1938.

SHEO AHIR v. KING-EMPEROR.

KHAJA MOHAMAD NOOR, J.

magistrate, did not think it fit to take action under section 476 of the Criminal Procedure Code, thinking that the offenders could be adequately punished for an offence which did not require the sanction of the civil court.

Finally it was urged that the sentence was severe. I do not think so. I look upon the defiance of the processes of law as a serious offence, as they hamper the administration of justice. If allowed to be committed with impunity, the prestige of the court is lost. In my opinion in view of the manner in which the offence, as found by both the courts, was committed, the sentence is not only adequate but, in my opinion, somewhat lenient.

The application is rejected.

The petitioners should surrender to their bail and serve out the unexpired portion of their sentences.

ROWLAND, J.—I agree.

Rule discharged.

J.K.

APPELLATE CIVIL.

Before Dhavle and Agarwala, JJ.

BAHURIA RAM SAWARI KUER

v.

DULHIN MOTIRAJ KUER.*

1938.

August, 16.

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 2(2) *and Order VII, rule* 11—*Order rejecting memorandum of appeal as insufficiently stamped, whether is appealable as a "decree"—Order VII, rule* 11(*c*), *whether applies to*

*Appeal from Appellate Decree no. 289 of 1937, from a decision of S. K. Das, Esq., I.C.S., District Judge of Saran, dated the 18th November, 1936, affirming a decision of Muhammad Shamsuddin, Munsif at Chapra, dated the 28th September, 1936.

1938.

BAHURIA RAM SAWARI KUER v. DULHIN MOTIRAJ KUER.

appeals—Court, whether bound to give time to appellant to make up the deficit before rejecting memorandum of appeal.

An order of rejection of a memorandum of appeal on the ground that it was insufficiently stamped (particularly when it is passed without giving the appellant any time at all to make up the deficit), is a "decree" and is appealable as such.

Suraj Pal Pandey v. *Uttim Pandey*(1), *Rup Singh* v. *Mukhraj Singh*(2) and *Ayyanna* v. *Nagabhooshanam*(3), followed.

Jnanadasundari Shaha v. *Madhabchandra Mala*(4), distinguished.

The provisions of Order VII, rule 11, Code of Civil Procedure, 1908, apply to appeals and, therefore, it is the duty of the court, in cases coming under clause (*c*), to require the appellant to make up the deficiency in court-fee within a time to be fixed by the court before rejecting the memorandum of appeal.

Achut Ramchandra Pai v. *Nagappa*(5) and *Jananadasundari Shaha* v. *Madhabchandra Mala*(4), followed *quoad hoc*.

Baijnath Prasad Singh v. *Umeshwar Singh*(6), applied.

Akkaraju Narayana Rao v. *Akkaraju Seshaman*(7), not followed.

Held, further, that if an insufficiently stamped memorandum of appeal has in fact been accepted by the court by inadvertence, time may be given to the appellant to supply the deficiency.

Appeal by the defendants.

The facts of the case material to this report are set out in the judgment of the court.

B. P. Sinha and *S. C. Chakravarty*, for the appellants.

(1) (1922) A. I. R. (Pat.) 281.
(2) (1885) I. L. R. 7 All. 887.
(3) (1892) I. L. R. 16 Mad. 285.
(4) (1931) I. L. R. 59 Cal. 388.
(5) (1913) I. L. R. 38 Bom. 41.
(6) (1937) I. L. R. 16 Pat. 600, S. B.
(7) (1914) 26 Ind. Cas. 33.

1938.

BAHUBIA RAM SAWARI KUER v. DULHIN MOTIRAJ KUER.

K. Husnain and *Jaleshwar Prasad*, for the respondents.

DHAVLE AND AGARWALA, JJ.—This is an appeal against an order of the District Judge of Saran, rejecting a memorandum of appeal on the ground that it was insufficiently stamped.

The learned advocate for the plaintiffs respondents has raised a preliminary objection that no appeal lies against such an order, citing in support *Jnanadasundari Shaha* v. *Madhabchandra Mala*(1). That, however, was a case in which the point actually decided was that though the District Judge had rejected a memorandum of appeal on the failure of the appellant to put in deficit court-fees by the time allowed, he had jurisdiction to entertain a fresh application for time under Order VII, rule 13, applying section 5 of the Limitation Act. In the case before us the District Judge rejected the memorandum of appeal as soon as the deficiency in court-fees was brought to his notice. In *Suraj Pal Pandey* v. *Uttim Pandey*(2), following the Allahabad and Madras rulings in *Rup Singh* v. *Mukhraj Singh*(3) and *Ayyanna* v. *Nagabhoosanam*(4), moreover, it was held in this Court that an order of dismissal by a District Judge construed as an order rejecting a memorandum of appeal for the appellants' failure to make up a deficit in court-fees is tantamount to a decree within the meaning of the Civil Procedure Code. An order of rejection passed without giving the appellant any time at all to make up the deficit would seem even more clearly to be a decree, for to such an order it is impossible to apply Order VII, rule 13, the provision on which the decision in *Jnanadasundari's* case(1) was rested. The learned Calcutta Judges

(1) (1931) I. L. R. 59 Cal. 388.
(2) (1922) A. I. R. (Pat.) 281.
(3) (1885) I. L. R. 7 All. 887.
(4) (1892) I. L. R. 16 Mad. 285.

1938.

BAHURIA RAM SAWARI KUER v. DULHIN MOTIRAJ KUER.

DHAVLE AND AGARWALA, JJ.

did indeed make it clear that in their opinion the definition of " decree " in section 2 as inclusive of the rejection of a plaint is not extended by section 107(*2*) to the rejection of a memorandum of appeal. But the cases of *Rup Singh* v. *Mukhraj Singh*(1) and *Ayyanna* v. *Nagabhooshanam*(2) were decided under the Code of 1882 which provided that an order rejecting a plaint " is within the definition " of " decree ", and this provision is substantially reproduced in the present Code, even though the clause defining " decree " was materially modified in other respects in 1908. It may at first sight seem rather strange that the rejection of a plaint should under section 2 be deemed to be included in a decree and yet under Order VII, rule 13, should not, of its own force, preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action; but this is probably to be got over by a reference to the usual words in the defining section (section 2) " unless there is anything repugnant in the subject or context ". Be that as it may, the rejection of the memorandum of appeal in the present case was not rejection in any of the circumstances specified in any clause of rule 11 of Order VII, as happened in *Jnanadasundari Shaha's* case(3), and rule 13 only refers to rejection on the grounds given in rule 11. If it had been the intention of the Legislature to make the rejection of a memorandum of appeal in circumstances to which Order VII, rule 13, does not apply non-appealable, the rulings under the Code of 1882 would, it may be presumed, have led to a material change as regards the rejection of a plaint in the definition of decree or to a clear provision to that effect somewhere else in the Code of 1908. From this point of view it is impossible to hold that the rejection of the memorandum of appeal in the present case is not a decree (and is therefore not appealable

(1) (1885) I. L. R. 7 All. 887.
(2) (1892) I. L. R. 16 Mad. 285.
(3) (1931) I. L. R. 59 Cal. 386.

as such) merely because section 107(2) of the Code, as Suhrawardy, J. pointed out, " does not purport to give the order passed by an appellate court the same effect as an order passed by an original court of a like nature ". The preliminary objection must, therefore, be overruled.

The learned Government Pleader, who appears for the appellants, began by endeavouring to show that the memorandum of appeal was not in fact insufficiently stamped. This is, however, opposed to an express decision of the Taxing Judge in *T. K. Rowlins* v. *Lachmi Narain Jha*(1). The learned advocate referred to our recent Full Bench decision in *Thakan Chaudhuri* v. *Lachhmi Narain*(2) where several previous decisions relating to court-fees payable by a mortgagor decree-holder when he appeals or proceeds to execution were approved. But in the present case it was the defendants (the mortgagor and her transferees) that appealed to the lower appellate court. It has been pointed out in several cases that the relief that defendants in such suits have to seek from the appellate court is different from what a plaintiff appellant would have to seek. On this being realised, the point was not pressed, and it must be held that the appeal to the District Judge was not in fact sufficiently stamped.

It was next contended that the learned District Judge should not have summarily rejected the memorandum of appeal on noticing the deficiency, but ought to have given the appellants some time for filing the necessary stamps. Order VII, rule 11, which deals with the powers of original courts in such matters, has been recently considered by a Full Bench of this Court in *Baijnath Prasad Singh* v. *Umeshwar Singh*(3), and it has been held that it is the duty of the court in cases coming under clause (*c*) of rule 11 of Order VII to require the plaintiff to

(1) (1916) 3 Pat. L. J. 443.
(2) (1934) I. L. R. 14 Pat. 4, F. B.
(3) (1937) I. L. R. 16 Pat. 600, S. B.

1938.

BAHURIA RAM SAWARI KUER v. DULHIN MOTIRAJ KUER.

DHAVLE AND AGARWALA, JJ.

supply the requisite stamp paper within a time to be fixed by the Court before rejecting the plaint. It has been pointed out on behalf of the respondents that there has been some difference of opinion on the question whether Order VII, rule 11, applies to courts of appeal. The Bombay High Court, in *Achut* v. *Nagappa*(1), held that section 107(2) of the Civil Procedure Code does make Order VII, rule 11, applicable to appeals. This view was not accepted in Madras in *Akkaraju Narayana Rao* v. *Akkaraju Seshamma*(2), but the learned Judges in this case proceeded on what had been held in *Balkaran Rai* v. *Gobind Nath Tiwari*(3) regarding High Courts to which Order VII, rule 11 (*c*), is made inapplicable by Order XLIX, rule 3. In *Jnanadasundari Saha's* case(4) it seems to have been held that Order VII, rule 11, is applicable to the Court of the District Judge as a Court of appeal; and the same view is implied in *Suraj Pal Pandey's* case(5) which has been already referred to. In Allahabad and Calcutta the view also taken seems to be that if an insufficiently stamped memorandum of appeal has in fact been accepted by the Court by inadvertence, time may be given to the appellant to supply the deficiency. Now, this is what happened in the present case, for the memorandum of appeal was presented on the 17th of November, 1936 (the first open day after the Civil Court vacation), and was ordered by the District Judge on that date to be registered; it was rejected on the following day on a stamp report pointing out the deficiency in court-fees. The learned advocate for the respondents has relied on the observation in *Ram Sahay's* case(6) that section 149 should not be construed—and time extended—in such a way as to nullify section 6 of the Court-fees Act. But it was

1) ((1913) I. L. R. 38 Bom. 41.
2) (1914) L. R. 26 Ind. Cas. 33.
3) (1890) I. L. R. 12 All. 129, F. B.
4) (1931) I. L. R. 59 Cal. 388.
5) (1922) A. I. R. (Pat.) 281.
6) (1917) 3 Pat. L. J. 74.

also said in that case that " when the amount of the court-fee payable is open to doubt, or the amount of the fee cannot be ascertained by the court till the record is received, or it appears that the appellant has made an honest attempt to comply with the law, the court may properly receive the appeal and allow time for the deficiency, if any, to be made good ". The appellants (as already indicated) were the defendants in the mortgage suit, and they valued their appeal at the figure at which the plaintiffs had valued it in the trial court. According to the ruling in *Rowlins'* case(1), they ought to have valued it a little higher by including the interest pendente lite—a relatively small matter. There was also a number of rulings which would at first sight suggest that the appellant need not pay court-fees on such interest. It is plain that the learned Judges who decided *Ram Sahay's* case(2) would have had no hesitation, on the principles laid down by them, in giving such an appellant the benefit of section 149 or Order VII, rule 11. The argument for the appellants becomes all the more irresistible when we see that the stamp report about the deficiency was evidently dealt with by the District Judge without the knowledge of the appellants. The learned advocate for the respondents has endeavoured to argue that no consideration ought to be shown to the appellants, because after the rejection of their memorandum of appeal they applied to the District Judge under section 151 of the Civil Procedure Code, and when it was pointed out to them that their proper remedy was by an application under Order XLVII, rule 1, which required the payment of court-fees equal to half the court-fees payable on the appeal they took no further action. What this, however, has to do with the propriety of the order of rejection passed by the District Judge on the 18th of November, 1936, it is not very easy to see.

(1) (1916) 3 Pat. L. J. 443.
(2) (1917) 3 Pat. L. J. 74.

1938.

BAHURIA RAM SAWARI KUER v. DULHIN MOTIRAJ KUER. DHAVLE AND AGARWALA, JJ.

The appeal must, in our opinion, be allowed, and the order of rejection passed by the lower appellate court set aside, the case being sent back to the lower appellate court for disposal in accordance with the law.

S. A. K.

Appeal allowed.

FULL BENCH.

1938.

August, 22.

Before Wort, A.C.J., Varma and Manohar Lall, JJ.

NRIPENDRA NATH CHATTERJEE

v.

KULDIP MISRA.*

Landlord and tenant—sale in execution of rent decree—notification of arrears for subsequent years in sale proclamation, effect of—landlord auction-purchaser, how far affected by the notification—suit for rent for those years, whether maintainable.

Where in a sale proclamation it was notified that the arrears of rent for subsequent years were an incumbrance, *held*, that the auction-purchaser purchased the holding subject to the incumbrance. A landlord auction-purchaser was in no better position than a stranger purchaser and, therefore, he was debarred from bringing a suit for rent for those years.

Sailaja Prasad Chatterjee v. *Gyani Das*(1) and *Kamaldhari Lal* v. *Tarachand Marwari*(2), followed.

Jugal Kishore Narayan Singh v. *Bhatu Modi*(3) and *Haradhan Chattoraj* v. *Kartik Chandra Chattopadhaya*(4), distinguished.

---

*Appeal from Appellate Decree no. 419 of 1936, from a decision of Babu Kshetra Mohan Kumar, Subordinate Judge of Bhagalpur, dated the 11th March, 1936, affirming a decision of Babu Damodar Prasad, Munsif of Bhagalpur, dated the 16th September, 1935.

(1) (1912) 18 Cal. L. J. 29.
(2) (1934) 16 Pat. L. T. 73.
(3) (1923) I. L. R. 2 Pat. 720.
(4) (1902) 6 Cal. W. N. 877.