

pleaded and what are to be the consequences of not specifically pleading them, that if I hold the appellant protected by the pardon given him, I ought to give him the benefit of it, as no doubt the learned Judge would have done had he had the materials before him that I have, just as much as if I were now satisfied that the appellant had been formerly acquitted or convicted of the offences of which he has now been convicted, I should feel bound to give effect to such a plea in appeal. To sum up the matter, having before me the additional evidence contained in the Calcutta record I am of opinion that, by the terms of the conditional pardon granted to the appellant, on the 17th February, the conditions of which were satisfied by him, as is shown by its never having been withdrawn, he was protected from trial at Benares in respect of the offences under ss. 474, 472 and 471 of the Penal Code, and was not liable to be proceeded against in respect of them. I therefore hold such trial to have been illegal, and accordingly I reverse the findings and sentences of the learned Judge, and quashing all the proceedings of the Sessions Court, discharge the appellant and direct that he be released.

Conviction quashed.

FULL BENCH.

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Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Tyrrell.

MUHAMMAD SADIK AND OTHERS (DEFENDANTS), v. MUHAMMAD JAN AND OTHERS (PLAINTIFFS).

Dismissal of suit for insufficient court-fee on plaint—Decree—Appeal—Civil Procedure Code, ss. 2, 54, 158—Act VII of 1870 (Court Fees Act) s. 12.

The Court of first instance being of opinion that the plaint bore an insufficient court-fee, and the plaintiff not making good the deficiency, dismissed the suit after recording evidence, but without entering into the merits. On appeal the lower appellate Court held that the court-fee was sufficient, and remanded the case for trial on the merits.

Held that s. 158 of the Civil Procedure Code was not applicable to the case; that the first Court's disposal of the suit must be treated as being under s. 54, and was therefore a decree within the meaning of s. 2, and appealable as such, and that such

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appeal was not prohibited by s. 12 of the Court Fees Act. *Ajoodhya Pershad v Gunga Pershad* (1) and *Annamalai Chetti v. Cloeté* (2) referred to.

THIS was a reference to the Full Bench by Edge, C.J., and Tyrrell, J.

The facts are sufficiently stated in the judgment of the Full Bench.

Mr. *Hamidullah*, for the appellants.

Mr. *Dwarika Nath Banerji*, for the respondents.

EDGE, C. J., STRAIGHT and TYRRELL, J.J.—This was a suit for redemption of mortgage. The mortgagor had assigned. The mortgagee and the assignee were the defendants. The Munsif decided that the fee payable on the plaint was insufficient, being of opinion that the relief sought by the plaintiff must include a further relief against the assignee by a declaration that the assignment was bad. The Munsif consequently held that the relief sought in the plaint was under-valued. He dismissed the suit without entering into the merits, on the ground that the plaintiff did not then and there make good the fee which he, the Munsif, had determined to be payable. The plaintiff appealed, and on appeal the Subordinate Judge, holding that the fee paid by the plaintiff was more than sufficient and that no cancelment of the deed of assignment was sought, allowed the appeal and remanded the case for trial on the merits. From that order this appeal has been brought. If the relief sought was, in fact, under-valued, it was the duty of the Munsif to reject the plaint. He, in fact, recorded evidence, and having recorded evidence he dismissed the suit without expressing any opinion on that evidence. It is obvious that if he was right as to the fee, the only proceeding open to him was to reject the plaint under s. 54 of the Code of Civil Procedure on failure of the plaintiff within a reasonable time to make good the deficiency. We are not prepared to hold that s. 158 was applicable to a case of this kind, when there is a plain direction in s. 54 as to the course a Court must adopt. We must regard the Munsif's disposal of the suit as being under s. 54. If that be a correct view, his order rejecting the plaint

(1) I. L. R., 3 Calc., 240.

(2) I. L. R., 4 Mad., 204.

was a decree under s. 2 of the Code. An order rejecting a plaint is in terms included in the definition in s. 2, and being a decree was appealable when there is no statutory prohibition to the contrary. The next question is, is there such statutory prohibition? On behalf of the appellants, s. 12 of the Court-fees Act is said to be a direct prohibition against an appeal in this matter. If that argument is to be accepted there would be no appeal when a Judge of first instance wrongly decided that a suit was under-valued, and on that decision rejected the plaint. In our opinion the intention of the framers of the Code of Civil Procedure was that there should be an appeal in every case falling within s. 54; otherwise we should have found in the definition of decrees in s. 2 words limiting those orders under s. 54 which might for the purpose of the Code be considered decrees. A similar view was taken in the case of *Ajoodhya Pershad v. Gunga Pershad* (1). We are of opinion that the decree of the Munsif should be regarded as passed in rejection of the plaint and was appealable. Several cases have been referred to. In *Annabala Chetti v. Cloete* (2) the learned Judges endeavoured to reconcile s. 54 of the Code of Civil Procedure with s. 12 of the Court-fees Act. We do not think it necessary to consider whether those sections can or cannot be reconciled, as we are of opinion that an appeal lies under the Code of Civil Procedure of 1882. If we had to consider whether those sections could be reconciled or not on the lines on which those Judges proceeded, we should have a great difficulty in coming to the conclusion that a Court could determine the amount without deciding the question as to the relief sought, and yet that the relief sought was not a question relating to the valuation for the determination of the fee chargeable. The Subordinate Judge may have been wrong in remanding the case under s. 562, as the evidence had been recorded. The Subordinate Judge ought to have treated the decree of the Munsif as an order rejecting the plaint. The Munsif should have been told to accept the plaint as properly stamped and to proceed to dispose of the case on the merits. To that extent we allow the appeal and direct the Munsif to restore the suit to its place in the list of pending cases on the basis of its being

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a suit in which a proper court-fee has been paid, and dispose of it according to law. Costs here and hitherto to abide the result.

Cause remanded.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Mahmood.

KESHABDEO (PETITIONER) v. RADHE PRASAD (OPPOSITE PARTY).

Execution of decree—Civil Procedure Code, ss. 311, 313, 320, 322B, 322C, 322D—Transfer of execution to Collector—Application to Civil Court to set aside sale held by Collector on the ground of irregularity.

Held by the Full Bench that an application to set aside, on the ground of material irregularity within the meaning of s. 311 of the Civil Procedure Code, a sale held by the Collector in execution of a decree transferred to him for execution under s. 320, cannot be entertained by a Civil Court. *Madho Prasad v. Hansa Kuar* (1) followed. *Nathu Mal v. Lachmi Narain* (2) distinguished.

Per EDGE, C.J.—The intention of the Legislature as expressed in s. 320 and the following sections of the Civil Procedure Code was not to allow any delegation to the Collector of power to adjudicate upon questions of title, but, in other matters, to hand over all the proceedings to the Collector, and to withdraw the matters so handed over from the purview of the Civil Courts to that extent, but not questions of title or the other questions, if in dispute, referred to in ss. 322B, 322C, or 322D.

THIS was a reference to the Full Bench of an appeal which originally came for hearing before Brodhurst and Mahmood, J.J. The facts are sufficiently stated in the judgments of Edge, C. J., and Straight, J.

Pandit *Sundar Lal*, for the appellant.

Munshi *Kashi Prasad*, for the respondent.

EDGE, C. J.—In this case the respondent in the appeal before us obtained a money-decree against the appellant. The decree was transferred to the Collector for execution under the rules framed by the local Government under s. 320 of the Code of Civil Procedure. After the sale by the Collector, the judgment-debtor (appellant) applied to the Munsif to set aside the sale, on the ground of there having been irregularity in the conduct of the sale. The Munsif dismissed the application on the ground that he had no jurisdiction.

(1) I. L. R., 5 All., 314.

(2) I. L. R., 9 All., 43.