

Before Mr. Justice Aikman.

MAHADEO PRASAD (DEFENDANT) v. GORAKH PRASAD (PLAINTIFF) *
*Act No. VII of 1870 (Court Fees Act), section 7, ix; schedule I, article 1—
 Court fee—Decree for redemption of mortgage—Appeal on the main
 ground that nothing was due under the mortgage.*

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 July 21.

Held that in the case of an appeal from a decree allowing a defendant mortgagee to redeem the mortgage on payment of a sum named therein based upon the ground that the mortgage debt has been satisfied out of the usufruct of the property mortgaged and nothing whatever was due from him the proper court fee payable was an *ad valorem* fee upon the total amount of the decree under appeal. *Nepal Rai v. Debi Prasad* (1) and *Reference under Court Fees Act, 1870, (2)* followed.

THIS was reference made by the Taxing Officer to the Taxing Judge under section 5 of the Court Fees Act. A memorandum of appeal having been presented for a stamp report, the Stamp Reporter made the following report:—

“This appeal has arisen out of a suit for foreclosure. The principal money expressed to be secured by the instrument of mortgage was Rs. 6,000. The defendant pleaded *inter alia*, that the mortgage debt had been paid off from the usufruct of the property, and that only 4 annas and not a 5 anna 4 pie share had been mortgaged.

“Upon the trial of the suit the lower Court passed a decree in plaintiff's favour subject to defendant's right of redemption on payment of Rs. 8,664 within six months from the date of the decree, and failing that, the entire property mortgaged, namely, 5 annas 4 pies was to be foreclosed and the defendant's right of redemption extinguished.

“The defendant appeals to this Hon'ble Court and has paid court fees on the principal mortgage money.

“Having regard to the rulings of *Nepal Rai v. Debi Prasad* (1), and *Reference under Court Fees Act, 1870 (2)*, and to the grounds raised in the memorandum of appeal, it appears that the value of the subject-matter in dispute in appeal for the purposes of court fees is Rs. 8,664, the amount found to be payable under the mortgage in dispute, and Rs. 323 costs, total Rs. 8,987. As to costs, a distinct ground having been taken in the memorandum of appeal, an additional court fee is payable thereon (*vide*

* Stamp Report in First Appeal No. 155 of 1908.

(1) (1905) L. L. R., 27 All., 447; (2) (1905) L. L. R., 29 Mad., 367.

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Weekly Notes, 1901, p. 21). This being so, a fee of Rs. 435 is payable. Rs. 315 having been paid, there is therefore a deficiency of Rs. 120 to be made good by the defendant appellant for this Court."

This report having come before Banerji, J., as a Judge receiving applications, he made the following order:—

"Mr. Surendra Nath Sen objects to the office report. Lay before the Taxing officer."

The Taxing officer on the 3rd of May 1908 made the following reference to the Taxing Judge:—

"I have the honour to refer for decision under the provisions of section 5 of the Court Fees Act the following question:—

"The plaintiffs sued for foreclosure. The Court of first instance gave him a decree subject to the defendant's right to redeem on the payment of Rs. 8,987 within six months.

"This sum of Rs. 8,987 is made up of Rs. 6,000, the original sum secured, Rs. 2,664 interest and Rs. 323 costs.

"The defendant mortgagor appeals. His plea in appeal is that the sum secured has been satisfied out of the usufruct. He stamps his appeal under the Court Fees Act, section 7 (ix), with reference to Rs. 6,000, the amount secured by the mortgage. The office reports that the appeal should be stamped *ad valorem* on Rs. 8,987 according to article 1 of the first schedule to the same Act. Four rulings have been cited. One of these, which was delivered by the present Chief Justice, is reported in I. L. R., 27 All., at page 447.

"This ruling was agreed with by a Divisional Bench of the Madras High Court in case reported in I. L. R., 29 Mad., at p. 367. In the Allahabad case the plaintiffs had sued for redemption. They obtained a decree subject to the payment of Rs. 1,555-14-0. They considered that they were entitled to redemption on the payment of the sum smaller by Rs. 288-11-0 than Rs. 1,555-14-0. It was held that the appeal should be stamped *ad valorem* on Rs. 288-11-0.

"In the case for decision now the defendant's prayer in appeal is that he is entitled to redeem without making any payment, that is to say, he is entitled to redemption on the payment of a sum less by Rs. 8,987 than the sum decreed by the Court of

first instance. On the principal laid down in the above ruling, I think the report of the office is correct.

“Two rulings have been quoted by the learned counsel for the appellant. One is a case decided by Sir John Edge, reported in I.L.R., 13 All., 94. The ruling in this case has been dissented from in the two cases quoted above. But as far as the present matter goes, I do not think that it is opposed to the view of the office. Sir John Edge limited his rulings to appeals in which it was impossible to value the subject-matter, *e. g.*, an appeal asking for redemption subject to the payment of an unknown amount. In the present appeal the right to redeem is not contested, and the amount the appellant seeks to avoid paying is a definite sum. The remarks in the last paragraph of the judgment appear to me to deal with a case like the present, and to fully support the view that the appellant should be required to pay on Rs. 8,987.

“The second ruling referred to on behalf of the appellant is reported in I. L. R., 10 Bom. at page 41.

“I see, however, from the report of the Taxing officer in that case that the appeals there in question ‘re-opened the whole question of mortgage.’”

“This the present appeal does not do. Therefore I do not think it applies to the present case.”

The following order was passed by Aikman, J:—

I agree with the judgment of the learned Chief Justice in *Nepal Rai v. Debi Prasad* (1), which is against the appellant's contention. In my opinion the view expressed by the Taxing officer is right.

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August 4.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
DHARAM KUNWAR (PLAINTIFF) v. BALWANT SINGH (DEFENDANT). *
Act No. I of 1872 (Indian Evidence Act), section 115—Estoppel—Adoption
—Suit by adoptive mother to set aside an adoption made by her.

In a suit to set aside an adoption brought by the adoptive mother against her adopted son it was found that the plaintiff had represented that she had authority to adopt, and this representation was acted on by the defendant; that the ceremony of adoption was carried out on the faith of this representation; that the marriage of the defendant was likewise on the strength of

* First Appeal No. 98 of 1906, from a decree of Nihal Chandra, Subordinate Judge of Saharanpur, dated the 26th of February 1906.

(1) (1906) I. L. R., 27 All., 447.