

## APPELLATE CIVIL.

*Before Das and Ross, J. J.*

RAM MANDAR

1924.

v.

April, 9.

MAHARANI NAWLAKHBATI.\*

*Court-Fee—Suit for ejectment and mesne profits—decree for possession and for ascertainment of mesne profits—appeal fully valued—smaller amount decreed for mesne profits—appeal from decree for mesne profits.*

Plaintiff sued for possession of land valued at Rs. 775 and for mesne profits valued at Rs. 4,696-8-3. The claim for possession was decreed and it was directed that mesne profits should be ascertained. There was an appeal to the High Court on which the full court-fee was paid. The appeal was dismissed. Subsequently the mesne profits were ascertained to be Rs. 1,600-10-3. The defendant appealed to the District Judge, paying a court-fee of eight annas on his memorandum of appeal. The appeal was dismissed and the defendant then preferred a second appeal to the High Court. On objection being taken that the appeal to the District Judge should have been stamped with a court-fee of Rs. 130, *held*, that the full court-fee on the mesne profits having been paid on the first appeal to the High Court the defendant was not bound to pay a court-fee on the appeal to the District Judge.

*Kanchan Mandar v. Kamala Prasad Chowdhury*(1), followed.

Appeal by the defendant.

The plaintiff brought a suit for possession and mesne profits valuing the land at Rs. 775 and the mesne profits at Rs. 4,696-8-3. The suit was decreed for possession and it was directed that the amount of mesne profits should be ascertained. Against this decree an appeal was made to the High Court on which full court-fee was paid. That appeal was dismissed. Then the mesne profits were ascertained to be

\* In the matter of S. A. 308 of 1924.

(1) (1912) 16 Cal. L. J. 564.

1924.

RAM  
MANDER  
v.  
MAHARANI  
NAW-  
LAKHBATI.

Rs. 1,604-10-3. The defendant appealed against that decree to the District Judge and preferred this second appeal to the High Court.

The Stamp Reporter was of opinion that the memorandum of appeal to the District Judge, which bore a court-fee of 8 annas was under-stamped and should have been stamped with a court-fee of Rs. 130. The question was whether that opinion was correct.

*S. K. Mitter*, for the appellant.

*Lachmi Narain Sinha*, Government Pleader, for the respondent.

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

The learned Counsel for the appellant contends that full court-fee on the claim for mesne profits has already been paid and that he should not be required to pay again. He relies on the decision in *Kanchan Mandar v. Kamala Prosad Chowdhury* <sup>(1)</sup> where the facts were similar to the facts of the present case; and it was decided that the defendant could not be called upon to pay court-fees a second time.

The learned Government Pleader refers to section 6 of the Court-Fees Act and contends that on this memorandum of appeal the proper court-fee must be paid. But the question for decision is whether the court-fee demandable has not in fact been paid already by the court-fee on the original memorandum of appeal; and it was that question which was decided in *Kanchan Mandar's* case <sup>(1)</sup>. The ground of the decision was that the court-fee had been paid and that it should not be paid a second time. Section 6 therefore does not help towards a decision. The decision in *Kanchan Mandar v. Kamala Prosad* <sup>(1)</sup> was sought to be distinguished on the ground that in that case the first appeal was still pending before the Court when the second appeal was filed, and that appears to have been

(1) (1912) 16 Cal. L. J. 564.

1924.

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 RAM  
 MANDER  
 v.  
 MAHARANI  
 NAW-  
 LAKHRATI.

Ross, J.

adopted as a ground of distinction by the learned Taxing Judge in *Mullik Mokhtar Ahmad v. Mussamat Bibi Rahimunnisa Begum* (1). Now that was not the ground on which the decision in *Kanchan Mandar v. Kamala Prosad* (2) proceeded and when it is examined it does not appear to be a valid ground of distinction. Whether the two appeals are pending simultaneously or one has been disposed of before the second is filed, cannot, in my opinion, make any difference. If, as has been suggested, the court-fee is paid for the Court's time, then the time of the Court must be devoted to the question, whether the two cases are heard at the same time or one after the other. The amount of mesne profits is a separate question which must be separately dealt with and it can make no difference whether the question of the amount of mesne profits is debated at the hearing of the main appeal or at a later date. The time of the Court must be devoted to it equally in either case. I am unable to find any valid ground of distinction between the facts of the present case and the facts in *Kanchan Mandar v. Kamala Prosad* (2). The appellant has paid the court-fee, and in fact more than the court-fee, payable on the amount of the decree for mesne profits against which he appeals, and I can see no reason why he should be required to pay again. When he first appealed, the amount of mesne profits had not been ascertained but had only been ordered to be ascertained. The fee was paid on the amount at which the plaintiff estimated the mesne profits. This turns out to be much more than the mesne profits actually awarded. Therefore the appellant has really paid more than the decree that has now been made against him would have necessitated.

There is a further reason against requiring the appellant to pay an additional court-fee on the memorandum of appeal before the District Judge. That appeal was incompetent. The District Judge

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 (1) Misc. Ap. 62 of 1921, decided on the 10th March, 1921.

(2) (1912) 16 Cal. L. J. 564.

1924.

RAM  
MANDER  
v.  
MAHARANI  
NAW-  
LAKHBATI.

ROSS, J.

had no jurisdiction; the appeal lay to the High Court. The memorandum of appeal ought to have been returned to the appellant by the District Judge, and if he had done so, the appellant would have been able to file the appeal here on the same court-fee. In my opinion, therefore, no further court-fee should be required from the appellant.

The appellant is entitled to the costs of this hearing.

DAS, J.—I agree.

### LETTERS PATENT.

*Before Dawson Miller C. J. and Mullick, J.*

SRI KANTA PRASAD

v.

JAG SAH.\*

1924.

April, 9.

*Transfer of Property Act, 1882 (Act IV of 1882), section 60—Equity of redemption, right of part owners of, to redeem—Redemption, parties to suit for—objection by defendant to joinder—estopped from subsequently pleading non-joinder—Escheat—brit tenure, whether can escheat—Practice.—Appeal—ground not taken in memorandum of appeal—notice of new ground given to respondent.*

Section 60 of the Transfer of Property Act, 1882, does not debar the owner of a part of the equity of redemption from offering to redeem the whole mortgage.

*Ahmad Ali Khan v. Jawahir Singh*,<sup>(1)</sup> *Bhikaji v. Lakshman*<sup>(2)</sup>, and *Yadali Beg v. Tukaram*<sup>(3)</sup>, referred to.

Where, in a suit to redeem a mortgage instituted by some of the owners of the equity of redemption, the defendants oppose an application by the plaintiffs to add the other owners

\* Letters Patent Appeal no. 59 of 1920.

(1) S. D. N. W. P. 425.

(2) (1891) I. L. R. 15 Bom. 27 (note).

(3) (1921) I. L. R. 48 Cal. 22; L. R. 47 I. A. 207.