APPEAL FROM ORIGINAL CIVIL

1955
Nov. 25

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Dixit.

R. N. JHUNJHUNWALA & CO., LTD., APPELLANTS (ORIGINAL DEFENDANTS) *v.* N. JIWANLAL & CO., LTD., RESPONDENTS (ORIGINAL PLAINTIFFS).*

Civil Procedure Code (V of 1908), ss. 2 (2) & 97: O. XXI, r. 16—Finding on issue embodied in preliminary decree—Appeal against final decree—Point raised in appeal regarding validity of such finding—Whether appeal regarding such finding barred?

A decretal order of reference to the Commissioner for ascertaining damages as on breach of a contract, is a preliminary decree within the meaning of s. 2 (2) of the Code of Civil Procedure, 1908, with the result that where the finding on the issue regarding the date of the breach is embodied in that decree it becomes appealable. If no appeal is preferred from such decree, the appellants are precluded from disputing its correctness in an appeal from a final decree by reason of the provisions of s. 97 of the Code.

Dattatraya Purushottam Parnekar v. *Radhabai Balkrishna Hingne,*[1] relied on.

Facts material to this report are set out in the Judgment.

Sir Jamshedji B. Kanga, with *K. S. Shavaksha,* for the Appellants.

K. T. Desai, with *N. P. Nathwani,* for the Respondents.

Chagla C. J.—This is an appeal from a judgment of Mr. Justice Desai and it came to be passed under the following circumstances. The suit out of which this appeal arises was filed for damages for breach of a contract. Mr. Justice Tendolkar heard the suit, held that there was a breach, and also determined the date of the breach, and then referred the suit to the Commissioner to ascertain the damages on that basis. The Commissioner heard the reference, ascertained the damages, and exceptions were filed to the Commissioner's report, and Mr. Justice Desai after disposing of the exceptions passed a decree on November 1, 1954, for damages. The present appeal has been preferred on December 8, 1954, and one of the points raised in this appeal is that Mr. Justice Tendolkar was in error in determining the date of the breach as June 14, 1951.

Mr. K. T. Desai raises a preliminary objection that it is not open to the appellants to raise that contention inasmuch as that contention was disposed of by Mr. Justice Tendolkar by his judgment, that an appeal against that judgment is time barred, and it is not open to the appellants to raise that contention in the appeal against the judgment of Mr. Justice Desai. The short question that we have to decide on this

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*Appeal No. 136 of 1954 : Suit No. 824 of 1951.

1. [1921] 45 Bom. 627.

appeal is whether the judgment of Mr. Justice Tendolkar of February 18, 1952, constitutes a preliminary decree within the meaning of the Civil Procedure Code. Under s. 97 :

> "Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."

The appellants were undoubtedly aggrieved by the finding of Mr. Justice Tendolkar that they had committed a breach of the contract. They were also aggrieved by the fact that the learned Judge had fixed a particular date as the date of the breach. Therefore, if these two decisions of Mr. Justice Tendolkar are embodied in a preliminary decree, then by reason of s. 97 the appellants should have appealed against the preliminary decree passed by Mr. Justice Tendolkar and if they did not choose to do so they are bound by that judgment and they cannot dispute it now, when they are appealing against the final decree. "Decree" is defined in the Code by s. 2 (*2*) :

> "Decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters incontroversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within s. 47 or s. 114, but shall not include—
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> (*a*) any adjudication from which an appeal lies as an appeal from an order, or
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> (*b*) any order of dismissal for default."

Then there is an explanation to this section :

> "A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

Sir Jamshedji concedes that the decision of Mr. Justice Tendolkar that there was a breach constitutes a preliminary decree and it is not open to the appellants to challenge that finding, they not having done so within time and having only appealed against the final decree passed by Mr. Justice Desai. Order XX, r. 16, makes it obligatory upon the Court to pass preliminary decrees in cases referred to in that rule, and it may be conceded that this particular suit does not fall within the ambit of that rule. But there is nothing to prevent a Court from passing preliminary decrees in other suits. Under O. XX, r. 16, the Court must pass a preliminary decree. In other cases it is optional for the Court whether to pass a preliminary decree or not. In this very case it was open to Mr. Justice Tendolkar not to refer the suit to the Commissioner, to take evidence himself with regard to damages, and pass a decree after he had ascertained the damages. But what he did was, he gave his decision with regard to the breach and the date of

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the breach, and directed the Commissioner to ascertain the damages which was further proceedings to be taken within the meaning of the expression "preliminary decree" before the suit could be completely disposed of. Sir Jamshedji's contention is that the finding of the learned as to the date of the breach is merely a finding on an issue, that it is a step taken by the Court for the purpose ultimately of deciding what the quantum of damages is, and till the quantum of damages is determined the finding as to the date of the breach cannot possibly constitute a preliminary decree. There is no doubt that Sir Jamshedji is right that when a Court merely gives a finding on an issue, the finding ordinarily does not become appealable and a party aggrieved by that finding cannot appeal from that finding. But it is equally clear that if a finding is embodied in a decree, then the decree becomes appealable. Section 96 of the Code makes every decree appealable. It is true that on the Original Side we are governed by cl. 15 of the Letters Patent and it is that clause that we have got to consider in order to decide whether any decision constitutes judgment which would make a decision appealable. But there cannot be the slightest doubt that even under cl. 15 every decree is appealable. Clause 15 makes many decisions which would not be appealable under the Code appealable under that clause. And if the decision of the Judge constitutes a judgment, obviously and without the slightest doubt that decision would become appealable. If Mr. Justice Tendolkar had merely given his finding on an issue with regard to the date of the breach, then it would have been open to Sir Jamshedji to contend that it was not an appealable finding. But the position here is that this finding has been embodied in a decree. What Mr. Justice Tendolkar has done is to pass a decretal order of reference. If the decision of Mr. Justice Tendolkar has been embodied in a decree, then under the Code a decree can only be either final or preliminary. It cannot be suggested that the decree passed by Mr. Justice Tendolkar is final. Therefore, the inevitable conclusion is that the decree passed by Mr. Justice Tendolkar was a preliminary decree. It is difficult to understand Sir Jamshedji's contention that part of the decree to the extent that it relates to the breach is appealable, but part of the decree to the extent that it relates to the date of the breach is not appealable and could only have been appealed against when the final decree was passed by Mr. Justice Desai. If a Court passes a decree, whatever is embodied in that decree is appealable. He may appeal against a part of it and not against the whole of it, but the whole of it and every provision in it is appealable. Therefore, if the appellants did not choose to appeal against the finding of Mr. Justice Tendolkar that the date of the breach was June 14, 1951, the result was that they did not appeal from a part of the preliminary

decree which was appealable. If that be the true position, then s. 97 comes into play and the result of the appellants not appealing against a part of Mr. Justice Tendolkar's decree is that they are bound by that decision and they cannot question the decision in the final decree passed by Mr. Justice Desai.

A reference was made to the practice in this Court, but our attention has not been drawn to any judgment relating to this point. It may be that in some cases appeal was only preferred against the final decree and no objection was taken under s. 97. But the failure to take objection does not necessarily constitute either a practice to that effect or an implied decision by the Court that that practice was in conformity with the Code. But our attention has been drawn by Mr. Desai to a judgment of Sir Norman Macleod, C. J. and Mr. Justice Fawcett in *Dattatraya* v. *Radhabai.*[2] At p. 633 the learned Chief Justice says; referring to suits under O. XX, r. 16:—

"The suits referred to above are the most common in which preliminary decrees can be passed. I may also mention suits for damages in which the plaintiff establishes his right to receive damages but an inquiry is necessary as to the amount before a final decree can be passed. The principle remains the same. The judgment should ordinarily come at the end of the case. But there are cases where although the Court can decide all questions relating to the rights and liabilities of the parties, the details of the decree have to be ascertained by a further inquiry, or time is allowed to a defendant before the decision becomes final."

In this case the plaintiff has established his right to receive damages and all that is necessary is an inquiry as to the amount before the final decree can be passsed. Sir Jamshedji says that the plaintiff has established his right to receive damages by proving the breach but his right has nothing to do with the date of the breach. That is obviously untenable. The right that the plaintiff obtained by the judgment of Mr. Justice Tendolkar was not only the right to receive damages but the right to receive damages assessed on the basis that the date of the breach was a particular date. In our opinion, although these observations might not have been necessary for the decision of the matter before Sir Norman Macleod, with respect, we are in agreement with these observations and in our opinion these observations do apply to the question before us.

Sir Jamshedji has then asked us to condone delay under s. 5 of the Limitation Act. It is difficult to understand how the facts here would constitute sufficient cause, which alone would entitle us to condone delay. It is not a case where under a mistake of law a party is prosecuting the litigation in a wrong tribunal. This is clearly a case of ignorance of law and ignorance of law can never constitute sufficient cause. A party cannot say that because of ignorance of law he failed to assert his right in time. If he failed to assert his right in

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time, then his remedy must be held to be barred and ignorance cannot constitute sufficient cause to entitle the Court to condone delay.

In our opinon, therefore, to the extent that this appeal raises the question of the date of the breach, it is not maintainable by reason of the provisions of s. 97 of the Civil Procedure Code.

Attorneys for Appellants: *Mulla & Mulla* and *Cragie Blunt & Caroe.*

Attorneys for Respondents: *Bhaishankar Kanga & Girdharilal.*

Order accordingly.

P. M. P.

2. (1921) 45 Bom. 627.

APPEAL FROM ORIGINAL CIVIL AND INHERENT JURISDICTION

1955
Nov. 28

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Dixit.

K. B. SIPAHIMALANI, ASSISTANT CUSTODIAN OF EVACUEE PROPERTY, BOMBAY AND ANOTHER, APPELLANTS (ORIGINAL RESPONDENTS) *v.* FIDAHUSSEIN VALLIBHOY, RESPONDENT (ORIGINAL PETITIONER).*

Administration of Evacuee Property Act, (XXXI of 1950), ss. 27 & 28 : 18 (1)—Order of Custodian Confirming order of assistant Custodian an appeal—Application for revision against Custodian's order to Custodian General—Petition for Writ of Certiorari *against Custodian's order pending revisional application—Eventual dismissal by Custodian General of such revisional application—Whether High Court had jurisdiction to entertain writ—Contention that 'final order' was the order of Custodian General—Distinction between Appellate and revisional jurisdiction—Effect of dismissal of revisional application explained—Whether statutory tenancy is occupancy right under s. 18* (1) ?

An appeal is a continuation of a suit with the result that where the Appellate Court dismisses the appeal, it only confirms the order of the Lower Court and the order of the Lower Court becomes merged in the decision of the Court of Appeal. On the other hand, an application for revision is an independent proceeding; when the Revisional Court dismisses such application, the effect in law is that it refuses to exercise its revisional jurisdiction with the result that the final order is the order of the Lower Court itself.

*Appeal No. 13 of 1955 : Miscellaneous Application No. 141 of 1953.