APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

1920.
August 16.

DATTATRAYA PURSHOTTAM PARNEKAR AND ANOTHER (ORIGINAL PLAINTIFFS)., APPELLANTS *v.* RADHABAI, WIDOW AND HEIR OF THE DECEASED BALKRISHNA TRIMBAK HINGNE (ORIGINAL DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), sections 97 and 2—Preliminary decree—Preliminary issue, whether a party is an agriculturist—Finding on the issue not an adjudication which can be embodied in a decree—Practice—Procedure.

A finding on a preliminary issue whether a party is an agriculturist is not by itself an adjudication which can be embodied in a preliminary decree within the meaning of section 97 of the Civil Procedure Code, 1908.

PER MACLEOD, C. J.—It is only when the finding on an issue is sufficient for the decision of a suit or a part of the suit that the Court may pronounce judgment. When the finding is not sufficient for the decision the suit must be postponed for further hearing. Accordingly, the stage of the case at which judgment is pronounced will determine whether the decree is preliminary or final.

PER FAWCETT, J.—It is an abuse of the procedure intended by the Code for a Court to draw up a preliminary decree directing accounts to be taken under section 13 of the Dekkhan Agriculturists' Relief Act, before it had even decided whether the mortgage sued upon was proved.

Municipal Committee of Nasik City v. *The Collector of Nasik*(1), considered.

SECOND appeal against the decision of S. J. Murphy, District Judge of Nasik, confirming the decree passed by V. V. Gadkari, Joint Subordinate Judge at Nasik.

Suit for accounts.

The plaintiff sued to recover Rs. 3,637 being the balance due on two mortgage deeds, dated 28th June 1891 and 26th September 1892.

The defendant contended that he was an agriculturist and that the suit should be tried under the Dekkhan Agriculturists' Relief Act.

* Second Appeal No. 963 of 1919.

(1) 1915 39 Bom. 422.

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In the Subordinate Judge's Court, preliminary issues were framed (1) Whether the defendant was an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act ?; (2) Whether the suit was maintainable without a succession certificate ?; (3) Whether a certificate under the Pensions Act was necessary ? The Subordinate Judge found that the defendant was an agriculturist. He was asked to draw up a decree on the finding on this issue and the decree was drawn up. There were also other issues framed (1) Whether the mortgage bonds in suit are proved ; (2) What is proved to be the consideration of the said bonds ; (3) What is proved to be the amount received by plaintiffs towards satisfaction of the said bonds ; (4) Whether the suit is within time ; (5) What is found due on taking accounts under the Dekkhan Agriculturists' Relief Act ; (6) How should the amount due be made payable ?

Against the decree, the plaintiffs appealed to the District Court. The District Judge relying on the authority of the *Municipal Committee of Nasik City* v. *The Collector of Nasik*[1] held that the finding on the preliminary issue amounted to a preliminary decree in substance and appeal lay against the decree. On the merits he agreed with the Subordinate Judge and confirmed the decree.

The plaintiffs appealed to the Hight Court.

D. C. Virkar, for the appellants.

D. R. Patwardhan, for the respondent.

MACLEOD, C. J.:—The plaintiffs sued to recover Rs. 3,637 being the balance due on two mortgage deeds, dated 28th June 1891 and 26th September 1892. The defendant in his written statement contended that he was an agriculturist and that the suit should be tried under the Dekkhan Agriculturists' Relief Act. The

[1] (1915) 39 Bom. 422.

following issues were raised as preliminary issues: (1) Whether the defendant is an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act; (2) Whether the suit is maintainable without a succession certificate and (3) Whether a certificate under the Pensions Act is necessary ? On the first issue the Judge found that the defendant was an agriculturist. The second issue was found in the affirmative and the third in the negative. Further issues were then drawn up:—

1. Whether the mortgage bonds in suit are proved ?

2. What is proved to be the consideration of the said bonds ?

3. What is proved to be the amount received by plaintiffs towards satisfaction of the said bonds ?

4. Whether the suit is within time ?

5. What is found due on taking accounts under the Dekkhan Agriculturists' Relief Act ?

6. How should the amount due be made payable ?

Unfortunately, the plaintiff applied to the Court to draw up a decree on the finding on the first issue and a decree was drawn up. An appeal was filed against that decree which was admitted by the District Judge. The appeal was dismissed, the learned Judge being of opinion that the defendant was rightly held to be an agriculturist. I think he was wrong in holding that an appeal lay and he failed to appreciate in the right way the remarks of Mr. Justice Heaton in the *Municipal Committee of Nasik City* v. *The Collector of Nasik*[1].

The importance of the question arises from section 97 of the Code which enacts that if a party aggrieved by a preliminary decree passed after the commencement of the Code does not appeal from such decree he shall be

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precluded from disputing its correctness in any appeal which may be preferred from the final decree, thus giving effect to the opinion of the dissenting Judges in *Khadem Hossein* v. *Emdad Hossein*[1] that in an appeal against the final decree in a partition suit it was not open to the appellant to question the correctness of the preliminary order or decree for partition when no appeal was preferred against such order within the time allowed by law. Such an order was, according to legal phraseology, a preliminary or interlocutory decree but it was not a decree as defined by section 2 of the Civil Procedure Code of 1882 although it was appealable as if it had been a decree.

In section 2 of the Code of 1908 decree was defined so as to bring preliminary or interlocutory decrees within the definition of a decree but the only change in procedure introduced by the definition of decree in section 2 combined with section 97 was in respect of the right of an aggrieved party to appeal from a preliminary decree. The right which he had before to wait until the final decree was passed and then appeal from both the preliminary and the final decrees was taken away.

But the impression has gained ground that the kind of preliminary decrees which can be passed has been indefinitely extended by the Code of 1908. Constant applications are made to the Judges in the Mofussil Courts to embody in the form of decrees judicial pronouncements which are not judgments according to the Code, on the ground that the aggrieved party may be debarred from raising the question in an appeal from the final decree. This apprehension may be genuine in some cases but it too often is merely the cover for deliberate obstructions to the final decision of the suit. The object is easy of attainment. The Judge is asked

(1) (1901) 29 Cal. 758.

to draw up a decree on the ground that he has decided something which conclusively determines the right of the parties with regard to one of the matters in controversy in the suit. The Judge declines. An application is made to compel him to draw up a decree. Whether successful or not the hearing of the suit is delayed for months. If the Judge consents there is at once an appeal. In this way litigation which is in any event sufficiently protracted can be indefinitely prolonged.

In my opinion the above impression is entirely erroneous and has arisen chiefly from the failure to observe the rules of procedure laid down by the Civil Procedure Code, 1908, with regard to the institution and hearing of suits. The solution of the question before us is to be found not in any of the numerous cases which deal with the question but by a careful consideration of those rules which with some minor alterations re-enact the corresponding sections of the Code of 1882. They prescribe when and in what circumstances the Court is to pronounce judgment and it is only when a judgment has been pronounced in conformity with those rules that it can be embodied in a decree.

The real question, therefore, seems to me to be not what is or what is not a preliminary decree but when may a trial Judge pronounce a judgment which has to be embodied in a decree. Then the stage of the case at which judgment is pronounced will determine whether the decree is preliminary or final. It may be as well to set out as briefly as possible the course a suit should follow under the rules. When a suit has been duly instituted a summons may be issued to the defendant to appear: Order V, Rule 1. The Court shall determine at the time of issuing the summons whether it shall be for the settlement of issues only, or for the final disposal of the suit: Order V, Rule 5. Order XIV deals with the settlement of issues. At the first hearing of the suit the

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Court shall proceed to frame and record the issues on which the right decision of the case appears to depend: Order XIV, Rule 1 (5).

Where issues both of law and of fact arise in the same suit and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined: Order XIV, Rule 2. Nothing is said regarding the procedure at the trial of such issues but following the analogy of Order XV, Rule 3, judgment should only be pronounced when the finding disposes of the case or a part of the case which would then be final *pro tanto*. Order XV deals with the disposal of a suit at the first hearing. Rule 3 seems to amplify Order XIV, Rule 2, as it refers to issues of fact as well as of law. If the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such issues as may be sufficient for the decision of the suit and that no injustice will result from proceeding with the suit forthwith the Court may proceed to determine such issues, and if the finding thereon is sufficient for the decision may pronounce judgment accordingly. If the finding is not sufficient for the decision the Court shall postpone the further hearing and shall fix a day for proceeding with the suit. Although this rule appears to be applicable only to the first hearing of a suit it seems obvious that it must also apply by reason of Order XVII to a further hearing of a case after all the issues or issues of law only have been settled at the first hearing.

It is only when the finding on an issue is sufficient for the decision of the suit or a part of the suit that the Court may pronounce judgment. When the finding

is not sufficient for the decision the suit must be postponed for further hearing.

Under section 33 the Court after the case has been heard shall pronounce judgment and on such judgment a decree shall follow.

Order XX deals with judgment and decree. Before Rule 12 of that order there is no provision in the Code for any other judgments except (1) those which are given at the end of the hearing, (2) those which decide the case or presumably a part of the case by findings on certain issues only.

Order XX, Rules 12 to 16 and 18 and Order XXXIV, Rules 2, 4 and 7, deal with certain classes of suits in which there can be an adjudication which though it determines the right of the parties with regard to the matter in controversy in the suit does not completely dispose of the suit. They enable the Court to pronounce a judgment which must be embodied in a decree before the end of the suit, but they carefully prescribe on what points judgment shall be given.

The suits referred to above are the most common in which preliminary decrees can be passed. I may also mention suits for damages in which the plaintiff establishes his right to receive damages but an inquiry is necessary as to the amount before a final decree can be passed. The principle remains the same. The judgment should ordinarily come at the end of the case. But there are cases where although the Court can decide all questions relating to the rights and liabilities of the parties, the details of the decree have to be ascertained by a further inquiry, or time is allowed to a defendant before the decision becomes final.

I do not see why this principle should not be applied to suits under the Dekkhan Agriculturists' Relief Act.

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If the rights and liabilities of the parties can be determined and accounts taken at one hearing no difficulty arises although for form's sake it may be necessary to draw up a preliminary and a final decree. If the Court arrives at a stage where the rights and liabilities of the parties have been determined but an inquiry is necessary to ascertain the state of accounts between the parties judgment may be given on which a preliminary decree can be drawn up. But the finding that a party is an agriculturist is not by itself an adjudication which can be embodied in a decree, though it may result in the plaint being returned for presentation in the proper Court.

Issues of law on which a case may be disposed of most often raise question of jurisdiction or of limitation. But a finding that the Court has jurisdiction or that the plaintiff has brought his suit within the time prescribed by the law of limitation, does not determine the rights of the parties with regard to all or any of the matters in controversy in the suit, it merely enables the Court to proceed to inquire into those rights. So, too, an issue of *res judicata* found in the plaintiff's favour enables the Court to deal with the merits of the case.

It has been contended that decisions in the plaintiff's favour on such issues as these determine his right to sue which is a matter of controversy in the suit but a consideration of the analysis of rights in Holland's Jurisprudence will make it clear that there is no such right known to law as the "right to sue". A plaintiff in a suit claims to be entitled to a remedial right on the consequence of an infraction of an antecedent right.

"A remedial right is in itself a mere potentiality, deriving all its value from the support which it can obtain from the power of the State. The mode in which that support may be secured, in order to the realisation of a

remedial right, is prescribed by that department of law which has been called 'adjective', because it exists only for the sake of 'substantive law', but is probably better known as 'Procedure'.... It comprises the rules for (i) selecting the jurisdiction which has cognizance of the matter in question; (ii) ascertaining the Court which is appropriate for the decision of the matter; (iii) setting in motion the machinery of the Court so as to procure the decision;" Holland's Jurisprudence, 12th Edn., pp. 358, 359.

The opinion I have expressed on this question in no way affects the rights of an aggrieved party to obtain relief when appealing to a higher Court. I have only made it clear when he must appeal and I have shown that he is not debarred from appealing at the end of the case from certain findings during the hearing of the cases which merely decide that the suit must proceed, or which decide questions without disposing wholly or partially of the case. This will put an end to the applications which are constantly being made to the High Court to compel the trial Courts to draw up decrees based on such findings, instead of waiting until the end of the case, thus enabling a party to prolong the hearing of the suit for an indefinite time and paralysing the administration of justice. One thing is perfectly clear, and that is, that a formal expression by a decree of a finding by a Court that a party is an agriculturist cannot conclusively determine the rights of the parties with regard to any or all of the matters in controversy in the suit. Nothing is said in the Code about a preliminary issue, but a decree is preliminary when a further proceeding is to be taken before the suit is disposed of. It follows then, in my opinion, that a Judge should never accede to an application to draw up in the form of a decree a finding no the question whether a party is an agriculturist or

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not. Undoubtedly that is an issue which is the first issue to be tried in the case, and a decision may be given on it; but it by no means follows that because that is the first issue to be tried, therefore it is a preliminary issue on which a decree can be drawn up. The whole case must be decided first before the judgment can be pronounced. There will be then a judgment deciding the rights of the parties with regard to all or any of the matters in controversy in suit, and then it will rightly be the subject of a decree. The result will be in this case that as there was no appeal, the case must go back to the trial Court to continue the hearing from the point at which it was left off. This appeal is dismissed with costs.

FAWCETT, J.:—I quite agree in the general principles laid down by the learned Chief Justice in the judgment just pronounced. In regard to the decision in the *Municipal Committee of Nasik City* v. *The Collector of Nasik*[1] I think Mr. Justice Heaton never intended to say that the Court should frame a preliminary decree directing accounts to be taken under section 13, Dekkhan Agriculturists' Relief Act, until the proper stage had been arrived at for such a preliminary decree. The principle applicable is that judicially laid down in regard to references for inquiry and report. This is that the power to order such a reference is only exercised in cases where the question cannot conveniently be decided in the usual way by the Court, as for instance, where a prolonged examination of documents or accounts, or some specific or local investigation is necessary, or where, as may be the case when damages have to be assessed, the inquiry involves questions of detail which would occupy too much time in Court: Halsbury's Laws of England, Vol. I, Article 1000 at p. 484, and *D.N. Ghose & Bros.* v. *Popat Narain Bros.*[2]

[1] (1915) 39 Bom. 422.

[2] (1915) 42 Cal. 819.

Accordingly it is a general rule in cases falling under Order XX, Rule 16, of the Code, that the main points at issue in the case should be decided first by the Court, and a preliminary decree framed only when nothing more remains to be done than the ministerial function of drawing up the account in accordance with the directions of the Court. It is, in my opinion, an abuse of the procedure intended by the Code to draw up a preliminary decree directing accounts to be taken under section 13 of Dekkhan Agriculturists' Relief Act, before, for instance, as in this case, it had not been even decided whether the mortgage sued upon was proved. Personally I am inclined to think that it will be seldom necessary under the Dekkhan Agriculturists' Relief Act to draw up a preliminary decree under Order XX, Rule 16. That is a provision of a general nature and does not, in my opinion, detract from the power given to the Court by a special Act, namely, section 13 of the Dekkhan Agriculturists' Relief Act, to take an account in accordance with the provisions of that section. My experience is that in ordinary cases the Court can itself take the account with the help of a clerk for any formal calculations, and that there is no real necessity for a preliminary decree, under which a Commissioner would have to be formally appointed and the ultimate decision of the suit almost inevitably delayed. I think, therefore, it is only in exceptional cases, that there should be a preliminary decree of the kind referred to in Mr. Justice Heaton's judgment already mentioned.

Decree confirmed.

J.G.R.