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The result therefore is that I allow the appeal with costs, set aside the decision of the lower appellate court and remand the case to the learned Subordinate Judge with directions to re-admit the appeal under its original number and to determine it according to law.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice A. G. P. Pullan.

1930 *September,* 17.

LALTA PRASAD (APPELLANT) *v.* MISRI LAL (RESPONDENT).*

Civil Procedure Code (Act V of 1908), *section* 35—*Costs—Trial court's discretion in the matter of allowing costs of a suit to parties—Second appeal—Appellate court's power to interfere with the discretion of lower court in the matter of allowing costs.*

Section 35 of the Code of Civil Procedure gives the court the full power to determine the amount of costs and the party or parties who shall pay them subject to such conditions and limitations as may be prescribed by the provisions of any law for the time being in force, and the same section enacts that where the court directs that any costs shall not follow the event the court shall state its reasons in writing.

Where a plaintiff comes to enforce a legal right and there has been no misconduct on his part, and no omission or neglect which would induce the court to deprive him of his costs, the court has no discretion and cannot take away the plaintiff's right to costs.

Where the trial court decreed a suit with costs and in appeal the lower appellate court disallowed costs without stating any reasons except that it considered it to be a very hard case for the appellant, *held*, that the lower appellate court acted in an arbitrary manner in interfering with the proper decision of the court of first instance on the question of costs and the High Court was justified in interfering with the order of the lower appellate court in second appeal. *Eshahuq Molla* v. *Abdul Bari Haldar* (1), distinguished.

*Second Civil Appeal No. 182 of 1930, against the decree of S. Ali Hamid, 1st Subordinate Judge of Kheri, dated the 15th of April, 1930, modifying the decree of Pandit Data Ram Misra, Additional Munsif of Kheri, dated the 19th of February, 1930.

(1) (1903) I.L.R., 31 Cal., 183.

Mr. *Bhagwati Nath*, for the appellant.

Mr. *R. N. Shukla*, for the respondent.

PULLAN, J.:—This is an appeal from the judgment of the first Subordinate Judge of Kheri who has interfered with the judgment of the Additional Munsif of Kheri on the question of costs. The appellant before me, who was the plaintiff in the suit, advanced a certain sum of money to the respondent on a simple bond. The respondent executed a mortgage to a third party under the terms of which the mortgagee was to pay a sum of Rs. 543-6-0 to the present plaintiff appellant in satisfaction of the bond. This sum was actually deposited by the mortgagee on the 25th of April, 1929, in court. There is no law under which a sum of money due on a simple bond which is not the subject of litigation can be deposited in court, and the plaintiff-appellant was not bound in law to accept this deposit even had it been sufficient to satisfy his bond. But as a matter of fact the sum was insufficient, and it was deposited on conditions that the plaintiff-appellant returned the bond. It was clearly impossible for the plaintiff-appellant to return the bond unless he were paid off in full. He appeared in the court of the Munsif and made a statement to that effect. An attempt was made to secure the attendance of the respondent but he never appeared. The money consequently was not paid to the plaintiff-appellant and he brought this suit to recover the amount due to him with interest up to date and future interest up to the date of payment. The first court decreed the suit with costs but the decree shows that the amount actually decreed was Rs. 606-11-0, namely, the amount due on the bond up to the date of *filing the suit together with* costs of the suit. No decree was passed for interest *pendente lite* or future and no appeal was preferred by the plaintiff. When the case came in appeal at the instance of the defendant before the first Subordinate Judge the defendant objected to the decree for interest after the date of the deposit.

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This clearly refers only to the sum decreed by the court, namely, the difference between Rs. 552 which was the sum due on the date of the deposit and Rs. 606-11-0, the sum due when the suit was filed. It does not appear that the question of interest *pendente lite* or future was raised in the Court of the Subordinate Judge and I cannot interfere on this question now. I must confine myself therefore only to the question of costs. Section 35 of the Code of Civil Procedure gives the court full power to determine the amount of costs and the party or parties who shall pay them subject to such conditions and limitations as may be prescribed by the provisions of any law for the time being in force, and the same section enacts that where the court directs that any costs shall not follow the event the court shall state its reasons in writing. In this matter the courts in India have followed the courts in England in obeying the general principle that costs follow the result. As was observed by JESSEL, M. R. in the case of *Cooper* v. *Whittingham* (1).

> "Where a plaintiff comes to enforce a legal right and there has been no misconduct on his part, and no omission or neglect which would induce the court to deprive him of his costs, the court has no discretion and cannot take away the plaintiff's right to costs."

This dictum has been quoted more than once by the courts in India and I need only refer to a decision of the Madras High Court reported in *Kuppuswami Chetty* v. *Zamindar of Kalahasti* (2). In the present case the plaintiff was obliged to come into court in order to get his money. It cannot be said that he acted in any way which could induce any court to refuse him his costs and the first court clearly acted in accordance with law in decreeing his costs. Sitting as a court of second appeal I would not be inclined to interfere with the decision of the lower appellate court on such a matter, if I could

(1) (1880) L.R., 15 Ch., D., 501. (2) (1903) I.L.R., 27 Mad., 341.

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consider that he used his discretion in a proper manner according to law. The lower appellate court has not given any reasons for interfering with the decision of the first court except that he personally considers that this was a very hard case for the appellant. This is not a sufficient reason for disallowing the costs of the plaintiff unless the plaintiff has committed some fault. It could equally be a hard case for the plaintiff if he was refused the costs to which he was entitled by law; but I find further that the lower appellate court was actuated by another reason. He believed that he was following the principle laid down by the Calcutta High Court in *Eshahuq Molla* v. *Abdul Bari Haldar* (1). But no principle was laid down by the Calcutta High Court in that judgment. In that particular case the plaintiff had delayed for five years to bring a suit with the result that he was able to obtain a decree for a large sum by way of interest and the learned Judges finding that the case was a hard one for the defendant directed the costs to be borne by the parties. But this is not a general principle and the facts of that case are not applicable to this. In the present case the plaintiff brought the suit at once and the sum even now is very little in excess of that which was due when the mortgagee deposited Rs. 543-6-0 on the 25th of April, 1929. I consider that the lower appellate court acted in an arbitrary manner in interfering with the proper decision of the court of first instance and that being so I consider that I am justified in interfering with the order of the lower appellate court in second appeal. I accordingly allow this appeal on the question of costs alone and set aside the decree of the court below and restore the order of the court of first instance. The plaintiff-appellant will be entitled to his costs in all courts.

I have been asked to consider that there is a mistake in the decree of the lower appellate court in estimating the pleader's fee as Rs. 22-8-0. It appears that this was done in accordance with the rule which enacts that only

(1) (1903) I.L.R., 31 Calc., 183.

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half fees should be allowed if the pleader's power-of-attorney is filed on the day of hearing. I am therefore unable to interfere in this matter.

Appeal allowed.

APPELLATE CIVIL.

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Before Mr. Justice Bisheshwar Nath Srivastava.

QAZI ABDUL QAVI (DEFENDANT-APPELLANT) *v.* QAZI MAHBOOB ALI AND OTHERS (PLAINTIFFS-RESPONDENTS.)*

Mussalman Waqf Validating Act (VI of 1913), *section* 3—*Waqf, essential requisites of*—Mutawalli *required to perform personal services to a* dargah—*No provision that ultimate benefit is to vest in the* dargah—*Deed, whether amounts to a valid waqf*—*Construction of document,*—*Gift*—*Defendant put in possession as* mutawalli *but no intention to transfer the property absolutely*—*Deed, whether amounts to gift*—*Construction of a deed, whether a question of law.*

Held, that one of the essential conditions for the validity of a *waqf* under Act VI of 1913 as laid down in the proviso to section 3 of that Act is "that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character."

Where in a deed there was merely a provision that the *mutawalli* was to render certain personal services to a *dargah* but there was not a word to suggest that when the provisions for the maintenance and support of the family have been exhausted the ultimate benefit is to vest in the *dargah* or that any income of the *waqf* has at any time to be appropriated for the benefit of the *dargah*, held, that it did not constitute a valid *waqf* under the Waqf Validating Act.

Where all that a deed purports to do is to put the defendant in possession as *mutawalli* and to direct that he and his heirs will remain in possession as such and there is nothing in its terms to show any intention to transfer the property absolutely in favour of the defendant, *held*, that it did not amount

*Second Civil Appeal No. 223 of 1930, against the decree of Babu Shiva Gopal Mathur, Additional Judge of Fyzabad, dated the 22nd of April, 1930, confirming the decree of Pandit Hari Shankar Chaturvedi, Munsif Havali, Fyzabad, dated the 12th of December, 1929.