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Court : Kolkata

Decided On : Jul-10-1923

Reported in : AIR1924Cal994

Appellant : Nowrang Singh

Respondent : Janardan

Judgement :

Mookerjee, J.

1. This is an application for review of judgment and decree in an appeal from original decree. The judgment was delivered on the 7th June, 1922. The decree was signed on the 21st July, 1922. The application for review was presented to the stamp reporter on the 6th September, 1922. The Court-fee paid on the application was one-half of the Court-fee paid on the memorandum of appeal. The application was returned by the stamp reporter on the very day it was presented. It thereupon became incumbent on the petitioner to present the application by way of motion in open Court to the Division Court of whose decision the review was sought, within seven days of the return of the application. If the Judges of such Division Court were not sitting together the application had to be presented to the senior of the Judges who might be then attached to the Court and present. On the 6th September, 1922, when the application was returned by the stamp reporter, the Court was closed for the long vacation. The senior member of the Division Court

was not sitting and the junior member had ceased to be a Judge of the Court. In these circumstances the application was presented to the senior Judge on the 13th November, 1922, when the Court reopened after the long vacation. The question arises, whether, in these circumstances the application should be entertained.

2. Article 4 of Schedule I of the Court Fees Act prescribes that an application for review of judgment if presented on or after the 90th day from the date of the decree, shall bear Court-fee payable on the plaint or memorandum of appeal. Article 5 provides that an application for review of judgment if presented before the 90th day from the date of the decree, shall bear one half of the Court-fee leviable on the plaint or memorandum of appeal. In our opinion the presentation to the stamp reporter was presentation within the meaning of Articles 4 and 5 of schedule I to the Court Fees Act. The question, consequently, arises whether this entitles the petitioner to have the application heard upon payment of half of the fee. The date of the decree, under Order 20, Rule 7 of the Civil Procedure Code, is the date of the judgment, and consequently on the 6th September, 1922, when the application was presented to the stamp reporter the 89th day from the date of decree had already elapsed. But it is plain that, under Section 14 of the Court Fees Act, this is precisely a case where the applicant cannot be blamed for the delay, for the decree itself was not in existence till the 21st July, 1922. We are of opinion that it would be unjust to deprive the petitioner of the advantage conferred by article 5 of schedule I of the Court Fees Act. The position thus is that if the strict letter of law be followed, the applicant should be celled upon to pay one-half of the Court-fee in addition to what he has paid before, and we should then forthwith grant a certificate under Section 14 for a refund of this sum. This would be an idle formality and would needlessly delay the consideration of this application on the merits. We accordingly direct that this application be heard as if the full fee had been paid and one-half had been returned. The view we take is not affected by the decision in *Sayem Bibi v. Bhutnath* (1910) 15 C.L.J. 505 which was decided under very different circumstances and merely affirmed the proposition that an application for review of judgment, presented on the 90th day, the previous day being a Sunday, should bear the full amount of Court-fees: see also *Kalipada Karmakar v. Shekhar* (1916) 24 C.L.J. 235.

3. We now proceed to consider the case on the merits. We are of opinion that this application for review should not succeed. The petitioner has not disputed the accuracy of the propositions of law enunciated in our judgment, which is reported as *Nowrang Singh v. A.J. Meik* A.I.R. 1923 Cal. 41. He has not contested the position that the injury sustained by him owing to the trespass on the part of Myer & Co., cannot be urged as a defence against the claim put forward by the plaintiff, unless such act was directly or indirectly authorised by the plaintiffs. He has urged, however, that there is a provision in the lease, dated the 22nd April, 1897, which is the root of the title of Myer & Co. and supports the contention that the action of Myer & Co. was in essence authorised by the landlord. The passage is as follows : 'If you raise out coal by joining the gallery of the khad of this land settled hereby with the gallery of anybody else's khad, or if you raise out coal by digging beyond the boundary of this mouza, and treating it as part of' another mouza, then you will have to pay and will pay compensation for the quantity of coal which will be proved to have been misappropriated by the aforesaid deceitful means, at the rate of one anna per maund.' This clearly did not contemplate an authorisation by the landlord, so as to enable Myer & Co. to commit acts of trespass on adjoining lands. What this does in substance is to impose on them a heavy penalty, if they should commit such unlawful acts. This is made clear by an earlier passage in the lease, which runs to the following effect : 'After digging khad in the said settled land, you will not be entitled to dig across and encroach upon any land beyond the same. If you dig across the same or take the coal thereof, then you will be liable for the entire loss which will be sustained by reason thereof.' These two clauses taken together plainly indicate that the landlord did not authorise any unlawful act on the part of the lessee. He imposed a penalty on him if he should commit an unlawful act, and, at the same time, warned him that he would be liable to pay the entire loss which might be caused by reason of such act. In these circumstances, it is impossible to sustain the position that what happened in this case might be imputed to the plaintiff as landlord. In this view, it is not necessary for us to consider whether the petitioner was entitled to take this point in support of his application for review, notwithstanding the decision of the Judicial Committee in *Chujju Ram v. Neki* A.I.R. 1922 P.C. 112.

4. The Rule is discharged with costs-two gold mohurs.

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