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**(1934) 12 CAL CK 0034**

**Calcutta High Court**

**Case No:** None

Kartick Chandra Ray

APPELLANT

Vs

Asharam Agarwalla

RESPONDENT

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**Date of Decision:** Dec. 10, 1934

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 34 Rule 6

**Citation:** 164 Ind. Cas. 423

**Hon'ble Judges:** D.N. Mitter, J

**Bench:** Single Bench

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### **Judgement**

@JUDGMENTTAG-ORDER

D.N. Mitter, J.

This is a Reference made u/s 5 of the Court Fees Act and I have been appointed by the learned Chief Justice to decide on this Reference.

2. The question which arises is whether or not ad valorem court-fees are leviable on a memorandum of appeal against a personal decree in a mortgage suit. It appears that the mortgagee obtained a preliminary mortgage decree directing the sale of mortgage properties. Against that decree an appeal has been preferred to this Court and ad valorem court-fees have been paid on the same. Subsequently after the obtaining of a final decree the mortgaged properties were sold and it appears that the sale proceeds of the mortgage properties are insufficient to liquidate the mortgage debt. Consequently, the mortgagee applied under the provisions of Order XXXIV, Rule 6, Civil Procedure Code, for a personal decree and he was successful in obtaining such a decree. Against that decree the present appeal has been filed by the mortgagor on a court-fee stamp of Rs. 2 only. The Stamp Reporter reported that ad valorem court-fees are leviable having regard to the decision of the Allahabad High Court in the case of Muhammad Litafat Hussain v. Alim-un-Nissa Bibi 40 AC 553 : 47 Ind. Cas. 561 : 16 ALJ 438. There can be no question that a decree passed under

Order XXXIV, Rule 6 of the Code of Civil Procedure, is a decree within the meaning of Article 1 of Schedule I of the Court Fees Act. It seems that prima facie ad valorem court-fees are payable. But it has been argued on behalf of the appellant that he having already paid the court-fees on entire amount claimed by the mortgagee, should not be made to pay twice over the court-fees on the same amount or on the amount less than the amount which has been realized by the sale of the mortgaged properties. This question was mooted in the case of *Lakhi Narain Jagdeb v. Kirtibas Das* 18 CLJ 133 : 19 Ind. Cas. 971, but that was not decided. Sir Asutosh Mookerjee, J. in that case observed as follows:

We do not decide a question which may possibly arise hereafter, namely, if an appeal is preferred against a decree nisi or a decree absolute in a mortgage suit, whether, upon an appeal preferred against the decree under s. 90, court-fees can be levied a second time; that point is not before us and we reserve our opinion upon it.

3. That is the point which has now arisen for decision. The effect of a decree under Order XXXIV, Rule 6 of the Code, is that it gives the mortgagee the right to proceed against the properties of the mortgagor other than those covered by the mortgage. In that sense I think the mortgagee is entitled to have a larger remedy and a wider relief against the mortgagor. The question for consideration with reference to the decree under Order XXXIV, Rule 6, which may arise, is as to whether if the person proceeded against is a person other than the mortgager, to wit the purchaser of equity of redemption, such a decree can be passed against him. Questions also of limitation might arise for a mortgagor's suit if not instituted within either six or three years of the due date of mortgage a personal decree is barred by limitation. Great reliance has been placed on a recent Full Bench decision in the case of [Taleb Ali and Another Vs. Abdul Aziz and Others](#), and it is said that a final decree has been held to be subservient to and dependant on the preliminary decree. Therefore it is said that if the preliminary decree is set aside in an appeal from the said preliminary decree, it is not necessary in view of the Full Bench decision to prefer any appeal against the final decree. That is no doubt what that case decides. There is no reference, to the case of a personal decree which can only be applied for if after the sale, the proceeds of the mortgaged properties are held to be insufficient to liquidate the mortgage debt. It is no doubt true that sometimes a combined decree is made. That is, at the time of the passing of a final decree the Court also can pass another decree under Order XXXIV, Rule 6 of the Code combining both decrees in one and the same decree. Of course if the preliminary decree is set aside, the decree under Order XXXIV, Rule 6, must necessarily go with it. We are concerned with the construction which is to be put on the Court Fees Act, and if it is once conceded that an appeal made against a decree passed under Order XXXIV, Rule 6 of the Code is an appeal from a "decree" within the meaning of the Court Fees Act, Schedule I, Article 1, there seems to be no basis for the contention that ad valorem court-fees should not be paid. Having regard to the reasons stated above we think ad valorem fees must be paid.

4. The appellant must, therefore, pay the deficit court-fees of Rs. 538 due from him within one month of this date. If the court-fees are paid within this time the appeal will proceed, otherwise not.