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Sept. 22

Civil Petition.

Bagubai, widow of Visaji Dinkar Desai... *Petitioner.*
Kazi Sayad Nizmuddin and Kazi Sayad
Amruddin... ..... *Opponents.*

Special Appeal—Appeal from orders of District Court relating to execution—Civ. Proc. Code, Sec. 372.

Held, that a Special Appeal lies from an order of a District Judge passed in appeal in a matter relating to the execution of a decree,

This was a miscellaneous civil application made to the High Court for the exercise of its extraordinary jurisdiction, under cl. 2 of Sec. 5 of Reg. II. of 1827, under the following circumstances:—

The petitioner, Bagubai, obtained a decree, No. 99 of 1865, in the Court of the Munsif of Puna against Kazi Sayad Nizmuddin and Kazi Sayad Amruddin, upon a mortgage bond, in accordance with which she attached in execution the mortgaged property, a fourth share in the proceeds of the village of Erandvan. The defendants in the attachment proceedings applied to the Munsif's Court to raise the attachment, on the ground that the village attached was held in *inam* for a *devasthan*, for the support of the shrine of a Pir, Sayad Sada, of which defendants were managers only.

The Munsif ordered the attachment to be raised. Bagubai thereupon appealed to the District Judge, who dismissed the appeal, on the ground that no appeal lay from a matter disposed of under Sec. 246.

The application came on for hearing before a Division Court (GIBBS and MELVILL, JJ.) on the 2nd of July 1869, which referred the matter to the Full Court on the preliminary point whether the petition could be admitted as a

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special appeal from the Judge's order in appeal. The Full Court made an order on the 21st of July directing that the appeal should be received, and notice sent to the opposite side, subject to the question of the admissibility of appeal being raised at the hearing.

In accordance with this order, the point was argued before the Full Court (COUCH, C.J., WARDEN, GIBBS, LLOYD, and MELVILL, JJ).

Shantaram Narayan for the petitioner:—The question is whether a special appeal lies from the order of a District Judge passed in appeal in execution matters. The Calcutta and the Madras High Courts have held that a special appeal does lie in such cases *(a)*, and, though the practice of this Court has invariably been to hold that no special appeal lies under the circumstances, the point has never been formally decided by it. The practice has arisen since the Civil Procedure Code came into force; before that time appeals were allowed generally from decrees and orders of District Judges passed in appeal.

The section which allows special appeal is Sec. 372, which enacts that, "unless otherwise provided, a special appeal shall lie to the Sudder Court from *all decisions passed in regular appeal* by the subordinate Courts." The words "decisions in regular appeal" in themselves are large enough to include orders in regular appeal in execution matters, as there is nothing in the section which makes it necessary to limit their meaning to *decrees* passed in regular appeal. The question thus depends upon the interpretation to be put upon the words "regular appeal," for unless these words have acquired a technical meaning, so as to be equivalent to *appeals from decrees*, there is nothing in Sec. 372 to support the present practice.

Reg. II. of 1827, Sec. 5, provides that "the Sudder Dewanny Adawlut shall hear and determine appeals against decrees and orders passed in the zillah Courts." In that

(a) 1 Marshall 296, 4 Mad. H. C. Rep. 82.

Regulation the words "regular appeal" does not appear to have acquired any fixed meaning. It is used by way of alternation with many other similar expressions. "Decisions regularly appealable," "ordinarily appealable decisions," "suits not ordinarily appealable," "orders not regularly open to correction by way of appeal,"— all these expressions occur throughout the different sections of Regs. II. and IV. of 1827. The words "regular appeal" seemed to have conveyed the idea of an ordinary or general appeal, an appeal going through the whole case of law and facts, as opposed to an appeal made to rest on special grounds.

Under the regulations of 1827 the Sadr Adalat had a right to hear appeals from decrees as well as orders. Chap. 22 of Reg. IV. provides specifically for special appeals; and it expressly enacts in two separate clauses that special appeals shall lie in *all suits* not ordinarily appealable to the Sadr Adalat, and also *against orders* which, by not relating to the merits of the case in general, are not open to correction by means of appealing against the decree. Other section in the same chapter provided that copies of the decrees or orders shall accompany the petition, and that the special appeal must be made within the time limited for regular appeal. The law, as laid down by these Regulations, was continued by Act III. of 1843, subsequently repealed by Act XVI. of 1853. Sec. 1 of Act III. of 1843, and Sec 4 of Act XVI. of 1853 depart, however, from the language of the Regulations. For the first time the word "decisions" occurs, and as the Regulations of 1827 were not repealed by the new Acts, it follows that the word "decisions" was meant to include the suits and orders of the Regulations above-mentioned. These Acts took away from all subordinate Courts the power of hearing the special appeals, which was under certain circumstances allowed to them under the Regulations; but the practice of the Sadr Court of admitting special appeals in execution matters remained unaffected by these Acts. The words of Sec. 372 are exactly those used in the sections just quoted. If, therefore, the practice founded under the

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Regulations was not affected by the Acts of 1843 and 1853, there was no reason to alter it under the Code which uses the same language.

The present alteration seems to have been effected by force of the sections, which lay down generally that no appeal shall lie from orders passed in the course of a suit or prior to decree (Sec. 363), or from any order passed after decree and relating to the execution thereof, except as in the Code expressly provided (Sec. 364). These words are undoubtedly strong. The Section referred to in the latter part of Sec. 364 is probably Sec. 283 of the Code, which provides that questions relating to mesne profits or interest, as well as sums alleged to have been paid in discharge or satisfaction, shall be determined by order of the Court executing the decree and not by a separate suit, and the *order passed by the Court shall be open to appeal.* This section was repealed by Sec. 11 of Act XXIII. of 1861, which added other matters, namely, any other questions between the parties to the suit and relating to the execution of the decree. This section must be read as part of the Code (Sec. 44), and it will be seen that both the sections simply say that the order passed by the Court shall be open to appeal. The words are very nearly the same as those used in Sec. 332, which follows appeals from decrees.

The interpretation that I contend for is borne out by a comparison of Sec. 332, which allows regular appeals, and Sec. 372, which provides for special appeals. In Sec. 332 the words used are that an appeal shall lie "from decrees." The word "decisions" in Sec. 372 is evidently intended to bear a larger meaning than the word "decrees", and so to include orders.

That the Code contemplates special appeals from orders is also evident from Sec. 366, which provides that the time for appeals from orders shall be the same as the time for appeals from decrees. Besides, there are other sections which especially provide for appeals from orders both prior to and subsequent to the decree; Sec. 36 (in the matter of the

rejection of plaints); Sec. 76 (arrest before judgment); Sec. 85 (attachment before judgment); Sec. 94 (injunction); Sec. 119 (orders for setting aside judgment by default in appealable cases); and, lastly, Sec. 231, in matters of execution. In all these cases the words used are "an appeal shall lie", or "shall be open to appeal," exactly the same words as those used in Sec. 283 of the Code, and in Sec. 11 of the Act of 1861, and in some of these cases a special appeal clearly lies. The prohibition therefore to be operative, under the wording of Sec. 372, must be an express prohibition, as in Secs. 257, 269; otherwise the permission of an appeal includes special appeal by force of the words of Sec 372.

The inconsistancies which result from the narrow construction are another argument against it; thus an order for mesne profits may be made at the time of the decree, or the settlement of the amount may be reserved; in one case a special appeal will be allowed; in the other, as being an order after decree, the Judge's decision in appeal will be final. Then, again, in Sec. 231 of the Code, and Sec. 11 of Act XXIII. of 1861; both relate to orders after decree, both relate to the execution of decrees, both prevent separate suits, both are subject to appeal, both have a form of a decree and yet, special appeal lies in one, while it is prohibited in the other case.

It is curious that about the time that the practice was here altered, the Madras High Court changed its practice, in the year 1860 as mentioned in the reported case. It was only last year that the Calcutta ruling was followed, and the old practice was restored.

Nanabhai Haridas for the opponents:—Some section must give the power, to hear such appeals, but there is no section, except 372, which has reference to this subject. It is true the Regulations allowed special appeals from suits or decrees as well as orders, but it will be seen that they provide that copies of the decrees or orders shall accompany the petition of appeal. Act III. of 1843, subsequently repealed by Act XVI. of 1853, for the first time seemed to

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narrow the power of admitting special appeals from decrees as well as orders passed in regular appeal. For these Acts provide for a special appeal from *decisions* passed in regular appeal, and the subsequent sections make it necessary that copies of the decrees appealed from—not decrees and orders as before—shall accompany the petition of appeal. These Acts, if they had stood by themselves, would certainly have altered the practice as it obtained before; but the old Regulations were not repealed by them, and that is the reason why the practice continued unaltered before the introduction of the Code, which for the first time repealed the Regulation law on the subject. Sec. 373 of the Code points out the limitation to be imposed upon the word *decisions*, because it provides that copies of the judgments and decrees shall accompany the application. This restrictive section taken along with the general section 364, which prohibits special appeals from orders passed after decrees, enforced a change in the old practice.

The contention on the other side that the words *decisions* in regular appeal which occur in Sec. 372 include *orders* as well as decrees, cannot be sustained; for, on referring to Secs. 26 and 27 of Act XXIII. of 1861, it will be seen that both these words are used side by side; Sec. 27 especially lays down that no special appeal shall lie from any decision or order which shall be passed in regular appeal in any suit of the nature cognizable by Small Cause Courts. The word *decision* in this place can mean nothing more than decree or judgment, an interpretation supported by the language of the Acts above referred to. The narrow interpretation is thus the only one which is borne out by the language by the Act itself, and the Courts cannot take on themselves to give a more liberal construction than the words warrant. Even after the ruling of the Calcutta High Court, the Agra Court has held that the limited interpretation is the only one borne out by the language of the Code of Civil Procedure and the subsequent Act (XXIII. of 1861).

Cur. adv. vult.

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The judgment of the Full Court was, on the 22nd of September 1869, delivered by

COUCH, C. J. :—We concur in openion with the Calcutta and Madras High Courts on the point which has been argued before us. This question has been raised from time to time in this Court ; and whenever raised before me I have considered it to be liable to be re-opened for a formal decision. Under Sec. 372 a special appeal lies from all decisions in regular appeal. The words "regular appeal" have in no part of the Act been construed to mean an appeal from a decree. As stated in the judgment of the Chief Justice of the Calcutta High Court, regular appeal a means nothing more than a general ordinary appeal, an appeal lying on every ground of error, whether of fact or law. This seems to be the way in which the phrase has been used in the old Regulations. Unless the words have any special meaning attached to them, we ought not to put upon them a limited interpretation. We have held, under Sec. 376, that decree means an order, and none of the prohibitory sections seem to bear out the limited construction. Certainly, even if there were a slight ambiguity in the expression, there are very many reasons of convenience and expediency why we should adopt the liberal construction. We allow the special appeal.

Special appeal allowed.

Oct. 6.

Special Appeal No. 326 of 1869.

Kashinath Sitaram Oze ... ... *Appellant.*
Dadki, Woman, *et al* ... ...*Respondents.*

Hindu widow—Sale—Onus probandi.

A party claiming immoveable property by virtue of an alienation by a Hindu widow during her son's minority is bound, whether he be a plaintiff or a *defendant*, to prove that he made reasonable inquiry, and that he in good faith believed that such circumstances existed as would justify the widow in alienating her son's estate.

This was a Special Appeal from the decision of Arthur Bosanquet, Judge of the District of Thana, in Appeal Suit No. 520 of 1868, confirming on remand the decree of the Munsif of Panwel, in Original Suit No. 345 of 1866.