APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Rao.

1913.
February 17.

SAKHARAM VISHRAM SURVE AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* SADASHIV BALSHET LODHA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

SADASHIV BALSHET LODHA (ORIGINAL DEFENDANT NO. 1), APPELLANT, *v.* BALKRISHNA AND OTHERS (HEIRS OF ORIGINAL DEFENDANT NO. 6), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 97—Preliminary decree—Appeal—Finding on preliminary issue, but no decree drawn up—Appeal not necessary—Duty of raising issues—Practice and procedure.

In a suit for redemption, a preliminary issue was raised and decided that the plaintiff was an agriculturist. Accounts were next taken under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) and a redemption decree was passed. On appeal from the final decree, the question as to the status of the plaintiff was raised; and the Court of appeal decided that the plaintiff was not an agriculturist; and varied the decree by increasing the amount of redemption. On second appeal, it was contended that the lower appellate Court was wrong in going into the preliminary point at the stage it did :—

Held, that no appeal was necessary against the preliminary finding; and that unless there was a preliminary decree no appeal could lie under the provisions of section 97 of the Civil Procedure Code (Act V of 1908).

Bai Divali v. *Shah Vishnav Manordas*(1), followed.

Govind Ramchandra v. *Vithal Gopal*(2), explained.

CROSS-APPEALS from the decision of G. B. Laghate, First Class Subordinate Judge with A. P., at Ratnagiri, varying the decree passed by R. D. Pandya, Second Class Subordinate Judge at Devrukh.

Suit for redemption.

The plaintiffs sued to redeem a mortgage dated 1888 alleging that they were agriculturists and praying for taking of accounts under the provisions of the Dekkhan

* Cross-Appeals Nos. 455 and 473 of 1911.

(1) (1909) 34 Bom. 182. (2) (1912) 36 Bom. 536.

Agriculturists' Relief Act. At the hearing, a preliminary issue was raised, whether the plaintiffs or any of them were agriculturists. The Court found that the plaintiff No. 2 was an agriculturist; and took accounts under the provisions of the Dekkhan Agriculturists' Relief Act. A final decree was eventually passed decreeing redemption on payment of Rs. 344 odd.

One of the defendants appealed from the final decree; and one of the grounds of appeal was that the first Court erred in holding that the plaintiff No. 2 was an agriculturist. The lower appellate Court went into the question and held that the plaintiff No. 2 was not an agriculturist. It, therefore, took accounts afresh and fixed the redemption amount at Rs. 660.

Both parties appealed to the High Court.

In appeal No. 455 of 1911.

A. G. Desai, for the appellants.

P. D. Bhide, for respondent No. 1.

K. H. Kelkar, for heirs of respondent No. 6.

In appeal No. 473 of 1911.

P. D. Bhide, for the appellant.

K. H. Kelkar, for the respondents.

HEATON, J.:—In this case the plaintiffs sued for redemption. In the first Court an issue was raised as to whether any of the plaintiffs were agriculturists. It was found that plaintiff No. 2 was an agriculturist. But no decree was drawn up in accordance with that preliminary finding. The trial proceeded as a trial under the provisions of the Dekkhan Agriculturists' Relief Act and a decree was made for redemption.

Thereupon one of the defendants appealed to the District Court, taking amongst other grounds that it was wrong to hold that plaintiff No. 2 was an agriculturist. An issue on the point was framed by the Court

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of appeal. It was found that plaintiff No. 2 was not an agriculturist.

He now comes in second appeal to this Court and urges that the Court of first appeal was wrong in going into this preliminary point at all. He bases his contention largely on the case of *Govind Ramchandra* v. *Vithal Gopal*[1].

The application of the law on the question of appeals against preliminary decrees has been to some extent confusing. In the case of *Bai Divali* v. *Shah Vishnav Manordas*[2], after argument on the point, it was held that although there may be a preliminary finding, yet unless a formal decree is drawn up there is no preliminary decree and there is consequently no possibility of such an appeal as is contemplated by section 97 of the Code. The reasoning in that case appeals to me and it seems to me that it contains the correct interpretation of the law. There are expressions in the judgment in the case of *Krishnaji* v. *Maruti*[3], which may seem to conflict with the reasoning and decision in the earlier case. In *Krishnaji's case*, however, the Court was dealing with a matter in revision. Speaking for myself, I am not at all clear that the reasoning in that case does override the reasoning in the earlier case, but, if it does, and if I had to choose between the two, I should certainly choose the reasoning in the earlier case. So I am quite satisfied that in law no appeal did lie against the preliminary finding.

Then I come to the case of *Govind Ramchandra* v. *Vithal Gopal*[1], which was particularly relied on by the appellant. That case accepts the assumption that no appeal lies where there is in fact no formal decree, and proceeds on the ground that it is the duty of the

(1) (1912) 36 Bom. 536. (2) (1909) 34 Bom. 182.
(3) (1910) 12 Bom. L. R. 762.

person aggrieved by a preliminary finding to have a decree drawn up, and that if he fails to do this, he must be taken to have waived his right to appeal. Waiver is primarily, and in most cases very largely, an inference to be drawn from facts, though in certain classes of cases this inference has come to be looked on as an inference of law. But whether so regarded or regarded as an inference of common sense it is essential to know the facts on which the inference is based. Here we have these facts. The preliminary finding was against the interest of the defendant. He did not apply to have a preliminary decree drawn up, but later on when the final decree was made he did appeal, and amongst other matters, against this preliminary finding. The plaintiff did not object to his doing this on the ground that he had waived or in any way forfeited his right to appeal. On these facts I should hold as an inference of common sense that the defendant had not waived his right to appeal ; and I do not think the case of *Govind Ramchandra* v. *Vithal Gopal*[1] is a decision which comes in the way of holding that the Court of first appeal was empowered to hear and decide this preliminary issue. It has been suggested that the failure to have a decree drawn up on a preliminary point, even though it may not amount in certain cases to a waiver, does amount to actual loss of the right to appeal, because, it is suggested, the duty to ask the Court to draw up a decree was so imperative that failure to perform that duty involves loss of the right to appeal. To say this would be to go much further than the Judges have gone in the case of *Govind Ramchandra* v. *Vithal Gopal*[1] ; and I think it would be going further than the law either requires or suggests. The duty to draw up a decree is the duty of the Court. That, I think, is clear enough from the provisions of the Code

[1] (1912) 36 Bom. 536.

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of Civil Procedure, and in practice it is very clearly understood by those who are conversant with the ways of our Courts in the moffusil. Speaking for myself, I think the duty of the litigant to remind the Court of its duty to draw up a decree is no more than the duty that devolves on any person in common every day affairs to see that there is no undue delay in the performance of matters in which he is interested. It is a duty of a very different character, if the word 'duty' is the true word to use, from the obligation which the law casts on the Court itself.

For these reasons I am unable to hold that there is any force in the objection taken by the plaintiff, and I hold that the Court of first appeal was empowered to hear and decide the issue as to whether plaintiff No. 2 was an agriculturist. The appeal No. 455 of 1911, therefore, must be dismissed with costs. The respondents' cross-objections are disallowed with costs.

Appeal No. 473 of 1911.

In this case the plaintiffs sued to redeem certain property mortgaged to the father of defendant No. 1. Pending the suit the right, title and interest of defendant No. 1 in the mortgaged property was put up to sale in execution of a decree, and purchased by defendant No. 6, and so defendant No. 6 was added as a party to the suit. The question then arose as to whether defendant No. 1 or No. 6 was entitled to the mortgage money. The matter was amicably settled by a compromise between defendants Nos. 1 and 6 and both of them presented an application, requiring the Court to file the compromise. Upon this application the Court passed an order directing the compromise to be recorded, but leaving the matter to be considered at the time of passing judgment. It appears that defendant No. 1 afterwards was dissatisfied with the compromise and made an application to the Court for a review of this

order. He alleged in his application for review that the compromise had been obtained from him by fraud. The Court after taking the evidence adduced by the parties came to the conclusion that the allegation of fraud was not made out and rejected the application for review. That being the case the Court ought to have awarded to defendant No. 6 the whole of the mortgage money as agreed upon by the terms of this compromise. But the Court of first instance directed the mortgage amount to be deposited in Court and referred defendants Nos. 1 and 6 to a separate suit to establish their right to the money so deposited.

Against this decree defendant No. 6 appealed. The District Court held that defendant No. 1 was bound by the terms of the compromise, as his allegation of fraud had not been proved, and directed the whole of the mortgage money to be paid to defendant No. 6 in accordance with the terms of the compromise.

Against this decision defendant No. 1 has preferred this Second Appeal. We agree with the lower Court that the matter having been compromised by a lawful agreement between the parties, and defendant No. 1 having failed to establish the fraud alleged by him, the mortgage money should be paid to defendant No. 6 in accordance with the terms of the compromise. We, therefore, confirm the decree of the lower appellate Court with costs.

Decree confirmed.

R. R.