

from paying the sum of Rs. 35,000, as they could have done, and would otherwise have done within the time stipulated for by the solehnama, he must be put into the same position, as if that sum had been tendered to him within that time, and he had refused the tender. Their Lordships think that that is the principle of the decree, and that in the circumstances of the case it is a sound principle. It follows that the appellant cannot get any interest on his Rs. 34,300. The learned Subordinate Judge has taken that view, and the High Court also have taken the same view on that question as was taken by the Subordinate Judge.

In the result their Lordships will humbly advise His Majesty that the decree of the High Court should be affirmed, and the appeal dismissed ; and the appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant : Messrs. *Gush, Phillips, Walters & Williams.*

Solicitors for the respondent : Messrs. *Watkins & Lempriere.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Brett.

AMIRUL HOSSAIN PLAINTIFF.

v.

KHAIRUNNESSA AND ANOTHER DEFENDANTS.*

Court Fees—Court Fees Act (VII of 1870), s. 7, cl. iv (c) and Art. 15 of Sch. II—Suit for declaratory decree and consequential relief—Suit for possession of wife—Appeal—Costs.

S. 7, cl. iv (c) and not article 15 of sch. II of the Court Fees Act (VII of 1870) applies to a case in which the plaintiff seeks for a declaration that the defendant is lawfully married to him, and prays for the consequential relief that the defendant should be ordered to live with him.

Mode of computation of Court fees discussed.

It is doubtful whether there is a right of appeal against the order for costs, when no matter of principle is involved.

* Appeal from Original Decree No. 52 of 1901, against the decree of Babu Sarat Chunder Mukerjee, Subordinate Judge of Patna, dated the 14th of February 1901.

1901

HARENDRA
LAL RAI
CHOWDHRI
v.
MAHARANI
DASI.

1901
Mar. 25.

1901

AMIRUL
HOSSAIN
v.
KHAIRUN-
NESSA.

THE plaintiff instituted this suit against his alleged wife and her mother in the Court of the Subordinate Judge at Patna, praying in his plaint "that by adjudication of the fact that the defendant No. 1 is, under the Mahomedan law and the law of the country, a lawfully married wife of the plaintiff, a decree be passed in favour of the plaintiff directing the defendant No. 1 to live with the plaintiff, and a decree be given to the plaintiff against the defendants for the restitution of conjugal rights." He stamped his plaint with a Court fee of Rs. 25, and stated in the last paragraph of the plaint "that the suit is valued for the purpose of jurisdiction at Rs. 100,000, and one gold mohur being the amount of dower fixed; the Court fees of Rs. 10 is paid for having the *nikah* declared as valid, Rs. 10 for having an injunction issued, and Rs. 5 for recovery of possession of the wife, in all Rs. 25."

The Subordinate Judge ordered that the plaint should be rejected under the provisions of s. 54, cl. (b) of the Civil Procedure Code, and that the plaintiff should pay to the defendants Rs. 1,269 for costs.

The plaintiff appealed, and it was contended on his behalf that the Court fee payable was only Rs. 5 under article 15 of schedule II of the Court Fees Act; and the Subordinate Judge was wrong in giving the defendants a decree for costs.

Babu *Saligram Singh* and Moulavi *Mahomed Ishak* on behalf of the appellant.

The *Advocate General* (Mr. J. T. Woodroffe), Moulavi *Sirajul Islam*, Moulavi *Mahomed Yusoof* and Babu *Satish Chunder Ghose* on behalf of the respondents.

The judgment of the High Court (RAMPINI and BRETT, JJ.) is as follows :—

This is an appeal against a decision of the Subordinate Judge of Patna, dated the 14th of February 1901, rejecting a plaint under s. 54, clause (b) of the Code of Civil Procedure.

The plaintiff instituted this suit to obtain a declaration that the defendant No. 1 is his lawfully married wife according to Mahomedan law, and he prayed that a decree might be passed

in his favour directing the defendant No. 1 to live with him, and that a decree might also be given him against the defendants for restitution of conjugal rights.

The plaintiff stamped his plaint with a Court fee of Rs. 25, and the learned pleader, who appears on his behalf in this Court, explains that he paid this stamp on this computation, namely, Rs. 10 for a declaratory decree, Rs. 10 for an injunction, and Rs. 5 under Article 15 of Schedule II of the Court Fees Act, for a suit to obtain possession of a wife. At the same time the plaintiff valued his suit for the purposes of jurisdiction at one *lakh* and 26 rupees.

The Subordinate Judge held that the Court fee paid was insufficient, inasmuch as the section of the Court Fees Act applicable to the case was s. 7, clause IV (c), the suit being one "to obtain a declaratory decree or order, where consequential relief is prayed"; and that that being so, the suit ought to have been valued and the Court fee should have been paid according to the amount, at which the relief sought is valued in the plaint.

The learned pleader for the appellant in this Court contends that the Subordinate Judge is wrong, and that he should have held that the Court fee payable was only Rs. 5 under article 15 of schedule II of the Court Fees Act.

After fully considering the arguments advanced by the learned pleaders and counsel on both sides, we think that the decision of the Subordinate Judge is correct. The suit appears to us to be not merely a suit for possession of a wife, inasmuch as the parties are at issue as to whether the defendant No. 1 is the plaintiff's wife or not. It appears to us that the class of suits contemplated by article 15 of schedule II of the Court Fees Act are suits in which the question of the marital relation is admitted, and in which there is a contest between the parties, as to whether the defendant is justified in leaving the protection of her husband or in resisting his attempts to obtain possession of her. But we think that article 15 of schedule II of the Court Fees Act cannot apply to cases such as this, in which the parties are disputing as to whether the defendant No. 1 was ever married to the plaintiff or not, and in which the plaintiff seeks

1901

 AMIRUL
HOSSAIN
v.
KHAIRUN-
NESSA.

1901

AMIRUL
HOSSAINv.
KHAIRUN-
NESSA.

for a declaration that the defendant No. 1 is married to him, and only in the event of his obtaining this declaration prays for the consequential relief that the defendant No. 1 should be ordered to live with him, and that the other defendants should be directed to give her up to him. We, therefore, think that the Subordinate Judge is quite right in holding that the Court fee paid on the plaint is insufficient, and in rejecting the plaint under s. 54, clause (b) of the Code of Civil Procedure. The mode, in which the plaintiff has attempted to value the suit in the lower Court, is wrong, and inconsistent with the plea he sets up in this Court. He cannot place his suit under two different articles of the schedule to the Court Fees Act, saying that he has paid Rs. 10 for the declaratory decree he seeks for, and at the same time Rs. 5 under the article for a suit for possession of his wife. Such a computation is utterly unknown under the Court Fees Act, and we think totally against the practice of the Courts. It appears, therefore, that the Subordinate Judge was right in his decision, and we think that this appeal must be dismissed.

The pleader for the appellant contends that the Subordinate Judge is also wrong in giving the defendants a decree for costs. He urges that the pleader's fee should not have been assessed at Rs. 1,100 upon the valuation which he put upon the relief sought for in this case. We think, however, that it is very doubtful whether the plaintiff is entitled to appeal against the order of the Subordinate Judge as to costs, inasmuch as no matter of principle is involved in the question which is raised in this Court. But be that as it may we do not think on the merits that the Subordinate Judge was wrong. The suit appears to have been strenuously contested in the Court below. Witnesses were summoned, if not examined, and arguments were heard, and in these circumstances we do not think it necessary to interfere with the discretion imposed by the law on the Subordinate Judge in assessing the costs of the suit. The appeal is dismissed with costs.

The costs for the paper book having been paid by the respondents in this case, they will, of course, be entitled to recover these costs from the appellant.

S. C. B.

Appeal dismissed.