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The defendants appealed.

Babu *Benoy Kumar Mukerji*, for the appellants.

The respondents were not called on to defend the appeal.

RICHARDS, C. J. and BANERJI, J.—We think that the view taken by the learned Judge of this Court was correct and we dismiss the appeal.

*Appeal dismissed.*

## FULL BENCH.

1913  
November, 8.

*Before Justice Sir Pramada Charan Banerji, Mr. Justice Tudball and Mr. Justice Piggott.*

RAGHUBIR PRASAD AND OTHERS (DEFENDANTS) v. SHANKAR BAKHSI SINGH (PLAINTIFF.)\*

*Act No. VII of 1870 (Court Fees Act), section 7 (ix) ; schedule I, article (1) —Suit for redemption or foreclosure of a mortgage—Appeal—Court fee.*

The criterion laid down in section 7 (ix) of the Court Fees Act, 1879, for determining the court fee payable in respect of a suit for redemption or foreclosure of a mortgage does not apply to the appeal in such a suit.

In the case of appeals or cross objections in suits for redemption or foreclosure, in all cases in which the amount declared by the court to be due at the date of the decree can be ascertained by reference to the judgement and the decree, it is that amount at which the appeal or cross objections should be valued, and future interest should not be taken into account.

The rule in *Baldeo Singh v. Kalka Prasad* (1) modified.

THE question raised in this appeal, so far as the present report is concerned, was as to the proper amount of the court fee payable in respect of cross objections filed in an appeal from the decree in a suit for foreclosure of a mortgage. The material facts appear from the following office report :

The plaintiff in this case claimed to recover Rs. 1,830 due on foot of mortgage, dated the 28th of July, 1880, *plus* costs of the suit and *pendente lite* and future interest at Rs. 3-2-0 per cent. per mensem, or in the alternative to have the mortgaged property foreclosed

A court fee of Rs. 11-4-0 was paid on the plaint on Rs. 150, the principal amount of mortgage.

At the trial of the suit the court of first instance held that there was a prior mortgage subsisting on the property, and decreed

\*Stamp Reference in Second Appeal No. 548 of 1912.

(1) (1913) I. L. R., 95 All., 94.

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the plaintiff's claim subject to his paying Rs. 967, being the proportionate *quota* of the prior mortgage, dated the 11th of November, 1875, and additional court fee thereon, and declared that on the said amount being paid, the plaintiff was entitled to recover the said amount *plus* Rs. 632-12-11, out of Rs. 1,830 claimed, together with future interest and proportionate costs. The Court passed a decree for sale under order XXXIV, rule 4, whereby the plaintiff was declared entitled to recover Rs. 1,955-3-8, inclusive of costs, i.e., Rs. 967, the amount of prior mortgage, to be paid by the plaintiff as aforesaid, and Rs. 988-3-8 on foot of the plaintiff's mortgage, inclusive of *pendente lite* interest.

Against the said decree the plaintiff preferred an appeal to the lower appellate court in so far as it ordered payment of the amount of the prior mortgage, valuing it at Rs. 967, and paying a court fee of Rs. 85 thereon. The defendants filed cross objections to the decree under order XLI, rule 22. The objections were valued at Rs. 632-12-11, and a court fee of Rs. 11-4-0 was paid thereon, on the principal amount of the mortgage, i.e., Rs. 150. The decree appealed against was a decree for sale, passed under order XXXIV, rule 4, and the defendants appellants are liable to pay an *ad valorem* court fee on the amount of the decree, inclusive of interest. This being so, a court fee of Rs. 74-4-0 was payable by the defendants appellants on Rs. 988-3-8, which should be the proper valuation of the cross objections filed by them in the lower appellate court. A court fee of Rs. 11-4-0 having been paid, there is, therefore, a deficiency of Rs. 63 to be made good by the defendants appellants on the objections filed in the lower appellate court.

The case having come up before a Division Bench the following order was made :—

GRIFFIN and CHAMBER, JJ:—The Taxing Officer is of opinion that there was a deficiency of Rs. 63 in the court fee paid by the defendants on the memorandum of objections, presented by them to the lower appellate court. The defendants do not accept his view. The case is not covered by section 5 of the Court Fees Act, therefore the decision of the Taxing Officer is not final, and the question must be decided by the Bench which hears the appeal.

The facts are as follows :—The suit was for the recovery of Rs. 150 principal, and Rs. 1,680 interest, total Rs. 1,830, on foot

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of a simple mortgage. The Subordinate Judge held that the plaintiff was entitled to Rs. 632-12-11, on account of principal and interest at the date of the suit, and he passed a decree for that amount with interest for six months at the contract rate, and thereafter till realization at the rate of six per cent. per annum. His decree, dated the 29th of April, 1911, which was prepared in the usual form, declared that Rs. 988-3-8 would be due to the plaintiff, on the 19th of October, 1911, on account of principal and interest on the mortgage in suit. We omit the rest of the decree, as it is immaterial at present. On the 2nd of June, 1911, the plaintiff appealed on a point which does not now concern us, and on the 25th of July, 1911, the defendants filed objections under order XLI, rule 22, asking that the suit should be dismissed. They paid a court fee upon Rs. 150, the amount of the principal sum secured by the mortgage. The fee paid was certainly insufficient, but the question is on what amount it should have been paid. The Taxing Officer of this Court holds that they should have paid court fees on Rs. 988-3-8. His view is supported by the decision of Tudball and Rafiq, JJ. in *Baldeo Singh v. Kalia Prasad* (1), and we are informed, by decisions of former Taxing Judges of this Court. As at present advised we are unable to accept these decisions. According to article 1 of schedule I to the Court Fees Act, the court fee payable on objections, filed under order XLI, rule 22, is to be calculated according to the amount or value of the subject-matter in dispute. There appears to us to be no justification for the hard and fast rule, which seems to have obtained in this Court, that a mortgagor who, in a memorandum of appeal or objections, contends that a preliminary decree for sale, passed against him, should be set aside *in toto*, should pay court fees on the amount declared to be due on the date fixed in the decree. An appeal or objection may be, and often is, filed before the day fixed in the decree. That was the case here. The amount payable by the defendants for redemption of the mortgage on the day when they filed their objections was less than the amount declared in the decree. A mortgagor is entitled to redeem his property before the day fixed in the decree, and if he does so, he is not bound to pay the amount declared in the decree. He may redeem on payment

(1) (1913) I.L.R., 35 All., 94.

of the principal and interest due on the day on which he pays the money. On the other hand, a court passing a preliminary decree for sale is not bound to allow six months for payment. It may, and often does, allow a much shorter time, and in such a case the appeal or the objections may be filed after the date fixed in the decree. In neither of the cases which we have instanced can there, in our opinion, be any justification for requiring court fees to be paid on the amount declared in the decree. The rule hitherto observed, is, no doubt a convenient one for the Taxing Officer's department, but it appears to rest upon no principle, and we understand that it has been challenged on many occasions and that it does not obtain in any other High Court. The High Court of Bombay appears to disregard all interest accruing after the date of a suit on a mortgage so far as court fees are concerned. Where a mortgagor by appeal or objection challenges part only of a preliminary decree for sale, the practice is to require him to pay court fees on the amount which he says should be struck out of the decree, and in ascertaining the value of the subject matter of the appeal no attention is paid to the date fixed in the preliminary decree.

We think that the present state of affairs is unsatisfactory and we direct that this case be laid before the Chief Justice in order that he may consider the propriety of appointing a larger Bench to hear this appeal.

The case coming on before a Full Bench—

Munshi *Govind Prasad*, for the appellant, submitted that it was the intention of the Legislature that in all suits for redemption or foreclosure court fees should be paid on the sum secured by the mortgage deed. Therefore in this appeal the plaintiff should be allowed to pay court fees on Rs. 150, the sum secured. The defendant denied the plaintiff's right to redeem and the issue was, whether the plaintiff had a right to redeem, and is liable to pay court fees only on the sum secured by the mortgage deed. The amount which at the date of the decree the plaintiff was held to be entitled to was the sum of Rs. 632-11-11, which the Court found to be due to him upon his mortgage. The additional sum mentioned in the decree as payable by the defendant included interest for a period subsequent to the date of the decree.

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Mr. W. Wallach (for the Government), submitted that it was true that in a suit for redemption or foreclosure court fee was payable on the principal amount secured by the mortgage deed. But that only applied to the suit which was instituted in the court of first instance. In the case of an appeal, the court fee payable was an 'ad valorem' court fee on the subject matter of the appeal, (Schedule I, article I, of the Court Fees Act.) When one appeals; it does not matter if the lower court was right or wrong or what the issue was; he attacks the decree of the lower court and, therefore, he must pay court fees on the amount decreed by that court; *Baldeo Singh v. Kalka Prasad* (1).

BANERJI, TUDBALL and PIGGOTT JJ:—This appeal arises out of a suit for foreclosure of a mortgage, of the 28th of July, 1880. There were two sets of defendants, namely, the legal representative of the mortgagors and persons who had purchased a part of the mortgaged property. The purchasers are the appellants before us. In the court below they denied the mortgage on which the plaintiff's claim was based and they asserted that they had discharged an earlier mortgage and were entitled, if the plaintiff's mortgage was genuine, to hold up the payment made by them in discharge of the prior mortgage as a shield against the plaintiff's claim. The court of first instance found the plaintiff's mortgage to be genuine and Rs.632-12-11 to be due to the plaintiff upon that mortgage at the date of the decree. It accordingly made a decree directing the plaintiff to pay to the present appellants Rs. 967, on account of the prior mortgage discharged by them, and for sale of the mortgaged property in the possession of those defendants for the realization of the said amount, as also the amount found to be due on the plaintiff's own mortgage. The plaintiff appealed to the court below from this decree and the appellants before us, who were defendants to the suit, filed cross objections, under order XLI, rule 22, of the Civil Procedure Code, disputing the genuineness of the plaintiff's mortgage, and his right to maintain the suit. They valued their cross objections at Rs. 632-12-11, but paid court fees upon Rs. 150, the principal amount of the mortgage on which the plaintiff's suit was based. The taxing officer of this Court submitted a report to the effect that the defendants ought to have valued their objections in

the court below at Rs. 988-3-8, which included interest after the date of the decree of the court of first instance, and up to the date fixed for payment. Objections having been taken to this report, the matter came before a Division Bench, and on the recommendation of that Bench the case has been laid before us for disposal of the question whether the appellants were liable to pay further court fee on their cross objections in the court below? We are clearly of opinion that the appellants were bound to pay court fees upon a larger sum than Rs. 150, the principal amount of the plaintiff's mortgage. It is true that in a suit for redemption or foreclosure the court fee is payable upon the principal amount secured by the mortgage. But that applies to the suit which is instituted in the court of first instance. In the case of an appeal the court fee payable is an *ad valorem* court fee on the value of the subject matter of the appeal—See schedule I, article 1, of the Court Fees Act. We have, therefore, to consider what was the subject matter of the cross objections in the court below and what was the value of that subject matter. There can be no doubt that the subject matter of the cross objections was the amount which the court by its decree declared that the plaintiff was entitled to recover, and not the principal amount of the mortgage. The amount which at the date of the decree the plaintiff was held to be entitled to is the sum of Rs. 632-12-11, which the court found to be due to him upon his mortgage. The additional sum mentioned in the decree as payable by the defendants includes interest for a period subsequent to the date of the decree. In valuing their cross objections the defendants were questioning the propriety of the decree in so far as it awarded to the plaintiff Rs. 632-12-11, on the date of the decree. The interest for the subsequent period was a necessary addition to the amount so awarded, in accordance with the provisions of the Code of Civil Procedure, order XXXIV. We are of opinion that in all cases in which the amount declared by the court to be due at the date of the decree can be ascertained by reference to the judgement and the decree, it is that amount at which the appeal or cross objections should be valued, and future interest should not be taken into account. The wording of the decree in this case is no doubt defective in this respect, but its

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intention is clearly manifest if we refer to the judgement. The amount, therefore, at which the appellants ought to have valued their cross objections, as they did in the court below, was Rs. 632-12-11, and court fees ought to have been paid upon that amount. This would come to Rs 48, and as Rs. 11-4-0 was paid, there was a deficiency of Rs. 36-12-0. We allow the appellants two weeks to make good this deficiency.

## APPELLATE CIVIL.

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November, 22.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

MUHAMMAD ALI KHAN AND OTHERS (PLAINTIFFS) v. JAS RAM AND OTHERS (DEFENDANTS)\*

*Civil Procedure Code (1908), order XLI, rule 10—Appeal—Vakalatnama—Appeal presented by vakil whose vakalatnama was in fact defective.*

Where, by an oversight, the name of a vakil<sup>†</sup> who had filed an appeal was omitted from the body of his vakalatnama, it was held, on objection taken by the respondents, that the document was invalid and the appeal consequently had not been properly presented. The force of this objection to the validity of the appeal was not lessened by the fact that it was raised at a very late stage of the proceedings, in fact after two orders of remand had been made by the court of first appeal.

THIS was an appeal under section 10 of the Letters Patent from the judgement of a single Judge of the Court. The facts of the case appear from the judgement under appeal, which was as follows :—

“ The plaintiffs appellants brought a suit in the court of the Munsif of Bulandshahr for possession of certain *abadi* land. The claim was decided against them and an appeal was filed on their behalf in the court of the District Judge of Aligarh on the 10th of July, 1911. The appeal was filed by one Munshi Abdul Salam Khan, vakil, who at the same time filed his vakalatnama also. The case was heard by the Additional Judge who remanded it to the lower court for the trial of certain issues. The remand order was made on the 4th of August, 1911. The Munsif returned the case with his findings on the 28th of November, 1911. The parties filed cross objections on the 13th and 19th of December, 1911. The case was again remanded on the 22nd of January, 1912. The Munsif submitted his second finding on the 2nd of March, 1912. On the 13th of April, 1912, the respondent filed objections to the finding submitted by the Munsif. Munshi Abdul Salam Khan died prior to the submission of the first finding by the learned Munsif. The appeal was heard on the 1st of July, 1912, when a preliminary objection was taken to the effect that the memorandum of appeal had not

\* Appeal No. 60 of 1913 under section 10 of the Letters Patent.