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alleged infringement of an individual right, and, as such is clearly not within the section."

With reference to the above remarks the learned advocate for the appellant says that a dispute regarding the succession to the *tawliat* (trusteeship) of a *waqf*, may be referred to arbitration.

These remarks cannot be deemed to support his contention. They only specify the scope of section 539.

For the above reasons we hold that the right to succeed to the *tawliat* (trusteeship) of *waqf* property is not a right which can be settled by reference to arbitration, and that the court below had no jurisdiction to entertain an application for filing the award in court under section 20, schedule II, of the present Code of Civil Procedure.

The result is that the appeal fails and is dismissed. We make no order as to costs.

Appeal dismissed.

MISCELLANEOUS CIVIL.

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April 2.

Before Mr. Justice Tudball.

BHOLA NATH AND ANOTHER (DEFENDANTS) *v.* PARSOTAM DAS AND OTHERS (PLAINTIFFS).*

Act No. VII of 1870 *(Court Fees Act), section* 7; *schedule II, clauses* 3, 4—*Suit for dissolution of partnership—Preliminary decree—Appeal—Court fee.*

In a suit for dissolution of partnership the defendants appealed against the preliminary decree, pleading that they had no interest in the partnership, and that they sought only a declaration to that effect. *Held* that the appellants ought to pay an *ad valorem* fee according to the amount at which the relief sought was valued in the memorandum of appeal.

THIS was a reference by the taxing officer to the Taxing Judge under section 5 of the Court Fees Act, 1870, arising out of an appeal against the preliminary decree in a suit for dissolution of partnership and accounts. The plaintiffs alleged that the defendants had an interest in the partnership to the extent of $\frac{5}{16}$. The defendants denied having any interest. The court below held in favour of the plaintiffs and passed a preliminary decree for dissolution and accounts. The defendants appealed and paid a court

* Stamp Reference in First Appeal No. 146 of 1910.

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fee of Rs. 10 on the memorandum of appeal. The office reported that *ad valorem* fee should be charged.

The appellants objected to the office report on the following grounds:—

(1) Because the preliminary decree under form 21, schedule 1, No. 21, of Civil Procedure Code, 1908, being only a declaratory decree and the only relief prayed in appeal being to set aside the declaration that the appellants are sharers of 6 annas with defendant No. 1 in the disputed firm, a fixed fee of Rs. 10 was sufficient on the memorandum of appeal under schedule II, No. 17 (iii), of the Court Fees Act.

(2) Because the object of the change introduced into the Civil Procedure Code of 1908, was to compel the aggrieved party to appeal against the preliminary decree at a moderate expense.

(3) Because, under the Civil Procedure Code of 1908, there is necessarily more than one appeal from decree (preliminary and final) in the same suit in certain cases; it was never intended by the Legislature by the change in the law that the parties should be obliged to pay *ad valorem* court fee upon memoranda of appeals twice over.

(4) Because, under any circumstances, it is not possible to estimate at a money value the subject-matter in dispute, and a fixed fee was payable under column 17(iv), schedule II of the Court Fees Act.

The stamp reporter reported as follows:—

"In continuation of my report, dated the 26th January, 1910, I beg to submit a few more points for consideration of the Taxing Officer.

"The change in procedure introduced by the new Code of Civil Procedure does not affect the provisions of the Court Fees Act except in so far as the Legislature has expressly amended or repealed them (vide schedules IV and V of Act No. V of 1908). Section 7, clause iv of Act VII of 1870, which governs the present case, does not find its place in any of the said schedules. Under the old Code too, in suits for dissolution of partnership, the court had to pass a preliminary decree declaring the rights of parties and laying down the lines on which the account had to be taken (*vide* section 215 and Form No. 132, schedule IV of Act No. XIV of 1882), please see also the case of *Biswa Nath Chaki* v. *Bani Kanta Dutta*(1) and it was open to the parties to appeal against the preliminary decree as well as against the final decree: both had to be charged with *ad valorem*

(1) (1896) I. L. R., 23 Calc., 406.

duty computed according to the valuation given in the memorandum of appeal. An appeal from a preliminary decree is generally valued at the same amount as that at which the suit is valued—it being an appeal in a suit for accounts—while an appeal from a final decree is valued at the difference between the amounts alleged as due on one side and the other—the latter being an appeal questioning the result of the accounts.

"The upshot of the appellants' objection is that as the Legislature has, by enacting section 97 of the new Code, made it compulsory for the party aggrieved by a preliminary decree to appeal against it *within the period of limitation*, it works a great hardship upon them to be called upon to pay *ad valorem* court fees twice over. I submit that in enacting the above section, the Legislature has only given effect to the principle laid down in *Boloram Dey* v. *Ram Chundra Dey*(1) which was over-ruled in a later Full Bench decision of the said Court in *Khadem Hossein* v. *Emdad Hossein*(2). The Legislature has not thereby effected any change in the law relating to court fees payable on such appeals. Be that as it may, what we are concerned with is to see whether the fee paid is in accordance with the law on the subject. This is a suit for accounts and the learned vakil for the appellants does not deny this. Turning to section 7, clause iv*(f)*, we find that in a suit for accounts, the court fee is to be computed according to the valuation given in the plaint or memorandum of appeal. The mention of the words "Memorandum of appeal," I submit, in clause iv to section 7 of Act VII of 1870, is significant, for, in other clauses to that section which deal with different classes of cases, the words quoted above have been omitted and the word "suits" only occurs. It therefore follows that in cases dealt with by this clause, a memorandum of appeal has to be charged with *ad valorem* fee calculated on the valuation given therein. Please see the case of *Ladubhai Premchand* v. *Revichand Venichand*(3)

"Article 17, clause ii, of schedule II of Act VII of 1870, referred to by the learned vakil for the appellant has no application. It applies to cases of quite a different nature. The present suit was not one for declaration but for accounts, and it is expressly provided for by section 7, clause iv *(f)*.

"For the reasons stated above, I submit that the court fee payable on this memorandum of appeal should be *ad valorem*.

"Further, I submit, that by dint of section 8 of Act VII of 1887, the value for computation of court fee is the same as that for purposes of jurisdiction. Its provisions apply to appeals also (*vide* I. L. R., 18 Bom., 207)."

Babu *Girdhari Lal Agarwala*, for the appellants, replied as follows:—

"In the present appeal, the only question is whether or not the appellants are partners in the firm Ram Lal Bankey Lal. The relief sought is only a declaration that the appellants are not partners and so under schedule II, article 17 (iii) a fixed fee of Rs. 10 has been paid. Article 17 (vi) would also seem to apply inasmuch as the relief sought in appeal, as far as the appellants are concerned is incapable of accurate valuation. The valuation put in the memorandum

(1) (1895) I. L. R., 23 Calc., 279. (2) (1901) I. L. R., 29 Calc., 758.
(3) (1881) I. L. R., 6 Bom., 143.

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of appeal refers only to jurisdiction and not to court fee. Although the Suits Valuation Act, section 8, provides that where with certain exceptions, the court fee is payable *ad valorem*, the valuation for the purpose of court fees and jurisdiction shall be the same, but (*a*) that Act was passed on 11th of February, 1887, and did not repeal any of the provisions of the Court Fees Act, (*b*) made a special provision for appeals (*vide* section 12), and (*a*), section 8 has nothing to do with cases in which the court fee payble is not *ad valorem*.

"As to section 7 (*f*) of sub-clause iv, it appears that it is inapplicable to the present appeal as there is no question of accounts involved in it. In some cases it has, no doubt, been held that every suit for dissolution of partnership is a suit for accounts, probably because in the second stage of such a suit accounts are generally adjusted. But in the first stage when only the rights of the parties are to be declared, such a suit could hardly be treated a suit for accounts within the meaning of section 7 (iv) (*f*) of the Court Fees Act. The plaintiff was concerned with both stages, but the defendants appellants are not concerned with the second at all.

"As the new Civil Procedure Code makes it compulsory for the aggrieved party to appeal from the preliminary decree, if he likes to appeal at all with regard to the matters dealt with in the preliminary decree, it is really a great hardship upon the litigants, to be obliged to pay *ad valorem* court fee twice over, the point requires careful consideration as there has, up to this time, been no ruling under the new Code upon this question.

"Even if the valuation put upon the appeal be wrong or in contravention of the Suits Valuation Act, that cannot affect the question of court fee.

"No change has, of course, been introduced in the Court Fees Act so far as the present question is concerned, probably because it was quite unnecessary inasmuch as article 17 of that Act is wide enough to provide for cases not expressly dealt with any other portion of the Act. The whole question is by no means quite free from difficulty; and it would be a great advantage to have the matter authoritatively set at rest."

The taxing Officer referred the case to the taxing Judge with the following report:—

"This is a suit for dissolution of partnership which for purposes of court fees is treated as a suit for accounts and dealt with under section 7 iv (*f*) of the Court Fees Act.

"The facts bearing on the point for decision are simple. The plaintiff sued the present appellants, amongst others, for dissolution of partnership. The court of first instance passed a preliminary decree, declaring the present appellants to be liable for 6/16th of the profits of the partnership. They come in appeal against this decree alleging that they have no interest in the partnership at all and asking this Court to set aside, as far as they are concerned, the preliminary decree of the court of first instance. The question is whether their appeal should be stamped *ad valorem* or should bear the fixed fee of Rs. 10.

"Under the provisions of the new Code of Civil Procedure (section 97 and order 20, rule 5) it is necessary to take a separate appeal against a preliminary decree such as this. If this is not done, objection cannot be subsequently taken

to it. Before the enactment of the new Code rulings on this point differed, but there can be no doubt that a party could, if he wished, appeal separately against a preliminary decree.

"All this is only relevant to the point at issue in so far as it relates to the question whether the alteration in the law has in any way affected the method in which the court fee payable on an appeal against a preliminary decree should be completed. The office contends that it has not. In so far as it appears to me that alteration in the law has merely cleared up a doubtful point as to the necessity for filing a separate appeal against a preliminary decree, I think the contention of the office is correct.

"The practice in this Court under the old law was that when an appeal against a preliminary decree was separately filed, it, as well as the appeal against the final decree was stamped *ad valorem*. From the ruling in *Ladubhai Premchand* v. *Revichand Venichand*(1), this would appear to have also been the custom in Bombay. It is also noteworthy that from the wording of the judgement in that case, there appears to have been no question but that the appeal if treated as an appeal against a *decree*, would have to be stamped *ad valorem*. The learned council for the appellants in the present case contends that the appeal is governed by schedule II, article 17 (iii) of the Court Fees Act, he also suggests that it would be unfair to require a suitor to pay *ad valoram* fees both in his preliminary as well as in his final appeal. The reply to the latter part of his argument seems to me to be that this has always been the practice, and that as far as the method of computing the court fee is concerned, the law has not been altered. The first point of his argument, however, brings forward what to my mind is the real crux in the case, and that is, does or does not the decree asked for, which is admittedly a declaratory decree, involve consequential relief? In my judgement this question should be answered in the affirmative. Most important consequential relief will accrue to the appellants in event of success. They will, in that case, be relieved of the responsibility for accounting for any share of the profits of the partnership business.

"The learned counsel has also referred to schedule II, article 17 (vi) of the Court Fees Act. This I do not think can apply, as the subject-matter in this appeal is essentially capable of valuation.

"As the whole question is not free from difficulty, I refer it for your decision."

TUDBALL, J.—The question which has been referred to me for decision by the Taxing Officer is whether this appeal be stamped with an *ad valorem* fee or should bear a fixed fee of Rs. 10. The suit out of which this appeal has arisen is a suit for dissolution of partnership and for taking of accounts. For the purposes of court fees this suit falls under section 7, clause iv *(f)* of the Court Fees Act, and an *ad valorem* fee is to be paid according to the amount at which the relief is valued in the plaint. The court

(1) (1881) I. L. R., 6 Bom., 143.

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of first instance has passed a preliminary decree. The appellants were impleaded as defendants, and the court held that their share in the partnership amounted to 6/16. Their case is that they have no interest whatsoever in the partnership. It is argued on their behalf that all that they seek in this appeal is a declaration that they have no interest whatever in this partnership, and that the appeal therefore comes under article 17, clause iii or clause vi of schedule II of the Court Fees Act. The Taxing Officer, however, is of opinion that the appeal should bear an *ad valorem* fee according to the amount at which the relief sought is valued in the memorandum of appeal. It has been the practice of the Court in the past to take *ad valorem* fees in the cases of appeals from preliminary decrees in suits of the nature of the present one. The fact that it is now compulsory on the appellants to appeal against the preliminary decree passed in such a suit does not affect the matter of court fees in any way. Section 7 of the Court Fees Act distinctly lays down that the amount of fee payable shall be computed in suits for accounts according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. The language of this section seems to me quite plain. Whether the appeal be one from a preliminary decree or a final decree, it seems to me impossible to hold otherwise than that an *ad valorem* fee must be paid according to the amount at which the relief sought is valued in the memorandum of appeal. In the present case the appellants have valued their relief at Rs. 21,698-13. They must, therefore, pay an *ad valorem* fee on the above amount, or if the memorandum of appeal is amended, on the amount entered according to such amendment.

Reference answered accordingly.