

MOHAMMAD MAHIBULLA AND ANR.

A

v.

SETH CHAMAN LAL (DEAD) BY LRS. AND ORS.

SEPTEMBER 18, 1991

[RANGANATH MISRA, CJ., A.M. AHMADI AND P.B.  
SAWANT, JJ.]

B

*Code of Civil Procedure, 1908—Sections 107 (2), 149, Order VII—  
Proper court-fees not paid on the memorandum of appeal—Duty of appellate  
Court indicated—Costs to respondents for appellants negligence.*

C

The plaintiff—Wakf Board's suit for declaration of the right to the passage and possession thereof having been dismissed by the Trial Court, a title appeal was filed before the District Judge.

A Court -fee of Rs. 15 was paid on the plaint by the Wakf Board by an exemption notification. On its memorandum of appeal, the plaintiff had paid the same amount of court fee.

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Respondents asked for dismissal of the memorandum of appeal as it had not been sufficiently stamped.

The Additional District Judge dismissed the memorandum of appeal.

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The High Court did not interfere, when plaintiff took the matter before it.

Hence this appeal by special leave by the plaintiff contending that the learned Additional District Judge instead of dismissing the memorandum of appeal, an opportunity should have been given and the appellant should have been called upon to make good the deficiency.

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Allowing the appeal, this Court,

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**HELD:** 1. When the lower Appellate Court came to hold that the memorandum of appeal had not been sufficiently stamped, an opportunity should have been given by the Court to the appellant to make good the balance court -fee within a time to be indicated and if there was failure to comply with the direction of the Court, the memorandum of appeal could

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A have been dismissed. This opportunity having not been given, the dismissal of the appeal was not appropriate. [181F-G]

2. This is a case of negligence on the part of the appellants and, therefore, the respondents who have been dragged in these proceedings for about 10 years should be compensated, by way of costs of Rs. 1,000. [182 B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No.1290 of 1979.

C From the Judgment and Order dated 16.8.1977 of the Punjab and Haryana High Court in Regular Second Appeal No. 1001 of 1966.

Dhruv Mehta and S.K. Mehta (NP) for the Appellants.

J.D. Jain for the Respondent.

D The following Order of the Court was delivered:

This is an appeal by special leave by the plaintiff – Wakf Board. Its suit for declaration of the right to the passage and possession thereof having been dismissed by the Trial Court, a title appeal was filed before the District Judge of Karnal. By an exemption notification on the plaint in a suit of this type filed by the Wakf Board, court-fee of Rs. 15 is payable. On its memorandum of appeal, the plaintiff had paid the same amount of court-fee also. Objection was raised to sufficiency of court-fee and respondents asked for dismissal of the memorandum of appeal as it had not been sufficiently stamped. As a fact, while court fee of Rs. 638 was payable, court fee of Rs. 15 had been paid. This matter was preliminarily considered by the appellate court and by the order dated 5.5.1966 the Additional District Judge sustained the objection and directed the memorandum of appeal to be dismissed. The High Court did not interfere when plaintiff took the matter before it. Ultimately special leave had been granted by this court and at the time of grant of leave, the following order was made:

G "As the petitioner is willing to pay deficit court fee on the memo of appeal before the District Judge without prejudice, we direct the issue of show cause notice to the other side."

It is unfortunate that even when that order was made on 27.11.1978 this matter is coming for final disposal almost 13 years thereafter.

H The plea raised by the appellant before the learned Additional District Judge that the appeal was a continuation of the suit and the same

court fee as was payable on the plaint was appropriate in appeal had been rightly negated. At the trial stage, there was an exemption and since it was specifically confined to the trial stage there was no ground to claim the benefit at the appellate stage also. But when the learned Additional District Judge came to hold that the memorandum of appeal had not been sufficiently stamped, instead of outright dismissing the memorandum of appeal, an opportunity should have been given and the appellant should have been called upon to make good the deficiency. Under the provisions of Order VII of the Code of Civil Procedure which applies to suits, when the plaint does not bear appropriate court-fee this is the requirement of the law. Section 107 (2) of the Code of Civil Procedure provides:

"(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."

Section 149 of the Code of Civil Procedure provides:

"Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be; of such court-fee; and upon such payment the document, in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance."

Reading these two provisions together and keeping fairness of procedure in view, we are inclined to agree with the counsel for the appellant that when the lower Appellate Court came to hold that the memorandum of appeal had not been sufficiently stamped, an opportunity should have been given by the Court to the appellant to make good the balance court-fee within a time to be indicated and if there was failure to comply with the direction of the Court the memorandum of appeal could have been dismissed. This opportunity having not been given, we are of the view that the dismissal of the appeal was not appropriate.

Counsel for the appellant has undertaken to pay the deficit court fee as was payable on the memorandum of appeal when the appeal was filed within four weeks hence. In case the amount of court-fee is so paid, the

- A** title appeal shall be revived to be dealt with in accordance with law. If there be failure to do so, the order of dismissal shall stand sustained.

- B** We are inclined to agree with counsel for the respondents that this is a case of negligence on the part of the appellants and, therefore, the respondents who have been dragged in these proceedings for about 10 years should be compensated. We direct that the restoration of the appeal in the appellate court on payment of appropriate court-fee shall be subject to the further condition of payment by way of costs of Rs. 1,000.

The appeal is disposed of accordingly.

V.P.R.

Appeal allowed.