

1891  
July 28.

## APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Knox.*

RAM KISHEN UPADHIA (PLAINTIFF) v. DIPA UPADHIA (DEFENDANT).\*

*Second appeal—Plea raised at the hearing which was not taken in the memorandum of appeal—Practice.*

A plea that the memorandum of appeal in the lower appellate Court was insufficiently stamped, and that such deficiency was not made good within the period of limitation is not a plea which can be raised at the hearing of a second appeal, when it has not been taken in the memorandum of appeal.

The plaintiff-appellant claimed a declaration of right and maintenance of possession in respect of a certain zamindari share by cancelment of certain Settlement Court's decisions. He obtained a decree in the Court of first instance. The defendants appealed; and the Court of appeal (the Subordinate Judge), finding that the plaintiff-respondent had been out of possession for more than twelve years before suit, decreed the appeal and dismissed the plaintiff's claim. The plaintiff then appealed to the High Court, and there a plea was sought to be raised in his behalf which had not been taken in the memorandum of appeal, namely, that the defendant's memorandum of appeal in the lower appellate Court had not been properly stamped, and that the deficiency in stamp had not been made good within the period of limitation.

Mr. J. Simcoe, for the appellant.

The Hon'ble Mr. Spinkie, for the respondents.

STRAIGHT, J. (Knox, J. concurring). I have had an opportunity of consulting the learned Chief Justice upon the question raised by the learned pleader for the appellant which was not taken in his memorandum of appeal, *viz.*, that by reason of the fact that the memorandum of appeal presented to the appellate Court was insufficiently stamped on the date upon which it was presented, there was no appeal at that time before the Court, and the subsequent payment of the deficiency did not cure the defect and save the bar of

---

\* Second Appeal No 424 of 1889 from a decree of Rai Lalta Prasad, Subordinate Judge of Ghazipur, dated the 11th January 1889, reversing a decree of Maulvi Muhammad Abdul Ghafur, Munsif of Ballia, dated 10th November 1887.

limitation. My brother Knox and I, in common with the learned Chief Justice, are agreed that where a question of this kind is not specifically taken in the memorandum of appeal, involving as it does primarily a matter of Court-fees and the other incidental inquiries that necessarily arise in regard thereto, it should not be entertained. That being so, we have to consider whether there is any ground for this appeal. The learned pleader has not seriously contended that the finding of the learned Judge that the plaintiff-appellant was never in possession of the property to which he seeks a declaration of his title, is not strongly in favor of the view that the plaintiff had no title in respect of which he could claim to have a declaration. The appeal is dismissed with costs.

*Appeal dismissed.*

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

1891  
July 30.

TULSA (PLAINTIFF) v. KHUB CHAND (DEFENDANT).\*

*Mortgage—Prior and subsequent mortgages—Rights of persons advancing money to pay off a prior mortgage—Suit to sell mortgaged property under mortgage—Form of decree to be given.*

Where in a suit to bring certain immovable property to sale under a mortgage it was found that the predecessor in interest of one of the defendants had advanced money upon a mortgage of the same immovable property in order to save a portion thereof from sale under two prior mortgages : held that such defendant was entitled to the benefit of the payment so made, and that the proper decree in the suit should be that the plaintiff could only bring that portion of the property in suit to sale on payment to the said defendant of the money advanced as aforesaid, with interest from the date of payment to the date of the receipt of the final decree by the Court of first instance together with proportionate costs ; such payment to be made within 90 days from the ascertainment of such amount and the receipt of the final decree by the Court of first instance ; otherwise the plaintiff to be absolutely debarred from all right to redeem that particular portion of the property mortgaged.

The facts of this case are fully given in the judgment of the Court.

Pandit *Sundar Lal* and *Babu Durga Charan Banerji*, for the appellant.

\* Second Appeal No. 1141 of 1888 from a decree of H. F. Evans, Esq., District Judge of Aligarh, dated 23rd April 1888, reversing a decree of *Babu Abinash Chandar Banerji*, Subordinate Judge of Aligarh, dated 6th October 1885.