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APPELLATE  
CIVIL.

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Before Mr. Justice Ghose and Mr. Justice Pratt.

RAJKISHORI KOER v. MADAN MOHAN SINGH.\*

[14th May 1903.]

*Court fee—Plaint, insufficiently stamped—Deficit Court-fee, time for payment of—Civil Procedure Code (Act XIV of 1882) s. 54.—Court-fees Act (VII of 1870) s. 28—Limitation.*

Under s. 54 of the Civil Procedure Code, and s. 28 of the Court-fees Act, the Court has a discretionary power to fix a time within which the requisite Court-fee is to be furnished, and if the stamp be made good within the time indicated, the date of the institution of the suit is to be reckoned from the date of presentation of the plaint.

*Moti Sahu v. Chhatri Das* (1); *Surendra Kumar Basu v. Kunja Behary Singh* (2) followed.

The Court has also a discretionary power to enlarge the time originally fixed for making good the requisite stamp.

[Foll. 123 P. B. 1907=82. P. W. R. 1907=3 M. L. T. 63; Ref. 8 O. C. 241; 21. I. C. 866.]

APPEAL by the defendant, Musammat Rajkishori Koer.

One Achaibat Pershad Narayan Singh, the husband of Musammat Rajkishori, borrowed from Madan Mohan Singh, the plaintiff, a sum of Rs. 5,000 under a registered mortgage bond dated the 7th Baisakh 1293 F. S., for his own marriage expenses, and a further sum of Rs. 2,000 under another registered mortgage bond dated the 8th Jeyt 1293 F. S., mortgaging certain [76] property in his possession as security for the payment of these debts.

The rate of interest stipulated in the said bond was Re. 1-8 per cent. per mensem, and it was also provided that if the principal amount and interest were not paid on the due date, then interest at the above rate would continue to run till the date of repayment. The due date for repayment of the debt with interest, as entered in the first mortgage bond, was the 30th Kartick 1294 F. S., and in the second mortgage bond the 30th Pous 1294 F. S.

Afterwards Achaibat Pershad Narayan Singh died leaving his widow Musammat Rajkishori as his heiress, and she took possession of his moveable and immoveable properties. The plaintiff, Madan Mohan Singh, then filed a suit on the 16th November 1898 against the widow Musammat Rajkishori, to recover Rs. 7,000 principal and Rs. 15,825 as interest, in all Rs. 22,825-8. The defence was that the suit was barred by limitation, and that the plaint was filed with deficit court-fees and should be rejected under s. 54 of the Code, and that the defendant had no knowledge of the bonds executed by her late husband. The Subordinate Judge decreed the suit in favour of the plaintiff, Madan Mohan Singh, and directed the defendant to pay within two months from date the sum claimed and costs, with interest upon Rs. 7,000 at Re. 1-8 per cent. per mensem from the date of institution.

From this decree the defendant Rajkishori appealed.

Babu Umakali Mukerjee and Maulvi Mahomed Mustafa Khan for the appellants.

\* Appeal from Original Decree No 76 of 1901, against the decree of Hara Gobinda Mukerji, Subordinate Judge of Tirhoot, dated Dec. 15, 1900.

(1) (1892) I. L. R. 19 Cal. 780.

(2) (1900) I. L. R. 27 Cal. 814.

Dr. *Rash Behary Ghose* and *Babu Joy Gopal Ghose* for the respondent.

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GHOSE AND PRATT, JJ. This is a suit upon two mortgage bonds said to have been executed by the late *Achaibat Pershad Narayan Singh*, one on the 7th Bysack 1293 corresponding to the 25th April 1886, for Rs. 5,000, the due date being the 11th November 1886, and the other on the 8th Jeyt 1293 corresponding to the 26th May 1886, for Rs. 2,000, the due date being the 9th January 1887.

[77] The plaint was presented to the Court on the 16th November 1898, the last date to save limitation as regards the first mentioned bond, the 12th to 15th November being close holidays. The amount claimed with interest was Rs. 16,302 on the first bond, and Rs. 6,523 on the second bond. The plaint bore a stamp of Rs. 835 which would be correct if the aggregate claim had arisen on only one cause of action, but having regard to section 17 of the Court-fees Act, the stamp was not sufficient, and on the 7th November the Court recorded this order: "The plaintiff is to pay the deficit court-fees of Rs. 180 within two weeks." On the 2nd December the latest date allowed for payment by that order (the 1st December being a holiday) the plaintiff put in a petition intimating that he wished to cite authorities to shew that the Court was wrong in demanding an additional court-fee and he prayed for two weeks' time to enable him to have the point argued and to cite authorities. The Court's order on that petition was: "Two weeks' time may be granted." On the 15th December Rs. 180 court-fee stamp was filed, the plaintiff having apparently abstained from further urging the objection to his liability. On the same day the Court recorded an order directing the plaint to be admitted and registered.

At the hearing in the Court below, the defendant, who is the widow of the late *Achaibat Pershad Narayan Singh*, urged that the suit was barred by limitation, and while admitting that the bonds seemed apparently to have been executed by her husband averred that she had no knowledge of them, as they came into existence before her marriage, and she therefore put the plaintiff to strict proof of due execution and the passing of consideration. The suit was decreed, and hence this appeal by the defendant.

As regards limitation, there can be no doubt that under section 54 (b) of the Civil Procedure Code, read with section 28 of the Court-fees Act, it is in the discretion of the Court to fix a time within which the requisite court-fee is to be furnished and that if the stamp be made good within the time indicated, the date of the institution of the suit is to be reckoned from the date of the presentation of the plaint. For authority we need only refer to the case of *Moti Sahu v. Chhatri Das* (1) which was followed in the [78] case of *Surendra Kumar Basu v. Kunja Behary Singh* (2). And we further think that the Court may in its discretion enlarge the time originally fixed for making good the requisite stamp. But the question which arises is whether the Subordinate Judge, by his order of the 2nd December on the plaintiff's petition for time to enable him to cite authorities, intended in any event to enlarge the time for filing the deficit stamp. We think this must have been so understood both by the plaintiff and by the Court. The plaintiff who had already paid so much as Rs. 835 would hardly have staked his entire claim upon the chance of his being able to show that no further court-fee was

(1) (1892) I. L. R. 19 Cal. 780.

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demandable by law. And the Subordinate Judge admitted the plaint with a full knowledge of what he intended when granting an extension of time to the plaintiff. There was a *bona fide* mistake on the part of the plaintiff, and it was a case in which the Court was justified in allowing time to consult authorities, and to file the deficit stamp, if the plaintiff failed to show that the demand was contrary to law.

There is another point of view from which we think the plaintiff's suit could not have been rightly rejected. There were two separate causes of action. The stamp of Rs. 835 was more than sufficient for the suit as based on the first bond and the balance of Rs. 165 together with the excess paid on the 15th December was adequate for the suit as based on the later bond which was not barred on the 15th December . . . . .

[Their Lordships after discussing the merits of the case dismissed the appeal with costs.]

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*Appeal dismissed.*

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[79] APPELLATE CIVIL.

*Before Mr. Justice Hill and Mr. Justice Brett.*

SHYAMA CHARAN BANERJI v. MRINMAYI DEBI\*

[27th August, 1902.]

*Res judicata*—Civil Procedure Code (Act XIV of 1882) s. 13, Expl. II—“*Matter directly and substantially in issue.*”

In a previous suit brought by the defendant's husband against the plaintiff, for a declaration of his title to a moiety of a garden purchased from the ancestors of the plaintiff and for partition, the suit was not defended and an *ex-parte* decree was passed. In a subsequent suit by the plaintiff to have his title to the said garden declared, to have the sale to the defendant's husband set aside as having been made without legal necessity, and to recover possession, the defence was that the suit as regards the moiety of the land was barred by the operation of s. 13 of the Civil Procedure Code:—

*Held*, that the question of the validity of the sale to the defendant's husband ought to have been raised by way of defence to the previous suit and it must therefore, by virtue of Explanation II to s. 13 of the Civil Procedure Code, be treated as having been directly and substantially in issue in that suit, and was consequently *res judicata*.

*Sundar v. Parbati* (1) distinguished.

*Mahabir Pershad Singh v. Macnaghten* (2) and *Kameswar Pershad v. Raj Kumari Ruttan Koer* (3) referred to.

[*Ref.* 1 C. L. J. 337; 6 C. L. J. 622; 8 C. L. J. 269; 13 C. L. J. 38=6 I. C. 860; 27 I. C. 999. *Foll.* 10 C. L. J. 527=4 I. C. 442.]

SECOND APPEAL by the plaintiff, Shyama Charan Banerji.

This appeal arose out of an action brought by the plaintiff to recover possession of a parcel of garden land. The allegation of the plaintiff was that the said garden land belonged to his father and uncle, that on the death of his father he obtained possession of the half share, and the other half went to the heirs of his uncle, [80] Kalikamal and Nilkamal; that on the death of Kalikamal his widow Trailokyamahini succeeded to his one-fourth share, and on her

\* Appeal from Appellate Decree No. 454 of 1900, against the decree of Karuna Das Bose, Subordinate Judge of 24-Farganas, dated Dec. 19, 1899, reversing the decree of Jogendra Nath Deb, Munsif of Sealdah, dated April 29, 1899.

(1) (1898) I. L. R. 12 All. 51; L. R. 16 I. A. 107.

16 I. A. 186.

(3) (1892) I. L. R. 20 Cal. 79; L. R. 19

(2) (1869) I. L. R. 16 Cal. 682; L. R. I. A. 234.