

of the provisions of Article 17 (iv) of the Second Schedule of the Court Fees Act.

It follows that if section 8 of the Court Fees Act is not applicable, the provisions of Article 1 of the First Schedule must be applied, and the result will be the same in either case.

We find that court-fees are payable in these appeals *ad valorem* on the difference between the sum awarded by the Court and the sum which the appellant now claims should have been awarded.

1927

SPECIAL
COLLECTOR
OF RANGOONV.
KO ZI NA
AND OTHERSRUTLEDGE,
C.J., AND
BROWN J.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Maung Ba.

AHMED RAHMAN AND FOUR OTHERS

v.

A.L.A.R. CHETTIAR FIRM.*

1928

Jan. 24.

Court-fee on appeal from order passing final decree for sale in mortgage suit—Adjustment of preliminary mortgage decree not an adjustment of suit within the meaning of O. 23, r. 3 of Civil Procedure Code (Act V of 1908)—Effect of non-certification under O. 21, r. 2—O. 34, r. 5.

Held, that where an appeal is preferred against an order which is an order for a final decree for sale in a mortgage suit, such appeal must be against the final decree itself and not against the order as an order, and consequently the appeal must be stamped *ad valorem*.

Where a mortgage decree-holder applies for a final decree for sale of the mortgaged property and the judgment-debtor urges that the decree-holder had allowed him an extension of time for payment, *held* that such an agreement would amount to an adjustment of the preliminary decree and could not be recognized by the Court that is bound to pass the final decree for sale in terms of the preliminary decree, unless the adjustment was certified to the Court under Order 21, rule 2, of the Civil Procedure Code within the prescribed time. The alleged agreement cannot be regarded as an adjustment of a suit within the meaning of Order 23, rule 3, of the Civil Procedure Code.

Bajrangi Lal v. Mahabir, 35 All. 476; *Jankibai v. Chimna*, 22 Bom. L.R. 811—followed.

Krishnaswamy for the appellants.

* Civil First Appeal No. 330 of 1927 and Civil Miscellaneous Application No. 7 of 1928.

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HEALD and MAUNG BA, JJ.—Respondent sued appellants to recover Rs. 16,141-2 due on a mortgage, and by consent was given a preliminary mortgage decree for that amount with costs, subject to a condition that if appellants should pay the sum of Rs. 66,500 with interest thereon at one per cent. per mensem in two instalments, namely one of Rs. 20,000 with interest thereon to be paid on or before the 15th of March 1927, and one of Rs. 46,500 with interest thereon to be paid on or before the 31st of May 1927, respondent would accept that sum in full satisfaction of all his claims against appellants.

On the 18th of July 1927 respondent filed an application alleging that he had received from appellants only the sum of Rs. 28,400 and he asked for a final mortgage decree for sale of the mortgaged properties to recover the balance of the mortgage money.

On the 7th October appellants filed an objection to that application in which they alleged that on the 18th of May respondent had agreed to extend the time for payment of the balance of the money, which was payable under the agreement embodied in the consent decree, from the 31st of May 1927 to the 31st January 1928.

Respondent denied the alleged agreement to extend the time and said that even if such an agreement had been made the Court could not recognise it because appellants were barred by limitation from applying to have it recorded as certified.

The Court accepted the view that it could not recognise the adjustment because no application to have it recorded had been made within the time limited by law, and gave respondent a final decree for sale of the mortgaged properties to recover the balance of the mortgage money as stated by respondent.

Appellants claim to be entitled to appeal against the lower Court's order giving respondent a final decree for

sale as if it were an order in execution, but it seems clear that it was not in fact an order in execution but was a judgment in the mortgage suit, and that if appellants desire to appeal they must appeal against the final decree for sale of the mortgaged property, and must stamp their appeal *ad valorem*. This is the view taken in the Full Bench case of *Bajrangi Lal v. Mahabir Kunwar* (1), which was followed by the learned Chief Justice of Bombay in the case of *Jankibai v. Chimna* (2) and we accept it.

We therefore hold that before the appeal can be heard it must be stamped *ad valorem* and we give the appellants 20 days within which to supply the deficient stamps.

[Appellants applied for a review. Their Lordships gave judgment as follows :—]

HEALD and MAUNG BA, JJ. —Respondent holds a preliminary mortgage decree against applicants, made in a suit for the recovery of his mortgage money by sale of the mortgaged property. That decree was made by consent and at the time when it was made it was agreed between the parties that on applicants' paying to respondent a certain sum by the 31st of May 1927, that is within the time allowed in the decree for payment of the mortgage money or of the amount payable under the agreement, respondent would accept that sum in full satisfaction not only of the mortgage debt but also of all his claims against applicants. That agreement was by consent embodied in the decree.

Applicants made certain payments but admittedly did not pay the full amount mentioned in the agreement or the full amount of the mortgage debt.

On the 18th of July 1927 respondent applied for a final decree for sale of the mortgaged properties.

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Feb. 24.

(1) (1913) 35 All. 476.

(2) 22 Bom. L.R. 811.

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Applicants objected to the making of a final decree on the ground that before the expiry of the time fixed in the preliminary decree respondent had agreed to allow them an extension of time for payment of the full amount mentioned in the agreement up to the 31st of January 1928.

The lower Court said that the alleged agreement would amount to an adjustment of the preliminary decree and could not be recognised by the Court because applicants had not applied within the period of limitation to have it recorded as certified. The Court accordingly granted respondent a final decree for sale of the mortgaged properties.

Applicants appealed to this Court, and their appeal was described as an appeal under section 96 (1) read with sections 47 and 2 (2) of the Code, that is as an appeal against an order made in execution proceedings. It was heard as such an appeal and we said that it was not an appeal against an order in execution but was an appeal against an order in the suit, and that since the order against which applicants desired to appeal was an order for a final decree for sale on which a final decree for sale had actually been made, appellants must appeal against the final decree and could not be allowed to appeal against the order as an order. We accordingly allowed applicants 20 days within which to stamp their appeal as an appeal against the decree.

Applicants now ask us to review our judgment on the ground that their application was in fact an application made under the provisions of Order 23, rule 3 and that Order 43, rule 1 (*m*) expressly allows an appeal from an order passed on such an application.

The orders dealing with the adjustment of suits and the adjustment of decrees are Order 23, rule 3 and Order 21, rule 2 respectively. Mortgage suits are anomalous because decrees are made in them at various

stages and proceedings in the suit are not necessarily terminated by the making either of the preliminary decree or of the final decree for sale. Applications in the suit can therefore be made after the passing of the preliminary decree or of the final decree for sale and are of course commonly so made.

The question which now arises is whether applicants' application was in fact an application which could properly be made in the suit as an objection to the passing of a final decree for sale in accordance with the terms of the preliminary decree, or was in effect an application for the recognition of an adjustment of the preliminary decree.

The application alleged that on or about the 18th of May respondent agreed to accept, as payment under the agreement which was embodied in the decree, a payment of the money in full if such payment should be made by the 31st of January 1928. The date fixed for payment in the decree was the 31st of May and the alleged agreement if recognised by the Court would have the effect of substituting the 31st of January 1928 for the 31st of May 1927 in the decree. There is no provision in Order 34, rule 5, under which the decree was made, giving the Court power to extend the time for payment, and it follows that, so far as the Court was concerned, unless the preliminary decree had been adjusted, as it could of course have been, under Order 21, rule 2, respondent was entitled on application made after the 31st of May 1927 to a final decree for sale. The position would seem to be that because applicants had failed to have the alleged adjustment of the preliminary decree recorded as certified within the period of limitation, the Court was debarred from recognising it and was bound to regard the preliminary decree as in full force and to pass the final decree for sale in accordance therewith on respondent's application.

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 HEALD
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 JJ.

The Court was of course entitled to consider applicants' objection to the making of a final decree, if it was an objection which could be entertained on the basis that the preliminary decree was still in force, but it seems to us that the objection which applicants actually took was not an objection of that nature, but was an objection that by agreement between the parties the terms of the preliminary decree had been altered, and that such an agreement could not be considered unless it had been recorded as certified under the provisions of Order 21, rule 2. We do not think that the alleged agreement could be regarded as an adjustment of the suit within the meaning of Order 23, rule 3. It was merely an agreement to extend the time given by the preliminary decree and in our opinion, since the proper steps had not been taken to have that adjustment of the decree recorded as certified by the Court, it could not be considered as an objection to the passing of the final decree for sale.

We therefore see no reason to review our judgment and we reject the application for review.

We may note that in view of our opinion that the applicants' objection was not an objection which could properly be considered by the Court as an objection to the passing of the final decree, applicants will probably be well advised not to prosecute their appeal further.

The interim order for stay of sale made in these proceedings is hereby withdrawn.