

MISCELLANEOUS CIVIL.

Before Mr. Justice King.

KUNDAN LAL AND ANOTHER (DEFENDANTS) v. DULI
CHAND AND OTHERS (PLAINTIFFS).*

1931
October, 28.

Court Fees Act (VII of 1870), section 7 (iv) (c) and schedule II, article 17(iii)—Declaratory decree prayed in appeal—Suit for sale on a mortgage—Appeal by a defendant, adjudged to be a subsequent mortgagee, praying for declaration of his priority—Ad valorem court fee payable.

Certain defendants were impleaded, as being subsequent mortgagees, in a suit for sale on a mortgage. They claimed to be prior mortgagees, but the trial court found that they were subsequent mortgagees and decreed the suit against them as such. They appealed, and the relief prayed for in the appeal was a declaration that they were prior mortgagees. The appeal was valued at Rs. 1,600 and the court fee paid was Rs. 10.

Held that article 17(iii) of schedule II of the Court Fees Act did not apply to the case, as the suit was not one to obtain a declaratory decree but was a suit for sale on a mortgage, out of which the appeal had arisen.

The substance of the relief sought, and not merely its form, must be considered. The appellants obviously sought to get the decree of the trial court modified in their favour so as to get the property sold subject to their mortgage. An *ad valorem* court fee was payable on Rs. 1,600, the value of the subject matter of the appeal.

Mr. H. C. Mukerji, for the appellants.

KING, J. :—This is a reference under section 5 of the Court Fees Act, 1870. The question is what is the proper court fee on a certain memorandum of appeal.

The appellants were impleaded as defendants in a suit for sale on a mortgage upon the allegation that they were subsequent mortgagees. They claimed to be prior mortgagees but the trial court found that they

1931

KUNDAN LAL
v.
DULI CHAND.

are subsequent mortgagees and decreed the plaintiff's suit against all the defendants.

The appellants appeal to this Court against the decree. The relief sought by the appeal is expressed as follows: "That the Hon'ble Court will be pleased to declare that the mortgage deeds held by Bhulla and Kundan are in effect prior to that of the plaintiff and allow the appeal with costs throughout." The appeal is valued at Rs. 1,600 but a court fee of rupees ten only has been paid. The Stamp Reporter objects that an *ad valorem* court fee is payable on the value of the subject matter in dispute in the appeal, namely Rs. 1,600, and there is therefore a deficiency of Rs. 95 in the court fee paid.

It is contended for the defendants appellants that they seek a mere declaration that they are prior mortgagees, and do not pray for any consequential relief, and therefore the court fee of Rs. 10 is correct under article 17(iii) of schedule II.

I hold that the clause mentioned has no application to the facts of this case. That clause applies to a memorandum of appeal *in a suit* to obtain a declaratory decree where no consequential relief is prayed. In the present case we have a memorandum of appeal in a suit of a totally different nature, namely a suit for sale on a mortgage. If the appellants' contention were accepted, I think it would be always possible for a defendant, against whom a decree has been passed, to appeal against the decree on payment of a fixed court fee of Rs. 10, by the simple device of asking for a mere declaration that the decree is erroneous and not binding upon him. Supposing a money decree for Rs. 10,000 is passed against a defendant. He might in his appeal ask for a mere declaration that the decree is erroneous and that he is not liable to pay anything to the decree-holder, and might thus claim to file the appeal on a fixed court fee of Rs. 10 only.

Whatever may be the view of the appellate court regarding the form in which the relief sought by the appeal has been framed, I think it is clear that article 17(iii) of schedule II has no direct application, and I see no reason for applying the principle of that clause by way of analogy.

The appellants obviously seek to get the decree of the trial court modified in their favour so as to get the property sold subject to their mortgage for which they claim priority. I think the substance of the relief sought, and not merely its form, must be considered. Their interest in the property is valued at Rs. 1,600 and this must be the value of the subject matter in dispute in the appeal.

The appellants rely on *Rup Chand v. Fateh Chand* (1), but that ruling is clearly distinguishable upon the facts. They also purport to rely on *Makund Ram v. Ruqaiya Khatun* (2), but the decision is against them rather than in their favour. The appellant asked the court to grant a declaration and to modify the trial court's decree accordingly. It was held that the case was governed by section 7(iv) (c) of the Court Fees Act and the court fee was payable *ad valorem* on the appellant's valuation of the relief sought. The view that the appellants must pay an *ad valorem* court fee on the value of the subject matter in dispute in the appeal finds support in *Moti Begam v. Har Prasad* (3); *Premsookh Das v. Shah Gopi Saran* (4) and *Venkappa v. Narasimha* (5).

I hold that the appellants must pay an *ad valorem* court fee on Rs. 1,600 and make good the deficiency of Rs. 95. This sum is exclusive of the court fee payable in respect of ground No. 3, the liability for which is not contested.

(1) (1911) 8 A.L.J., 821.

(2) [1931] A.L.J., 150.

(3) (1912) 16 A.L.J., 81.

(4) (1919) 4 Pat., L.J., 328.

(5) (1887) I.L.R., 10 Mad., 187.