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Testing the application made on 10th March, 1879, by this rule and by article 179, sch. II. of Act XV of 1877, we do not think it was one made according to law from which a new period of limitation could be computed. It did not ask the Court to take any steps towards executing the decree, only to keep the decree alive: an application not provided for, or contemplated in the Code of Civil Procedure. The present application, then, was barred, and we confirm the District Judge's order, with costs.

Order confirmed.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nanabhai Haridas.

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ANUSUYABAI, WIDOW OF BALAJI, (ORIGINAL DEFENDANT NO. 1), APPELLANT, *v.* SHAKHARAM PANDURANG (ORIGINAL PLAINTIFF), RESPONDENT.*

Res judicata—Appeal—Incidental finding—Decree.

Plaintiff sued for a declaration that certain lands were his, and for possession of them. Defendant No. 1 claimed the ownership of the lands; defendant No. 2 claimed to be mortgagee in possession. The decree simply dismissed the suit; but the lower Court found, as a fact, that the ownership of the lands was in the plaintiff, although the plaintiff was not entitled to possession of them by reason of the mortgage to defendant No. 2. Defendant No. 1 now appealed on the ground that, although the decree itself was entirely in her favour, she would be prejudiced in any future proceedings if the finding of fact as to the ownership of the lands were left unchallenged.

Held that the appeal would not lie; for the decree is what must be looked to to see what was conclusively decided, and there was nothing in the decree actually passed which the plaintiff could afterwards use as *res judicata* in his favour; and an appeal is not admissible on any point not having the authority of *res judicata*.

An adjudication is only conclusive evidence of the facts established therein or properly tending thereto; hence from a simple judgment against him a party cannot deduce any thing in his favour as *res judicata*, for nothing in his favour can have been an essential element of an adverse decree.

THIS was a second appeal from the decree of R. F. Mactier, Judge of Satara, confirming the decree of Rav Saheb J. S. Bodhrav Tirmalrav, Subordinate Judge of Rahimatpur.

The plaintiff alleged that one Balaji, the husband of defendant No. 1, Anusuyabai, on the 6th of December, 1871, sold to the

* Second Appeal, No. 397 of 1882.

deceased father of the plaintiff three fields for Rs. 1, 500; that the defendant No. 1 unlawfully denied the sale; that the defendant No. 2 unjustifiably asserted a mortgage in his own favour, and recovered rent of the said fields from defendants Nos. 3, 4 and 5, who were his (the plaintiff's) tenants; the plaintiff, therefore, prayed that a decree might be passed, declaring him to be the owner of the fields, and that he might be put in possession of them.

Defendant No. 1 denied the sale; defendant No. 2 set up three mortgages, still unpaid, on the fields. Defendants Nos. 3, 4 and 5 said they were the tenants of defendant No. 2, and not of the plaintiff.

The Subordinate Judge simply rejected the claim. The District Judge confirmed his decree. Disagreeing with the lower Court he held the sale to the plaintiff's deceased father proved; but he found, also, that defendant No. 2 held more than one mortgage in the fields, and was in possession. As the plaintiff had not chosen to sue for redemption, he merely confirmed the decree of the Subordinate Judge, dismissing the claim.

Defendant No. 1 appealed to the High Court.

Ghanasham Nilkanth Nadkarni for the appellant.—The object of the appeal is to obtain the reversal of the District Judge's finding against the first defendant on the question of sale. The decree is in her favour. But in a future litigation she might be precluded from contesting the finding.

Ganesh Ramchandra Kirloskar for the plaintiff.—The decree being in favour of the appellant, and she not seeking to disturb it, the appeal is futile, and must be dismissed. In *Jani Gaba* v. *Hulia Waru*(1) the Court—in dismissing the special appeal as being made in a case within the jurisdiction of Courts of Small Causes, and, therefore, not sustainable under section 2 of Act XXIII of 1861—made the following remark:—"The difficulty suggested by the pleader for the special appellant, that if this special appeal be not entertained, the special appellant will be bound by the findings of the District Judge on the questions of title, does not exist. Those findings have been arrived at for the purposes of deciding the question of damages in this case; but

(1) Printed Judgment for 1873, p. 170.

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the action being one for an amount, and of a nature, within the jurisdiction of a Court of Small Causes, the special appellant will not be estopped, by the findings or decree in such an action, from raising afresh the question of title in a suit duly brought for a declaration of title."

The judgment of the Court was delivered by

WEST, J.—The decree of the Court below being in favour of the appellant, and she seeking no alteration of it, the present appeal must be dismissed. Mr. Ghanasham, for the appellant, urges that, though the decision is in his client's favour, one of the grounds on which it is based has been decided unfavourably to the appellant's title, and may thus, as *res judicata*, greatly prejudice her in a future suit between her and the respondent. This fear, though there are some decisions and *dicta* which support it, does not appear to be well grounded. The judgment is not, and cannot really be based on a ground unfavorably to the successful party, though an opinion unfavourable to him may be expressed on some incidental point. According to the English law, "the attribute of being conclusive evidence of the facts stated therein, and properly tending thereto, seems to have been thought to belong to every adjudication emanating from a competent Court"—*Crepps* v. *Durden*(1). It cannot be said in such a case as that of *Balak Tewari* v. *Kausil Misr*(2) that a finding that the fruit trees belonged to the plaintiff was one "properly tending to" the decision against the plaintiff on a claim for damages for taking the fruit. From a judgment against a plaintiff no adjudication in his favour can properly be derived as *res judicata*. It is not, and cannot be, an essential element of the jural relation on which an adverse decree rests, and no appeal lies against a merely incidental decision by one who is not in any way prejudiced by the concluding decision to which the partial ones are but subsidiary. But "everything that should have the authority of *res judicata* is, and ought to be, subject to appeal, and reciprocally an appeal is not admissible on any point not having the authority of *res judicata*"—Sav. Syst., sec. 293. There are cases, no doubt, in which the plaintiff may be regarded

(1) 1 Sm. L. C. (1876), 716; see, too, Ev. Poth., 354. (2) I. L. R., 4. All. 49.

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as seeking both a declaratory decree as to his title and a particular relief for a specified infringement of his right. In such cases it is for the plaintiff to make the distinction clear, and, if the law allows it, to obtain the declaratory decree to which he is entitled. To deduce it from an incidental statement in a judgment for the defendant not admitting of an appeal by him, because there is no relief awarded to the plaintiff, seems opposed to sound principle as well as to high authority—see *per* Knight Bruce, V.C., in *Barrs* v. *Jackson*(1). In the case of *Jania Gaba* v. *Hulia Waru*(2) it was said that an incidental finding of a District Court on a question of title in a case not admitting of further appeal could not be *res judicata* as to that point in a future suit. The decision could not be appealed against, and, therefore, on the incidental question was not final. The same principle applies where an appeal is excluded by the decree: a point is not finally decided against any party who is not allowed the opportunity of questioning the decision, with the exception of the particular points, as in small causes, to the judgment on which a special finality is given by Statute.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 1 Y. & C. (Ch. C), 585. See also *per* Lord Selborne in *Reg.* v. *Hutchings*, L. R., 6 Q. B. D. at pp. 304, 305.

(2) Printed Judgments for 1873, p. 170.

APPELLATE CIVIL.

Before Mr. Justice Kemball, Mr. Justice West, and Mr. Justice Pinhey.

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August 6.

GANSAVANT BAL SAVANT AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* NARAYAN DHOND SAVANT (ORIGINAL PLAINTIFF), RESPONDENT.*

Mortgage—Redemption suit—Omission to direct foreclosure—Neglect to redeem—Second suit to redeem—Res judicata—Hindu family—Suit by manager in his own name—Representative character—Practice—Parties—Civil Procedure Code Act XIV of 1882, *Sec.* 50.

In 1856, V., a member of an undivided Hindu family, sued the defendants, and obtained a decree for the redemption of certain immoveable property, but the

* Special Appeal, No. 261 of 1881.