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Government". The High Court Rules do not, as I read them, contemplate a peon serving processes without remuneration of any kind: obviously no proper system of process serving could, as it simply means that this irregular forces of peons is to gain its remuneration from the litigant public. I would, therefore, hold that the so called peon in this case was not a public servant and was not acting in that capacity and I would dismiss the appeal.

ORDER.

SCROOPE, J.

SCROOPE AND AGARWALA, JJ.—As we have disagreed in this case let the appeal be placed before the Hon'ble the Chief Justice for necessary orders.

On this reference

Sir Sultan Ahmed, Government Advocate, for the appellants.

H. Singh, for the respondents.

COURTNEY TERRELL, C.J.—I need only say that I entirely agree with the judgment of Mr. Justice Agarwala and have nothing to add to it.

Appeal allowed.

Case remanded.

**REFERENCE UNDER THE COURT-FEES ACT,
1870.**

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November,
18.

Before James, J.

DHANUKDHARI PRASAD PANDEY

v.

RAMADHIKARI MISSIR.*

Court-fees Act, 1870 (Act VII of 1870), section 11 and Schedule I, Article 1—final decree determining amount of mesne profits, appeal from—ad valorem court-fee payable on amount of decree—liability of defendants joint—value of appeal, what should be—ad valorem court-fee paid on the appeal from preliminary decree, whether allowance should be made for—Taxing Judge, whether can make reference to Division Bench.

* Reference under section 5 of the Court-fees Act.

Where the amount of mesne profits is definitely ascertained and embodied in a final decree, and an appeal is presented against that decree, the appellant must pay on the memorandum of appeal ad valorem court-fee calculated on the amount of the decree which is the subject-matter of the appeal and not merely on the value of the mesne profits claimed in the plaint.

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Kedar Nath Goenka v. Maharaja Chandra Mauleshwar Prasad Singh Bahadur(1), followed.

Shoodhin Singh v. Noranji Lal Ram Marwari(2), not followed.

Ram Gulam Sahu v. Chintaman Singh(3), referred to.

The second part of section 11, Court-fees Act, 1870, applies only to a claim for mesne profits accruing subsequently to the date of suit of which the plaintiff is unable to calculate the approximate value and to a case in which the mesne profits calculated in execution exceed the original claim. It does not apply to mesne profits accruing before suit on which a definite valuation has been placed in the plaint.

Where the liability of the defendants under a decree for mesne profits was joint and some only of them preferred an appeal from the decree adopting a valuation calculated on the proportion which the area held by them bore to the total area of which the plaintiff had been dispossessed, held, that the value of the appeal must be the value of the whole decree, and that the ad valorem court-fee payable was to be calculated on that amount.

Held, further, that in calculating this court-fee allowance should be made for the ad valorem court-fee already paid on the appeal from the preliminary decree, since the appellant was not required to pay ad valorem court-fee twice.

Kanchan Mandar v. Kamla Prasad Chowdhury(4), followed.

A Taxing Judge must himself decide the point referred to him for his decision and he cannot make a reference to a Division Bench.

(1) (1932) I. L. R. 11 Pat. 532.

(2) (1926) 11 Pat. L. T. 703.

(3) (1925) I. L. R. 5 Pat. 361, F. B.

(4) (1912) 16 Cal. L. J. 564.

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Kachera v. Kharag Singh(1), followed.

Reference to the Taxing Judge under section 5 of the Court-fees Act.

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

B. N. Mitter, for the appellants.

Government Pleader, for the Crown.

JAMES, J.—This appeal arises out of a suit for recovery of mesne profits. The suit was decreed against all the defendants with the direction that a commissioner should be appointed to take an account in order to ascertain the actual value of the profits to be awarded. The suit was valued at thirteen thousand rupees; but the commissioner has found that the plaintiff is entitled to mesne profits of Rs. 16,011. This decision has been adopted by the Subordinate Judge who has by his final decree definitely directed, without any ambiguity, that the liability of all the defendants will be joint. The appellants preferred an appeal from the preliminary decree adopting a valuation calculated on the proportion which the area held by them bore to the total area of which the plaintiff has been dispossessed. They have now preferred an appeal from the final decree valuing their appeal in the same way and paying ad valorem court-fee on the difference between this value and that of the appeal against the preliminary decree. The Taxing Officer has made a reference under the Court-fees Act on two grounds; first, of whether ad valorem court-fee is payable on an appeal of this kind; and secondly, of whether the value of the appeal for the purposes of court-fee is that of the entire decree.

On the question of whether the appeal should be valued at the value of the entire decree, or only at that which would have been its proportionate value if the learned Subordinate Judge had decided otherwise than he did, it appears to be clear, since by the

(1) (1910) I. L. R. 33 All. 20.

decree these defendants are liable to pay mesne profits of Rs. 16,011, and not any smaller sum calculated on what might have been their liability if the decision had been otherwise, that the value of the appeal is the value of the whole decree. It has been definitely found that these defendants with the other defendants who were jointly liable entered into a conspiracy to dispossess the plaintiff, and that the liability of the defendants cannot be split up and apportioned. The value of this appeal is, therefore, Rs. 16,011-5-0; and if ad valorem court-fee is payable it must be calculated on that amount.

On the second point the reference has been made on account of a decision of a Division Bench of this Court, differing from the decision of the Taxing Judge which has hitherto prescribed the rule for determining the court-fee payable on such appeals. Jwala Prasad, J. in *Sheodhin Singh v. Norangi Lal Ram Marwari*(¹) held that where the applicant for ascertainment of mesne profits in a proceeding under Order XX, rule 12, of the Code of Civil Procedure was not satisfied with the amount awarded by the court enquiring into the matter, and preferred an appeal claiming a higher amount, he was not liable to pay ad valorem court-fee on the amount which he claimed on appeal, because no court-fee calculated ad valorem could be demanded from the appellant until the amount of mesne profits actually due to him had been ascertained in the appeal, when the provisions of the second part of section 11 of the Court-fees Act would become applicable. A Full Bench of this Court, in *Ram Gulam Sahu v. Chintaman Singh*(²), had laid down the rule that where the decree directs mesne profits to be ascertained in execution, court-fee calculated ad valorem cannot be levied on the successful plaintiff when he prefers his claim in execution; it is not payable until, after the enquiry has been held and the amount of the mesne profits

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ascertained, he proceeds to execute his decree against the judgment-debtor. Following the principle laid down in that decision, Jwala Prasad, J. in *Sheodhin Singh's*(¹) case held that no court-fee calculated ad valorem could be levied from the successful plaintiff at any stage of the proceedings until the provisions of the second part of section 11 of the Court-fees Act became applicable, on his proceeding to execute his final decree, and that, therefore, ad valorem court-fee could not be levied on an appeal by the successful plaintiff, in which he claimed a higher amount than the lower court had awarded him in the preliminary execution proceedings. The matter came before a Division Bench of this Court in *Kedar Nath Goenka v. Maharaja Chandra Mauleshwar Prasad Singh Bahadur*(²) wherein the learned Judges, acting under section 28 of the Court-fees Act, decided that court-fee calculated ad valorem was payable on a memorandum of appeal presented against a decree made on an application for ascertainment of mesne profits. The learned Judges differed from the view taken by the Taxing Judge in *Sheodhin Singh's*(¹) case, pointing out that the document which they had to consider was not a petition for ascertainment of mesne profits but a memorandum of appeal. They observed that section 4 of the Court-fees Act required that no document of any of the kinds specified in the first schedule of the Act could be received by the High Court unless in respect of that document there had been paid a fee or an amount not less than that indicated by the said schedule as the proper fee for such a document. They then proceed to point out that the first article of Schedule I of the Court-fees Act prescribes that a memorandum of appeal is to bear a court-fee stamp calculated on the value of the subject-matter in dispute in the appeal. It is argued that the learned Judges of the Division Bench had no power to reopen under section 28 of the Court-fees

(1) (1926) 11 Pat. L. T. 703.

(2) (1932) I. L. R. 11 Pat. 532.

Act a matter which had already been finally decided by the fact that the Stamp Reporter had accepted the memorandum of appeal as sufficiently stamped at the time when the appeal was preferred. The matter came before the Division Bench because the officer whose duty it was to prepare the decree of the Court found difficulty, owing to the fact that in his opinion the memorandum of appeal had been insufficiently stamped. I do not consider that it is necessary for me to decide whether a Division Bench has power under section 28 of the Court-fees Act to enquire into the question of whether a memorandum of appeal which is before them has been sufficiently stamped or not. Even if the argument be accepted that the remarks of the learned Judges are to be treated as no more than obiter dicta, the fact remains that the obiter dictum of a Division Bench must be treated with respect; and the Taxing Officer in the present case acted rightly in making his reference.

In view of the fact that the liability of all the defendants has been found to be joint so that the present appellants were by the original decree liable to pay the whole of the mesne profits which might ultimately be found to be payable, there can be no question in the present case regarding the correctness of the Stamp Reporter's view that ad valorem court-fee is payable on the value of the decree up to the extent of thirteen thousand rupees which was the valuation in the plaint. The second part of section 11 of the Court-fees Act has no application until the amount of mesne profits payable comes to be determined in execution. Where a definite value is placed in the plaint on the mesne profits claimed, and the suit is decreed, the defendant appealing from the decree must pay court-fee calculated ad valorem on the value of the mesne profits claimed in the plaint, whether the suit is only for mesne profits, or whether the claim for recovery of mesne profits accompanies a claim for recovery of land: *Kanchan Mandar v. Kamla Prashad Chowdhury*(1). The second part of

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section 11 of the Court-fees Act, whether it applies to appeals or not, applies only to a claim for mesne profits accruing subsequently to the date of suit, of which the plaintiff is unable to calculate the approximate value, because he cannot say for how long a period he is likely to be kept out of possession, and to a case like this, in which the mesne profits calculated in execution exceed the original claim. The rule applies to the present case only to this extent, that the plaintiff must pay additional court-fee before he can execute his decree; but it does not apply to mesne profits accruing before suit on which a definite valuation has been placed in the plaint. The question, therefore, to be considered in the present case is that of whether ad valorem court-fee is payable on the whole amount for which the appellants seek to avoid liability, or only on that portion of it which was included in the value of the plaint. The amount to which the second part of section 11 applies is thus the sum of three thousand rupees or so by which the mesne profits ascertained in execution exceed the amount definitely claimed in the plaint. According to the decision of the Taxing Judge in *Sheodhin Singh's*(¹) case ad valorem court-fee is not payable on this amount; while according to the decision of the Division Bench in *Kedar Nath Goenka's*(²) case ad valorem court-fee is payable. As this question has been referred to me for decision as Taxing Judge, I am obliged to decide it, since I cannot make a reference to a Division Bench: *Kachera v. Kharag Singh*(³). It appears to me that the reasons given by the Division Bench for their decision in *Kedar Nath Goenka's*(²) case should prevail, that an appeal differs from a mere application for ascertainment of mesne profits, and that a memorandum of appeal of this kind is liable to ad valorem court-fee under Article 1 of Schedule 1 of the Court-fees Act. When mesne profits have once

(1) (1926) 11 Pat. L. T. 703.

(2) (1932) I. L. R. 11 Pat. 53;

(3) (1910) I. L. R. 33 All. 20.

been definitely ascertained in execution, the plaintiff is certainly capable of ascertaining the exact amount which he claims, and the defendant knows definitely the amount of the liability which he is seeking to escape. I would, therefore, hold that the value of the present appeal is Rs. 16,011-5-0 and that ad valorem court-fee is payable on that amount. In calculating this court-fee allowance should be made for the amount of the ad valorem court-fee already paid on the appeal from the preliminary decree, since the appellant is not required to pay ad valorem court-fee twice: *Kanchan Mandar v. Kamla Prasad Choudhury*(¹); but the attention of the Stamp Reporter should be drawn to the fact that unless ad valorem court-fee is paid on this appeal, the memorandum in First Appeal 117 of 1930 will be insufficiently stamped.

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Order accordingly.

PRIVY COUNCIL.

RAJA KIRTYANAND SINGH

v.

RAJA PRITHI CHAND LAL CHAUDHURY.

J.C.*
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November,
 22.

Limitation—Execution of Decree—Subsequent Order directing Payment—Order in different Suit—Order staying Execution—Debtor and Surety—Limitation Act (IX of 1908) s. 15—Code of Civil Procedure (V of 1908), s. 48(1)(b); s. 145.

Under section 48(1)(b) of the Code of Civil Procedure, 1908, a subsequent order directing payment does not postpone the commencement of the period limited for making a fresh application for execution of a decree unless the order is made in the suit in which the decree was made and directs payment by the debtor or surety of money due under the decree; the provision does not apply, therefore, where a receiver having been appointed in a different suit he is directed to make payments in discharge of the decree sought to be executed. Further, a statement in an order in that

* PRESENT: Lord Tomlin, Lord Thankerton and Sir Lancelot Sanderson.

(1) (1912) 18 Cal. L. J. 564.