

## FULL BENCH.

1909  
August 7.

Before Mr. Justice Sir George Knox, Mr. Justice Richards and Mr.  
Justice Abston.

DARYAO SINGH (PLAINTIFF) v. BHARAT SINGH AND OTHERS (DEFENDANTS).  
Suit for pre-emption of sale of mortgaged property—Property in possession  
of usufructuary mortgagee—Possession not claimed—Act No. VII of 1870,  
(Court Fees Act) section 7, paragraphs (v) and (vi).

Held that in a suit for pre-emption of a sale of land the fact that the land is  
subject to a usufructuary mortgage and immediate possession cannot be obtained,  
or is not in fact sought, does not prevent the application of section 7 (vi) of the  
Court Fees Act to the suit; but the plaintiff must pay court fees upon the value  
of the land computed in accordance with section 7 (v) of the Act. *Ram Raj  
Tewari v. Girnandan Bhagat* (1) distinguished.

THE facts out of which this appeal arose were as follows:—

On the 5th December, 1906, the defendants 1 and 2 sold  
their equity of redemption in certain property to the other defen-  
dants for Rs. 20,000. The same property was usufructuarily  
mortgaged to one Ilahi Bakhsh for Rs. 79,050 on 19th June, 1877.  
The plaintiff sued on 5th December, 1907, to pre-empt the sale  
of the 3rd December, 1906, and alleged that the true sale con-  
sideration was Rs. 5,000. He did not claim possession of the  
property, and paid an *ad valorem* court fee of Rs. 274 on  
Rs. 5,000. The first court being of opinion that the court fee  
should be paid in accordance with the provisions of section 7,  
paragraphs (v) and (vi) of Act No. VII of 1870, ordered the  
plaintiff to make good the deficiency of Rs. 975 on or before 19th  
December, 1907. The deficiency was made good, but the  
court on the authority of *Jawanti Prasad v. Bachu Singh* (2) dis-  
missed the suit on the ground that there was no properly stamped  
plaint presented within the period of limitation. The plaintiff  
appealed and again paid court fees *ad valorem* on Rs. 5,000  
and v. The District Judge on 24th July, 1908, passed an order  
directing the plaintiff to make good the deficiency of Rs. 975  
on or before 10th August, 1908, and the plaintiff having failed  
to do so he dismissed the appeal. The plaintiff presented a  
bill of costs.

\* Second Appeal No. 910 of 1908, from a decree of Louis Stuart, District Judge  
of Meerut, dated the 11th of August 1908, confirming a decree of Soti Raghubans  
Lal, Subordinate Judge of Meerut, dated the 25th of May 1908.

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second appeal on the ground that the memorandum of appeal was sufficiently stamped, as the subject-matter of the suit being only the equity of redemption which had been sold, the plaintiff was right in paying an *ad valorem* fee with reference to the value which he put upon it.

The appeal first came up before RICHARDS and ALSTON, JJ., who, on account of the importance of the question raised, recommended that it should be laid before a larger Bench, which was accordingly done.

Babu Peary Lal Banerji, (with him Dr. Satish Chandra Banerji) for the appellant, contended that this suit differed essentially from that class of pre-emption suits in which the pre-emptor in seeking to enforce his right of pre-emption, sued for possession of the land itself. Here the pre-emptor only wanted to be substituted for the vendee, who held the equity of redemption.

The Legislature when it enacted the Court Fees Act, VII of 1870, only contemplated suits for pre-emption in which the pre-emptor claimed possession of the land itself. Provision was made in this Act only for such suits as had been provided for in the Limitation Act. In the Limitation Act, IX of 1871, article 10, and Act XIV of 1859, section 1, clause (1), the Legislature only contemplated suits for pre-emption where the "purchaser at the sale sought to be impeached takes actual possession." It was not till the year 1877 that the Legislature, by Act XV of 1877, provided for suits for pre-emption, "where the subject of the sale does not admit of physical possession." It was thus clear that this particular class of suits was not in the contemplation of the Legislature when the Court Fees Act was enacted and that therefore there was no direct provision for it.

Moreover, section 7, paragraph (vi), of Act VII of 1870, not enact that, irrespective of the nature of the interest in the claimed, in all cases court fees should be calculated upon value of the land itself where the right of pre-emption claimed in respect of an "interest in the land" only. C. fees should be levied upon the value of that "interest" and not upon the value of the land itself. The value would only be required to be computed in accordance with paragraph (v) when

pre-emption was claimed in respect of the land itself and possession was sought. Here an "interest in the land" was sought to be pre-empted, and it was the value of that "interest in the land" upon which court fees had to be paid. As no special mode of the computation of such "interest in the land" had been provided for, an *ad valorem* court fee should be paid upon the market-value of that "interest in the land." Further, section 7, paragraph (v) only enacted that in "suits for possession of the land," court fees should be paid according to the value of the subject-matter. If the subject matter was only an "interest in the land" and not the "land itself" court fees should be paid upon the value of "such interest" only. He cited *Ram Raj Tewari v. Girnandan Bhagat* (1) and *Radha Prasad Singh v. Pathan Ojah* (2).

It was held that in a suit for possession by a landlord against a fixed rate tenant, court fees should be paid not on the value of the land itself but on the value of the tenant's right in the land. The Legislature adopted the view of this court that the fees should be levied on the value of the tenant's rights and merely provided a means for the computation of the value. He cited *Haidar Khan v. Ali Akbar Khan* (3).

He further submitted that the leading principle of taxation was that the amount of court fees levied should have relation to the amount of relief sought. The party claiming the assistance of the State should pay a tax only upon the nature of the interest he claimed and the relief he sought. Fiscal enactments should be construed in favour of the suitor and if a literal interpretation lead to hardship and anomalies such interpretation ought to be avoided. He cited *Amanat Begam v. Bhajan Lal* (4) and *In the matter of Sheikh Maqbul Ahmad* (5), also Maxwell's interpretation of Statutes (3rd edn.) pp. 319, 351, 353.

Mr. Nihal Chand (with him Maulvi Ghulam Mujtaba) for the respondents, submitted that the language of section 7, paragraph (vi) of the Court Fees Act was very clear and there was no ambiguity. The section nowhere indicated that it was limited to suits in which immediate possession was claimed. It applied

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(1) (1892) I. L. R., 15 All., 63.

(3) (1897) P. R., 18.

(2) (1893) I. L. R., 15 All., 363.

(4) (1886) I. L. R., 8 All., 488.

(5) (1909) I. L. R., 31 All., 294

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to all "suits to enforce pre-emption." There was no provision in the Act for the calculation of court fees as suggested by the appellant; therefore the court fee should be calculated as laid down in section 7, paragraph (vi) on the value of the land computed in accordance with paragraph (v) of the same section. There was absolutely no justification for the addition of such words as "interest in" to qualify "land." The words "market value" in section 7, paragraph (v) (d), meant the value of the land itself, irrespective of any incumbrance that might be on it. In a suit for possession of land, if it is incumbered, the amount of the mortgage will be taken into consideration, but the land itself will be valued in accordance with section 7, paragraph (v), and court fees paid on it. Moreover, if the appellants' contention be correct, the Court would have to investigate for purposes of court fee whether any land, possession of which was claimed, was really mortgaged, and if so, what the amount due upon it was. If a person in possession of property which was heavily incumbered was ousted by a trespasser and it appeared that the amount due upon the incumbrances was more than the value of the property itself, it could not be suggested that no court fees ought to be paid. The valuation for purposes of court fees and for purposes of jurisdiction should not be confounded. He cited *Hafiz Ahmed v. Sobha Ram* (1).

Babu Peary Lal Banerji replied.

KNOX, ACTING C.J., and RICHARDS and ALSTON, JJ.:—The question which has been referred to this Bench is "what is the proper Court fee in a pre-emption suit, when the property in respect of which pre-emption is claimed is already subject to a usufructuary mortgage which the pre-emptor does not seek to disturb."

The material facts are shortly as follows: The plaintiff claimed to pre-empt a sale of the equity of redemption in certain property. The sale was made on the 3rd December, 1906, the defendants 1 and 2 to the other defendants. The sale consideration as stated in the deed was Rs. 20,000, but the plaintiff alleged that the real consideration was Rs. 5,000. The property was mortgaged in 1877 by way of usufructuary mortgage, to

secure Rs. 79,000. The plaintiff does not seek possession of the land. He admits that possession must remain in the hands of the usufructuary mortgagee until the mortgage is redeemed. He came into Court seeking merely to enforce his right to pre-empt the equity of redemption. He paid a court fee of Rs. 275, which was calculated upon Rs. 5,000, at which he valued his suit. The court of first instance held that the plaintiff must pay a court fee valued upon the land itself, according to the provisions of section 7, paragraph (v) of the Court Fees Act, VII of 1870. The consequence was that the plaintiff paid an additional Court fee of Rs. 975. Having paid this sum, his suit was dismissed by the first court on the ground that the plaint was not properly stamped when presented; and the proper court fee having been paid after the expiry of the period of limitation, the suit was barred. The plaintiff appealed and only paid a court fee upon Rs. 5,000. A second appeal was subsequently presented to the High Court, which is still pending. The only question before this Bench is the question above mentioned, *viz.*, what is the proper court fee having regard to the nature of the suit? The plaintiff contends it is not equitable that he should be compelled to pay the same court fee when he seeks only to enforce his right of pre-emption in respect of the equity of redemption as he would have to pay if he were seeking possession of the land by right of pre-emption freed and discharged of all incumbrances. It has been pointed out that the real value of what the plaintiff seeks to pre-empt is Rs. 5,000, while the land freed and discharged from incumbrances is probably worth near Rs. 1,00,000. A ruling was cited to us, *viz.*, *Ram Raj Tewari v. Girnandan Bhagat* (1). That was a suit for possession by a landlord against a fixed rate tenant on the allegation that the tenant defendant had broken some of the conditions of the tenancy and that the plaintiff was therefore entitled to possession. The suit was clearly a suit coming under section 7, paragraph (v) of the Court Fees Act. A Bench of two Judges held that the mode of valuation provided by the fifth paragraph of section 7 was inapplicable and allowed a court fee to be paid upon the value of the interest which the plaintiff was seeking to recover, *viz.*, the tenancy. It is clear that the

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Court felt the difficulty of charging the plaintiff the same court fee when merely seeking to evict the tenant as would be charged if full proprietary right was claimed. An amendment has been introduced by Act V of 1905, providing expressly for cases in which a landlord seeks to recover possession from the tenant, and the court fee payable has been greatly reduced; but so far as suits for pre-emption are concerned we still must look to the provisions of section 7, paragraph (vi), of the Court Fees Act, in answering the present question, "what is the proper fee?" No doubt, if any ambiguity exists, the Act should be read most favourably to the suitor. The question is:—Is there any ambiguity? Section 7, paragraph (vi) deals with suits to enforce a right of pre-emption. It clearly and expressly says that the court fee is to be "according to the value of the land, house or garden, in respect of which the right is claimed." It does not say that the court fee is to be according to the value of the interest in the property pre-empted. It is to be according to the value of the land "in respect of which the right is claimed." In the present case the right of pre-emption is claimed unquestionably in respect of the entire land, subject though it be to the mortgage of 1877. Paragraph (vi) goes on to say that the value of such land, house or garden is to be computed in the manner provided by paragraph (v). It is said that this operates very hardly upon the present plaintiff. This is no doubt true, but it seems to us that the hardship in his case is no greater than the hardship to a plaintiff who seeks to recover possession of immovable property subject to incumbrances. Take, for example, a suit between two persons, rival claimants to the estate of a deceased owner, the property being subject to incumbrances which both parties admit to be due and binding upon them. It has not been contended that in such a suit, the plaintiff would not be obliged to pay court fee on the value of the land without any allowance or ere being given for the incumbrances. It may be that there reason for amendment of the Court Fees Act. We think the provisions of the Act are free from all doubt and ambiguity and that the court fee must be assessed according to the provisions of section 7, paragraph (vi), upon the value of the property, computed in accordance with section 7, paragraph (v).

This is our answer to the reference.

The appeal was then returned to the Bench which had made the reference, by which it was dismissed in accordance with the opinion pronounced by the Full Bench.

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Sir George Knox, Acting Chief Justice, and Mr. Justice Richards.*

SHIAM LAL AND ANOTHER (PLAINTIFFS) v. RAM PIARI (DEFENDANT).\*

*Act No. IX of 1872 (Indian Contract Act), sections 11, 64, 65, 70—Minor—Sale by a minor—Discharge of mortgage by vendees—Sale not completed—Suit by vendees to recover consideration paid.*

H and R, two Hindu widows, of whom R was a minor, sold a shop to the plaintiffs. Registration of the sale deed was refused, and the vendees thereupon sued to recover Rs. 231 alleged to have been paid to certain mortgagees in discharge of a mortgage on the shop, and Rs. 100 as paid in cash to the vendors, and they asked for sale of the shop. *Held* that, the sale being by a minor, the plaintiffs acquired no interest to support their discharge of the mortgage, and that the remaining sum of Rs. 100 not having been paid for necessaries was also not recoverable.

THIS was a suit to recover Rs. 346-1 by sale of a shop. The facts were briefly these:—The shop in dispute was the property of two brothers Chhote Lal and Bhagwan Das. Both the brothers died about the same time leaving them surviving their mother, Musammât Hulaso, Musammât Ram Piari, widow of Chhote Lal, and Musammât Goma, daughter of Bhagwan Das. Musammâts Hulaso and Ram Piari executed a sale-deed of the shop in suit in favour of the plaintiffs on September 20, 1903, in lieu of Rs. 600. The consideration was made up thus :

(1) Rs. 100 for the maintenance and support of the defendants.

(2) Rs. 231 paid to Mattru Mal and Basdeo, who held a mortgage over the shop and a house, created by Bhagwan Das and Chhote Lal on December 12, 1903.

(3) Rs. 269 left in deposit for the vendors.

The plaintiffs then applied to have the sale-deed registered, but registration was refused on the ground that Ram Piari was a minor. Thereupon the plaintiffs brought the present suit to recover the first two items with interest. Ram Piari alone defended the suit and it was contended on her behalf that she was a

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\* Appeal No. 27 of 1908, under section 10 of the Letters Patent.