APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Rao.

1912.
October 4.

MANOHAR RAMCHANDRA HINGE AND OTHERS (ORIGINAL DEFENDANTS Nos. 1-3), APPELLANTS, *v.* THE COLLECTOR OF THE NASIK DISTRICT (ORIGINAL PLAINTIFF), RESPONDENT.*

Bombay Regulation II of 1827, section 52†—Pleaders' Act (I of 1846), sections 6 and 7‡—Bombay High Court Appellate Side Rules, 1909, Rule 65§—Pleaders' fees—Taxation—Appeal from a preliminary decree deciding status of agriculturist—Practice.

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* First Appeal No. 154 of 1911.

† The material portion of the section runs thus :—

52. *First.*—Each pleader employed in prosecuting or defending an original suit shall be entitled to a percentage on the amount sued for, according to the rates specified in Appendix (L), as a remuneration for his trouble in acting in behalf of his client, until the decree in the suit is passed, and thereafter until such decree is fulfilled.

Second.—The remuneration to a pleader employed in prosecuting or defending an appeal, regular or special, shall be the same as is above prescribed in the case of an original suit.

‡ Sections 6 and 7 run as follows :—

6. And it is hereby enacted that section 25, Regulation XXVII, 1814 of the Bengal Code, section 25, Regulation XIV, 1816 of the Madras Code, and section 52, Regulation II, 1827 of the Bombay Code, shall cease to be enforced, excepting for the purpose specified in section 7 of this Act.

7. And it is hereby enacted that parties employing authorised pleaders in the said Courts shall be at liberty to settle with them by private agreement of the remuneration to be paid for their professional services, and that it shall not be necessary to specify such agreement in the Vakalatnama : Provided that when costs are awarded to a party in any regular suit, original or appeal, decided on the merits, against another party, the amount to be paid on account of fees of pleaders shall be calculated according to the rules contained in the sections of regulations specified in section 6 of this Act ; and that when costs are awarded in other cases the amount to be paid on account of such fees shall be one-fourth of what it would have been in a regular suit decided on its merits.

§ The rule is in the following terms :—

Rule 65.—When a vakil is employed in any reference made under section 113 (O. XLVI, r. 1) of the Code of Civil Procedure, or any appli-

1912.

MANOHAR RAMCHANDRA v. THE COLLECTOR OF THE NASIK DISTRICT.

The pleaders' fees in the High Court, in an appeal from a preliminary decree determining the status of an agriculturist, must be assessed at Rs. 30 under Rule 65 of the Bombay High Court Appellate Side Rules; and not on the subject-matter in dispute, under section 52 of the Bombay Regulation II of 1827 or under section 6 of Act I of 1846.

* Taxation of pleaders' fees.

The plaintiff sued to redeem a mortgage, valuing his claim at Rs. 17,500. In the Court of first instance, a preliminary decree was passed determining that the plaintiff was an agriculturist as defined by section 2 of Dekkhan Agriculturists' Relief Act. The defendant appealed to the High Court from the preliminary decree and valued his claim at Rs. 130 both for Court-fee purposes and for assessing pleaders' fees. The High Court confirmed the decree. (See p. 101.)

A question having arisen as to how the pleaders' fees should be taxed, the defendant's pleader contended that the fees should be allowed on Rs. 130 since the subject-matter in dispute in appeal was the alleged status of the plaintiff as an agriculturist, whilst the plaintiff's pleader contended that the fees should be taxed on Rs. 17,500 the principal amount expressed to be secured by the mortgage sought to be redeemed.

The Taxing Officer was of opinion that the fees should be taxed at Rs. 30 under Rule 65 of the High Court Appellate Side Rules, as neither section 52 of Bombay Regulation II of 1827 nor section 6 of Act I of 1846 applied.

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cation for the exercise of the Court's extraordinary jurisdiction in civil matters under section 115 or in any application under section 25 of the Provincial Small Cause Courts Act, IX of 1887, or any appeal, in regard to which the provisions of section 6 of Act I of 1846 and section 52 of Regulation II of 1827 do not apply and costs are awarded, a sum of Rs. 30 shall be allowed as vakil's fee in the Bill of Costs.

* The facts of the case are set forth at p. 97 *supra*.

1912.

MANOHAR RAMCHANDRA *v.* THE COLLECTOR OF THE NASIK DISTRICT.

The plaintiff's pleader objected to this mode of taxation. The matter was therefore placed before the Court for disposal.

K. H. Kelkar, for the appellant (defendant).

L. A. Shah, acting Government Pleader, for the respondent (plaintiff).

BATCHELOR, J. :—A suit was filed by the Collector of Nasik, representing the Court of Wards, and on behalf of a certain ward, for redemption of certain lands under the Dekkhan Agriculturists' Relief Act. Preliminary issues were framed as to whether the plaintiff, the ward, was an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act; and whether he was otherwise entitled to the benefit of that Act. These issues were determined in the plaintiff's favour by the learned First Class Subordinate Judge. The defendant appealed to this Court contending that it should have been held that the plaintiff was not an agriculturist. We, however, were of opinion, that the learned Judge below was right, and we affirmed his finding that the plaintiff is an agriculturist within the meaning of the Act.

The question now involved is as to the basis upon which pleader's fees should be calculated in the defendant's appeal. The learned Government Pleader on behalf of the plaintiff has contended for the application of the second clause of section 52 of Regulation II of 1827, while the Taxing Officer has taken the view that that Regulation does not apply, and that the fees must be assessed under Rule 65 of the Appellate Side Rules of this Court. That rule provides for the allowance of a sum of Rs. 30 in appeals where the provisions of section 6 of Act I of 1846 and section 52 of Regulation II of 1827 do not apply.

The question, therefore, first to be considered is, whether the case falls within the scope of section 52 of

1912.

MANOHAR RAMCHANDRA v. THE COLLECTOR OF THE NASIK DISTRICT.

the Regulation. That section consists of two clauses, whereof the first deals with the costs allowable in a suit, and the second with the costs allowable in an appeal. It is provided that in regard to the costs in a suit the pleader is to be entitled "to a percentage on the amount sued for, according to the rates specified in Appendix L, as a remuneration for his trouble in acting in behalf of his client, until the decree in the suit is passed, and thereafter until such decree is fulfilled." The second clause lays down that the remuneration in respect of an appeal "shall be the same as is above prescribed in the case of an original suit." It is admitted that in the case of an appeal those words must be read as meaning not a percentage on the amount sued for, but a percentage on the amount forming the subject-matter of the appeal.

This then being the scope of section 52, can it be said to govern such an appeal as the present? We think not. In the first place, the only question raised in this appeal was as to the status of the plaintiff, whether he was or was not an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act; and we are of opinion that it cannot be said that any amount of money whatever could be allocated or described as the subject-matter of such an appeal. Secondly, section 52 clearly contemplates the case of a decree which terminates the suit, for the remuneration is to be for the pleader's trouble in acting, not only until the decree in suit is passed, but also thereafter, until such decree is fulfilled. This, however, is a decree which did not and could not terminate the suit. Lastly, this particular kind of appeal is a creature of the recent Civil Procedure Code of 1908, as interpreted by this Court which has held that an order that a party is or is not an agriculturist within the meaning of the Act amounts to a preliminary decree, and so requires the party aggrieved to appeal from it if

1912.

MANOHAR RAMCHANDRA *v.* THE COLLECTOR OF THE NASIK DISTRICT.

he wishes to contest it. No such appeal as the present was possible when the Regulation was enacted, and in our judgment the words of the regulation cannot without undue straining be held to cover the case of such an appeal or such a decree as we have here. But if section 52 of Regulation II of 1827 has no application to this decree, then section 7 of Act I of 1846 is equally inapplicable, and in these circumstances the case must inevitably be governed by Rule 65 of the Appellate Side Rules. It may be that this result is in some respect anomalous as furnishing inadequate remuneration for the labour and trouble which pleaders must incur in a particular class of cases. Our duty, however, is limited to administering the law as we find it, and if our decision leads to the anomaly which I have suggested, it will by no means be the only or the most serious anomaly of its class now existing.

We must, therefore, affirm the order of the Taxing Officer.

Order affirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Rao.

1912. *October* 7.

JAGU BABAJI VARANG AND OTHERS (ORIGINAL DEFENDANTS NOS. 11 TO 26), APPELLANTS, *v.* BALU LAXMAN VARANG AND OTHERS (ORIGINAL PLAINTIFF AND SOME OF THE DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 11—Res judicata—*First suit for partition—Declaratory decree—Second suit by other members for partition of their share*—Res judicata *does not bar the second suit.*

A Khoti village was owned by two families known as Varang and Desai. In 1854, two members of the Desai family brought a suit for partitioning the one-

* Second Appeal No. 584 of 1908.