

1890

JULY 29.

APPEL-
LATE
CIVIL.

15 B. 82.

15 B. 82.

[82] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Telang.

KASHINATH NARAYAN (*Original Plaintiff*), Appellant v.
GOVINDA BIN PIRAJI (*Original Defendant*), Respondent.*
[29th July, 1890.]

Court Fees' Act (VII of 1870), s. 17—Applicability of—"Cumulative reliefs"—Alternative relief.

Where the plaintiff sues, in the alternative, for one of two reliefs, the larger of the two reliefs sought determines the amount of the stamp. Section 17 of the Court Fees' Act (VII of 1870) does not apply to such a case. That section is applicable only to a case of cumulative relief sought by the plaintiff.

Motigauri v. Pranjivandas (1) followed.

[N.F., 30 M. 61=16 M.L.J. 462=1 M.L.T. 426; F., 11 O.C. 173 (174); R., 23 B. 486 (488); 16 C.L.J. 371=17 C.W.N. 503=16 Ind. Cas. 575.]

SECOND appeal from the decision of A. S. Moriarty, Assistant Judge of Satara, in appeal No. 170 of 1888 of the District File.

This suit was brought by plaintiff for the recovery of certain *raytava* land with mesne profits, or, in the alternative, for an award of Rs. 60 every year on account of its produce.

Plaintiff paid the requisite Court fee in respect of the first relief he sought, but paid no Court fee at all for the alternative claim.

The Subordinate Judge ordered the plaintiff to pay an additional Court fee of Rs. 45 under s. 17 of Act VII of 1870 or else to give up the second and alternative claim.

Plaintiff refused to take either course. Thereupon his plaint was rejected as being insufficiently stamped.

This order of rejection was confirmed, on appeal, by the Assistant Judge, who held that the decision of the Subordinate Judge was final under s. 12 of the Court Fees' Act (VII of 1870).

The plaintiff thereupon preferred a second appeal to the High Court.

Vishnu Krishna Bhatavadekar, for appellant:—Section 17 of the Court Fees' Act does not apply to the present case. We sue, in the alternative, for one of two reliefs. In such a case the proper [83] stamp is the one payable on the larger relief sought: see *Motigauri v. Pranjivandas* (1).

Ghanasham Nilkanth Nadkarni, for respondent.—The plaintiff refused to pay any fee for the second portion of his claim; his plaint is, therefore, rightly rejected. He may file a fresh suit, if he likes—*Chedi Lal v. Kirath Chand* (2); *Mulchand v. Shib Charan Lal* (3).

JUDGMENT.

BIRDWOOD, J.—The plaintiff sued to recover possession of land, or in the alternative, for an award of Rs. 60 *per annum* in lieu of the profits of the land. The plaint was stamped in respect of the claim for the possession of the land with a Court-fee stamp of Rs. 4-8-0. The Subordinate

* Second Appeal No. 604 of 1889.

(1) 6 B. 302.

(2) 2 A. 682.

(3) 2 A. 676.

Judge held that a further fee of Rs. 45 was leviable in respect of the annual payment claimed. The plaintiff refused to pay the aggregate fee, or to amend the plaint by restricting his claim to that for possession of the land.

We think that the Subordinate Judge erred in applying s. 17 of the Court Fees' Act, 1870. to the case. The principle on which the fee was leviable is that stated in *Motigauri v. Pranjivandas* (1). The claim having been in the alternative, the larger of the two reliefs sought ought to have determined the amount of the stamp. On his memorandum of appeal in this Court, the plaintiff has paid a stamp of the value of Rs. 45, which is the appropriate stamp for the larger of the two reliefs here prayed for, and he is willing to make up the stamp to Rs. 45 on his plaint. The case is one with which we can deal in appeal, notwithstanding s. 12 of the Court Fees' Act, on the principles laid down in the Full Bench case of *Vithal Krishna v. Balkrishna Janardan* (2), because the valuation settled by the Subordinate Judge was not one within his proper function, inasmuch as the case did not fall under the section of the Act relied on by him. He treated the case as if it were one of cumulative reliefs sought by the plaintiff, to which alone s. 17 is applicable; whereas a single cause of action only is alleged in the plaint.

[84] We reverse the decrees of the Courts below, and direct that, on the plaintiff making up the deficient stamp on the plaint, the suit be proceeded with according to law. Costs to be costs in the cause.

Decree reversed.

15 B. 84.

APPELLATE CIVIL.

Before Mr. Justice Bayley and Mr. Justice Parsons.

BALKRISHNA BABAJI (*Original Plaintiff*) Appellant v. HARI GOVIND
(*Original Defendant*), Respondent.* [12th August, 1890.]

Interest—Rule of damdupat—Its application to mortgages where no account of rent and profits is to be taken—Mortgage.

The rule of *damdupat* applies to mortgages where no account of the rents and profits has to be taken.

SECOND appeal from the decision of Mr. H. Scott, District Judge of Satara, in appeal No. 123 of 1888 of the District File.

The plaintiff sued as purchaser of the equity of redemption, to redeem certain property which had been mortgaged with possession under two bonds. One bond was passed in A.D. 1835 for Rs. 350, and provided that the whole of the rents and profits of the property mortgaged should be taken in lieu of interest. The other bond was passed in A.D. 1838 for Rs. 25, for which interest was to be paid at 12 per cent. for the first six months and then at 24 per cent. *per annum*.

The Subordinate Judge held that the mortgagee was not entitled to claim interest exceeding the principal under the second mortgage. He

* Second Appeal, No. 697 of 1889.

(1) 6 B. 302.

(2) 10 B. 610.