

FULL BENCH

Before P. C. Jain A. C. J., D. S. Tewatia and J. M. Tandon, JJ.

KARNAIL SINGH and others,—Appellants.

versus

KAPUR SINGH and another,—Respondents.

Letters Patent Appeal No. 221 of 1977 in

C.M. No. 518-C I of 1977 in

R.F.A. No. 432 of 1977.

February 18, 1980.

Court Fees Act (VII of 1870)—Section 7—Code of Civil Procedure (V of 1908)—Sections 2(2) and 51—Suit for redemption—Appeal against preliminary decree pending—Ad valorem court fee paid on the memorandum of such appeal—Appeal against final decree—Court fee payable on this appeal—Whether to be ad valorem—Preliminary decree—Whether a final adjudication of the rights of the parties—Such decree—Whether could be attacked in appeal against the final decree.

Held, that a preliminary decree in a redemption suit is not a tentative decree, but decides conclusively so far as it deals with the matters concerning the passing of that decree. Thereafter a final decree is passed which again decides conclusively the matters raised therein. A party is bound to prefer an appeal if it is aggrieved against a preliminary decree, otherwise, the matters decided therein cannot be agitated in an appeal preferred against the final decree. The subject-matter of the appeal against the preliminary decree has to be different from that of the final decree and any point agitated in an appeal against a preliminary decree cannot form a ground of attack in final decree. Thus, it is evident that in a suit for redemption, a preliminary decree is distinct from a final decree and a party, if aggrieved from that decree does not prefer an appeal then the matters adjudicated therein cannot be attacked in an appeal filed against the final decree. (Paras 7 and 8).

Held, that the matter of payment of court fee is governed by the provisions of the Court Fees Act, 1870 and has to be decided strictly in accordance thereof. No other consideration can enter into the picture. If any exemption or credit is claimed by any party, then

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the same has to be under some provisions of the said Act. There is no gain-saying that under the Court Fee Act, there is no provision which may warrant payment of fixed court fee on an appeal from the final decree. If the real appeal is that which has been filed against the preliminary decree, then there is absolutely no need to file an appeal against the final decree, as in the event of the success of the appeal against the preliminary decree, the final decree even if passed would automatically fall. But in case some new matters have been adjudicated upon in the final decree, then an independent appeal would be required to be filed. In that event it would become absolutely necessary to pay *ad valorem* court fee on the memorandum of appeal. The two appeals which are filed against the preliminary and final decrees, have nothing common between them and have to be decided and adjudicated upon independent of each other. Thus, *ad valorem* court fee would be payable on the memorandum of appeal filed against a final decree passed in a redemption suit even if an appeal against a preliminary decree is pending on which *ad valorem* court fee has already been paid.

(Paras 9, 10 and 13).

Budh Ram and another vs. Niamat Rai and others

A.I.R. 1923, Lahore 632

OVERRULED.

Case referred by Division Bench consisting of Hon'ble Mr. Justice Prem Chand Jain and Hon'ble Mr. Justice D. S. Tewatia, on 28th September, 1979 to a larger Bench for decision of an important question of law involved in the case. The larger bench consisting of Hon'ble Mr. Justice Prem Chand Jain, acting Chief Justice, Hon'ble Mr. Justice D. S. Tewatia and Hon'ble Mr. Justice J. M. Tandon, finally decided the case on 13th February, 1980.

Letters Patent Appeal under Clause 10 of the Letters Patent against the indowment dated 5th May, 1977, passed by Hon'ble Mr Justice R. N. Mittal, in C.M. No. 518-C-I of 1977 in R.F.A. No. 432 of 1977 Kapur Singh v. Karnail Singh and others. The learned Single Judge confirming the stay order on 5th May, 1977.

H. L. Sarin, Sr. Advocate, with M. L. Sarin & R. L. Sarin, Advocates, for the Appellants.

A. N. Mittal, Advocate, for the Respondents.

JUDGMENT

Prem Chand Jain, J.

(1) The question that falls for determination in this appeal may be stated thus:—

“What court-fee would be payable on the memorandum of appeal filed against a final decree passed in a redemption

suit when an appeal filed against a preliminary decree, on which *ad valorem* court-fee has been paid, is still pending decision?".

(2) The learned Single Judge, against whose judgment the present appeal under Clause X of the Letters Patent has been filed, has, on the basis of a Division Bench judgment of the Lahore High Court in *Budh Ram and another v. Niamat Rai and others* (1), held that a fixed court-fee would be payable on such a memorandum of appeal.

(3) Mr. M. L. Sarin, learned counsel appearing for the appellants, has challenged the correctness of the aforesaid finding of the learned Single Judge by contending that an appeal is filed against a decree and that there is no provision either in the Code of Civil Procedure or in the Court-fee Act permitting affixation of a fixed court-fee on a memorandum of appeal filed against a final decree where an appeal against a preliminary decree is pending decision. The learned counsel also submitted that the view taken in *Budh Ram's case* (supra) does not lay down the correct law and deserves to be re-considered.

(4) On the other hand, Mr. A. N. Mittal, learned counsel for the respondents, reiterated the stand taken by him before the learned Single Judge.

(5) After giving our thoughtful consideration to the entire matter, we find that there is considerable force in the contention of the learned counsel for the appellants.

(6) Before dealing with the question of court-fees, it would be essential to understand the scope of the word 'decree'. This expression has been defined in sub-section (2) of section 2 of the Code of Civil Procedure, as follows:—

"decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and

(1) A.I.R. 1923, Lahore 632.

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may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include—

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default.

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.”

(7) From the bare perusal of the aforesaid provisions, it is evident that the preliminary decree also falls within the said definition. The decrees that are recognised under the Code, are preliminary decree, final decree, decree partly preliminary and partly final, and order rejecting the plaint. Under the Code there are classes of cases in which a preliminary decree is required to be passed and a suit for redemption is one of them. In such a suit, there are two stages when a decree is passed, i.e., a preliminary decree and a final decree. A preliminary decree in a redemption suit is not a tentative decree, but decides conclusively so far as it deals with the matters concerning the passing of that decree. Thereafter, a final decree is passed which again decides conclusively the matters raised therein. A party is bound to prefer an appeal, if it is aggrieved against a preliminary decree, otherwise, the matters decided therein cannot be agitated in an appeal preferred against the final decree. This position is quite evident from the provisions of Section 97 of the Code which provides that where any party aggrieved by a preliminary decree, does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

(8) This Section was enacted in the year 1908. Under the old Code of 1882, objections to the preliminary decree could be raised in the appeal against the final decree. Therefore, under the law, as it now stands, a party is required to file an appeal from the preliminary decree and cannot wait to attack it in an appeal against the

final decree. The subject-matter of the appeal against the preliminary decree has to be different from that of the final decree. Any point agitated in an appeal against a preliminary decree, cannot form a ground of attack in final decree. This position is abundantly clear from the judgment of the Supreme Court in *Venkata Reddy and others v. Pethi Reddy* (2), wherein at page 995, it has been observed thus:—

“A preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees, a preliminary decree and a final decree, the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made, the decision of the court arrived at the earlier stage also has a finality attached to it. It would be relevant to refer to Section 97 of the Code of Civil Procedure which provides that where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. This provision thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree.”

Thus from the aforesaid discussion, it is evident that in a suit for redemption, a preliminary decree is distinct from a final decree and a party, if aggrieved from that decree, does not prefer an appeal, then the matters adjudicated therein cannot be attacked in appeal filed against the final decree.

(9) Having arrived at the aforesaid conclusion, the next question that arises for determination is as to what court-fee would be payable on the two appeals, i.e., one preferred against the preliminary decree

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and the other preferred against the final decree. It may be observed at the outset that the matter of the payment of court fee is governed by the provisions of Court-Fee Act and has to be decided strictly in accordance thereof. No other consideration can enter into the picture. If any exemption or credit can be claimed by any party, then the same has to be under some provisions of the said Act. There is no gainsaying that under the Court-Fee Act, there is no provision which may warrant payment of fixed court fee on an appeal from the final decree. The contention of Mr Mittal, learned counsel for the respondents was that an appeal from a final decree is of a formal nature and generally does not contest anything beyond what is contested in the appeal from the preliminary decree, and in this situation, only fixed court fee is payable on such an appeal.

(10) The argument, on the face of it, appears to be untenable. As earlier observed, the matter of the payment of court fee is strictly governed by the provisions of the Court Fees Act. If the real appeal is that which has been filed against the preliminary decree, then there is absolutely no need to file an appeal against the final decree, as in the event of the success of the appeal against the preliminary decree, the final decree even it passed, would automatically fall. But in case, some new matters have been adjudicated upon in the final decree, then an independent appeal would be required to be filed. In that event, it would become absolutely necessary to pay *ad valorem* court fee on the memorandum of appeal. The two appeals which are filed against the preliminary and final decrees, have nothing common between them and have to be decided and adjudicated upon independent of each other. In matters of the payment of the court fee, hardship or any ethical consideration has never crept in. The view, which we are inclined to take, finds full support from the judgment of the Madras High Court in *Kothandaraman and others v. Collector of Chingelput District* (3), and of Patna High Court in *Smt. Kausalya Debi and others v. Kauleshwar Singh and others* (4). But the Division Bench judgment in *Budh Ram's case* (supra) has taken a contrary view. Hence, it has become necessary to refer this matter to a larger Bench for reconsideration of the view taken in *Budh Ram's case* (supra). Consequently, we direct that papers of

(3) A.I.R. 1953 Madras 415.

(4) A.I.R. 1947 Patna 113.

this case be laid before the learned Chief Justice for constituting a larger Bench.

Prem Chand Jain, A.C.J.

(11) This judgment of ours may be read in continuation of the order of reference dated September 28, 1979.

(12) While dealing with the matter, detailed reasons have been given in the referring order for coming to the conclusion that *ad valorem* court-fee would be payable on a memorandum of appeal filed against the final decree passed in a redemption suit even if an appeal against the preliminary decree is still pending decision. As a different view had been taken in *Budh Ram and another v. Niamat Rai and others*, (5), it had become necessary to get the matter decided by a larger Bench and that is how we are seized of the matter.

(13) We have heard the learned counsel for the parties. No new argument has been advanced and those very points were put forth which have been considered at length in the referring order. For the detailed reasons given in the referring order, we find ourselves unable to agree with the view taken in *Budh Ram's* case and hold that *ad valorem* court-fee would be payable on the memorandum of appeal filed against a final decree passed in a redemption suit even if an appeal against a preliminary decree is pending on which *ad valorem* court-fee has already been paid.

(14) In view of the aforesaid answer, we allow the appeal and set aside the judgment of the learned Single Judge in this respect. The defendant-appellants are granted three months' time to make up the deficiency in the court-fee. If deficiency in the court-fee is not made good within the aforesaid period, then the appeal of the defendants shall stand dismissed. In the circumstances of the case, we make no order as to costs.

D. S. Tewatia, J.— I agree.

N.K.S.

(5) A.I.R. 1923 Lahore 632.