

MUTTIA  
v.  
APPASAMI. whole chapter applicable, whilst section 268 of Act VIII of 1859 rendered only sections 226, 227 and 228 applicable.

For these reasons I think an appeal lies and concur in the order proposed by my learned colleague. I do not consider that the question of limitation under article 167 arises, for the application for delivery under section 318 is substantially an application for execution of the decree by ordering delivery of possession of the property purchased.

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## APPELLATE CIVIL.

*Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.*

RAMASAMI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

SUBBUSAMI (DEFENDANT No. 2), RESPONDENT.\*

*Court Fees Act—Act VII of 1870, sched. I, art. 1, sched. II, art. 17.*

In a suit upon a hypothecation bond it was found by the Court of first appeal that the bond and the debt secured thereby were binding on the first defendant, but not on the second defendant. The plaintiff preferred a second appeal against the second defendant as sole respondent :

*Held*, that the Court fee payable on the second appeal should be calculated on the amount of the debt sought to be recovered.

SECOND APPEAL against the decree of P. Narayanasami Ayyar, Acting Subordinate Judge of Tanjore, in appeal suit No. 829 of 1888, reversing the decree of W. Gopalachariar, District Munsif of Tiruvadi, in original suit No. 101 of 1888.

The plaint set out that defendant No. 1 had executed to plaintiff No. 1 (who with plaintiff No. 2 was the manager of their undivided Hindu family) on 22nd October 1882 a hypothecation bond for Rs. 900, that certain payments had been made and credited towards the amount of the bond, and the prayer of the plaint was as follows :—

“ We therefore pray for a decree for the recovery of the  
“ amount undermentioned due on the said hypothecation bond,  
“ together with the subsequent interest and the costs of the suit,  
“ making the property hypothecated liable, as also the body of

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\* Second Appeal No. 1136 of 1889.

“ plaintiff No. 1 who executed the hypothecation bond and such  
 “ other property as the defendants may own.  
 “ To be recovered—

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	RS.	A. P.
“ The principal of the said bond . . . . .	900	0 0
“ Interest thereon at $\frac{3}{4}$ per cent. per mensem as shown “ in the bond from the date of the bond to date.	435	6 0
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“ Total principal and interest . . . . .	1,335	6 0
“ Amount of credit as made in the bond of the pay- “ ment on the 14th June 1888 towards the principal.	196	0 0
“ Amount of counter-interest thereon from the said “ date to date at the above rate of $\frac{3}{4}$ per cent. . . . .	30	8 6
“ Total payment with counter-interest . . . . .	226	8 6
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“ Balance due . . . . .	1,108	13 6”
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Defendant No. 2, who had been adopted by the husband (deceased) of defendant No. 1, claimed that the debt was not binding on him.

The District Munsif passed a decree against the defendants for the amount claimed and directed that if that amount were not paid before 12th April 1889, it should be “ realised by the sale of “ the hypotheca mentioned in the plaint, and that if deficiency “ should arise, the second defendant’s other properties may be “ proceeded against.”

On appeal the Subordinate Judge said :—“ the only point for “ determination is whether the debts referred to in the hypotheca- “ tion bond were *bonâ fide* contracted for the second defendant’s “ benefit,” and having determined this point in favor of defendant No. 2, he passed a decree exonerating the second defendant and his property, including the land hypothecated.

The plaintiff’s preferred this second appeal, joining the second defendant only as respondent and affixing to the memorandum of appeal a Rs. 10 stamp as if a declaratory decree were sought.

*Subramanya Ayyar* for appellant.

*Rama Rau* for respondent.

JUDGMENT.—The appeal is substantially to establish the plain- tiffs’ right to render the hypothecated property belonging to the second defendant liable to be sold in satisfaction of the debt

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claimed in the suit. The Court fees payable must, therefore, be calculated on this amount.

The appellant is allowed six weeks within which to pay the deficient Court fees.

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## APPELLATE CIVIL.

*Before Mr. Justice Handley and Mr. Justice Weir.*

SHAIK SAHEB (PLAINTIFF), APPELLANT,

v.

MAHOMED AND ANOTHER (DEFENDANTS), RESPONDENTS.\*

*Civil Procedure Code—Act XIV of 1882, ss. 13, 102, 153—Failure to pay  
Commissioner's fee—Res judicata.*

A suit for land was dismissed in 1886 on the plaintiff's failure to comply with an order to pay a fee for the appointment of a commissioner to value the land. No issues were framed in the suit, and the order directing payment of the fee prescribed no time within which it was to be made. The plaintiff now sued the defendants again for the same land :

*Held*, that the claim was not *res judicata*.

SECOND APPEAL against the decree of S. T. McCarthy, District Judge of Chingleput, in appeal suit No. 387 of 1888 reversing the decree of V. Subramania Sastri, District Munsif of Poonamallee, in original suit No. 107 of 1887.

Suit to recover possession of certain land. It appeared that in original suit No. 13 of 1886 on the file of the District Munsif of Poonamallee the plaintiffs had sued to eject the defendants from the same land ; that a question having arisen as to the valuation of that suit, the plaintiff was ordered to pay a fee for a commissioner to be appointed to value the land, and that the plaintiff having failed to comply with this order, the suit was dismissed, no issues having been framed.

The District Munsif passed a decree as prayed, holding that the suit of 1886 was no bar to the present suit. Upon this question he referred to *Ahar v. Seshamma*(1), *Venkatachalam v. Mahalakshmanamma*(2), *Shankar Baksh v. Daya Shankar*(3), *Ganesh Rai*

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\* Second Appeal No. 964 of 1889.

(2) I.L.R., 10 Mad., 272.

(1) I.L.R., 10 Mad., 270.

(3) I.L.R., 15 Cal., 422.