

was to pay the money within one year from the date of receiving notice of foreclosure, otherwise Luchman Prasad's proprietary title would by efflux of time become completely established. At the time Umeda Singh signed the *wajib-ul-arz* he could not put the land, in which Luchman Prasad was jointly interested with him, under disabilities and conditions, so to speak, of which the mortgagee had neither notice nor knowledge, nor could he make any contract which could have the retrospective effect of rendering an agreement he had already entered into incapable of fulfilment, in that other persons were to have a priority of right to purchase over the head of his conditional vendee. Whether the plaintiffs lay their cause of action as having arisen on the 13th February, 1875, when the foreclosure proceedings became final, or on the 26th September, 1875, when the defendant-appellant obtained possession, can make no difference. Umeda Singh had "no share" to offer for sale, pursuant to the terms of the *wajib-ul-arz*, and he was not in a position to fulfil its conditions, for all that remained to him till the 13th February, 1875, was his equity of redemption, which then became irretrievably lost. There was in effect no sale on that date in respect of which the plaintiffs could set up a right of pre-emption; all that took place was that the conditional vendee by operation of law became an absolute proprietor.

I am, therefore, of opinion that the view of Pearson, J. is correct upon both points referred to me, and I concur in his order that the appeal should be decreed and the decision of the first Court restored without costs.

Appeal allowed.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

MEHDI HUSAIN (PLAINTIFF) *v.* MADAR BAKHSI AND OTHERS
(DEFENDANTS).*

1880
May 7.

Error or irregularity—Court-fees—Appeal—Act X of 1877 (Civil Procedure Code), s. 578.

The refusal of a plaintiff-respondent to make good a deficiency in court-fees in respect of his plaint when called upon to do so by the Appellate Court is not a

* Second Appeal, No. 14 of 1880, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 1st October, 1879, reversing a decree of Maulvi Kamar-ud-din Ahmad, Munsif of Azamgarh, dated the 23rd June, 1878.

1886

ground upon which the Appellate Court should reverse the decree of the Court of first instance and dismiss the suit.

MEHDI
HUSAIN
v.
MADAR
BARKHSHI.

THE plaintiff in this suit obtained a decree in the Court of first instance. On appeal by the defendants against this decree the lower appellate Court set it aside and dismissed the suit on the ground that the plaintiff had not sufficiently stamped his plaint, and when called upon to stamp it sufficiently refused to do so. The decision of the lower appellate Court was in the following terms:—
“Full fees have not been paid in this suit, and the appeal is decreed and the suit is dismissed in consequence of the plaintiff respondent’s refusal to make good the value of the fees. The suit is for a declaratory decree and consequential relief and falls under s. 7, cl. iv, letter c, Act VII of 1870. In this section it is declared that the amount of fee payable in such a case shall be computed according to the amount at which the consequential relief sought is valued. Now the value of the suit is stated in the petition of plaint to be Rs. 600, and in the table of rates of *ad valorem* fees leviable on institution of suits of the Act, Rs. 45 is given as the fee chargeable. The plaintiff has paid Rs. 35 only: this finding of the Court is explained to the plaintiff in Court through his vakil, and payment of the balance being refused, this Court cannot but throw his case out. The appeal is decreed with costs and interest. The lower Court’s decision is reversed, the suit being dismissed.”

The plaintiff appealed to the High Court.

Shah *Asad Ali*, for the appellant.

Pandit *Ajudhia Nath* and *Lala Latta Prasad*, for the respondents.

The judgment of the Court (STUART, C. J., and OLDFIELD, J.,) was as follows:

JUDGMENT.—In this case the Munsif decreed the claim, but his judgment was reversed by the Judge, not on the merits, but because the plaintiff had paid a court-fee too small for the suit, Rs. 35 instead of Rs. 45. In this view he may or may not be right, but clearly the objection is not one affecting the merits of

the case, and therefore as provided by s. 573, Act X of 1877, he ought not to have made the order he did reversing the decision of the Munsif. We must, therefore, set aside the Judge's order and direct him to try the appeal that was taken to his Court on the merits. Costs to abide the result.

1880

MEHNDI
HUSAIN
v.
MADAR
BAKUSH.

Cause remanded.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

1880
May 15

NASIR HUSAIN (DEPENDANT) v. MATA PRASAD AND ANOTHER (PLAINTIFFS)*

Voluntary alienation—Good Faith—Fraud—Consideration.

A decree-holder instituted a suit against his judgment-debtor and the latter's son for a declaration that a gift by the judgment-debtor to his son of certain property was fraudulent, and that such property was liable to be taken in execution of the decree. Held that, such gift having been made by the donor out of natural love and affection for the donee and in order to secure a provision for him and his descendants, and therefore for good consideration, and having operated, and the donor having reserved to himself sufficient property to satisfy the decree, the mere fact that the donor reserved to himself no property within the jurisdiction of the Court which made the decree was not a ground for holding that such gift was fraudulent and not made in good faith, and for setting it aside and allowing the decree-holder to proceed against the property transferred by it.

The law relating to voluntary alienations explained.

The facts of this case are sufficiently stated for the purposes of this report in the order of the High Court (SPANKIE, J., and OLDFIELD, J.,) remanding the case.

The *Senior Government Pleader* (Lala Juala Prasad) and Shah Asad Ali, for the appellant.

Pandit Nand Lal and Babu Jogindro Nath Chaudhri, for the respondents.

The High Court's order of remand was as follows :—

OLDFIELD, J. (SPANKIE, J., concurring)—It appears that Zulfiakar Husain executed a deed of gift dated 14th December, 1872, by which he bestowed a large portion of his property on his son Nasir Husain. The plaintiff held at the time of gift a decree against him

* Second Appeal, No. 168 of 1879, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 23rd December, 1878, reversing a decree of Babu Raud Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 21th December, 1877.