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31 C. 357=8 C. W. N. 197.

For those reasons, we think, the case must go back to the District Judge for his decision, irrespective of the petitions put in on the 3rd December 1901. He must decide it on the evidence already on the record and such other evidence that may be produced before him. The respondent must pay to the appellant the costs incurred by the latter in this appeal.

Appeal allowed. Case remanded.

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31 C. 365 (=8 C. W. N. 233.)

[365] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Pratt.

GULAB KHAN *v.* ABDUL WAHAB KHAN.*

[6th January, 1904.]

Valuation of suit—Appeal—Forum of appeal—Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), *s.* 21*—Suit for account.*

When the plaintiff fixes a certain sum as the amount of his claim only approximately or tentatively, and prays that the amount of his claim may be ascertained in the course of the suit, the amount found by the Court to be due to him must be regarded as the value of the original suit for the purpose of determining the forum of appeal, under s. 21 of Act XII of 1887.

Mohini Mohan Das v. *Satis Chandra Roy* (1), *Nilmony Singh* v. *Jagabandhu Roy* (2) and *Modhu Sudan Roy* v. *Prosanno Kumar Dutt* (3) referred to.

Rameswar Mahton v. *Dilu Mahton* (4) and *Nagendra Nath Mozumdar* v. *Russik Chandra Rai* (5) distinguished.

[**Foll.** 46 P. R. 1906=94 P. L. R. 1906. **Constr. and Foll.** 34 Cal. 954. F. B.=6 C. L. J. 255=11 C. W. N. 1133; **Ref.** 34 Cal. 216=5 C. L. J. 380 ; 6 C. L. J. 38 ; 43 Cal.650. **Dist.** 37 P. L. R. 1909 ; 14 C.L.J. 489=12 I. C. 745; 14 I. C. 73.]

APPEAL by the defendant No. 1, Gulab Khan.

The plaintiffs, Abdul Wahab Khan and another, as heirs of one Nawab Khan, brought a suit in the Court of the Subordinate Judge of Monghyr, for a declaration that the defendant No. 1, as general agent of Nawab Khan, was liable to render accounts for the period of his agency, and for an order that after examination and adjustment of accounts, a sum of Rs. 5,000, being the balance which will be found due by the said defendant to the plaintiffs, might be directed to be paid by him. The claim for accounts was " valued at Rs. 5,000 approximately," and the Court-fee was paid on that amount. It was alleged in the plaint that the plaintiffs were not in a position to state what was the correct estimate of the defendant No. 1's liability, but that " the [366] plaintiffs submit that from information gathered through other servants of Nawab Khan, deceased, a balance of at least Rs. 5,000 will very likely fall due by the defendant No. 1 to the plaintiffs. The plaintiffs further submit that as all the papers in connection with this suit for accounts are now before the High Court at Calcutta, the plaintiffs are unable to give any detailed and correct account of the liabilities of the defendant No. 1." The 3rd prayer clause in the plaint was as follows : " On taking and adjusting such accounts between the plaintiffs and the defendant No. 1, if any sum over and above the amount in

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* Appeal from Original Decree, No. 470 of 1900, against the decree of Tara Prosanna Banerjee, Subordinate Judge of Monghyr, dated July 31, 1900.

(1) (1890) I. L. R. 17 Cal. 704.
(2) (1896) I. L. R. 23 Cal. 536.
(3) Unreported.
(4) (1894) I. L. R. 21 Cal. 550.
(5) (1901) 6 C. W. N. 346.

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claim, be found justly due by the defendant No. 1 to the plaintiffs, then the Court may be pleased, on the Court-fee for the deficit amount being paid, to pass a decree for the full and entire amount so found due by the defendant No. 1."

A preliminary decree for accounts was made on the 28th February 1899, which was confirmed on appeal by the District Judge on the 10th May 1899. On the 22nd September 1900 the suit was finally decreed by the Subordinate Judge, the plaintiffs being declared entitled to recover from the defendant No. 1 the sum of Rs. 5,756-13-6 pies on account of the money claimed as per account given in the decree and the sum of Rs. 1,016-9-6 pies on account of costs.

Babu *Ram Charan Mitter*, for the respondents. As a preliminary objection no appeal lies to the High Court, under section 21 of Act XII of 1887; the appeal lies to the District Judge, inasmuch as the plaintiffs had valued the suit at Rs. 5,000 only, and that, and not the amount fixed by the decree, must be taken as the value of the suit for the purpose of determining the Court of appeal. Besides, the appeal against the preliminary decree has been filed in the Court of the District Judge, who confirmed that decree. *Mohini Mohan Das* v. *Satis Chandra Roy* (1) and *Nilmony Singh* v. *Jagabandhu Roy* (2).

Moulvi *Syed Shamsul Huda* (Moulvi *Syed Mahomed Tahir* with him), for the appellant. The plaintiff has only tentatively valued his suit at Rs. 5,000 and asked the Court to fix the real value in the course of the trial. The real value, when so [367] ascertained, determines the forum of appeal. This contention is supported by the case of *Mohini Mohan Das* v. *Satis Chandra Roy* (1) and the unreported case of *Modhu Sudan Roy* v. *Prosonna Kumar Dutt*, A. O. D. 38 of 1901.

The cases of *Rameswar Mahton* v. *Dilu Mahton* (3) and *Nagendra Nath Mozumdar* v. *Russik Chandra Rai* (4) are distinguishable. It should be noted that section 21 of Act XII of 1887 speaks of the value of the *original suit* and not of the *original value* of the suit.

RAMPINI AND PRATT, JJ. The suit out of which this appeal arises was one brought for accounts from an agent and for the sum which, on account being taken, might be found to be due by the agent. The plaintiff valued his suit at Rs. 5,000, but he prayed that, if a larger amount might be found due to him, he might be given a decree for the amount so found due on his paying the deficit Court-fee duty.

The Subordinate Judge found the plaintiff entitled to a sum of Rs. 5,756-13-6.

The defendant has now appealed. A preliminary objection has been taken to the hearing of this appeal on the ground that, as the plaintiff valued his suit at Rs. 5,000, the appeal lies to the District Judge and not to this Court, as under section 21 of Act XII of 1817, it is "the value of the original suit" that determines the forum of appeal. The cases of *Mohini Mohan Das* v. *Satis Chandra Roy* (1), *Rameswar Mahton* v. *Dilu Mahton* (3), *Nilmony Singh* v *Jagabandhu Roy* (2), *Nagendra Nath Mozumdar* v. *Russik Chandra Rai* (4), and *Modhu Sudan Roy* v. *Prosanna Kumar Dutt* (5), A. O. D. 38 of 1901, have been cited to us.

In the first of these cases, the suit was one for possession and mesne profits. The suit was valued at Rs. 4,000, mesne profits were assessed

(1) (1890) I. L. R. 17 Cal. 704.
(2) (1896) I. L. R. 23 Cal. 536.
(3) (1894) I. L. R. 21 Cal. 550.
(4) (1901) 6 C. W. N. 346.
(5) Unreported.

at Rs. 6,188 and the appeal was held to lie to this Court. It was laid down in that case that, where in such a suit "no amount is fixed by the plaintiff approximately or nominally upon mesne profits, it is an unknown quantity and the value of the suit, [368] so far as the appeal from the preliminary decree of possession is concerned, is the value of the property alone, which would determine the forum of appeal. When the amount of mesne profits has been ascertained, the value of the original suit is the value of the property sued for, plus the mesne profits, and the appeal would lie accordingly."

The case of *Rameswar Mahton* v. *Dilu Mahton* (1) is not in point. The question decided there was a question not as to the forum of appeal, but as regards the jurisdiction of the original Court.

In *Nilmony Singh* v. *Jagabandu Roy* (2), the plaintiff valued his suit at over Rs. 5,000, and the defendant objected that the suit was overvalued. The Court of First Instance found this issue in favour of the defendant and held that the value of the suit was less than Rs. 5,000. The plaintiff appealed, and contested the finding. He valued his appeal at Rs. 7,500. The defendant urged that the appeal did not lie to the High Court, but it was decided that the words "value of the original suit" did not mean the value as found by the original Court, and that the appeal was rightly preferred to the High Court.

In *Nagendra Nath Mozumdar* v. *Russik Chandra Rai* (3), the plaintiff sued for an account and valued his suit at Rs. 2,000. He afterwards intimated that he desired to alter the amount of his claim, and fixed it as Rs. 9,000. His suit was dismissed and he appealed, valuing his appeal at Rs. 4,500. In this case it was held that "the value must be considered as that stated in the plaint (Rs. 2,000)" and that the appeal lay to the District Judge. In the case of *Modhu Sudan Roy* v. *Prosanna Kumar Dutt* (4) the suit was one for an injunction and damages. The suit was valued in respect of the injunction at Rs. 800 and at Rs. 1,200 "for the present" on account of damages. The plaintiff subsequently claimed Rs. 24,000 as damages. The Subordinate Judge, however, gave the plaintiff a decree for Rs. 1,200 damages. The plaintiff then appealed to this Court, and the defendant to the District Judge. It was held by the Court, that the suit was really [369] one for more than Rs. 5,000 and the plaintiff's appeal was properly preferred to this Court, and the defendant was permitted to withdraw his appeal from the Court of the District Judge and to present it to this Court.

These decisions at first sight seem to be somewhat conflicting; but we consider that the rule to be deduced from them is that where a plaintiff definitely fixes a certain sum as the amount of his claim, this must be considered as the value of the original suit and the appeal will lie accordingly:—but when he fixes a certain sum as the amount of his claim only approximately or tentatively and prays that the amount of his claim may be ascertained in the course of the suit, then the amount found by the Court to be due to him must be regarded as the value of the original suit for the purpose of determining the forum of appeal.

The only case apparently in conflict with this rule is that of *Nagendra Nath Mozumdar* v. *Russik Chandra Rai* (3), but the facts of that case are peculiar. The plaintiff in that case first valued his suit at Rs. 2,000. He then expressed his intention of altering it to Rs. 9,000; but he did

(1) (1894) I. L. R. 21 Cal. 550.
(2) (1896) I. L. R. 23 Cal. 536.
(3) (1901) 6 C. W. N. 346.
(4) Unreported.

not amend his plaint and when his suit was dismissed, he valued his appeal at Rs. 4,500. It was accordingly held that the appeal lay to the District Judge. In this case it may, we think, be fairly said that the plaintiff did not definitely fix the amount of his claim at Rs. 9,000. He first fixed it at Rs. 2,000, then expressed a wish to alter it to Rs. 9,000 and finally reduced it to Rs. 4,500. In these circumstances, it was apparent that the real value of the suit was under and not over Rs. 5,000.

In the present suit the plaintiff never definitely fixed the amount of his claim at Rs. 5,000. He did so only tentatively and from the first expressed an intention of claiming whatever sum might, on accounts being taken, be found due to him. This sum has been determined to be Rs. 5,756. Hence we consider this amount must be regarded as the value of the original suit and that the appeal has been rightly preferred to this Court.

We accordingly proceed to hear the appeal. . . . .

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31 C. 370.

[370] APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Brett.

GUNINDRA PROSAD *v.* BAIJNATH SINGH.*
[25th November, 1903.]

Mortgage—Lien on mortgaged property—Mortgagee, joint purchase of mortgaged property by—Mortgagor, objection to sale by—Transfer of Property Act (IV of 1882) s. 101.

Where the mortgagee purchases the mortgaged property along with other properties and jointly with other persons in undivided shares, his lien upon the property is not extinguished, but is existing, it being for his benefit within the meaning of s. 101 of the Transfer of Property Act.

A mortgagor is precluded from raising the objection that the sale of the mortgaged property in execution of the decree in the mortgage suit is invalid by reason of the decree *nisi* in that suit not having been made absolute, if such objection is not raised at an early stage of the proceedings.

SECOND APPEAL by plaintiff Gunindra Prosad.

This appeal arose out of an action brought by the plaintiff to set aside a sale of the property in dispute in execution of a mortgage decree. The plaintiff's allegations were that one Chuni mortgaged a share of 8 pies in touzi No. 2067, and a share of 1 anna in Katof, to the defendants, that the mortgagees obtained a preliminary decree upon this mortgage on the 7th June 1895; that on the same day 2 annas 9 pies of touzi No. 2066 including the 8 pies above mentioned and some other properties were sold under section 54 of Act XI of 1859 for arrears of Government Revenue, and were purchased by the mortgagee defendant jointly with several other persons; that in January 1898, these properties were again sold for arrears of Government Revenue and were purchased by the plaintiff; that subsequently, in May of the same [371] year, the mortgagee defendants executed the said decree of 1895; that the mortgaged property Kalof was actually sold and the share in

* Appeal from Appellate Decree No. 1881 of 1901, against the decree of H. R. H. Cox, District Judge of Arrah, dated the 31st of May 1901, confirming the decree of Lal Behary Dey, Subordinate Judge of Shahabad, dated the 22nd of September, 1900.