

FULL BENCH.

1906
November 25.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir William Burkitt and Mr. Justice Richards.

MOHAN LAL AND OTHERS (PLAINTIFFS) v. NAND KISHORE AND ANOTHER (DEFENDANTS).*

Act No. VII of 1870 (Court Fees Act), sections 10 and 12—Court fee—Procedure—Second appeal—Appeal to lower appellate Court by respondent in High Court insufficiently stamped.

Where it was discovered in Second Appeal in the High Court that the respondents, when appellants in the lower appellate Court, had not paid a sufficient court fee on their memorandum of appeal in that Court, and up to the date of the hearing of the plaintiffs' appeal in the High Court, though called upon to do so, had not made good the deficiency, it was held that the proper procedure was not to dismiss the respondents' appeal to the lower appellate Court, but to stay the issuing of the decree, if any, of the High Court in favour of the respondents until such time as the additional court fee due by them might be paid. *Narain Singh v. Chaturbhuj Singh* (1) followed. *Madan Lal v. Jai Kishan Das* (2) overruled.

THE facts out of which this appeal arose are as follows:—The plaintiffs sued to recover a moiety of a debt secured by a mortgage of the 16th of July 1896 by sale of the mortgaged property. The plaintiffs offered to redeem two prior mortgages which were then subsisting. The Court of first instance (Munsif of Jalesar) decreed the plaintiffs' claim, and directed payment in respect of the prior mortgages of a sum of Rs. 8,293. From this decree the defendants appealed. The lower appellate Court (Extra Additional Subordinate Judge of Aligarh) dismissed the suit on the ground that it was barred by the provisions of section 43 of the Code of Civil Procedure. A second appeal was preferred from this decree, and in the course of the proceedings it was ascertained that an insufficient court fee had been paid on the memorandum of appeal to the lower appellate Court, the fee having been paid only with reference to the amount secured by the mortgage of the 16th of July 1890, leaving out of calculation the two earlier mortgages of which redemption was decreed. The respondents were ordered to pay in the deficiency in the Court

* Second Appeal No. 176 of 1904, from a decree of Maulvi Muhammad Shafi, Additional Subordinate Judge of Aligarh, dated the 30th of November 1903, reversing a decree of Babu Ishri Prasad, Munsif of Jalesar, dated the 27th of September 1902.

fee, but neglected or refused to do so, and the question raised before the High Court was, what was the procedure to be adopted under these circumstances, whether the respondent's appeal to the lower appellate Court ought to be dismissed, or whether the decree of the High Court, if in favour of the respondents, ought to be granted with the reservation that it should not issue until the deficiency in the court fee had been made good?

Babu *Jogindro Nath Chaudhri* and the Hon'ble Pandit *Sundar Lal*, for the appellants.

Babu *Durga Charan Banerji* (for whom *Munshi Gulzari Lal*), for the respondents.

STANLEY, C.J. and BURKITT and RICHARDS, JJ.—This appeal has been laid before a Bench of three Judges by reason of a divergence of opinion to be found in the reported cases on the matter which is the subject of the appeal. The question for determination is as to the proper order to be passed under the following circumstances. The suit was brought by the plaintiffs to recover a moiety of a debt secured by a mortgage of the 16th of July 1890 by sale of the mortgaged property. The plaintiffs offered to redeem two prior mortgages which were then subsisting. The Court of first instance decreed the plaintiffs' claim, and directed payment in respect of the prior mortgages of a sum of Rs. 8,293. From this decree the defendants appealed. The lower appellate Court on the hearing of the appeal dismissed the suit on the ground that it was barred by section 43 of the Code of Civil Procedure. A second appeal was preferred from this decree, and in the course of the proceedings it was ascertained that an insufficient court fee had been paid by the appellants in the lower appellate Court. It appears that the fee was calculated only on the amount secured by the mortgage of the 16th of July 1890, the amount due on foot of the earlier mortgages not having been taken into consideration. The appellants in the lower appellate Court, respondents to this appeal, were ordered to pay the deficiency in the court fee, but have neglected or refused to do so. The question for the determination of the Court is, what order under the circumstances should be passed upon this appeal? The lower appellate Court did not determine the issues which were knit between the parties, but decided the appeal simply on the ground

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that the suit was barred by the provisions of section 43 of the Code of Civil Procedure. It is contended on behalf of the appellants that the proper order for the Court to pass under these circumstances is to dismiss the appeal of the defendants appellants in the lower appellate Court and restore the decree of the Court of first instance. On the other side it is contended that the proper course is to determine the appeal to this Court, and if the Court adopt the view which the appellants have presented, namely, that the suit ought to have been dismissed under section 43 to remand the case to the lower appellate Court for determination.

Now in the case of *Mudan Lal v. Kishan Das* (1) it was held by a Bench of this Court that where a memorandum of appeal was insufficiently stamped, but was admitted through inadvertence and the appeal decreed, upon the attention of the High Court being called to the insufficiency, and upon the respondent failing to make good the deficiency within a prescribed time, the proper order to pass is to discharge the decree of the lower appellate Court and to restore that of the Court of first instance. This does not appear to have been the practice which previously obtained in the Court. That practice is to be found in a judgment of one of us in the case of *Narain Singh v. Chaturbhuj Singh* (2). The facts of that case seem to be on all fours with those of the present. There it was held that where it was discovered in second appeal that the respondent when appellant in the lower appellate Court had not paid a sufficient court fee on his memorandum of appeal to that Court, and when, up to the date of the hearing of the appeal in the High Court, he, though called upon to do so, had not made good the deficiency, the proper procedure was, not to dismiss the respondent's appeal to the lower appellate Court, but to stay the issuing of the decree in favour of the respondent, if such should be passed, until such time as the additional court fee due by him might be paid. In that case the learned counsel for the appellant asked the Court to take action under the second clause of section 12 and the second clause of section 10 of the Court Fees Act and dismiss the appeal to the lower appellate Court. This the Court refused to do and we think properly. The case before the Court does not appear to us to be provided for by the Court Fees

(1) Weekly Notes, 1905, p. 277. (2) (1898) I. L. R., 20 All., 362,

[Act, and the reasons assigned in the judgment in *Narain Singh v. Chatarbhuj Singh* for the order passed therein commend themselves to us. It is unnecessary for us to recapitulate the reasons which are given in that judgment. Upon the merits the decision of the Court below based upon section 43 of the Civil Procedure Code is not supported by the learned vakil who represents the respondents.

We therefore allow this appeal, set aside the decree of the lower appellate Court, and inasmuch as the material issues in the appeal have not been determined and the appeal was decided upon a preliminary point, we remand the case under the provisions of section 562 of the Code with directions that it be reinstated in its original number in the file of pending appeals and be determined according to law. On the re-hearing of the appeal it will be open to the Court below to deal with the question of the insufficiency in the court fee paid by the defendants appellants in that Court. The appellants will have their costs of this appeal. All other costs will abide the event.

Appeal decreed and cause remanded.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice
Sir William Burkitt.*

BEHARI SINGH (AUCTION-PURCHASER) v. MUKAT SINGH AND ANOTHER
(JUDGMENT-DEBTORS).*

Civil Procedure Code, sections 244 and 311—Execution of decree—Property sold as non-ancestral after inquiry by Court and notice to judgment-debtors—Plea that property was in fact ancestral barred.

Where after an inquiry as to the nature of the property, of which the judgment-debtors had notice, a Court in execution of a decree caused certain immovable property to be sold by auction as non-ancestral, the judgment-debtors standing by and neglecting to supply the Court with any information as to the nature of the property sold, it was held that it was not competent to the judgment-debtors subsequently to seek to have the sale set aside upon the ground that the property was ancestral and ought to have been dealt with in the manner provided by law in respect of such property. *Shirin Begam v. Agha Ali Khan* (1) followed. *Arunachellam Chetti v. Arunachellam Chetti* (2) referred to. *Sukhdeo Rai v. Sheo Ghulam* (3) not followed.

* Appeal No. 48 of 1905 under section 10 of the Letters Patent.

(1) (1895) I. L. R., 18 All., 141. (2) (1888) L. R., 15 I. A., 171.
(3) (1882) I. L. R., 4 All., 332.

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