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of this Order to an authority competent at the date of the passing of that law to exercise any powers or authorities, or discharge any functions, in any part of British India shall, where a corresponding new authority has been constituted by or under any part of the Government of India Act, 1935, for the time being in force, have effect until duly repealed or amended as if it were a reference to that new authority."

The argument of learned counsel was that, under this paragraph, for the purpose of the Government of India Act of 1935 the Encumbered Estates Act, although passed before that Act, should be considered as having been passed after that Act and that therefore any question which would arise on the interpretation of that Act would give rise to an appeal under section 205 to the Federal Court. We do not desire to express any opinion on the merits of this argument.

In the present case we consider that our decision on the point No. 1 is sufficient for the purpose of this case. Accordingly we allow this first appeal with costs and set aside the order of the 10th August, 1936, of the learned Civil Judge and direct that the execution should proceed in whatever court the decree-holder desires.

MISCELLANEOUS CIVIL

Before Mr. Justice Bennet

DEBI CHAND (APPLICANT) v. SECRETARY OF STATE FOR INDIA AND OTHERS (OPPOSITE PARTIES)*

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October, 17

Court Fees Act (VII of 1870), section 8; schedule II, article 17(iv)—U. P. Town Improvement Act (Local Act VIII of 1919), sections 57, 58—Award by Tribunal constituted under the Act—Is an order of a civil court—Appeal from award—Ad valorem court fee payable—"Set aside an award", meaning of.

The court fee payable on a memorandum of appeal against an award by a Tribunal constituted under the U. P. Town Improvement Act of 1919 comes under section 8 of the Court

*Stamp Reference in First Appeal No. 238 of 1934.

Fees Act and is an *ad valorem* fee on the difference between the amount awarded and the amount claimed by the appellant. Section 8 will apply whether the appellant is the person claiming a larger amount of compensation or whether the appellant is the Secretary of State for India claiming that he should pay a lesser amount than what has been awarded.

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Sections 57 and 58(a) of the U. P. Town Improvement Act, read with section 3(d) of the Land Acquisition Act, show that the Tribunal is a civil court; and the award of the Tribunal is the formal expression of its decision which, not amounting to a decree, is an "order" as defined in the Civil Procedure Code. Accordingly, section 8 of the Court Fees Act is applicable to an appeal from the award.

Article 17(iv) of the second schedule to the Court Fees Act does not apply to the appeal, because the article implies that there should be a suit and that before the plaint an award should have been given between the parties, and because the appeal was not one simply "to set aside an award"—which means that the award should be declared to be of no effect, the rights of the parties which the award had purported to settle remaining undecided—but was one claiming the remedy that a larger award be granted to him. The essential distinction between a case contemplated by article 17(iv) and the present appeal was that the article deals merely with a declaration whereas the remedy asked by the appellant was the obtaining of a sum of money by a decree.

Mr. *Bankey Behari*, for the appellant.

Mr. *S. K. Dar*, for the respondents.

BENNET, J.:—This is a reference by the Taxing Officer of the following question to me as Taxing Judge: "Is the court fee payable on a memorandum of appeal against an award by a tribunal, constituted under the U. P. Town Improvement Act of 1919, under section 8 of the Court Fees Act on the difference between the amount awarded and the amount claimed by the appellant, or is a fixed court fee payable?"

The matter has been fully argued by learned counsel for the appellant and various rulings have been laid before me. The grounds for the appellant are comprised in an application dated the 25th of October, 1937. The facts of the present case are that there was

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a decision of the Improvement Trust Tribunal at Cawnpore in regard to compensation to be paid to Debi Chand and Debi Chand has filed this first appeal before the High Court claiming Rs.1,00,000 more compensation than has been awarded to him. The appellant has paid a court fee of Rs.10 only and he claims that this amount is sufficient under the Court Fees Act, schedule II, article 17(iv) as the court fee on a memorandum of appeal to set aside an award. On the other hand the Taxing Officer and stamp reporter consider that the court fee should be *ad valorem* under section 8 of the Court Fees Act and that there is a deficiency of Rs.1,415. The contest is which of these two portions of the Court Fees Act should be applied. Taking first schedule II, article 17(iv), this prescribes a fee of Rs.10 for "plaint or memorandum of appeal in each of the following suits:—(iv) to set aside an award." Now the article in question implies that there should be a suit and there should be a plaint or memorandum of appeal and the plaint or memorandum of appeal should ask that an award should be set aside. This implies that before the plaint an award should have been given between the parties. Such an award would arise where the parties without reference to the court agree that some question as regards their legal rights should be settled by arbitration and an award is given by the arbitrators. One of the parties is then dissatisfied with the award and he files a suit in court asking for a declaration that the award should be set aside. If the trial court or the appellate court grants such a declaration the result is that there is no award and that the rights between the parties which the award had purported to settle remain undecided. Now the present case is not a proceeding of that nature. The appellant before the High Court does not ask that the award of the Tribunal should be set aside and that he should have no other relief. On the contrary what he asks for is that an award should be granted by this Court in appeal giving him an

amount of compensation which is Rs.1,00,000 greater than the compensation awarded by the court below. He therefore contemplates that as a result of the appeal there will be an award decreed by this Court. Such an appeal cannot be described as an appeal to set aside an award. The remedy of setting aside the decision of the lower court would only be a part of the remedy asked and there is the further remedy of granting a larger award. The present appeal therefore will not come under schedule II, article 17(iv). It may be noted that the essential distinction between that article and the present appeal is that the article deals merely with a declaration whereas the remedy asked by the appellant is the obtaining of a sum of money by a decree. The two matters are essentially different. This distinction has been pointed out by a ruling of a Bench of the Rangoon High Court in *Special Collector of Rangoon v. Ko Zi Na* (1) and the relevant passage is at page 284. Learned counsel relies on a decision of a learned single Judge of this Court, KING, J., which has not been reported and which is the case of *Secretary of State for India v. Ramji Das Bhargava* (2). In that case KING, J., did hold that an appeal against an award of a Tribunal under the U. P. Town Improvement Act would come under article 17 (iv) of the second schedule of the Court Fees Act and a fixed court fee of Rs.10 was sufficient. He did not consider the difficulties which I have just pointed out and apparently they were not brought to his notice. Neither was his attention drawn to a Bench ruling of the Allahabad High Court in *Sheo Rattan Rai v. Mohri* (3), where it was held that an appeal against the distribution of an award under the Land Acquisition Act was an appeal which could not be stamped merely with a fixed court fee as an appeal from an order but, as the record shows an *ad valorem* court fee was required, as an appeal

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(1) (1927) I.L.R. 6 Rang. 281.
(3) (1899) I.L.R. 21 All. 354.

(2) F. A. No. 349 of 1931, decided
on 28th July, 1931.

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from a decree, and Rs.21-12-0 was further required which was paid. The grounds which led KING, J., to give his decision were that the appeal before him was not by the party claiming compensation but by the Secretary of State asking that the amount of compensation should be decreased.

Section 8 of the Court Fees Act states as follows: "The amount of fee payable under this Act on a memorandum of appeal against an order relating to compensation under any Act for the time being in force for the acquisition of land for public purposes shall be computed according to the difference between the amount awarded and the amount claimed by the appellant." The section uses the words, "the difference between the amount awarded and the amount claimed by the appellant." The view of KING, J., was that the words "amount claimed by the appellant" meant the amount which the appellant claimed to receive and could not be applied to the amount which the appellant claimed he should pay. He held that in the case of an appeal by the person claiming compensation against the decision of the Tribunal of an Improvement Trust, such as the present one before me, the appeal would properly bear an *ad valorem* court fee under section 8 of the Court Fees Act, but that in the case of an appeal by the Secretary of State this section would not apply. In regard to the difficulty felt by KING, J., in applying the words "amount claimed by the appellant" to the Secretary of State the construction of these words in the method which I have mentioned does not seem to have occurred to him, and on this view there is no difficulty in applying the words to the Secretary of State who is claiming that he should pay a less amount. On the other hand the decision of KING, J., involves a great difficulty in bringing the case at all under article 17 (iv) of the second schedule because as I have pointed out the appellant asks for an award to be granted and not for the mere setting aside of an award. The view,

therefore, of KING, J., involves a greater difficulty than the difficulty which he sought to avoid. The Rangoon case was a case of an appeal by the Government against the award of a district court asking that that award should be decreased, and the Bench of the Rangoon High Court held that if section 8 of the Court Fees Act was not applicable the provisions of article 1 of the first schedule must be applied and the result would be the same in either case, that an *ad valorem* court fee must be paid. Another point was mentioned by learned counsel in regard to the judgment of KING, J., and that was that the Town Improvement Act speaks of the decision of the Tribunal as an award and therefore apparently he contrasted it with a decision of the District Judge under the Land Acquisition Act which by an Amending Act, Act XIX of 1921, must be deemed to be a decree under the Code of Civil Procedure, and he proceeds to say that as it was an appeal against the decree therefore an *ad valorem* court fee will be payable under schedule I, article 1. This appears to imply that KING, J., thought that an *ad valorem* fee under article 1, schedule I is stated to be on a memorandum of an appeal from a decree. The words "from a decree" do not occur in this article, and there seems no reason to read those words into the article as they are not there. No such distinction therefore can be drawn in regard to article I of schedule I between appeals from decrees and appeals which are not from decrees. Section 8 speaks of an appeal against an order relating to compensation and does not state that the order should amount to a decree.

Against applying the words in section 8 learned counsel for the appellant next argued that the word "order" would not cover the order of a Tribunal because he said it is not an order of a civil court; alternatively his argument was that the word "order" would not cover the award by a Tribunal. Now the word "order" is defined in the Civil Procedure Code, section 2(14): "Order means the formal expression of any decision of a civil

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court which is not a decree." The U. P. Town Improvement Act, Act VIII of 1919, provides in sections 57 and 58 (a) as follows:

"57. A Tribunal shall be constituted, as provided in section 59, for the purpose of performing the functions of the court in reference to the acquisition of land for the Trust, under the Land Acquisition Act, 1894."

"58. For the purpose of acquiring land under the said Act for the Trust,—(a) the Tribunal shall (except for the purposes of section 54 of that Act) be deemed to be the court, and the President of the Tribunal shall be deemed to be the Judge, under the said Act."

These provisions show that the Tribunal is deemed to be the court under the Land Acquisition Act. The Land Acquisition Act, section 3(d) states: "The expression 'court' means a principal civil court of original jurisdiction, unless the Local Government has appointed (as it is hereby empowered to do) a special Judicial Officer within any specified local limits to perform the functions of the court under this Act." These provisions show clearly that the Tribunal is a civil court. There is no doubt that the award of the Tribunal is the formal expression of its decision, and as learned counsel for appellant claims that this award is not a decree [see the U. P. Town Improvement (Appeals) Act, U. P. Act No. III of 1920] it follows under the definition in the Civil Procedure Code, section 2(14), that the award is an order of a civil court. Accordingly, therefore, section 8 of the Court Fees Act will apply.

Some argument was made in regard to an order passed by me on 7th March, 1934, on an application for refund of excess court fee in First Appeal No. 3 of 1933, which was an application for refund in an appeal against an award of the Improvement Trust Tribunal of Allahabad. The application set out that an excess amount had been paid and a claim was made for refund. The office note was that the refund should be made and there was no contest on the point and my order was "Let the application be granted." There was no

point raised before me by the Registrar as Taxing Officer that the refund should not be made and this decision was not given in my capacity as Taxing Judge but was apparently given as Application Judge. This decision therefore has no bearing on the point as there was nothing decided on the merits.

There is a decision of a learned single Judge of this Court, GANGA NATH, J., in *Sahdeo Rai v. Debi Rai* (1) where there was an appeal against the award of the Improvement Trust Tribunal of Cawnpore by a person claiming that the compensation awarded to him should be increased. He asked for a refund of an excess court fee paid. The learned single Judge considered that section 8 of the Court Fees Act applied to the case which was exactly the same as the present and he further considered that KING, J., had laid down that dictum in *Secretary of State for India v. Ramji Das Bhargava* (2) and accordingly the excess was refused as it was held that the *ad valorem* court fee was necessary. Some reference was made by learned counsel for appellant to a ruling of their Lordships of the Privy Council in *Secretary of State for India v. Hindusthan Co-operative Insurance Society* (3). That case dealt with a claim that an appeal lay from a decision of the Calcutta High Court in such a matter to His Majesty in Council. In the Bengal Act V of 1911 setting up the Calcutta Improvement Trust there was a section 71 repealing section 54 of the Land Acquisition Act, which gave a right of appeal under that Act to the High Court, and it was further provided that the award of the Tribunal shall be final. There was also a Bengal Act XVIII of 1911 providing for appeals to the Bengal High Court in certain cases. No part of this decision has any application to the present matter because the present case is not one dealing with a right of appeal but the proper court fee on an appeal, and further the U. P. Town Improvement

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(1) F. A. No. 194 of 1934, decided on 30th March, 1937. (2) F. A. No. 349 of 1931, decided on 28th July, 1931.

(3) (1931) I.L.R., 59 Cal., 55.

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Act does not repeal the provisions of section 54 of the Land Acquisition Act.

For these reasons I consider that the court fee payable on a memorandum of appeal against an order by a Tribunal, constituted under the U. P. Town Improvement Act of 1919, does come under section 8 of the Court Fees Act on the difference between the amount awarded and the amount claimed by the appellant and it should not be a fixed court fee under the second schedule, article 17 (iv). I may add that in my opinion section 8 will apply whether the appellant is the person claiming compensation or whether the appellant is the Secretary of State.

APPELLATE CIVIL.

Before Mr. Justice Iqbal Ahmad and Mr. Justice Verma

KARIMUL RAHMAN KHAN AND ANOTHER (JUDGMENT-DEBTORS) *v.* SARASWATI SUGAR SYNDICATE AND OTHERS (DECREE-HOLDERS)*

1938
October, 18

Civil Procedure Code, order XXXIV, rule 5—Order in which the mortgaged properties are to be sold—Court executing the decree can direct such order if mortgagee is not prejudiced—Equities in favour of subsequent transferees—Civil Procedure Code, sections 2(2), 47—“Decree”—Decision directing order of sale of mortgaged properties—Whether appealable.

A court passing a decree for sale on the basis of a mortgage, or a court executing such a decree, has full discretion, even where the doctrine of marshalling is not strictly applicable, to prescribe the order in which the various items of the properties comprised in the mortgage decree are to be sold, provided it is necessary to do so with a view to adjust the equities arising between subsequent transferees from the mortgagor or with a view to protect the rights of a subsequent transferee, and further provided that the order of sale prescribed by the court has not the effect of prejudicing the right of the mortgagee to realise the whole of the decretal amount.

The question whether such an order of the execution court, prescribing the order in which the various items of mortgaged

*First Appeal No. 59 of 1936, from a decree of Raj Rajeshwar Sahai, Civil Judge of Etah, dated the 6th of January, 1936.