

## APPELLATE CIVIL.

Before Dawson Miller, C. J. and Adami, J.

RASIK BEHARI PRASAD CHOWDHRY

v.

1922.

HIRDE NARAIN CHOWDHRY.\*

March, 23.

*Court-Fee—Suit for declaration and recovery of possession, ad valorem fee payable on—Recovery of deficit in lower appellate court, High Court's power to refuse to entertain appeal until deficit paid—Plaintiffs' suit decreed in part—appeal by defendants—cross-objection by plaintiff—defendant's appeal decreed—second appeal by plaintiff with respect to portion decreed in trial court, court-fee payable on.*

Where there has been a deficit in the court-fee in the lower appellate court, and the person by whom that deficit was payable appeals to the High Court, the latter court has power to refuse to entertain the appeal until the deficit in the lower appellate court has been paid.

Where plaintiff's suit for a declaration of title to, and recovery of possession of 10 *gundas* share in certain property was decreed as regards 5 *gundas* only, and the defendants appealed, contesting the plaintiff's right to recover even 5 *gundas*, and the plaintiff entered a cross-objection claiming the entire 10 *gundas*, paying upon the memorandum of cross-objection half the fee which had been paid on the plaint, and the defendants' appeal was decreed, with the result that the plaintiff recovered nothing, *held*, in an appeal by the plaintiff with respect to the 5 *gundas* which had been awarded to him by the trial court. (i) that an *ad valorem* fee should have been paid on the plaint and not a fee assessed on 10 times the Government revenue; (ii) that half of the amount payable on the plaint should have been paid on the memorandum of cross-objection in the lower court and on the memorandum of appeal to the High Court; (iii) and that although the subject-matter of the cross-objection did not fall within the scope of the second appeal to the High Court that court was entitled to refuse to entertain the appeal until the deficit due on the memorandum of cross-objection had been paid.

\* Second Appeal No. 264 of 1921.

1922.

*Narain Prasad v. Sheo Kameshwar Prasad Singh*(<sup>1</sup>), approved.

RASIK  
BEHARI

*Kirala Varma v. Chadayan Kuiti*(<sup>2</sup>), distinguished.

PRASAD  
CHOWDHRY

The facts of the case material to this report are stated in the order of the Court.

v.

*Janak Kishore*, for the appellant.

HIRDE  
NARAIN  
CHOWDHRY.

*Sultan Ahmed*, Government Advocate (with him *Sambhu Saran*), for the respondent.

DAWSON MILLER, C. J., AND ADAMI, J.—The question for decision in this case is whether the Court has power to order the appellant who is the plaintiff in the suit to pay a deficit court-fee upon his memorandum of cross-objection in the Lower Appellate Court before it will entertain his appeal here. The circumstances are a little peculiar and the question arises in this way. The plaintiff brought a suit against the defendants for a declaration of his title and recovery of possession in respect of 10 *gundas* share in certain property. The fee he paid upon his plaint was based upon a valuation of ten-times the Government revenue and the fee actually paid arrived at in that manner was Rs. 3-12-0. In the trial Court the plaintiff succeeded as to half his claim, that is to say, he got a decree in respect to 5 *gundas* only and not 10 *gundas*. From that decree the defendants appealed contesting the plaintiff's right to recover even 5 *gundas*. The plaintiff entered a cross-objection claiming that he was entitled not only to the 5 *gundas* under the decree of the trial Court, but that he was entitled to the other 5 *gundas* also. In respect of his cross-objection he paid a court-fee of Re. 1-14-0 upon the same basis of calculation as in the trial Court. The defendants' appeal in the Lower Appellate Court succeeded and the plaintiff's cross-objection failed. The result, therefore, was that the plaintiff recovered nothing. From that decision he entered a second appeal in this Court. That appeal, however, was concerned only with what I may call the first 5 *gundas*

(<sup>1</sup>) (1918) 3 Pat. L. J. 101.

(<sup>2</sup>) (1892) I. L. R. 15 Mad. 181.

or that part of the claim which was decreed in the trial Court. As far as the 5 *gundas* refused by the trial Court were concerned the plaintiff did not pursue his appeal in this Court.

Now when the case came before this Court, the Taxing Officer came to the conclusion that the fee payable by the plaintiff appellant was not a fee based upon ten-times the Government Revenue but an *ad valorem* fee. Therefore he was ordered to pay a deficit upon his memorandum of appeal. It was also found that his plaint in the trial Court was deficient in the matter of fee and those two fees he has now paid. It was also found by the Taxing Officer that his memorandum of cross-objection in the Lower Appellate Court was deficient to the amount of Rs. 88-2-0, that is to say, there was a deficiency in respect of property which is no longer the subject of appeal to this Court; and the question for us to determine is whether before we allow his appeal to proceed we should insist upon his paying the fee which he ought to have paid in his cross-objection in the Lower Appellate Court. It is contended on behalf of the appellant that this Court has no jurisdiction in the matter because the subject-matter of his cross-objection in the Lower Appellate Court is not now before the Court, and he relies upon the case of *Kirala Varma v. Chadayan Kuti* (1). The facts of that case, however, are entirely different from those of the present. What happened in that case was that the plaintiff obtained a decree for arrears of rent and possession of certain parcels of land. There were four defendants and he recovered against them all. One of the defendants appealed and during the appeal it was discovered that the plaintiff-respondent had not paid the proper court-fee on the plaint. His decree was not objected to except by one of the defendants who only objected to it in so far as it related to his interest, namely, one-fourth of the whole. The District Judge before whom the appeal came considered that he was entitled to give the defendant a decree because the

1922.

RASIK  
BEHARI  
PRASAD  
CHOWDHRY

v.  
HIRDI  
NARAIN  
CHOWDHRY.

(1) (1892) I. L. R. 15 Mad. 181.

1922.

BASIK  
BHARI  
PRASAD  
CHOWDHRY  
v.  
HIRDE  
NARAIN  
CHOWDHRY.

respondent, the plaintiff, had not paid the full court-fee in the Court below. He made an order that the defendant's appeal should be allowed merely upon that ground. When the matter came before the High Court it was pointed out that the Court had no jurisdiction over the whole subject matter of the suit as the appeal by the fourth defendant related to one item only and it seems obvious that as the plaintiff had a vested interest in that part of the decree which had not been appealed from the Court clearly had no jurisdiction to interfere with that interest merely because one of the defendants appealed against another portion of the decree.

Now the matter so far as this Court is concerned appears to me to depend upon whether or not where there has admittedly been a deficit in the court-fee in the Lower Appellate Court and the person by whom that deficit was payable appeals to this Court, this Court has power to refuse to entertain his appeal until the deficit in the Lower Appellate Court has been paid. The question is not one which arises under any particular provision of the Court-Fees Act but it is a matter which as has been held in this Court is within the inherent jurisdiction of the Court. In the case of *Narain Prasad v. Sheo Kameswar Prasad Singh* (1) it was laid down by the late Chief Justice and Jwala Prasad, J., that the plain duty of the Court was to require the appellant to pay a deficiency in the court-fee in the Court below before they could entertain any appeal arising out of the same suit by that appellant. Now although it is true that in the present case the appellant is not appealing from that part of the decree of the Lower Appellate Court which disallowed his cross-objection nevertheless he was in default and it is a default arising out of the same suit and he is now asking this Court to hear his appeal although he in the Lower Court did not comply with the provisions of law requiring him to pay a certain court-fee. There can be no doubt as to his liability in the Lower Court.

(1) (1918) 3 Pat. L. J. 101.

and I think that the Court has discretion in the matter to insist upon his paying the proper court-fees throughout the litigation as a condition precedent to allowing him to come before this Court in appeal and ask it to set aside the decree of the Lower Appellate Court.

The result is that the appeal will be stayed until the appellant has complied with his obligation to pay the deficit court-fee in the Lower Appellate Court which amounts to Rs. 88-2-0. The appellant will be allowed ten days' time within which to pay the court-fee.

1922.

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RASIK  
BEHARI  
PRASAD  
CHOWDHRY  
v.  
HIRDE  
NARAIN  
CHOWDHRY.

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### APPELLATE CIVIL.

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*Before Das and Bucknill, J.J.*

MAHANTH RAMRUP GIR

v.

LAL CHAND MARWARI.\*

1922.

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*April, 4.*

*Religious Endowment—alienation of properties belonging to—suit for recovery—adverse possession—Limitation Act, 1908 (Act IX of 1908), Schedule I, Articles 134 and 144—Absence for seven years, presumption as to death—onus of proving date of death—Transferee pendente lite, whether necessary parties—Resumption proceedings, effect of.*

Where property is vested in the juridical person and the mahant is only the representative or manager of the idol an act of alienation is a direct challenge to the title of the idol, and a suit by the idol, or the manager of the idol on behalf of the idol, for recovery of possession, must be brought within 12 years from the date of the alienation.

But where the title is in the mahant or shebait an act of alienation is not a challenge to the title of the idol, though the property may be endowed property in the sense that its income has to be devoted to the purposes of the endowment, and there is no adverse possession so long as the person making

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\* Appeal from Original Decree Nos. 101-102 of 1919 and Nos. 28 to 32 of 1920, from a decision of Lala Damodar Prasad, Subordinate Judge of Muzaffarpur, dated the 12th September, 1918.