

Tipper Chand v. Matu Ram, etc. (Sodhi, J.)

age was improper. I accordingly find the only Issue for the petitioner.

(20) The result, therefore, is that this petition is allowed and the election of the returned candidate is declared void. There will be no order as to costs.

R.N.M.

APPELLATE CIVIL

Before H. R. Sodhi, J.

TIPPER CHAND,—Appellant.

Versus

MATU RAM AND ANOTHER,—Respondents.

Regular Second Appeal No. 541 of 1959

September 10, 1969.

Civil Procedure Code (V of 1908)—Sections 107, 149 and Order 7, rule 11—Provisions of Order 7, rule 11—Whether apply to appeals—Appeal not properly valued for court-fee—Appellate Court—Whether bound to afford opportunity to appellant to correct it.

Held, that provisions of Order 7, rule 11 of the Code of Civil Procedure do not in terms apply to appeals and the appellate Court is not bound to afford an opportunity to the appellant to correct the valuation of the appeal for the purpose of a court-fee within a time to be fixed by the Court before the appeal can be dismissed. No doubt by virtue of section 107 of the Code, an appellate Court has the same powers as an original Court in respect of plaintiffs but that does not imply that Order 7 rule 11 becomes applicable in terms to appeals. The only provision of law under which an appellate Court can extend time for the purpose of making up the deficit court-fee is section 149 of the Code which vests a discretion in the Court in this regard. The discretion has to be judicial and not arbitrary. Where a Court is satisfied that the mistake in not paying a proper court-fee is a *bona fide* one, it is only then that it is bound to allow the deficiency to be made good within a time prescribed by it. (Paras 5 and 6)

Regular Second Appeal from the decree of the Court of Shri O. P. Sharma, Senior Sub-Judge, with enhanced appellate powers, Karnal, dated 5th December, 1958, affirming that of Shri Avtar Singh Gill, Sub Judge, 2nd Class, Kaithal, dated 26th October, 1957.

A. L. BAHRI, ADVOCATE, for the Appellant.

PARKASH CHAND, ADVOCATE FOR LEGAL REPRESENTATIVES OF MATU RAM DECEASED.

JUDGMENT.

SODHI, J.—This is a regular second appeal by Tipper Chand defendant against the judgment and decree of the Senior Subordinate Judge, with enhanced appellate powers, Karnal, who dismissed his appeal on 5th December, 1958, on the ground that it was insufficiently stamped and that the mistake on the part of the appellant was not *bona fide*. The facts as are necessary for the proper disposal of the point of law can be stated in a narrow compass.

(2) Matu Ram plaintiff respondent filed a suit against the appellant and his brother Ayudhiya Parshad respondent praying for permanent injunction restraining the appellant from interfering with his ownership and possession of the southern one-half portion of the roof of the inner Dalhiz as shown in the plan filed with the plaint, also from using that portion of the roof as passage and further restraining him from opening any door in the same. The trial Court decreed the suit and granted a permanent injunction restraining the defendant appellant from in any way interfering with the ownership and possession of the plaintiff in regard to the southern one-half portion of the roof of the inner Dalhiz by constructing any door or an opening towards it or by passing over it. It was also directed that the defendant appellant and the plaintiff respondent shall construct a partition wall in the midst of the property in dispute from east to west, 4½ inches wide and 10 feet high before 1st December, 1957, bearing the expenses equally. It may be mentioned that the defendant appellant took an objection before the trial Court that requisite court-fee in the case had not been paid by the plaintiff. Defendant No. 2 did not, however, contest the suit and admitted the facts as stated by the plaintiff in his plaint.

(3) An appeal was taken to the Senior Subordinate Judge, with enhanced appellate powers, Karnal, who was of the opinion that necessary issues arising from the pleadings of the parties had not been struck and that the plaint was also not sufficiently stamped. He held that the plaintiff had asked for two distinct and separate reliefs by way of injunction, restraining the defendant No. 1 from opening the door and also from using a part of the roof, shown red in the plan, as passage. The alternative relief prayed for was for possession of one-half of the roof of the inner Dalhiz by partition. The Senior Subordinate Judge hearing the appeal relied upon the rules framed under section 9 of the Suits Valuation Act in holding that the value for the purposes of court-fee and jurisdiction in respect of the two reliefs was Rs. 140, and the aggregate amount of court-fee payable for these two reliefs came to Rs. 21. The case was consequently remanded and the plaintiff was permitted to make good the deficiency in court-fee. The trial Court gave findings on the issues as recast which are not necessary to be reproduced here, but it may be stated that the suit was decreed again. A permanent injunction was granted to the plaintiff restraining defendant No. 1 in the terms already referred to above.

(4) An appeal was again preferred by the defendant but he valued the relief at Rs. 130 and paid the court-fee of Rs. 13, only. In other words, the appellant paid the court-fee for one of the reliefs and that too was deficient by Re. 1 though he had himself raised an objection that earlier in the trial Court the court-fee was payable by the plaintiff on two reliefs of injunctions valued at Rs. 280, which required a court-fee of Rs. 38. The appellant himself had in the previous appeal paid a court-fee of Rs. 21, which was in respect of two distinct reliefs. A preliminary objection was raised by the plaintiff respondent before the Senior Subordinate Judge that the appeal was insufficiently stamped and, therefore, liable to be dismissed on that ground alone. This objection prevailed and the appeal was accordingly dismissed. Hence the present second appeal.

(5) The only submission made by Mr. A. L. Bahri, learned counsel for the appellant, is that the lower appellate Court was bound under the law, in terms of Order 7 rule 11, Code of Civil Procedure, to have afforded an opportunity to the appellant to correct the valuation within a time to be fixed by Court and it was only on his failure to do so that the appeal could be dismissed. It is urged that Order

7 rule 11 of the Code applies to appeals as well by virtue of section 107 of the same Code. Section 107 is in the following terms :—

“107 (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—

- (a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.”

It is further contended that in any case the appellate Court could have, in the exercise of its discretion under section 149, Code of Civil Procedure, allowed the appellant some time to make good the deficiency in court-fee. Reliance in this connection has been placed by the learned counsel on a single Bench judgment of the Patna High Court reported as *Mahabir Ram and another v. Kapildeo Pathak and others* (1). It has been held there that the provisions of Order 7 rule 11, are applicable to appeals also and that where the memorandum of appeal is insufficiently stamped, the Court must afford the appellant an opportunity of making good the deficiency of the court-fee, and that a memorandum of appeal cannot be rejected summarily on the ground that it is insufficiently stamped. This authority fully supports the appellant and to the same effect are some of the decisions of Bombay, Calcutta, Rajasthan and Tranvancore-Cochin High Courts.

(6) There is indeed a conflict of opinion on the question as to whether the provisions of Order 7 rule 11 in terms apply to appeals or not. A Division Bench of the Lahore High Court in *Balwant Singh v. Jagjit Singh and another*, (2), has however, held that they are

(1) A.I.R. 1957 Pat 111

(2) A.I.R. 1947 Lah. 210.

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not applicable to appeals and it is a matter of discretion with the Court under section 149 of the Code, whether time for payment of the deficit court-fee should be extended or not. The same is the view held by a Full Bench of the Allahabad High Court in a case reported as *S. Wajid Ali v. Mt. Isar Bano Urf Isar Fatma* (3). It may be that by virtue of section 107, an appellate Court has the same powers as an original Court in respect of plaints but that does not imply that Order 7 rule 11, becomes applicable in terms to appeals. I must follow the Division Bench judgment of the Lahore High Court which, I may say with all respect, lays down the correct law. The only provision of law under which an appellate Court can extend time is section 149 of the Code which vests a discretion in the Court in this regard. It is, of course, true that the discretion has to be judicial and not arbitrary. Where a Court is satisfied that the mistake in not paying a proper court-fee was a *bona fide* one, it is bound to allow the deficiency to be made good within a time prescribed by it. In the instant case, the appellate Court has rightly come to the conclusion that the mistake was not *bona fide*. The appellant himself raised an objection that the plaintiff had not paid proper court-fee as the two reliefs were involved and had the plaintiff made up the deficiency. He himself earlier filed an appeal paying Court-fee on the same basis but in the present appeal, he chose to pay less court-fee for reasons best known to him. The court of first appeal was, therefore, justified in dismissing the appeal on the ground that it was insufficiently stamped, and not allowing any more time to the appellant to make up the deficiency.

(7) The appeal has also abated. Matu Ram died on 16th February, 1962, and an application to bring his legal representatives on the record was made on 1st June, 1962, which was after the period of 90 days. The explanation given for the delay in making the application is that the appellant was living at Jullundur and Matu Ram died in Kaithal, District Karnal. The appellant claims that he got authentic information from the Municipal Committee, Kaithal, by a letter dated 26th May, 1962, and it was then only that he made an application to implead the legal representatives of the deceased on 1st June, 1962. There is a gap of more than six days between the receipt of the information and filing of the application in this Court which is not explained. It is admitted before me that the parties are related to each other. I cannot believe that the petitioner did not know about the death of Matu Ram being his relation.

(3) A.I.R. 1951 All. 64

It appears that to cover his delay, he wrote to the Municipal Committee, Kaithal, for information about the death of the plaintiff so that he could be armed with a written information and rely on the same to represent that the delay was not wilful. There is inherent evidence in his affidavit which belies his statement and I am not prepared to believe that he was not aware of the death of Mutu Ram. The appeal must therefore be held to have abated.

(8) For the foregoing reasons the appeal stands dismissed with no order as to costs.

R.N.M.

REVISIONAL CIVIL

Before Mehar Singh, C.J.

NAND KISHORE,—*Petitioner.*

Versus

DES RAJ CHOPRA AND ANOTHER,—*Respondents.*

Civil Revision No. 887 of 1969

September 23, 1969

East Punjab Urban Rent Restriction Act (III of 1949)—Sections 4, 15(3), 15(4) and 15(5)—Fair rent—Fixation of—Whether can be based on the compromise between the parties—Fair rent fixed by the Rent Controller—Landlord appealing for its increase—Appellate Authority—Whether has the jurisdiction to decrease the rent while deciding the appeal.

Held, that once the Rent Controller has been moved for fixation of fair rent, the ambit of the inquiry is entirely within his control, because an order fixing fair rent is an order *in rem* and not merely an order *inter partes*. Once fair rent of the premises is fixed, it attaches to the premises and is not merely a decision between the parties. Hence a duty is cast on the Rent Controller to make as just an inquiry as he should think fit to fix fair rent of the premises, provided an application is moved by one of the two parties, either the tenant or the landlord. Thus the Rent Controller is not in any way restricted, by the pleadings or compromise between the parties in fixing the fair rent. He must fix the fair rent after arriving at the basic rent on the criteria provided in sub-section (2) of section 4 and after holding as complete an inquiry as he thinks fit. Hence no fair rent can be fixed on the compromise or statement of parties. (Para 4)