

REFERENCE UNDER THE COURT-FEES ACT.

Before D. N. Mitter J.

1934

Dec. 10.

KARTIKCHANDRA RAY

v.

ASHARAM AGARWALA.*

Court-fee—Mortgage decree—Ad valorem fees if leviable on a memorandum of appeal from a personal decree made under O. XXXIV, r. 6 of the Code of Civil Procedure (Act V of 1908)—Court-fees Act (VII of 1870), Sch. I, Art. 1.

The court-fee leviable on a memorandum of appeal from a personal decree made against a mortgagor under Order XXXIV, rule 6 of the Code of Civil Procedure when the sale proceeds of the mortgaged properties are insufficient to liquidate the mortgage debt is *ad valorem*.

Such personal decree is a decree within the meaning of Article 1, Schedule I of the Court-fees Act, and it does not matter if an appeal against the preliminary decree for the entire amount of the mortgage debt, including the portion for which a personal decree has subsequently been passed, is pending and *ad valorem* court-fee already paid on the memorandum of the earlier appeal.

Muhammad Iltifat Husain v. Alim-un-nissa Bibi (1) followed.

Lakhi Narain Jagdeb v. Kirtibas Das (2) and *Talebali v. Abdul Aziz* (3), referred to.

REFERENCE under section 5 of the Court-fees Act on a question raised by the Taxing Officer.

The facts of the case and the arguments on the Reference are stated in the order.

Harendrakumar Sarbadhikari and *Subodhchandra Datta* for the appellant.

The Senior Government Pleader, Saratchandra Basak, for the Secretary of State.

MITTER J. This is a Reference made under section 5 of the Court-fees Act and I have been appointed by the learned Chief Justice to decide on this Reference.

*Reference by the Registrar, Appellate Side, dated Sep. 9, 1934, under section 5 of the Court-fees Act.

(1) (1918) I. L. R. 40 All. 553.

(2) (1913) 18 C. L. J. 133.

(3) (1929) I. L. R. 57 Calc. 1013.

The question which arises is whether or not *ad valorem* court-fees are leviable on a memorandum of appeal against a personal decree in a mortgage suit. It appears that the mortgagor obtained a preliminary mortgage decree directing the sale of mortgaged properties. Against that decree an appeal has been preferred to this Court and *ad valorem* court-fees have been paid on the same. Subsequently, after the obtaining of a final decree, the mortgaged properties were sold and it appears that the sale proceeds of the mortgaged properties are insufficient to liquidate the mortgage debt. Consequently, the mortgagee applied under the provisions of Order XXXIV, rule 6, Civil Procedure Code, for a personal decree and he was successful in obtaining such a decree. Against that decree the present appeal has been filed by the mortgagor on a court-fee stamp of Rs. 2 only. The Stamp Reporter reported that *ad valorem* court-fees are leviable, having regard to the decision of the Allahabad High Court in the case of *Muhammad Iltifat Husain v. Alim-un-nissa Bibi* (1). There can be no question that a decree passed under Order XXXIV, rule 6 of the Code of Civil Procedure is a decree within the meaning of Article 1 of Schedule I of the Court-fees Act. It seems that *prima facie* *ad valorem* court-fees are payable. But it has been argued, on behalf of the appellant, that he, having already paid the court-fees on the entire amount claimed by the mortgagee, should not be made to pay twice over the court-fees on the same amount or on the amount less than the amount which has been realized by the sale of the mortgaged properties. The question was mooted in the case of *Lakhi Narain Jagdeb v. Kirtibas Das* (2), but that was not decided. Sir Asutosh Mookerjee J., in that case, observed as follows:—

We do not decide a question which may possibly arise hereafter, namely if an appeal is preferred against a decree *nisi* or a decree absolute in a mortgage suit, whether upon an appeal preferred against the decree under section 90, court-fees can be levied a second time; that point is not before us and we reserve our opinion upon it.

(1) (1918) I. L. R. 40 All. 553.

(2) (1913) 18 C. L. J. 133, 137.

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That is the point which has now arisen for decision. The effect of a decree under Order XXXIV, rule 6 of the Code is that it gives the mortgagee the right to proceed against the properties of the mortgagor other than those covered by the mortgage. In that sense I think the mortgagee is entitled to have a larger remedy and a wider relief against the mortgagor. The question for consideration with reference to the decree under Order XXXIV, rule 6, which may arise is as to whether if the person proceeded against is a person other than the mortgagor, to wit the purchaser of equity of redemption, such a decree can be passed against him. Questions also of limitation might arise, for in a mortgagee's suit, if not instituted within either six or three years of the due date of mortgage, a personal decree is barred by limitation. Great reliance has been placed on a recent Full Bench decision in the case of *Talebali v. Abdul Aziz* (1), and it is said that a final decree has been held to be subservient to and dependant on the preliminary decree. Therefore, it is said that, if the preliminary decree is set aside in an appeal from the said preliminary decree, it is not necessary, in view of the Full Bench decision, to prefer any appeal against the final decree. That is no doubt what that case decides. There is no reference to the case of a personal decree which can only be applied for if, after the sale, the proceeds of the mortgaged properties are held to be insufficient to liquidate the mortgage debt. It is no doubt true that sometimes a combined decree is made. That is at the time of the passing of a final decree the court also can pass another decree under Order XXXIV, rule 6 of the Code, combining both decrees in one and the same decree. Of course if the preliminary decree is set aside, the decree under Order XXXIV, rule 6, must necessarily go with it. We are concerned with the construction which is to be put on the Court-fees Act, and if it is once conceded that an appeal made against a decree passed under Order XXXIV, rule 6 of the Code is an appeal from

a decree within the meaning of the Court-fees Act, Schedule I, Article 1, there seems to be no basis for the contention that *ad valorem* court-fees should not be paid. Having regard to the reasons stated above, we think *ad valorem* fees must be paid.

The appellant must, therefore, pay the deficit court-fees of Rs. 538 due from him within one month of this date. If the court-fees are paid within this time, the appeal will proceed, otherwise not.

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