

1912

OHABRAJI
KUNWARv.
THE COURT
OF WARDS.

"In the face, however, of your order of 23rd February, 1912, order XVI, rule 33, of Civil Procedure Code, and taxing officer's ruling of 27th February, 1912, in S. A. No. 680 of 1911, where a part of the property was exempted in the decree, I do not agree.

"But the matter is one of general importance, and under section 5 of the Court Fees Act, I beg to refer the matter."

The following decision was given by the Taxing Judge.

TUDBALL, J.:—This case is clearly distinguishable from the case in F. A. No. 197 of 1912. Here various properties have been held separately liable for separate sums of money. The present appellants are transferees of two parts of property which have been held liable for specific sums of money. If they succeed in their appeal it is only those properties which will be released from the operation of the decree and it is only these sums which the decree-holder will lose. The rest of the decree-holder's decree for various other sums and for various other properties will still hold good even if the appellants' appeal succeeds. The correct stamp on this appeal will be Rs. 365. I allow one fortnight to make good the deficiency.

Order accordingly.

1912,
November, 25.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

BALDEO SINGH AND ANOTHER (PLAINTIFFS) v. KALKA PRASAD AND ANOTHER
(DEFENDANTS)*

Act No. VII of 1870 (Court Fees Act), section 7, clause IX—Suit for sale on a mortgage—Court fee payable in appeal—Value of the subject matter—Amount declared due on date fixed for payment.

A decree for sale on a mortgage declared that on the date fixed for payment a specified sum would be due from the mortgagor, which included interest *pendente lite*.

Held that the court fee payable in appeal from such decree was to be assessed, not on the amount claimed in the suit but upon the amount with interest *pendente lite* found due by the court of first instance at the date fixed for payment.

THE question in this case was as to the amount upon which the court fee is payable on a memorandum of appeal against a decree awarding mortgage money with interest *pendente lite* to date

*Second Appeal No. 251 of 1912 from a decree of E. O. Allen, District Judge of Mainpuri, dated the 21st of December, 1911, reversing a decree of Pratap Singh, Additional Subordinate Judge of Etawah, dated the 10th of July, 1911.

of payment and declaring the amount so awarded. The following extract from the office report gives the material facts.

"The plaintiffs brought a suit for recovery of Rs. 1,191-11-6 on account of principal and interest calculated up to the date of suit on foot of a mortgage, dated the 7th December, 1885, executed by the ancestor of the defendants in favour of one of the plaintiffs and ancestors of the other plaintiffs.

"The court of first instance decreed the plaintiffs' claim with future interest till the expiry of six months from the date of decree at the bond rate and allowed no interest thereafter. A decree for sale under order XXXIV, rule 4, of the Code of Civil Procedure was accordingly drawn up which awarded to the plaintiffs a sum of Rs. 1,487-7-6 composed of the following items.

Rs. 1,191-11-6 amount claimed.

Rs. 129-12-0 *pendente lite* interest.

Rs. 166 costs of the suit.

Total Rs. 1,487-7-6.

"Against the said decree the defendants preferred an appeal to the lower appellate court valuing it at Rs. 1,191-11-6, the amount originally claimed by the plaintiffs, and paying a court fee of Rs. 85, as was paid by the plaintiffs on the plaint, and praying for a reversal of the decree of the court of first instance. The only ground taken in the memorandum of appeal was to the effect:—"It is fully proved from the evidence and probabilities that the consideration of the bond in suit has been paid off. The lower court is not right in its finding to the contrary." The lower appellate court allowed the appeal and dismissed the plaintiffs' suit. Hence the plaintiffs have preferred this second appeal.

"According to the long established practice of this Court I reported on 18th June, 1912, that the proper valuation of the appeal inclusive of *pendente lite* interest was Rs. 1,321-6-6 on which a court fee of Rs. 95 was payable, and that a court fee of Rs. 85 having been paid there was therefore a deficiency of Rs. 10 due by the defendants for the lower appellate court. The report was initialled by the learned vakil for the defendants respondents on the 20th June, 1912. He did not dispute the accuracy of the report within three weeks thereafter under rule 10,

1912

 BALDEO
SINGH
v.
KALKA
PRASAD.

1912

BALDEO
SINGH
v.
KALKA
PRASAD.

chapter III. The report was laid before the Hon'ble Judge receiving applications by order of the taxing officer. The Hon'ble Judge ordered the matter to be laid before the taxing officer who after referring the matter to the learned counsel, and consulting the Hon'ble Taxing Judge, to the best of my recollection, passed the following order on the 22nd July, 1912. 'It is not open to the learned vakil to dispute the accuracy of the office report now. He should have objected within three weeks of the 20th June, 1912. He is time-barred by rule 10, chapter III, High Court Rules.'

"On the matter coming on again before the Hon'ble Judge receiving applications on 6th August, 1912, the report was disputed a second time, and it was directed that the matter should be referred to the Bench hearing the appeal.

"In spite of the order of the taxing officer with reference to the Hon'ble Court's Rules quoted above, it is, I respectfully submit, expedient that the question of *pendente lite* interest should be decided once for all as there are several other similar objections raised by the learned vakils in other cases and our present taxing officer has been pleased to order that they should be kept in abeyance pending orders of the Hon'ble Court in this particular case."

The taxing officer thereupon recorded as follows:—"It is important that a final decision should be reached on the questions raised by the taxing clerk. I am in entire agreement with the decisions of the previous taxing officers Messrs. Hose and Burkitt."

Babu *Sital Prasad Ghose* for the respondent.

The words "*the amount claimed*" in section 7 of the Court Fees Act mean, the specific amount claimed in the plaint, that is, the amount of principal and interest up to the date of the suit. There being no provision in the Act for paying court fees upon interest *pendente lite*, upon the analogy of the provision of section 11 of the Court Fees Act relating to mesne profits, it follows that the words "subject matter in dispute" in article 1, schedule 1 of the Act must mean either the whole or a portion of the "amount claimed" which was the only thing upon which the parties joined issue. In the present case the appellants in the lower

1912

BALDEO
SINGH
v.
KALKA
PRASAD.

appellate court did not challenge the adjudication of the court of first instance with regard to interest *pendente lite* under section 34 of the Code of Civil Procedure. Therefore no question of such interest ever formed "the subject matter in dispute in appeal" to that court.

The Hon'ble Dr. *Sundar Lal*, for the appellant, was not called on to reply.

TUDBALL and MUHAMMAD RAFIQ, J. J.:—This suit was one for sale on the basis of a mortgage. The plaintiffs claimed a certain sum as principal with interest up to the date of institution together with *pendente lite* and future interest and in default of payment, asked for sale of the property. The main defence was that the debt had been satisfied. The first court held in favour of the plaintiffs and passed a decree, which is worded as follows:—

"This suit coming on this 10th of July 1911, it is hereby declared that the amount due to the plaintiffs on account of principal, interest and costs, calculated up to the 9th day of January, 1912, is Rs. 1,487-7-6 and it is decreed as follows. No order is passed as to future interest.

(1) That if the defendant pays into court the amount so declared due on or before the said 9th day of January, 1912, the plaintiff shall deliver up to the defendant or to such person as he appoints, all documents in his possession or power relating to the property and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him.

(2) That, if such payment is not made on or before the said day of 9th January, 1912, the mortgaged property or a sufficient part thereof, be sold, and that the proceeds of the sale, &c."

From this decree the defendants appealed, and the sole ground of appeal was that it had been fully proved by evidence that the consideration of the bond had been paid off. They valued the appeal at Rs. 1,191-11-6, the amount of the principal, plus interest up to the date of the institution of the suit, as claimed by the plaintiffs, and they paid court fees accordingly. The lower appellate court held in their favour and dismissed the suit on a preliminary point. The plaintiffs have come up here on appeal. The taxing officer has reported that the defendants on their

1912

BALDEO
SINGH
v.
KALEA
PRASAD.

memorandum of appeal to the lower appellate court ought to have paid court fees on Rs. 1,321-7-6, the amount decreed against them by the court of first instance, which included interest subsequent to the date of institution. The court fee payable by the defendants in the lower appellate court is an *ad valorem* fee according to the amount or value of the subject matter in dispute in appeal. In view of the wording of the decree granted by the court of first instance it is quite clear that the amount or value of the subject matter in dispute is Rs. 1,321-7-6 (exclusive of costs) which the defendants had been ordered to pay on or before the 9th of January, 1912. It may be that the decree is not properly drawn up, but we cannot go behind the decree in deciding this matter. It is quite clear that as the decree stood it imposed on the defendants a liability to pay a sum of Rs. 1,321-7-6 on a fixed date and by the appeal they sought to set aside that liability. An argument has been strongly pressed upon us that in the circumstances of the present case the subject matter of the appeal is the same as the subject matter of the suit, *i.e.* the value of the plaintiff's claim. In our opinion, the decree being as it is, there is no force in this contention. The value of the subject matter of the appeal before the court below is as we have stated above. The defendants must make good the deficiency as reported by the taxing officer.

Order accordingly.

1912,
November, 27.

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

SAIYID ALI (PLAINTIFF) v. ALI JAN (PRINCIPAL DEFENDANT) AND
SAJJAD HUSAIN AND OTHERS (*Pro forma* DEFENDANTS).*

*Civil Procedure Code (1908), section 92 (i) — Procedure — Muhammadan law —
Waqf — Trust for a public purpose of a religious or charitable nature.*

Where a trust is a trust created for a public purpose of a religious or charitable nature (in this case a waqf under the Muhammadan law) no suit can be maintained for the removal of a duly appointed trustee, save in conformity with the provisions of section 92, sub-section (1), of the Code of Civil Procedure.

The facts of this case were as follows:—

One Sahib Ali erected a mosque and an *Imambara* at Jaunpur. After his death his wife Bikani Bibi became owner, and in 1856 she executed a deed of endowment with respect to this

* First Appeal No. 119 of 1911 from a decree of Keshab Deo, Subordinate Judge of Jaunpur, dated the 16th of January, 1911.