

Before Mr. Justice Wilson.

NORENDRONATH BOSE v. ABINASH CHUNDER ROY.*

1891
April 16.

Presidency Small Cause Courts Act (XV of 1882), ss. 38 and 71—

Practice—Stamp—Rehearing, application for—Petition insufficiently stamped—Deficiency of stamp, power to make good, after period of limitation allowed for presentation of application.

On the 7th April, being the last day on which such application could be made under the provisions of section 38 of the Presidency Small Cause Courts Act, an application was made to the High Court under that section for the rehearing of a suit which had been dismissed by the Small Cause Court. The application was made by petition at the rising of the Court, and not being a regular motion day, the hearing of the matter was postponed till the 9th April. On that day, on the application being brought on, it appeared that the petition only bore a 7-rupee stamp instead of one of the much larger value required by section 71 of the Act. It was contended on behalf of the petitioner that the deficiency could then be made up, and that he was entitled to have the application heard.

Held, that this could not be done. The eight days allowed by section 38 expired on the 7th April, and had the application been then considered, it could not have been received, but must have been rejected, as section 71 requires the proper fee to be paid before the application can be received. Although the consideration of the application was deferred to the 9th April, that made no difference, as the eight days had expired before the petition was in such a condition that it could be received.

THIS was an application under the provisions of section 38 of Act XV of 1882 (The Presidency Small Cause Courts Act) for an order that two suits in which the petitioner was plaintiff might be reheard in the High Court. The suits were for the recovery of the respective sums of Rs. 1,800 and Rs. 1,900 alleged to be due on two promissory notes of which the plaintiff stated he was the holder for value, the defendants being the alleged maker of the notes, the payee, and a subsequent endorser. The suits came on for hearing before the Chief Judge of the Small Cause Court and resulted in both being dismissed by one judgment. The petition on which the application was made was presented at the rising of the Court on Tuesday, the 7th April, that being the last day on which the application could be made under the section.

* Original Civil Motion, in the matter of section 38 of Act XV of 1882, and in the matter of suits Nos. 23172 and 23173 of 1890.

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At the sitting of the Court on the 9th April, Mr. *Chowdhry* applied for an adjournment of the matter on the ground that he was not in a position to go on owing to the lengthy nature of the depositions which he had not had an opportunity of reading. This application was refused, and the Court directed that the matter must come on in its usual turn.

Later in the day Mr. *Pugh* (Mr. *Chowdhry* with him) appeared in support of the application, when it was brought to the notice of the Court that the petition was not properly stamped, as it bore only a stamp of the value required on an ordinary petition in place of the amount required under section 71 of Act XV of 1882. On this being pointed out, His Lordship observed that the defect would appear to be fatal to the application; as the previous Tuesday was the last day on which the petition could be presented, it was then, not being properly stamped, improperly admitted, but that after the petition had been properly stamped he would hear Mr. *Pugh* as to whether the Court had any power to hear the application.

The matter accordingly stood over till later in the day, when it was brought on again by Mr. *Pugh*, who stated that the petition had not been stamped, as there was some doubt as to the exact amount of the stamp required.

Mr. *Pugh*.—The Court having received the petition on Tuesday and permitted the matter to stand over till to-day, has in fact extended the time for making the application. It is the practice on the Appellate side to permit appeals to be properly stamped if any deficiency be discovered subsequent to their presentation, but I have been unable to find any rule on the subject. In this case there is a doubt as to the proper amount of the stamp, as the Chief Judge tried only one of the two suits, though in one judgment he dismissed them both. The question is whether the stamp duty is to be calculated on the aggregate value of the two suits or on the value of each suit taken separately, and a reference to the Registrar is necessary to determine that question. The petition could not, therefore, be stamped till that reference had been made.

WILSON, J.—I think it would be safer for your client to treat the present application as one to perfect the petition by affixing the proper stamp.

Mr. Pugh.—There are no decisions of this Court on the point. The Bombay Court in *In re Jaikisondass Purshotamdas* (1), while dealing with the question, does not actually decide this point. *Balkaran Rai v. Gobind Nath Ticari* (2) is an authority against me, though that is not a decision of this Court. I am bound, however, to admit that I have been informed that a bench of this Court, consisting of NORRIS and BEVERLEY, JJ., has within the last fifteen days followed it. See also *Waterton v. Baker* (3), and *Park Gate Iron Company v. Coates* (4). I would submit, however, that the Court having extended the time till to-day for hearing this application, has in fact extended my time for making it, and that I should now be at liberty to do what I could easily have done last Tuesday, had the application been heard and the defect been pointed out, namely, affix a stamp of the proper value.

The judgment of the Court was delivered on the 16th April, and was as follows:—

WILSON, J.—This is a petition under section 38 of the Presidency Small Cause Courts Act. The section (cl. i) is as follows:—“Any party may, within eight days after the judgment in any suit in the Small Cause Court in which the amount or value of the subject-matter exceeds one thousand rupees, apply to the High Court for an order that such suit may be reheard in the High Court.” Section 71 of the Act says:—“A fee not exceeding (the scale is given) shall be paid on the plaint in every suit and every application under section thirty-eight or section forty-one, and no such plaint or application shall be received until such fee has been paid.”

According to the practice of this Court petitions are presented in chambers, or by counsel in open Court on days when motions are heard. In urgent cases, however, it is common to allow them to

(1) I. L. R., 12 Bom., 408.

(3) L. R., 3 Q. B., 173.

(2) I. L. R., 12 All., 120.

(4) L. R., 5 C. P., 684.

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1891 be presented on days other than motion days, and to hear counsel
 in support of them the next motion day.

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In this case the eighth day from the Small Cause Court judgment was Tuesday last, and it was not a motion day. Mr. Chowdhry on that day asked leave to present the petition; this was allowed, and the next motion day, Thursday, Mr. Pugh rose to move in terms of the petition. It then appeared that the petition was not duly stamped, bearing only a 7-rupee stamp instead of the very much larger one required by section 71.

Mr. Pugh then asked to be allowed to stamp the petition properly, and that it might then be treated as a good petition from the first. I think this cannot be done. Eight days are by section 38 allowed, within which an application can be heard; and by section 71 the application is not to be received unless the proper stamp duty has been paid. This petition was presented on the last possible day; if considered then it could not have been received, but must have been rejected. The consideration was deferred to Thursday, but that can make no difference; eight days had expired before the petition was in such a condition that it could be received.

Application refused.

Attorney for the petitioner: Mr. C. N. Manuel.

H. T. H.

PRIVY COUNCIL.

P. C.*
 1891

January
 29, 30, and
 February
 21.

FAZL KARIM AND ANOTHER (PLAINTIFFS) v. MAULA BAKSH AND
 OTHERS (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

Mahomedan law—Custom—Public worship in mosque—Injunction restraining defendants from interrupting religious ceremonies in a masjid—Right of Imam and of Matwali to be protected in their offices—Differences of opinion between the Imam and certain of the worshippers as to observances at prayer.

Among Sunni Mahomedans, neither on the ground of any general and express rule of Mahomedan law, nor on the ground of the growth of

Present: LORDS WATSON, HORRHOUSE, and MORRIS, and SIR R. COUGH.