APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Nánábhái Haridás.

MAHANT ISHVARGAR BUDHGAR, DECEASED (ORIGINAL DEFENDANT), APPLICANT, *v.* CAUDA'SAMA AMARSANG AND OTHERS (ORIGINAL PLAINTIFFS), OPPONENTS.*

Privy Council, appeal to—Civil Procedure Code (Act XIV of 1882), Sec. 595—Final decree—Interlocutory decree—Practice.

Where the High Court reverses the decree of the Court below, and remands the case for retrial on the merits, and for a new decree to be passed by the Court below, no appeal lies as a matter of right, under section 595 of the Code of Civil Procedure (XIV of 1882), to the Privy Council, albeit the value of the subject-matter admittedly exceeds Rs. 10,000, as such a decree of the High Court is not a final, but an interlocutory, decree. In such a case a certificate should first be obtained under clause (*c*) of the section that the case is a fit one for appeal to Her Majesty in Council.

THIS was an application under section 598 of the Code of Civil Procedure (Act XIV of 1882).

In April, 1877, the plaintiffs instituted this suit in the Court, of the First Class Subordinate Judge at Ahmedabad to recover possession of the village of Sháhpur. The plaintiffs alleged in their plaint that they were the original *tálukdárs* of that village; that in 1796 they mortgaged it to the defendant's predecessor in title; that in 1837 their accounts were made up and a balance of Rs. 15,154 was found to be due by them; that on the 20th of November, 1838, fresh agreements were executed between the parties; that, according to the terms of the fresh agreements, the mortgage had been fully paid off; and that, therefore, the plaintiffs were entitled to recover possession without any further payment.

The defendant, who was the *mahánt* or priest of the temple of Shri Bhimnáth, contended *(inter alia)* that the suit was barred by limitation. He also denied that the plaintiffs were the owners of the village, or that they ever mortgaged it to his predecessor, and asserted that it belonged to the temple which had enjoyed it as proprietor. He further impeached the fresh agreements set up by the plaintiffs as false and unauthorized.

* Civil Application, No. 354 of 1883.

The Subordinate Judge found the suit time-barred, and the mortgage neither proved, nor valid, and rejected the claim.

On appeal the High Court was of opinion that the suit was within time and the mortgage proved, and on the 4th May, 1883, it reversed the decree of the Subordinate Judge and remanded the suit for the Judge to proceed to investigate the merits of the case and pass a new decree. On the 19th November, 1883, the original defendant made the present application, and prayed for a certificate that the value of the subject-matter in suit and appeal was upwards of Rs. 10,000, and for permission to appeal to Her Majesty's Privy Council as of right. A rule *nisi* was accordingly issued to the plaintiffs to show cause why the defendant's prayer should not be granted.

Hon. *F. L. Latham* (Advocate General) with *Shivrám Vithal Bhándarkar* showed cause.—There is no doubt in this case that the subject-matter of the suit exceeds Rs. 10,000; the only question is whether under section 595 of the Code of Civil Procedure (Act XIV of 1882), an appeal lies to the Privy Council as a matter of right, or is it necessary to obtain the permission of the High Court. That question turns upon the question whether under clause (*a*) of the above section the decree passed by the High Court, which remanded the suit for the Court below to investigate the merits of the case and pass a new decree, is a final decree. The expression "final decree" does not seem to have been considered by this High Court in connection with clause (*a*), but it has been considered in connection with clause (*b*), section 595, and clauses 39 and 40 of the Letters Patent 1865. In *Aben Sháh Sabit Ali* v. *Cassiráo Bába Holkar*[1] it was held that an order in a partnership suit for account refusing to allow the plaintiffs to have their accounts taken in the manner suggested by themselves, was not a final decree, although the effect of the order was to make it impossible for the plaintiffs to proceed further in the case, and that, consequently, no appeal lay from it to the Privy Council. According to the practice of the Chancery Courts in England, the decree would be final if it does not adjourn the consideration of the case—Daniell's Chancery Practice, pp. 785, 894 and 896. Final

(1) I. L. R., 6 Bom., 260.

1884

MAHÁNT ISHVARGAR BUDHGAR v. CAUDÁSAMA AMARSANG.

determination of the rights of parties does not necessarily give finality to a decree—*Pheysey* v. *Pheysey*(1). In *Rustomji Burjorji* v. *Kessowji Náik*(2) the term decree as defined in section 2 of Act X of 1877 is explained to mean an order final in its nature, not including an interlocutory order for taking accounts. The decree in the present case expressly leaves it to the lower Court to pass a final decree, and is, therefore, not final and not appealable to the Privy Council without permission of the High Court.

K. T. Telang with Ráv Sáheb *Vásudev Jagannáth Kirtikar* in support of the rule.—The High Court has by its decree completely disposed of the case; nothing more remains to be done. If what is done by the lower Court is satisfactory to the parties, the High Court will see no more of the case. The decree is, therefore, final. In *Shubrook* v. *Tufnell*(3) an arbitrator stated a case for the opinion of the Court, which provided that if the opinion of the Court should be one way, the case was to be referred back to the arbitrator; if the other way, judgment was to be entered for the defendant. A Division Court decided in the plaintiff's favour, and referred the case back to the arbitrator, It was held that the Court's order was final and appealable, because, said the Master of the Rolls: "Here, if we differ, final judgment has to be entered for the defendant, and there is an end of the action." The same Judge in *Re Leonard Jacques*(4) expresses a similar opinion on an order on the construction of a will. The cases of *The East India Company* v. *Syed Ally*(5) and *Hirji Jina* v. *Narran Mulji*(6) show the practice respectively of the Madras and Bombay Supreme Courts. In the present case there has been a final determination of the relationship of the litigating parties. If the High Court instead of holding that the plaintiff's mortgage was proved had held with the lower Court that it was not, there would have been an end to the suit. Even under the direction of the decree as it now stands, suppose the lower Court finds the amount due, and the account is rightly taken, there will be no appeal to this Court. In the case of

(1) L. R., 12 Ch. D., 305.
(2) I. L. R., 3 Bom., 161.
(3) 9 L. R., Q. B. D., 621.
(4) 18 L. R., Ch. D., 392.
(5) 7 Moo. I. A., 555.
(6) 12 Bom. H. C. Rep., 129.

1884

MAHÁNT ISHVARGAR BUDHGAR v. CAUDASAMA AMARSANG.

Lakshman Dáda Náik v. *Rámchandra Dáda Náik*[1] this Court made a partition decree, and gave directions to make an inquiry as to the existence and division of certain property. An appeal was preferred without objection from that decree to the Privy Council. The rule should, therefore, be made absolute.

The judgment of the Court was delivered by

SARGENT, C. J.—In this case the plaintiffs had filed a suit to recover possession of certain lands, alleging that they had been mortgaged to the defendant, and that the mortgage-debt had been paid off. The First Class Subordinate Judge of Ahmedabad rejected the plaintiffs' claim on the ground that the genuineness of the alleged mortgage was not proved, and that in any case it was not a valid instrument binding on the defendant, and that the claim by the terms of the mortgage deed itself was barred. This Court on general appeal found the mortgage-deed proved, and that the claim was not barred, and reversed the decree of the Subordinate Judge, and remanded the suit for the Judge to proceed to investigate the merits of the case and pass a new decree.

The question we have to decide is whether an appeal lies as a matter of right under section 595, Civil Procedure Code, to the Privy Council, it being admitted that the value of the subject-matter is more than 10,000 rupees. The meaning of the expression "final decree" in that section was considered in *Aben Sha Sabit Ali* v. *Cassiráv Bába Sáheb Holkar*[2], and the conclusion was arrived at that the expression was used, as in clauses 39 and 40 of the Letters Patent, in contrast with the expression "interlocutory". In Daniell's Chancery Practice, pages 894 and 896, it is said "that when a decree does not adjourn the consideration of the case, it is said to be final"; and such is said to be a decree in a foreclosure or redemption suit, although accounts are directed to be taken, and although a further order according to the practice of the Court of Chancery is required to complete the decree of foreclosure or redemption. In the present case, however, the High Court, although it has decided that the relationship of mortgagor and mortgagee existed between the parties, and directed the accounts to be taken, has left it to the Court below to pass the proper decree according to the result.

(1) I. L. R., 1 Bom., 561. (2) I. L. R., 6 Bom., 264.

1884

MAHÁNT ISHVARGAR BUDHGAR v. CAUDASAMA AMARSANG.

Therefore, whether or no this Court, whilst directing accounts to be taken in this case, could have passed a final decree, it is plain that the actual decree passed is worded so as to reserve the consideration of the proper and final decree to be passed to the Court below.

We have been referred by the applicant to the remarks of Sir G. Jessel, M. R., in the case of *Shubrook* v. *Tufnell*(1) where the question was whether the order made on a point of law referred by an arbitrator for the opinion of the Court was final under Rule 15 of the Rules of the Supreme Court, 1875. The Master of the Rolls says: "Here if we differ from the Court below, final judgment has to be entered for the defendant, and there is an end to the action. I am of opinion that this is to be treated as a final order." If this be taken as the test of finality in all cases, it is difficult to reconcile it with the decision in *Kreh* v. *Burrell*(2) where it was held by the Appeal Court that an order made by the Master of Rolls on the issue whether the plaintiff was entitled to the right of way (the interference with which was the cause of his action), that the plaintiff was not so entitled, was an interlocutory order, as it is plain that if it had been found against the plaintiff, the suit must at once have been dismissed. In the case of *The East India Company* v. *Sayad Ali* (3), also referred to by applicant, it was assumed that the decree of May, 1820, which pronounced upon the rights of the parties, and directed accounts to be taken, and reserved further directions was an interlocutory decree, and the only question was whether such decree was appealable to the Privy Council under the Madras Charter. Again, in *Lakshman Dáda Náik* v. *Rámchandra Dáda Náik*(4) the decree of this Court, which was appealed against to the Privy Council without objection being taken, contained no reservation of further directions, but was simply a decree for partition of the family property. Upon the whole, we think that the decree in question cannot, in strictness, be regarded otherwise than as an interlocutory decree, and, therefore, not appealable without the permission of the Court.

Rule discharged.

(1) 9 Q. B. D., 621.
(2) L. R., 10 Ch. Div. at p. 424.
(3) 7 Moore's I. A., 555.
(4) I. L. R., 5 Bom., 48.