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was wrong in dismissing the suit on the plea of *res judicata*. We therefore reverse his finding on that point, and setting aside his decree, remand the case under section 562 of the Code of Civil Procedure to the lower appellate Court to be restored to the file of pending appeals and disposed of according to law. Costs of this appeal will follow the event.

Appeal decreed and cause remanded.

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June 12.

Before Mr. Justice Banerji and Mr. Justice Aikman.

PIRYA DAS (PLAINTIFF) v. VILAYAT KHAN AND OTHERS (DEFENDANTS).*

Execution of decree—Civil Procedure Code, section 335—Suit by unsuccessful auction-purchaser for a declaration of right and for possession—Court-fee—Act No. VII of 1871 (Court Fees Act), section 7.

A purchaser of property at a sale held in execution of a decree obtained formal possession, but was resisted in obtaining actual possession by a person, who claimed to be the owner in possession of the property. An application made by the auction-purchaser under section 335 of the Code of Civil Procedure was rejected, and the auction-purchaser accordingly filed a suit against the person in possession claiming a declaration of his right to the property, and to be put in actual possession thereof. *Held*, that such a suit was one for a declaratory decree and consequential relief and Court-fee was payable under Clause IV (e) of section 7 of the Court Fees Act. *Dhondo Sakharam Kulkarni v. Govind Babaji Kulkarni* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi Gokul Prasad and Munshi Haribans Sahai for the appellants.

Maulvi Ghulam Muftaba for the respondents.

BANERJI and AIKMAN, JJ.—We are of opinion that the lower appellate Court improperly dismissed the appeal before it. The plaintiff was the auction-purchaser of certain property, of which formal possession was delivered to him by the officer of the Court. The defendant No. 1 complained that the plaintiff was not entitled to possession, and that he, the defendant, had been improperly dispossessed. An inquiry was held, and an order was made by the Court under section 335 of the Code of Civil Procedure, declaring the defendant to be entitled to possession, and ordering

* Second Appeal No. 923 of 1897, from a decree of Maulvi Saiyid Akbar Husain, Judge of Small Causes exercising the powers of a Subordinate Judge of Agra, dated the 31st August 1897, confirming a decree of Pandit Bishan Lal Sarma, Munsif of Agra, dated the 4th June 1897.

him to be restored to possession. The plaintiff thereupon brought the present suit on the allegation that Miran Sakka, whose rights he had purchased at auction, was the owner of the property in question, and that he the plaintiff was consequently entitled to the possession of it. He prayed that his right to the property should be declared, and that possession should be restored to him. He also included in his prayer for relief a prayer to have the order under section 335 set aside. He valued the relief sought by him at Rs. 62, but paid a Court-fee of Rs. 10 as in a suit for a declaratory decree only. The defendant objected to the amount of the Court-fee paid as insufficient. That objection was overruled by the Court of first instance which, however, dismissed the suit on the merits. The plaintiff appealed and paid on his memorandum of appeal a Court-fee of Rs. 10. The officer of the Court reported that the memorandum of appeal and the plaint were insufficiently stamped, and on that report the learned District Judge made the following order:—"Appellant to make good the deficiency in both Courts within four days or show cause." The learned Subordinate Judge, who decided the appeal in this case, says in his judgment that the appellant neither paid the required amount nor showed any cause. But this statement is clearly wrong. It appears that within the time allowed by the Court the appellant's pleader appeared to show cause, and did show cause apparently to the satisfaction of the District Judge, because we find that on the 16th July 1897, the District Judge ordered the appeal to be admitted subject to any objection as to Court-fees that might be raised at the hearing. At the hearing the objection was renewed on behalf of the respondents. The learned Judge of the Lower Appellate Court, without assigning any reasons for his opinion, held that the amount of Court-fees was insufficient, and thereupon dismissed the appeal. Even if it be assumed that the Court-fees paid on the plaint and the memorandum of appeal were insufficient, the Court was wrong in dismissing the appeal without giving the appellant an opportunity to make good the deficiency. Further, we are of opinion that there was no deficiency of Court-fee on the plaint in this case or on the memorandum of appeal. If the suit be treated as a suit for a declaration of the plaintiff's right to present possession of the property within

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the meaning of the last paragraph of section 335 of the Code of Civil Procedure, it was properly stamped with a Court-fee of Rs. 10, and this was the view taken by the Bombay High Court in *Dhondo Sakharan Kulkarni v. Gobind Babaji Kulkarni* (1). In that case there was a distinct prayer for possession, and the Bombay Court held that, notwithstanding such prayer, the amount of Court-fee paid, *i.e.* Rs. 10, was sufficient. We are, however, not called upon to decide this point, because if the suit be treated as a suit for possession, the plaint was properly stamped under clause v, section 7 of the Court Fees Act. Further, as the claim sought not only a declaration of right but possession also, there was a prayer for a declaratory decree and consequential relief, and therefore the Court-fee was payable under clause IV (c) of section 7 of the Court Fees Act. In any aspect of the case the amount of Court-fee paid was sufficient or more than sufficient. The fact of the plaintiff asking for a declaration of his title and also to have the order passed under section 335 set aside was not asking for several declarations or reliefs, inasmuch as the order sought to be set aside negatived his right, and the effect of the declaration of his right would necessarily be the setting aside of that order. We think that the Subordinate Judge was wrong in dismissing the appeal. We set aside his decree and remand the case under section 562 of the Code of Civil Procedure to the lower appellate Court with directions to try the appeal before it on the merits. The appellant will have his costs of this appeal. Other costs will abide the event.

Appeal decreed and cause remanded.

Before Mr. Justice Burkitt and Mr. Justice Henderson.

CHAJJU (DEFENDANT) v. UMRao SINGH AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, section 13—Res judicata—Under what circumstances a decision may be res judicata as between defendants—Civil Procedure Code, section 544.

Where an adjudication between defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this

* Second Appeal No. 854 of 1897 from a decree of Babu Jai Lal, Additional Subordinate Judge of Meerut, dated 31st July 1897, confirming a decree of Babu Udit Narain Singh, Additional Munsif of Meerut, dated the 26th November 1895.

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