

APPELLATE CIVIL

Before Mr. Justice C. M. King, Chief Judge and
Mr. Justice Ziaul Hasan

ABDUL SUBHAN KHAN *alias* KHALILUR-RAHMAN KHAN (PLAINTIFF-APPELLANT) *v.* NUSRAT ALI KHAN AND OTHERS (DEFENDANTS-RESPONDENTS)*

1935
February, 19

Court Fees Act (VII of 1870), Schedule I, Article 1, and Schedule II, Article 17—Declaratory Suit—Appeal—Cross-objections—Court fee payable on cross-objections in a suit for mere declaration.

The Court fee on cross-objections even in a suit for mere declaration should be paid *ad valorem* according to the value of the subject-matter in dispute under Article 1, Schedule I of the Court Fees Act and not on the same principle as laid down for the case of appeals in Article 17 of the Second Schedule of the Act. *Raja Harnam Singh v. Rani Bahu Rani* (1), followed. *Surendra Singh v. Gambhir Singh* (2), referred to.

Messrs. *Ghulam Hasan* and *Iftikhar Husain*, for the applicant (cross-objector).

KING, C.J. and ZIAUL HASAN, J.:—The office has raised an objection regarding deficiency of Court fee.

The suit was for a mere declaration that a mortgage deed executed by the plaintiff in favour of Chaudhri Mohammad Ghayas Uddin Ashraf and Abu Saeed was void and not binding upon him. According to the plaintiff's contention he was a minor at the time when the deed was executed.

The trial court decreed that the mortgage deed was void and not binding on the plaintiff and declared that the defendants 2 and 3 could recover Rs.11,500 as principal sum from the plaintiff's property and that parties would bear their own costs.

The plaintiff filed an appeal in this Court in respect of his liability to pay Rs.11,500 and Chaudhri Mohan-

*First Civil Appeal No. 5 of 1934, against the decree of Syed Qadir Hasan, Subordinate Judge of Bara Banki, dated the 9th of September, 1933.

(1) (1933) 147 I.C., 186.

(2) (1934) 32 A.L.J., 743.

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mad Ghayas Uddin Ashraf who was defendant No. 2 in the Court below filed a cross-objection against the decree of that Court declaring that the mortgage was not binding upon the plaintiff. The cross-objector also claimed Rs.750 as costs which should have been awarded in his favour.

The office has reported that the cross-objection should be valued, for the purpose of Court fee, at Rs.11,500 and that ad valorem Court fee should be paid on this sum under article 1 of the first schedule of the Court Fees Act, a further ad valorem Court fee should be paid on the interest, Rs.4,140 which has been claimed, and a further ad valorem Court fee should be paid upon the amount of costs which according to the lower Court's decree amounted to Rs.1,077.

For the cross-objector it has been contended that as the Court fee payable upon the plaint and upon the memorandum of appeal in the suit was governed by article 17 of the second schedule, as the suit was for a mere declaration where no consequential relief is prayed, therefore, the Court fee payable on the cross-objection should be governed by the same provision of the Court Fees Act.

It certainly does seem anomalous that the cross-objector could have filed an *appeal* claiming precisely the same reliefs as he claims in his cross-objection upon a Court fee of Rs.15 under article 17, schedule II, whereas if he files a cross-objection he should pay an ad valorem Court fee on the value of the subject-matter in dispute. The anomaly has frequently been noticed in judicial decisions. Unfortunately for the cross-objector there is no special provision in the Court Fees Act governing the Court fee payable upon a cross-objection excepting only article 1 of schedule I. There is no reference to cross-objections in article 17 of the second schedule. This certainly does give rise to anomalies as pointed out in previous judicial decisions but we think that we are bound to follow a very clear ruling of a Bench of this

Court in *Raja Harnam Singh v. Rani Bahu Rani* (1)

In that case it was held that the Court fee on cross-objections should be paid ad valorem according to the value of the subject-matter in dispute under article 1, schedule I of the Court Fees Act and not on the same principle as laid down for the case of appeals in article 17 of the second schedule. We think that we are bound to follow this ruling unless we see good reason to differ from it.

The learned Advocate for the cross-objector has relied upon a recent decision by a learned Judge of the Allahabad High Court in *Surendra Singh v. Gambhir Singh* (2). That ruling is certainly in his favour but it is contrary to the general trend of judicial authority and it is a decision by a single Judge. There are many rulings which take the same view as the ruling of this Court which we have already cited. On this point therefore we find that the cross-objector must pay Court fee ad valorem on the value of the subject-matter in dispute.

The question then arises as to what is the value of the subject-matter in dispute. The interest of the cross-objector in the principal mortgage money was only Rs.6,700; he is not interested in the rest of the mortgage money which is due to Abu Saeed who has not thought fit to file a cross-objection. The principal of the mortgage, therefore, in respect of which the cross-objector has filed his cross-objection, is Rs.6,700.

In addition to this, interest is claimed but the learned advocate states that simple interest will only be claimed at the rate of 6 per cent. per annum. It is open to him to reduce the contractual amount of interest if he so wishes. The office must therefore calculate the amount of interest on Rs.6,700 at the rate of 6 per cent. per annum simple interest from the 4th of May, 1929, to the 30th of April, 1932. The Court fee will be ad valorem on this sum also.

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As regards costs, the cross-objector has claimed Rs.750 under this head and has already paid an ad valorem Court fee on this amount, so no further deficiency can be claimed on this score.

The Court fee will be paid ad valorem on the total sum calculated as ordered above. One month will be allowed for making good the deficiency.

APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty

1935
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MUSAMMAT RAJANA (PLAINTIFF-APPELLANT) *v.* MUSAHEB
ALI (DEFENDANT-RESPONDENT)*

Evidence Act (I of 1872), section 115—Estoppel between mortgagor and mortgagee—Mortgage of minor's property by guardian without permission of Court—Suit to avoid mortgage—Mortgagee not estopped from denying minor's title to property—Guardian and Wards Act (VIII of 1890), sections 29 and 30—Adverse possession—Joint property—One co-sharer in possession of other co-sharer's property—Suit against mortgagee—Other co-sharers not parties—Adverse possession, if can be set up—Possession transferred to mortgagee within 12 years—Adverse possession, when ripens—Plea of adverse possession not raised in trial court—Plea, if can be entertained in appeal.

In a suit on the basis of a mortgage-deed the mortgagee is estopped from challenging the title of the mortgagor. Where, however, the certificated guardian of a minor mortgages the property of the minor without the permission of the Court and on attaining majority the minor brings a suit to avoid the mortgage under the provisions of sections 29 and 30 of the Guardians and Wards Act, the mortgagee is not estopped from challenging the plaintiff's title to the property. *Bhaigunta Bewah v. Himmat Badyakar* (1), *Surendra Nath Mitra v. Khitindra Nath Mitra* (2), *Jangi Ram v. Sheoraj Singh* (3).

*Second Civil Appeal No. 276 of 1933, against the decree of Babu Bhagwat Prasad, Subordinate Judge, Mohanlalganj at Lucknow, dated the 31st of July, 1933, modifying the decree of Syed Akhtar Alisan, Munsif, Lucknow District, dated the 10th of March, 1932.

(1) (1916) 20 C.W.N., 1355.

(2) (1919) 29 C.L.J., 434.

(3) (1915) 2 O.L.J., 338.