

1914
 March, 27.

Before Mr. Justice Tudball.

Haidari Begam (Defendant) v. Gulzar Bano (Plaintiff).*

Act No. VII of 1870 (Court Fees Act), schedule I, article 1—Court fee—Subject-matter in dispute in appeal—Suit for possession—Defence of lien for dower—Appeal by defendant.

In a suit for recovery of property in the possession of a Muhammadan lady the defendant pleaded, first, that the plaintiff had no title, and, secondly, that she was not entitled to a decree for possession without payment to the defendant of Rs. 80,000, the amount of dower due to the defendant. The court of first instance decreed the suit for possession, holding that payment of the defendant's dower, whatever it might amount to, was not a condition precedent to the plaintiff's obtaining a decree. The defendant appealed, paying court fees on the value of the property. On a reference by the taxing officer as to whether she was liable to pay court fees on Rs. 80,000 as well, *held*, that the subject-matter in dispute in the appeal was the property of which possession was sought and that the court fee paid was sufficient.

This was a reference made under section 5 of the Court Fees Act, 1870, by the Taxing Officer of the Court. The following order sets forth the facts of the case:—

In this case the defendant appellant seeks that the decree of the court below be set aside and the suit be dismissed. The defendant appellant is the widow of one Saiyid Kurban Husain who is the own brother of the plaintiff. The plaintiff claims that her right in certain property may be established and a declaration made to the effect that the defendant appellant has no title thereto, and that she (the plaintiff) may be put in proprietary possession of certain property. She also stated that if she was held liable to the payment of the dower debt due to the defendant she was ready to pay the same.

"In the lower court the defendant appellant denied the plaintiff's title to and possession over the property, and contended that her dower debt amounted to Rs. 80,000 and that in lieu thereof she was entitled to remain in possession of the entire property. She also alleged that as the plaintiff had not shown her readiness to pay the full amount of her dower debt the suit was liable to be dismissed.

"The lower court decreed the suit in the plaintiff's favour, and did not record any finding on the 2nd issue, viz., 'What is the amount of the defendant's dower debt?' It, however, expressed an opinion in its judgement that the plaintiff was entitled to recover possession of the property in dispute even if the defendant's dower debt be unpaid.

"The defendant appellant has now preferred this appeal to this Court and has paid a court-fee of Rs. 700, as was paid by the plaintiff respondent on the plaint. She seeks that the decree of the court below be set aside and the plaintiff respondent's suit be dismissed.

* Stamp Reference in First Appeal No. 343 of 1913, under section 5 of the Court Fees Act.

"Pleas Nos. 1, 3 and 9 of the memorandum of appeal are important. The first plea states that she is entitled to retain possession till her dower debt is paid in full, and in plea No. 9 she claims to hold the entire property against the plaintiff in lieu of dower. It is, therefore, open to question whether she is not liable to pay court fee on the sum of Rs. 80,000, which she claims as the amount of her dower debt. If this view is correct, a further court fee of Rs. 615 is due from the defendant appellant.

"The learned counsel for the defendant appellant maintains that the appellant is merely asking for the suit to be dismissed, and claims no set-off. I have had an opportunity of hearing the learned counsel, and I asked him whether there was any bar to the Bench hearing the case passing a decree modifying the decree of the lower court to this extent that the plaintiff be given possession and her title be upheld on condition that she pays Rs. 80,000 the amount of the dower debt, as claimed by the defendant appellant, to the defendant appellant. The learned counsel admitted that such a decree was possible, but he maintains that, even if such a decree be passed, the defendant appellant cannot execute the same; but the defendant appellant is already in possession of the property, and if she obtains such a decree she obtains the relief she desires as mentioned in the pleas raised in the memorandum of appeal.

"Schedule I, Article 1, of the Court Fees Act gives the *ad valorem* fee to be paid on the subject-matter in dispute in the case not only on claim but on counter-claim. I consider therefore that the court fee should be paid on the value of this counter-claim, and hold that the additional court fee of Rs. 615 must be paid. As, however, the question is by no means free from difficulty and is of general importance, I refer the same to the Honourable Taxing Judge."

On the matter coming up before the Taxing Judge.

Dr. Satish Chandra Banerji, for the defendant appellant:—

The question is what is the value of the subject-matter in dispute in the appeal. In the recent case of *Raghubir Prasad v. Shankar Bakhsh* (1) it was said that the subject-matter in dispute would be the decree of the lower court. If that test is applied then the proper court fee is that calculated on five times the revenue of the property over which the lower court has awarded possession; that fee has been paid on the appeal. A defendant is entitled to raise all kinds of pleas. The defendant resists the suit on the ground, *inter alia*, that she is entitled to retain possession in lieu of dower. The dispute is really about the property, as to whether the plaintiff is or is not entitled to immediate possession. The claim for the dower debt is merely incidental to the real claim, namely, possession of the property. The case is analogous to a case where the plaintiff sues to eject a

(1) (1913) I. L. R., 36 ALL., 40.

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tenant and the latter pleads, *inter alia*, that he should not be ejected until the plaintiff pays for improvements made by the tenant. In such a case the question of improvements arises only incidentally; the subject-matter of the appeal, as well as of the suit, being the property of which possession is sought. I rely on the cases of *Reference under Court Fees Act, section 5, (1)*, *Shaiikh Nawab Ali v. Durga (2)* and *Abdur Rahman v. Charag Din (3)*. The real test to be applied is, whether the appellate court can pass a substantive decree in favour of the appellant for the sum of money which is being said to be the subject-matter in dispute in the appeal. The utmost that the appellant can get in this case is to have the suit dismissed; nothing beyond that. She can get no decree which she can execute for the Rs. 80,000 or any portion thereof. Should the court pass a decree for possession conditional on the plaintiff paying Rs. 80,000 or some other sum, it will be entirely at the plaintiff's option to pay it or not; the defendant appellant will not be able to recover it by execution of the decree. The court fee paid is, therefore, sufficient.

The following order was passed by TUDBALL, J. —

This is a reference by the Taxing Officer. The defendant appellant is the widow of a deceased Muhammadan, Syed Qurban Husain. The plaintiff respondent is the own sister of the deceased. She brought a suit to obtain possession of certain property and a declaration that the defendant had no title thereto. She added that if she were held liable for payment of any dower debt due to the defendant she was ready to pay the same. In the court below the defendant appellant denied the plaintiff's title to the property, and further contended that her own dower debt amounted to Rs. 80,000 and that she was entitled to remain in possession of the entire property at least until her dower debt had been satisfied. The court of first instance decreed the plaintiff's suit. It did not go into the question of the amount of the defendant's dower, being of opinion that the plaintiff was entitled to recover possession even if the dower debt remained unpaid. The defendant appellant has now preferred this appeal, paying a court fee equal in amount to that paid by the plaintiff in the lower court.

(1) (1899) I. L. R., 23 Mad., 84. (2) (1897) 11 Oudh Cases, 45.

(3) (1907-1908) Punj. Rec., C. J., No. 10, p. 124.

She raises the same pleas, and the question before me is whether she is liable to pay court fee on the sum of Rs. 80,000, which she claims as the amount of her dower debt. The question is what is the value or amount of the subject-matter in dispute in this appeal. It is suggested that it is not only the property in dispute but also the dower debt claimed by the appellant. It is perfectly true that it is open to this Court to grant a decree to the plaintiff conditional on payment of whatever may be found due to the defendant as her dower debt. But even in that case it will not be a decree which the defendant appellant would be able to put into execution, so as to enable her to recover her debt. It would be merely an attachment of a condition to the decree for possession. Of course it may also be that the Court might dismiss the claim of the plaintiff *in toto* or it might uphold the decree of the court below. In any view it seems to me impossible to hold that the amount or value of the subject-matter of this appeal is anything more than the value of the property which the plaintiff is seeking to recover and possession of which the defendant is seeking to retain. The same considerations do not operate in this instance as would operate if the plaintiff had appealed against a decree for possession conditional on payment of a large sum. I am, therefore, of opinion that the court fee already paid is sufficient.

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 HAIDARI
 BEGAM
 v.
 GULZAR
 BANO.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

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MUHAMMAD ABDUL GHAFUR KHAN (PLAINTIFF) v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), sections 109 and 110; order XLI, rule 10—Dismissal of appeal for default in furnishing security for costs—Application for leave to appeal to His Majesty in Council—"Substantial question of law."

Held that an order dismissing an appeal for default in furnishing security for costs under order XLI, rule 10, of the Code of Civil Procedure, 1908, is not a fit subject for the grant of a certificate under section 109 (c) of the Code.

THE facts of this case were as follows :—

The plaintiff instituted a suit in the Court of the Subordinate Judge of Cawnpore claiming a declaration of his title to certain property. The suit was dismissed by the court of first instance upon various grounds. The applicant presented an appeal to the High Court which was admitted. Subsequently an application

* Privy Council Appeal No. 2 of 1914.