

(1964) 07 MP CK 0003

In the Madhya Pradesh High Court

Case No : Civil Revision No. 443 of 1963

Motilal Laxman and Others

APPELLANT

Vs

Purshottam Damodar and Others

RESPONDENT

Date of Decision : 16-07-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Court Fees Act, 1870 — Article 1, 7

Citation : AIR 1966 MP 330 : (1966) JLJ 271 : (1966) 11 MPLJ 958

Hon'ble Judges : P.K. Tare, J

Bench : Single Bench

Advocate : N.B. Dindorkar, for the Appellant; B.K. Zamindar, for Opponent No. 1, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Tare, J.

This revision u/s 115 of the CPC is by the defendants against the order, dated, 20-8-1963, passed by Shri Devendrasingh, Civil Judge Class I, Khargone in Civil Suit No. 20-A of 1962, demanding court-fees on Rs. 2201/- on the ground that the defendants were claiming the said amount by way of a counter claim.

The first respondent, Purshottam filed a suit for redemption of the mortgage, dated, 38-1-1909 for a consideration of Rs. 1000/- alleging that the period for redemption was fixed at 21 years; and that the plaintiff being successor-in-interest of the original mortgagor, was entitled to redeem the same. The heirs of the original mortgagor had executed gift deeds in favour of the Gaud Malviya Brahmin Sakal Panch Khargone on 18-11-1961 and 19-12-1961. The plaintiff, therefore, sued in his capacity as manager of the said institution.

The defendants in their defence alleged that they were entitled to Rs. 2000/- as damages on account of a breach of a contract of sale of the mortgaged property, made by Sunderbai and Shankar. In lieu of the same, an amount of Rs. 201/-

had been paid as earnest money. Therefore, the mortgagees were entitled to claim the two items on the basis of the agreement of sale executed in the year 1949. As the original agreement was missing, the mortgagees filed an affidavit about the agreement having been executed.

The question, therefore, arises whether the mortgagees are liable to pay court-fees on the two items of Rs. 2000/- and Rs. 201 claimed as damages, as also towards refund of consideration upon a breach of the contract of sale. The learned Judge of the trial Court, relying on *Vithaldas Gulabdas v. Hyderabad Spinning and Weaving Co. Ltd.* AIR 1923 Rom. 24, held that the two items amounted to a counter claim on which the mortgagees were liable to pay ad valorem court-fees.

As against this, the learned counsel for the mortgagees urged that this would be a question of adjustment of the redemption amount in the mortgage decree. Therefore, they were not liable to pay any court-fees. Reliance is placed on *Anthony Salvador Dias Vs. A. Sivarama Rao*, .

In this connection, it is to be noted that in a suit for redemption any item claimed upon an account of the mortgage claim being taken would certainly not be liable to payment of court-fees. But the essential condition is that the rights and liabilities should arise out of the mortgage contract. In this connection, I may refer to the observations in AIR 1940 177 (Nagpur) , wherein the learned Judge observed that a legal set off must be presented in a written statement which shall have the same effect as plaint, and it must be shown that it is an ascertained sum of money legally recoverable by the defendant from the plaintiff, and that both parties fill the same character as they fill in the plaintiff's suit. So far as an equitable set-off is concerned, it cannot be claimed as a matter of right. The Court can refuse to go into the question when a protracted enquiry becomes necessary. The learned Judge further opined that under Article 1, Schedule 1 of the Court-fees Act, the court-fees must be paid on the full amount of the set-off, and not only on the amount claimed in excess of that claimed by the plaintiff. The Court is debarred from going into the question of set-off if ad valorem court fee is not paid and an appellate Court cannot make an order for the payment of an additional court-fee when no fee at all has been paid.

From the observations of the learned Judge, it is clear that if the parties fill different character or capacity in the matter of set-off, the court-fees would be payable on an equitable set-off. However, in respect of a legal set-off, it is to be noted that so far as redemption suit is concerned, it would not be necessary to pay court- fees in respect of items which would accrue on taking accounts of the mortgage transaction. Say where the mortgagee may effect improvements, the item towards that can be adjusted towards the final account taken. But if the set-off or the counter claim has no connection with the mortgage contract and if the item is claimed on an altogether different contract such as a subsequent contract of sale, in the present case, the set-off or the counter claim will be liable to payment of court-fees. That, in my opinion, is the real distinction, although I am

certainly in agreement with the view expressed in *Anthony Salvador Dias Vs. A. Sivarama Rao*, that in a redemption suit the mortgagee will not be liable to payment of court-fees on items claimed upon taking of accounts on the contract of mortgage.

I may further refer to the Full Bench case of this Court, namely AIR 1937 295 (Nagpur) wherein the learned Judges held that in an appeal from a decree for redemption and surplus profits, where the appellant challenges bona fide both the right of redemption and the amount of profits, court-fees should be paid only on the principal sum secured by the mortgage. But that principle, in my opinion, will be inapplicable where one of the parties claims some additional sum on a different contract than the contract of mortgage and wants to add the same to the redemption amount or wants to deduct it from the redemption amount. Had the liability of the mortgagor to pay damages or to refund consideration arisen out of the contract of mortgage, I would have been inclined to hold that the mortgagees are not liable to payment of any court-fees. But, as the items claimed are on a separate subsequent agreement of sale, I am of opinion that the order of the trial Judge demanding court-fees was correct. The learned counsel for the mortgagor (respondent 1) urged that an order demanding court-fees would not be revisable unless it affects the question of jurisdiction. In this connection, reliance is placed on the observations of a Division Bench of this Court in *Wamanrao v. Vidyacharan* ILR (1952) Nag 527: (AIR 1953 Nag 122) wherein Sinha C. J. (as he then was) and Mudholkar J. (as he then was) laid down that an erroneous decision on a question of law which has no bearing on the question of jurisdiction would not be revisable by the High Court exercising its powers u/s 115 of the Civil Procedure Code. So far as that proposition is concerned, it is in accordance with the later observations of their Lordships of the Supreme Court in *Keshardeo Chamria Vs. Radha Kissen Chamria and Others*, . The question may arise in a case where additional court-fees are demanded and a claim or a counter-claim is rejected for non-payment of such court-fees.

In such a case, in my opinion, the question of jurisdiction would be involved as laid down by a Full Bench of this Court in AIR 1938 122 (Nagpur) , wherein Stone C. J., Bose J. and Digby J. laid down that an order demanding additional court-fees on a memorandum of appeal would be revisable, though one accepting the court-fees would not be so revisable. The reason is obvious. In a case where, court-fees are demanded and the claim or the counter claim is rejected for non-payment of court-fees, the Court would be exercising its jurisdiction illegally or would be refusing to exercise its jurisdiction properly and legally, if the order demanding court-fees is not warranted by the provisions of the court-fees Act. Therefore, there is no substance in the contention of the learned counsel for the first respondent that such an order would not be revisable u/s 115 of the Civil Procedure Code. I am of opinion that even having in view the dictum of their Lordships of the Supreme Court in *Keshardeo Chamria Vs. Radha Kissen Chamria and Others*, , such an order would be revisable in exercise of revisions powers.

As a result of the discussion aforesaid, this revision fails and is accordingly dismissed with costs. Counsel's fee in this Court Rs. 30/-, if certified.