

proprietor of such share, thus defeating the object of the *wajib-ul-arz*, namely, the exclusion of strangers. The only difference in the present case is that, by the default of the mortgagor and operation of law, a transaction which to a particular date existed only as an hypothecation of land upon that date was converted into a sale. But a mortgagor, having full knowledge that an hour must arrive when all his rights and interests as mortgagor will be absorbed, and when his mortgagee will become his vendee, does not appear to me to be in a different position to one, who, having entered into a contract to sell his equity, knows that upon the execution of the instrument of transfer such equity is parted with by him. In either case he is perfectly well aware that a time certain must arrive, when, either voluntarily or compulsorily, his rights and interests vest in another person. It seems to me, therefore, that, having regard to the terms of the *wajib-ul-arz* and the spirit and intention obviously dictating them, it was incumbent upon Bansi, both before the execution of the deed of 12th May, 1871, and prior to the termination of the year of grace, to make an offer to the plaintiff, and that the present suit is therefore maintainable. In coming to this conclusion, I regret to find myself constrained to form an opinion at variance with the views I expressed in concurrence with Pearson, J., in *Lachman Prasad v. Bahadur Singh* (1), the decision in which, however, I am glad to think, can be upheld on independent grounds.

In this reference to the Full Bench the appeal itself has been submitted for disposal, and with respect to this I would only add that I approve of the modification of the decree of the lower appellate Court as proposed by Spankie, J. The appeal must be dismissed with costs.

Appeal dismissed.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

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RAM KIRPAL SHUKUL (APPELLANT) v. RUP KUAR (RESPONDENT).*

Appeal to Her Majesty in Council—Final order passed on appeal by the High Court on a question mentioned in s. 244 of Act X of 1877 (Civil Procedure Code)—Act X of 1877, ss. 595, 596.

An order passed on appeal by a High Court determining a question mentioned in s. 244 of Act X of 1877 is a final "decree" within the meaning of s.

* Application No. 15 of 1880, for leave to appeal to Her Majesty in Council.

(1) I. I. R., 2 All. 884.

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595 of that Act. *Held*, therefore, where such an order involved a claim or question relating to property of the value of upwards of ten thousand rupees, and reversed the decisions of the lower Courts, that notwithstanding the value of the subject-matter of the suit in which the decree was made in the Court of first instance was less than that amount, such order was appealable to Her Majesty in Council.

THIS was a reference to the Full Bench by Pearson, J., and Oldfield, J., arising out of an application made to them for leave to appeal to Her Majesty in Council from an order made by them relating to the execution of a decree, in the exercise of the appellate jurisdiction of the High Court, on the 10th August, 1880. This application was referred by those learned Judges to the Full Bench. The facts of the case and the point of law arising therein are stated in the judgment of the Full Bench.

Munshi *Hanuman Prasad*, Lala *Lalta Prasad*, and Maulvi *Mehdi Hasan*, for the applicant.

The *Senior Government Pleader* (Lala *Juala Prasad*), the *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), and Babu *Jogindro Nath Chaudhri*, for the respondent.

The judgment of the Full Bench was delivered by

STRAIGHT, J.—This case originally came before a Division Bench of this Court, as a second appeal from an order of the Judge of Gorakhpur made in certain proceedings in execution, under a decree of the *Sudder Dewanny Adawlat*, dated the 23rd June, 1864. Applications had been regularly made from time to time to execute this decree for mesne profits, and they had been granted, the latest of them being allowed by the Munsif on the 10th May, 1879, when the total amount declared to be recoverable under this head was Rs. 16,233-0-7. Upon the hearing of this last application, objection was taken by the judgment-debtor that the original decree did not give mesne profits, but the Munsif was of opinion that, as this objection had been urged by the judgment-debtor in an earlier application and decided against him, the matter was *res judicata* and could not be re-opened. An appeal was preferred to the Judge, but he, entertaining a like view, upheld the decision of the Munsif. The judgment-debtor then appealed to this Court, and the Division Bench before whom the case came, being of opinion that a point of considerable importance was raised, referred to the

Court at large the question whether the provisions of s. 13 of the Civil Procedure Code were applicable to proceedings in execution. The Full Bench were unanimously of opinion that the principle of *res judicata* did not hold in the execution department; and, fortified by this decision, the Division Bench subsequently disposed of the appeal, and on the 10th August, 1880, determined it in favour of the judgment-debtor, appellant, on the ground that the decree of the 23rd June, 1864, did not give mesne profits. From this decision the judgment-creditor now applies for leave to appeal to Her Majesty in Council, and the simple question is whether, under the terms of ss. 595-596 of the Civil Procedure Code, such an appeal lies. It is admitted that the subject-matter of the suit in the Court of first instance, namely, the property possession of which was sought, was considerably under the value of Rs. 10,000. But it is contended on behalf of the judgment-creditor that the decree from which he seeks to appeal is that passed by this Court on the 10th August, 1880, which directly involves a question respecting property of the value of Rs. 10,000. If s. 2 of the Civil Procedure Code as amended by Act XII of 1879, in its definition of decree, is applicable to the chapter relating to "Appeals to the Queen in Council," the order of this Court, although passed in a miscellaneous proceeding, would be a final decree passed by this Court in the exercise of its final appellate jurisdiction. But even if s. 594 alone has to be considered, it cannot be said that the decision of this Court upon an appeal relating to questions raised in execution under s. 244 of the Civil Procedure Code is not a decree. It therefore appears to us that the objection that the subject of the suit in the Court of first instance was below the value of Rs. 10,000, has no force. It is not the decree of the Sudder Dewanny Adawlat of 23rd June, 1864, which is sought to be appealed to Her Majesty in Council, but a final decree of this Court, passed in the exercise of its final appellate jurisdiction on the 10th August, 1880, which directly involves a question respecting mesne profits to the amount of Rs. 16,233-0-7. We would therefore grant the application as prayed, and allow the appeal to Her Majesty in Council to be preferred.

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Application allowed.