

of res judicata did not fall to be considered. The Judicial Committee accepted the first proposition, but not the second. They referred to their decision in *Mungul Pershad Dikhit v. Grija Kant Lahiri* (1) for the proposition that the binding force of a judgment or order depends, not upon the rule of res judicata as enunciated in the Code, but upon general principles of law; but they were of opinion that "the matter decided by Mr. Probyn was not decided in a former suit, but in a proceeding of which the application, in which the orders reversed by the High Court were made, was merely a continuation". Now a clear distinction is drawn by the Judicial Committee between a proceeding in the suit itself and a proceeding which is a continuation of the suit; and, in my opinion, we cannot ignore the distinction in considering whether proceedings in execution are comprehended within the term "suit" as used in the Regulation. In my opinion, they are not; and I must therefore affirm the order of the court below and dismiss the appeal with costs.

It follows that the application, which has been made in the appeal, must be refused.

FOSTER, J.—I concur in the final order.

Appeal dismissed.

REFERENCE UNDER THE COURT-FEES ACT, 1870.

Before Jwala Prasad, J.

MADHO RAY

v.

MUSAMMAT BIBI MAHBUWAN NISA.*

Court-fees Act, 1870 (Act VII of 1870), section 7(1) and Schedule I, Article 1—appeal against final decree—ad valorem

*Stamp Reference.

(1) 1871) I. L. R. 8 Cal. 51.

1926.

UPENDRA
CHANDRA
SINGH
v.
SARDAR
CHANDJET
SINGH.

DAS, J.

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May, 3, 4.

1926. *court-fee payable—property sought to be exempted from liability of the decree—value of the property, court-fee payable*
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 NISA.

Defendant no. 2 sold to the plaintiffs certain land which was alleged to be free of incumbrances. Subsequently he sold other land to defendants 1, 3, 4 and 5: There was, however, a mortgage on the land sold to the plaintiffs, and, the mortgagees having obtained decree, the plaintiffs paid the decretal amount and then sued the defendants for recovery of the amount so paid and for a declaration charging the properties purchased by defendants 1, 3, 4 and 5, with the same. They obtained a preliminary decree and then applied for a final decree under Order XXXIV, rule 5, Code of Civil Procedure, 1908. The defendants 1, 3, 4 and 5 objected to their properties being made liable for the decree. The objection having been overruled by the Subordinate Judge, the defendants appealed to the High Court and paid Rs. 4 as court-fee, treating the appeal as a Miscellaneous Appeal. The Taxing Officer was of opinion that an ad valorem court-fee was payable on the amount found due to the plaintiffs and which had been declared to be charged on the properties held by appellants. The appellants disputed this view.

Held, that if the value of the properties purchased by the appellants was less than the decretal amount, an ad valorem court-fee on the value of the properties was payable; but if the value of such properties was not less than the decretal amount an ad valorem court-fee on the decretal amount was payable.

Kesavarapu Ramkrishna Reddi v. Kotta Kota Reddi (1), *Jugal Prasad Singh v. Parbhu Narain Jha* (2) and *Bunwari Lal v. Daya Sunker Misser* (3), followed.

The facts of the case material to this report are stated in the order of the Court.

J. P. Sinha, for the appellants.

L. N. Sinha, Government Pleader, for the respondents.

JWALA PRASAD, J.—This is a reference under section 5 of the Court-fees Act. The appellants were

(1) (1907) I. L. R. 30 Mad. 96, F. B.

(2) (1910) I. L. R. 37 Cal. 914.

(3) (1908-09) 13 Cal. W. N. 815.

defendants 3 to 5 in the court below. In 1904 the plaintiffs purchased certain properties from defendant no. 2 who stated in the deed of sale that the villages sold were free from encumbrances of any sort. Shortly after, the said defendant no. 2 sold other properties to defendant no. 1 and defendants nos. 3 to 5, appellants in this case. There were, however, encumbrances upon the properties sold to the plaintiffs and the mortgagees of those villages obtained mortgage decrees and caused the properties purchased by the plaintiffs to be put up to sale. The plaintiffs deposited the decretal amount and thus saved the villages and got the mortgage decrees satisfied and the sale set aside. They then instituted the action which has given rise to the present appeal for recovery of the money so deposited by them from the defendants and prayed for declaring the same a charge upon the properties purchased by defendant no. 1 and defendants nos. 3 to 5, appellants before me. The Subordinate Judge gave a decree in the following terms :

" It is hereby ordered that the suit be decreed for Rs. 12,724-12-0, with interest at six per cent. per annum from the date of deposit, together with Rs. 110 with cost and interest at six per cent. per annum till realisation, against defendant no. 2. It is further ordered that in case the defendant no. 2 does not pay the decretal money within four months from the date of the decree the properties given in the petition for amendment of the plaint will be sold subject to the rights of persons that have not been made parties to this suit. Defendant no. 1 is exempted. He is to get one-fourth cost."

Against the said decree there was an appeal to the High Court at Calcutta with the result that the suit was dismissed. Then the plaintiffs appealed in the Privy Council and their Lordships on the 2nd of December, 1921, set aside the decree of the High Court at Calcutta and restored that of the Subordinate Judge with certain modifications. On receipt of the order of His Majesty in Council the plaintiffs applied for a final decree to be prepared under Order XXXIV, rule 5, of the Code of Civil Procedure. The defendants-appellants objected to the properties purchased by them from defendant no. 2 being liable to the decree of the plaintiffs. The

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1926. contest before the Subordinate Judge raised by the appellants was that the properties purchased by them from defendant no. 2 were not at all liable to the money due to the plaintiffs under the decree. This question was decided by the Subordinate Judge against the defendants and hence they have preferred an appeal to this Court. They have paid Rs. 4 as court-fee treating the appeal as miscellaneous appeal.

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The Taxing Officer, upon the report of the stamp-reporter, was of opinion that the court-fee payable was upon the amount found due to the plaintiffs with respect to which the final decree had been prepared and which had been made a charge upon the properties held by the appellants. In other words, according to the Taxing Officer the value of the appeal is Rs. 33,315, the amount found due to the plaintiffs and which has been declared to be a charge upon the properties held by the appellants. The appellants disputed the view. Hence the matter has been referred for a decision of the Taxing Judge.

It is true that in an appeal against the final decree ad valorem court-fee should be paid. The point has been concluded by decisions not only of the other High Courts, but of this Court also. The defendants in this case do not dispute the amount due to the plaintiffs under the decree. They dispute the liability of the properties held by them to the decretal amount. They are not personally liable to pay the decree. They are liable to the extent of the value of the properties held by them and their appeal is therefore directed against so much of the decree as is equivalent to the value of their properties. In support of this, the case of *Kesavarapu Ramakrishna Reddi v. Kotta Kota Reddi* (1) may be referred to. The facts of that case seem very much to be analogous to the present case. That was a suit to recover Rs. 9,420 due on a hypothecation bond executed in favour of the plaintiff by defendants 1 to 3. Defen-

(1) (1907) I. L. R. 30 Mad. 96, F. B.

dants nos. 6 to 9 had purchased some of the hypothecated properties. A decree was passed in favour of the plaintiff for the amount claimed against the hypothecated properties, excepting the items purchased by defendants nos. 6 to 9. The plaintiff appealed on the ground that such properties were wrongly exonerated from liability. He paid court-fee upon the value of the properties which he said were wrongly excluded from the liability. The value of those properties was Rs. 4,000. It was held that under Article 1, schedule 1, of the Court-fees Act the value of the appeal for the purpose of court-fee was the value of those properties when such value is less than the amount of the decree; and, when such value exceeds the amount of the decree, such decretal amount. This principle was accepted in the case of *Jugal Pershad Singh v. Parbhu Narain Jha* (1) which again referred to an earlier case, *Bunwari Lal v. Daya Sunker Misser* (2). The decisions in the aforesaid Madras and Calcutta cases seem to be fully in accordance with section 7, clause (1), under which the court-fee payable is according to the amount claimed. The appellants in this case claim exemption of their properties from the liability of the decree, i.e., they dispute the decree to the extent of the value of the properties held by them; and that is the amount of their claim in the present appeal. If the value of the properties is less than the decretal amount, they should pay a court-fee upon the value of the properties. If, however, the decretal amount does not exceed the value of the properties then in that case they should pay court-fee upon the entire decretal amount, because they will be asking for an exoneration of their properties from the entire decree. I do not know what the value of the properties in the present case is. The appellants have not stated the value of the properties. They should satisfy the Court that the value of the properties is less than the decretal amount. If not, they should pay court-fee upon the entire decretal amount.

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(1) (1910) I. L. R. 37 Cal. 914.

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