

APPELLATE CIVIL

Before Harbans Singh, J.

BASANT LAL,— Plaintiff-Appellant.

versus

BARU AND ANOTHER,— Respondents.

Regular Second Appeal No. 1086 of 1957.

1965

August, 17th

Court fees Act (VII of 1870)—S. 12—Trial court decreeing suit in part—Defendant not filing any appeal against decree granted but plaintiff filing appeal against the part of claim disallowed—Appellate court holding plaint and memorandum of appeal to be insufficiently stamped and ordering plaintiff to pay additional court fee on plaint as well as memorandum of appeal—Plaintiff not complying with the order and the appellate court dismissed the suit—Dismissal of the suit by the appellate Court—Whether legal.

Held, that where a part of the subject-matter of the suit only is comprised in the appeal before the Appellate Court, deficit court-fee only in respect of that part of the suit can be levied and not in respect of the entire subject-matter of the suit. If the deficit court-fee is not paid, there is no proper appeal before the Appellate Court of which it can take cognisance and the appeal will be dismissed as incompetent but the Appellate Court cannot dismiss the entire suit on the failure of the plaintiff-appellant to make good the deficit in the court fee, especially when the defendant did not file an appeal against the decree granted to the plaintiff.

Second Appeal from the decree of the Court of Shri Banwari Lal, Senior Sub-Judge with Enhanced Appellate powers, Karnal, dated the 11th day of June, 1957, dismissing the plaintiff's appeal and suit with costs throughout under section VB read with section 10(2) of the Court Fees Act, for non-payment of the proper Court Fees within the time allowed.

D. C. GUPTA, ADVOCATE, for the Appellant.

D. S. KEER, ADVOCATE, for the Respondents.

JUDGMENT.

Harbans Singh J. HARBANS SINGH, J.—This second appeal has arisen in the following circumstances. A suit was brought by the appellant claiming that in the western wall of his house he had five windows, nine ventilators and 2 gutters and that this has been in existence for more than 20 years and, therefore, he had acquired a right of easement *qua* the adjoining land of the defendant and that the defendant wanted to construct a wall and that an injunction should be granted against the defendant preventing him from raising any wall within four feet of plaintiff's wall, so that

he may not interfere with the right of easement enjoyed by the plaintiff. Valuation for Court-fee fixed was Rs. 130 and Court-fee was paid thereon. Meanwhile the defendant had constructed a portion of the wall obstructing two of the ventilators but the trial Court granted the decree as prayed but did not direct demolition of the wall that had already been constructed. Aggrieved by this, the plaintiff went up in appeal. There, the learned lower appellate Court came to the conclusion that the Court-fee should have been paid in the Court below as well as before him, treating each opening as giving a separate cause of action. He, therefore, gave time to the appellant to put in additional Court-fee not only on the memorandum of appeal but also in respect of the suit. This not having been done, the entire suit of the plaintiff was dismissed, notwithstanding the fact that no appeal had been filed by the defendant against the decree granted by the trial Court. Aggrieved by this, the plaintiff filed this second appeal.

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The learned lower appellate Court felt that sub-clause (ii) of section 12 of the Court-fees Act was applicable and, therefore, suit could be dismissed. Sub-clause (i) of section 12 is to the effect that where any dispute arises as to the sufficiency of the Court-fee on a plaint or memorandum, the Court shall decide this matter and that will be final and binding between the parties. Then sub-clause (ii) runs as follows:—

“But whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of section 10, paragraph (ii), shall apply.”

The argument of the learned counsel for the appellant was that even if it be taken for the sake of arguments that the plaint in the trial Court was insufficiently stamped, the matter before the Court of appeal related only to the two ventilators, *qua* closing of which plaintiff's suit had been dismissed. The entire suit was not before the Court and,

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consequently, the lower appellate Court had no jurisdiction to dismiss the entire suit. In support of this contention, he cited *Secretary of State v. Cubramanian* (1), which is a decision by a Division Bench, and head-note (a) runs as follows:—

“Where a part of the subject-matter of the suit only is comprised in the appeal before the Appellate Court, deficit court-fee only in respect of that part of the suit can be levied and not in respect of the entire subject-matter of the suit.”

If deficit Court-fee can be levied only in respect of the part which is before the appellate Court, then it follows that on non-payment of the deficit, suit relating to that part alone can be dismissed. There appears to be force in this argument.

Another objection raised by the learned counsel for the appellant is that the Court-fee even on appeal, according to the finding of the learned lower appellate Court, was not sufficient. That being the case, the appeal was not properly before the Court. The first step to be taken by the Court, therefore, was to direct the proper Court-fee to be paid on the appeal so that it was properly before the Court before it could take any action under sub-clause (ii) of section 12 of the Act. Again a Division Bench judgment of the Madras High Court *Mahalakshmi Ammagaru v. Vencatachalapati* (2), is referred to in this respect. It was observed as follows:—

“Until the appeal was admitted, it was not competent to the Judge to pass any order dismissing the original suit.”

No authority was cited to the contrary. It is to be observed in the present case that the defendant had not filed any appeal against the order of the trial Court prohibiting him from raising any further construction so as to obstruct any of the other openings. It was only the plaintiff, who was aggrieved against the order of the Court dismissing his suit *qua* the two openings which had been closed. So the matter before the lower appellate

(1) A.I.R. 1938 Mad. 278.

(2) (1891) 1 M.L.J. 528.

Court related only to the two ventilators and this appeal was also under-stamped according to the view of the lower appellate Court. Thus, there was no proper appeal before the Court and the only course open to the Court was to call upon the appellant to pay the correct Court-fee on the memorandum of appeal and if that was not paid, to dismiss the appeal and it could not take any further action. Following the view of the Madras High Court, therefore, I feel that the order passed by the lower appellate Court is not warranted and I accept this appeal, set aside the judgment and decree of the lower appellate Court and restore that of the trial Court. In the peculiar circumstances of the case, there will be no order as to costs.

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B. R. T.

REVISIONAL CIVIL

Before D. Falshaw, Chief Justice and Mehar Singh, J.

JOGINDER KAUR, AND ANOTHER,—*Petitioners.*

versus

JASBIR SINGH AND OTHERS,—*Respondents.*

Civil Revision No. 260 of 1964.

Punjab Pre-emption Act (I of 1913)—S. 15(2) (b) (Secondly)—Husband's brother of the vendor filing suit for pre-emption and dying during the pendency of the suit—His sons—Whether can continue the suit as his legal representatives.

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Held, that the heir of a deceased plaintiff in a pre-emption suit can continue the suit if, at the date of the sale he had an independent right to pre-empt. The sons of the deceased plaintiff—pre-emptor in the present case had such a right under section 15(2) (b)—Secondly of the Punjab Pre-emption Act, 1913, and they were therefore, rightly impleaded as his legal representatives in the suit and are competent to continue the same.

Case referred by the Hon'ble Mr. Justice Shamsheer Bahadur on 21st August, 1964 to a larger Bench owing to an important question of law involved in the case. The Division Bench consisting of the Hon'ble the Chief Justice Mr. D. Falshaw and the Hon'ble Mr. Justice Mehar Singh decided the case on 25th August, 1965.

Petition under Section 115 C.P.C. for revision of the order of Shri N. S. Swaraj, Sub-Judge, 1st Class, Muktsar, dated the 6th April, 1964, bringing on record the heirs of the deceased pre-emptor and permitting them to continue the suit.

F. C. MITTAL, AND B. S. Gupta, ADVOCATES, for the Petitioners.

H. L. SARIN, AND MISS ASHA KOHLI, ADVOCATES, for the Respondents.