1886
June 16.

FULL BENCH.

Before Mr. Justice Straight, Offg. Chief Justice, Mr. Justice Brodhurst, Mr. Justice Oldfield, Mr. Justice Tyrrell and Mr. Justice Mahmood.

AMANAT BEGAM AND ANOTHER (PLAINTIFFS) *v.* BHAJAN LAL AND OTHERS (DEFENDANTS) *

Mortgage—Joint mortgage—Suit for redemption—Jurisdiction—Court-fee—Valuation of suit—"Subject-matter in dispute"—Act VII of 1870 *(Court-Fees Act), s.* 7, *art.* ix—*Act VI of* 1871 *(Bengal Civil Courts Act), s.* 20—*Statute, construction of.*

A deed of mortgage was executed by *P*, *T* and *S* for Rs. 4,000. *A*, the purchaser of the share of *S*, brought a suit for recovery of possession of one-third of the mortgaged property against the mortgagees, who had purchased the shares of *P* and *T* the other mortgagors.

Held by the Full Bench with reference to s. 7, art. ix of the Court-Fees Act (VII of 1870), that the defendants-mortgagees having bought up the equity of redemption of two of the mortgagors, and *pro tanto* extinguished their mortgage-debt, and so by their own act empowered the plaintiff to sue for redemption of one-third of the property, the principal money now secured as between them and the plaintiff must now be regarded as one-third of the original mortgage amount, namely, Rs. 1,333-5-4, more particularly as fiscal enactments should, as far as possible, be construed in favour of the subject. *Balkrishna Dhondo* v. *Nagvekar* (1) referred to.

Held also, with reference to the terms of s. 20 of the Bengal Civil Courts Act (VI of 1871), that the "subject-matter in dispute" in suits of this kind was the amount of the mortgage-debt and the mortgagee's rights which were sought to be paid off; that from the terms of the plaint it was obvious that in the present case the subject-matter in dispute was Rs. 1,333-5-4, the one-third of the original mortgage sum of Rs. 4,000; and that it was therefore beyond the limits of the Munsif's pecuniary jurisdiction.

Per MAHMOOD, J.—It is a rule of construction that while in cases of taxation everything must be strictly construed in favour of the subject, in questions of jurisdiction, the presumption is in favour of giving jurisdiction to the highest Court.

Observations by MAHMOOD, J., as to the subject-matter of suits for the redemption of mortgages, and the mode in which the value of such subject-matter should be calculated for purposes of jurisdiction.

THIS was a reference to the Full Bench by Petheram, C. J., and Straight, J. The facts of the case were as follows:—

The plaintiffs sued to recover possession of certain property which had been mortgaged by a deed dated the 1st September,

* Second Appeal No. 801 of 1885, from a decree of Mirza Abid Ali Beg, Subordinate Judge of Shâhjahânpur, dated the 21st February, 1885, reversing a decree of Maulvi Muhammad Ismail, Munsif of Bisauli, dated the 23rd December, 1884.

(1) I. L. R., 6 Bom. 324.

1863. It appeared that three persons named Pan Kuar, Takht Singh, and Maidan Singh, on the 1st September, 1863, mortgaged one-third of the 20 biswas of a village called Mau for Rs. 4,000, for a term of five years. The mortgage deed provided *inter alia* that the profits should, during the term of the mortgage, be appropriated in payment of Rs. 1,000 of the principal money, and the mortgagors should be entitled to redeem at the end of the term on payment of Rs. 3,000. Three persons named Mohan Singh, Chandan Singh, and Dharam Singh became the mortgagees of the property by virtue of a decree for pre-emption. Subsequently to this the rights of these persons under the mortgage were sold to persons named Gopi, Sham Sundar, Ram Prasad, Bhola Nath, and Makund Ram. Ram Prasad, Bhola Nath, and Makund Ram then purchased the equity of redemption of two of the mortgagors, Pan Kuar and and Takht Singh, and on the 13th January, 1884, the third mortgagor, Maidan Singh, sold his equity of redemption to the plaintiffs. The plaintiffs brought the present suit against the heirs of Ram Prasad and Makund Ram, and Gopi, Sham Sundar and Bhola Nath, to recover one-third of the mortgaged property, that is to say, the 2 biswas 4 biswansis and 7 kachwansis share of Maidan Singh, on payment of Rs. 1,000, one-third of the principal money due at the end of the mortgage-term. The suit was instituted in the Court of the Munsif of Bisauli, zila Shâhjahânpur. The plaintiffs paid an *ad valorem* court-fee on Rs. 1,000 in respect of the plaint. The defendants set up as a defence, amongst other things, that, having regard to the principal amount secured by the mortgage, that is to say, Rs. 4,000, the suit was not cognizable by the Munsif. The Munsif held that as the plaintiffs claimed to redeem on payment of Rs. 1,000, the suit was cognizable by him, and in the event gave the plaintiffs a decree. On appeal by the defendants the Subordinate Judge of Shâhjahânpur held that the suit was not cognizable by the Munsif, the value of the subject-matter of the suit being Rs. 1,333-5-4, one-third of Rs. 4,000, the principal amount secured by the mortgage; and he also held that such value was the value for the purposes of the Court-Fees Act (VII of 1870), s. 7, art ix, and the plaint was insufficiently stamped. He made an order directing the plaint to be returned to the plaintiffs to be presented to the proper Court.

1886

AMANAT BEGAM v. BHAJAN LAL.

The plaintiff appealed to the High Court, contending that the suit had been properly valued at Rs. 1,000, one-third of the principal money due at the end of the mortgage-term, both for the purposes of jurisdiction and court-fees.

The appeal came for hearing before Petheram, C. J., and Straight, J., who referred the following questions to the Full Bench :—

"(i) Had the Munsif jurisdiction to hear and determine the suit? and

(ii) On what amount should the court-fees be calculated both in the Court of first instance and in the Court of appeal?"

Pandit *Nand Lal*, for the appellants.—The amount secured by the mortgage-deed is Rs. 3,000, and as the suit relates to one-third of the mortgaged property, it must be taken that one-third of that amount, namely, Rs. 1,000, is the amount secured, within the meaning of s. 7, art. ix., Court-Fees Act—*Balkrishna Dhondo* v. *Nagvekar* (1). For the purposes of jurisdiction, the value of the subject-matter in dispute is also Rs. 1,000. The subject-matter in dispute is the mortgage-debt and the mortgagee's right which is sought to be paid off, which is Rs. 1,000. He cited *Gobind Singh* v. *Kallu* (2), *Bahadur* v. *Jawab Jan* (3), *Kubair Singh* v. *Atma Ram* (4), *Cotterell* v. *Stratton* (5), *Krishnama Chariar* v. *Srinivasa Ayyangar* (6).

Pandit *Ajudhia Nath* (with him, Babu *Ratan Chand*), for the respondents.—The mortgage is a joint one, and the principal amount secured by it is Rs. 4,000, and court-fees should be paid on the whole of that amount—*Umar Khan* v. *Mahomed Khan* (7). If the "subject-matter in dispute" is the mortgage-money, it is the whole amount of the mortgage-money. In a suit for redemption the subject-matter in dispute is the property itself, and not the amount is respect of which redemption is claimed.

STRAIGHT, Offg. C. J.—(After stating the facts and the questions referred to the Full Bench, continued)—These questions have been argued before the Full Bench in inverse order, and it

(1) I. L. R., 6 Bom. 326. (4) I. L. R., 5 All. 322.
(2) I. L. R., 2 All. 778. (5) L. R., 17 Eq., 543.
(3) I. L. R., 3 All. 822. (6) I. L. R., 4 Mad. 339.
(7) I. L. R., 10 Bom. 41.

will therefore be most convenient to deal with them in the order in which they have been argued by the learned pleader for the appellants. The first contention urged by the learned pleader is as to the construction to be placed on the instrument of the 1st September, 1863, which he urges was only a mortgage for Rs. 3,000. We have had, by the assistance of my brother Mahmood, the advantage of hearing a literal English translation of the language of the instrument in question, and I entertain no doubt that by it the property was mortgaged for Rs. 4,000, and not Rs. 3,000, and that the mere conditions as to the mode in which Rs. 1,000 of the amount was to be liquidated, did not affect its original character as a mortgage for Rs. 4,000.

The next question relates to s. 7 of the Court-Fees Act; but before considering the precise terms of that section, I may observe that this suit is brought by one of three mortgagors to redeem a particular portion of the mortgaged property. Under ordinary circumstances, this would not only be contrary to all principle, but it would also be contrary to an express rule of law now contained in the Transfer of Property Act. The reason, however, why the plaintiff is entitled to sue for redemption of a portion of the property is that the mortgagees, themselves having become purchasers of a portion of the mortgaged property, that is to say, they having bought up the equity of redemption of two of the mortgagors, have, *pro tanto*, extinguished their mortgage-debt. For by their purchase they cannot make the residue of the mortgaged property responsible for the entire mortgage-debt, nor can they prejudice the right of the other mortgagors to redeem their proportionate share of the mortgaged property. The mortgagees having broken up the integrity of the mortgage, the plaintiff is entitled to assert his equity of redemption, upon payment of so much as represents his interest under the mortgage. This being so, we have to look at art. ix, s. 7. of the Court-Fees Act, which is as follows:—"In suits against a mortgagee for the recovery of the property mortgaged, and in suits by a mortgagee to foreclose the mortgage, or, where the mortgage is made by conditional sale, to have the sale declared absolute," the court-fee is to be calculated "according to the principal money expressed to be secured by the instrument of mortgage." Of course, if we

1886

AMANAT BEGAM v. BHAJAN LAL.

are to interpret this language strictly, it is difficult to say that the instrument in question in the present case expresses as secured any other sum than Rs. 4,000, and the extreme contention urged by Pandit *Ajudhia Nath* was that we must make the plaintiff pay court-fees upon that sum. But it appears to me that the defendants-mortgagees, having broken up the mortgage, and so by their own act having empowered the plaintiff to sue for redemption of one-third of the property, that the principal money now secured as between them and the plaintiff must be regarded as one-third of the original mortgage amount, namely, Rs. 1,333-5-4, more particularly when it is borne in mind that fiscal enactments should, as far as possible, be construed in favour of the subject. My brother Mahmood reminds me of the observations of Melvill, J., in *Balkrishna Dhondo* v. *Nagvekar* (1) where the same principle was adopted. They are as follows :—"In cases in which it is competent to the mortgagor to sue to recover a portion of the mortgaged property, the debt must be regarded as distributed over the whole property; and as regards the portion of property sued for 'the principal money expressed to be secured,' must be taken to be the proportionate amount of the debt for which such portion of the property is liable."

This ruling I adopt and approve, and applying it to the present case, I am of opinion that the court-fee payable by the appellant is payable on Rs. 1,333-5-4, as mentioned in the judgment of the Subordinate Judge.

So much as to the question of court-fee. And now with reference to the first of the two questions referred to the Full Bench, namely, the jurisdiction of the Munsif to try the suit, which depends upon the construction to be placed on the words "subject-matter in dispute" in s. 20 of the Bengal Civil Courts' Act. In the plaint what is alleged is that the plaintiff comes into court to redeem one-third of the mortgage for Rs. 4,000, and such is the case, as I have already said, he is entitled to make. There is a long current of rulings in this Court to the effect that "the subject-matter in dispute" in suits of this kind is the amount of the mortgage-debt and the mortgagee's rights which are sought to be paid off; and whether these rulings are right or wrong, they repre-

(1) I. L. R., 6 Bom. 324.

sent a long current of authority from which, for my own part, I should hesitate to depart. According to the rule of "*stare decisis*," I must assume that they are right, and follow them; and this being so, it follows that the subject-matter in dispute in the present suit is the mortgage-debt and the rights of the mortgagees which the plaintiff seeks to clear off. It is therefore obvious from the terms of the plaint, that in this the subject-matter in dispute was Rs. 1,333-5-4, the one-third of the original mortgage sum of Rs. 4,000. Without basing my judgment therefore upon the reasons stated by the Subordinate Judge, who appears to have mixed up fiscal considerations with those relating to jurisdiction, I think that he was right in his conclusion that Rs. 1,333-5-4 was the value of the mortgagee's interest and the subject-matter of the suit, and that it was therefore beyond the limits of the Munsif's pecuniary jurisdiction. The order of the Subordinate Judge that the plaint should be returned for presentation to the proper Court was correct. My answer to this reference is in the sense indicated by the foregoing observations.

OLDFIELD, BRODHURST and TYRRELL, JJ., concurred.

MAHMOOD, J.—The judgment of the learned Chief Justice makes it unnecessary for me to say much, for I have arrived at the same conclusions. He has shown that the exigencies of the case do not require us to rule what I may call the major hypothesis upon which Pandit *Ajudhia Nath's* argument proceeded, namely, that in all suits for redemption, the subject-matter is not the amount which the plaintiff offers to pay to the defendant, the mortgagee in possession, but the suit must be regarded as a claim for possession of immoveable property, to which claim there is a plea resisting such possession. But though we are not bound to decide this large question, I cannot help, with due respect for the rulings cited by Pandit *Nand Lal*, doubting their accuracy. For I am inclined to think that a suit for redemption against a mortgagee in possession, is, on principle, a suit by an owner having for its object the realisation of the incidents of ownership, and the plea of a subsisting mortgage amounts to seeking to establish a qualification of that ownership: and in such a dispute the scope of the subject-matter, for purposes of

1886

AMANAT BEGAM v. BRAJAN LAL.

jurisdiction, would seem to be the plaintiff's ownership of the property, and not the qualification which the defendant seeks to set up as a limitation upon that ownership. Again, the allegation of the plaintiff as to the extent of the limitation upon his ownership, would seem to be equally inconclusive as to the pecuniary extent and value of the dispute, for, whilst on the one hand, he may be met by a plea that the mortgage charge is far higher than that stated by him, on the other hand, I think that the learned Pandit for the respondents put the matter very forcibly, when he said that there may be cases in which the plaintiff offers to pay nothing at all, because the whole amount of the mortgage-money has been paid either from the usufruct or otherwise. I have called this last argument forcible, because, if the extent of the money which the plaintiff-mortgagor offers to pay is to regulate the value of the subject-matter in dispute, in the case contemplated there would be no standard for any calculation of the value. Perhaps a more plausible theory would be to say that the value of the subject-matter of a redemption suit is the value of the property *minus* the mortgage charge, that is, the difference between the two. But then the difficulty would arise how to determine the amount of such difference without going into the merits of the defendant-mortgagee's allegation as to the extent of his incumbrance. And of course, apart from the question of the mortgage-money, a redemption suit may be met by the plea that either on account of foreclosure or prescription, the right of redemption no longer exists,—and it is obvious that in such a dispute the whole *corpus* of the property would be at stake, whilst the question of jurisdiction lies at the threshold, and must be disposed of before the real merits of the litigation are entered upon. These observations have been made by me only to illustrate the nature of the considerations which lead me to doubt the rulings upon which Pandit *Nand Lal* relied, and in this I am supported by an unreported judgment of this Court in *Muhammad Dilawar Khan* v. *Arthur Gardener* [S. A. No. 1039 of 1877, decided on the 18th January, 1878] in which Turner and Spankie, JJ., held that the property mortgaged was the subject-matter in dispute, and, as the *corpus* of the property in that case largely exceeded the Munsif's jurisdiction, they held that he was not competent to try the suit.

I must, however, not be understood as laying down any definite rule upon this point, for, as I have already said, the observations of the learned Chief Justice satisfy the exigencies of this particular case.

The question of valuation for purposes of court-fees rests upon very different considerations, for, as pointed out by the Lords of the Privy Council in *Lekraj Roy* v. *Kanhya Singh* (1), "the stamp duties imposed for fiscal purposes are calculated on a certain rule, fixed by law, but the right of appeal depends on the value, which is a matter of fact." This distinction of principle must never be lost sight of. In the case of *Cotterell* v. *Stratton* (2), cited by Pandit *Nand Lal*, the judgment of Malins, V. C., is entitled to high respect; but all that he there ruled was that, for purposes of law taxation, a certain standard should be taken as the amount of the subject-matter. No question of jurisdiction was before the Court in that case, and it is therefore not applicable, because, while in cases of taxation everything is to receive a strict construction in favour of the subject, in questions of jurisdiction the presumption is in favour of giving jurisdiction to the highest Court—a view which is in keeping with the principles upon which the Full Bench ruling of this Court in *Nidhi Lal* v. *Mazhar Husain* (3) proceeded. Therefore, as to the valuation for purposes of court-fees, I agree in all that has fallen from the learned Chief Justice, and I also readily adopt the views of Melvill, J., in the case to which the learned Chief Justice has referred. But then the learned Pandit on behalf of the respondent has referred to another case—*Umar Khan* v. *Mahomed Khan* (4)—which, he contends, has the effect of laying down the rule that in a case such as the present the plaintiff-appellant should be made to pay the court-fees upon the *whole* mortgage-money expressed to be secured by the mortgage-deed. There may be some difficulty in reconciling the case with the ruling of Melvill, J., and I might, perhaps, with due respect, say that it keeps out of sight the salutary rule of construction adopted by the Courts in England, namely, that statutes imposing burdens upon the subject must, in every case of doubt, be interpreted in favour of the subject. But I think it is

(1) L. R., 1 Ind. Ap. 317.
(2) L. R., 17 Eq. 543.
(3) I. L. R., 7 All. 230.
(4) I. L. R., 10 Bom. 41.

1886

AMANAT BEGAM v. BHAJAN LAL.

unnecessary for me to say anything definite as to whether I concur in, or dissent from, the ruling, because Birdwood, J., who laid down the rule, distinguished it from cases such as the present, where the decree has not been split up or made the subject of more than one appeal.

The ruling, therefore, is not on all fours with the present case, and I need say nothing more about it here.

For these reasons I concur in the answers proposed by the learned Chief Justice to both the questions before the Full Bench.

1886
April 22.

APPELLATE CIVIL.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

GANGADHAR AND ANOTHER (PLAINTIFFS) *v.* ZAHURRIYA AND ANOTHER (DEFENDANTS). *

Landholder and tenant—Suit for the removal of trees—Act XV of 1877 *(Limitation Act), sch.* ii, *No.* 32—*Jurisdiction—Civil and Revenue Courts—Act XII of* 1881 *(N.-W.P. Rent Act), s.* 93 *(b).*

Held that a suit by a landholder for the removal of certain trees planted by the defendants upon land held by them as the plaintiff's occupancy-tenants was cognizable by the Civil and not by the Revenue Court. *Deodat Tiwari* v. *Gopi Misr* (1) referred to.

Held also that No. 32, sch ii of the Limitation Act (XV of 1877), applied to the suit. *Raj Bahadur* v. *Birmha Singh* (2), *Amrit Lal* v. *Balbir* (3), and *Kedarnath Nag* v. *Khetturpaul Sritirutno* (4), referred to.

THE plaintiffs in this case sued the defendants for the removal of certain trees planted by the latter on land held by them as occupancy-tenants, the plaintiffs being the landholders. The suit was instituted in the Court of the Munsif of Shamli, zila Saháranpur. The defendants set up among other defences the defence that the suit was not cognizable in the Civil Courts, under the provisions of s. 93 *(b)* of the N.-W. P. Rent Act (XII of 1881). The Court of first instance allowed this defence, relying on *Deodat Tiwari* v. *Gopi Misr* (1). It found also that that the trees, the removal of which was sought, had been planted some eight years

* Second Appeal No. 1313 of 1885, from a decree of C. W. P. Watts, Esq., District Judge of Saháranpur, dated the 3rd July, 1885, confirming a decree of Maulvi Muhammad Tajammul Husain, Munsif of Shamli, dated the 15th January, 1885.

(1) Weekly Notes, 1882, p. 102.
(2) I. L. R., 3 All. 85.
(3) I. L. R., 6 All 68.
(4) I. L. R., 6 Calc 34.