made by a court and this must mean the person named in the decree. Then we have Order XXI, rule 1, directing that all money payable under a decree is to be paid either into the court or out of court to the decree-holder or otherwise as the court may direct. Then Order XXI, rule 2, refers to payment out of court or adjustment of the decree "to the satisfaction of the decree-holder" and does not recognise any payment or adjustment to the satisfaction of some third party. And rule 2, clause (3), lays down that a payment or adjustment which has not been certified or recorded as aforesaid shall not be recognised by any court executing the decree. The facts put in issue in this case were matters between the judgment-debtor and Ramsarup, a stranger to the suit, rather than between the judgment-debtor and the decree-holder named in the decree. The proper place for the disputes between the judgment-debtor and Ramsarup to be settled is not in the executing court but in separate and appropriate proceedings. I also agree with the reasoning of my learned brother and I concur in the order proposed to be passed.

S.A.K.

Appeal allowed.

APPELLATE CIVIL.

Before James and Rowland, JJ.

1939.

January, 30.

GORAKH SAHU

v.

SHEO NANDAN SINGH.*

Court-Fees Act, 1870 (*Act VII of* 1870), *Schedule II*, *article* 17(1)—*Code of Civil Procedure*, 1908 (*Act V of* 1908),

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*Appeal from Appellate Decree no. 78 of 1936, from a decision of T. Luby, Esq., I.C.S., District Judge of Muzaffarpur, dated the 13th February, 1935, confirming a decision of Babu Kshetra Nath Singh, Subordinate Judge at Muzaffarpur, dated the 28th July, 1934.

1939.

GORAKH SAHU v. SHEO NANDAN SINGH.

Order XXI, rule 63, suit under—prayer for injunction—Article 17(1), whether still applicable—plaint rejected for non-payment of court-fee—appeal—court-fee payable on memorandum of appeal—appeal, value of.

The plaintiffs instituted a suit under Order XXI, rule 63, Code of Civil Procedure, 1908, and also made a prayer for an injunction. The plaint bore a stamp of Rs. 15 but the trial court called upon the plaintiffs to pay ad valorem court-fee. The plaintiffs having refused to pay, the plaint was rejected. The plaintiffs appealed from the order of rejection paying a court-fee of Re. 1. The District Judge demanded ad valorem court-fee which was not paid and the memorandum of appeal was rejected. The plaintiffs then appealed to the High Court.

Held, (*i*) that the memorandum of appeal against the order rejecting the plaint must be stamped ad valorem and the value of the appeal for that purpose should be taken to be the difference between the value of the stamp on the plaint and the value of the stamp demanded by the trial court.

Munshi Mahto v. *Lachman Lal*(1) and *Durga Prasad* v. *Raghubar Dial*(2), followed.

(*ii*) that the prayer for an injunction cannot be treated as taking the plaint out of the operation of article 17(*1*) of the second schedule of the Court-Fees Act, 1870.

Phul Kumari v. *Ghanshyam Misra*(3), relied on.

Appeal by the plaintiffs.

The facts of the case material to this report are set out in the judgment of the Court.

S. K. Mitter and *Sambhu Barmeshwar Prasad*, for the appellants.

A. K. Mitter, for the respondents.

Government Pleader, for the Crown.

JAMES AND ROWLAND, JJ.—This second appeal arises out of a suit which was instituted under Order

(1) (1929) 10 Pat. L. T. 545.
(2) (1882) 2 All. W. N. 244.
(3) (1907) I. L. R. 35 Cal. 202, P. C.

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JAMES AND ROWLAND, JJ.

XXI, rule 63, of the Code of Civil Procedure. The plaint bore a stamp of Rs. 15; but the Subordinate Judge called upon the plaintiffs to pay a court-fee ad valorem on the value of the property. The plaintiffs did not pay and the plaint was rejected. The plaintiffs appealed to the District Judge stamping their memorandum of appeal as for an appeal against an order; but the learned District Judge required them to stamp his memorandum with a court-fee stamp of the value of Rs. 15 granting them time for the purpose. Later on the same day the District Judge cancelled this order and required the plaintiff to pay court-fee ad valorem on the value of the property. The plaintiffs failed to pay and their memorandum of appeal was rejected. When the second appeal came before the High Court the Taxing Officer referred to the Taxing Judge the question of what court-fee should be demanded from the appellants. It was held by the Taxing Judge that court-fee should be paid ad valorem on the difference between the value of the stamp on the plaint and the amount of court-fee demanded by the Subordinate Judge.

Mr. S. K. Mitter on behalf of the appellants points out that after the decision of the Judicial Committee in *Phul Kumari* v. *Ghanshyam Misra*(1), it cannot be argued that a plaint under Order XXI, rule 63, requires a higher court-fee stamp than Rs. 15. In the case before the Judicial Committee the plaintiff had prayed for an injunction which had been granted and he paid court-fee separately for the declaration and for the injunction; but the Pricy Council pointed out that a single court-fee was sufficient under Article 17(*1*) of the second schedule of the Court-Fees Act. In the present case the Subordinate Judge demanded ad valorem court-fee because the plaintiffs prayed for an injunction; but the prayer

(1) (1907) I. L. R. 35 Cal. 202, P. C.

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for an injunction cannot after the decision in *Phul Kumari's* case[1] be treated as taking the plaint out of the operation of Article 17(*1*).

On the question of what was the proper stamp for the memorandum of appeal, the learned Government Pleader argues that this should be the same as the stamp on the plaint; and the learned Advocate for the respondents suggests that this should be ad valorem on the value of the property. The memorandum bore a stamp of one rupee; but the appellants' pleader in the court of the District Judge accepted the view that stamp of Rs. 15 was payable. In *Munshi Mahto* v. *Lachman Lal*[2] it was held that a memorandum of appeal of this kind must be stamped ad valorem and it appears to have been assumed that this necessarily meant ad valorem on the value of the suit. That decision would be applicable to this case if any attempt had been made to defend the treating of the appeal to the District Judge as an appeal from an order; but the question remains of what we should take to be the value of the appeal in the District Judge's court for the purposes of assessment of court-fee. In the High Court the value for that purpose has been taken to be the difference between the value of the stamp on the plaint and the value of the stamp demanded by the Subordinate Judge. That appears to us to be a reasonable method of assessing valuation of court-fee in cases where the only point raised is the question of whether the plaint or the memorandum of appeal was sufficiently stamped. This was the view taken by Straight and Oldfield, JJ. in *Durga Prasad* v. *Raghubar Dial*[3]. The appellants must make good the deficit of Rs. 36/8 on the memorandum of appeal in the District Judge's Court within fourteen days. If he does this within time this appeal will be allowed with costs payable by the defendant-respondents for this Court and the Court below.

(1) (1907) I. L. R. 35 Cal. 202, P. C.
(2) (1929) 10 Pat. L. T. 545.
(3) (1882) 2 All. W. N. 244.

If they fail to make good the deficit within the time allowed, the memorandum of appeal to the District Judge will stand rejected, and the appeal to this Court will stand dismissed.

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S. A. K.

Order accordingly.

FULL BENCH.

Before Harries, C.J., Wort, James, Agarwala and Manohar Lall, JJ.

1939.

February, 6.
March, 29.

BRIJ BEHARI LAL

v.

FIRM SRINIVAS RAM KUMAR.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 90(1), proviso (i)(b)—deposit of security, whether must be made within thirty days of the sale—proviso, meaning of—amendment of rule 90, whether is ultra vires the rule-making powers of the High Court.

All that the substituted proviso (*i*)(*b*) to sub-rule (*1*) of Order XXI, rule 90, of the Code of Civil Procedure, 1908, requires is that before the *admission* of an application to set aside the sale the necessary sum of money or security, unless dispensed with, must be deposited. The applicant can then be said to have deposited "with his application" such deposit or security within the meaning of the proviso.

The Limitation Act only requires that the application be made within thirty days of the sale, and there is nothing in the substituted proviso to suggest that the money or other security must be deposited within limitation.

Where, therefore, no deposit accompanies an application to set aside a sale, the Court has no power to reject such application forthwith. On the other hand, it must give the applicant an opportunity to urge that the deposit should be

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*Civil Revision no. 649 of 1937, from an order of N. C. Chandra, Esq., Additional District Judge of Shahabad, dated the 17th September, 1937, affirming an order of Maulavi Ali Hasan, Second Munsif, Sasaram, dated he 25th May, 1937.