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it must be exercised with great caution, and in strict conformity with the provisions of the Civil Procedure Code. In this case the mandatory injunction directing the defendant to remove the partition does not appear to me to conform to the provisions of the rule in question. Having regard to the pleadings, as also to the reasons given by the lower Courts for granting a mandatory injunction, I feel satisfied that there has been a material irregularity in making such an order.

I, therefore, agree in the order proposed by my learned brother.

*Order set aside.*

R. R.

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### APPELLATE CIVIL.

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*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

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January 22.

NARAYAN BALKRISHNA KULKARNI (ORIGINAL DEFENDANT 2),  
APPELLANT, v. GOPAL JIV GHADI AND OTHERS (ORIGINAL PLAINTIFFS),  
RESPONDENTS.\*

*Civil Procedure Code (Act V of 1908), sections 2, 97, Order XXVI, Rules 11, 12 (2)—Dekkhan Agriculturists' Relief Act (XVII of 1879)—Redemption suit—Direction to a Commissioner to take account—The direction not a preliminary decree.*

In a redemption suit tried under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879), the first Court, on the 15th August 1910, referred the taking of the account to a Commissioner and on the 30th August 1910 passed a decree for the plaintiffs for possession free from incumbrances, the defendants having received profits for 25 years after the debt had been paid off

One of the defendants having appealed on the 10th October 1910, the appellate Court dismissed the appeal as time-barred on a preliminary objection taken by the plaintiff-respondents, namely, that the period of 30 days for the appeal ran from the date when the Court issued the commission to the Commissioner on the 15th August 1910 because the issue of commission constituted a preliminary decree within the definition of section 2 of the Civil Procedure Code (Act V of 1908).

\* Appeal No. 138 of 1912.

The defendant having appealed to the High Court,

*Held*, reversing the decree of the appellate Court and remanding the case for disposal on the merits, that there was nothing in the Civil Procedure Code (Act V of 1908) which prevented the appellate Court from entertaining the appeal inasmuch as there was not a preliminary decree within the meaning of section 97 of the Code, that in applying the definition of decree contained in section 2 of the Civil Procedure Code (Act V of 1908) the right of the parties in respect to matters in controversy should be taken to mean the general rights in relation to status, in relation to jurisdiction, in relation to limitation, in relation to frame of the suit and in relation to liability to account which, if decided, must have a general effect upon the proceedings in the suit and could be decided preliminary to the investigation of the matters in dispute between the parties upon the merits.

*Krishnaji v. Maruti*<sup>(1)</sup>, explained.

SECOND appeal from the decision of V. G. Kaduskar, Additional First Class Subordinate Judge of Ratnagiri with appellate powers, rejecting as time-barred an appeal against the decree of V. N. Navaratna, Subordinate Judge of Devgad.

Redemption suit.

The plaintiff sued in the year 1909 to have an account taken under the provisions of the Dekkhan Agriculturists' Relief Act of all the transactions from commencement in connection with two mortgages of the 20th and the 21st December 1865, to have the amount due determined and to have a decree for redemption passed.

The defendants answered *inter alia* that they had become full owners of some portions of the mortgaged property and the plaintiffs had no right to redeem the said portions and that they had no objection to the account being taken as prayed for by the plaintiffs.

At the trial the Subordinate Judge passed an order on the 15th August 1910 for the appointment of a Commissioner to make an account in the light of the instructions given by the Court, and the Commissioner submitted a report stating that "the debt was

<sup>(1)</sup> (1910) 12-Bom. L. R. 762.

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paid off out of the profits of the property by 1884-85". Neither party having offered any objections to the Commissioner's report, the Subordinate Judge found that the whole debt had been paid out of the profits of the mortgaged property and passed a decree on the 30th August 1910 directing the plaintiffs to recover possession of the property described in the plaint except survey No. 92, pôt No. 4, free from all incumbrances, the defendants having received profits for 25 years after the debt was paid-off.

Defendant 2 having appealed on the 10th October 1910 the appellate Court dismissed the appeal as time-barred for the following reasons :—

The respondents' pleader takes a preliminary objection that the appellant's appeal as regards the decision of 15th August 1910 is time-barred, the appeal being filed more than 30 days after that decision.

Mr. Parulekar urges that no formal decree being drawn up in accordance with that decision, that decision was not appealable and that his present appeal is in time, being filed within 30 days after the lower Court drew up its final decree. I feel myself unable to accept this contention. The decision of the lower Court on the 15th August was evidently the formal expression of an adjudication which, so far as regards that Court, conclusively determined the rights of the parties with regard to the manner in which accounts should be taken, and is therefore a preliminary decree within the meaning of section 2 of the Code and as such was appealable. That that adjudication was a preliminary decree is beyond doubt, and it is equally evident that that decree was appealable. The appellant cannot urge in support of his position the omission of the lower Court to draw up a formal decree in accordance with that decision. It is true that the appellant could not have appealed against the decision, in the absence of a formal decree as held by the Bombay High Court in the case reported in Bombay Law Reporter, XI Volume, page 1, for the simple reason that there is no appeal against a judgment merely, but that an appeal only lies against a decree, and the provisions of the Civil Procedure Code show that a decree is different from a judgment, though the decree follows the directions contained in the judgment. But although the appellant could not have appealed against the decision of the 15th August in the absence of a formal decree, he should have moved the lower Court to draw up that decree to enable him to appeal legally against that decision, and if he did not do that he alone is to blame if his present appeal is time-barred, as was said of the appellant in the case

reported in Bombay Law Reporter, XI Volume, page 1326, by His Lordship, the learned Chief Justice, of the Bombay High Court. By his omitting to follow the course mentioned above, the appellant could not extend the period provided by law for appealing against the decision of the 15th August. The present appeal has been preferred more than three months after that decision, and as the present appeal is directed solely against the decision of the 15th August, I must find that the appeal is time-barred.

Defendant 2 preferred an appeal.

*K. N. Koyaji* for the appellant (defendant 2):—The lower appeal Court erred in supposing that the instructions to the Commissioner on the various points therein discussed constituted a preliminary decree. No rights of the parties were conclusively determined by those instructions, even though definite opinion might have been pronounced by the Subordinate Judge on several points of dispute. After receipt of the report of the Commissioner which formed part of the evidence in the case, it would be open to the Judge to abandon or alter his former opinion on any particular point. The rulings relied on by the lower Court do not apply as in those rulings questions of jurisdiction or of status or of some rights of the parties had been finally determined.

*A. G. Desai* for the respondents (plaintiffs):—In the order of reference issued to the Commissioner the Court discussed and definitely decided the various points arising in the case and only required the Commissioner to make calculations in accordance with the definite findings and report the result of his calculations. The Commissioner and the parties were bound by those findings. The findings conclusively determined the rights of the parties “with regard to the manner in which accounts should be taken”: *Krishmaji v. Maruti*<sup>(1)</sup>. Under Order XXXIV, Rule 7 of the Civil Procedure Code, the Court has to pass a preliminary decree ordering accounts to be taken: *Sidhanath Dhonddev v. Ganesh Govind*<sup>(2)</sup>.

<sup>(1)</sup> (1910) 12 Bom. L. R. 762.

<sup>(2)</sup> (1912) 37 Bom. 60.

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SCOTT, C. J. :—The plaintiffs sued to have an account taken under the provisions of the Dekkhan Agriculturists' Relief Act of all transactions from the commencement in connection with two mortgages of the 20th December 1865 and the 21st December 1865, and to have the amount due determined, and to obtain a decree for redemption.

The learned Subordinate Judge on the 30th of August 1910 passed a decree for the plaintiffs for possession of the property, except one survey number, free from incumbrances, the defendants having received profits for 25 years after the debt had been paid off. Before passing that decree the learned Judge had investigated certain questions of fact in issue between the parties with reference to the amounts due in respect of different mortgages and different plots of land. Then instead of making up the final mortgage account himself he, as is permissible under the Civil Procedure Code, referred the taking of the account to a Commissioner. The Code provides, Order XXVI, Rule 11, that "In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment"; and Rule 12 (2) provides that "The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit". In the present case the work of the Commissioner appears merely to have been the ascertainment of the figures based upon the facts found by the Subordinate Judge, and the figures having been furnished by the Commissioner, and neither party objecting, the Court found the fact to be that the whole debt had been paid out of the profits of the mortgage-property, and passed the decree already referred to.

From that decree an appeal was preferred to the First Class Subordinate Judge, with appellate powers, and a preliminary objection was taken that the appeal was time-barred, inasmuch as time ran from the date when the Court issued the commission to the Commissioner to take the account, on the ground that that issue of a commission or the instructions which were recorded for the benefit of the Commissioner at the time of the issue of commission constituted a preliminary decree within the definition of section 2 of the Civil Procedure Code. This preliminary point found favour with the appellate Court and the appeal was accordingly dismissed, because the matters decided by the Subordinate Judge on the question in issue between the parties were decided in fact by the 15th of August when he issued his directions to the Commissioner.

The learned Judge of the appellate Court held the decision of the 15th of August to be the formal expression of an adjudication which, so far as regarded the Court of the Subordinate Judge, conclusively determined the rights of the parties *with regard to the manner in which accounts should be taken*, and was therefore a preliminary decree within the meaning of section 2 of the Code, and as such was appealable. The words "with regard to the manner in which accounts should be taken" appear to have been selected from a judgment of this Court in *Krishnaji v. Maruti*<sup>(1)</sup> but they were selected without due regard to the question which was before the Court in that case. The question was as to the status of the plaintiff, whether he was entitled to the special rights of the favoured class under the Dekkhan Agriculturists' Relief Act in the matter of demanding accounts from the mortgagee. It was a decision with regard to the general right of the plaintiff and the general liability of the defendant without

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reference to particular questions of fact which might be in issue between the parties in an investigation of the merits of their particular cases after it had been decided what law was applicable to them. In applying the definition of the Civil Procedure Code of 1908, section 2, it will be found that in the reported cases in this Court the right of the parties in regard to matters in controversy is taken to mean general rights such as rights in relation to status, in relation to jurisdiction, in relation to limitation, in relation to frame of the suit and in relation to liability to account, which if decided must have a general effect upon the proceedings in the suit and can be decided preliminary to the investigation of the matters in dispute between the parties upon the merits.

In the present case what was decided on the 15th of August at the time of the issue of the commission was not any general question of right, such as has been referred to, but merely a number of different points in dispute upon the merits of the case between the parties. The learned Judge passed no decree upon the merits. He was waiting for the Commissioner to send in his calculation which would form an item in the evidence to be taken into consideration before framing the decree.

We, therefore, think that the learned Judge of the appellate Court was in error in dismissing this appeal, for there was nothing in the Code which prevented him from entertaining it inasmuch as there was not a preliminary decree within the meaning of section 97. We, therefore, set aside the decree and remand the case to the lower appellate Court for disposal on the merits.

Costs costs in the appeal.

*Decree set aside and case remanded.*

G. B. R.

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