervene between the institution of the suit and the recovery of possession. In the Court Fees Act there are two sections which are relevant for the present purpose. Section 7 (*i*) prescribes that in suits for money including suits

for damages or compensation, the court-fee shall be computed according to the amount claimed. Mesne profits being in essence damages or compensation, this section applies to suits for mesne profits. Once again, this provision can have no reference to future mesne profits which, as already stated, are incapable of being ascertained, the plaintiff not being bound under Order VII, rule 2, Civil Procedure Code, to state approximately the amount of such profits. Section 11 of the Court Fees Act with the Madras amendment provides for each of the cases which Order XX, rule 12, Civil Procedure Code, contemplates. Whatever obscurity there was in the law previously, there seems to be no room for doubt under the present provisions. As already observed, in the matter of past mesne profits, a final decree may straightaway be passed ; in such a case part 1 of section 11 applies, which enacts that, if the profits decreed are in excess of the profits claimed, the decree shall not be executed until the excess court-fee is paid. If, however, in respect of past mesne profits, the decree passed is preliminary and not final, the first clause of part 2 applies. It provides that, where an enquiry into past mesne profits is directed and the amount ascertained on such enquiry exceeds the amount claimed, no final decree shall be passed till the excess fee is paid. In the first case (that which falls under section 11, part 1), the decree that has already been passed shall not be executed ; in the second case (that which falls under section 11, part 2, first clause), no final decree shall be passed. So much for mesne profits antecedent to the suit. Then, as to subsequent profits, the second clause

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of part 2 provides that, when a final decree is passed following upon a preliminary decree directing an enquiry (this is in strict accordance with Order XX, rule 12, Civil Procedure Code), the final decree shall not be executed until the requisite court-fee is paid. The point to note is, and that is very important, that in respect of future mesne profits, no portion of the court-fee is payable before the final decree is passed ; even then, if the plaintiff does not seek to execute the decree which he has invited the Court to pass in his favour, he may altogether escape the payment of court-fee. This rule, which may appear anomalous, is, however, based upon an intelligible principle. A claim to subsequent mesne profits is in respect of a cause of action not arising at the date of suit ; nevertheless, the Court is empowered to grant them by way of an exception to the general rule that the reliefs claimed should be confined to causes of action which had already arisen ; but, as has been pointed out in *Doraiswami* v. *Subramania*(1), the power of the Court to award mesne profits subsequent to suit is discretionary. On this ground, it has been held that when in a suit for past and future mesne profits, the Court passes a decree for the past mesne profits, and says nothing in regard to the future mesne profits, a fresh suit to recover such profits is not barred by *res judicata* ; *Doraiswami* v. *Subramania*(1), *Muhammad Ishaq Khan* v. *Muhammad Rustam Ali Khan*(2), *Bipulbihari Chakravarti* v. *Nikhilchandra Chakravarti*(3) and *Kalidas Rakshit* v. *Keshablal Majumdar*(4). Thus, the

(1) (1917) I.L.R. 41 Mad. 188 (F.B.). (2) (1918) I.L.R. 40 All. 292.
(3) (1929) I.L.R. 57 Cal. 381. (4) (1930) I.L.R. 58 Cal. 1040.

passing of a decree in respect of the subsequent profits being in the discretion of the Court (though except for special reasons the Court will not refuse to exercise the discretion in favour of the party), section 11 of the Court Fees Act has enacted that, prior to the passing of such decree, no court-fee is payable. Is there any reason then why in principle this rule, which applies in terms to suits, should be departed from in the case of appeals ? It is contended by the learned Government Pleader that the body of the Act not having provided for appeals in the case of such claims, we must turn to the Schedules to the Act, which contain several articles relating not only to plaints but also to memoranda of appeal. True, the value of an appeal is not always the value of the suit but the value of the relief granted by the decree, which the party seeks to get rid of ; in that sense, where the suit and the appeal are differently valued, the Schedules to the Act may furnish the appropriate article. In the matter in hand, there is no question of an amount being claimed in appeal in excess of what has been granted by the lower Court. On the other hand, the claim made here is identical with that made in the Court below, namely, to have the right to subsequent profits adjudicated upon. The lower Court has held that in the circumstances of the case the plaintiff ought not to be allowed to claim in this suit future mesne profits. It is this conclusion that the plaintiff attacks in the appeal. This very case illustrates the good sense underlying section 11, for we have held, confirming the decision of the lower Court, that the plaintiff ought not to be allowed to claim subsequent

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mesne profits by amending his plaint, and, as I have shown, he is not precluded by the doctrine of *res judicata* from claiming these very profits in a fresh suit, paying a proper court-fee on his plaint. The contention of the Government Pleader involves the levying of a double court-fee which, of course, would be an obvious injustice. I am clearly of the opinion that the decision of the Taxing Officer is wrong; but we are constrained, owing to our decision on the first point, to refuse to make an order granting a refund. We make no order as to costs.

HORWILL J.

HORWILL J.—I agree. The learned Government Pleader has put forward a somewhat novel argument that the main sections of the Court Fees Act do not apply to appeals, unless a section makes a specific mention of appeals, such as section 7 (iv) (*c*) does, and that the provisions which apply to appeals are to be found almost entirely in the Schedules. If that were so, then appeals would be governed almost wholly by the most general provisions, such as are found for example in Schedule I, article 1. None of the rulings quoted before us have gone anything like so far as this. The learned Government Pleader relies principally on the judgments of WHITE C.J. in *Reference under Court Fees Act, 1870* (1) and in a Full Bench case, *Ramakrishna Reddi* v. *Kotta Kota Reddi*(2), in which he sat soon afterwards. The subject-matter of each of those suits was a mortgage which was sought to be redeemed. In *Reference under Court Fees Act, 1870* (1), the dispute was confined in appeal to a sum of money which had

(1) (1905) I.L.R. 29 Mad. 367.

(2) (1906) I.L.R. 30 Mad. 96 (F.B.).

to be paid before the mortgage could be redeemed, and the discussion turned on the question, now long settled, whether the "subject-matter", which was to form the basis for the computation of the court-fee, meant, in relation to appeals, the subject-matter of the appeal or the subject-matter of the original suit; and it was held that court-fee had to be paid in appeal on the subject-matter of the appeal. As the subject-matter of the appeal was a sum of money, clearly section 7, sub-section (ix), applicable to suits for redemption, could not be applied to the appeals, and it was held that the only provision of the Court Fees Act applicable would be article 1, Schedule I. This decision went no further. An examination of the wording of the various sections of the Court Fees Act shows that they are intended to apply to appeals also; for example, section 7 begins:

> "The amount of fee payable under this Act in the suits next hereinafter mentioned. . . . shall be computed as follows:—"

In section 7 (iv) (*f*) we find the words "for accounts". Thus section 7 (iv) (*f*), on the face of it, is applicable only to suits for accounts; yet we find for all the clauses of section 7 (iv) that the method of computing the value of the suit is

> "according to the amount at which the relief sought is valued in the plaint or memorandum of appeal".

Thus, the whole of section 7 (iv), although on the face of it applicable only to suits, yet gives the method of computing the value of appeals. The only reason why the word "appeal" is found here is that reference is made to the plaint; and if no mention were made of the memorandum of appeal, appeals as well as suits would have to be valued according to the amount at which the

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relief sought is valued in the plaint. In the other clauses of section 7 and in other sections no reference is made to the memorandum of appeal except where there is some necessary difference in the method of valuing a suit and an appeal. There can be no doubt that all the High Courts have always taken it for granted that appeals are valued in the same way as suits.

With regard to the question as to what mesne profits should be included in valuing an appeal, the cases quoted by the learned Government Pleader have been of defendants who have appealed against decrees for possession with mesne profits. It is, however, necessary to maintain a distinction between an appeal by a plaintiff, who has had his suit dismissed, and that of an unsuccessful defendant. The latter has to rid himself of the decree and therefore everything that has been granted to the plaintiff in the decree and against which he wishes to appeal must be the subject-matter of the appeal, even though more has been given in the decree (by way of interest or ascertained mesne profits, for example than was due to the plaintiff at the time of filing his suit. But the plaintiff who has had his suit dismissed is in fact told that he had no cause of action against the defendant at the time of filing his suit and it is against this adverse finding that he has to appeal. After having his suit dismissed he goes to the appellate Court in the same position as at the time of filing his suit. Even so long ago as *Srinivasa Row* v. *Ramaswami Chetti*(1), this distinction between the positions of a defendant-appellant and a plaintiff-appellant

(1) (1900) 10 M.L.J. 144.

was considered so obvious as not to require discussion, and this distinction has always since been maintained. The power of a Court to grant future mesne profits and future interest is an exception to the general rule that a plaintiff can only sue on such cause of action as has arisen on the date of filing his suit and that the Court can give him no more. These provisions were clearly made to prevent the constant litigation that would be necessary if persons unlawfully kept out of possession of their lands had to file suits every three years for mesne profits that had accrued since the filing of the previous suit. Although, therefore, a plaintiff can ask in his plaint for future mesne profits, no cause of action for these mesne profits has arisen and no court-fee is payable on that part of his claim. If, therefore, the position of a defeated plaintiff is the same when he files his appeal as it was at the time of filing his plaint, he would not have to pay court-fee in appeal on mesne profits that had accrued after the filing of his plaint. The decided cases have in fact gone further and held that even a defendant-appellant has not to pay court-fee on mesne profits that have not been ascertained. It is true that in *Punya Nahako, In re*(1) WALLACE J. says:

> " . . . . . 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 " ;

but this case is now considered to be no longer good law. In *Kandunni Nair* v. *Raman Nair*(2), for example, it was made clear that unless past

(1) (1926) I.L.R. 50 Mad. 488, 493. (2) (1930) I.L.R. 53 Mad. 540.

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mesne profits had been exactly ascertained no court-fee was payable on them. The Madras amendment to section 11 of the Court Fees Act has provided that the Court may direct an enquiry as to future mesne profits and that a decree cannot be executed until court-fee is paid on those mesne profits. It would seem to follow from this that until a decree is sought to be executed no party is bound to pay court-fee on those profits. The present case is an example of the complications and injustice that result where a party is made to pay court-fee on future mesne profits at the time of the appeal. As the refusal of a Court to grant future mesne profits does not operate as *res judicata*, the defeated party can again claim future mesne profits ; and, if he is compelled to pay court-fee in the first instance, he would have to pay it again when he instituted a fresh suit. That is what has happened with the present petitioner, who has had his claim for future mesne profits negatived both in the trial Court and in this Court and who will be free to bring a fresh suit for these profits.

Although we are of opinion that there was no need for the petitioner to have paid court-fee on his memorandum of cross-objections claiming mesne profits, we regret that we cannot order refund of the court-fee paid. Mr. Venkatarama Sastri has quoted to us many cases relating to section 12 of the Court Fees Act to show that, even where the statute says that the decision of the appellate Court shall be final, all the High Courts have nevertheless been willing to reopen the question where they considered that the decision of a subordinate Court had been erroneous. It is

unnecessary to refer to the cases quoted by Mr. Venkatarama Sastri because the learned Government Pleader does not deny that under section 12 High Courts have been prepared to interfere ; but we cannot accept Mr. Venkatarama Sastri's argument that the word "final" used in sections 5 and 12 of the Act does not mean "final" in the ordinary sense of the word, as being conclusive between the parties, but as conferring a mere temporary finality to any contentions that parties may raise during the preliminary proceedings of getting the appeal filed. We find no justification for this contention in any of the cases quoted to us and Mr. Venkatarama Sastri has not attempted to support this argument from any reported cases. His argument seems to be that if a final decision under section 12 can be interfered with by the High Court, it cannot really be final and that the explanation of the word "final" given by him is the only reasonable one. We would however explain the interference of the High Courts with orders passed under section 12 as the exercise of the revisional jurisdiction given to the High Court to correct the errors of subordinate Courts, a power which has not been taken away by any provisions of the Court Fees Act. Section 5, however, applies to proceedings in the High Court itself, where a question of revision would not arise. All Courts have an inherent right to correct mistakes made through inadvertence, but an error based upon an interpretation of the past practice of the Court and upon an interpretation of the law cannot be considered to be an inadvertence. There is no reason therefore why the natural interpretation of section 5, viz.,

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that the decision of the Taxing Officer shall be final except when in his opinion the matter is of such importance that it should be referred to the Chief Judge of the Court for his final decision, should not be accepted. That the decision of the Taxing Officer is final and binding on all parties was laid down in *Ranga Pai* v. *Baba*(1). The matter was made clearer in *Kasturi Chetti* v. *Deputy Collector, Bellary*(2) where it was pointed out that, if the word "final" in section 5 is not final in the ordinary sense of the word, neither is the decision of the Judge to whom the matter is referred by the Taxing Officer, final; and no finality can be reached at all. In *Kandunni Nair* v. *Raman Nair*(3) the question was precisely the same as in *Ranga Pai* v. *Baba*(1), the earlier case being followed and approved. Neither in *Kasturi Chetti* v. *Deputy Collector, Bellary*(2) nor in *Kandunni Nair* v. *Raman Nair*(3) was any doubt thrown upon the accuracy of the law laid down in *Ranga Pai* v. *Baba*(1) that the decision of the Taxing Officer was final and binding not only on the party who had disputed the correctness of the taxation but also on the respondent who was no party to it. No case has been quoted to us in which this well-settled interpretation of section 5 has been even doubted. We must therefore hold that although the decision of the Taxing Officer in this case was wrong it is nevertheless binding on the petitioner.

The petition is therefore dismissed. There will be no order as to costs.

A.S.V.

(1) (1897) I.L.R. 20 Mad. 398. (2) (1898) I.L.R. 21 Mad. 269.
(3) (1930) I.L.R. 53 Mad. 540.