MISCELLANEOUS CIVIL.

1929.

June, 5.

Before Jwala Prasad and Rowland, JJ.

THAKUR JAMUNA PRASAD SINGH

v.

JAGARNATH PRASAD SINGH.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 110—*mortgage decree by Subordinate Judge—interest pendente lite refused—defendants' appeal to High Court dismissed—plaintiffs' cross-appeal decreed—interest allowed—decree, whether one of affirmance—defendant, whether entitled to appeal to His Majesty-in-Council—appeal, whether would be limited to the question of interest only.*

Plaintiffs obtained a mortgage decree in the Court of the Subordinate Judge, but their claim to interest pendente lite was disallowed. The defendants appealed to the High Court while the plaintiffs preferred a cross-appeal in respect to interest pendente lite. The defendants' appeal was dismissed while the plaintiffs' cross-appeal was allowed, the decree of the High Court being in the following terms :—

"The decree of the Court below be modified to this extent that interest at the bond rate shall run on the principal up to the expiry of the period of grace."

The defendants applied for leave to appeal to His Majesty-in-Council. The value of the subject-matter of the suit and the appeal was above ten thousand rupees.

Held, that the decree of the High Court was not one "affirming the decision of the court immediately below", within the meaning of section 110 of the Code of Civil Procedure, 1908, and that, therefore, the applicants were, as of right, entitled to appeal to His Majesty-in-Council.

Held, further, that the appeal could not be limited to the question of interest only, upon which point there was variation in the decree, but that the applicants were entitled to appeal from the entire decree.

*Privy Council Appeal no. 11 of 1929. In the matter of,

Bhagwan Singh v. *Bhawani Das Bhagwan Das* (1), *Syed Ali Zamin* v. *Nawab Syed Mohammad Akbar Ali Khan* (2), *Annapurnabai* v. *Ruprao* (3), followed.

Raja Sree Nath Roy Bahadur v. *The Secretary of State for India in Council* (4), *Bhagwat Singh* v. *Jai Ram* (5), *Kamal Nath* v. *Bithal Das* (6), *Chaitanya Charan Set* v. *Mohamed Yusuf* (7), *Narendra Lal Das Choudhury* v. *Gopendra Lal Das* (8), *Mahadeo Lal Marwari* v. *Rai Bahadur Dalip Narayan Singh* (9), *Khaja Mohammad Tabarak Ali Khan alias Amir Nawab* v. *Rai Dalip Narayan Singh Bahadur* (10), referred to.

This was an application for leave to appeal to His Majesty-in-Council by the defendants 2nd party. They are sons of Thakur Baijnath Singh, who was defendant 1st party in the suit.

The plaintiffs obtained a mortgage decree on the 30th June, 1925, against Thakur Baijnath Singh, defendant 1st party, and his sons the applicants, as defendants 2nd party, and all of them preferred an appeal to the High Court (First Appeal no. 2 of 1926). Thakur Baijnath Singh died during the pendency of the appeal, and the applicants his sons, being already on the record, were substituted in his place.

The plaintiffs brought a suit to enforce a mortgage, dated the 17th of April, 1914, executed by the defendant, Thakur Baijnath Singh, for a consideration of Rs. 19,890 due on three previous bonds, namely, (1) a bond of 7th of December, 1898, for Rs. 6,000 with interest at $7\frac{1}{2}$ per cent. compoundable annually; (2) a simple mortgage bond, dated the 27th

(1) (1921) I. L. R. 43 All. 223.
(2) (1928) 9 Pat. L. T. 731.
(3) (1924) I. L. R. 51 Cal. 969, P. C.
(4) (1903-04) 8 Cal. W. N. 294.
(5) (1915) 26 Ind. Cas. 402.
(6) (1922) I. L. R. 44 All. 200.
(7) (1921) 34 Cal. L. J. 299.
(8) (1926-27) 31 Cal. W. N. 572.
(9) (1928) 9 Pat. L. T. 393.
(10) (1927) 103 Ind. Cas. 703.

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of February, 1910, for Rs. 500 with interest at the rate of 24 per cent. compoundable annually; and (3) a bond, dated the 17th of May, 1910, for Rs. 1,900 with interest at 21 per cent. compoundable annually. The first of these bonds was executed by Poshan Singh, father of Baijnath Singh and grand-father of the other defendants. The second and the third bonds were executed by Thakur Baijnath Singh. The interest stipulated for in the bond in suit was at the rate of 9 annas per cent. per mensem or Rs. 6-12-0 per cent. per annum with annual rests. The plaintiffs claimed :

Rs.	as.	p.	
19,890	0	0	... on account of principal.
11,797	8	0	... on account of interest up to 22nd August, 1922.
31,687	8	0	... Total.

They also claimed future interest at the rate mentioned in the bond in suit till the date of realisation.

The defendant 1st party, Thakur Baijnath Singh, admitted his having executed the bond, but the other defendants denied knowledge of execution and passing of consideration, or that they were in any way benefited by the bond in suit or the previous bonds. All of them denied that there was any legal necessity to borrow money at such a high rate of interest and compound interest as mentioned in the aforesaid bonds and that the stipulation in respect thereof was penal and unconscionable and contrary to the intention of the parties and pleaded certain payments not having been credited. They also stated that the mortgaged property was an ancient ghatwali tenure and was inalienable, and the Ghatwal for the time being had no right to mortgage, alienate or in any way to incumber the tenure. Consequently, they urged the mortgage in question was illegal, invalid and no mortgage decree could be passed affecting it.

The Subordinate Judge overruled these contentions and decided the issues arising out of them against the defendants and gave the plaintiffs a decree for the amount claimed with costs, but disallowed interest after the institution of the suit.

The defendants preferred an appeal to the High Court, attacking the decree of the Subordinate Judge, particularly on three points, namely, (*1*) that the mortgaged property was not a mukarrari tenure as held by the Subordinate Judge, but was Kharagpur ghatwali and was inalienable and that the Ghatwal had no right to mortgage or alienate it in any way, (*2*) that the three payments alleged by them should have been credited and (*3*) that the rate of interest and compound interest was high, penal, unconscionable and without legal necessity and it should have been disallowed.

The plaintiffs preferred a cross-appeal as to the interest pendente lite amounting to Rs. 6,500, which was disallowed by the Court below and claimed that the interest at the bond rate till the period of grace and thereafter at the Court rate of six per cent. per annum till realisation ought to be allowed and prayed that the decree of the Court below be modified accordingly.

The High Court by its decree, dated the 20th December, 1928, dismissed the defendants' appeal, and decreed the plaintiffs' cross-appeal directing that the decree of the Court below be modified to the extent that interest at the bond rate shall run on the principal up to the expiry of the period of grace. Against this decree the defendants applied for leave to appeal to His Majesty-in-Council.

Ramlal Dutt, for the petitioners, argued that the decree was not a decree of affirmance and, therefore, the value of the suit being above Rs. 10,000, the petitioners were entitled to appeal to His Majesty-in-Council as of right. He referred to sections 109 and

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110 of the Code of Civil Procedure, 1908, and cited *Bhagwan Singh* v. *Bhawani Das Bhagwan Das* (1).

K. P. Jayaswal (with him *Jagarnath Prasad*), for the opposite party, argued that the case of *Bhagwan Singh* v. *Bhawani Das Bhagwan Das* (1) had no application. He drew the attention of the Court to *Annapurnabai* v. *Ruprao* (2) and contended that the portion of the decree of the lower court affirmed by the High Court cannot be the subject-matter of leave to appeal to the Privy Council. He then referred to *Khaja Muhammad Tabarak Ali Khan alias Amir Nawab* v. *Rai Dalip Narayan Singh Bahadur* (3), *Chaitanya Charan Set* v. *Mohamed Yusuf* (4) and *Narendra Lal Das Chowdhury* v. *Gopendra Lal Das* (5).

Ramlal Dutt, in reply referred to the case of *Syed Ali Zamin* v. *Nawab Syed Mohamad Akbar Ali Khan* (6).

JWALA PRASAD and ROWLAND, JJ. (after stating the facts set out above proceeded to say as follows:)

The value of the subject-matter of the suit in the Court of first instance as well as that of the subject-matter in dispute on appeal to His Majesty-in-Council is undoubtedly above Rs. 10,000. The amount of interest itself, which was the subject-matter of dispute between the parties both in the trial Court and in the High Court and that which is involved in the proposed appeal to His Majesty-in-Council, is over Rs. 10,000. The defendants will be entitled to obtain the leave to appeal asked for as a matter of right whether any substantial question of law is involved or not, provided that this Court did not affirm the decree of the first Court but varied it.

(1) (1921) I. L. R. 43 All. 223.
(2) (1924) I. L. R. 51 Cal. 969.
(3) (1927) 103 Ind. Cas. 703.
(4) (1921) 34 Cal. L. J. 296.
(5) (1926-27) 31 Cal. W. N. 572.
(6) (1928) 9 Pat. L. T. 731.

Now, the Subordinate Judge while passing a decree in favour of the plaintiffs for the principal sum with interest and compound interest as claimed disallowed them interest for a certain period. The defendants being aggrieved by the entire decree appealed to this Court. Both parties were, however, aggrieved by the direction of the Subordinate Judge as to interest and both of them took objections to the directions regarding interest which affected them respectively and this Court disposed of the objections of both the parties in a single decree prepared by it, modifying the decree of the Subordinate Judge in favour of the plaintiffs and to the prejudice of the defendants. Thus, the decree of the Subordinate Judge as to interest was not affirmed but was modified and the decree of this Court sought to be appealed from is consequently a decree not of affirmance but of reversal of the decision of the Subordinate Judge on a substantial question of interest involved in the litigation. The decree of this Court may usefully be quoted here :

"It is ordered and decreed that this appeal be and the same is hereby dismissed with costs and the cross-appeal be allowed, the decree of the Court below be modified to this extent that interest at the bond rate shall run on the principal up to the expiry of the period of grace."

Mr. Jayaswal on behalf of the respondents contends that inasmuch as the defendants' appeal was dismissed and the decree of the Court below was affirmed so far as their appeal was concerned, the decree passed by this Court was a decree of affirmance and that the variation in the rate of interest made by this Court in the cross-appeal preferred by the plaintiffs would not change the character of the decree of this Court from that of affirmance to that of reversal or modification of the decision of the Court below. Mr. Dutt, appearing on behalf of the applicants for leave to appeal to His Majesty-in-Council, disputes this contention and urges that the decree of this Court has substantially varied the decision of the Court below and has saddled his clients with a much larger amount of interest than what was

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allowed by the Court below and that the decree of this Court as a whole must be deemed to be a decree of reversal of the decision of the Court below. At any rate, he contends that the partial variation of the decree of the Court below in such a substantial matter as the rate of interest goes to show that the decision of the Subordinate Judge was not affirmed in terms of section 110 of the Civil Procedure Code.

Both parties cited a number of authorities in support of their respective contentions: *Raja Sree Nath Roy Bahadur* v. *The Secretary of State for India in Council* (1), *Bhagwat Singh* v. *Jai Ram* (2), *Kamal Nath* v. *Bithal Das* (3), *Bhagwan Singh* v. *Bhawani Das Bhagwan Das*(4), *Chaitanya Charan Set* v. *Mohamed Yusuf* (5), *Narendra Lal Das Chaudhury* v. *Gopendra Lal Das* (6), *Mahadeo Lal Marwari* v. *Rai Bahadur Dalip Narayan Singh* (7), *Syed Ali Zamin* v. *Nawab Syed Mohammad Akbar Ali Khan* (8), *Khaja Mohammad Tabarak Ali Khan* v. *Rai Dalip Narayan Singh Bahadur* (9) and *Annapurnabai* v. *Ruprao* (10).

None of these cases is exactly on all fours with the present case. A distinction, however, seems to be traceable between the cases where the modification by the decree of the High Court has been to the advantage or benefit of the applicant for leave to appeal to His Majesty and where the modification has been to his prejudice.

The case in *Bhagwan Singh* v. *Bhawani Das Bhagwan Das* (4) to some extent approaches the present case, where the modification affected the

(1) (1903-04) 8 Cal. W. N. 294.
(2) (1915) 26 Ind. Cas. 402.
(3) (1922) I. L. R. 44 All. 200.
(4) (1921) I. L. R. 43 All. 223.
(5) (1921) 34 Cal. L. J. 290.
(6) (1926-27) 31 Cal. W. N. 572.
(7) (1928) 9 Pat. L. T. 393.
(8) (1928) 9 Pat. L. T. 731.
(9) (1927) 103 Ind. Cas. 703.
(10) (1924) I. L. R. 51 Cal. 969, P. C.

amount of interest only and leave to appeal was granted. In the case of *Annapurnabai* v. *Ruprao* (1) the plaintiff sought to recover possession of the property in dispute from the defendants 1 and 2 upon the ground that he was adopted by the senior widow of one Shanker Rao Patel and that the defendant no. 2 was not the adopted son. Defendant no. 1 was the mother of defendant no. 2. The defendants resisted the plaintiff's claim and denied the adoption set up by him. The Additional District Judge who tried the case held that the plaintiff's adoption was proved and gave him a decree for possession, but he directed that the plaintiff was bound to provide maintenance for defendant no. 1 at the rate of Rs. 800 per annum making it a charge upon the estate. The Judicial Commissioner of Central Provinces modified the decree by increasing the maintenance from Rs. 800 to Rs. 1,200 per annum. In all other respects the decree of the Additional District Judge was affirmed. The defendants applied for leave to appeal to the Privy Council, but the application was dismissed upon the ground that the decree of the first Court had been affirmed, except in respect of "a small change" in favour of one of the appellants and that no question of law was involved. On an application for special leave their Lordships of the Judicial Committee allowed the leave. Lord Dunedin in making the order observed that "In the opinion of their Lordships the contention of the petitioners' Counsel as to the effect of section 110 of the Code is correct. They had therefore a right of appeal." The contention of Sir George Lowndes, Counsel for the appellants, was that the appellate Court did not affirm the decree of the first Court but varied it and, consequently, it was not material under section 110 whether any substantial question of law was involved. Of course in that case special leave to appeal was limited to the question of maintenance only, because Sir George Lowndes said that having regard to the concurrent finding the petitioners desired to appeal only with regard to the amount of maintenance.

(1) (1924) I. L. R. 51 Cal. 969, P. C.

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It is contended by Mr. Jayaswal that as the appeal in that case was limited to the question of maintenance only upon which point the learned Judicial Commissioner had varied the amount decreed by the Additional District Judge, the petitioners in this case should likewise be limited in their appeal to the question of interest only, upon which point alone there has been variance between the decree of this Court and that of the Court below, and that the petitioners have no right to obtain leave to appeal on other points involved in the case, as on those points the decree of this Court has affirmed the decision of the Court below. It seems to us that the leave in that case was limited not because in other respects the decree of the High Court had affirmed the decree of the Subordinate Court, but because Sir George Lowndes did not want to appeal on other points by reason of the concurrent findings of the Courts on those points. Therefore, I do not think that if leave has to be given it can be limited by us to the question of interest only. All that we have to see is whether in the circumstances of this case the decree of this Court is a decree of affirmance of the decision of the Court below, and it comes well within the principle laid down by Lord Dunedin when the decree of this Court expressly states that

> "the decree of the Court below be modified to this extent that interest at the bond rate shall run on the principal up to the expiry of the period of grace".

Now a plain reading of the provision in section 110 of the Civil Procedure Code would show that the leave to appeal cannot be withheld, unless it can be shewn that the decree or the final order appealed from affirms the decision of the Court immediately below passing such decree or order. The provision in the section distinctly says:

> "where the decree or final order appealed from affirms the decision of the Court immediately below, etc."

A decree which substantially alters the decree of the Court below cannot be said to be a decree affirming

that decision. In cases where the variation is of an unsubstantial nature or of an incidental character as in the case of costs, the Courts in India have held that the decree passed is a decree of affirmance. Limitations have been placed upon the principle that in construing a decree as to whether it is one of affirmance or of reversal or variation one should look to the substance of the decree and see what is the subject-matter of the appeal to His Majesty-in-Council. Sir George Rankin, C.J., in the case of *Narendra Lal Das Chaudhury* v. *Gopendra Lal Das Chaudhury* (1), while affirming that principle and stating that it has been acted upon and should be acted upon, says: "I have, I confess, some doubt as to whether in the end even that principle would be found to be in accordance with the construction to be put upon section 110 but this Court and other High Courts have for many years acted upon that principle." The learned Chief Justice, therefore, felt that the limitation placed upon the construction of the section is not in consonance with the language used in the statute. Das, J., in the case of *Syed Ali Zamin* v. *Nawab Syed Mohammad Akbar Ali Khan* (2), says: "Sir Sultan Ahmad appearing on behalf of the opposite party contends that the variation is entirely in favour of the appellant and that such variation as there is in the decree of this Court will not give him the right to appeal to His Majesty-in-Council, since the petitioner is really appealing from that portion of the decree of this Court which affirms the decree of the Court of first instance. I confess that on the words of the statute the argument is wholly inadmissible. All that we have to see under section 110 of the Code is whether 'the decree or final order appealed from affirms the decision of the Court immediately below.' If it does, then the applicant is not entitled to succeed unless he satisfies the Court that the appeal involves some substantial question of

(1) (1926-27) 31 Cal. W. N. 572 (576).
(2) (1928) 9 Pat. L. T. 731 (733).

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law; but in this case one has only to read the two decrees, the one passed by the learned Subordinate Judge and the one passed by the High Court, to be satisfied that neither in point of form nor in substance can it be said that the decree appealed from affirms the decision of the learned Subordinate Judge."

As stated in the passage quoted above, the decree of this Court varied the decision of the Court below in favour of the applicants for leave to appeal and that only with respect to a very small property and it was held that neither in point of form nor in substance the decree appealed from would be said to have affirmed the decision of the Court below. This is how Das, J. interpreted the decision of their Lordships of the Judicial Committee in *Annapurnabai* v. *Ruprao* (1), for he says: "The decision of the Judicial Committee in *Annapurnabai v. Ruprao* in my judgment concludes the matter."

The present is a stronger case than that dealt with by Das, J., for here the decree of this Court has varied the decision of the Court below substantially to the prejudice of the applicants who seek to obtain leave to appeal to His Majesty.

Therefore, in consonance with the pronouncement of their Lordships of the Judicial Committee and in accordance with the language used in section 110 of the Civil Procedure Code, we hold that the applicants are entitled to the certificate prayed for, irrespective of whether any substantial question of law is involved or not. In this view it becomes unnecessary to consider whether the appeal raises any substantial question of law or not.

It seems to us, however, that the question as to whether the mortgaged property is ghatwali and inalienable is at least a point of law, as it depends upon the construction of the documents on the record.

(1) (1924) I. L. R. 51 Cal. 969, P. C.

The application is allowed with costs, hearing fee three gold mohurs. Let a certificate issue that this case complies with the provisions of section 110 of the Code of Civil Proce

REVISIONAL CIVIL.

Before Jwala Prasad and Dhavle, JJ.

DAMODAR JHA

v.

BALDEO PRASAD.*

Provincial Small Cause Courts Act, 1887 (*Act IX of* 1887), *Schedule II, article* 35 (*ii*)—*suit by landlord against tenant for the price of bamboos unlawfully cut, whether cognizable by a Court of Small Causes—article* 35 (*ii*), *whether applicable.*

Article 35 (*ii*), Schedule II of the Provincial Small Cause Courts Act, 1887, does not bar the jurisdiction of a Small Cause Court Judge to try a suit brought by a landlord against his tenant for the recovery of the price of bamboos alleged to have been unlawfully cut and appropriated by the latter.

Mirza Dilbar Hossain v. *Sadaruddin Chowdhury* (1), *Radha Ballabh Guha* v. *Panchkari Sil* (2), *Raghubir Dayal* v. *Mulwa* (3), and *Shiv Gir* v. *Khazan Gir* (4), followed.

Ramprasad Parmanik v. *Sricharan Mandal* (5) and *Deoki Rai* v. *Harakh Narayan Lal* (6), not followed.

The facts of the case material to this report are stated in the judgment of Jwala Prasad, J.

S. C. Mozumdar, for the applicant.

*Civil Revision no. 115 of 1929, from a decision of Babu S. C. Sen, Subordinate Judge of Darbhanga, dated the 11th January, 1929.

(1) (1922) 27 Cal. W. N. 469.
(2) (1927) 46 Cal. L. J. 552.
(3) (1926) I. L. R. 49 All. 440.
(4) (1922) I. L. R. 3 Lah. 369.
(5) (1917) 27 Cal. L. J. 594.
(6) (1926) 97 Ind. Cas. 129.