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under the Indian Divorce Act only a "Commissioner of a Division" is given in Non-Regulation Provinces, such as Aden, jurisdiction to entertain a suit for divorce.

Answer accordingly.

R. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Beaman.

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July 29.

SIDHANATH DHONDDEV GARUD (ORIGINAL DEFENDANT 1), APPLICANT, *v.* GANESH GOVIND GARUD (ORIGINAL PLAINTIFF), OPPONENT.*

Findings on issues relating to misjoinder, limitation and jurisdiction—Drawing up a preliminary decree—Material irregularity in declining to do so.

A Subordinate Judge in trying a suit gave his decision on issues relating to misjoinder, limitation and jurisdiction and directed the parties to adduce evidence relating to accounts. He was asked to draw up a preliminary decree in accordance with his findings on the issues and having declined to do so,

Held, that the Subordinate Judge committed a material irregularity in the exercise of his jurisdiction. The decision of the issues conclusively determined the rights of the parties regarding some matters in controversy so far as his Court was concerned, the decision on each of those issues was, therefore, sufficient to constitute a preliminary decree.

Per Curiam :—It is the duty of the Court, where it is applied to after the passing of a preliminary decree, to have the decree drawn up so as to enable the party aggrieved to appeal.

Bai Divali v. *Shah Vishnav Mavordas*(1), referred to.

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against an order passed by N. B. Majmundar, First Class Subordinate Judge of Dhulia, in suit No. 47 of 1907.

The plaintiff brought the present suit against the defendants to recover mesne profits for three years of his share of the joint estate.

The defendants resisted the suit on the grounds *inter alia* that the Court had no jurisdiction to entertain the suit, that there was a misjoinder of the causes of action and that the claim was time-barred.

* Application No. 50 of 1912 under the extraordinary jurisdiction.

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The Subordinate Judge raised several issues and six of them were found as follows:—The claim was properly valued and the plaint was duly stamped, the suit was not bad for misjoinder of parties, the claim was not time-barred, the suit was not liable to be dismissed on the ground that the plaintiff paid additional Court-fee after the expiry of the time allowed for it by the Court, defendants 2 and 3 were agriculturists, and the suit for mesne profits of the land in Berars was maintainable.

After the said findings the Court directed the parties to adduce evidence relating to accounts. The defendants applied to the Court to draw up a preliminary decree on the findings recorded by it. But the Court declined to do so on the following grounds:—

The request to pass a decree at this stage cannot be granted. The Court has merely recorded findings on the points of limitation, joinder of parties and of jurisdiction respecting a portion of the claim. No relief has been awarded as yet to any party, nor any acts ordered to be done, such as taking an account. The Code of Civil Procedure clearly provides in Orders 20 and 34 and elsewhere in what cases preliminary decrees are to be passed. But it nowhere directs that a formal decree should be passed when any preliminary points in a case are decided and the suit is set down for trial on the remaining issues. Nor is any rule of the High Court pointed out which makes it obligatory for passing a preliminary decree in a case of this kind.

Defendant 1 applied to the High Court under its extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) urging *inter alia* that the Subordinate Judge erred in refusing to exercise jurisdiction vested in him to draw up a preliminary decree and that he acted with material irregularity in compelling the defendants to go into accounts and into the merits of the case which would become unnecessary if the decision on the questions of jurisdiction, limitation and the maintenance of the suit be set aside. A rule *nisi* having been issued requiring the plaintiff to show cause why the order of the Subordinate Judge be not set aside,

T. R. Desai appeared in support of the rule for the applicant (defendant 1):—The lower Court erred in declining jurisdiction to draw up a preliminary decree. The question is whether the decision of a Court on questions of jurisdiction and limitation amounts to a preliminary decree. The lower Court raised

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six preliminary issues and found thereon. The only thing that remains to be done now is to take accounts and determine the liability of the defendants. We submit that the findings on the issues gave us a right to approach the higher Court for relief. Therefore the findings were tantamount to a decree and the lower Court was bound to draw up a preliminary decree when we applied for it: *Bai Divali* v. *Shah Vishnav Manordas*[1]. The lower Court erred in declining jurisdiction and we have a right to apply under section 115 of the Civil Procedure Code.

G. K. Dandekar for the opponent (plaintiff) to show cause:—This is not a case for interference under section 115 of the Civil Procedure Code. If the decision on the issues amounts to a decree, the defendant should prefer an appeal against it, and if does not, the lower Court was not bound to draw up a decree and it could not be said to have failed to exercise jurisdiction. The decision on the issues cannot amount to a decree within the decision of that term in section 2 of the Civil Procedure Code. The case relied on does not decide any right between the parties.

Any interference by this Court will have the effect of prolonging the litigation.

[SCOTT, C. J.:—Is the defendant prepared to be put upon terms, if he is allowed to appeal at this stage?]

Desai:—We leave the matter entirely in the hands of the Court.

SCOTT, C. J.:—In this case the Subordinate Judge has given decision upon six issues in the case, one of these being an issue of misjoinder, another limitation, and the third of jurisdiction, and after finding on these issues directed that the parties should be allowed to adduce evidence on the remaining issues, which were issues of accounts. He was then asked to draw up a preliminary decree in accordance with his findings. This, however, he declined to do.

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We are of opinion that in so declining he committed a material irregularity in the exercise of his jurisdiction. The decision of the issues to which we have referred conclusively determined the rights of parties regarding some matters in controversy so far as his Court was concerned, the decision on each of those issues, therefore, was sufficient to constitute a preliminary decree.

The defendant has a right to appeal from a decision of the Court amounting to a preliminary decree, but he can only appeal if the decree is existent in a formal shape. This we decided in *Bai Divali* v. *Shah Vishnav Manordas*[1]. It is the duty of the Court, where it is applied to after the passing of a preliminary decree, to have the decree drawn up so as to enable the party aggrieved to appeal.

It is suggested on behalf of the plaintiff that this application is made solely for the purpose of delay, but the defendant in order to rebut that suggestion is willing to be put on terms with regard to the time within which he shall file his appeal from the preliminary decree.

We order the lower Court forthwith to draw up a preliminary decree upon the questions decided in the issues dealt with in its judgment of the 7th of February 1912, the defendant undertaking to prefer his appeal, if any, to this Court within one month from the drawing up of such decree.

Costs costs in the appeal if preferred.

If no appeal is preferred, costs costs in the cause.

Preliminary decree ordered to be drawn up.

G. B. R.

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