REFERENCE UNDER THE COURT-FEES ACT, 1870.

Before Jwala Prasad J.

1924.

Dec., 12.

SITAL PRASAD SINGH

v.

JAGDEO SINGH *

Code of Civil Procedure, 1908 (*Act V of* 1908), *sections* 47 *and* 144—*Restitution—Interest—appeal from order awarding interest, court-fee payable on—Court Fees Act*, 1870 (*Act VII of* 1870), *section* 35, *Schedule II, Article* 11—*Bihar and Orissa Government Notification no.* 2576, *dated* 5*th December*, 1921.

An order directing a mortgagee decree-holder to pay interest to the judgment-debtor on a certain sum out of the proceeds of a sale held in execution of the decree, which sum he had been directed to deposit in Court for payment to the holder of a decree on a prior mortgage, is an order under section 47, Civil Procedure Code, 1908, and the Bihar and Orissa Government Notification no. 2576, dated the 5th December, 1921, directing, under section 35 of the Court-Fees Act, 1870, that the fee chargeable in appeals from orders under section 47, Civil Procedure Code, shall be limited to the amounts chargeable under Schedule II, Article 11, of the Court-Fees Act, applies to an appeal from such an order. The court-fee payable on the memorandum of appeal in such a case is therefore Rs. 4.

This was a reference by the Taxing Officer about the court-fee to be paid upon the memorandum of appeal. The facts were as follows :—

The appellants obtained a mortgage decree against Gopi Nath Singh, Bodh Narayan, the *Mahanth* of Bodh Gaya and others. Bodh Narayan was a prior mortgagee, and the *Mahanth* was made a defendant as a subsequent purchaser. In execution of that decree some of the mortgaged properties were sold for Rs. 71,198 on 21st October, 1918. Bodh Narayan also obtained a decree on his prior bonds making Harbans Narayan a defendant. He claimed

* Miscellaneous Appeal.

1924.

SITAL PRASAD SINGH v. JAGDEO SINGH.

Rs. 36,907-7-7 out of the sum realized by the auction sale in the decree of Harbans Narayan. This was disallowed by the Subordinate Judge Bodh Narayan then appealed to the High Court. That appeal was treated as one under section 47 of the Code of Civil Procedure. The order of the Subordinate Judge was set aside by the High Court and Bodh Narayan was declared entitled to receive Rs. 36,907-7-7 out of the sale proceeds. Against the order of this Court there was an appeal to the Privy Council which was pending when this reference was made. During the pendency of the appeal in the High Court the decree-holder, Harbans Narayan, had withdrawn the entire sale proceeds of Rs. 71,198 on furnishing security. Bodh Narayan subsequently died, and his representative, Har Ballabh Narayan Singh, assigned the decree to Jagdeo Singh and the latter applied to the Subordinate Judge for an order that Sital Prasad, representative-in-interest of Harbans Narayan, who had also died in the meanwhile, should deposit Rs. 36,907-7-7 in Court as ordered by the High Court. Sital Prasad opposed this petition and the matter came to the High Court again. Upon the final order passed by the High Court Sital Prasad deposited Rs. 36,907-7-7 in Court on the 6th February, 1922. Jagdeo Singh appellant claimed, besides the amount deposited by the decree-holder, interest and damages from 4th April, 1919, the date on which the sum had been taken out of Court by Harbans Narayan and others. His claim was allowed by the Court below and the respondent was directed to deposit Rs. 11,736 as interest. Against the order of the Subordinate Judge, Sital Prasad and others preferred an appeal to the High Court, with a court-fee of Rs. 4 only. The Stamp Reporter reported that an *ad valorem* court-fee should have been paid upon the amount of Rs 11,736. This view was accepted by the Taxing Officer. The appellant claimed that he was liable to pay only the court-fee already affixed by him on the memorandum of appeal. On account of this difference the matter was referred to Jwala Prasad, J., the Taxing Judge.

1924.

SITAL PRASAD SINGH v. JAGDEO SINGH.

Guru Saran Prasad, *Raghunandan Prasad* and *Anand Prasad*, for the appellants.

Lachmi Narain Sinha, Government Pleader, for the respondent.

JWALA PRASAD, J.

JWALA PRASAD, J. (after stating the facts set out above, proceeded as follows): The point involved in this reference appears to be somewhat difficult, and the views of the High Courts have been divergent thereupon. The relevant sections in the Code of Civil Procedure upon this point are sections 47 and 144. Section 144 corresponds with section 583 of the Civil Procedure Code of 1882. That section ran as follows:

"583. When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred; and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for the execution of decrees in suits."

Section 244 of the old Code ran as follows:

"244. The following questions shall be determined by order of the Court executing a decree and not by separate suits (namely):—

(a) questions regarding the amount of any mesne profits as to which the decree has directed inquiry;

(b) questions regarding the amount of any mesne profits or interest which the decree has made payable in respect of the subject-matter of a suit, between the date of its institution and the execution of decree or the expiration of three years from the date of the decree;

(c) any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree or to the stay or execution thereof."

Section 583, which, under the old Code, occurred in Chapter XLI relating to appeals, has now been replaced by section 144 of the Code of Civil Procedure under Part XI, headed "Miscellaneous." That section ran as follows:

"583. (1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution, or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof

as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal."

Section 47, clause (*1*), which corresponds to section 244, clause (*c*), of the old Code of Civil Procedure, runs as follows:

"(*1*) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(*2*) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees.

(*3*) Where a question arises as to whether any person is or is not the representative of a party, such questions shall, for the purposes of this section, be determined by the Court."

Clauses (*a*) and (*b*) of section 244 do not now find place in section 47.

Section 35 of the Court-Fees Act empowers the Government to reduce or remit the fees mentioned in the First and Second Schedules of the Act. Under this section the Governor-General in Council issued Notification no. 4650, dated the 10th September, 1889. Clause (*6*) of that notification directed that the fee chargeable on appeals from orders under section 244 of the Code of Civil Procedure (Act XIV of 1882) shall be limited to the amounts chargeable under Article 2 of the Second Schedule.

By Notification no. 4344-S.R., dated the 6th October, 1893, this was amended by direction that the fee chargeable on appeals from orders under clause (*c*) of section 244 shall be limited to the amounts chargeable under Article 2 of the Second Schedule to the Court-Fees Act, 1870.

The present section 35 of the Court-Fees Act empowers the local Government to reduce or remit the fees mentioned in the First and Second Schedules of the Court-Fees Act. Under this power the local Government issued Notification no. 2576—L.A.-25,

1924.

SITAL PRASAD SINGH v. JAGDEO SINGH.

JWALA PRASAD, J

dated the 5th December, 1921, directing that the fee chargeable on appeals from orders under section 47 of the Code of Civil Procedure (Act V of 1908), shall be limited to the amounts chargeable under Article 11 of the Second Schedule. Article 11 of the Second Schedule provides that on a memorandum of appeal, when the appeal is not from a decree or an order having the force of a decree and is presented to a High Court, the court-fee chargeable is Rs. 4.

Section 2 of the Code of Civil Procedure (Act XIV of 1882), defines "decree" to include an order determining any question mentioned or referred to in section 244 of that Code. Similarly, section 2 of the present Code of Civil Procedure (Act V of 1908) defines "decree" as including orders determining any question within section 47 of the Code. Prior to the present Code of Civil Procedure the relief by way of restitution was to be given by execution of the appellate decree under section 583 of the old Code. Now, under the present Code the relief by way of restitution is to be given by an application in the Court of first instance under section 144 of the Code. Orders under section 583 relating to restitution under the old Code of 1882 used to be appealable as if they were orders passed under section 244 of the Code of Civil Procedure. Therefore there was no necessity of making orders under section 583 as being included in the definition of "decree." The present arrangement of the Code has taken out section 583 of the old Code from the Chapter relating to appeals and has made a distinct provision in section 144 under the heading "Miscellaneous." In order to remove any doubt as to whether orders under section 144 would be appealable or not, such orders have been included in the definition of "decree" along with section 47 of the Code.

In the case of *Gangadhar Marwari* v. *Lachman Singh* (1) it was held that an application for mesne profits made not by the plaintiffs but by the defendants

(1) (1910) 11 Cal. L. J. 541.

against whom the suit had been dismissed, by way of restitution under section 583, Civil Procedure Code, comes under section 244(*c*) of the Code, and that such application would be chargeable with court-fees under Article 11, Schedule II, of the Code, and not *ad valorem*.

In the unreported case of *Shyamnandan Kishore Singh* v. *Rai Radha Krishna Rai Bahadur* (1)

(1) MISCELLANEOUS APPEAL No. 370 OF 1913.

Shyam Nandan Kishore

v.

Rai Radha Krishna Rai Bahadur.

SHARFUDDIN AND CHAPMAN, J.J.—A preliminary objection has been made to the hearing of this appeal upon the ground that the court-fee paid is insufficient. The appeal is against an order made under section 144, Civil Procedure Code, upon an application for ascertainment of mesne profits claimed by the defendant in the rent suit by way of restitution due to him by reason of the reversal of the decree originally obtained by the plaintiff and subsequently set aside by this Court in appeal. The court-fee paid is Rs. 2 under Article 11 of Schedule II of the Court-fees Act and the respondent objects that that article is not applicable and alleges that an *ad valorem* fee is payable.

We are, however, not concerned with the wording of this article in the present case. What we are concerned with is the construction of a notification of the Government of India made under section 35 of the Court-Fees Act exempting applications under section 244(*c*) of the old Code of Civil Procedure from *ad valorem* fees and directing that the fee payable upon such applications shall be the fee prescribed by Article 11. Under the old Code, it was held that a Court had an inherent power to grant *restitution* in such a case as the present and that an application for restitution was a proceeding in execution of the decree of the appellate Court reversing the decree of the first Court. A specific procedure has been provided by section 144 of the new Code. It is argued that a proceeding under section 144 of the new Code can no longer be held to be a proceeding in execution of a decree and the fact that an order passed under section 144 is now included in the definition of a decree in section 2 is relied upon.

There is, no doubt, much to be said for the view contended for by the respondent; but we are of opinion that for us the matter is concluded by authority. In the case of *Gangadhar Marwari* v. *Lachman Singh* [(1910) 11 Cal. L. J. 541], it was held that such an application as this came within the terms of the order of exemption by the Government of India to which we have referred. No doubt the decision in that case referred to an application made under section 244, clause (*c*), of the old Code but there can be no doubt that it did decide that an application exactly similar to the application with which we are dealing in the present case was exempted by the notification. Now, under section 8 of the

1924.

SITAL PRASAD SINGH v. JAGDEO SINGH.

JWALA PRASAD, J.

(Sharfuddin and Chapman, J.J.), decided on the 20th December, 1915, this view was upheld and it was held that an order passed under section 144 of the Code of Civil Procedure came under the notification, inasmuch as such order under section 144 of the present Code amounts to an order under section 244(*c*) of the old Code. They further held that the reference in the notification to section 244(*c*) of the old Code must relate to section 144 by virtue of section 8 of the General Clauses Act. This was the view taken under the present Code of Civil Procedure.

The matter was fully dealt with by Chatterjea, J., in the case of *Madan Mohan Dey* v. *Nogendra Nath Dey* (1). The learned Judge referring to the notification, referred to above, puts the question to himself as to whether an order under section 144 is an order which decides a question falling under section 47(1) of the present Code, and he replies that under section 583 of the old Code an application for restitution was treated as an application for execution of the appellate decree, and it was expressly provided that the Court shall proceed to execute the decree passed on appeal according to the rules for execution of decrees in suits. It was accordingly held that an order under section 583 fell within the provisions of section 244 (*c*), and therefore, clause (*6*) of the notification applied.

General Clauses Act, the references in the orders of the Governor-General in Council made under the Court-Fees Act to the provisions of the Code of Civil Procedure, must be construed as references to the same provisions re-enacted under the new Code: that is to say, that an order exempting from court-fee an application under the old Code of Civil Procedure must be held also to exempt a similar application made under the new Code of Civil Procedure. It was held by this Court that an application of the present kind under the old Code was exempted. It follows by reference to section 8 of the General Clauses Act to which we have referred, that an application of the same kind made under the present Code must be held to be similarly exempted.

We may observe that the law governing the disposal of such applications has not been altered by the repeal of the old Code of Civil Procedure and the enactment in the new Code.

The result is that the objection is over-ruled.

(1) (1917) 21 Cal. W. N. 544.

Continuing, the learned Judge observes: "It is true section 144 of the present Code omits the provision that the Court is to proceed according to the rules prescribed for the execution of decrees in suits, but it expressly lays down that no suit shall be instituted for the purpose of claiming any restitution which can be obtained by application under the section. The Court in making restitution has to execute the decree of reversal (which necessarily carries with it the right to restitution even though the decree may be silent as to such restitution) in order to give effect to the reversal of the decree. That being so, an order under section 144 comes under section 47(*1*), and clause (*6*), of the notification applies to such an order."

On the 26th March, 1917, the matter was agitated in this Court upon the report of the Stamp Reporter and ultimately came up for the decision of the Taxing Judge (Roe, J.). The learned Judge expressed the view taken in the case of *Madan Mohan Dey* v. *Nogendra Nath Dey* (1) and directed that the court-fee of Rs. 2 as was payable under the old Code was sufficient: [*vide* the unreported case of *Sheikh Kamaruddin Mandal* v. *Raja Thakur Barham* (2)].

(1) (1917) 21 Cal. W. N. 544.

(2) MISCELLANEOUS APPEAL No. 142 OF 1917.

Shaikh Kamaruddin Mandal.

v.

Raja Thakur Barham.

STAMP REPORTER [*2nd September, 1916*].—The appeal is from an order determining a question under section 144, Civil Procedure Code. Such orders are decrees within the meaning of section 2(*2*). The appeal is therefore from a decree and an *ad valorem* court-fee is payable on the value of the appeal under Article 1, Schedule I, Court-Fees Act. But the appeal has not been valued at any fixed sum. Therefore, unless the appeal is properly valued, it is impossible to submit a report as to sufficiency of the stamp.

[*13th December, 1916.*] The value of the appeal has been laid at Rs. 6,000. A court-fee of Rs. 315 calculated *ad valorem* on it is payable on it. Rupees 2 having been paid, this memo. of appeal is insufficiently stamped by Rs. 313.

TAXING OFFICER [*26th March, 1917*].—This is an appeal against an order made under section 144, Civil Procedure Code, upon an application

1924.

SITAL PRASAD SINGH v. JAGDEO SINGH.

JWALA PRASAD, J.

The Allahabad High Court has taken a contrary view: [vide *Jagdip Narain Singh* v. *Mahant Keshogir* (1)]. That was an authority under the old Code.

Under the present Code and under the notification of the Government of the United Provinces, Daniels, J. took the same view in the case of *Baijnath Das* v. *Balmukand* (2), and the reason given by him is as follows: "An application under section 144 is no doubt one which carries out the intention of the appellate Court's decree, but it does not directly execute that decree. What it does is to undo an execution wrongly granted by the Court below. In this case the High Court's decree was declaratory and could only have been executed in respect of costs. The appellant must, therefore, stamp his appeal *ad valorem*." The learned Judge felt the inequity of levying an *ad valorem* fee upon a miscellaneous application of this kind, and he observed as follows: "It is unlikely that the omission of orders under section 144 from the notification referred to above was due to deliberate intention. The exemption of appeals under section 47 from an *ad valorem* fee dates back to a time when the Code of 1882 was in force. Under that Code, section 583, an application by way of restitution was treated as a proceeding in execution and there was no need for a separate notification under the section

for restitution on account of the reversal of a decree by the Privy Council. The Stamp Reporter is of opinion that an order determining a question under section 144 is a decree and that an appeal from it should be stamped with an *ad valorem* court-fee. I find that this appears to be the practice in Allahabad but there is a ruling by Sharfuddin and Chapman, J.J., in which their Lordships found in a similar case to the present one that *ad valorem* court-fee was not necessary and that the court-fee of Rs. 2 was sufficient. As there is apparently a conflict of opinion between the Calcutta and the Allahabad High Courts, I direct that this case be placed before the Taxing Judge for orders.

ROE, J. [*8th June, 1917*].—I accept the view taken in *Madan Mohan Dey* v. *Nogendra Nath Dey* [(1917) 21 Cal. W. N. 544]. The court-fee of Rs. 2 is sufficient.

(1) (1901) 21 All. W. N. 180. (2) (1924) 82 Ind. Cas. 321.

corresponding to the present section 144. It is probable that if the matter is brought to the notice of Government, Government will not consider it desirable to impose an *ad valorem* fee on a party who is merely asking the Court to right a wrong unintentionally done by the Court itself. I direct that a copy of this judgment be forwarded to Government with the suggestion that the provisions of paragraph (4) of the notification should be extended to appeals from orders under section 144." The notification of the Government of the United Provinces referred to by Daniels, J., exactly corresponds with the notification of the Government of Bihar and Orissa already referred to, which makes the fee payable on appeals from orders under section 47 of the present Code of Civil Procedure of 1908, under Article 11 of Schedule II. I am inclined to think that the notification did not consider it necessary to include orders under section 144. Whereas section 583 of the old Code of 1882 has been removed from the category of the chapter headed "Appeals" which gave relief by way of restitution to a party when the decree under which injury has been done to him has been set aside by the appellate Court by executing the decree of the appellate Court, the present section 144 gives the same relief and prescribes the same *forum*, namely, the Court which passes the decree from which the relief is sought. Determination of a question arising under section 144 will naturally relate to the execution, discharge or satisfaction of the decree either of the first Court or of the appellate Court. If the first Court's decree has been discharged by the appellate Court, the question arising under section 144 will naturally be a question as to the discharge of the decree coming under section 47 of the Code of Civil Procedure. This view has been accepted by the Calcutta High Court under the present Code and the view is in consonance with reason, equity and justice so much so that even the learned Judge of the Allahabad High Court, Daniels, J., felt that if the interpretation was correct

1924.

SITAL PRASAD SINGH v. JAGDEO SINGH.

JWALA PRASAD, J.

it requires to be set right by the Legislature. This province used to be governed formerly by the rules and practice obtaining in the Calcutta High Court, and the practice has been followed by this Court ever since in the matter with which we are at present concerned. The Taxing Judge (Roe, J.) in 1917 gave effect to the Calcutta view and held that the fee chargeable was one under Article 11 of Schedule II of the Court-Fees Act. I, as a Taxing Judge, am not prepared to go against the view of my predecessor-in-office. Whatever trouble there might have arisen in the interpretation due to section 144 not being expressly included in the Government notification, it is, I think, amply obviated by the reason given by me above. In a matter of this kind the decision of a Taxing Judge such as that of Roe, J., should be the rule of the Court and it should not be disturbed by his successor in office.

I, therefore, hold that the court-fee paid is sufficient.

APPELLATE CIVIL.

Before Mullick and Kulwant Sahay J.J.

MAHARAJA BAHADUR KESHO PRASAD SINGH

v.

TRILOKE NATH TEWARI *

1924.

Nov., 26.
Dec., 3, 18.

Bengal Tenancy Act, 1885 (*Act VIII of* 1885), *section* 150—*Rent suit—plea that plaintiff is not entitled to amount claimed—amount admitted not paid into Court.*

In a suit for rent under the Bengal Tenancy Act, 1885, where the defendant admits that money is due from him to the plaintiff on account of rent, section 150 of the Act is a bar to the Court taking cognizance of a plea that the amount claimed is in excess of the amount due unless the defendant

* Appeal from Appellate Decree nos. 325 and 326 of 1922 from a decision of J. F. W. James, Esq., I.C.S., District Judge of Arrah, dated the 25th January, 1922, affirming the decision of B. Phanindra Lal Sen, Subordinate Judge, Arrah, dated the 9th May, 1921.