

1914.

MADHAVRAO
MORSHVAR
v.
RAMA
KALU.

claimed by the defendant. The plaintiff is entitled to Rs. 41-4-10 (Rs. 39-6-8, the amount of his claim, plus Rs. 1-14-2, the amount of costs incurred in the Revenue Court), with further interest upon Rs. 41-4-10. We do not think that he is entitled to his costs because this suit appears to us to have been unnecessarily filed having regard to the fact that he had already obtained decrees in assistance suits.

No order as to costs throughout.

Decree partially set aside.

G. B. R.

APPELLATE CIVIL.

FULL BENCH.

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

1914.

August 28.

THOMAS GEORGE GILBERT FRENCH, APPLICANT, v. JULIA FRENCH,
OPPONENT.*

Bombay Civil Courts Act (XIV of 1869), section 16—Indian Divorce Act (IV of 1869), sections 4, 6, 7, 8, and 15—Decree for dissolution of marriage—Assistant Judge—Jurisdiction.

Section 16 of the Bombay Civil Courts Act (XIV of 1869) does not authorize any reference to an Assistant Judge to decide a suit under the Indian Divorce Act (IV of 1869).

REFERENCE under section 17 of the Indian Divorce Act (XIV of 1869) made by S. N. Sathaye, Assistant Judge of Dharwar, for the confirmation of the decree *nisi* in miscellaneous application No. 15 of 1913.

This was a proceeding started by the applicant in the District Court of Dharwar for dissolution of marriage under the Indian Divorce Act. At the time of the

* Civil Reference No. 6 of 1914.

distribution of work in the District Court and the Assistant Judge's Court, the application was transferred for trial and disposal to the Court of the Assistant Judge without the knowledge of the District Judge, and that Court, on inquiry, passed a decree *nisi* which was referred to the High Court for confirmation.

There was no appearance for the parties.

The judgment of the Full Bench was delivered by

SCOTT, C. J. :—This is a decree passed by the Assistant Judge of Dharwar for dissolution of marriage under the Divorce Act. The Assistant Judge presumed that he had jurisdiction, believing that the suit had been referred to him for trial by the District Judge under section 16 of the Bombay Civil Courts Act. We have referred to the District Judge and we find that as a matter of fact the case was not referred by him to the Assistant Judge, but it seems to have been sent to the latter by the Clerk of the Court, as though it were a mere matter of administrative routine, and the question of referring it under section 16 was never brought before the District Judge at all.

We are of opinion, however, that even if it had been referred by the District Judge to the Assistant Judge, the latter would have had no power to deal with the case under section 16 of the Bombay Civil Courts Act; for though section 16 empowers the District Judge to refer to the Assistant Judge suits, where the subject-matter does not exceed a certain amount or value, and applications or references under special Acts, it does not, in our opinion, authorise him to refer suits for dissolution of marriage, for we think that such suits cannot be appropriately described as applications under a special Act. They are suits (see sections 4, 6, 7, 8 and 15 of the Divorce Act) but not suits the subject-matter of which is capable of valuation. Being of

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opinion that section 16 does not authorise any reference to an Assistant Judge to decide a suit under the Divorce Act, we must decline to confirm the decree.

Under section 115 of the Civil Procedure Code we set aside the decree which has been passed and remand the case to the District Judge for trial.

Decree set aside and case remanded.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

1914.
August 31.

DHONDO RAMCHANDRA KULKARNI (ORIGINAL PLAINTIFF), APPELLANT,
v. BHIKAJI WALAD GOPAL (ORIGINAL DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), section 11, Explanation IV, Order II, Rule 2—Dekkhān Agriculturists' Relief Act (XVII of 1879), sections 12 and 13—Prior and subsequent mortgages upon the same property by the same mortgagor to co-parcener mortgagees—Suit on subsequent mortgage without reference to the prior mortgage—Subsequent suit on the prior mortgage—Separate causes of action—Subsequent suit barred—Res judicata—Finding as a matter of fact that the two mortgages had been transactions "out of which the suit has arisen."

A mortgagee, who has two mortgages of different dates upon the same property, having sued upon a mortgage of the later date and having had the property sold without reference to the prior mortgage, cannot afterwards bring a suit on the prior mortgage though the causes of action for the two suits are distinct. This rule is not the result of Order II, Rule 2 of the Civil Procedure Code (Act V of 1908) but it depends upon the principle of *res judicata*.

Per Hayward J. :—If the two mortgages had been found as a matter of fact to have been transactions "out of which the suit has arisen," the subsequent suit on the prior mortgage would have further been barred in view of the previous suit on the subsequent mortgage by the provisions of Order II, Rule 2 of the Code and the special provisions of section 13 of the Dekkhān Agriculturists' Relief Act (XVII of 1879).

* Civil Reference No. 5 of 1914.