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order that it may be appealable under order XLIII, rule 1 (e), and without amounting to a decree. The mere fact that a decree has been passed subsequently would not take away the right of appeal from the order which is conferred by the Statute.

PIGGOTT and WALSH, JJ. :—The appeal before us purports to be a first appeal from an order passed under rule 4 of order X of the Code of Civil Procedure. A preliminary objection is taken that no appeal lies. Under order XLIII, rule 1 (e), an appeal lies against an order under rule 4 of order X pronouncing judgement against a party. Whether an order passed by a court which is purporting to deal with one of the parties under the provisions of order X, rule 4, of the Code of Civil Procedure does or does not amount to pronouncing judgement against that party, must depend on the particular facts of each case, and on what actually took place. We have examined the record, and we are quite satisfied that it cannot be said that the court below pronounced judgement against the present defendant appellant within the meaning of that rule. That court seems to have gone on and tried the suit on the merits. The appeal will lie against the final decree, and in the course of that appeal, if this particular defendant has any grievance against the proceedings of the court below as affecting the merits of its decision, he may raise the point in his memorandum of appeal. We accept the preliminary objection and dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Tudball.

LALTA PRASAD AND OTHERS (DEFENDANTS) v. SHEORAJ SINGH AND OTHERS (PLAINTIFFS), IN THE MATTER OF LALTA PRASAD AND OTHERS.*

Suit for redemption of a mortgage—Preliminary decree passed in two parts—

Appeal—Court fee.

The court of first instance in a suit for redemption of a mortgage passed in effect two preliminary decrees. It first passed a decree declaring the plaintiffs' right to redeem, which was denied by the defendants, against which the defendants filed an appeal, and then, whilst the appeal was pending, a second preliminary decree deciding the amount for which redemption might take place. Against that decree also the defendants appealed. *Held* that the two appeals were not to be regarded as separate appeals for the purpose of assessing the court fee, but should be counted as one.

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IN a suit for redemption of a mortgage the defendants challenged the plaintiffs' right to redeem as well as the correctness of the amount due. The court found that the plaintiffs had a right to redeem and thereupon passed a decree declaring such right and directing accounts to be taken. The defendants mortgagees appealed to the High Court from that decree, and paid full court fees on the appeal. Accounts having, in course of time, been taken as directed, the lower court passed a preliminary decree for redemption on payment of Rs. 37,000 odd by the plaintiffs into court; the decree further directed that the money, if so paid, would be at the disposal of certain sub-mortgagees who were parties to the suit, and the amount due to whom from the mortgagees the court found to be Rs. 85,000 odd. The defendants mortgagees filed a fresh appeal from this decree. The relief sought in this appeal was the modification of the decree by the substitution of Rs. 61,000 for the sum of Rs. 37,000 and by cancellation of the order relating to the payment to the sub-mortgagees. The appeal was valued at Rs. 85,000 and the court fee paid on it was Rs. 2. Upon a report by the Taxing Officer to the effect that the court fee payable was Rs. 1,475 the matter was laid before the Taxing Judge.

Babu *Preo Nath Banerji*, (with him the Hon'ble Dr. *Tej Bahadur Sapru*), for the appellants:—

Two appeals had to be filed, by reason of the incorrect procedure of the lower court, instead of what should have been a single appeal from a single properly framed decree. Unfortunately the lower court passed the decree piecemeal, the result being *two* preliminary decrees in place of the one preliminary decree prescribed by order XXXIV, rule 7, of the Code of Civil Procedure. There is no warrant for the procedure adopted by the lower court in embodying in the form of a decree its decision on the question of the plaintiffs' title to redeem; the court should have gone on to ascertain the amount due and then, and not till then, have passed its decree. As, however, the court did pass two decrees, the appellants were compelled to file two appeals, which virtually constitute but one appeal. Full court fees were paid on the appeal which was first filed, and the appellants ought not to be penalized, for no fault of theirs, to pay

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court fees twice over for the adjudication of the same thing in the same case. The total court fee, payable on the two appeals taken together, is the court fee on the principal amount of the mortgage or on the value of the subject-matter of the appeal, whichever might be the greater. The amount declared payable to the sub-mortgagees is not a criterion. The two appeals should now be ordered to be consolidated together or otherwise deemed to be one, and the court fee paid on the first should be taken into account in calculating the fee payable on the second.

TUDBALL, J. :—The facts of this case may be briefly stated as follows. The plaintiff respondent brought a suit for redemption of a mortgage. The suit was resisted by the present appellant, who denied the plaintiff's right to redeem and also challenged the amount on which redemption was sought. The court below held that the plaintiff had the right to redeem and directed that the accounts be taken. The defendant appealed against that decree. He paid the necessary court fees and the appeal was admitted. The court below has now gone into the accounts and has found a sum of about Rs. 37,000 to be due. The defendant has again appealed and he claims a sum of about Rs. 61,000. He has filed his appeal on a two-rupee stamp. The office reports that the court fee payable is the *ad valorem* fee on the value of the appeal. The only argument before me is that the appellant has had to appeal once against the preliminary decree, that it was the fault of the court below in passing this preliminary decree in two parts and that he ought not to be penalized thereby and made to pay court fees a second time. The first appeal filed is now pending, and in my opinion the two appeals should be considered as one and full amount of court fee realized as if the two appeals were one appeal. The amount which the court below has found to be due to the sub-mortgagees is a sum of Rs. 85,322. The court has ordered that the amount due from the mortgagor shall be devoted first of all to the satisfaction of the sub-mortgage. It is obvious that if the sum found due to the sub-mortgagees has been correctly ascertained the amount payable by the mortgagor, even if the appeal succeeds as to the amount, will not satisfy the sub-mortgage. Therefore in calculating the value of the appeal the sum which has been found to be due to the sub-mortgagees must not

be taken into consideration. The office will calculate the fee payable on the appeal as if the two appeals were one. The sum already-paid will be deducted and the balance only will be recoverable. Let the office submit a report on this basis. When the amount is ascertained I will fix the time within which the deficiency should be made good.

By my order, dated the 15th of February, 1917, this appeal and earlier appeal (F. A. No. 364 of 1915) have been consolidated into one appeal. The valuation of the appeal to this Court must be taken to be Rs. 61,000, and on that valuation a court fee of Rs. 1,250 must be paid. A court fee of Rs. 1,035 having been paid in the earlier appeal, and of Rs. 2 on this appeal, total Rs. 1,037, there is a deficiency of Rs. 213, payable by the defendants appellants in this Court. Let the deficiency be received, if paid within six weeks.

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

ABDUL HASAN AND OTHERS (DEFENDANTS) v. MAKHDUM BAKHSH AND OTHERS (PLAINTIFFS) AND MOHAN KOEBI AND ANOTHER (DEFENDANTS).^{*}
Act (Local) No. II of 1901 (Agra Tenancy Act), section 79—Fixed rate holding—Purchase of holding at auction sale in execution of a decree—Formal possession obtained—Suit for physical possession—Jurisdiction.

The purchasers of a fixed-rate holding at an auction sale held in pursuance of a decree on a mortgage applied for and obtained formal possession of the holding; the zamindar, however, refused to allow them to cultivate, and in consequence thereof they instituted, in a Civil Court, a suit for possession of the holding.

Held that the position of the plaintiffs was that of tenants who had been wrongfully ejected by the zamindar, to which section 79 of the Agra Tenancy Act, 1901, applied, and that no suit would lie in a Civil Court. *Collector of Benares v. Shyam Das* (1) distinguished.

THE facts of the case were as follows :—

In execution of a decree for sale upon a mortgage a certain fixed rate tenure was sold by auction and was purchased by the mortgagees. The land was at that time in possession of the zamindar who had ejected the tenant in execution of a decree for

^{*} Second Appeal No. 1848 of 1915, from a decree of Muhammad Shafi, Additional Subordinate Judge of Jaunpur, dated the 30th of June, 1915, confirming a decree of Rup Kishan Agha, City Munsif of Jaunpur, dated the 28th of April, 1914.