APPELLATE CIVIL.

Before Mullick and Bucknill, J.J.

SHEOPUJAN RAI

v.

MAHARAJA BAHADUR KESHO PRASAD SINGH.*

1923.

July, 11.

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 100—*Second Appeal—finding of fact based on misconception of law of evidence, effect of—amendment of plaint, power of appellate court to allow—Court-Fees Act*, 1870 (*Act VII of* 1870), *section* 5—*additional court-fee realised by Taxing Officer, power of Divisional Bench to order refund.*

Where a finding of fact is based upon a misconception of the law of evidence and an error in procedure it is not binding on the High Court in second appeal. Therefore, where, in deciding a question of possession, the lower court had thrown the burden of proof on the wrong party and had disregarded an entry in the Record-of-Rights, *held*, that the decision was not binding in second appeal.

Although an appellate court will not ordinarily allow an amendment of the plaint where the plaintiff has elected to go to trial upon the issue whether the frame of the suit is correct notwithstanding the objection of the defendant that the suit offended against section 42 of the Specific Relief Act, 1877, yet, where the plaintiff has framed his suit *bona fide*, believing that consequential relief is not open to him and that he is entitled only to a declaration, the court is justified in allowing an amendment of the plaint.

Narayana v. *Shankunni*(1) and *Deokali Kuer* v. *Kedar Nath*(2), referred to.

In this case the Taxing Officer of the High Court had demanded and realised additional court-fee on the plaint and on the memorandum of appeal on the ground that the suit

*Appeal from Appellate Decree No. 1283 of 1921, from a decision of H. W. Williams, Esq., I.C.S., District Judge of Shahabad, dated the 11th April, 1921, setting aside a decision of Maulavi Saiyid Ghalib Hasnain, Subordinate Judge of Shahabad, dated the 10th January, 1920.

(1) (1892) I. L. R. 15 Mad. 255. (2) (1912) I. L. R. 39 Cal. 704.

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was one for a declaration with consequential relief and not a suit for a mere declaration. The Division Bench held that the suit as framed was a suit for a declaration only, but held that they had no power to order a refund of the additional fee paid on the memorandum of appeal inasmuch as the decision of the Taxing Officer was final under section 5 of the Court-Fees Act, 1870, but they ordered a refund of the additional fee paid on the plaint.

Appeal by the plaintiff.

The plaintiff alleged that he and his brother Mosafir were joint owners of an occupancy holding which was sold in execution of a rent decree obtained against Mosafir alone by the landlord, the Maharaja of Dumraon, on the 14th August, 1912. The holding was sold on the 13th March, 1916, and possession was delivered to the decree-holder auction-purchaser on the 21st January, 1917. On the 5th July, 1918, the plaintiff lodged the present suit in the Court of the Subordinate Judge of Arrah, for the following reliefs:

(1) That it may be decided that the decree passed on the 14th August, 1912, the sale confirmed on the 13th March, 1916, and delivery of possession made to the defendant No 1 on the 21st January, 1917, are fraudulent and collusive. The defendant No. 1 neither has nor can acquire any right under such a purchase and the decree and the sale are null and void as against the plaintiff. They are not and cannot be binding upon the plaintiff.

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(3) That besides the above, other reliefs, which the plaintiffs may be entitled to, may be granted.

Of the issues framed, No. 1 related to the question of limitation, No. 2 to the form of the suit, No. 3 to the question whether sufficient court-fee had been paid upon the plaint, No. 4 to the question whether section 42 of the Specific Relief Act barred the suit and No. 5 to the question whether the decree obtained by defendant No. 1 was fraudulent.

The Subordinate Judge found that the plaintiff had never been dispossessed, that he was joint owner of the occupancy holding and not having been impleaded as defendant in the rent suit his interest

could not be affected; he also held that the suit was properly framed and was one falling within the provisions of section 42 of the Specific Relief Act.

In appeal the District Judge came to a different conclusion. He found that the plaintiff was not in possession and having failed to sue for a declaration and consequential relief, that is to say possession, the suit was bad under section 42 of the Specific Relief Act. He also found that Mosafir, the plaintiff's brother, the judgment-debtor in the rent suit, did not represent the plaintiff in his relations with the landlord.

The present second appeal was preferred by the plaintiff against the judgment of the District Judge.

Lakshmi Narain Singh and *Abani Bhushan Mukerji*, for the appellant.

Nirsu Narain Sinha, for the respondents.

MULLICK, J. (after stating the facts, as set out above, proceeded as follows) :—

With regard to the finding on the question of possession, it is contended by the learned Vakil, for the respondent, that it cannot be attacked in second appeal. That would have been perfectly true if the finding had not been vitiated by a misconception of the law of evidence and an error of procedure. The learned Judge in the first place throws the onus of proving possession upon the plaintiff. He disregards the record-of-rights published in April, 1913, which shows that both Mosafir and the plaintiff were recorded as *raiyats* on the land and until the record-of-rights is rebutted the defendant cannot be heard to say that the onus lies upon the plaintiff.

Then in considering the oral evidence adduced by the plaintiff and the defendant, the learned Judge seems to give special prominence to the order for delivery of possession in favour of the defendant-landlord. Now, that order was made against Mosafir only and it could not have had the effect of ejecting the plaintiff if he was in possession on that date, and

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I am not quite certain, from the form in which the learned Judge has put his judgment, how far he has been influenced by the view that the delivery of possession in this case had the effect of putting the landlord in *khas* possession.

Then the learned Judge refers to an order passed under section 144, Criminal Procedure Code, in December, 1917, that is to say, about eleven months after possession was given to the landlord. It seems that there was a fear of a breach of the peace and a prohibitory order was made against Sheopujan and Mosafir restraining them from going upon the land. Now an order of this nature is not necessarily evidence of possession. Without further materials it is impossible to say that Sheopujan was found to be out of possession, and if he desired to use the order as evidence the learned Judge should have investigated the circumstances under which it was passed.

This being so, in my opinion, the case has not been properly tried.

The learned Judge has also not disposed of the question of limitation and if his finding as to possession is not maintained, then the necessity for deciding the question of limitation will also arise.

But instead of sending the appeal to the learned Judge for rehearing, I think we should allow the prayer, which is now made for the amendment of the plaint, in order that it may conform with the provisions of section 42 of the Specific Relief Act. The plaintiff asked simply for a declaration on the footing that he was in possession and that no consequential relief was available to him. The Subordinate Judge found in his favour. The learned District Judge in appeal has found against him and the plaintiff now prays that he may be permitted to amend the plaint by adding to the third relief a prayer in the following terms:

"and if the plaintiff should be found to be out of possession the court may be pleased to order delivery of possession to him."

I think in the circumstances of this case the amendment should be allowed and the case retried.

It is true that there is a class of cases in which the Appellate Court will not allow amendment if the plaintiff has elected to go to trial upon the issue whether the frame of the plaint is correct notwithstanding the objection of the defendant that the suit offends against the provisions of section 42 of the Specific Relief Act and *Narayana* v. *Shankunni* (1) is an example of a case of this kind. But on the other hand where a plaintiff has framed his suit *bonâ fide*, believing that consequential relief is not open to him and that he is entitled to a declaration, I think the Court would be justified in allowing him to amend the plaint even in appeal; and the cases have even gone so far as to permit a plaintiff, who is suspected of asking for a declaratory decree simply for the purpose of evading stamp duty, to amend his plaint at the appellate stage in the High Court upon its being shown that consequential relief was available and upon his offering to pay the necessary court-fee: [*Deokali Kuer* v. *Kedar Nath* (2)]. It is contended by the learned Vakil for the respondent that *Deokali's* case (2) did not require a declaration and that the proper prayer should have been one for possession. It is true that Sir Lawrence Jenkins C.J., held that it was not a case coming within section 42: but the point is that though the plaint was defective the learned Chief Justice allowed an amendment at a very late stage. Therefore I do not think it is an inflexible rule that no amendment can be allowed if the plaintiff has notice in the trial Court of the defendant's objection that the frame of the suit is bad. I think, therefore, that in this case the amendment should be allowed to be made in the trial Court and the case should be remanded to that Court for disposal according to law. It may be necessary for

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the defendant to file a fresh written statement and for the Court to frame additional issues and to take further evidence. The evidence already recorded will be evidence in the trial now ordered.

The plaintiff has paid deficit court-fee in this Court on his memorandum of appeal. He has also paid the deficit court-fee realizable from him in the Court of the Subordinate Judge on the footing that the plaint was one for declaration and consequential relief. Apparently the Registrar of the High Court was of opinion that the plaint in effect contained a prayer for consequential relief. If that were so, no amendment would be necessary; but it is now admitted before us, and I think it is established, that the plaint as it stands does not contain any prayer for consequential relief and that an amendment is necessary in order to enable the plaintiff to recover possession. Therefore the court-fee that has been paid should, in my opinion, be refunded and we direct that the plaintiff be given a certificate from this Court entitling him to claim from the Revenue authorities a refund in respect of the stamp fee paid by him. He will pay the proper fee in the Court of the Subordinate Judge after the plaint has been amended.

In respect of fee paid on the memorandum of appeal in the High Court we cannot interfere with the decision of the Taxing Officer which is final under section 5 of the Indian Court-Fees Act.

The appeal is decreed and the case is remanded. In the special circumstances of this case the plaintiff will pay the contesting defendant his costs in this Court.

BUCKNILL, J.—I agree.

Appeal decreed.