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whole property. Such an inconsistent plea he could not be allowed to raise in appeal, and the lower appellate Court ought not to have considered that plea and to have decided the appeal with reference to that plea.

I would allow the appeal as between the parties to it, and, setting aside the decree below, remand the case to the lower appellate Court under section 562 of the Code of Civil Procedure for a trial of the other questions raised in the appeal before that Court. The appellant will get his costs of this appeal.

AIKMAN, J.:—I concur in the judgment of my brother Banerji and in the decree proposed by him. As this appeal is allowed "as between the parties to it," it will not affect any benefit which the defendants to the suit who are not parties to it may have obtained by the decree of the lower appellate Court.

Appeal decreed and cause remanded.

FULL BENCH.

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July 7.

Before Mr. Justice Knox, Mr. Justice Blair, and Mr. Justice Burkitt.

AMJAD ALI AND OTHERS (PLAINTIFFS) *v.* MUHAMMAD ISRAIL AND OTHERS (DEFENDANTS).*

Act No. VII of 1870 *(Court Fees Act), sections* 12 *and* 28—*Court fee—Finality of decision of Court on question of Court fee.*

The decision of the Court on a question of the court fee payable on a plaint or memorandum of appeal which is to be "final as between the parties to the suit" must be a decision made between the parties on the record and after they have had an opportunity of being heard, and not a decision based upon the report of a munsarim before the plaint or memorandum of appeal is filed and therefore before any parties are before the Court.

Hence where a Court of first instance held on the report of the Munsarim that a plaint presented to it had been insufficiently stamped, but subsequently, both parties being before the Court and arguments having been heard, decided that the court fee originally paid was sufficient; it was *held* that the latter decision was the decision which was final as between the parties within the meaning of section 12 of the Court Fees Act, 1870.

* Second appeal No. 889 of 1894, from a decree of H. G. Pearse, Esq., District Judge of Agra, dated the 26th July 1894, confirming a decree of Maulvi Aziz-ul Rahman, Subordinate Judge of Agra, dated the 12th March 1894.

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THE plaintiffs in this case sued for pre-emption in respect of a sale deed executed on the 19th of October 1892. Their plaint was presented in the Court of the Subordinate Judge on the 16th of November 1893, the first day on which the Court was open after the Dasserah vacation. On that day the Munsarim reported that the court fees paid on the plaint were insufficient, and that the plaint required to be amended in respect of a claim for redemption. Upon this report the Court on the same day ordered that the plaint should be returned for amendment, and directed that it should be presented again, amended, and with the deficient court fee duty, within four days. On the following day (November 17th) the plaintiffs appeared before the Subordinate Judge and objected to his order in the matter of the court fee payable on their plaint. They contended that the amount of court fees they had paid was sufficient, but at the same time they brought into Court the additional amount they had been ordered to pay, and submitted themselves to the order of the Court as to whether it should be paid or not. They also pointed out that they had not made any claim for redemption. On this petition the Court ordered the deficient court fee duty to be paid, which was done, and the plaint was then admitted and registered and summonses were served on the defendants. The Court either disregarded or countermanded its order as to returning the plaint for amendment, and the case proceeded to a hearing without amendment. At the hearing of the suit the defendants raised the objection that the suit was barred by limitation, the plaint not having been properly stamped when presented on the 16th November, and the deficiency not having been made good within time. The Court, having heard arguments on this point, reconsidered its former *ex parte* decision, and held that the court fee originally paid on the plaint was sufficient. The suit was ultimately dismissed on the merits.

The plaintiffs appealed, and the defendants preferred an objection under section 561 of the Code of Civil Procedure raising the same point of limitation. The lower appellate Court (District

Judge of Agra) allowed the objection and dismissed the suit on the ground that it was barred by limitation.

The plaintiffs thereupon appealed to the High Court.

Mr. *D. N. Banerji*, for the appellants.

Mr. *T. Conlan* and Pandit *Sundar Lal*, for the respondents.

BURKITT, J.—The suit in which this second appeal has arisen is one for pre-emption. The sale-deed on which the cause of action for pre-emption is alleged to have arisen bears date of the 19th of October 1892. The plaint was presented in the Court of the Subordinate Judge on November 16th, 1893, the first day on which the Court was open after the Dasserah vacation. Therefore, so far as the day on which it was presented is concerned, the plaint was within limitation under section 5 of the Limitation Act. On November 16th, the Court Munsarim reported that the court fees paid on the plaint were insufficient and that the plaint required to be amended in respect of a claim for redemption. On this report the Court on the same day ordered that the plaint should be returned for amendment, and directed that it should be presented again, amended and with the deficient court fee duty, within four days. Now in passing that order the Subordinate Judge exceeded his powers, as has been held in the case of *Jainti Prasad* v. *Bacchu Singh* (1). The last day of the limitation period during which the plaint could have been presented so as to be a valid plaint was November 16th, 1893. If the plaint as presented on that day was not sufficiently stamped, and if the deficient duty were not paid on that day, it was not a valid plaint. The Subordinate Judge had no power to extend the period of limitation provided by Act No. XV of 1877 by permitting the intending plaintiffs to pay in the deficient court fee after November 16th. The case is not one to which the proviso to section 28 of the Court Fees Act applies, and therefore no payment subsequent to November 16th of any deficient court fees could validate the plaint. As matter of fact the plaint was not returned to the plaintiffs, for on the following day (November 17th) they appeared

(1) I. L. R., 15 All., 65.

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before the Subordinate Judge and put in a petition in which they objected to his order as to the amount of court fees paid on the plaint being insufficient. They contended that the amount of the court fees they had paid was sufficient, but at the same time they brought into Court the additional amount they had been ordered to pay and submitted themselves to the order of the Court as to whether it should be paid or not. They also pointed out that they had not made any claim for redemption. On this petition the Court ordered the deficient court fee duty to be paid, which was done, and the plaint was then admitted and registered, and summonses were served on the defendants. The Court either disregarded or countermanded its order as to returning the plaint for amendment, and the case proceeded to a hearing without amendment.

One of the pleas taken by the defendants at the hearing was that the suit was barred by limitation. Their contention was that the plaint as presented on November 16th, 1893, was not a valid plaint, as it was not sufficiently stamped, and that as the deficient duty was not paid till the following day, when the limitation period had expired, there was not before the Court any valid plaint to which they could be called on to plead. The plaintiffs replied that the court fees paid originally on the plaint on November 16th were sufficient, and that the Court had acted erroneously in compelling them to pay a larger sum. They contended that the plaint as presented on November 16th was a valid plaint. On these pleadings the Subordinate Judge, having heard argument on an issue as to whether the suit was barred by limitation or not, decided that it was not so barred, holding that the stamp duty paid on November 16th was sufficient, that the plaint was "legal and valid" on the day on which it was presented, and that "subsequent proceedings cannot invalidate a valid plaint." The suit was ultimately dismissed on the merits.

On appeal by the plaintiffs the defendants put in an objection under section 561 of the Code of Civil Procedure. Their contention was that the Subordinate Judge was wrong in holding

that the suit was not time-barred and that the plaint was properly stamped when presented on November 16th. The District Judge on these pleas held that "the plaint being insufficiently stamped on November 16th was not a plaint," and that that day being the last day of limitation, the Subordinate Judge was not competent to give time to amend the plaint or make good the deficiency. The learned Judge further gave his reasons for holding that the plaint when presented was insufficiently stamped.

On second appeal to this Court the case has been referred to a Bench of three Judges. Before us the case has been almost entirely argued on the effect of the words "such decision shall be final as between the parties to the suit" in section 12 of the Court Fees Act, a point which apparently was not raised before the District Judge, and which, I must say, is not in so many words taken in the memorandum of appeal to this Court. The section cited above provides that "every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or a memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit." The question we have to decide is—which of the orders passed by the Subordinate Judge in this case is the "decision" which is to be considered "final" under section 12.

Putting aside as immaterial the order passed on November 17th, it being merely a repetition of the order passed on the 16th, there are two orders which we have to consider. The first is the order of November 16th, by which the Subordinate Judge held that the plaint was not sufficiently stamped and directed the deficient duty to be made good within four days. It is admitted that if that order is the "decision" which section 12 makes final as between the parties, the case is at an end, the plaint not having been stamped within limitation to the amount required by that order. The second order is that passed at the hearing of an issue raised between the parties, by which it was held that the plaint when presented was sufficiently stamped, and so was a valid plaint.

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If that order be the "decision" referred to in section 12 of the Court Fees Act, it is admitted that this appeal must so far be allowed.

In my opinion the latter of the two orders must be considered to be the "decision" referred to in section 12 of the Court Fees Act. To hold otherwise would, it appears to me, be most unjust and productive of hardship in many cases. The first order was not one passed between the parties. Indeed on November 16th, when that order was passed, there can hardly be said to have been any parties or any suit. The plaint had not been admitted nor registered, and the defendants had not been summoned. I find it difficult to understand how a decision can be arrived at, which will be final as between parties, at the making of which practically neither party was heard. On the presentation of the plaint, all that happened was that the Munsarim made a report to the Court which the Court adopted, apparently without even calling on the plaintiffs. On the following day, when the plaintiffs did contest the correctness of the order as to the insufficiency of the court fees, it was too late, limitation having expired, and, according to the respondents' contention, this decision, though passed without hearing either party, is final and deprives the plaintiffs of all redress. I am unable to believe that the Legislature intended the word "decision" to be so interpreted. I cannot think that it was intended to mean a mere *ex parte* order by the Court, passed without argument and in the absence at least of one of the parties —the defendants. I take it that in a case in which the defendants have appeared and in which one or other side challenges the correctness of the court fees paid on the plaint, in that case the Court will have jurisdiction, and will be bound, to decide the question of valuation as between the parties, and may conceivably take a view different from that which it took when the plaint was presented and before it was admitted and registered. The latter order is, in my opinion, simply an interlocutory order which the Court may vary as long as it has seisin of the case. In this connection the word "filed" used in section 12 is significant

That word certainly means something more than "presented" for admission. It implies that the plaint or memorandum of appeal has been admitted and put on the files of the Court. That is the sense in which the same word is used in section 28 of the Court Fees Act, and I see no reason why I should give a different meaning to it in section 12. And indeed the words of the section read in their natural and literal sense are wholly inapplicable to a case in which the plaint had not been filed, and in which there was therefore no existing suit, and no parties to such suit. To accept the opposite construction, the section would have to be read "is presented for admission and filing" and "such decision shall be final as between the persons intended to be impleaded in a suit sought to be instituted." I know no principle of law which would justify so unnatural a construction.

When the Legislature intends to confer the status of finality upon an *ex parte* decision, it does so in plain and explicit terms, as in section 5 of the Court Fees Act. In the absence of clear and unequivocal language to the contrary, I must hold that a decision to be "final as between the parties" must be a judicial decision upon a hearing in which the general judicial maxim of "*Audi alteram partem*" has been observed. If then a plaint or memorandum of appeal has been so "filed," (and under the Rules of this Court it cannot be so filed without a report by the Munsarim that the court fees paid on it are sufficient) it surely would be open to the defendant at the hearing to contend that the fees paid were insufficient, and that for that reason the plaint on the files of the Court was not a valid plaint. On deciding such a plea—as is the case here—the Court would in my opinion come to the "decision," which, under the wording of section 12 of the Court Fees Act, would be final as between the parties. As an illustration I would take a case in which Rs. 10 was the amount of court fees legally chargeable on a plaint, but in which from ignorance the Munsarim reported to the Court that Rs. 1,000 ought to have been paid, and that the Court adopted and acted on that report. If then the plaintiff pay that sum—as indeed he

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must do or have his plaint rejected—surely the defendant at the hearing would be entitled to plead that the proper court fee chargeable on the plaint was Rs. 10, and that he—if the decree went against him—ought not to have to pay the extra Rs. 990 in costs. I certainly hold that he could ask the Court to decide the valuation for court fees chargeable on the plaint, and to hold that it had acted erroneously in calling on the plaintiff to pay the Rs. 990, and that the plaintiff, if successful in obtaining a decree, could not recover that sum as part of the costs. This no doubt would be hard on the plaintiff, who simply obeyed the order of the Court, but the defendant would not be in fault, and the plaintiff would not be entitled to pass the loss on to the defendant and to make him responsible for the mistake of the Court.

In the above observations I desire to guard myself against its being supposed that in this judgment I have had in my contemplation any of the cases under section 54 of the Code of Civil Procedure in which the Court may *reject* a plaint. None of these cases come within the scope of the present appeal.

Some argument was addressed to us on an analogy which it was sought to draw from the practice of the High Court in cases under section 3 of the Court Fees Act. The procedure enjoined by statute and the practice of the High Court and of the District Court is, however, so very different in those matters that no useful analogy can be drawn from them.

For all the above reasons I am of opinion that the order passed by the Court of first instance at the hearing of the suit on March 12th, 1894, was the "decision" which, under section 12 of the Court Fees Act, is final as between the parties.

I would therefore allow this appeal, and, setting aside the decree of the lower appellate Court, I would remand the case under the section 562 of the Code of Civil Procedure for a decision on the merits, the lower appellate Court having decided the suit on a preliminary point. I would direct that costs should abide the event.

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KNOX, J.—I fully concur and have nothing more to add.

BLAIR, J.—I concur.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decree on the preliminary point reversed, and the case remanded under section 562 of the Code of Civil Procedure to the lower appellate Court with directions to readmit the case on its file of pending appeals and to dispose of it according to law. Costs will abide the result.

Appeal decreed and cause remanded.

Before Mr. Justice Knox, Mr. Justice Blair; and Mr. Justice Burkitt.

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July 7.

NAND LAL (PLAINTIFF) *v.* BANSI (DEFENDANT).*

Pre-mortgage—Wajib-ul-arz—Co-sharer—Mortgagee of a co-sharer not himself a co-sharer.

Two co-sharers in a village, A and G, mortgaged their proprietary interest, with possession, to L. L made either an assignment or a sub-mortgage of her interest under the mortgage for a term of twenty years to B, with a foreclosure clause in case of non-payment. B afterwards transferred to X for an unexpired period of sixteen years and eleven months the interest in the property which he had acquired from L. One N L, a co-sharer in the village, thereupon brought a suit for pre-mortgage in respect of the transfer to X, on the basis of the village *wajib-ul-arz*, which gave a right of pre-emption or pre-mortgage when the share of a co-sharer should be sold or mortgaged.

Held, that, inasmuch as B could not be regarded as a co-sharer, no right of pre-mortgage arose in favour of N L in respect of the transfer of the mortgagee interest from B to X. The principle laid down in *Khair-un-nissa Bibi* v. *Amin Bibi* (1) and in *Ali Ahmad* v. *Rahmat-ul-lah* (2) followed.

THE material facts of this case are fully stated in the judgment of Burkitt, J.

Munshi *Madho Prasad*, for the appellant.

Mr. *Roshan Lal*, for the respondent.

BURKITT, J :—The question we have to decide in Full Bench in this second appeal has arisen in the following manner. Two co-sharers named Asa and Gopal mortgaged their proprietary interest with possession to Musammat Laria. The latter made

* Second Appeal No. 338 of 1896, from a decree of Munshi Mata Prasad, Subordinate Judge of Bánda, dated the 3rd February 1896, reversing a decree of Babu Jailal, Munsif of Hamirpur, dated the 3rd December 1896.

(1) Weekly Notes, 1887, p. 93. (2) I. L. R., 14 All., 195.