

1934

JANG
BAHADUR
SINGH,
BABU
v.
HAFIZ
EWAZ
MOHAMMAD

*Nanavutty
and
Thomas, JJ.*

and Jang Bahadur Singh from their maternal grandfather, Subedar Gaend Singh.

For the reasons given above, we hold that village Bhiti in the hands of Jang Bahadur Singh and Jag Prasad Singh was not ancestral property but was self-acquired property and in respect of such self-acquired property no written permission of the Collector was necessary before the judgment-debtors could execute a mortgage deed. The fact that the execution proceedings were conducted in the Court of the Deputy Commissioner of Fyzabad under a mistaken belief that village Bhiti was ancestral property does not affect the right of the plaintiff, Hafiz Ewaz Mohammad, to prove before us that in fact village Bhiti was the self-acquired property of the judgment-debtor. The plaintiff has fully proved the execution of his mortgage deed and the passing of the entire consideration in respect thereof. No other plea raised in the memorandum of appeal was argued before us. For the reasons given above, we uphold the judgment and decree of the learned Subordinate Judge of Fyzabad and dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice Ziaul Hasan

1934
November, 11

HAR PRASAD (APPLICANT) v. KAPURTHALA ESTATE AND OTHERS (OPPOSITE-PARTY)*

Civil Procedure Code (Act V of 1908), section 115—Deficiency in court-fee in memorandum of appeal—Order directing deficiency to be made up communicated to appellant's counsel—Counsel's letter never reached appellant—Appeal dismissed for non-payment of court-fee within the time allowed—Revision against the order of dismissal of appeal, whether lies.

*Section 115 application No. 10 of 1933, against the order of Pandit Shyam Manohar Nath Shargha, District Judge of Gonda, dated the 7th of November/9th of July, 1932.

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Where in an appeal in the Court of the District Judge an order requiring the appellant to make good certain deficiency in court-fee was communicated to the appellant's counsel but the post-card sent by the counsel never reached the appellant who thus never knew of the order for deposit of further court-fee and the appeal was dismissed for non-payment of the deficiency in court-fee within the time allowed by the Court, *held*, that the District Judge acted in the exercise of his jurisdiction illegally and with material irregularity inasmuch as without giving any real opportunity to the applicant to make good the alleged deficiency in court-fee, he summarily rejected the appeal of the applicant for non-payment of the court-fee, and the order dismissing the appeal was therefore open to revision under section 115 of the Code of Civil Procedure. *Jai Singh Gir v. Sita Ram Singh* (1), *Deoraj v. Kunj Behari* (2), and *Adit Prasad Singh v. Ram Harakh Ahir* (3), referred to.

Mr. H. K. Ghosh, for the applicant.

Messrs. Siraj Husain and K. N. Tandan, for the opposite party.

NANAVUTTY and ZIAUL HASAN, JJ.:—This is an application for revision of an order of the learned District Judge of Gonda dismissing the application of the applicant, Har Prasad to set aside the order, dated the 9th of July, 1932, and rejecting the appeal of the applicant for want of a deficiency of annas 4 in the court-fee stamp affixed to the memorandum of appeal.

The facts out of which this application for revision arises are briefly as follows:

The Kapurthala Estate got an *ex parte* decree on the 6th of November, 1929, for arrears of rent against Har Prasad from the Court of the Assistant Collector of Bahraich, and in execution of that decree, groves and houses in village Tendwa Alpi Misr belonging to the judgment-debtor were attached. On the 30th of January, 1932, the attached property was sold for Rs.900 and purchased by Ram Asre, Gur Prasad and Sarju, opposite parties nos. 2, 3 and 4. On the 31st of March, 1932, the sale was set aside by the Assistant Collector on the objection of the judgment-debtor on the ground that no sale-proclamation had been issued.

(1) (1923) A.I.R., All., 349.

(2) (1929) I.L.R., 5 Luck., 474.

(3) (1924) I.L.R., 4 Pat., 180.

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Accordingly, a fresh proclamation had to be issued, and on the 16th of April, 1932, the property was again sold for Rs. 900 and purchased by the same three men, Ram Asre, Gur Prasad and Sarju. On the 29th of April, 1932, the judgment-debtor filed objections to the second sale on the ground that the proclamation was only posted in the village on the 16th of April, 1932, whereas 30 clear days were required under Order XXI, rule 68 of the Code of Civil Procedure before the sale could be held. After issue of proclamation on the 10th of May, 1932, these objections were summarily rejected by the Assistant Collector on the ground that these objections ought to have been taken before the sale took place. An appeal against the order of the Assistant Collector was filed on the 22nd of June, 1932, to the District Judge of Gonda under Order XLIII, rule 1(j) of the Code of Civil Procedure. On this memorandum of appeal the applicant-appellant, Har Prasad, affixed a court-fee label of annas 12. The Munsarim of the District Judge's Court reported that there was a deficiency of court-fee to the extent of Re.1-4 and the appellant should be asked to make good the deficiency. The District Judge thereupon ordered on the 23rd of June, 1932, that the appellant should make good the deficiency in court-fee within 10 days. On the 8th of July, 1932, the office of the District Judge reported that the appellant had not made good the deficiency in the court-fee although counsel for the appellant had been directed to do so. On the following day, the 9th of July, 1932, the District Judge of Gonda passed the following order:

"Appeal rejected for non-payment of court-fee within the time allowed."

About a month later, on the 8th of August, 1932, the applicant-appellant, Har Prasad, filed an application under Order XLVII, rule 1 read with section 151 of the Code of Civil Procedure stating that although his vakil had sent a post-card directing him to make good

the deficiency in court-fee, he never received the post-card and never got any information that he had been called upon to make good the deficiency in court-fee and that he was seriously ill and could not personally come to the court to learn what had happened to his appeal. The applicant, therefore, prayed that his fault may be condoned and the order rejecting his appeal be set aside and his appeal be restored to its original number and justice be done to him. This application was supported by an affidavit solemnly verified by the applicant, Har Prasad, before the Munsarim of the District Judge's Court on the 10th of August, 1932. On the 7th of November, 1932, the learned District Judge of Gonda dismissed this application of the applicant-appellant Har Prasad, as incompetent under section 151 of the Code of Civil Procedure and as disclosing no sufficient cause if Order XLVII, rule 1 of the Code of Civil Procedure were to be applied. Against this order of the learned District Judge of Gonda Har Prasad has filed this application for revision under section 115 of the Code of Civil Procedure.

We have heard the learned counsel for the applicant as well as the learned counsel for the Kapurthala Estate and for Ram Asre, Gur Prasad and Sarju. In *Jai Singh Gir v. Sita Ram Singh and others* (1), it was held by two learned Judges of the Allahabad High Court that an appellate court had no right to reject an appeal on the ground that it was insufficiently stamped, and it further held that where the appellate court had not exercised its discretion as regards granting time to make up the deficiency in court-fee and rejected the memorandum of appeal the High Court had power to set aside the order of rejection. In the present case, it is clear from the narrative of the facts of the case set forth above that the applicant never knew that he had been ordered to make good the alleged deficiency in court-fee stamp within 10 days. Information to the counsel

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was in this case not tantamount to information to the appellant himself because we have on the record the sworn affidavit of the applicant-appellant, Har Prasad, that the post-card which his lawyer sent to him never reached him at all and there is no counter affidavit filed by the opposite-party. In *Deoraj v. Kunj Behari and others* (1), it was held by two learned Judges of this Court that where the appellate court decided that the appellant was liable to make good the deficiency in court-fee and the appellant was not in a position to make the deficiency good at once, the appellate court ought to have allowed the appellant reasonable time within which to make good the deficiency in court-fee before dismissing his appeal under Order VII, rule 11, clause (c) of the Code of Civil Procedure. This ruling has been relied upon by the learned District Judge of Gonda but, in our opinion, the facts of the present case did not justify the lower appellate court in rejecting the appeal for non-payment of the court-fee within the time allowed by that Court for the simple reason that appellant was never aware, at any time before his appeal was dismissed, that he had been asked to make good any deficiency in court-fee. In short, in our opinion, there was no wilful disobedience of the court's order on the part of the applicant-appellant, Har Prasad, so as to justify, the learned District Judge of Gonda in rejecting the appeal for non-payment of the alleged deficiency in court-fee demanded from the appellant. In *Adit Prasad Singh v. Ram Harakh Ahir* (2), it was held that the plaintiff had the right to ask the trial court to set aside its decree and to restore the case whether the application be deemed to be one under section 151, 149, 148 or 147 of the Code of Civil Procedure or under Order XLVII, rule 1 of the Code of Civil Procedure.

In our opinion the present application under section 115 of the Code of Civil Procedure is entertainable on

(1) (1929) I.L.R., 5 Luck., 474.

(2) (1924) I.L.R., 4 Pat., 180.

the ground that the learned District Judge acted in the exercise of his jurisdiction illegally and with material irregularity inasmuch as without giving any real opportunity to the applicant to make good the alleged deficiency in court-fee, he summarily rejected the appeal of the applicant for non-payment of the court-fee. We, therefore, allow this application for revision, set aside the orders of the learned District Judge, dated the 9th of July, 1932, and 7th of November, 1932, and restore the appeal of the applicant. Har Prasad, to its original number in the register of appeals and direct that the appeal be disposed of according to law. The applicant, in any case, will get his costs of this revision. Other costs will abide the result.

Application allowed.

APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice Ziaul Hasan

SADA NAND AND OTHERS (DEFENDANTS-APPELLANTS) *v.* DAYA SHANKER SINGH AND ANOTHER, PLAINTIFFS AND OTHERS, DEFENDANTS (RESPONDENTS)*

1934
October, 30.

Mortgage—Deed of further charge—Construction of deeds—Mortgage-deed providing that mortgagor would have no power to redeem without payment of amount due under a previous mortgage—Deed, whether creates further charge—Mortgage by Hindu father—Sons creating deed of further charge after the father, effect of—Consolidation of mortgages, whether permissible—Limitation—Suit on first mortgage—Mortgagee whether can set up deed of further charge, though a separate claim on it would be time-barred—Mortgage deed not providing that interest would be chargeable after date fixed for payment—Interest, whether could be charged after the date fixed for payment.

Where a mortgage-deed provides that the mortgagor will not have power to redeem the mortgage property without payment

*Second Civil Appeal No. 217 of 1933, against the decree of S. Ali Hamid, District Judge of Unao, dated the 27th of April, 1933, modifying the decree of Pandit Krishna Nand Pande, Additional Subordinate Judge of Unao, dated the 28th of February, 1931.