1903 NOV. 18. 1904 FEB. 26.

PRIVY COUNCIL.

31 C. 503=31 I. A. 75=14 M. L.J. 152=8 C. W. N. 425=8 Sar. 611.

defendants to improve their property, provided sufficient pasturage were left. Their Lordships think it will be advisable to insert a provision to that effect in the decrees of the Subordinate Judge. It will tend to prevent disputes in future. With this variation the decrees seem to be unobjectionable. Mr. Jardine, for the respondents, said everything that could be said on their behalf. But it was obviously impossible to support the order of the High Court or to argue that the result would be different, if the case went back to the Subordinate Judge on remand.

While their Lordships are unable to concur in the view of the learned Judges of the High Court, they wish to guard themselves against being supposed to adopt all the reasoning on which the decrees of the Subordinate Judge appear to be based.

Their Lordships will humbly advise His Majesty that the decree of the High Court ought to be discharged with costs, and that the decrees of the Subordinate Judge ought to be restored, with an amendment in terms providing in each case that the decree is not to prevent the defendants or their successors in title from cultivating or executing improvements upon the waste lands in question so long as sufficient pasturage is left for the plaintiffs and the other persons entitled to the right of pasturage claimed, with liberty to the parties from time to time, in case of difference, to apply to the Subordinate Judge, as they may be advised.

The alteration in the decrees will make no difference in the costs, as the right, which it is now proposed to protect by express words, has never apparently been disputed. The respondents must pay the costs of the appeals.

Appeals allowed.

Solicitors for the appellants : *Miller, M. Smith & Bell.*

Solicitor for the respondent : *Freshfields.*

---

31 C. 511.

[511] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Pratt.

FULKUMARI *v.* GHANSHYAM MISRA.*

[4th and 10th December, 1903.]

Court-fee—Suit—Title—Possession— Injunction— Consequential relief—Ad valorem *fee—Court Fees Act (VIII of* 1870), *Sch. II, art.* 17—*Civil Procedure Code (Act XIV of* 1882), *s.* 283.

A suit of the nature referred to in section 283 of the Code of Civil Procedure, instituted for the declaration of the plaintiff's right to and possession of a property attached, and for a perpetual injunction to restrain its sale in execution of a decree, is one, in which consequential relief is prayed for and therefore subject to an *ad valorem* Court-fee duty.

Ahmed Mirza Saheb v. *Thomas* (1), *Modhusudun Koer* v. *Rakhal Chunder Roy* (2) and *Mufti Jalaluddeen Mahomed* v. *Shohorullah* (3) followed ; *Ram Prasad* v. *Sukh Dai* (4).

[Ref. 11 C. W. N. 705=6 C. L. J. 427; 32 I. C. 267. Cons. 2 N. L. R. 87.]

APPEAL by the plaintiff, Bibi Fulkumari.

---

* Appeal from Original Decree, No. 381 of 1900, against the decree of Shoshi Bhushan Chatterjee, Subordinate Judge of Purnea, dated the 1st of September, 1900.

(1) (1886) I. L. R. 13 Cal. 162.
(2) (1887) I. L. R. 15 Cal. 104.
(3) (1874) 15 B. L. R. Ap. 1 ; 22 W. R. 422.
(4) (1880) I. L. R. 2 All. 720.

1903
DEC. 4, 10.

APPELLATE CIVIL.

31 C. 511.

The suit was brought under the provisions of section 283 of the Civil Procedure Code. It was alleged in the plaint that the plaintiff had on the 2nd September 1893 purchased the properties in suit from Chhatraput Singh, the defendant No. 2, for Rs. 70,000, and was in possession thereof since the purchase; and that in 1898, Ghanshyam Misra, the defendant No. 1, in execution of a money decree against the defendant No. 2, attached the said properties, whereupon the plaintiff preferred a claim, which was disallowed on the 24th April 1899. Hence the present suit, which was instituted on the 30th May 1899, the prinicipal prayers in the plaint being (1) " that the plaintiff's title to and possession [512] of the aforesaid properties be declared and that it be declared that the defendant No. 2 has no right or title left in the said properties after the sale to the plaintiff as aforesaid," (2) " that it be further declared that the said properties are not liable to be sold in execution of the decree of the defendant No. 1 against the defendant No. 2 as aforesaid " and (3) " that a permanent injunction may issue on the defendant No. 1 not to execute his said decree against the said properties of the plaintiff." The plaint further stated that the plaintiff paid a Court-fee of Rs. 10 for her prayer for a declaration and another Court-fee of Rs. 10 for her prayer for a permanent injunction.

Upon the pleadings, several issues were framed, the first of which was: " Whether the plaint has been sufficiently stamped?" It was contended by the plaintiff that the plaint was sufficiently stamped and the following authorities were cited in support of the contention: *Chunia* v. *Ram Dial* (1), *Gulzari Mal* v. *Jadauv Rai* (2), *Fatima Begam* v. *Sukh Ram* (3) *Manraj Kuari* v. *Maharaja Radha Prasad Singh* (4), *Dildar Fatima* v. *Narain Das* (5), *Gobind Nath Tiwari* v. *Gajraj Mati Tauravan* (6), *Kammathi* v. *Kunhamed* (7), *Dhondo Sakharam Kulkarni* v. *Govind Babaji Kulkarni* (8) and *Vithal Krishna* v. *Balkrishna Janardan* (9).

The decision of the Subordinate Judge was as follows:—

" A reference to these authorities reveals the fact that the three High Courts uniformly held that the Court Fees Act being a fiscal enactment, its provisions should be so construed as to affect the litigants less heavily and acting upon this principle they unanimously held that in a suit instituted under section 283, Civil Procedure Code, the duty leviable should be that provided in Article 17, Schedule II, and not *ad valorem*, as provided in Schedule I of the Court Fees Act. The precedent of *Dhondo Sakharam Kulkarni* v. *Govind Babaji Kulkarni* (8) went so far as to hold that the same duty would be payable even when the plaint would contain a prayer for an award of possession. Against this array of authorities, there are two precedents of the Calcutta High Court, namely, *Ahmed Mirza Saheb* v. *Thomas* (10) and *Modhusudun Koer* v. *Rakhal Chunder Roy* (11). The [513] former distinctly rules that in a suit of this nature, *ad valorem* duty should be leviable, while the latter lays down that the duty should be charged on the amount of the decree and not on the value of the property attached, unless the two amounts happen to be identical. None of these precedents, it is true, is a Full Bench one, but when they are in conflict with those of the other High Courts, one of which is a Full Bench decision, I think I am bound to follow the dictum of the High Court, to which I am subordinate. Now it appears from the execution of Mohurir's note that defendant No. 1's decree is now worth Rs. 62,022-11 and I must call upon the plaintiff to pay duty on this sum amounting to Rs. 1,250, but as

(1) (1877) I. L. R. 1 All. 360.
(2) (1878) I. L. R. 2 All. 63.
(3) (1884) I. L. R. 6 All. 341.
(4) (1884) I. L. R. 6 All. 466.
(5) (1889) I. L. R. 11 All. 365.
(6) (1891) I. L. R. 13 All. 389.
(7) (1891) I. L. R. 15 Mad. 288.
(8) (1884) I. L. R. 9 Bom. 20.
(9) (1886) I. L. R. 10 Bom. 610.
(10) (1886) I. L. R. 13 Cal. 162.
(11) (1887) I. L. R. 15 Cal. 104.

she has already paid Rs. 20, she should now be required to pay Rs. 1,280 on or before 31st August 1900."

The plaintiff having stated her inability to pay the stamp duty called for, the suit was dismissed.

Dr. *Rashbehary Ghose* (Babus *Dwarkanath Chakravarti*, *Hemendra Nath Sen* and *Joygopal Ghose* with him), for the appellant. The case of *Modhusudun Koer* v. *Rakhal Chunder Roy* (1) is not in point; the case of *Ahmed Mirza Saheb* v. *Thomas* (2) is no doubt against me, but this decision, it is submitted, is wrong. The question is fully discussed in *Dayachand Nemchand* v. *Hemchand Dharamchand* (3). See the Court Fees Act, Sch. II, Art. 17, cl. 1. The suit was brought in pursuance of sec. 283 of the Civil Procedure Code. If the plaintiff did not bring the suit, the order directing the property to be sold would become conclusive. See also *Strimathoo Moothoo Vijia Ragoonadah Ranee Kolandapuree Natchiar* v. *Dorasinga Tevar* (4). The case therefore comes under Sch. 11, Art. 17, of the Court Fees Act, and a fixed Court-fee is leviable. As to the intention of the Legislature to impose a charge on a subject, see *Cox* v. *Rabbits* (5), *Oriental Bank Corporation* v. *Wright* (6) and Hardcastle on *Statute Law*, 2nd edition, p. 131. If upon a strict construction, words are not found to impose a tax, it ought not to be imposed.

[RAMPINI, J. Another principle is that we should follow existing rulings, so as not to upset existing practice. The case of *Ahmed Mirza Saheb* v *Thomas* (2) follows the earlier case of *Mufti Jalaluddeen Mahomed* v. *Shohorullah* (7).]

[514] Babu *Sarada Charan Mitra* (Babu *Lalmohan Ganguli* with him) for the respondents. The case is one in which consequential relief was prayed for, and under the decisions of this Court, an *ad valorem* fee should be paid. There is a clear distinction between Sch. II, Art. 17, cl. iii and section 7, sub-section IV, cls. (*c*) and (*d*) of the Court Fees Act. In so far as it is a suit for confirmation of possession, it comes under section 7, sub-section IV, cl. (*c*). As regards the prayer for injunction, it comes under the same sub-section, cl. (*d*). Hence an *ad valorem* fee is leviable. Ever since the Court Fees Act came into force, it has been so held. See *Dinabundhu Chowdhry* v. *Raj Mahini Chowdhrain* (8) and *Mufti Jalaluddeen Mahomed* v. *Shohorullah* (7).

Dr. *Rashbehary Ghose*, in reply, submitted that no consequential relief was asked for in the case and the prayer for injunction was wholly unnecessary. No such injunction could be granted; see section 56 of the Specific Relief Act. As to the decisions of this Court, the maxim *Communis error facit jus* must be taken with qualification, when no vested rights would be disturbed. See Broom's Legal Maxims, 17th edition, p. 113.

Cur. adv. vult.

RAMPINI AND PRATT, JJ. This is an appeal against an order of the Subordinate Judge of Purneah dismissing a suit on the ground of the plaint being insufficiently stamped. The suit is one to establish the plaintiff's right to certain property and for a perpetual injunction restraining its sale, as the property of the defendant No. 2. It is, therefore,

(1) (1887) I. L. R. 15 Cal. 104.
(2) (1886) I. L. R. 13 Cal. 162.
(3) (1880) I. L. R. 4 Bom. 515.
(4) (1875) 15 B.L.R. 83; 23 W.R. 314.
(5) (1878) 3 App. Cas. 473, 478.
(6) (1880) 5 App. Cas. 842, 856.
(7) (1874) 15 B. L. R. Ap. 1; 22 W. R. 422.
(8) (1871) 8 B. L. R. App. 32.

1903 DEC. 4, 10.

APPELLATE CIVIL.

31 C. 511.

a suit of the nature referred to in section 283 of the Code of Civil Procedure.

The Subordinate Judge has pointed out that in certain cases decided by the Allahabad, Madras and Bombay High Courts, a suit of this kind has been held to be one coming under Art. 17, Sch. II of the Court Fees Act and therefore subject to a Court-fee duty of Rs. 10 only. He has, however, followed two rulings of this Court, viz., *Ahmed Mirza Saheb* v. *Thomas* (1) and **[515]** *Modhusudhan Koer* v. *Rakhal Chunder Roy* (2), according to which a suit of this nature is one in which consequential relief is prayed for and therefore subject to an *ad valorem* Court-fee duty.

The learned pleader, who appears for the appellant, has invited us to come to the conclusion that the above cited rulings of this Court are erroneous and to refer the question of the Court-fee duty payable on such a suit to a Full Bench with the view of having the decisions in these two cases set aside. We do not see any necessity to adopt this course. The earlier of these two cases only followed the still older decision of *Mufti Jalaluddin Mahomed* v. *Shohorullah* (3); so that the rule of this Court on the subject is one of very many years' standing. Moreover, in this case the plaintiff seeks not only for a declaration of her right, but for the grant of a perpetual injunction restraining the sale, as the property of defendant No. 2, of the property she lays claim to. Hence, she would seem to us to seek for more than a mere declaratory decree and the suit comes within the purview of the Full Bench decision of the Allahabad High Court in *Ram Prasad* v. *Sukh Dai* (4), which seems to have been overlooked in some at least of the later cases decided by the Allahabad High Court, which are cited in the Subordinate Judge's judgment.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

---

31 C. 516.

[516] CIVIL RULE.

Before Mr. Justice Brett and Mr. Justice Mitra.

GAURI SHANKAR *v.* MAIDA KOER.*

[20th March, 1904.]

Award—Arbitration without intervention of Court—Application to file an award—Withdrawal of such application—Civil Procedure Code (Act XIV of 1882), ss. 373 and 525.

When an application has been made under s. 525 of the Civil Procedure Code, to have a certain award filed in Court, which had been made without the intervention of the Court, the applicant is at liberty at any stage of the hearing, prior to the delivery of judgment and preparation of the decree, to withdraw the application under s 373 of the Code.

[Ref. 21 M. L. J 404=8 I. C. 860=9 M. L. T. 160=(1911) 1 M. W. N. 33.]

RULE granted to the defendant, opposite party, Mussamat Maida Koer.

---

* Civil Rule No. 3551 of 1903.

(1) (1886) I. L. R. 13 Cal. 162.
(2) (1887) I. L. R. 15 Cal. 104.
(3) (1874) 15 B. L. R. Ap. 1; 22 W. R. 422.
(4) (1880) I. L. R. 2 All. 720.