APPELLATE CIVIL.

FULL BENCH.

Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Heaton, Mr. Justice Macleod, Mr. Justice Shah and Mr. Justice Hayward.

CHANMALSWAMI GURU RUDRASWAMI RUDRAXIMATH AND ANOTHER (ORIGINAL DEFENDANTS 1 AND 2), APPELLANTS, *v.* GANGADHARAPPA ALIAS SUGAPPA BIN BASLINGAPPA ALAGUNDAGI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1914. *June* 30, *October* 15.

Civil Procedure Code (Act V of 1908), section 97—Preliminary decree—Appeal—Decision that suit not barred as caste question.

A decision in favour of the plaintiff upon a preliminary defence that the matters in dispute are caste questions outside the jurisdiction of Civil Courts does not amount to a preliminary decree attracting the provisions of section 97 of the Civil Procedure Code (Act V of 1908).

Sidhanath Dhondder v. *Ganesh Govind*[1] overruled.

Narayan Balkrishna v. *Gopal Jiv Ghadi*[2] dissented from.

SECOND appeal against the decision of E. H. Legatt, District Judge of Dharwar, reversing the decree of V. V. Kalyanpurkar, Subordinate Judge of Hubli.

The plaintiffs sued for an injunction restraining defendants 1 and 2 from worshipping defendants 3 and 4 in the Rudraximath and its yard, for an injunction restraining defendant 3 from entering upon the premises of the math and parading in a Palkhi in a dress assuming the symbols of Parashiva and to restrain defendant 4 from worshipping the tomb in the math.

The defendants contended *inter alia* that the Civil Court had no jurisdiction to try the suit as it involved a caste question.

The Subordinate Judge found on the preliminary issue that his Court had jurisdiction to try the suit notwithstanding the fact that the question whether the

* Second Appeal No. 586 of 1912.

(1) (1912) 37 Bom. 60. (2) (1914) 38 Bom. 392.

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acts complained of constitute pollution or not may depend entirely on the decision of questions as to religious tenets and rites.

The said finding having been embodied in a decree the defendants appealed and the respondents-plaintiffs took the preliminary objection that no appeal lay. The District Judge allowed the preliminary objection and dismissed the appeal. The following were some of his reasons :—

A "Decree" means the formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final and it is expressly enacted that an order of dismissal for default is not a decree.

Now the order that the Court has jurisdiction certainly determines the question whether plaintiff can bring the suit, but is that matter in controversy *in the suit?* I think it is not. It is a matter which must be considered and decided before the suit is begun. If the decision be that the suit will lie the Court will then proceed to hear the suit, if it be that the suit will not lie the Court will then proceed to dismiss the suit. In neither case will there be any appeal from the decision that the suit will or will not lie, for in neither case is that a matter in controversy in the suit. But when the consequence of the decision is that the suit is dismissed there is a refusal to grant to plaintiff the relief which he seeks in the suit and therefore an adjudication on a matter which is in controversy in the suit, namely plaintiff's right to relief. I think it follows from this that when the suit is disposed of on a preliminary point an appeal will lie from the decree dismissing the suit, but when the suit is not disposed of but merely proceeds no appeal will lie from the order on the preliminary point.

I know only of two cases which deal directly with this point since the new Code of Civil Procedure, 1908, came into force. In *Krishnaji* v. *Marati* (12 Bom. L. R. p. 762) it was held that the formal expression of an order that the plaintiffs are agriculturists is a decree. The decision did not then dispose of the suit, but as the question was clearly a matter in controversy *in the suit* that ruling does not apply. Unless the suit is to proceed it does not matter in the least whether the plaintiffs are agriculturists or not.

In *Orr* v. *Chidambaram Chettiar* (I. L. R. 33 Mad. p. 220) an order dismissing an inter-pleader suit as not sustainable was held to be a decree. That ruling was under the old Code and so also does not apply : but I think that the

formal expression of such an order would still be a decree, though the formal expression of such an order that the suit was sustainable would not be a decree.

In the present case the decision of the lower Court was that it had jurisdiction and that the suit would lie. In my view this is not a matter in controversy *in the suit* and therefore the formal expression of that order is not a decree. It is not suggested that an appeal will lie from it as an order.

Orders refusing to set aside an order of dismissal for default or on failure to furnish security for costs, etc., are now made appealable as orders under Order XLIII, Rule 1, and the question no longer arises with regard to them.

In the present case I must hold that no appeal lies.

Defendants 1 and 2 preferred a second appeal.

The second appeal was originally heard by a Division Bench consisting of Beaman and Hayward JJ., who, in referring the question involved in the case to the decision of a Full Bench, delivered the following judgments :—

BEAMAN, J. :—We think that in the present state of the authorities, the general question, what is and what is not a preliminary decree, needs to be considered by a Full Bench. We are sensible of the difficulty of stating the question in a sufficiently clear cut and definite form. But this Court appears to have held that decisions on various points are preliminary decrees, and we feel grave doubts not only whether the particular decisions are right, but much more, whether the reason underlying them is not capable of extension so as to cover a trial Court's ruling upon every disputed point arising during the trial. I find for example that I was myself a party to a ruling of this Court in *Sidhanath Dhondder* v. *Ganesh Govind*[1] which certainly seems to have held that the finding of an original Court upon three points—(1) Misjoinder, (2) Limitation, (3) Jurisdiction—was in each case a preliminary decree. Upon further reflection, a careful

[1] (1912) 37 Bom. 60.

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examination of the cases bearing on the point, and the definition of decree in the Code, along with every section contained in the Code which can throw any light upon the subject, I am convinced that that decision is wrong, that it goes much too far, and that if such findings really are preliminary decrees, it would be virtually impossible to deny that any ruling as to whether a document tendered were admissible or not, or a question objected to, relevant, would also be a preliminary decree.

Scott, C.J., who delivered the judgment in *Sidhanath Dhondder* v. *Ganesh Govind*[1] subsequently held in *Rachappa* v. *Shidappa*[2] that a decision of this Court upon a question of jurisdiction was not a decree giving the parties aggrieved by it, a right of appeal to the Privy Council. These decisions certainly appear to be in conflict with each other.

Having regard to the definitions of a decree, and a preliminary decree in the Code of Civil Procedure, I have formed a very strong opinion that no finding by a trial Court upon such points as limitation, or jurisdiction, where that finding is in favour of the plaintiff, and permits the suit to proceed can, in any true sense, be a preliminary decree. It further seems that virtually every true preliminary decree is actually provided for in the Code itself. A comparison of these, with the class of findings I have just mentioned, brings out the radical distinction in principle between them with sufficient clearness. For my own part I would go even further, notwithstanding the current of authority in this Court, and doubt with all becoming respect, whether in suits under the Dekkhan Agriculturists' Relief Act a finding *in limine*, that a party is or is not an agriculturist within the meaning of the Act, is a

(1) (1912) 37 Bom. 60. (2) Civ. App. No. 21 of 1913 (Un. Rep.).

preliminary decree. That is a more difficult case requiring a finer analysis. But in every such suit the plaintiff claims some concrete relief, he wants money or land, and a finding that he (or a defendant) is or is not an agriculturist does not conclusively determine any such right, but merely determines procedure, as a result of which the rights put in controversy will be settled and decreed. It is true that in many cases status alone may be decreed, and all such decrees are of course true decrees. But they are not preliminary. If the suit is for declaration of status, a decree conferring or refusing to confer that status concludes the suit, and leaves nothing more to be done.

But in suits under the Dekkhan Agriculturists' Relief Act, finding that a party is or is not an agriculturist, does not determine any of the substantial rights which the Court is asked to give or withhold. It is true that it is a matter in controversy, in respect of which the rights must be determined. But so is every detail of procedure, and rule of evidence, more or less directly. As I understand the definition it describes two things, (1) the legal rights of the parties which are to be decreed or not decreed. These are in a vast majority of cases concrete, as a sum of money or piece of land or house, or some other form of real or personal property, (2) the said rights in respect of any or all the matters in controversy. This means, as I understand it, everything which is necessary in law, during the course of a trial, to the establishment or refutation of the alleged right. Every fact which a plaintiff alleges and a defendant denies comes under this head, as well as all the rules of procedure and evidence which have to be enforced and followed during the trial. But these latter are means to an end, and the end is the right or rights claimed, and to be, or not to be decreed. The far wider construction put upon the words in this

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Court is, in my opinion, uncalled for, and will lead in practice to the most disastrous consequences. The conduct of civil business is already slow enough, but how can it ever be finished if the trial Judge has to frame twenty preliminary "decrees" in the course of every trial and so open the door to twenty successive appeals before any decision on the merits has been given? Upon this subject I may be permitted to call attention to the weighty words of their Lordships of the Privy Council in *Maharajah Moheshur Sing* v. *The Bengal Government*[1]. This is not a question of mere words, empty dialectic, but of great and far reaching practical importance. I believe that this Court stands alone in the extension it has given to the meaning of the term "preliminary decree", and in view of the steadily increasing number of appeals from what are called preliminary decrees, and may fairly be said to have been held to be preliminary decrees by this Court, and the resultant delays, expenses, and harassments to which suitors are being subjected, it is very desirable that the whole question should be fully considered and authoritatively settled by a Full Bench.

HAYWARD, J. :—The plaintiffs sued defendants for an injunction in respect of certain religious ceremonies. The defendants raised a preliminary defence that the matters in dispute were caste questions outside the jurisdiction of Civil Courts. The original Court held that the matters were within the jurisdiction of the Civil Courts. The District Court held on first appeal that this decision was not appealable at that stage as it did not amount to a preliminary decree within the meaning of section 2 of the Code of Civil Procedure. This Court has been asked to hold on second appeal that the decision was a preliminary decree and subject as

[1] (1859) 7 Moo. I. A. 283 at p. 302.

such to appeal relying on the cases of *Krishnaji* v. *Maruti*[1] and *Sidhanath Dhonddev* v. *Ganesh Govind*[2] in which it was held respectively that the decision as to the defendant being an agriculturist and the decisions as to misjoinder, limitation and jurisdiction were preliminary decrees inasmuch as they determined the rights of the parties with regard to matters in controversy in the suit within the meaning of section 2, Civil Procedure Code.

It has, however, been conceded that these decisions, if pressed to their logical conclusion, would cover all interlocutory orders passed in the suit, a result strongly condemned by the Privy Council in the following terms: "We are not aware of any law or Regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory Order by which he may conceive himself aggrieved, under the penalty, if he does not do so, of forfeiting for ever the benefit of the consideration of the appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities", in the case of *Maharajah Moheshur Sing* v. *The Bengal Government*[3] under the old Civil Procedure Code. It has been further pointed out that it was held in *Rachappa* v. *Shidappa*[4] under the present Civil Procedure Code, that a decision upon jurisdiction by the High Court had only the effect of regulating procedure

[1] (1910) 12 Bom. L. R. 762. [2] (1912) 37 Bom. 60.
[3] (1859) 7 Moo. I. A. 283 at p. 302.
[4] Civ. App. No. 21 of 1913 (Un. Rep.).

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and decided none of the rights of the parties for purposes of appeal to the Privy Council. It is necessary in all these circumstances to examine with particular care all the provisions relating to preliminary decrees contained in the present Civil Procedure Code before coming to the conclusion that a result so strongly condemned by the Privy Council has been intended by the Legislature.

No doubt such a result might be deduced from a literal interpretation of the words of the definition "'decree' means the formal expression of an adjudication which.....determines the rights of the parties with regard to all or any of the matters in controversy in the suit" and of the explanation "a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit" in section 2 (2). But it would appear that a limited interpretation was contemplated and that the adjudication determining the rights of the parties was meant to be an adjudication after a complete hearing of the case, because it has been provided that only after such a hearing should judgment be pronounced and be followed by decree by section 33. This has been made still clearer by the rules relating to the hearing of the suit. It has been provided that preliminary issues of law should be tried if those issues would *dispose of the suit* by Order XIV, Rule 2, and that if the finding should not be sufficient for the decision there should be a postponement of the hearing of the suit but that if the finding should be *sufficient for the decision* judgment should be pronounced, even though the hearing should not have been fixed for *the final disposal of the suit* by Order XV, Rule 3. It has been further provided that only after the case has been heard should there be judgment and that there should be a finding on each issue unless a finding on one or more issues should

be *sufficient for the decision of the suit* and that the judgment should be the basis of the decree and that the relief granted *or other determination of the suit* should be clearly specified in the decree by Order XX, Rules 1, 5 and 6. The limited interpretation contemplated has been indicated with sufficient precision by the following rules which specify the cases in which preliminary decrees may or shall be passed in anticipation of the prescribed final decrees. These cases are administration suits, suits for dissolution of partnerships, account suits and suits for partition dealt with in Order XX, Rules 13, 15, 16 and 18. The only other preliminary and final decrees provided are those in mortgage suits under Order XXXIV. Special forms for these preliminary and final decrees have been prescribed in Appendix D, Nos. 3, 4 to 11, 17 to 20 and 22 of the 1st Schedule. It has then been provided that if a preliminary decree should not give satisfaction there must be an immediate appeal and that the questions thereby decided should not be open to dispute on appeal from the final decree by section 97. But it has been recognized that there well might be many interlocutory orders not appealable as orders under section 104 and not amounting to decrees which might seriously affect the final decision of the suit and it has been expressly provided that such orders should be open to consideration on appeal from the decrees by section 105, Civil Procedure Code. It appears to me incontrovertible in view of all these provisions that the limited interpretation indicated has throughout been contemplated and that the only preliminary decrees sanctioned have been exhaustively enumerated subject of course to extension by further rules lawfully framed and that in all other cases the final determination of the suits has been required before preparation of the decrees. This limited interpretation has moreover the merit of avoiding the evils so strongly

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condemned by the Privy Council and there would be a strong general presumption against any other interpretation out of respect for the Legislature.

This matter is of far reaching consequence to the administration of justice and should therefore in my opinion be referred for final decision by the Full Bench.

The point being thus referred it was argued before the Full Bench composed of Scott, C. J., Heaton, Macleod, Shah and Hayward JJ.

D. A. Khare, for the appellants (defendants 1 and 2):—The term "decree" is defined in the present Civil Procedure Code, 1908, as "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit." It may be either preliminary or final. A decree is preliminary "when further proceedings have to be taken before the suit can be completely disposed of." It is final "when such adjudication completely disposes of the suit." This definition limits the point of decision to matters which determine the rights of the parties. Matters in controversy arise on the pleadings of the parties and are focussed in the issues raised.

It cannot be said that every preliminary decree gives a ground for appeal. But when there is a question of jurisdiction and the Court gives its decision on the question, there is a preliminary decree and appeal lies from it: *Sidhanath Dhondder* v. *Ganesh Govind*[1], *Sakharam Vishram* v. *Sadashiv Balshet*[2], *Kaluram Pirchand* v. *Gangaram Sakharam*[3] and *Narayan Balkrishna* v. *Gopal Jiv Ghadi*[4].

The Court should go only upon the definition of the term "decree" in section 2 of the Civil Procedure

(1) (1912) 37 Bom. 60. (2) (1913) 37 Bom. 480.
(3) (1913) 38 Bom. 331. (4) (1914) 38 Bom. 392.

Code. The enumeration of preliminary decrees in other sections and rules is not exhaustive. The section means that all rights, which are in contest between the parties and which are in controversy before the Court, when decided become the subjects of a decree. Compare section 109 of the Code which makes a distinction between "decree" and "final order". The term "decree" is not separately defined in the section as was done in the Code of 1882; but it obviously refers back to section 2.

The term "preliminary" must be construed with reference to the main definition. When the decision refers to *any* matters in suit, the decree is preliminary. It is final when it refers to *all* matters in suit.

Dhurandhar, with *G. S. Mulgavkar*, for the respondents (plaintiffs):—The distinction between a preliminary decree and a final decree is that the latter completely disposes of the suit, whilst the former only disposes of it partially.

[Scott, C. J.:—Do you contend that "rights of parties" means the whole bundle of rights?]

We mean the rights with regard to which the suit is brought. Every preliminary decree contemplates "further proceedings" before the suit is completely disposed of. This import of meaning is made clear by instances of preliminary decrees given in the Code. These instances are: (1) Administration Suits (Order XX, Rule 13, Appendix D, Form No. 17), (2) Suits for dissolution of partnership (Order XX, Rule 15, Appendix D, Form No. 21), (3) Account suits (Order XX, Rule 16), (4) Suits for partition (Order XX, Rule 18) and (5) Mortgage-suits (Order XXIV, Rule 2, Appendix D, Forms Nos. 3, 4, 5 to 9). In all these cases the Court, in the first instance, determines the rights of the parties and directs further proceedings to be taken. The Court stays

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its hands and awaits the result of those proceedings. The enumeration of preliminary decrees given in the Code is exhaustive: *Khadem Hossein* v. *Emdad Hossein*[1] which brought section 97 in the new Code.

The definition of "decree" as given in section 2 cannot be limited in any way. The decision in a case must be arrived at after the whole hearing of the case (section 33 of the Code) except when it can be reached on a preliminary question of law: Order XIV, Rule 2.

[Scott, C. J.:—Section 33 says what should be done under certain circumstances. It does not say what should be done in all cases. The question seems to be what is the meaning of "right", to what extent can "rights" be limited?]

The "rights" means substantial rights—rights with regard to which relief is sought.

[Scott, C. J.:—The Court has to consider "rights" with reference to "the matters in controversy."]

The definition of "decree" is in very wide terms. Some limitation should be placed on their meaning. What the limitation must be is indicated by the provisions of the Code: Order XV, Rule 3; Order XX, Rules 5, 6.

[Macleod, J.:—Can a judgment be a decree if it decides a suit one way and not be a decree if it decides the suit the other way?]

Yes, because in the former case the suit is decided, while it is not in the second case.

As to what orders are considered decrees, see *Bhikhaji Ramchandra* v. *Purshotam*[2], *Subbayya* v. *Samina-dayyar*[3] and *Maharaja Dhiraj Maharana Shri Mansingji* v. *Mehta Hariharram Narharram*[4].

[1] (1901) 29 Cal. 758.
[2] (1885) 10 Bom. 220.
[3] (1895) 18 Mad. 496.
[4] (1894) 19 Bom. 307.

Khare, in reply :—The words "the formal expression of an adjudication which conclusively determines the rights of the parties" include a decision on the point of jurisdiction. The word "right" includes the determination whether a particular Court should go into a claim or not and points to the right of a party to get relief from a particular Court.

[Heaton, J.:—The adjudication of a question of jurisdiction is not an adjudication on merits.]

The "rights" are not merits. They include both substantive rights and adjective rights. "Matters in controversy" refer to both questions of procedure and questions regarding which relief is claimed, in short, they refer to all matters which go to the root of the question.

[Shah, J. referred to *Bharat Indu* v. *Yakub Hasan*[1].]

C. A. V.

The judgment of the Full Bench was delivered by

SCOTT, C. J. :—The question arising in the suit in which this reference has been made is whether a decision in favour of the plaintiff upon a preliminary defence that the matters in dispute were caste questions outside the jurisdiction of civil Courts, amounts to a preliminary decree from which the unsuccessful party must at once appeal by reason of section 97 of the Code, and the referring judgments call attention to *Sidhanath Dhonddev* v. *Ganesh Govind*[2], in which it was held that decisions as to misjoinder, limitation and jurisdiction are preliminary decrees. This Court is of opinion that the judgment in the last mentioned case was wrong and that such decisions are not preliminary decrees nor is the decision in the referred case a

[1] (1913) 35 All. 159. [2] (1912) 37 Bom. 60.

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preliminary decree. We also think certain dicta in *Narayan Balkrishna* v. *Gopal Jiv Ghadi*[1], which are based upon *Sidhanath Dhondder* v. *Ganesh Govind*[2], go too far.

G. B. R.

(1) (1914) 38 Bom. 392. (2) (1912) 37 Bom. 60.

APPELLATE CIVIL.

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

1914.

November 26.

DATTAJIRAO ALIAS TATYASAHEB BIN SHIDHOJIRAO ALIAS ABASAHEB GHORPADE (ORIGINAL PLAINTIFF), APPELLANT, *v.* NILKANTRAO BIN SANTOJIRAO ALIAS BAPUSAHEB GHORPADE (ORIGINAL DEFENDANT), RESPONDENT.*

Pensions Act (XXIII of 1871), section 6—Saranjam—Grant of land revenue, Suit to recover—Collector's certificate—Admission of pleader binding on client—Preliminary decree—Appeal—Remand—Civil Procedure Code (Act V of 1908), Order XLI, Rule 23.

The grantee of a Saranjam filed a suit for the recovery thereof and at the trial a preliminary issue was raised as to the maintainability of the suit without the certificate provided for by section 6 of the Pensions Act. The grantee's pleader admitted a certificate was necessary but after several adjournments for the purpose failed to produce a certificate. A decree was thereupon passed on the preliminary issue dismissing the suit. On appeal by the grantee it was contended that he was not bound by the admission of the pleader and it was stated that such evidence could be produced as would render a certificate unnecessary.

Held, that the grantee was bound by the admission of his pleader and that even if he was not so bound there was no material before the Court to justify a reversal of the decree and therefore a remand under Order XLI, Rule 23 of the Civil Procedure Code (Act V of 1908) was impossible.

In the absence of evidence to the contrary the grant of a Saranjam must be presumed to be a grant of land revenue and not of the soil.

Ramchandra v. *Venkatrao*[1] and *Raja Bommadevara Venkata Narasimha Naidu* v. *Raja Bommadevara Bhashyakarlu Naidu*[2], referred to.

* First Appeal No. 197 of 1913.

(1) (1882) 6 Bom. 598. (2) (1902) L. R. 29 I. A. 76.