

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

KALURAM PIRCHAND MARWADI (ORIGINAL PLAINTIFF), APPELLANT, v.
 GANGARAM SAKHARAM SHET SHIMPI (ORIGINAL DEFENDANT),
 RESPONDENT.^o

1913.

November 12.

*Civil Procedure Code (Act V of 1908), section 97—Preliminary decree—
 Appeal—Findings on preliminary issues—No appeal lies from findings—
 Decree, drawing up of—Duty to draw up decree is of the Court—Civil
 Circulars (1912), clause 159.†*

In a suit for accounts, the first Court recorded findings on certain preliminary issues and ordered accounts to be taken on the basis of those findings. No preliminary decree was drawn up by the Court and none was asked for by the plaintiff's pleader. The accounts were next taken by a Commissioner and a decree was passed in accordance with his report, dismissing the suit. The plaintiff appealed against the final decree and urged objections against findings on preliminary issues.

Held, that the plaintiff was not barred of his right to urge objections against the findings on preliminary issues, for under the Civil Procedure Code (Act V of 1908), section 97, his right to appeal arose only when there was a decree based on those findings. That the practice in the mofussil Courts was in accordance with the provisions of the Civil Procedure Code and Civil Circulars, clause 159, viz., that the Court was to draw up the decree, and that the pleaders, if any, in the case were to see that it was in accordance with the judgment. There is no provision requiring a party or his pleader to move the Court to draw up a decree and mere omission to ask the Court to do that which it is the duty of the Court to do on its own motion cannot affect his right to appeal.

SECOND appeal from the decision of N. B. Mujumdar, First Class Subordinate Judge, A. P., at Dhulia, confirming the decree passed by R. B. Khangaonkar, Subordinate Judge at Amalner.

Suit for account.

^o Second Appeal No. 297 of 1913.

† The clause runs as follows :—

In cases in which pleaders are employed, it is their duty to see that decrees and final orders are properly drawn up in conformity with the terms of the judgment, and every facility should be given them for that purpose and for being heard on the subject in cases of doubt and difficulty

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The plaintiff sued the defendant for accounts and to recover the balance due. The defendant owned a ginning factory, and the plaintiff was a customer of his who had his cotton ginned at the factory. The defendant contended that if an account were taken between the parties, the plaintiff would be found indebted to him. Contentions were raised in the case about an oral agreement between the parties, custom of trade as to certain items and other incidental matters.

On the 30th June 1910, the Court of first instance decided the several contentions, and ordered an account to be taken on the basis of those findings. No preliminary decree was drawn up in terms of those findings; and no such decree was asked for by the parties. A Commissioner was appointed to take the accounts. The Court accepted the report made by the Commissioner and dismissed the suit on the 26th September 1910.

The plaintiff appealed from the final decree and contended that the findings recorded by the first Court on the 30th June 1910 were erroneous. The lower appellate Court held that it was not open to the plaintiff to question the validity of findings, as he did not appeal from the findings and his conduct in not asking the Court to draw up a decree in terms of those findings amounted to a waiver of his right to appeal. As the plaintiff had nothing to say against the Commissioner's report, the lower appellate Court dismissed his appeal.

The plaintiff appealed to the High Court.

M. V. Bhat, for the appellant:—The Code of Civil Procedure lays the duty of drawing up a decree on the Court. See section 33, and Order XX. The practice in the mofussil Courts is to the same effect. As the plaintiff had no duty in drawing up the decrees there could be no waiver on his part by absence of the decree. See *Sakharam Viswaram v. Sadashiv Balshet*⁽¹⁾.

⁽¹⁾ (1913) 37 Bom. 480.

As the other side has not appeared, the attention of the Court is drawn to the following cases which are against me. *Govind Ramchandra v. Vithal Gopal*⁽¹⁾; *Bai Divali v. Shah Vishnav Manordas*⁽²⁾ and *Sidhanath Dhonddev v. Ganesh Govind*⁽³⁾.

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The respondent did not appear.

SHAH, J.:—The plaintiff brought the present suit for an account and for recovery of the balance due by the defendant, who was the owner of a ginning and pressing factory and with whom the plaintiff had dealings as a customer. Several issues relating to the agreement between the parties, custom of the trade, interest and other details were raised by the trial Court. After recording findings on these issues the Court ordered accounts to be settled as per findings on the 30th June 1910. It was also ordered on the same day that the plaintiff ought to apply for commission within four days from that date or put in his own statement of accounts so that defendant may check it and ascertain its correctness. Ultimately a Commissioner was appointed to take accounts. He took accounts and found that a certain sum was due by the plaintiff to the defendant. The Court accepted the Commissioner's report and dismissed the plaintiff's suit with costs on the 26th September 1910.

The plaintiff appealed to the District Court against the final decree and urged objections to the findings recorded by the trial Court, in accordance with which the account was taken between the parties. The lower appellate Court refused to allow the appellant to urge his objections on the ground that the order dated 30th June 1910 amounted to a preliminary decree, and that the plaintiff having failed to take steps to appeal against the preliminary decree, he must be deemed to have

(1) (1912) 36 Bom. 536.

(2) (1909) 34 Bom. 182.

(3) (1912) 37 Bom. 60.

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waived his right to appeal against the preliminary decree based upon these findings. The lower appellate Court accordingly confirmed the decree of the trial Court.

The present second appeal is preferred by the plaintiff against the decree of the lower appellate Court, and it is urged that the view taken by that Court as to the plaintiff's right to object to the findings in his appeal against the final decree is not correct. The defendant, though served, has not appeared. The learned pleader for the appellant, however, has argued the case before us fairly.

After a careful consideration of the provisions of the Code of Civil Procedure and the decisions of this Court, I am of opinion that the appellant's contention ought to be allowed. In this case there was no preliminary decree drawn up in pursuance of the interlocutory judgment of the 30th June 1910. The plaintiff took no steps to have the preliminary decree drawn up. Under the Code, the right to appeal arises when there is a decree, *i. e.*, when there is a formal expression of the adjudication. There is no right to appeal from any preliminary judgment of the kind we have here. The obligation to appeal against a preliminary decree, by which a party is aggrieved, contemplated by section 97 of the Code, arises when the right to appeal accrues and not before that. So far the point presents no difficulty and in the absence of any preliminary decree, it is clear that the party appealing against the final decree would have a right to object to findings, which may have been recorded in the preliminary judgment.

It is said, however, that it is the duty of the party or his pleader to ask the Court to draw up a preliminary decree and that if he fails to do his duty the party must be deemed to have waived his right to appeal. The lower appellate Court has drawn that inference, but I

am unable to accept it. Under the Code it is the duty of the Court to draw up a decree. The Civil Circulars also proceed upon this view of the provisions of the Code. There is no express provision of law which requires the party concerned to move the Court to draw up a decree. The only provision relating to the pleader's duty in this respect is to be found in clause 159 of the Manual of Civil Circulars (1912). This clause provides that "in cases in which pleaders are employed it is their duty to see that the decrees and final orders are properly drawn up in conformity with the terms of the judgment and every facility shall be given them for that purpose and for being heard in cases of doubt and difficulty." So far as I know this provision has always been understood—and, in my opinion, rightly understood—requiring the pleaders employed in a case to see that the decree is in accordance with the judgment, when it is drawn up, and before it is signed, by the Court as required by the Code. It is not as if the decree is to be drawn up only *when applied for* as on the Original Side of this Court: see Rule 245 of the Rules and Forms of the Bombay High Court (1909). The practice in the mofussil Courts is in accordance with the provisions of the Code and the Civil Circulars, *viz.*, that the Court is to draw up the decree, and that the pleaders, if any, in the case are to see that it is in accordance with the judgment. Thus it will appear that there is no provision requiring the party or his pleader to move the Court to draw up a decree. Under these conditions I am unable to say that a party waives his right to appeal, when he or his pleader omits to ask the Court to draw up a preliminary decree. Mere omission on his part to ask the Court to do that, which it is the duty of the Court to do of its own motion, cannot affect the right of the party to appeal, which can arise only when the decree is drawn up by the Court.

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In this case there is no express waiver. And it can be implied when the person entitled to anything does or acquiesces in something else which is inconsistent with that to which he is entitled. The appellant in this case has done nothing, which can be said to be inconsistent with that to which he is entitled, nor has he acquiesced in any such thing. His right to appeal did not arise as no preliminary decree was drawn up. The omission on his part to move the Court to draw up the preliminary decree is not inconsistent with his right to appeal, when it arises.

The lower appellate Court has relied upon the case of *Govind Ramchandra v. Vithal Gopal*⁽¹⁾. Under similar circumstances a different view was taken of the duty of the party to apply to the Court to have a decree drawn up and of the inference of waiver to be drawn from the omission of the party to do that duty in the case of *Sakharam Vishram v. Sadashiv Balshet*⁽²⁾. I, therefore, feel myself free to decide this appeal in conformity with the conclusion which I have come to in this case. I have stated my reasons for holding that in the absence of any statutory provision requiring the party or his pleader to ask the Court to draw up a decree in pursuance of a judgment no inference adverse to the party as to his right to appeal ought to be drawn from an omission on his part to ask the Court to draw up the decree.

The result, therefore, is that the decree of the lower appellate Court is reversed, and the case remanded to that Court for disposal according to law. Costs of this appeal to abide the result.

HEATON, J. :—I am of the same opinion.

Decree reversed.

R. R.

⁽¹⁾ (1912) 36 Bom. 536.

⁽²⁾ (1913) 37 Bom. 480.