

(1937) 10 BOM CK 0015

In the Bombay High Court

Case No : Reference in First Appeal Stamp No's. 1240 and 1330 of 1937

Balaramcharya Swamiracharya Rajpurohit

APPELLANT

Vs

Chidambaragauda Ramchandragouda Bahadur Desai

RESPONDENT

Chidambaragauda Ramchandragouda Bahadur Desai Vs

Balaramcharya Swamiracharya Rajpurohit

Date of Decision : 07-10-1937

Acts Referred:

Court Fees Act, 1870 — Section 5

Citation : AIR 1938 Bom 320 : (1938) 40 BOMLR 416

Hon'ble Judges : John Beaumont, J

Bench : Single Bench

Judgement

John Beaumont, Kt., C.J.—This is a reference made to me by the Taxing Officer u/s 5 of the Court-fees Act, 1870, and the difficulty arises in this way. In a suit before the First Class Subordinate Judge of Dharwar the learned Judge directed that the plaintiffs do recover mesne profits from the date of suit from the defendants. There was then an appeal to this Court, and the Court varied the decree in certain respects, but in the main confirmed it, and directed that the mesne profits be determined in execution. Under the CPC of 1882, Section 244, it was provided that the following questions shall be determined by (order of) the Court executing a decree and not by separate suit (namely) :-

(a) questions regarding the amount of any mesne profits as to which the decree has directed inquiry ;

(b) questions regarding the amount of any mesne profits or interest which the decree has made payable in respect of the subject-matter of a suit, between the date of its institution and the execution of the decree, or the expiration of three years from the date of the decree ;

(c) any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof.

2. The present Code of 1908 in Section 47, which is substituted for Section 244 of the old Code, provides that " all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit." So that, in effect Section 47 embodies the old Section 244 (c), but Sub-clauses (a) and (b) are omitted. Then under Order XX, Rule 12, of the present Code, it is provided in Sub-rule (i) that where a suit is for the recovery of possession of Immovable property and for rent or mesne profits, the Court may pass a decree and then Sub-clause (c), which is material, is in these terms, " directing an inquiry as to rent or mesne profits from the institution of the suit," and Sub-rule (2) provides that where an inquiry is directed under Clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry. So that the correct procedure under the present Code is for the Court to direct an inquiry as to the mesne profits, and then pass a final decree for the amount found due on the inquiry. In the present case the executing Court, which was directed to determine the amount of the mesne profits, has ordered that the plaintiffs do recover certain specified sums, and from that order there is an appeal, and the question is, what are the proper Court-fees on that appeal ? It is argued for the appellant that the case falls under the second schedule, item 11, of the Court-fees Act, which provides that the Court-fee on a " memorandum of appeal when the appeal is not from a decree or an order having the force of a decree," and is presented to a High Court shall be two rupees, because by Government Notification dated September 16, 1921, Government directed that the fee chargeable on appeals from orders u/s 47 of the Code of Civil Procedure, 1908, shall be limited to the amounts chargeable under Article 11 of the second schedule. It is to be noticed that under the old Code a similar notification by Government in respect of appeals from orders u/s 244 of the old Code was limited to orders under Sub-clause (c) of that section. The question, therefore, which I have to decide is whether the order under appeal in this case is an order u/s 47 of the Civil Procedure Code. It is to be noticed that the actual order which the High Court passed was not that the amount of mesne profits be recovered in execution, but that they be determined in execution. As was pointed out by this Court in the case of *Lakshmibai v. Ravji* (1928) 31 Bom. L.R. 400 an executing Court cannot challenge the decree which it is called upon to execute, and I apprehend that if this Court had directed the recovery of the mesne profits in execution, the executing Court would have had to provide for their recovery. In fact, however, as I have said, this Court did not direct the executing Court to recover them, it only directed the Court to determine them, and in my opinion the Court ought merely to have determined the amount. It would then have been for the Subordinate Judge, in his capacity as trial Judge, to have passed a final decree for recovery of the amount. That procedure, however, was not adopted. I must assume that the order of this Court was a valid order made under Order XX, Rule 12, and as the High Court has directed the Subordinate Judge to deal with this inquiry in execution, and to treat the ascertainment of these mesne

profits as being a question arising in execution, I must treat the order made by the Subordinate Judge as an order made u/s 47, and therefore the stamp upon it is Rs. 2 only under Article 11.