

1915.

The defendants preferred these appeals.

BHARMA
BIN
SHIDAPPA
v.*S. R. Bakhale* for the appellants.BHAMA-
GAVDA.*S. M. Kaikini* for the respondents.

SCOTT, C. J :—Applying the Full Bench ruling in *Chanmalswami v. Gangadharappa*⁽¹⁾, we hold that, a decision that a matter is not *res judicata*, and that, therefore, the trial can proceed is not a preliminary decree from which an appeal will lie at this stage. We dismiss both the appeals. Costs, costs in the cause.

Appeals dismissed.

J. G. R.

⁽¹⁾ (1914) 39 Bom. 339.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

1915.

February 2.

THE MUNICIPAL COMMITTEE OF NASIK CITY (ORIGINAL DEFENDANT), APPELLANT, v. THE COLLECTOR OF NASIK ON BEHALF OF THE COURT OF WARDS, THE ADMINISTRATOR OF THE ESTATE OF SARDAR GOPALRAO SHIVADEV-RAO RAJE BAHADUR (ORIGINAL PLAINTIFF), RESPONDENT⁽¹⁾.

AMIRUDDIN VALAD MAHOMED HUSSEIN AND OTHERS (ORIGINAL DEFENDANTS Nos. 2, 3 AND 4), APPELLANTS, v. MAHOMED SAYAD VALAD MAHOMED ALI ISANE (ORIGINAL PLAINTIFF No. 10), RESPONDENT⁽²⁾.

EKOBA GUNASHET VANI (ORIGINAL PLAINTIFF), APPELLANT, v. SARAF ALLI MAHMAD ALLI BOHARI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS⁽³⁾.

MAHAMAD HUSSEIN VALAD MAHAMAD ALLI ISANE (ORIGINAL PLAINTIFF No. 2), APPELLANT, v. MARYAMBIBI AYAL SAMSUDDIN VALAD BHAUDIN ZATAM (ORIGINAL DEFENDANTS Nos. 1, 2, 3 AND 4), RESPONDENTS⁽⁴⁾.

⁽¹⁾ First appeal No. 293 of 1912.⁽³⁾ First appeal No. 26 of 1914.⁽²⁾ First appeal No. 271 of 1913.⁽⁴⁾ First appeal No. 50 of 1914.

GULABCHAND RAUTMAL AND OTHERS (ORIGINAL DEFENDANTS),
 APPELLANTS, v. BALIRAM NARAYAN AND OTHERS (ORIGINAL PLAINTIFFS);
 RESPONDENTS⁽¹⁾.

*Civil Procedure Code (Act V of 1908), sections 2 and 97—Preliminary decree—
 Finding on a preliminary issue whether a party is an agriculturist—In what
 cases is the finding a preliminary decree—Dekkhan Agriculturists' Relief
 Act (XVII of 1879), section 13.*

The finding on a preliminary issue, whether a party is or is not an agriculturist, can be the basis of a preliminary decree, only when it necessarily involves a conclusive determination of the rights of the parties with regard to the matter in controversy. That is to say, it is a preliminary decree in those cases where it necessarily involves the result that the accounts should be taken under section 13 of the Dekkhan Agriculturists' Relief Act, 1879, despite the terms of the contract to the contrary. It is not a preliminary decree, when there are other questions yet to be determined before the parties could be held entitled to have accounts taken under section 13 of the Act.

(1) APPEAL from the decision of F. W. Allison, Assistant Judge at Nasik.

(2) Appeal from the decision of V. G. Kaduskar, First Class Subordinate Judge at Thana.

(3) Appeal from the decision of M. N. Choksi, Additional First Class Subordinate Judge at Dhulia.

(4) Appeal from the decision of V. G. Kaduskar, First Class Subordinate Judge at Thana.

(5) Appeal from the decision of M. N. Choksi, Additional First Class Subordinate Judge at Dhulia.

The facts in these appeals were as follows :—

In appeal No. 293 of 1912, the plaintiff sued to recover possession of a house which was mortgaged with possession to the defendants, on condition that the defendants were to enjoy the house in lieu of interest. The plaintiff asked that this latter condition in the mortgage-deed should be cancelled and accounts taken in the manner provided for in the Dekkhan Agriculturists' Relief Act, 1879.

⁽¹⁾ First appeal No. 67 of 1914.

1915.
 MUNICIPAL
 COMMITTEE
 OF NASIK
 CITY
 v.
 THE
 COLLECTOR
 OF NASIK.

1915.

MUNICIPAL
COMMITTEE
OF NASIK
CITY
v.
THE
COLLECTOR
OF NASIK.

The defendants contended *inter alia* that the plaintiff was not an agriculturist.

A preliminary issue was raised on the contention. The Court found that the plaintiff was an agriculturist and was entitled to the benefits conferred by the Dekkhan Agriculturists' Relief Act. The finding was embodied in a preliminary decree.

The defendants appealed from the preliminary decree.

Appeals Nos. 271 of 1913 and 50 of 1914 arose out of one suit. The suit was instituted to redeem and recover possession of mortgaged property after taking an account under the Dekkhan Agriculturists' Relief Act. On defendants' contention, the Court raised a preliminary issue: "Are plaintiffs or any of them agriculturists?" The finding recorded was that plaintiff No. 10 was but that plaintiff No. 2 was not an agriculturist. From the decree framed in terms of the finding, the two appeals were preferred.

In appeal No. 26 of 1914, the suit was brought to redeem and recover possession of the mortgaged property on payment of instalments of the balance found due on taking accounts under the Dekkhan Agriculturists' Relief Act. The defendants having disputed plaintiff's status, a preliminary issue was raised; "Whether the plaintiff was proved to be an agriculturist?" The issue was found in the negative. The finding was embodied in a preliminary decree. The plaintiff appealed from the decree.

In appeal No. 67 of 1913, the suit was brought on a promissory note to recover its amount with interest from the defendants. The defendants contended that they were agriculturists, that accounts between the parties should be taken in the manner provided for by the Dekkhan Agriculturists' Relief Act, and that the

sum found due should be made payable in annual instalments of Rs. 1,000 each.

The Court raised a preliminary issue: "Are the defendants or any of them proved to be agriculturists within the meaning of the Dekkhan Agriculturists' Relief Act?" This issue was found in the negative and a decree was framed accordingly.

The defendants appealed from the decree.

Appeal No. 293 of 1912.

D. R. Patvardhan, for the appellant.

S. S. Patkar, Government Pleader, for the respondent.

Appeal No. 271 of 1913.

S. S. Patkar, for the appellants.

V. B. Virkar, for the respondent.

Appeal No. 26 of 1914.

M. V. Bhat, for the appellant.

D. G. Dalvi, for respondent No. 1.

Appeal No. 50 of 1914.

V. B. Virkar, for the appellant.

S. S. Patkar, for the respondents Nos. 2 to 6.

Appeal No. 67 of 1914.

G. S. Rao, for the appellants.

P. B. Shingne, for the respondents.

HEATON, J.—We are dealing with five appeals.—F. A. 50 of 1914, F. A. 271 of 1913, F. A. 67 of 1914, F. A. 26 of 1914 and F. A. 293 of 1912. They all raise the same point and we have now to decide whether a finding on the issue "Is the plaintiff an agriculturist" can legally form the basis of a preliminary decree and, therefore, be the subject of an appeal. The subject of preliminary decrees in general is discussed in the referring judg-

1915.

MUNICIPAL
COMMITTEE
OF NASIK
CITY
v.
THE
COLLECTOR
OF NASIK.

1915.1

MUNICIPAL
COMMITTEE
OF NASIK
CITY
v.
THE
COLLECTOR
OF NASIK.

ments in the case of *Chanmalswami v. Gangadharappa*⁽¹⁾ and we have the decision of the Full Bench in that case.

There is no doubt now that the words "the rights of the parties with regard to all or any of the matters in controversy in the suit" which occur in the definition of "decree" have not their widest possible meaning: they have a meaning restricted in some way or another. No one for example asserts that they include the right to ask a particular witness a particular question; or the right to put in evidence a particular document; and it is now decided by a Full Bench of this Court that they do not include the right to proceed with a suit in a particular Court or after a particular time.

How then are we to find out how the meaning of the words is restricted? To me it seems that the correct course is to ascertain their meaning from the provisions of the Code in which they occur. The words "decree" and "order" are so defined as to include all the orders a Court makes. We have some clue to what an order is in the enumeration of appealable orders given in Order XLIII of the Code. They certainly seem to include generally an order by the Court that it will or will not hear a suit on the merits and this general intention is not seriously disturbed by the provision that an order rejecting a plaint is a decree or by the fact that the dismissal of a suit on a preliminary point is a decree. Generally speaking, therefore, I infer that an order that a Court will proceed to hear a suit on the merits is not an order which should be immediately followed by a decree. And the decision of the Full Bench, so far as it goes, supports this conclusion.

A decision that a party is or is not an agriculturist is something more than a decision to go on with a suit,

(1) (1914) 39 Bom. 339.

for it determines also the law that the Court will apply ; whether the Dekkhan Agriculturists' Relief Act or the ordinary law. That does not seem to make any difference in principle, for the principle, so far as I can understand it, is that the progress of a suit is not to be interrupted by an appeal until there has been a decision either partial or entire, on the merits.

This is, I think, plainly to be inferred from the provisions of the Code relating to the trial of suits. These provisions are discussed by Hayward J. in his referring judgment in the Full Bench case. It is unnecessary here to repeat the discussion. I will only summarise it by saying that the Code intends the Court to hear and decide that which the parties come to Court to have decided, then to pronounce judgment and then to make a decree. As is pointed out by Beaman J. in his referring judgment, the parties come to Court to get decided some claim to property or to money or to an easement or the like. They do not come to Court for the purpose of having it decided whether one or another of them is an agriculturist. That is an incidental or accidental matter not intimately related to the claim itself, but related to the procedure the Court must follow and the law it must apply.

This conclusion that the Court before pronouncing judgment and making a decree must determine the real claim in whole or part is very strongly supported by the provisions of Rule 3 of Order XV of the Code. This rule covers the case of preliminary issues and provides that the findings on some only of the issues conclude the suit if those findings are enough for the decision of the suit : if not the suit must proceed. To my mind, having regard to the provisions of Order XX relating to judgment and decree, this means that if the suit is to proceed there shall not be a true judgment and consequently not a decree at that stage. There may be a

1915.

MUNICIPAL
COMMITTEE
OF NASIK
CITYv.
THE
COLLECTOR
OF NASIK.

1915:
 MUNICIPAL
 COMMITTEE
 OF NASIK
 CITY,
 v.
 THE
 COLLECTOR
 OF NASIK.

pronouncement of the Court's finding so far as it goes, but this is not a judgment of the kind which must be followed by a decree.

On purely general grounds I arrive at the same conclusion. If a finding on a preliminary issue can properly be the basis of a decree, then each preliminary issue could lawfully be tried separately and each such trial could be followed by an appeal. There might thus be two or three or more preliminary trials and appeals before the trial of the real claim was reached. I do not believe the legislature intended to enact so vicious a law. How vicious, is plainly indicated by the observations of the Privy Council quoted in the referring judgment of Hayward J.

Again we have the assistance of the Code in discovering what, within its intention, are preliminary decrees. There is an enumeration of such decrees in Orders XX and XXXIV. Not necessarily a complete, but a very suggestive enumeration; suggestive as showing that a preliminary decree is not to be drawn up until the real claim has been investigated and in part decided.

My conclusion, therefore, is that in the cases before us except First Appeal No. 293 of 1912 the finding that a party is or is not an agriculturist is not a judgment such as is intended by Order XX of the Code and is not a proper basis for a decree: and that a decree drawn up on the basis of such a finding alone and specifying such a conclusion alone, is not a legal decree at all and cannot be the subject of an appeal.

It follows from this that in First Appeals Nos. 26 of 1914, 50 of 1914, 67 of 1914 and 271 of 1913 we find that no appeal lies and the order of the Court will be that these cases be remanded to be tried according to law; costs to be costs in the suit.

In Appeal No. 271, as no appeal lies, there cannot be any hearing of the cross-objections. The costs of these like the costs in the appeal will be costs in the suit.

The question which arises in Appeal No. 293 of 1912 is different. It has been determined in that suit that the plaintiff is an agriculturist. Though it seems to me that the decree which has been drawn up is not in proper form a preliminary decree, yet in substance it may be taken to be a preliminary decree directing that an account be taken between the parties in the manner provided by section 13 of the Dekkhan Agriculturists' Relief Act. If that were in fact the form of the decree there could not, I think, be any real doubt that it was a true preliminary decree and that an appeal would lie. The only doubt that occurred to my mind is this, that, owing to the understanding of the Judge of the law as it then stood, he never applied his mind (of course this was no fault of his) to the question whether he should or should not at that stage draw up a preliminary decree. But seeing that this appeal is now before us, and that, a true preliminary decree could have been drawn up, it seems to me far better in the interests of justice to assume that the decree is defective only in form and not in substance, to hold that an appeal does lie, and to determine the appeal on the merits. To do otherwise would lead to a remand and this matter which is before us and which the parties are ready to argue would be delayed for an indefinite time. I wish particularly however to add this: Judges will now come to understand the view of the law which we have here set out, which is that in order that the preliminary decrees in these cases may be in proper form they must be in the form of decree, for taking an account as provided by Rule 16 of Order XX of the Code of Civil Procedure. But whether the Judge will make such a preliminary decree immediately on finding that a party is an agriculturist

1915.

MUNICIPAL
COMMITTEE
OF NASIK
CITY
v.
THE
COLLECTOR
OF NASIK.

1915

MUNICIPAL
COMMITTEE
OF NASIK
CITY
v.
THE
COLLECTOR
OF NASIK.

is a matter which lies within the Judge's discretion. Rule 16 no doubt requires that a preliminary decree is to be made where an account has to be taken ; but as will appear from Rule 17 the Court may, if it is so minded, determine various matters which go to help the taking of the account before it makes this preliminary decree. The Court may, for example, (taking the case before us) determine the amount of the principal ; the amount that is to be taken as the annual profits or rent of the house ; and the rate of interest that it will allow as provided by section 71 (a) of the Dekkhan Agriculturists' Relief Act. It is open to the Court, if it is so minded, to determine such matters before making a preliminary decree under Rule 16 of Order XX. That is all that I wish to say in this matter. Appeal No. 293 of 1912 will be set down for hearing on its merits.

SHAH, J. :—The question that arises in these appeals is whether the decision that a party is or is not an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, when formally expressed, is a preliminary decree within the meaning of section 2 of the Code of Civil Procedure. Apparently prior to the decision of the Full Bench in *Chanmalswami v. Gangadharappa*⁽¹⁾, it was accepted that such a finding, when formally expressed, would be a preliminary decree ; it seems to me that after the Full Bench ruling, the view requires to be reconsidered.

According to the definition a formal expression of an adjudication, which conclusively determines the rights of the parties with regard to all or any of the matters in controversy, is a decree, which may be preliminary or final. Reading the definition in the light of the other provisions of the Code as to preliminary decrees, and taking the scheme of the Code with regard to the

⁽¹⁾ (1914) 39 Bom. 339.

disposal of the suits, it seems to me that the word "matter" in the definition means the actual subject-matter of the suit with reference to which some relief is sought, and the word "right" means substantive rights of the parties, which directly affect the relief to be granted or which, in the words of the definition, relate to all or any of the matters in controversy. The explanation to the definition shows that a partial or complete disposal of the suit is involved in a decree. This interpretation of the definition derives support from the ruling in *Chanmalswami's case*⁽¹⁾.

An adjudication which satisfies these conditions would form the basis of a decree, and may be preliminary or final according as it partially or completely disposes of the suit. It is not essential that an adjudication should be covered by any one of the specific cases of preliminary decrees mentioned in Order XX of the Code, in order that it may form the basis of a preliminary decree. Those cases are illustrations of preliminary decrees and help us in determining the true meaning of the definition of the term "decree".

Having regard to the view I take of the definition, it seems to me that in all these cases it must be determined with reference to the pleadings whether the finding that a person is or is not an agriculturist can form the basis of a preliminary decree. No such finding by itself, in my opinion, can be the basis of a preliminary decree, unless it necessarily involves a conclusive determination of the rights of the parties with regard to the matter in controversy. To illustrate my meaning, I would take two cases, one in which the plaintiff sues for redemption of a mortgage contrary to the terms of the mortgage alleging that he is an agriculturist, and claims the benefit of the provisions of the Dekkhan Agriculturists' Relief Act, and the other in which the plaintiff sues for

1915.

MUNICIPAL
COMMITTEE
OF NASIK
CITY
v.
THE
COLLECTOR
OF NASIK

(1) (1914) 39 Bom. 339.

1915.

MUNICIPAL
COMMITTEE
OF NASIK
CITY
v.
THE
COLLECTOR
OF NASIK.

the redemption of a mortgage, which is in form a sale, and which he seeks to prove to be a mortgage in virtue of the provisions of section 10A of the Dekkhan Agriculturists' Relief Act. If it be found that he is an agriculturist, in the former case he will be entitled to have the accounts taken under section 13 of the Dekkhan Agriculturists' Relief Act in supersession of the original contract between the parties: in the other case the finding by itself will not entitle him to such accounts, as he will have further to establish that the transaction is a mortgage and not a sale. According to my view, the finding in the former case may form substantially the basis of a preliminary decree while in the latter it cannot. The ruling in *Krishnaji v. Maruti*⁽¹⁾, as I read it, seems to be quite consistent with this view.

It is common ground in F. A. 271 of 1913 and 50 of 1914 that before the plaintiffs could be held entitled to have accounts taken under section 13 of the Dekkhan Agriculturists' Relief Act there are other questions to be determined. It is clear, therefore, that there is no proper preliminary decree to appeal from. In Appeal No. 26 the finding that the plaintiff is not an agriculturist is either sufficient to dispose of the suit completely or insufficient to dispose of anything. The pleadings are not fully stated to us. But it is clear that in any case there is no proper *preliminary* decree to appeal from. In Appeal No. 67 of 1914 the finding that the defendants are not agriculturists does not dispose of any matter in suit, and affords no basis for a proper preliminary decree.

In Appeal No. 293 of 1914, it seems to me that there is a preliminary decree, which could be appealed from. Having regard to the pleadings it is clear that the finding necessarily involves the result that the accounts should be taken under section 13 of the Dekkhan Agri-

⁽¹⁾ (1910) 12 Bom. L. R. 762.

culturists' Relief Act; despite the terms of the contract to the contrary, and that the original contract to that extent is superseded. It may be that in order to take the accounts the rate of interest and the amount of the principal will have to be determined hereafter. But that would not, in my opinion, affect the question whether the adjudication, when it is formally expressed, is a preliminary decree. In this case I hold that substantially there is a preliminary decree, from which an appeal would lie. It is, however, necessary to point out that in such a case the decree should be in form a proper preliminary decree. As I have already stated, it is not the formal expression of a finding that a person is an agriculturist but of its necessary consequence that accounts should be taken under the Dekkhan Agriculturists' Relief Act in supersession of the contract between the parties that forms a preliminary decree. In a properly framed decree this result should appear clearly on the face of it, and should not be left to be inferred by the appellate Court as in this case. It is, I think, open to the Court to draw up a proper decree directing accounts to be taken under the Dekkhan Agriculturists' Relief Act either before or after deciding all matters which are necessary for the actual taking of the accounts.

I concur, therefore, in the orders proposed by my learned brother in all the appeals.

Orders accordingly.

R. R.

1915.
MUNICIPAL
COMMITTEE
OF NASIK
CITY
v.
THE
COLLECTOR
OF NASIK.