

opinion that the first charge of the Government laid down in section 141, Land Revenue Act, is a first charge of the revenue when the revenue is payable to Government or when the Collector takes proceedings under section 184 of that Act on behalf of a lambardar. We consider that the prior charge cannot be applied in the present case to the decree obtained by the lambardar under section 221, Tenancy Act."

1937

NAWAB
SIKANDAR
ARA AMINA
BEGAM
SAHEBA
v.
JAGANNATH
PRASAD

For the above reasons we think that the decision of the courts below is correct, and we dismiss these appeals with costs.

*Srivastava,
O.J. and
Smith, J.*

Appeal dismissed.

APPELLATE CIVIL

*Before Mr. Justice G. H. Thomas and Mr. Justice
Ziaul Hasan*

HUSAIN ALI KHAN AND OTHERS (DEFENDANTS-APPELLANTS)
v. AMBIKA PRASAD (PLAINTIFF-RESPONDENT)*

1937

April, 30

Civil Procedure Code (Act V of 1908), section 149 and Order VII, rule 11—Appeal filed on insufficient court-fee deliberately—Prayer for grant of time to make up deficiency—Appeal admitted and kept pending but notice not taken of grant of time—Court-fee deficiency, if can be allowed to be made up after expiry of limitation.

Where an appeal is filed deliberately on insufficient court-fee and in the memorandum of appeal it is prayed that time be granted to pay up the deficiency of court-fee and the appeal is admitted and remains pending for several months without any notice being taken of the appellant's prayer for grant of time to make up the deficiency in the court-fee the appellate court not only can allow time under section 149 but should do so under order VII, rule 11(c) of the Code of Civil Procedure. *Brijbhukhan v. Tota Ram* (1), distinguished. *Deoraj v. Kunj Behari* (2), *Sheo Shankar v. Ram Dei* (3) and *Achut Ramchandra Pai v. Nagappa Bab Balgya* (4), relied on.

*Second Civil Appeal No. 97 of 1935, against the decree of Pandit Krishna Nand Pandey, Civil Judge of Gonda, dated the 18th of December, 1934, upholding the decree of Babu Mahesh Chandra, Munsif of Utaula at Gonda, dated the 28th of April, 1934.

(1) (1928) I.L.R., 50 All., 980. (2) (1929) I.L.R., 5 Luck., 474.

(3) (1934) I.L.R., 10 Luck., 569. (4) (1913) I.L.R., 38 Bom., 41.

1937

HUSAIN
ALI
KHAN
v.
AMBIKA
PRASAD

Jnandasundari Shaha v. Madhab Chandra Mala (1), *Akharju Narayana Rao v. Namburi Venkata Krishna Rao* (2), *Ram Sahay Ram Pande v. Lachmi Narayan Singh* (3), *Gursaran Das v. District Board, Jullundher* (4), *Amir Mandal v. Mohan Chandra Mandal* (5), and *Ramji Lal v. Shibba* (6), referred to.

Mr. *Mohammad Ayub*, for the appellants.

Mr. *Hyder Husain*, for the respondent.

THOMAS and ZIAUL HASAN, JJ.:—This is an appeal against an order of the learned Civil Judge of Gonda rejecting the defendants-appellants' appeal as time barred.

The decree against which the appeal was preferred was passed on the 28th of April, 1934. The appeal was filed on the 31st of May, 1934. Excluding the time that was spent in obtaining copies, the appeal was within time. It was, however, filed on an insufficient court-fee stamp. The appellants in paragraph 7 of their memorandum of appeal stated that the proper court-fee was Rs.71-4 and that the appeal was being presented on a court-fee of Rs.36 only. It was prayed that time be given to pay up the deficiency in the court-fee. The Munsarim of the District Judge's court, while reporting that the court-fee was short, also referred to ground No. 7 of the memorandum of appeal. No notice of the Munsarim's report or of the prayer for time contained in the memorandum of appeal appears to have been taken and the appeal was transferred to the court of the Additional Subordinate Judge on the 18th of July, 1934. On the next day, 21st August, 1934, was fixed for the hearing of the appeal and even then no notice was taken of the deficiency in the court-fee. On the 21st of August, 1934, the appellants asked for ten days' time to make up the deficiency but on the 22nd of August, 1934, the learned Civil Judge ordered that the appeal be returned to the appellants with liberty to file it afresh on payment of

(1) (1931) I.L.R., 59 Cal., 388.

(3) (1918) 3 P.L.J., 74.

(5) (1922) I.L.R., 3 Pat., 337.

(2) (1904) 27 M.L.J., 677.

(4) (1927) 9 Lah. L.J., 290.

(6) (1923) 75 I.C., 667.

the full court-fee and to make an application under section 5 of the Limitation Act. The appeal was filed again on the 23rd of August, 1934, with full court-fee and it was prayed that the benefit of section 5 of the Indian Limitation Act be extended to the appellants. The learned Civil Judge was, however, of opinion that there was no good reason for admitting the appeal under section 5 and rejected it. Hence this appeal by the defendants-appellants.

1937

 HUSAIN
 ALI
 KHAN
 v.
 AMBIKA
 PRASAD

*Thomas and
 Ziaul Hasan,
 JJ.*

The learned counsel for the appellants relied on section 149 of the Code of Civil Procedure and on order VII, rule 11(c) of the Code. Order VII, rule 11 deals with the rejection of plaints and clause (c) provides that the plaint shall be rejected where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and 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. Section 149 is applicable to appeals as well as to suits and provides that where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the court may in its discretion at any stage allow the person by whom such fee is payable to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance. It is argued that under section 149 the court could have granted time to the appellants to pay up the deficiency in the court-fee and that under order VII, rule 11(c) read with section 107(2) the court was bound to fix a time for payment of the court-fee. On the other hand, the learned counsel for the respondent argues that order VII, rule 11 of the Code of Civil Procedure is not applicable to appeals and further that the insufficient payment of court-fee in the present case being deliberate, the appellants are not entitled

1937

HUSAIN
ALI
KHAN
v.
AMBIKA
PRASAD

Thomas and
Ziaul Hasan,
J.J.

to the benefit of section 149. The learned counsel has referred us to the cases of *Jnandasunari Shaha v. Madhab Chandra Mala* (1), *Akkarju Narayana Rao v. Namburi Venkata Krishna Rao* (2), *Ram Sahay Ram Pande v. Kumar Lachmi Narayan Singh* (3), *L. Gursaran Das v. District Board, Jullundher* (4), *Amir Mandal v. Mohan Chandra Mandal* (5) and *Ramji Lal v. Shibba* (6). We have considered these cases but the facts of the case before us are quite peculiar and are distinguishable from those of the cases cited on behalf of the respondent. On the other hand, in *Achut Ramchandra Pai v. Nagappa Bab Balgya* (7) the facts were quite similar to those before us and it was held that the lower court was in error in rejecting the memorandum and that it ought to have granted time within which to supply the requisite stamp and it was pointed out that while under section 582-A of the old Code of Civil Procedure the validation of insufficiently stamped memoranda of appeal was subject to the condition that "the insufficiency of the stamp was caused by a mistake on the part of the appellant as to the amount of the requisite stamp", these words of limitation were omitted from section 149 of the present Codes. The learned Judges said:

"The inference appears to be that the Legislature by the new provision intended that the court should have a free and unshackled discretion in this matter. There seems therefore to be no ground for the learned Judge's view that the concession referred in section 149 must be restricted to cases where there was *bona fide* misunderstanding of the law as to valuation."

In our own Court in *Sheo Shankar v. Ram Dei* (8) to which one of us was a party, it was held that section 149 of the Code of Civil Procedure gives the court a discretion to allow the payment of the court-fee at any

(1) (1931) I.L.R., 59 Cal., 388.

(3) (1918) 5 P.L.J., 74.

(5) (1922) I.L.R., 3 Pat., 397.

(7) (1913) I.L.R., 38 Bom., 41.

(2) (1904) 27 M.L.J., 677.

(4) (1927) 9 Lah. L.J., 290.

(6) (1923) 75 I.C., 667.

(8) (1934) I.L.R., 10 Luck., 569.

stage, and in another case in *Deoraj v. Kunj Behari* (1) it was held that where the appellate court decides that the appellant was liable to make good the deficiency in court-fee and the appellant is not in a position to make it good at once, the appellate court ought to allow the appellant reasonable time within which to make good the deficiency before dismissing his appeal under order VII, rule 11(c) of the Code of Civil Procedure.

1937

HUSAIN
ALI
KHAN
v.
AMBIKA
PRASAD

*Thomas and
Ziaul Hasan,
JJ.*

In view of these cases and of the special circumstances of the present case, we are clearly of opinion that the order rejecting the appeal as time barred is bad.

The learned Judge of the court below in rejecting the appeal purports to have done so according to a ruling of the Allahabad High Court reported in *Brijbhukhan v. Tota Ram* (2) but that case lays down that if an appeal is presented with insufficient court-fee, it should be returned *at once* to the appellant to be refiled with full court-fee. In the present case, as we have noted above, the appeal was not only admitted but remained pending for several months without any notice being taken of the appellants' prayer for grant of time to make up the deficiency in court-fee. It was not therefore a fit case to be dealt with in the manner suggested by the Allahabad ruling referred to above. The lower appellate court not only could have allowed time under section 149 but should have done so under order VII, rule 11(c) of the Code of Civil Procedure and in this view of the case no question of a sufficient cause under section 5 of the Indian Limitation Act arises.

We therefore allow this appeal with costs and send the case back to the lower appellate court with directions to restore the appeal to its original number and dispose of it according to law.

Appeal allowed.

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

(2) (1928) I.L.R., 50 All., 980.