

1912.

YAMNAVA  
v.  
LAXMAN  
BHIMRAO.

BATCHELOR, J. :—As one of the Judges who took part in the decision in *Ramchandra v. Gopal*<sup>(1)</sup> I desire to add a word. Mr. Khare's argument before us has not been wanting either in subtlety or ingenuity, but having listened to all that he has said I am bound to say that I have heard nothing which could induce me to hold that the decision of Mr. Justice Chaubal and myself was not at least as reasonable and probable a view of the material passages in the Dattaka Mimansa, as is the view for which Mr. Khare has now contended. I do not suggest that the case is not susceptible of argument from Mr. Khare's point of view, but I do say, that in my opinion, the argument on the other side is at least as convincing. In these circumstances, and on the principle *stare decisis*, I am of opinion, that the appellant's argument on this point should be disallowed.

*Decree confirmed.*

R. R.

(1) (1908) 32 Bom. 619.

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.*

1912.  
February 20.

GOVIND RAMCHANDRA SHEMBEKAR AND ANOTHER (ORIGINAL PLAINTIFFS),  
APPELLANTS, v. VITHAL GOPAL SAHASRABUDHE AND OTHERS (ORIGINAL  
DEFENDANTS), RESPONDENTS.\*

*Civil Procedure Code (Act V of 1908), section 97—Preliminary decree—Appeal—  
Status of agriculturists—The question if not appealed from as preliminary decree  
cannot be agitated in appeal on merits—Party's duty to ask Court to draw up  
decree—Practice and procedure.*

The plaintiffs brought a suit to redeem a mortgage according to the provisions of the Dekkhan Agriculturists' Relief Act, 1879. A preliminary issue was raised whether the plaintiffs were agriculturists, and decided against the plaintiffs. The Court ordered the plaintiffs to pay the requisite Court-fee within a week's time, which not having been done, the suit was dismissed. In the appeal which the plaintiffs preferred against the final decree they sought to question the finding on the preliminary issue :—

*Held*, that the preliminary decree having become extinct by reason of the final decree, and the plaintiffs not having exercised their right of presenting an appeal

\* First Appeal No. 75 of 1911.

from that decree, it was not open to them in the present appeal to challenge the finding on the preliminary issue.

*Held*, further, that though the statutory obligation lay on the Court to draw up a preliminary decree to entitle the plaintiffs to appeal, yet it was equally the duty of the plaintiffs to ask the Court to draw up that decree in order to enable them to present an appeal against it.

APPEAL from the decision of P. S. Pathak, First Class Subordinate Judge at Ratnagiri.

Suit to redeem a mortgage.

The plaintiffs brought a suit to redeem a mortgage under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879), alleging that they were agriculturists. The defendants admitted the mortgage but contended *inter alia* that the plaintiffs were not agriculturists and disputed the amount found due on the mortgage.

In the Court below a preliminary issue was framed, whether the plaintiffs were agriculturists, within the meaning of the term as defined in the Dekkhan Agriculturists' Relief Act. The Court found this issue against the plaintiff and gave them one week's time to pay in the Court-fees. The Court-fee was not paid, and the suit was accordingly dismissed.

The plaintiffs appealed from the decree dismissing the suit. In the appeal they sought to attack the finding on the preliminary issue. Thereupon the respondent's pleader raised a preliminary objection that the plaintiffs, not having appealed from the preliminary decree, could not question its correctness in the appeal preferred against the final decree.

*S. S. Patkar*, for the appellants.

*N. M. Patvardhan*, for the respondents.

CHANDAVARKAR, J. :—The appeal is preferred from a decree of the Subordinate Judge dismissing the suit under the following circumstances. The suit was brought by the appellants to redeem the property in dispute according to the provisions of the Dekkhan Agriculturists' Relief Act. The preliminary issue was raised in the Subordinate Judge's Court, whether the plaintiffs were agriculturists. That issue was found by the Subordinate Judge against the plaintiffs and he directed the

1912.

GOVIND  
RAMCHANDRA  
v.  
VITHAL  
GOPAL.

1912.

GOVIND  
RAMCHANDRA  
v.  
VITHAL  
GOPAL.

plaintiffs to pay the requisite Court-fee within one week from the date of that finding. That order for the payment of Court-fee not having been complied with, the Subordinate Judge dismissed the suit under Order XVII, rule 3. It has been held by the different High Courts that an order under section 158 of the old Code of Civil Procedure, which is the same as Order XVII, rule 3, is tantamount to a decree on the merits from which an appeal lies. Therefore, the final order made by the Subordinate Judge dismissing the suit was a decree, and it is because it was a decree that this appeal is allowed by law.

In arguing the appeal the appellants' pleader challenges the correctness of the finding of the Subordinate Judge on the issue, whether the appellants are agriculturists. The objection is raised by the respondents' pleader, that the appellants should not be allowed to re-open that question decided against them and to contend that they are agriculturists entitled to take the benefit of the provisions of the Dekkhan Agriculturists' Relief Act. We think that the respondents' contention must be allowed.

The decree appealed from is not a preliminary decree, but it is a final decree. There was, no doubt, the finding on the preliminary issue whether the appellants are agriculturists or not, and the Court ought to have made a preliminary decree in terms of its finding on that issue. But no decree was drawn up. And though the statutory obligation lay on the Court to draw up a preliminary decree to entitle the appellants to appeal, yet it was equally the duty of the appellants to ask the Court to draw up that decree in order to enable them to present an appeal to this Court. That duty the appellants failed to discharge in their own interests, and it is a reasonable inference to draw from it that they waived the right which the Legislature had given to them of presenting an appeal against the preliminary decree.

Section 97 of the present Code of Civil Procedure requires that an appeal should be preferred from a preliminary decree, and that, if it is not preferred, the party aggrieved shall not be

allowed to challenge the finding on the preliminary question in appeal on the merits of the suit. The intention of the Legislature was clearly to prevent preliminary questions being raised in the form of an appeal after the case had been decided upon the merits.

Now, here the preliminary decree having become extinct by reason of the final decree, and the appellants not having exercised their right of presenting an appeal to this Court from that decree, in the present appeal it is not open to the appellants to challenge the finding on the question whether they are agriculturists or not. The appellants' pleader, however, asks this Court to give them time to ask the lower Court to frame a preliminary decree in order to enable them to appeal against it. The Subordinate Judge has remarked in his judgment that this is an old case, and that it ought not to be allowed to linger on for nothing. We think that the appellants have been guilty of laches, and no further indulgence ought to be granted to them.

For these reasons the decree appealed from must be confirmed with costs.

*Decree confirmed.*

R. R.

---

## APPELLATE CIVIL.

---

*Before Mr. Justice Chandavarkar and Mr. Justice Batchelor.*

GURBASAPPA BIN SANGAPPA KUNCHAGNUR (ORIGINAL DEFENDANT No. 3),  
APPELLANT, v. RANGO VENKATESH KHUSNIS AND ANOTHER (ORIGINAL  
PLAINTIFF), RESPONDENTS.\*

1912.

*February 20.*

*Forfeiture by Government of Deshgat Inam lands—Effect of forfeiture on prior mortgage—Payment of assessment to Government by mortgagee in possession—Suit to redeem by mortgagor—Mortgagee cannot deny mortgagor's title.*

The plaintiffs' ancestors mortgaged their Deshgat Inam lands to the defendant's ancestor with possession in 1855. The lands were in 1856 forfeited by Government; but the mortgage was continued in possession and paid assessment in respect of

\* Second Appeal No. 832 of 1910.