1913
July, 4.

FULL BENCH.

Before Mr. Justice Sir George Knox, Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

BAJRANGI LAL AND OTHERS (JUDGEMENT-DEBTORS) *v.* MAHABIR KUNWAR AND OTHERS, (DECREE-HOLDERS.)*

Act No. VII of 1870 *(Court Fees Act), schedule I, article* 1; *schedule II, article* 11—*Civil Procedure Code* (1908), *order XXXIV, rule* 5—*Court fee —Appeal from final decree in a mortgage suit.*

Held that an appeal from the final decree passed under order XXXIV, rule 5, of the Code of Civil Procedure, 1908, requires an *ad valorem* court fee and cannot be stamped as an appeal from an order.

THE question raised in this case was as to the proper court fee payable upon an appeal from a final decree under order XXXIV, rule 5, of the Code of Civil Procedure. When the appeal was filed the stamp-officer of the Court reported as follows :—

"This is an appeal against an order passed under order XXXIV, rule 5, and it is appealable as an appeal from decree. This appeal is valued at Rs. 582-11-9 on which a court fee of Rs. 44-4-0 is payable. Rupees 2 having been paid, there is, therefore, a deficiency of Rs. 42-4-0 on this memorandum of appeal."

On admission of the appeal a further report was made :—

"For the reasons given in my report, dated the 14th of June, 1912, on the memorandum of appeal to this Court, the decree-holders respondents are liable to pay a court fee of Rs. 105 on Rs. 1,503-6-1, the valuation of their appeal to the lower appellate court. A court fee of annas 8 having been paid, there is, therefore, a deficiency of Rs. 104-8-0 due from them for the lower appellate court."

The question thus raised was remitted by the Taxing Judge, to the Bench hearing the appeal, by whom the following order was made.

KNOX and MUHAMMAD RAFIQ, JJ :—Another question arises in connection with this second appeal. The appeal before us is an appeal against an order under order XXXIV, rule 5, of the Code of Civil Procedure. It was valued at Rs. 582-11-9 and was put in on a paper bearing a court fee stamp of Rs. 2. The office reported that the fee payable was Rs. 44-4-0 and that therefore

*Stamp Reference in Execution Second Appeal No. 900 of 1912.

the appellant had to pay a deficiency of Rs. 42-4-0. The appellant raised no objection and made good the deficiency. The stamp-officer of the Court then pointed out that for similar reasons the decree-holders, the respondents in this appeal, were liable to pay a court fee of Rs. 105, instead of the court fee of eight annas which they paid on their appeal in the court of the District Judge. There was, therefore, a deficiency of Rs. 104-8-0 due from them. The respondents contested this report, and the Judge of this Court, to whom a reference was made, and who happens to be the Taxing Judge of the Court, held that the matter was one for the Bench hearing the appeal. The learned vakil for the respondents contended before us that the fee which he had paid in the court of the District Judge was all that was required by law and there was no deficiency due from him. The question raised is not free from difficulty, and it will affect a large number of cases if this Court should hold that an appeal from an order absolute should bear the same fee as if it were an appeal from an original decree. The learned vakil asks us for time in which to prepare the case. We grant two weeks; but we think it would be well if we had another Judge to assist us in determining this question. We think that the learned Government Advocate should also appear in the interest of the revenue. We direct that these papers be laid before the Hon'ble the Chief Justice with a request that a third Judge should be added to the Bench for the determination of this question.

The case was then laid before KNOX, TUDBALL and RAFIQ, JJ.

Babu *Sital Prasad Ghose*, for the respondent:—

The court is bound to make a final decree under order XXXIV, rule 5, if the provisions of the preliminary decree passed under order XXXIV, rule 4, are not complied with. So that the only matter which the court, upon an application under order XXXIV, rule 5, is called upon to decide, is whether there has or has not been such compliance. This is no more than what an executing Court has to do, and it is submitted that the final decree is an order within the meaning of section 47 of the Code. It is not suggested that an application for a decree under order XXXIV, rule 5, must bear an *ad valorem* court fee, and there is no reason why, when such application is refused and an appeal is taken

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from that refusal, the memorandum of appeal should be stamped with an *ad valorem* court fee. Anyhow the Court Fees Act makes no distinction between preliminary and final decrees, and the word 'decree' used in that Act must bear the ordinary meaning given to that expression in the first part of the definition of the term in the Code of Civil Procedure. It is clear, therefore, that the court fee paid by the present respondent in the court of the District Judge was all that was required by law and there was no deficiency due from him.

The Government Advocate (Mr. *W. Wallach*), was not called upon to reply.

KNOX, TUDBALL and MUHAMMAD RAFIQ, JJ:—We have heard all that the learned vakil for the respondent can urge in support of his contention that he was only bound in the lower appellate court to pay a court fee of annas eight as though he were appealing from an order, instead of an *ad valorem* duty. Looking to the change which has been made by the Legislature in order XXXIV, rules 4 and 5, as compared with sections 88 and 89 of the Transfer of Property Act, we have no doubt whatever that the court fee which he should have paid was an *ad valorem* court fee. The Legislature has deliberately altered the words "order absolute" and replaced them by the words "final decree." This is our answer to the question.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

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July, 8.

YAD RAM (PLAINTIFF) *v.* CHEDA LAL AND OTHERS (DEFENDANTS.)*

Pre-emption—Wajib-ul-arz—*Partition of village into several mahals*—Dastur dehi *relating to whole village*—*Suit by co-sharer of one mahal against co-sharer of another mahal on ground of nearness in relationship to the vendor.*

The *dastur dehi* of a village divided into several mahals, but which nevertheless was held to be applicable to the whole village, and to represent an arrangement come to by the co-sharers in the village amongst themselves, provided, as to pre-emption, as follows:—"If a co-sharer wants to sell his share, he must sell first to near co-sharers, then in the patti, then in the mahal, then in the village." *Held* that the effect of this clause was to give to a co-sharer in one mahal who was a relation of the vendor a preferential right of pre-emption over a co-sharer in another mahal who was not a relation.

* First Appeal No. 99 of 1912 from a decree of Muhammad Husain, First Additional Subordinate Judge of Meerut, dated the 30th of November, 1911.