

of the position of the parties, in those circumstances, was that on the one hand the mortgagee is entitled to enforce his mortgage deed against the persons who executed it, and the latter were, in their turn, entitled to obtain contribution from their co-heirs.

For the reasons explained above I agree to the order which my learned brother proposes to pass.

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MISCELLANEOUS CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Allsop

RAM PRASAD (APPLICANT) v. TRILOKI NATH
(OPPOSITE PARTY)*

1937
October, 7

U. P. Agriculturists' Relief Act (Local Act XXVII of 1934), section 5(2)—Order granting or refusing instalments—Appeal—Court fee—Court Fees Act (VII of 1870), schedule II, article 11—"Order not having the force of a decree".

An order passed under section 5(1) of the U. P. Agriculturists' Relief Act, granting or refusing to grant instalments, is not an order having the force of a decree; accordingly, the court fee payable on an appeal under section 5(2) from such an order is eight annas, under article 11 of schedule II of the Court Fees Act.

The parties were not represented.

NIAMAT-ULLAH, J.:—This is a reference by the learned District Judge of Cawnpore, and though it does not purport to be under order XLVI, rule 1 of the Code of Civil Procedure we treat it as such, as it raises the question of court fee in an appeal which was pending when the reference was made. The appeal had been filed by a judgment-debtor under section 5(2) of the Agriculturists' Relief Act. He paid the court fee of annas eight, under schedule II, article 11 of the Court Fees Act, under which a court fee of eight annas is to be paid on an appeal from an order not having the force of a decree. It was contended before the learned District

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Judge by the Stamp Inspector that the order in question had the force of a decree and therefore *ad valorem* court fee was payable.

Niamal-
u J.

Section 5 of the U. P. Agriculturists' Relief Act entitles the judgment-debtor to apply to the court passing a decree for money or a preliminary decree for sale or foreclosure that the same be converted into a decree for payment by instalments. It goes on to provide that if the court refuses to grant instalments or grants a number or period of instalments which the judgment-debtor considers inadequate, the order of the court shall be appealable to the court to which the court passing the order is immediately subordinate. It seems to me that an order under section 5(1) of the U. P. Agriculturists' Relief Act has not by itself the force of a decree. If it converts a decree for money into a decree for money payable by instalments and the judgment-debtor complains in appeal that inadequate relief has been given to him in that respect, he is appealing not from the amended decree but from the order itself under section 5(2). To have the force of a decree an order must possess all the characteristics of a decree. The word "decree" has not been defined in the Court Fees Act or in the General Clauses Act; and it is safe to assume that that word has been used in the Court Fees Act in the sense in which it is used in the Civil Procedure Code, under which all the decrees are passed, and which defines it as meaning "the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit . . ."

An order under section 5 of the U. P. Agriculturists' Relief Act, if it converts a money decree into a decree for payment by instalments, does not contain "the formal expression of an adjudication", but it is in pursuance of that order that the decree is amended. It is the decree which is capable of execution, and not the order itself. The order, apart from the decree which it

amends, has not the force of a decree. The case is analogous to one in which an application for review is made and the court passes an order amending its decree on review. Order XLVII, rule 7 of the Code of Civil Procedure allows an appeal from an order granting a review where the court alters a decree. Such an order has not the force of a decree, though in pursuance thereof the decree is amended. An important test, in my opinion, is, where the relief granted in a particular case is such as can be given by execution, whether it is the order which can be executed or whether it is the decree which is amended in terms of it which alone can be executed. I have no doubt that an order under section 5(1) of the U. P. Agriculturists' Relief Act is not by its own force capable of execution. The decree-holder can recover his money, which has become payable by instalments, by executing the decree which has been corrected in pursuance of the order.

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*Nizam-
 ulah, J.*

An order under section 5(1) of the Agriculturists' Relief Act may well be considered to be supplemental to the judgment of the court, and were it not for section 5(2), which expressly allows an appeal from it, no appeal would have lain from it but from the amended decree, and in that case *ad valorem* court fee would have been payable on the subject-matter of the appeal.

Another reason for thinking that such an order has not the force of a decree is that it does not conclude the matter. The finality attaches to the decree, and not to the order preceding it. The essential feature of the decree, according to its definition, is that, so far as the court deciding the matter is concerned, it does the last act in determining the rights of the parties.

It may be said that this view can hold good where instalments are allowed by the court under section 5(1) and the question raised in appeal is whether inadequate relief has been granted; and that where the court refuses to act under section 5(1) the same considerations do not apply. But I think refusal to take action under section

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*Niamat-
 ullah, J.*

5(1) is an order passed in the suit, which is re-opened, and should be considered to be interlocutory. When an application is made under section 5 the court is bound to re-open the suit and will either vary the decree or refuse to do so. In either case the order is one passed in the suit itself and not apart from it. Since an appeal has been allowed from such an order by section 5(2), it should be considered to be an addition to the list of appealable orders given in order XLIII, rule 1 of the Code of Civil Procedure. Section 104 of the Code of Civil Procedure clearly covers an order of the kind contemplated by section 5 of the U. P. Agriculturists' Relief Act.

The order of reference does not show whether the appeal preferred by the judgment-debtor was from an order refusing to grant instalments or was one from an order granting inadequate relief in that respect. In either view I think the order has not the force of a decree, and the court fee of annas eight paid was sufficient.

ALLSOP, J.:—I agree.

APPELLATE CIVIL

1937
 October, 18

*Before Sir John Thom, Chief Justice, and Mr. Justice
 Niamat-ullah*

SHEODARSHAN LAL (DEFENDANT) v. BALMAKUND
 AND ANOTHER (PLAINTIFFS)*

Civil Procedure Code, section 11—Res judicata—Agra Tenancy Act (Local Act III of 1926), section 82—Suit for ejectment for illegal sub-letting—Question of proprietary right—Decision of such question by revenue court under the former Tenancy Acts whether res judicata in suit under present Tenancy Act—Agra Tenancy Act (Local Act II of 1901), section 199.

The plaintiff brought a suit under section 82 of the Agra Tenancy Act in the court of an Assistant Collector, first class,

*Appeal No. 28 of 1936, under section 10 of the Letters Patent.