1872.

REG. v. NAVROJI DA'DA'BHA'I.

a decision within the section last referred to, and this, by the same section, the Court is not to do, if it shall appear that independently of the evidence improperly admitted, there was sufficient evidence to justify the decision.

For these reasons, I concur with the Chief Justice in the opinion that the judgment and sentence be affirmed.

[ORIGINAL CIVIL JURISDICTION.]

Appeal No. 210.

Oct. 5.

Suit No. 822 *of* 1871.

SONBA'I, widow of FAZUL HABIBHA'I, and another .....*Plaintiffs.*

AHMEDBHA'I HABIBHA'I and another.....*Defendants.*

Procedure—Appeal to Privy Council—Interlocutory judgment—Letters Patent of High Court, Cl. 15 *and* 40*—Intermediate appeal to High Court —Discretion—Order for Inspection of documents—Appeal from order in Chambers.*

No appeal lies, under Section 40 of the Amended Letters Patent of the High Court, to the Privy Council from an interlocutory judgment or order of a Judge of the High Court, until such judgment or order has been subjected to an appeal to the High Court under Clause 15 of the Letters Patent, except in those cases in which, by reason of the number of the Judges who have made such order, an appeal under Clause 15 is given directly to the Privy Council.

Semble—The High Court will not, in the exercise of its discretion, allow an appeal to the Privy Council upon a mere question of practice, such as an order for the inspection of documents.

Under Clause 15 of the Letters Patent and under the rules of the High Court, an appeal to the High Court from an interlocutory order made by one of its Judges only lies in those cases in which an appeal is allowed under the Code of Civil Procedure and its amending Acts.

IN the above suit and in a cross suit (No. 639 of 1871) between the same parties, Gibbs, J., sitting in Chambers, made an order, on the 9th of Sept. 1872, that the defendant, Ahmedbhái Habibhái should "produce and give full inspection of all books of account of the late Habibhái Ebráhim deceased and of the said Ahmedbhái Habibhái as executor of the last

1872.

SONBA'I, widow of FAZUL HABIBHA'I, *v.* AHMEDBHA'I HABIBHA'I.

will and testament of the said Habibhái Ebráhim deceased from the year 1854 down to the time of the making of the order" and in particular of certain of the said accounts.

From this order, *Marriott*, on behalf of the defendant, Ahmedbhái Habibhái, on notice of motion given to the plaintiff, moved, on the 28th of September 1872, before Sargent, Acting C.J., and Bayley and Green, JJ., for leave to appeal to the Privy Council.

Marriott:—The present motion is made for leave to appeal to the Privy Council under Clause 40 of the Letters Patent, which gives this Court a discretion to grant permission to any party to a suit to appeal to the Privy Council from "any preliminary or interlocutory judgment, decree, order, or sentence of the High Court," and the first question to be decided is whether the order of Mr. Justice Gibbs of the 9th of September comes within the meaning of that clause. An appeal in this case to the Privy Council, instead of to the High Court, is rendered necessary by Section 363 of the Civil Procedure Code which, except in certain specified cases, enacts that no appeal shall lie from any order passed in the course of a suit and relating thereto prior to decree unless and until the decree itself is appealed from. The latter proviso is nugatory in a case like the present, where the order will have been enforced long before a decree can be made in the suit. The clause in the Charter seems to have been inserted with a view to such a case as the present and the widest possible words are used in it. (Sargent, J.: Is there not an appeal to this Court from the order in question under Clause 15? Can the provisions of the Code override that clause?) The practice of the Court has generally been understood as not allowing of such an appeal, but if the Court should consider that such an appeal does lie, the present motion would not be insisted on. The question has been considered in the case of *DeSouza* v. *Coles* (*a*), but there the difficulty caused by Section 363 did not arise, because Section 36 of the Code allows an appeal in the case of the rejection of a plaint.

(*a*) 3 Mad. H. C. Rep. 384.

1872.

SONBA'I, widow of FAZUL HABIBHA'I, *v.* AHMEDBHA'I HABIBHA'I.

Anstey, contra :—I contend that this order does not fall within the meaning of Clause 40 of the Letters Patent. An order to be appealable must have some definitive and final effect—must decide some question of right between the parties. He cited upon this point *Johnston* v. *The East India Company* (*b*), *The East India Company* v. *Barton* (*c*), case of *Mahabul Singh and others* (*d*), *Cameron* v. *Fraser* (*e*), *Forbes* v. *Ameeroonissa Begum* (*f*), *Maharaj Moheshur* v. *The Government of India* (*g*). It is not any part of my argument to contend that an appeal lies in this case to the High Court, but it is to be remarked that Stat. 7 & 8 Vict., c. 69, s. 1, empowers the Privy Council to allow appeals from Courts of first instance without the intervention of the Lower Appellate Courts, but no such power is given to this Court; see *in re Cambridge* (*h*), and *in re Barnett* (*i*). This is a mere question of practice, and upon such questions the Privy Council and the House of Lords decline to entertain appeals : *Barry* v. *Butlin* (*j*), *Mellish* v. *Richardson* (*k*). The only exception is where the refusal to admit such an appeal will cause an absolute failure of justice as in the case of *Tronson* v. *Dent* (*l*). The appellant here has no merits and no important question is involved : *Brown* v. *McLaughan* (*m*).

SARGENT, C.J. :—We are of opinion that this motion must be refused. I think that Section 40 of the Letters Patent of 1865, only contemplates orders which have been made on appeal by the High Court, under the provisions of Clause 15 of the Letters Patent, and such orders as are by reason of the number of Judges who have taken part in the decision of them, on that account not appealable to the High Court.

The reason for my so thinking is, that to hold otherwise would lead to the conclusion that this Court might give

(*b*) 1 Strange's Notes of Cases 18.
(*c*) 1 Mor. Dig. p. 46 and note 1 at foot of same page.
(*d*) *Ibid* p. 55.
(*e*) 4 Moo. P. C. C. 1.
(*f*) 5 Calc. W. Rep. P. C. 47.
(*g*) 3 *Ibid* 45.
(*h*) 3 Moo. P. C. C. 175.
(*i*) 4 *Ibid* 453.
(*j*) 1 *Ibid* 98.
(*k*) 1 Cl. & F. 235.
(*l*) 8. Moo. P. C. C. 419.
(*m*) L. Rep. 3 P. C. 458.

1872.

SONBA'I, widow of FAZUL HABIBHA'I, v. AHMEDBHA'I HABIBHA'I.

leave to appeal from an interlocutory order at once to the Privy Council, although it has not power to give leave to appeal when the final judgment has been pronounced without an intermediate appeal to this Court. Such an anomaly could not, I think, have been intended. It was said that there are orders against which no appeal lies to this Court under Clause 15. If an order is of such a nature as not to warrant an appeal from it to this Court, what reason is there for thinking that it can have been intended that an appeal should be allowed to the Privy Council? I am of opinion, however, that if this were a case in which we considered that we had jurisdiction to allow an appeal to the Privy Council, it is one in which we should, in the exercise of the discretion vested in us by Clause 40, refuse to do so, as it is a well-established rule of the Privy Council not to entertain an appeal on a mere question of practice such as this order for the inspection of documents clearly is. As to whether this order is one from which an appeal lies under Clause 15 of the Letters Patent to this Court, I give no opinion.

BAYLEY, J. :—I concur in the opinion expressed by the Chief Justice, and I do not think that by Clause 40 of the Letters Patent an appeal can be allowed to the Privy Council from an order made by a single Judge, without the High Court, in the first instance, hearing an appeal from such order and deciding upon it.

Assuming, however, that the question arises whether this Court should in this instance allow an appeal to the Privy Council, I am clearly of opinion that it should refuse to allow such an appeal. It is well stated in the opinion of the Judges delivered in the House of Lords by Mr. Baron Bayley in the case of *Mellish* v. *Richardson* (*ubi supra*) that—" the practice of the Court below is a matter which belongs by law to the exclusive jurisdiction of the Court itself, it being presumed that such practice will be controlled by a sound legal discretion. It is, therefore, left to their judgment alone without any appeal to, or revision, by a superior court. * * * We think, therefore, that it is not competent for the superior court to examine into the

1872.

SONBA'I, widow of FAZUL HABIBHA'I, v. AHMEDBHA'I HABIBHA'I.

propriety of the amendment which is left to the sole discretion of the Court by which it has been made," and in the course of the argument of this case, I referred to a case in the Privy Council, decided in June (1872), of *in re Barlow* v. *Orde* (*n*), in which Sir Lawrence Peel observes: "Many hundreds of appeals come here. This tribunal is not supposed to know the practice of each Court." The question involved in the order sought to be appealed from, is a mere question of practice; it decides nothing as to the merits of the case, and I think that it is not such an order as that, in the exercise of a sound discretion, we ought to allow an appeal from it to be forwarded from this Court to their Lordships sitting in the Judicial Committee of the Privy Council.

Whether there be an appeal from the order of Mr. J. Gibbs to this Court itself, I do not give any opinion. The twenty days within which an appeal is allowed will not elapse until to-morrow; and the defendant, if so advised, can present an appeal to this Court, but as to whether such an appeal properly lies or not, I give no opinion. I think this motion should be refused with costs.

GREEN, J.:—I am of the same opinion. I think the Privy Council, if we allowed this appeal to go before it, would have great difficulty in ascertaining what the practice of this Court, with respect to the granting of inspection of documents, is, and what are the rules by which it should be guided in coming to a decision as to whether, according to those rules, the inspection was properly granted or not. This seems to me to be a strong ground for refusing (if we had jurisdiction in the matter) to exercise our discretion in favour of the defendant.

The motion was accordingly refused with costs.

Upon the motion being refused, Ahmebhái Habibhái filed an appeal to the High Court against the order of the 9th of September 1872. The appeal was set down for hearing on the preliminary point whether an appeal lay to the High Court from the order in question, and on the 3rd of October

(*n*) 18 Calc. W. Rep. Civ. R. 179.

1872.

SONBA'I, widow of FAZUL HABIBHA'I, v. AHMEDBHA'I HABIBHA'I.

1872, it was argued before Sargent, Acting C.J., and Bayley and Green, JJ.

Marriott (with him *Pigot*) for the appellant:—The case of *DeSouza* v. *Coles* (*o*) is a direct authority that orders, like the present, are appealable. The Madras Court has put the widest construction on the term "judgment" used in Clause 15 of the Letters Patent and properly so, for most important orders are made in Chambers, the disobedience of which involves the imprisonment of one of the parties to the suit, and it is only reasonable to suppose that it was intended that they should be subject to revision by an Appellate Court. The construction which this Court has already put upon Clause 40 is in favor of the view I now contend for. Such orders as the present would be open to appeal in the Courts of Equity in England, and were so in the late Supreme Court which adopted the practice of the Court of Chancery, see Cl. 41 of its Charter. The High Court will follow the same practice where it is not repugnant to the Letters Patent, see Cl. 18 of Letters Patent of 1862 and Clause 19 of Letters Patent of 1865 and Rule 1* of Ch. II. of the rules of this Court. If our construction of Clause 15 be correct and it is enacted by that clause that orders made by a single Judge, not being final judgements, should be appealable, then the rules of the Court adopting the Code of Civil Procedure as containing the rules of practice of this Court cannot take away the right of appeal expressly given by the Letters Patent. But in fact they have not that effect, for the provisions of the Code are to be applied only in so far as they are applicable.

* NOTE.—Rule I. of ch. II.: 1.—All rules which at the time of the abolition of the Supreme Court of Judicature at Bombay were in force for regulating the practice of that Court at its Plea and Equity Sides, shall extend, so far as the same are applicable, and as nearly as may be, to all matters of Ordinary Original Civil Jurisdiction in this Court, except in such respects as the same may be contrary to the Statute 24 & 25 Victoria, Chapter 104, or to the Letters Patent continuing this Court, bearing date the 28th day of December in the twenty-ninth year of the reign of Her Majesty (A.D. 1865,) or to the rules of this Court made, or which shall hereafter be made, under and in conformity with the 37th Section of the said Letters Patent, or to the provisions of Act VIII. of 1859 and of any

(*o*) 3 Mad. H. C. Rep. 384.

1872.

SONBA'I, widow of FAZUL HABIBHA'I, v. AHMEDBHA'I HABIBHA'I.

Anstey (with him *Starling*) for the respondents:—Orders for the inspection of documents are open to appeal in England because the Judges, in making such orders, are, under statute, exercising by delegation the power of the Courts to which they belong. The case is different where a single Judge exercises original powers derived from the common law and not the creatures of statute. He cited *Smeeton* v. *Collier* (*p*), *R.* v. *Faulkner* (*q*). Independently of statute, no appeal lies upon a mere question of practice: *Mellish* v. *Richardson* (*r*). It would be useless to admit such an appeal as the present, as, when the Court learned the nature of the order, it would refuse to enter upon the merits of it. Those orders only are appealable which go to the merits of the case and decide definitely some right between the parties: *Justices of the Peace for Calcutta* v. *The Oriental Gas Co. Limited* (*s*). This order concludes nothing. It is moreover discretionary: *Coleman* v. *Trueman* (*t*).

Marriott, in reply—The authority of the Court to order inspection of documents is based on Sec. 6 of Act XV. of 1852.

(*p*) 1 Exch. 457. (*q*) 2 Cr. M. & R. 525. (*r*) 1 Cl. & F. 235.
(*s*) 8. Beng. L. R. 433. (*t*) 3 H. & N. 874; S. C. 28 L. J. Ex. 5.

subsequent law which has been made amending or altering the same by competent legislative authority for India, save so far as the said provisions of the said Act VIII. of 1859, and subsequent laws as aforesaid, have been or hereafter shall be, as regards this Court, duly modified by its rules which have been or hereafter shall be made as aforesaid, under and in conformity with the 37th section of the Letters Patent.

And the practice of this Court, in all matters of Ordinary Original Civil Jurisdiction aforesaid, shall be likewise regulated by the provisions, so far as the same are applicable, of the said Act VIII. of 1859, and of any subsequent law which has been made, amending or altering the same by competent legislative authority for India, except so far as such provisions have been or shall hereafter be modified by this Court under and in conformity with the said 37th section of the said Letters Patent granted by Her said Majesty in pursuance of the said Statute 24 & 25 Vic., c. 104, and the Statute 28 & 29 Vic., c. 15. Nothing hereinbefore contained shall affect Chapter XVIII. of the rules of this Court made on the 25th day of November 1867 regulating proceedings in its Admiralty and Vice-Admiralty Jurisdiction, or the procedure of this Court in its Testamentary and Intestate Jurisdiction, which, as heretofore, shall continue to be the same as that of the said Supreme Court in its like jurisdiction at the time of its abolition (1st August 1871).

Formerly a bill of discovery would have been necessary and the decree made upon such bill would have been open to appeal. This is not an order provided for by the Code of Civil Procedure, and Sec. 363 does not, therefore, apply to it.

Cur. adv. vult.

SARGENT, Acting C.J. :—This is an appeal from an order made by Mr. Justice Gibbs on the 9th of September last, which was an order making absolute a summons requiring the defendant to produce certain documents for the inspection of the plaintiffs, and the preliminary question has been raised before us whether from such an order an appeal lies to this Court. The clause of the Letters Patent which gives the right of appeal to this court is Clause 15 which runs as follows :— "And we do further ordain that an appeal shall lie to the said High Court of Judicature at Bombay from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the said High Court, or of one Judge of any Division Court * * * and that an appeal shall also lie to the said High Court from the judgment, not being a sentence or order as aforesaid, of two or more Judges of the said High Court, or of such Division Court, wherever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being; but that the right of appeal from other judgments of Judges of the said High Court, or of such Division Court, shall be to us, our heirs, or successors in our or their Privy Council as hereinafter provided." Now, the construction of that section of the Letters Patent has been under consideration both in the High Court of Madras and the High Court of Calcutta, and the Madras High Court has interpreted the word "judgment" as meaning "any decision or determination affecting the rights or interest of any suitor or applicant," in fact, has put the largest possible interpretation upon the word. On the other hand, the Bengal High Court (consisting of our late Chief Justice, Sir Richard Couch, and Markby, J.), in the case of the *Justices of the Peace* v. *The Oriental Gas Company*

1872.

SONBA'I, widow of FAZUL HABIBHA'I, *v.* AHMEDBHA'I HABIBHA'I.

Limited (*u*), expressed an opinion that the word "judgment" must receive a more limited meaning and that it must be confined to "a decision which affects the merits of the question between the parties by determining some right or liability". Under the interpretation of the Madras High Court, the present order would apparently be appealable, but would not be so if the Calcutta High Court are right in their opinion, as this order does not in any way decide any of the merits between the parties. The question, therefore, arises—which of the above decisions will this court adopt? The conclusion I have arrived at is that the ruling of the Calcutta High Court is right and for the reasons I am about to state.

How did the matter stand under the first Letters Patent? The 14th clause provided that an appeal should lie to the High Court from the judgment of one or more Judges of the High Court or of any Division Court, provided the decision was not made by a majority of the full number of the Judges of the High Court, which provisions are in effect the same as those contained in the 15th clause of the present Letters Patent. The same term "judgment" is used in both. Then the 37th clause provided that the proceedings in all matters coming before the High Court with certain defined exceptions in Civil suits of every description should be regulated by the Code of Civil Procedure being Act VIII. of 1859, and by such further or other enactments of the Governor General in Council in relation to Civil Procedure as were then in force.

In construing these first Letters Patent, it would be contrary to all principles laid down for the construction of statutes and charters, if we were to neglect the provisions of Clause 37 in construing Clause 15, and we must read the two so as to make them, if possible, reconcileable. Now, on referring to Section 363 of the Code of Civil Procedure, we find it enacted that no appeal shall lie from any order passed in the course of a suit and relating thereto prior to decree, though, if the decree be appealed from, any error in any such order, affecting the merits of the case, may be set forth as a

(*u*) 8. Beng. L. Rep. 433.

ground of objection in the memorandum of appeal; and in other sections we find that some specified orders are appealable, such as injunction orders, orders rejecting plaints, orders refusing to set aside *ex parte* judgments, &c. This being so, what is the effect of the Civil Procedure Code as explaining Clause 14 of the Letters Patent. (I) Either the word "judgment" in Clause 14 must be read as being used in its more technical signification as equivalent to final decision—a view which is open to objection, for in Clause 40 we find that an appeal is given to the Privy Council from orders that are merely preliminary or interlocutory made in the High Court, which shows that some orders not being final decisions are open to appeal. Or (II) the word "judgment" may be taken to include any preliminary or interlocutory judgment, decree, order, or sentence within the meaning of Clause 40, and effect may be given to Section 37 by limiting the orders open to appeal to those orders which are expressly declared appealable in the various sections of the Civil Procedure Code, or in other words, by incorporating the provisions of the Civil Procedue Code relating to appeals with Sec. 15 of the Letters Patent, and holding the word "judgment" to mean all judgments and orders which are appealable under the provisions of the Civil Procedure Code. It is not material which view we take here. In either case this order would not have been open to appeal under the Letters Patent of 1862.

In the New Letters Patent, we do not find Clause 37 re-enacted. In lieu of it, we find a Clause (37) which gives power to the High Court to make rules and orders for the purpose of regulating all proceedings in Civil cases in the High Court in its various jurisdictions: "Provided always that the said High Court shall be guided in making such rules and orders, as far as possible, by the provisions of the Code of Civil Procedure * * *, and the provisions of any law which has been made amending or altering the same by competent legislative authority for India." Now, under that section, rules have been made, and in one of those rules it is laid down, that the practice of this Court in all matters of Ordinary Original Civil Jurisdiction shall be

1872.

SONBA'I, widow of FAZUL HABIBHA'I, v. AHMEDBHA'I HABIBHA'I.

regulated by the provisions, so far as the same are applicable, of Act. VIII. of 1859 and of any subsequent law which has been made amending or altering the same. The effect of that rule is that the Code has been again incorporated into the Letters Patent, and the result is the same as if Clause 37 of the former Letters Patent were still in force.

It has been said that that rule only relates to matters of Ordinary Original Civil Jurisdiction and does not apply to this Court in the exercise of its Appellate Jurisdiction, but that expression was intended clearly to mean the same as the words used in the heading of the Chapter in which they are found, *i.e.*, in all matters "relating to the Civil Jurisdiction on the Original Side of the High Court." The rule was intended to have the same scope as the corresponding rule in the Calcutta Court which uses larger words and plainly embraces the case of appeals on the Original Side of the Court. For these reasons, I have come to substantially the same conclusion as the High Court at Calcutta has arrived at, though by a somewhat different process of reasoning, and am of opinion that the order of Mr. Justice Gibbs of the 9th of September last, is not appealable, and that this appeal must be dismissed.

BAYLEY, J. :—I am also of opinion that this Court has no power to hear this appeal.

It is an old rule that in construing a document every part of it must be made, if possible, to take effect, and I think that we should so construe the Letters Patent of the High Court of Bombay as to make the different provisions of them harmonize, so far as can be done, the one with the other.

By Clause 37 of the Letters Patent of 1862, it is ordained that "save as hereinbefore in this clause otherwise provided, the proceedings in civil suits of every jurisdiction between party and party shall be regulated by the Code of Civil Procedure, Act. VIII. of 1859, and by such further or other enactments of the Governor General in Council in relation to Civil Procedure as are now in force."

It was admitted during the argument that orders made in England by Judges in Chambers are subject to be set

aside or modified by a motion to one of the superior courts at Westminster for that purpose; also that orders by an Equity Judge in chambers are open to appeal. I do not think, however, that the practice in England affords much assistance in deciding the present question, which appears to me to rest upon the proper construction to be put upon the Letters Patent.

The Act for establishing High Courts of Judicature in India, 24 & 25 Vict., c. 104, by Section 8 enacted that upon the establishment of such High Court in the Presidency of Bombay, the Supreme Court and the Court of Sadr Diváni Adálat, and Sadr Foujdári Adálat, in the same Presidency should be abolished.

The Letters Patent not only erected and established a perfectly new court on the ruins of the old one, but declared that the procedure to be followed in civil suits was that prescribed by the Code of Civil Procedure—a code which, though some difficulty was at first experienced in working it, is, I venture to think, on the whole a vast improvement upon the tedious and complicated systems of Common Law and Equity Pleadings which prevailed in the Supreme Court.

The framers of the Letters Patent of 1862 must be taken to have been fully cognizant of the provisions of the Code of Civil Procedure.

The appellant relies upon Cl. 15 of the Letters Patent of 1865 which corresponds with Cl. 14 in the Letters Patent of 1862, and in each clause an appeal is given "from the judgment of one Judge."

In Clauses 39 and 40, regulating appeals to the Privy Council, the words used are "judgment, decree or order."

Now, one would hardly speak of an order of a Judge in chambers granting an inspection of books or documents as a "judgment." Is there reason for supposing that the marked difference between the words in Cl. 15 and those in Clauses 39 and 40, was intentional, and that the right of appeal from a Judge in chambers was and is of a limited, and

1872.

SONBA'I, widow of FAZUL HABIBHA'I, *v.* AHMEDBHA'I HABIBHA'I.

not of a general, character? The Code of Civil Procedure itself seems to afford some explanation.

The word "judgment" in the Code is, in Sec. 183 and the following sections, used to denote the decision which the court is to pronounce after the exhibits have been perused and the parties heard in person or by their respective pleaders. Appeals from orders are regulated by Secs. 363 to 366 of the Code, the first of which enacts that "no appeal shall lie from an order passed in the course of a suit and relating thereto prior to decree." That provision must of course be read in connection with, and as subordinate to, other sections of the Code in which appeals are expressly given from orders, such, for instance, as Sec. 36 which provides that when a plaint is rejected under any of the sections previous to it, an appeal shall lie from the order rejecting the plaint; Section 76 where an appeal is given to a defendant who has been ordered to give bail; Sec. 85 where an appeal is given to a defendant against an order for an attachment before judgment made under Sec. 84; Sec. 94 where an appeal is given to a defendant against an order made for an injunction or receiver under Sec. 92 or 93; Sec. 119 where an appeal is given against an order rejecting an application to set aside an *ex parte* judgment.

Bearing these provisions of the Code of Civil Procedure Act in view, I think that it was not intended that the word "judgment" in Cl. 14 of the first and Cl. 15 of the Amended Letters Patent should have the extended meaning which the Judges of the High Court at Madras in *DeSouza* v. *Coles* (*v*) have ascribed to it. If it had been deemed expedient to give an appeal from an order of a Judge in chambers, the word "order," or some words to override the provisions of Sec. 363 of the Code that "no appeal shall lie from an order passed in the course of a suit and relating thereto prior to decree," would, I think, have been inserted in Cl. 14 of the first and Cl. 15 of the Amended Letters Patent.

The present practice of this side of the High Court is regulated by the general rules passed by the Judges on the

(*v*) 3 Mad. H. C. Rep. 384.

1872.

SONBA'I, widow of FAZUL HABIBHA'I, v. AHMEDBHA'I HABIBHA'I.

1st August 1871, which provide that "the practice of this court in all matters of Ordinary Original Civil Jurisdiction, shall be likewise regulated by the provisions, so far as the same are applicable, of the said Act VIII. of 1859 and of any subsequent law which has been made amending or altering the same by competent legislative authority for India;" and the section of the new Letters Patent (Sec. 37), under which those rules were made, ordains that "it shall be lawful for the said High Court of Judicature at Bombay from time to time to make rules and orders for the purpose of regulating all proceedings in Civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice-admiralty, Testamentary, Intestate, and Matrimonial Jurisdictions respectively: Provided always, that the said High Court shall be guided in making such rules and orders, as far as possible, by the provisions of the Code of Civil Procedure, being an Act passed by the Governor General in Council, and being Act No. VIII. of 1859, and the provisions of any law which has been made amending or altering the same by competent legislative authority for India."

The conclusion at which I have arrived is borne out by the decision of Sir Richard Couch, C.J., and Mr. Justice Markby on the 12th March 1872, in the case of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company, Limited* (*w*), where, after citing the cases of appeals from single Judges of the High Court at Calcutta, the Chief Justice says (*x*): "These are the only cases we have been able to find in which the right of appeal on this side of the Court has been discussed; *and in every case it has been determined with reference to the provisions of the Code of Civil Procedure.* This seems to us to be a reasonable course. For though the Code of Civil Procedure was not by the second Charter made absolutely binding on this court, it was clearly expected that so far as possible it would be adopted by it, and, as before pointed out, this has been done."

On the whole, therefore, I am of opinion that an order of a Judge in chambers, ordering the production of books and pa-

(*w*) 8 Beng. L. Rep. 433. (*x*) Ibid 454.

1872.

SONBA'I, widow of FAZUL HABIBHA'I, v. AHMEDBHA'I HABIBHA'I.

pers, is not a "judgment" within the true meaning of Cl. 15 of the Amended Letters Patent; and consequently that there is no appeal to this court from the order made by Mr. Justice Gibbs in this case, and that we have no alternative, but to dismiss this appeal and with costs.

GREEN, J. :—I concur in thinking this order not to be appealable. During the course of the arguments, I felt some difficulty and doubt and for two reasons. I.—Because many important orders are made before decree; amongst others, orders indirectly involving the imprisonment of the party disobeying them, which, though not directly orders touching the liberty of the subject, yet in effect are so, for though the order directing the actual imprisonment of a party for disobedience of a former order is itself open to appeal, yet upon such appeal I apprehend that the only inquiry would be—had the former order been made and had the party disobeyed it; and it would not be competent for the Appellate Court to consider whether the former order was correctly made or not. II.—My second doubt was founded on the wording of the rule of the 1st of August 1871, which seemed to contemplate laying down the practice of this Court in its Original and not in its Appellate Jurisdiction. These doubts I have been able to surmount, for, on reconsideration, I think that the rule in question may fairly be held to apply to the Appellate Jurisdiction of this Court on its Original side, and the Civil Procedure Code does in fact provide an appeal in the case of the more important class of orders, and I should have felt great difficulty in holding that the word "judgment" includes all orders of every description—an interpretation which is certainly opposed to its more generally received acceptation. The invariable practice too of this court for nearly ten years has been opposed to the construction of Clause 15 of the Letters Patent contended for by the appellant. No case has been cited to us in which an appeal from an order in chambers has been entertained, when such is not provided for by the Code. I concur in thinking that this appeal ought to be dismissed.

Appeal dismissed with costs.