

## APPELLATE CIVIL.

Before Mr. Justice Curgenvven.

RANGA RAJU AND ANOTHER (DEFENDANTS), PETITIONERS,

1929,  
September  
13.

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v.

ETHIRAJAMMAL (PLAINTIFF), RESPONDENT.\*

*Suit for sale on a mortgage—Preliminary decree—Application for passing final decree—Notice—Contest—Order directing that a final decree should be passed—Appeal against the order—Court fee, payable—Whether as on a miscellaneous appeal or on an appeal against the final decree.*

An appeal against an order directing, after contest, that a final decree shall be passed in a mortgage suit should be treated as a miscellaneous appeal and is liable to be stamped with a Court fee accordingly; it is not an appeal against the final decree, liable as such to be stamped with an *ad valorem* Court fee.

PETITION under section 115, Civil Procedure Code to revise the order of the District Court of Chingleput in A.S. No. 191 of 1928 (M.P. No. 279 of 1927 in O.S. No. 73 of 1926 on the file of the Court of the Subordinate Judge of Chingleput).

The material facts appear from the Judgment.

*K. P. Ramakrishna Ayyar* with *N. Ramachandra Ayyar* for petitioners.

*T. G. Aravamuthan*, for respondent.

## JUDGMENT.

This Civil Revision Petition was presented in the following circumstances. The plaintiff, now respondent, obtained a preliminary mortgage decree against the petitioner and applied in M.P. No. 279 of 1927 to have a final decree passed. The defendants were given

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\* Civil Revision Petition No. 107 of 1929.

RANGA RAJU  
P.  
ETHIRAJ-  
AMMAL.

notice and alleged that the decree debt had been adjusted. This issue was tried by the Subordinate Judge of Chingleput and found against, so that he directed that a final decree should be drawn up. The petitioners took this order on appeal to the District Court, stamping it as though for a miscellaneous appeal. The learned District Judge took up the matter of the sufficiency of the Court fee and passed an order in which he says that the appeal was clearly against the final decree in the mortgage suit and accordingly that an *ad valorem* Court fee should be paid. The petitioners now object to the terms of this order.

The question thus is whether an appeal against an order directing after contest that a final decree shall be passed in a mortgage suit should be treated as an appeal against the final decree in that suit. Not much guidance can be obtained from reported cases. The learned District Judge has referred to *Bajrangi Lal v. Mahabir Kunwar*(1), but all that that lays down is that an appeal from a final decree in a mortgage suit passed under Order XXXIV, rule 5, Code of Civil Procedure, requires an *ad valorem* Court fee, a proposition which need not be disputed. In *Subbalakshmi Ammal v. Ramanujam Chetty*(2), SPENCER and KRISHNAN, JJ., had to deal with an order dismissing an application for a final decree in a suit for sale on a mortgage from the point of view of its appealability, and there indeed they did hold that the effect of the order was to dismiss the suit, thereby being technically a decree and appealable. I do not, however, find that case of much assistance here, because although the effect of the order here no doubt would be that a final decree must be passed, it can hardly be said that this appeal is tantamount to an appeal from that decree.

(1) (1913) I.L.R., 35 All., 476.

(2) (1918) I.L.R., 42 Mad., 52.

We have only to consider what the permissible grounds in each case would be. In this appeal against the order, the grounds must necessarily be limited to adducing cause why the final decree should not be passed; whereas once the decree is passed and an appeal is preferred against it, grounds such as those would not avail the appellant, but he must attack the merits of the decree. I think it is quite clear, therefore, that the scope of an appeal against the order would be different from that against the decree and further that the judgment-debtor has a right of appeal against both. To charge him *ad valorem* fees in this appeal would mean, if he appealed against the decree, he would have to pay them twice over, which I do not think can be correct. I must accordingly allow the petition and decide that the appeal preferred to the District Judge was properly stamped and direct him to restore it to file and dispose of it according to law.

Petitioners will get their costs in this petition.

K.R.

RANGA RAJU  
v.  
ETHEIRAJ-  
AMMAL.