

a perfect title, he should not have a decree for redemption. We cannot perceive that we should confer any benefit upon the mortgagees by rejecting the present suit. The plaintiff might to-morrow file another suit for the same purpose if we were to reject this suit.

We reverse the decree of the Assistant Judge, and remand the cause in order that the District Court may take an account of what is due to or from the mortgagees, the defendants, and may make the usual decree for redemption of the premises. Any sum or sums which the plaintiff may have paid into Court in virtue of the decree of the Subordinate Judge should be taken into consideration by the District Court in making its decree. The plaintiff should pay the costs of the suit up to the present time. The defendants must pay the costs of this appeal. The costs of the appeal to the District Court should be disposed of by that Court.

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KRISHNAJI
RAVJI
GODBOLE
v.
GANESH
BAPUJI
PATVARDHAN.

APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice.

LADUBHAI PREMCHAND, PETITIONER, v. REVICHAND VENICHAND
AND ANOTHER, OPPONENTS.*

December 23.

The Indian Contract Act (IX of 1872), Sec. 265—Appeal—Stamp—Court Fees' Act VII of 1870, Sec. 7, Cl. iv (f).

The stamp duty payable on an appeal from an order made by a District Judge on an application under section 265 of the Indian Contract Act (IX of 1872) should be an *ad valorem* fee, as in a suit for accounts, under section 7, clause iv (f) of the 'Court Fees' Act VII of 1870.

Javali Ramasami v. Sathambakami(1) and *Lachman Lall v. Ram Lall*(2) referred to and approved.

This was a reference by the Taxing Officer of the High Court under section 5 of the Court Fees' Act VII of 1870.

The petitioner under section 265 of the Indian Contract Act (IX of 1872) applied to the District Court of Poona to wind up the partnership business which had existed between him and two others. The Judge made an order from which the petitioner proposed to appeal.

* Reference by the Taxing Officer under section 5 of the Court Fees' Act.

(1) I. L. R., 1 Ma 1., 340. (2) I. L. R., 6 Calc., 521.

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The question referred by the Taxing Officer for decision was—whether the appeal should bear a stamp of Rs. 2, as when the appeal is not from a decree or an order having the force of a decree (*vide* Schedule II, cl. 11, Court Fees' Act), or whether it should bear an *ad valorem* stamp.

The Taxing Officer was of opinion that the proposed appeal was an appeal in a suit for accounts, and should be stamped according to the amount at which the relief sought was valued (*vide* sec. 7, cl. iv (f), Court Fees' Act).

Pandurang Balibhadra appeared for the petitioner.

The following is the judgment delivered by

WESTROPP, C.J.—The question, referred to me in this case by the Taxing Officer, is—what stamp, by way of court-fee, should be attached to an appeal from an order in the nature of a decree by the District Judge of Poona in an original application made to him under section 265 of the Indian Contract Act (IX of 1872) for the winding up of a partnership, and the taking of the accounts necessary for that purpose?

The term “apply” unfortunately used in that section has occasioned some difficulty as to the nature of the procedure intended to be resorted to. Whether that procedure be styled an application or a suit, the nature of the objects to be attained by resort to that section is absolutely inconsistent with summary procedure strictly so called. The winding up of the business of a partnership firm, the provision for the payment of its debts, the ascertainment and the distribution of the surplus according to the shares of the partners, preclude in ordinary cases a rapid disposal of the task imposed by section 265 upon the District Judge. It is difficult to understand why an original jurisdiction should have been given to the District Court in such a matter, and, when given, why it should have been limited to cases where the partnership had already terminated. See *Sorabji v. Dulebhai*⁽¹⁾. The impossibility of dealing with the work to be done by the District Court in a summary manner probably led to the express enactment in the last clause of section 213 of the Civil procedure Code (Act X of 1877), that “applications under section 265 of the

(1) I. L. R. 5 Bom., 65.

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Indian Contract Act (IX of 1872), shall be deemed to be suits within the meaning of this section" (213 of Act X of 1877), which lays down the mode of conducting ordinary suits for an account of property and for its due administration under the decree of the Court, which would be the Court of the lowest grade competent to try it (sec. 15, Act X of 1877, and see Act XIV of 1869). It has been held—and, as I think, most rightly—that section 265 of Act IX of 1872 is intended to be ancillary to, and not in super-session of, the ordinary suit for winding up the affairs of a partnership: *Javali Ramasami v. Sathambakam* ⁽¹⁾; *Lachman Lall v. Kam Lall* ⁽²⁾.

The parties seem to be agreed as to the fact that the partnership had ceased to exist some time previously to the institution of these proceedings. Hence the application or suit is so far within section 265 of the Contract Act (IX of 1872). The District Judge, however, being under the impression that this case could be more effectively dealt with as an ordinary civil suit, declined to entertain it under section 265 of Act IX of 1872. But a Division Bench of this Court (M. Melvill and F. D. Melvill, JJ.,) being of opinion that the case came within that section, subject to any objection which might be made by the parties other than the applicant, by an order of the 25th November, 1880, directed the District Judge to receive it, and to proceed upon it according to law.

The District Judge has heard the case, and made an order or decree thereon, against which the applicant now desires to appeal.

In *Devidas v. Narsidas* ⁽³⁾ a Division Bench (Pinhey and F. D. Melvill, JJ.,) were of opinion that the proceeding permitted by section 265 of Act IX of 1872 might be commenced either by plaint or petition. It is not necessary for me now to decide how such plaint or petition should be stamped, the question here being how an appeal from an order or decree on the plaint or petition should be stamped. Mr. Pandurang Balibhadra, the proposed appellant's pleader, contends that the appeal is not from a decree or order having the force of a decree, and, therefore, that a two rupee stamp is, under article 11 of Schedule II of Act VII of

(1) I. L. R. 1 Mad., 340

(2) I. L. R. 6 Calc., 521.

(3) See Printed Judgments for 1880, p. 63.

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1870, the proper court-fee, and that section 213 of Act X of 1877 has not any bearing upon the fiscal question as to the amount of court-fee. I am unable, however, to follow his argument; for, if the order, subject to be appealed against, be not, by force of section 213 of Act X of 1877, rendered substantially a decree in a suit within the meaning of the term "decree" in section 2 of the same Act, I cannot perceive what right of appeal the applicant can have. Chapter XLIII of that Act (which chapter regulates appeals from orders) does not give him any appeal in such a case as the present. It is only by assuming that the application may have been by section 215 declared to be a suit, and that the order falls within the term "decree" in section 2, and, is therefore, under section 540 of the same Act, open to appeal, that I can entertain the idea of an appeal in the present case. If, then, an appeal lie at all from the order of the District Judge (a point which I cannot now fully decide), I agree with the Taxing Officer in thinking that it would do so in virtue of sections 2, 213 and 540 of the Civil Procedure Code, and that the court-fee payable would be as in a suit for accounts under section 7, cl. iv (f), of Act VII of 1870, and should, therefore, be, as there pointed out, an *ad-valorem* fee—liable, in case of undervaluation, to correction under section 11 of that Act.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

PATANKAR, PLAINTIFF, v. DEVJI, DEFENDANT.*

1882
January 24.

Decree—Execution—Satisfaction or part satisfaction out of Court, but not certified—Subsequent execution of decree for full amount—Suit for money previously paid—Civil Procedure Code, X of 1877, Secs. 244-258—Limitation Act (XV of 1877), Sch. II, Art. 161.

A suit for the recovery of money paid to a judgment-creditor out of Court in satisfaction of a decree, but not certified, is barred by section 244 (c) of Act X of 1877 and by the last paragraph of section 258 as amended by Act XII of 1879.

This was a reference by Rao Saheb Dhondo Janardan Karmarkar, Subordinate Judge of Junnar, under section 617 of the Code of Civil Procedure.

*Civil Reference, No. 41 of 1881.