1909.

GANGABAI v. BASWANT.

Without admitting that the interpretation sought to be put upon those documents on behalf of the appellants is correct, but assuming for the purpose of argument that it is so, we think that the altered position cannot affect the representative of the mortgagor. At the date of the mortgage in 1850, the mortgagee knew that the property which was being made over to him in mortgage was land appurtenant to an hereditary office. He knew or ought to have known that by reason of the provisions of the regulation of 1827, that land was inalienable beyond the life of the incumbent. He therefore cannot allege that he has any title by estoppel under which any enlarged estate coming to the mortgagor subsequent to the mortgage would enure to the benefit of the mortgagee, for a title by estoppel rests upon representation made by the grantor and acted upon by the grantee; see *Mussamat Udey Kunwar* v. *Mussamat Ladu* (1), and section 43 of the Transfer of Property Act. We hold therefore that the mortgagee took merely such estate as the holder of the Vatan property was capable of conveying to a mortgagee in 1850, and that being so he cannot claim to hold under the mortgage after the death of the mortgagor.

We affirm the decree of the lower Court with this variation that the plaintiffs do bear the costs throughout.

Decree affirmed.

G. B. R.

(1) (1890) 6 Ben. L. R. 283 at p. 291.

APPELLATE CIVIL.

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

1909. *October 19.*

BAI DIVALI (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHAH VISHNAV MANORDAS AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 33, Order XX, Rules 6 and 7 —Administration suit—Finding on a substantial question of right between parties—Appointment of receivers—Finding—Decree—Appeal.

In an administration suit the first Court recorded a finding on a substantial question of right between the parties and appointed receivers. The plaintiff

* Second Appeal No. 431 of 1909.

did not apply to have a formal decree drawn up. The plaintiff however appealed against the finding on the ground that it amounted to a decree. The Judge rejected the appeal holding that there was no decree which could be the subject of an appeal.

On second appeal by the plaintiff,

Held, that the second appeal could not be entertained because there was in fact no formal decree from which an appeal could be preferred.

SECOND appeal from the decision of Dayaram Gidumal, District Judge of Ahmedabad, confirming the order of N. V. Desai, Subordinate Judge of Dhanduka, appointing receivers in an administration suit.

The plaintiff sued to have accounts taken of the estate of her deceased father Madhavji Damodar and then to have the said estate administered under the orders of the Court. The plaintiff alleged that her father made his last will on the 10th May 1899 and died on the 12th September 1902, that under the will the testator disposed of his moveable and immoveable properties in favour of the parties, that is, the plaintiff and defendants 1—5, that the will appointed defendants 1—4 executors, and they had taken possession of the properties, that the executors declined to give anything to the plaintiff or to show her the accounts of the estate and that they did not carry out the several directions contained in the will. Hence the suit.

Defendants 1—4 contended *inter alia* that the plaintiff was entitled only to a one-fourth share of the estate, that defendant 5, the widow of the testator, was wrongly joined, that excepting certain properties which were devoted to charities and also those to which the plaintiff was not entitled under the will, the rest of the moveable and immoveable properties were in the possession of the plaintiff and defendant 5, that defendant 1 never declined to show accounts to the plaintiff, and that the plaintiff should obtain probate.

Defendant 5, the widow of the testator, answered *inter alia* that defendants 1—4 had wrongly taken possession of the bonds and other documents to which she was entitled during her life-time under the will, that the will gave her Rs. 300 per annum for her maintenance which should be charged upon some

1909.

BAI DIVALI v. SHAH VISHNAV MANORDAS.

property yielding an income equal to that amount, and the said property be handed over to her, and that under the will Rs. 3,000 in cash were bequeathed to her, but defendants 1—4 deceitfully took Rs. 2,500 from her; therefore they should be ordered to restore that sum.

The Subordinate Judge framed 14 issues in all and out of them on issues 3 and 5 he found as follows :—

"3. The whole of Madhavji's moveable and immoveable property of any sort whatever has been disposed of by his will."

"5. It is necessary to appoint a Receiver or Receivers to take charge of the estate and to manage the same till this suit is finally disposed of."

He therefore nominated the Nazir of his Court and defendant 1, Vishnav Manor, as fit persons to be appointed receivers of the estate. The nomination was made under section 505 of the Civil Procedure Code (Act XIV of 1882) and was submitted to the District Court for the necessary sanction. The District Judge having confirmed the nomination, the Subordinate Judge passed the following order:—

I appoint the Nazir of this Court and Vishnav Manor (defendant 1) to be joint receivers of the estate of deceased Madhavji, Vishnav Manor to give a security of Rs. 5,000 duly to account for what he shall receive in respect of the property and to work without remuneration while the Nazir will work without security and shall be paid a reasonable remuneration to be fixed hereafter.

I authorise these receivers to take possession and manage the whole estate moveable and immoveable of deceased Madhavji except what his widow is entitled to keep with her during her life-time under clause (12) of the will, exhibit 28. I further grant to these receivers all the powers of an owner specified in clause (*d*) subject to the condition that they shall at no time keep in their possession without this Court's previous permission any sum exceeding Rs. 200, uninvested, and that they shall invest all the moneys that have to be invested in some safe security with the permission of this Court. They should keep regular accounts of their management and should submit them annually for scrutiny by this Court on 1st July. Each of them shall be responsible for any loss occasioned to this estate by their wilful default or gross negligence.

In case of any disagreement between them on any point they should refer the matter for orders to this Court. The security required from Vishnav to be given by him within a week. That being done this joint appointment will come into operation. If he fails to give the security as required within the

time named the Nazir alone to be a receiver upon the conditions and terms mentioned above.

On appeal by the plaintiff against the appointment of defendant 1 as receiver and against the finding on issue 3, the defendants raised a preliminary objection which the District Judge embodied in the following issue :—

"Does an appeal lie ?"

On the said issue the Judge found in the negative for the following reasons :—

Whether under the old Code (section 213 and schedule IV, form 130) or under new (order XX, rule 13) it is necessary in every administration suit to draw up a preliminary decree and against it there is an appeal. Under section 213 the Court was to "order such accounts and inquiries to be taken and made and give such other directions" as it thought fit. Under rule 13 of order XX the Court is bound to pass a preliminary decree "ordering such accounts and inquiries to be taken and made and giving such other directions as it thinks fit." Now in the present case no decree whatsoever has been drawn up and the judgment itself does not order such accounts and inquiries to be taken and made as are mentioned in schedule IV, form 130 of the old Code. In the old Code as well as in the new the word "formal" in the definition of decree is, I think, important. Mr. Ameer Alli at page 36 of his commentary quotes the opinion of Pigot, J., in 19 Calcutta 452 which shows that this term is not to be ignored, for that learned Judge said: "I must add that had the point been raised I should have felt a difficulty in holding that a paragraph in the judgment, not drawn up in the form of a decree and not embodied in a separate form, is within the terms of the Code of Civil Procedure a decree at all." In 29 Calcutta, 758—760 the Calcutta High Court advised mofussil Courts to draw up a formal preliminary decree and was apparently of opinion that a paragraph in a judgment was not a decree—that case was expressly followed in X Bom. L. R. 514 on the question which it decided, namely, that it is open to an appellant in an appeal against the final decree, in a partition suit to question the correctness of the preliminary order or decree for partition when no appeal has been preferred against such order within the time allowed by law. The reasoning of Heaton, J., shows that the word "formal" in he definition of decree is important, for he says : "It is alleged that there was a decree dated the 31st July 1906 and consequently there should have been an appeal. Now as a matter of fact there was no decree of that date, though there was a judgment. It is argued that there ought to have been a decree . . . . . The judgment dated the 31st July determined (by finding on a particular issue) that the plaintiff was entitled to a certain share of two houses. Had the decree followed this judgment it would have been that the plaintiff must get such share in the two houses."

1909.

BAI DIVALI v. SHAH VISHNAV MANORDAS.

Mr. Rao referred to I. L. R. 22 Bom. 963 but in that suit there was not only a finding that the estate consisted of certain properties but the amount of the liabilities and outstandings was determined and there was an order that the defendant was to pay a certain amount within two weeks. The High Court also said that the lower Court had drawn up a kind of preliminary decree. In the present case no such decree has been drawn up and had any been drawn up embodying merely the finding on issue 3 it would not have been the preliminary decree which the Code orders to be drawn up in administration suits.

Mr. Mulla at page 7 of his commentary on the new Code refers to order 20, rules 12, 13, 14, 15, 16 and 18 and order 34, rules 2, 3 and rules 4, 5 and 7, 8 as instances of preliminary decrees. The Code itself directs in these rules that certain preliminary decrees shall be framed and I take it, therefore, that in the suits mentioned in these rules no other preliminary decrees are permissible.

There are many conflicting rulings under the old Code as to the meaning of the word "decree." In several of them the term "formal" has been ignored and the word "rights" has been given an extended meaning. Messrs. Woodroffe and Ameer Alli write at page 38: "There can, we think, be little doubt that what the legislature originally meant by these words (the rights of the parties) to refer to were rights of a substantive as distinguished from rights of a merely processual character."

In the present case no doubt a right of a substantive character has, from one point of view, been determined. But the Code does not give a right of appeal against every finding regarding such a right. It has stated what the preliminary decree is to be and I find no such decree in this case. I hold therefore that no appeal lies against the finding on issue 3.

Having thus disposed of the preliminary point, the District Judge found that the Subordinate Judge had exercised a wise discretion in the appointment of receivers and thus confirmed the order.

The plaintiff preferred a second appeal.

G. S. Rao for the appellant (plaintiff):—The only question is whether the finding recorded by the Subordinate Judge on issue 3 amounts to a preliminary decree and therefore one from which an appeal lies. We instituted the suit for accounts and partition of our share in our deceased father's property which was disposed of by him under his will. The principal point in the case was about the construction of the will. The Subordinate Judge took evidence and recorded his judgment on the point and that judgment practically decided the case. The other questions in the case related merely to details. We appealed to the District

Court and our appeal was rejected on the ground that no appeal lay at that stage. We submit that the adjudication by the Subordinate Judge on issue 3 amounted to a preliminary decree within the meaning of the term "decree" as defined in section 2 of the Civil Procedure Code. It was an adjudication and, so far as the Subordinate Judge was concerned, it conclusively determined the question.

[HEATON, J.:—There is no decree and there is no final adjudication. The lower Court merely recorded a finding but a paragraph in the judgment is not a decree: section 53 of the new Code.]

We submit that that section applies to a final decree and not to a preliminary decree.

[HEATON, J.:—Where does the Code say that no final decree is required to be drawn up in the case of a preliminary decree.]

We submit even if it is necessary, it is a mistake of the Court and such a mistake should not be allowed to operate to our prejudice.

Branson with *T. R. Desai* for the respondents (defendants) was not called upon.

SCOTT, C. J.:—In this case the Subordinate Judge in an administration suit upon issue No. 3 decided in effect a substantial question of right between the parties, and having so decided he appointed receivers of all the property in question in the suit.

An appeal was preferred from his judgment to the District Judge and it was sought to challenge in appeal the finding upon the third issue on the ground that it was a decree. It was, however, objected that there was no decree and the learned District Judge held that there was no decree which could be the subject of an appeal. He therefore disposed of the appeal confining the objections of the appellant to the order for the appointment of receivers.

Against his decision with reference to the appointment of receivers, no second appeal would lie, but the appellant comes here in second appeal contending that there has been a decree with reference to the question raised in the third issue, and that

1909.

BAI DIVALI v. SHAH VISHNAV MANORDAS.

the learned District Judge was wrong in declining to hear the appeal with reference to it.

Now a "decree" under the Civil Procedure Code 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 it may be either preliminary or final.

It was apparently the opinion of the learned District Judge that if the decision upon the third issue had been embodied in a formal expression, such as is contemplated by the Code and called a decree, still no appeal would have been maintainable. Without saying that we agree with the Judge in his hypothetical opinion, we think the appeal to this Court cannot be entertained because there is in fact no formal decree. A reference to Order XX will show that a decree is something different from a judgment. The decree has to agree with the judgment and Rule 6 and Rule 7 prescribe what the decree shall contain. Section 33 also leads to the same conclusion, for it provides that the Court after the case has been heard shall pronounce judgment and on such judgment a decree shall follow; that judgment may be either preliminary or final.

The appellant has only herself to thank for this result. If, as the unsuccessful party, she had directed her agent to apply that a decree should be drawn up against which an appeal could have been preferred the result might have been different. But we cannot allow the provisions of the Civil Procedure Code to be disregarded by appellants who seek to take advantage of the rule which allows of appeals from decrees. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

G. P. R.