

REFERENCE UNDER THE COURT-FEES ACT.

Before Mukerji J.

1933

Dec. 7, 13.

AKHILBANDHU GUHA

v.

SURADHANI DEBYA CHAUDHURANEE.*

Court-fee—Appeal—Prior and subsequent mortgagee—Court-fees Act (VII of 1870), Sch. I, Art. 1; Sch. II, Art. 17(vi).

Where appellants hold a prior as also subsequent mortgages in respect of properties covered by the mortgage in favour of the plaintiff-respondent, the dues on the appellants' mortgages cannot be regarded as the value of the subject-matter in dispute. The memorandum of appeal in such a case, in the present state of the law, should bear the court-fees required by clause (vi) of Article 17 of Schedule II of the Court-fees Act, and the case cannot be brought within Article 1 of Schedule I of the Act without unduly straining the words of the Article.

REFERENCE UNDER THE COURT-FEES ACT.

The facts of the case and the arguments in the Reference appear from the judgment.

Atulchandra Gupta, Ramendrachandra Ray and Hirankumar Ray for appellants.

The Senior Government Pleader, Sharatchandra Basak, and the Assistant Government Pleader, Rupendrakumar Mitra, for the Secretary of State.

Cur. adv. vult.

MUKERJI J. The appellants hold a prior mortgage (Ex. S) and two subsequent mortgages (Exs. R and T) in respect of some properties, which are also covered by a mortgage (Ex. 1) in favour of the plaintiff-respondent. There are some additional properties in Ex. 1 and Ex. T, but the matter is of no importance in this connection. There were two mortgagors, of

*Reference by Registrar, Appellate-Side, High Court, dated Aug. 22, 1933, in Appeal from Original Decree, File No. 3092 of 1933 (F. A. 2 of 1934).

whom one having died, the other is now the sole respondent representing the entire interest of the mortgagors.

The suit was for enforcement of the plaintiff's mortgage. The dues on all the four mortgages have been found by the court below, which has made a decree in Form No. 9 of Appendix D, which is the form applicable to a decree in a suit by the first mortgagee against the mortgagor with the second mortgagee as a party. The court has thus given the plaintiff relief on the basis of his being the first mortgagee and ignoring the appellants' mortgage (Ex. S), which, if it is taken into account, would make the plaintiff the second mortgagee and would make the appellants the first mortgagees as well as subsequent mortgagees after the plaintiff's mortgage.

On the basis, on which the court below has proceeded—

(a). The court has made a decree in Form No. 9 and has refused to make a decree in Form No. 10, as was asked for on behalf of the appellants, because the plaintiff had not prayed for redemption of the appellants' prior mortgage. It has thus ordered the sale of the property subject to the prior mortgage unless a sale free from the prior mortgage is properly applied for under Order XXXIV, rule 12.

(b). The court has refused the appellants' prayer to be given liberty to apply for the sale of the additional property mortgaged by Ex. T (which is not in Ex. 1). It has held that this is an advantage which the appellants are claiming in excess of what they can have in the plaintiff's suit.

(c). The court has refused the appellants' prayer for a reservation of their right to apply for a personal decree. It has held that such a right cannot be reserved for a defendant.

The prayers, refused as above, have been repeated in the memorandum of appeal which the appellants have preferred. We are not concerned, at the present

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stage, with the merits of the prayers or of the grounds upon which they have been refused. The question, at this stage, is only a question of court-fees.

The Crown relies upon Schedule I, Article 1, and contends that the case falls within the words,

Memorandum of appeal not otherwise provided in this Act * * *
* * * when the amount or value of the subject-matter in dispute, *etc.*

The appellants desire to bring the case within the words of Schedule II, Article 17 (*vi*):

Memorandum of appeal in each of the following suits * * * * *
every suit where it is not possible to estimate at a money-value the subject-matter in dispute and which is not otherwise provided by this Act.

It is conceded that there is no other provision which need be considered or is specifically applicable.

The appellants no doubt are asking for certain advantages, but they are doing so only on the footing of their being prior as well as subsequent mortgagees who were made parties to the suit. The decree, which has been or may be passed in the suit, will, no doubt, be a decree to their advantage and which they will be competent to execute, to the extent that it entitles them to any relief or reliefs on their own mortgages. But their position in the appeal must be that, as defendants in the plaintiff's suit, they are entitled to have certain rights of theirs protected in the decree which the plaintiff obtains or has obtained. This being the true view to take of the situation, I am unable to see how the dues on the appellants' mortgage or mortgages can be regarded as the value of the subject-matter in dispute, or how the dispute, such as there is in the appeal, may be valued in terms of such dues. In my opinion, the advantages which the appellants are seeking cannot be assessed at a money-value, so long as they are asking for them in the present suit or in the present appeal.

It should be remembered that it has not been the policy of the law to tax with court-fees *ad valorem* every advantage which a party is seeking for in courts: were it otherwise, a written statement by a

puisne mortgagee would have been so taxed. The fact seems to me to be this that, until the amendments of the Code in 1929, a prior mortgagee's rights were not required to be adjudicated on in a suit by a puisne mortgagee in the manner now provided for, and that the legislature, while it has now enacted Form No. 10 and given it statutory recognition in rules 2(3) and 4(4) of Order XXXIV, has not yet made any provision for court-fees which may be payable by the prior mortgagee. Whether it is possible for the appellants to get, in the present suit, the advantages he wants is of course a different matter, and, as I have already stated, with that we are not concerned at the present stage. But I am clearly of opinion that the present case cannot be brought within Article 1 of Schedule I, without unduly straining the words of that Article.

The appeal has arisen out of a suit which is not otherwise provided for by the Act, and it is not possible to estimate, at a money-value, the subject-matter of the dispute, which is there in the appeal. The case, in my judgment, comes within the words of clause (vi) of Article 17 of Schedule II of the Act, and the memorandum of appeal should bear the court-fees required by that clause.

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