

(1930) 08 CAL CK 0005**Calcutta High Court****Case No:** Appeal from Original Order No. 400 of 1929

Shailendrakumar Palit

APPELLANT

Vs

Haricharan Sadhukhan

RESPONDENT

Date of Decision: Aug. 26, 1930

Judgement

Mukerji and Mitter, JJ.

Of the objections that have been taken as regards the maintainability of this appeal, the one that we are concerned with at this stage relates to its competency as lying in this Court as its forum.

The appeal is from an order passed in proceedings relating to the execution of a decree in a mortgage suit for sale. The claim at the date of the suit was laid at Rs. 4,477-2. That was the amount of claim stated in the plaint, which, however, contained prayers for interest pendente lite, and costs, etc. The preliminary decree for sale was for Rs. 6,357-7. The question is whether, from an order passed in execution of such a decree, an appeal lies to this Court.

2. There can be no question that if the value of the original suit in this case was less than five thousand rupees the present appeal would lie to the District Judge u/s 20(1)(a) of the Bengal, North-Western Provinces and Assam Civil Courts Act, XII of 1887. It has, however, been contended, on behalf of the Appellant, that, though in the plaint only Rs. 4,477-2 was stated on the footing of the amount that was then due on the mortgage, the real claim was to get all that would be due up to the date of the decree. In other words, it has been maintained that the value of the claim was only tentatively put down in the plaint, because it was not possible for the Plaintiff to know when the decree would be passed and what further amount would be due on the mortgage by that date. It has been contended that when the decree was passed, it was found that Rs. 6,357-7 had become due to the Plaintiff on the mortgage, and so that should be taken as the real value of the claim, and consequently u/s 20(1)(b) of the Bengal, North-Western Provinces and Assam Civil Courts Act, XII of 1887, the appeal would lie to this Court and not to the District Judge.

3. Reliance has been placed on behalf of the Appellant upon three decisions of this Court, viz., *Ijjatulla Bhuyan v. Chandra Mohan Banerjee* ILR (1907) Cal. 954., *Bidyadhar Bachar v. Manindra Nath Das* ILR (1925) Cal. 14. and *Monmatha Nath Butt v. Matilal Mitra* (1928) 33 C.W.N. 614., of which the first two are Full Bench decisions and the last one is the decision of a Division Bench. All these decisions relate to suits for recovery of possession with mesne profits, which are governed by Section 7(v) and Section 11 of the Court-fees Act, VII of 1870. The present case has no concern with those provisions of the law: the cases cited, therefore, proceed on very different considerations. The present suit, having been one for enforcement of a mortgage by a decree for sale, does not fall within Section 7, paragraphs v, vi, ix or paragraph x, Clause (d) of the Court-fees Act, and is a suit for which Court-fees are payable ad valorem-. In the case of *Nama bin Kesu v. Hari bin Bahirji* (1905) 7 Bom. LR. 194. it appears to have been contended that a suit for recovery of the mortgage money, which means principal and interest, falls within the provisions of Section 7, but this contention was overruled. u/s 8 of the Suits Valuation Act, VII of 1887, the value of this suit as determinable for the computation of Court-fees and its value for the purposes of jurisdiction must be the same. We, therefore, think that the value of this suit must be taken to be the amount at which the claim was stated in the plaint and for which Court-fees were paid, that is to say Rs. 4,477-2.

4. For the above reasons, we must hold that the appeal does not lie to this Court but to the District Judge.

5. We, accordingly, order that the memorandum of appeal be returned to the Appellant for presentation to the proper court. We decide no other question than what we have expressly done.

6. The Respondents are entitled to their costs, 3 gold mohurs.