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long as there is not absolute finality, it should not be held that it has been definitely ascertained that the amount realised is insufficient to pay the decretal amount. It is only when the appellate court finally decides the matter, and all uncertainties are removed, that the right to apply accrues. It is not disputed that the present application was made within three years. We accordingly think that there is no force in this appeal. We, therefore, dismiss this appeal.

REVISIONAL CIVIL

Before Mr. Justice Niamat-ullah

1936
 December, 14

AMBA SHANKAR (PLAINTIFF) v. SEOTI (DEFENDANT)*

Civil Procedure Code, order XXXIII, rule 12—Pauper suit dismissed—Regular appeal with court fee—Order by appellate court to pay court fee and costs of Government incurred in trial court—"Rejection" of memorandum of appeal for non-payment—"Decree"—Civil Procedure Code, order VII, rule 11(c) read with section 107—Civil Procedure Code, section 115.

A pauper suit was dismissed on the merits, and the plaintiff applied for leave to appeal as a pauper, but this was refused. He then paid the court fee necessary for the appeal, and it was admitted. Afterwards, on application by the Government, the appellate court ordered the appellant to pay the court fee due from him in the trial court and the costs incurred by Government in that court; and, on non-compliance, rejected the appeal. A revision was filed against that order:

Held, that it is not the function of the appellate court to give effect to the right of the Government, conferred by order XXXIII, rule 12 of the Civil Procedure Code, to recover the court fee where a pauper suit has been dismissed on the merits; Government should proceed in the trial court for this purpose. An order passed by the appellate court, after admission of the appeal, calling upon the appellant to pay the court fee which became due under that rule, and rejecting the appeal on non-compliance, is without jurisdiction and liable to be set aside in revision.

*Civil Revision No. 165 of 1936.

Held, also, that the rejection of the appeal in such circumstances did not amount to a decree within the meaning of section 2(2) of the Civil Procedure Code, and therefore no appeal lay and the revision was competent. The "rejection", referred to in the definition of a decree, is such rejection as is authorised by some provision of the Civil Procedure Code, viz. order VII, rule 11. A memorandum of appeal can, by virtue of section 107, be properly rejected on those grounds on which a plaint can be rejected under order VII, rule 11; and clause (c) of rule 11, read with section 107, can not authorise the rejection of a memorandum of appeal where the court fee payable thereon has been fully paid but the plaintiff appellant has not paid the court fee due from him in respect of the trial court under order XXXIII, rule 12.

Mr *S. C. Das*, for the applicant.

Mr *Panna Lal*, for the opposite party.

NIAMAT-ULLAH, J.:—This is an application for revision directed against an order passed by the learned District Judge of Agra, purporting to reject the applicant's appeal to his court in circumstances which are as follows. The applicant instituted a suit *in forma pauperis* in the court of the Subordinate Judge, Agra. The suit was dismissed on the merits, and the applicant became liable to pay a sum of Rs.205 to the Government under order XXXIII, rule 11 of the Civil Procedure Code. The sum included the court fee payable on the plaint and some other costs said to have been incurred by the Government, probably in opposing the application for leave to sue as a pauper. He preferred an appeal in the court of the District Judge, and applied for leave to appeal as a pauper. His application was dismissed and time was given to him for payment of the court fee payable on the memorandum of appeal. The applicant paid the full court fee due on appeal, and his appeal was registered. Three months later the District Judge received a communication from the Collector to the effect that a sum of Rs.205 was due to the Government in respect of the court fee payable in the court of first instance and

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certain costs which had not been paid. The Collector requested the Judge to order the applicant to pay Rs.205 as a pre-requisite to the appeal being heard. Reliance was placed upon order XXXIII, rule 15 of the Civil Procedure Code, which was expressly mentioned in the Collector's letter. The District Judge expressed the opinion that order XXXIII, rule 15 was not applicable, but he held "that there is no impediment to my making an order for payment of this court fee under order XXXIII, rule 12 of the Civil Procedure Code." Accordingly the learned Judge directed the applicant to pay the sum demanded by the Collector within a certain time. This order was not complied with, and the appeal was dismissed. The applicant subsequently moved the District Judge to restore the appeal on condition of the sum of Rs.205 being paid; but the District Judge, who had already dismissed the appeal, rejected this application.

It is contended in revision that the order of the District Judge dismissing the appeal was without jurisdiction. Mr. *Panna Lal* for the opposite party has strenuously contended that the appeal having been dismissed, the order amounts to a decree as defined in section 2(2) of the Civil Procedure Code and that an appeal was competent. He goes on to contend that as the applicant could have preferred a second appeal, no revision under section 115 of the Civil Procedure Code can lie. In my opinion, the order of the District Judge dismissing the appeal in the circumstances already stated does not amount to a "decree" within the meaning of section 2(2). The disposal of a suit or an appeal amounts to a decree if there is an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit or appeal. "Rejection" of a plaint also amounts to a decree. It is argued that in so far as the learned Judge, rightly or wrongly, "rejected" the memorandum of appeal on non-payment of the court

fee payable in the trial court, the order amounts to a "rejection" of the memorandum of appeal and is therefore a decree. It seems to me that the "rejection", referred to in the definition of decree, is such rejection as is permissible under the Code of Civil Procedure. The entire scheme of the Code leaves no doubt that two kinds of termination of a suit or appeal are contemplated. Where a suit or appeal is tried and is disposed of on the merits, the court adjudicating on all or some of the points in controversy, the disposal amounts to a decree. Secondly, in certain cases a suit or appeal may terminate without an adjudication of all or any of the controversies between the parties. Those cases are mentioned in order VII, rule 11 of the Civil Procedure Code. It provides that a plaintiff shall be "rejected", *inter alia*, on the ground that the plaintiff, on being required by the court to supply the requisite stamp paper within a time to be fixed by the court, fails to do so. There may possibly be other cases in which the court is empowered to "reject" a plaintiff so as to terminate the suit. If the plaintiff is "rejected" on one of such grounds, the order rejecting the plaintiff is a decree as defined in the Civil Procedure Code. It is, however, perfectly clear that before an order can amount to such rejection as is contemplated by section 2(2), it must be "rejection" authorised by some provision of the Code of Civil Procedure. If the plaintiff is rejected for a cause for which the Code does not empower the court to do so, it will not be a decree as defined in the Civil Procedure Code, even though the court may use the word "reject" in disposing of the suit. What can be done by a court of first instance in reference to a plaintiff may also be done by a court of appeal as regards the memorandum of appeal. This is plainly the effect of section 107 of the Code of Civil Procedure.

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In this view, the important question to decide is whether it was open to the learned District Judge to

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reject the memorandum of appeal under order VII, rule 11 of the Code of Civil Procedure for non-payment of the court fee payable on the plaint. It is argued that order VII, rule 11, read with section 107, empowers a court of appeal to call upon the plaintiff appellant before it to pay the court fee payable on the plaint, and if he fails to pay it within the time allowed by the court, it may reject the appeal under order VII, rule 11, read with section 107. In my opinion, the language of order VII, rule 11(c) leaves no room for doubt that it contemplates cases in which court fee on the plaint or on the memorandum of appeal itself is not paid, and that it has no application to a case like this in which, though the court fee payable on the memorandum of appeal has been paid, the plaintiff appellant had not paid the court fee payable on the plaint, having been allowed to sue as a pauper originally and his suit having been eventually dismissed on the merits. The memorandum of appeal in the present case can not be said to have been written upon paper insufficiently stamped, because, as already stated, the appellant had paid full court fee in appeal.

The learned District Judge seems to have been of the opinion that he could enforce the right of the Government under order XXXIII, rule 12 to recover the court fee payable on the plaint. In my opinion, this view is erroneous. It is not the function of a court of appeal to give effect to the right of the Government conferred by order XXXIII, rule 12. It must, on admission of the appeal, dispose of it in the manner laid down by order XLI of the Code of Civil Procedure. Order XXXIII, rule 13 makes it clear that the Government should proceed in the trial court for recovery of the court fee to which its right has been declared by rule 12. Any order which that court may pass has been declared to be an order within the meaning of section 47 of the Code of Civil Procedure and is appealable as a decree. I am wholly unable to accept

the view that the appellate court can enforce the right of the Government in the matter of court fee either by issuing a process or by directing the appellant to pay the court fee on pain of his appeal being dismissed.

Learned counsel for the opposite party referred me to *Rup Singh v. Mukhraj Singh* (1) and similar other cases in support of his contention that where a plaint is rejected for non-payment of court fee the order rejecting it is a "decree". In all these cases the plaint was rejected for one or the other of the causes mentioned in order VII, rule 11. As already stated, where the court rejects a plaint for one of the reasons for which rejection is prescribed by the Civil Procedure Code, the order is a "decree". Where the court rejects a plaint or a memorandum of appeal for any other cause, very different considerations apply. In my opinion, the order of the learned District Judge, impugned in this revision, was wholly without jurisdiction. The application is allowed, the order of the lower court is set aside and the case is sent back to that court with the direction that the appeal be restored to its original number and disposed of according to law. The applicant shall have his costs of this revision from the opposite party.

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APPELLATE CIVIL

*Before Mr. Justice Harries and Mr. Justice
Rachhpal Singh*

CHANDRA SARUP AND ANOTHER (DEFENDANTS) v.
KANHAIYA LAL (PLAINTIFF)*

1936
December, 21

Civil Procedure Code, order II, rule 2—Sale deed wrongly mentioning a different property from the one sold—Rectification of sale deed—Possession of property really sold—Different causes of action—First suit for possession alone dismissed—Second suit for rectification and possession not

*First Appeal No. 494 of 1932, from a decree of Hari Shankar Vidyarthi, Additional Civil Judge of Etah, dated the 4th of August, 1932.

(1) (1885) I.L.R., 7 All., 887.