MISCELLANEOUS CIVIL.

1909
November 1.

Before Mr. Justice Tudball.

KUNWAR KARAN SINGH (PLAINTIFF) *v.* GOPAL RAI AND OTHERS (DEFENDANTS).*

Act No. VII of 1870 *(Court Fees Act), sections* 5 *and* 12—*Court fee —Decision of Taxing Officer final as to category.*

The decision of the Taxing Officer as to the proper amount of court fees payable on a memorandum of appeal, as also incidentally his decision as to the category within the suit falls, is final and binding upon the Court under section 5 of the Court Fees Act, 1870.

IN this case, a memorandum of appeal having been presented for report as to sufficiency of stamp, the stamp reporter made the following report :—

"The plaintiff appellant Kunwar Karan Singh brought the suit which gave rise to this appeal to recover Rs. 4,500 principal and Rs. 1,044 interest, total Rs. 5,544, from the surplus of the sale proceeds of property mentioned in schedule A, held in deposit in court and by sale of the property mentioned in schedule B attached to the plaint. He came into court on the allegation that Syed Haidar Shah, the defendant No. 1, borrowed from him the sum of Rs. 4,500 and in lieu thereof executed a mortgage deed in his favour on the 2nd of September, 1907, by hypothecating the properties mentioned in schedules A and B to secure the repayment of the mortgage money; that it was afterwards discovered that Ram Narayan, the defendant 2nd party, had in execution of a simple money decree attached the property mentioned in schedule A before the execution of the plaintiff's mortgage, that the said property was sold by auction for Rs. 14,200 and the sale proceeds were held in deposit in court; that the decree held by Ram Narayan defendant was for Rs. 7,124-1-0 and it had priority over the plaintiff's claim; that the other creditors, who were defendants 3rd party, applied to the Court for rateable distribution of the sale proceeds, and that as against the plaintiff who held a lien over the property sold, they had no right to have their debts satisfied out of the sale proceeds—hence the suit.

"Some of the creditors, who are the respondents, opposed the suit on the ground that they in execution of their decrees had attached the property mentioned in schedule A before the execution of the plaintiff's mortgage and that the plaintiff could not therefore claim priority over their debt.

"The case proceeded on its trial and the court below gave the plaintiff a decree for sale as against property mentioned in schedule B and as against the surplus of the sale proceeds of the property mentioned in schedule A: it directed that the plaintiff will come in after the decretal debts of Ram Narayan, Gopal Rai, Parbhu Lal and Rukman, and Raghubar Dyal and Harbhajan were fully discharged.

"The plaintiff being dissatisfied with the decree comes in appeal to this Hon'ble Court and prays that it may be declared that the plaintiff's mortgage has

* Miscellaneous Stamp Reference under section 5 of the Court Fees Act.

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priority over the claims of the aforesaid persons except Ram Narayan. He has valued the appeal at Rs. 2,296-5-0, the amount due under their decrees, and has paid a court fee of Rs. 10 on the memorandum of appeal.

"I beg to submit that a suit for recovery of mortgage-debt by enforcement of the hypothecation lien is a suit for money and, the suit not having changed its character in appeal, the court fee is payable *ad valorem*. The object of the appeal is the recovery of the mortgage-debt from the sale proceeds of the property held in deposit in court in precedence of the defendants respondents. That being so, a court fee of Rs. 140 is payable. Rupees 10 having been paid, there is therefore a deficiency of Rs. 130 to be made good by the plaintiff appellant on this memorandum of appeal."

Mr. *M. L. Agarwala*, for the appellant, preferred the following objections:—

"The appellant has obtained a decree to enforce his mortgage to the full extent of his debt, the reservation being that certain creditors had perfected their title under section 295 of Act XIV of 1882 and had priority over the appellant's claim. The object of the appeal is to get rid of this reservation. The appeal seeks a declaration only. Hence Rs. 10 is quite sufficient."

The office put up the following report:—

"In reply to the objection I submit that the allegations on which the plaintiff came into court and the contention put forward by him in the court below were exactly similar to what is now contended for by the learned counsel on his behalf and yet he, the plaintiff, chose to bring a suit for money instead of for declaration. The question is, can he change the nature of suit in appeal? I submit, not. The relief prayed for in the plaint was directed against the mortgagor as also the creditors, including the respondents to this appeal other than Ram Narayan the attaching creditor. The sale-proceeds of a major portion of the mortgage security were deposited in court and the plaintiff wanted to have the same for the satisfaction of his mortgage-debt against the rival claims of other creditors, the present respondents being some of them. That object of the plaintiff having failed there as against the respondents, he comes in appeal to this Hon'ble Court with the same object in view, but to evade the payment of proper institution fee he argues that he wants a declaration only, and that his object in appealing is the removal of the condition attached to the decree by the court below. If the decree of the court below is allowed to stand, he will be a loser to the extent of the respondents' claim against the sale proceeds, the other property mortgaged to him being insignificant and not sufficient to discharge his whole debt under the mortgage sued upon (vide paragraph 8 of the plaint).

"I may mention that the plaintiff appellant presumably claims to come under Art. 17, cl. vi, Sch. II of Act No. VII of 1870. That clause applies to a case where it is not possible to put a money valuation to the relief claimed, which is not the case here. According to the plaintiff himself the value of the subject matter in dispute in the appeal is Rs. 2,296, and I submit the court fe must be paid on this amount."

The Taxing Officer on the 12th of August, 1909, made the following order:—

"In the case of *Jhandu Mal* v. *Himmat*, (1) the Hon'ble Taxing Judge held that where an appellant sought for a declaration that he need not pay off a prior mortgage before bringing certain property to sale in execution of a decree obtained on his mortgage, he must pay court fees on the sum of which he wished to evade the payment. The present case is to my mind on all fours with this. The lower appellate court has in fact said to the present objector—you may draw the balance of the sum realised by the sale of one of the properties mortgaged to you, provided you first pay the sum of Rs. 2,296-5 to certain other persons. He seeks to avoid doing this. On the reasoning adopted by the Hon'ble Taxing Judge in the case referred to above, he is bound to pay court fees on this amount. I therefore agree with the report of the office and direct *ad valorem* fees to be paid on Rs. 2,296-5. This order is passed under section 5 of Act VII of 1870."

Mr. *M. L. Agarwala* contested this order upon the ground that the decision did not touch the class in which this case fell.

Whereupon The Hon'ble Mr. Justice GRIFFIN ordered the case to be laid before the Taxing Judge for orders.

Mr. *W. Wallach*, for the Crown, raised a preliminary objection to the effect that as the Taxing Officer had not thought fit to refer the matter to the Taxing Judge, his decision was final under section 5 of the Court Fees Act, 1870. It was not open to appeal in revision or review. He relied on *Balkaran Rai* v. *Gobind Nath Tiwari* (2) and *Badri Prasad* v. *Kundan Lal* (3).

Mr. *M. L. Agarwala*, for the appellant, submitted that the question whether an *ad valorem* fee should be paid or a fixed fee was one relating to the class or category to which a particular suit belonged. Even if there was no difference between the appellant and the Taxing Officer as to the class to which a particular suit belonged, yet there might be a difference as to the amount of court fee payable, and in such cases, the decision of the Taxing Officer, if he does not refer the matter to the Taxing Judge, shall be final. But where the question involved the determination of the class to which a particular suit belonged the matter was one not within the province of the Taxing Officer but that of the Judge.

He referred to section 12 of the Court Fees Act.

(1) Unreported; but see I. L. R., 31 All., 271. (2) (1890) I. L. R., 12 All., 129.
(3) (1893) I. L. R., 15 All., 117.

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The following judgment was delivered by

TUDBALL, J.—This matter has come before me in the following circumstances. A memorandum of appeal was filed on a Court Fee Stamp of Rs. 10. The officer, whose duty it was to see that the proper fee was paid, reported that there was a deficiency of Rs. 130. This report of his was contested on behalf of the appellant, and this difference having arisen the matter was placed before the Taxing Officer. The latter, on the 12th of August last, passed an order under section 5 of the Court Fees Act, holding that there was a deficiency and the amount of fee had been correctly estimated by the office. In some manner which is not apparent from the record, the papers were laid before Mr. Justice GRIFFIN, who thereupon ordered the matter to be placed before the Taxing Judge for orders. Mr. *Wallach* has appeared on behalf of the Crown and takes a preliminary objection that the order of the Taxing Officer was a final order as contemplated by section 5 of the Court Fees Act. Attention has been called to the rulings reported in I. L. R., 15 All., 117 and I. L. R., 12 All., 129. In view of those rulings and of the clear terms of the section there is no doubt in my mind, whatsoever, that the Taxing Officer's order is final and that I have no further power to interfere in the matter. It is urged by Mr. *Agarwala* on behalf of the appellant that the dispute was one as to the category within which the suit falls and that therefore the order is not a final order. But the decision as to the category is the preliminary point which has to be decided before a decision as to the amount of Court Fees can be arrived at. According to the plain language of section 5, the amount fixed by the Taxing Officer, no matter how he arrives at his conclusion, is fixed finally and is binding so far as the purposes of the Court Fees Act are concerned. Attention has been directed to section 12 of the Act, and it has been urged that a decision of a court as to the category within which a suit may fall is not a final decision contemplated by section 12, and the same principle applies to section 5 of the Act. With this I cannot agree. The language of section 12 is perfectly clear. It is merely the decision of a court as to valuation, not the category, which is final, whereas in section 5 it is the decision of the Taxing Officer as to

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the amount of the court fee payable which is final. The Legislature has not thought fit to allow any appeal from such an order, and it seems to me that once such an order has been passed, I cannot go behind it to examine the method which the Taxing Officer adopted to arrive at his decision. I have, therefore, no jurisdiction in this matter to set aside the order of the Taxing Officer. Let the papers be laid before the Judge taking applications. As Mr. *Agarwala* wishes to obtain time to make good the deficiency, I would further point out that in my opinion I have no jurisdiction in the matter, as it has not been referred to me as Taxing Judge by the Taxing Officer.

APPELLATE CIVIL.

1909
November 9.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

SAHIB ALI AND OTHERS (DEFENDANTS) *v.* FATIMA BIBI (PLAINTIFF).*

Pre-emption—Wajib-ul-arz—Interpretation—Perfect partition—No new wajib-ul-arz framed—"Malikan deh."

The determination of an alleged right of pre-emption must depend upon the particular circumstances of each case and the evidence adduced in support of the pre-emptive right.

A village was divided by perfect partition into several mahals, but no new wajib-ul-arz was prepared. The wajib-ul-arz framed before partition was headed "*Hakuk hissadaran bakhudha*: rights of co-sharers *inter se*" and gave the right of pre-emption (1) to co-sharers in the *khata* (2) to the proprietors of the *patti* and (3) to the proprietors of the village (*malikan deh*). Plaintiff was a co-sharer in a different mahal from that in which the vendor was a co-sharer. *Held* that the heading of the wajib-ul-arz limited the meaning of the expression "*malikan deh*" to proprietors who were co-sharers with a vendor, between whom and the vendor a common bond subsisted, and as the plaintiff was not a co-sharer in the same mahal with the vendor, she had no right of pre-emption.

Janki v. *Ram Partap Singh* (1), *Sardar Singh* v. *Ijaz Husain Khan*, (2) *and Gobind Ram* v. *Masih-ullah Khan*, (3) distinguished. *Dalganjan Singh* v. *Kalka Singh* (4) followed.

THE facts of this case were as follows:—

In 1888 the village of Arand, which had previously consisted of a single mahal, divided into *thoks* and *pattis*, was partitioned and split up into several mahals. The owners of one of these

* First Appeal No. 327 of 1907, from a decree of Saiyid Tajammul Husain, Subordinate Judge of Jaunpur, dated the 8th of October 1907.

(1) (1905) I. L. R., 28 All., 286.
(2) (1906) I. L. R., 28 All., 614.
(3) (1907) I. L. R., 29 All., 295.
(4) (1899) I. L. R., 22 All., 1.