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to the High Court but the plaintiffs did not file any cross-objection. On the date when the appeal came up for hearing the defendants withdrew their appeal without liberty to institute a fresh appeal. They were made to pay the costs of the opposite party. An oral request was made at that time for the amendment of the decree of the court below, which we declined to entertain at that stage.

In our opinion when the appeal was withdrawn the order which we passed on that occasion granting permission to withdraw the appeal under order XXIII, rule 1, was not a decree so as to supersede the decree of the court below. When an appellate court does not judicially deal with the matter of a suit but merely permits an appeal to be withdrawn, so that the decree of the court below is left intact, it cannot be said that it has confirmed the decision appealed from. It merely recognizes authoritatively that the appellant does not wish to go on with his appeal. We may refer to the case of *Abdul Majid v. Jawahir Lal* (1), where their Lordships of the Privy Council laid down this proposition with regard to an appeal which had been dismissed for want of prosecution. This case was followed in *Nand Lal Saran v. Dharam Kirti Saran* (2) where the appellate court had held that no appeal in fact lay to that court. There is another case of this Court, viz. *Pitam Lal v. Balwant Singh* (3), to the same effect. We are of opinion that that principle applies to an equal extent to the case where the appeal is withdrawn. We cannot therefore amend the decree of the court below.

The result therefore is that this application must be dismissed with costs.

Application dismissed.

(1) (190) I.L.R., 36 All., 350.

(2) (1926) I.L.R., 48 All., 377.

(3) (1925) 23 A.L.J., 518.

Before Mr. Justice Ashworth.

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TULA RAM (PLAINTIFF) v. DWARKA DAS AND ANOTHER
(DEFENDANTS).*

January,
16.

Act No. VII of 1870 (Court Fees Act), section 7, clause (iv) (c)—Act No. VII of 1887 (Suits Valuation Act), section 8—Court fee—Suit for a declaration of plaintiff's title and for possession.

If a plaintiff elects to ask in his plaint for a declaration of his title as well as for possession of certain property, when he need only have sued for possession *simpliciter*, he will have to pay court fees as on a suit for a declaration with consequential relief, unless the court allows him to amend his plaint by striking out the prayer for a declaration. So *held*, where the plaintiff had prayed (a) for a declaration that a mortgage executed by his co-parcener and a decree for foreclosure obtained thereon were void and ineffectual, and (b) for possession. *Ganga Dei v. Sukhdeo Prasad* (1), followed. *Tika Ram v. Salig Ram* (2), dissented from.

ON a first appeal being filed in the High Court, the Stamp Reporter made the following report:—

“This appeal arises out of a suit brought by the plaintiff appellant for the following reliefs:—

(a) It may be declared that the mortgage-deed, dated the 15th of September, 1913, executed by Roshan Lal, in favour of Dwarka Das, and decree No. 117 of 1915, *Dwarka Das v. Musammatt Kausilia*, dated the 4th of January, 1916, and final decree No. 265 of 1916, dated the 27th of November, 1916, are void, ineffectual, fraudulent and collusive and have been obtained in order to prejudice the right of the plaintiff.

(b) Possession over the property detailed below may be awarded to the plaintiff. If in the opinion of the court any condition or restriction may be considered

*Stamp Reference in First Appeal No. 322 of 1925.

(1) (1924) I.L.R., 47 All., 78.

(2) (1920) 57 Indian Cases, 494.

to be proper, possession may be awarded with those conditions and restrictions.

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(c) Costs of this suit may be awarded.

(d) Any other relief which may under the circumstances of the case be beneficial to the plaintiff may also be granted.

The valuation of the suit for purposes of jurisdiction was laid at Rs. 6,000 and a court fee of Rs. 53-10 was paid, *viz.* Rs. 30 for declaration and Rs. 23-10-0 for possession.

The suit, being for declaration and possession, clearly falls within the purview of section 7, cl. (iv) (c) of the Court Fees Act, read with section 8 of the Suits Valuation Act, and is liable to be charged with an *ad valorem* court fee, which comes to Rs. 315.

The nature of the claim is such as would render the suit to be one in which the declaration with a consequential relief is prayed, because unless the declaration prayed for is granted the possession asked for cannot be granted, because the properties are in the possession of the decree-holder who has purchased them. Rs. 53-8 having already been paid, there is a deficiency of Rs. 261-8 payable by the plaintiff appellant for the court below.

The suit having been dismissed, the plaintiff appellant has filed this appeal, valuing it at Rs. 6,000 and paying the same amount of Rs. 53-8 as court fee, as was paid in the court below. For the reasons stated above there is also a deficiency of Rs. 261-8 payable by the plaintiff appellant for this Court."

This report being disputed by the appellant, the Taxing Officer referred the case to the Taxing Judge, who passed the following order:—

ASHWORTH, J. :—This is a reference by the Taxing Officer for a decision as to the proper court fee to

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be paid in a suit out of which has arisen F. A. No. 322 of 1925. According to the plaint the plaintiff and his nephew were co-parceners in respect of certain property. On the 15th of September, 1913, the nephew, Roshan Lal, executed a usufructuary mortgage in favour of defendant No. 1. On the death of Roshan Lal, some eight or nine months later, the mortgagee brought a suit for foreclosure against Musammat Kausilia, widow of Roshan Lal, and got a decree. The plaintiff asks for a declaration that the mortgage-deed was void and ineffectual, as Roshan Lal had no right to transfer the family property. There is no statement in the plaint whether Roshan Lal was the manager or not of the family. The second relief claimed was possession of the property.

Now in a suit for possession it is not necessary for the plaintiff to sue for a declaration as to his title. At any rate, in a suit of this nature for possession, it is not necessary for him to do so. The plaintiff's counsel consequently maintains that the court fee should be valued merely as in a suit for possession. In support of this contention he invokes a Full Bench decision of the Patna High Court, *Ram Sumran Prasad v. Gobind Das* (1). That decision is not, in my opinion, applicable to the present case. In that case, although the plaintiff asked for an adjudication upon his title, he did not include amongst the reliefs claimed a prayer for a declaration as to his legal character or title or as to the invalidity of a certain transfer. Next I am referred to a single Judge decision of this Court, *Tika Ram v. Salig Ram* (2). In that case the plaintiff did ask for a declaration as one of the reliefs which he claimed. It was held by Mr. Justice TUDBALL that as it was unnecessary for the plaintiff to ask for a declaration, the suit should have been treated as an or-

(1) (1922) I.L.R., 2 Pat., 125.

(2) (1920) 57 Indian Cases, 494.

dinary suit for possession of property. The learned Judge invoked the fact that "suits of this nature are very common and they have always been treated as ordinary suits for possession of property and court fee is paid on five times the Government revenue". On the other hand I have been referred to a single Judge decision of this Court, *Ganga Dei v. Sukhdeo Prasad* (1). In that case DANIELS, J., stated as follows :—

"Now the suit as framed is clearly one for a declaration with consequential relief. It is, therefore, beside the mark to suggest that the suit might have been framed so as to ask for different reliefs, or, in other words, that it might have been framed purely as a suit for possession. The plaintiff has to pay court fee on the relief which she seeks to obtain by the suit".

I entirely concur with the decision of Justice DANIELS in *Ganga Dei v. Sukhdeo Prasad* (1) and dissent from the contrary view taken by TUDBALL, J., in *Tika Ram v. Salig Ram* (2). At the time when a plaint is filed, it is impossible for a court or an officer of the court to go into the question whether the plaint unnecessarily asks for a declaration with the consequential relief of possession or whether it would have served the purpose of the plaintiff to ask merely for possession. When the plaintiff asks for a declaration as his first relief and possession as a second relief, it must be taken that in the opinion of the plaintiff, or at least of his legal adviser, the declaration is a necessary relief. If the argument invoked by TUDBALL, J., were pressed to its logical conclusion, we should return the court fee to any litigant who could prove that he had brought an unnecessary suit. As regards TUDBALL, J.'s invocation of the practice of this Court, I am of the opinion that practice cannot override the language of a statute. There is no necessity of giving effect to a

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wrong view merely because that wrong view has not been challenged for a long time, that is to say, where the question is the construction to be put upon a certain enactment.

I hold that the test in such cases invariably should be whether the plaintiff includes amongst the reliefs claimed not only a request for possession but also, as paving the way to such request, the relief of a declaration of title. This view derives support from a consideration of what would happen in a reverse case where the plaintiff fails to ask for a declaratory relief but is found not to be entitled to possession without first obtaining a declaration. In such a case the plaintiff would be required to amend his plaint and to pay the extra court fee. Similarly in a case such as this case is, it is clear that the plaintiff can only be excused from the court fee if he gets the permission of the court to amend the plaint and strike out the relief for a declaration.

For the above reasons my answer to the Taxing Officer is that the view taken by the office is correct, and that the deficiency reported should be made good. The Taxing Officer may allow such time as he thinks fit for the payment of the deficiency. As counsel for the plaintiff appellant did not appear, this order is delivered *ex parte*.