1875.

SUGANCHAND SHIVDA'S v. MULCHAND JOHA'RIMAL.

and recovered the amount. I am of opinion, therefore, that there was consideration for *Hundi* A both as between Popsang and the defendant and as between Popsang and the plaintiffs, and that of the former consideration no failure has been shown. On the 2nd, 3rd, and 4th issues, therefore, the finding is that, besides the *hundi* in para. 3 of the written statement mentioned, there was payment of a sum of cash, the amount of which does not appear, in respect of interest on Rs. 2,500 for the period between the due dates of that *hundi* and the *hundi* sued upon in this suit. That further the plaintiffs received the *hundi* sued upon as agents of Popsang Hardarbaksh, but that before and at the time of the same becoming payable, and at the time of the institution of this suit, they became and were holders of the same for value, and so far did not hold the same as agents only of the said Popsang. This being so, the finding on the 5th issue is that the plaintiffs are entitled to recover the moneys claimed in the plaint. Decree for the plaintiffs for Rs. 2,500, with simple interest at 9 per cent per annum from the 15th June 1871 till this day, and Rs. 10 for notarial charges; costs. Interest on decree at 6 per cent.

NOTE.—This decree was subsequently, on October 15th, 1875, affirmed with costs by the Appellate Court, WESTROPP, C.J., and SARGENT, J., see 1, I. L. R. (Bombay), 23.—*Ed.*

[ORIGINAL CIVIL JURISDICTION.]

Suit No. 47 *of* 1871.

April 2 and 3.

HIRJI JINA' .....*Plaintiff.*

NA'RRAN MULJI and another .....*Defendants.*

Practice—Appeal from order—Decree—Civil Procedure Code, Section 363.

The question whether or not an order is appealable is one for the decision of the Court.

An order passed in a suit, referring it to the Commissioner to take the accounts between the parties, is a decree.

An order, passed on a certificate given (under Rule 371 of the Equity Rules of the Supreme Court) by the Commissioner, subsequently to the order of reference, is appealable.

1875.

HIRJI JINA' v. NA'RRAN MULJI.

Sonábhái v. *Ahmedbhái* (9 Bom. H. C. Rep. 398) explained. *The Justices of Peace of Calcutta* v. *The Oriental Gas Company* (8 Beng. LR. 433) distinguished.

THE plaintiff, desiring to appeal from an order of Bayley, J., made on the 19th December 1874, by which a decision of C. E. Fox, Commissioner for taking accounts, was reversed, lodged a memorandum of appeal with the Prothonotary, who, however, refused to file the appeal, on the ground that the order was interlocutory, and therefore not appealable (*a*).

Inverarity, for the plaintiff, on the 2nd April 1875 brought the facts stated above to the notice of the Appellate Court, WESTROPP, C.J., and SARGENT, J.

PER CURIAM :—We are of opinion that we ought not to delegate to the Officer of this Court the decision of a question properly cognisable by the Court itself, viz., whether or not an appeal lies. When a party, desirous of appealing from an order, lodges his memorandum of appeal within the proper time, the right course is for the Prothonotary to file the appeal, and to bring to the notice of the Court the fact that it is doubtful whether the order is appealable. Of course, if the memorandum is not lodged within the proper time, the Prothonotary is right in refusing to file the appeal, and the intending appellant must then apply to the Court by special motion.

On the following day, April 3rd, 1875, the case again came on for argument on the preliminary question, whether or not an appeal lay from the order of Bayley, J., made on 19th December 1874, on the certificate of C. E. Fox, Commissioner, dated 2nd October 1874.

The plaint was filed on 24th January 1871, and sought to recover from the defendant the amount alleged by the plaintiff to be due to him on the common money counts, and on an account adjusted on the 18th October 1868. The defendant, in his written statement, pleaded : 1st, that the Court had no jurisdiction to hear and determine the suit ; 2nd, that the account was not adjusted as in the plaint

(*a*) *Sonábhái* v. *Ahmedbhái*, 9 Bom. H. C. Rep. 398, see pp. 405 *et seq.*

alleged; and 3rd, that the plaintiff's claim was time-barred. The case came on for hearing before Bayley, J., on the 20th December 1873, when the learned Judge held that no adjustment, either in October 1868 or afterwards, had been proved, and that as to certain items included in the plaintiff's claim the Court had no jurisdiction, inasmuch as the whole cause of action with regard to those items had not arisen within the jurisdiction, and the plaintiff had not obtained leave to sue in respect of them under clause 12 of the Letters Patent. On the question of limitation, the learned Judge held that the plaintiff was entitled to an account extending over the six years immediately preceding the date of the filing of the plaint, and referred it to C. E. Fox, Commissioner for taking accounts, and as such a permanent officer of the Court, not specially appointed under Section 181 of the Civil Procedure Code in this cause, to take such account, directing him to allow the defendant credit for two items, admitted by the plaintiff in his particulars of claim to have been received by him within the six years immediately preceding the 24th January 1871, but not within the jurisdiction of the Court, "as well as for such other sums as the defendant might prove himself to be entitled to credit, wherever the same should become payable." The plaintiff filed his account before the Commissioner on the 1st April 1874, giving credit to the defendant for the two items as directed by the order of reference, and to this account the defendant filed a surcharge on the 23rd June 1874, by which he claimed credit for various payments made by him to the plaintiff. Before the Commissioner the plaintiff admitted having received the payments mentioned in the surcharge, but contended that the defendant was not entitled to credit for them in the present account, inasmuch as they had been appropriated towards the payment of sums due from the defendant prior to the 24th January 1865, and not included in the account directed by the order of reference. It was not pretended by the defendant that at the time of making the payments he had appropriated them to the discharge of any particular debt, but he contended that, having regard to the

1875.

HIRJI JINA' v. NA'RRAN MULJI.

terms of the order of reference of 20th December 1873, the plaintiff was not entitled to appropriate these payments towards the satisfaction of any claim prior to 24th January 1865. The Commissioner held that the plaintiff's contention was right, and that, under the circumstances, the plaintiff was entitled to appropriate these payments to the liquidation of the earliest debts due from the defendant. Upon this the defendant obtained from the Commissioner a certificate, dated 2nd October 1874, stating that such had been his decision. On that certificate defendant's counsel moved before Bayley, J., for a reversal of the decision of the Commissioner, and, on the 19th December 1874, the learned Judge passed an order directing the Commissioner that the payments made by the defendant after 24th January 1865 could not be applied to payment of the balance due from him before that date.

The question now for the decision of the Appellate Court was, whether an appeal lay from this order of 19th December 1874.

Inverarity for the plaintiff, appellant:—By the practice of this Court an appeal lies from the order of reference. *Dayál Jairáj* v. *Khatáv Ladhá* (*b*) was an appeal from such an order. Whether this order of 19th December 1874 is appealable, depends on whether the order of reference of 20th December 1873 is appealable. If that order is held to be interlocutory, *Sonábhái* v. *Ahmedbhái* (*c*) is against me. The question, therefore, is, whether the order of reference of 20th December 1873 is a "decree" within the meaning of Section 363 of the Civil Procedure Code. If it is, the order of 19th December 1874, which is supplemental to it, is also a decree, or, if it is not a decree, is still appealable as being made after the order of 20th December 1873, which is a decree. In the *Justices of Peace of Calcutta* v. *The Oriental Gas Company* (*d*), a wider construction was put on the word "judgment" in clause 15 of the Letters Patent than was done in *Sonábhái* v. *Ahmedbhái*. *DeSouza* v. *Coles* (*e*) gives a still wider

(*b*) *Supra*, p. 97.
(*c*) 9 Bom. H. C. Rep. 398.
(*d*) 3 Beng. L. R. 433.
(*e*) 3 Mad. H. C. Rep. 384.

construction to the word "judgment" than either the Bombay or the Calcutta case. If the Judge in the court below had held that the plaintiff was not entitled to an account, such an order would have been appealable. The order directing the account to be taken must, therefore, also be appealable. If, however, the order of reference is not appealable, then this order of 19th December 1874 is not. In that case we could, under Section 363 of the Civil Procedure Code, appeal against both those orders after final decree, and what would be the result? If the order of 20th December 1873 were wrong, all proceedings held and accounts taken under it would be upset, and all the time and money spent in the proceedings before the Commissioner would be wasted. [He was here stopped by the Court.]

[WESTROPP, C.J. :—The separate certificate of the Commissioner, and the rule and practice of this Court, under which that certificate was given, are entirely outside but not opposed to the provisions of the Civil Procedure Code. Of that rule, and of that practice, the defendant has availed himself, by getting the certificate which the Commissioner is authorised to give for the purpose of preventing protracted litigation. How then can the defendant, after this, be allowed to rely solely upon the Civil Procedure Code ?]

Scoble, Advocate-General, for the defendant, respondent: —A *mandamus* is a proceeding *dehors* the Civil Procedure Code, yet, on the authority of the *Justices of Peace of Calcutta* v. *The Oriental Gas Company*, the order for a *mandamus* is not appealable. If by the order of 19th December 1874 the Judge in the court below misinterpreted his own former order of 20th December 1873, the plaintiff ought to have waited until the passing of the final decree on the Commissioner's report, and then have appealed against that decree. The order of 19th December 1874, which is now sought to be appealed against, does not finally affect the rights of the parties, and the question whether such an order is appealable must be decided independently of the fact whether or not the plaintiff gets anything by the final decree. That

1875.

HIRJI JINA' v. NA'RRAN MULJI.

this order was in a matter not contemplated by the Civil Procedure Code does not affect the question, for *Sonábhái* v. *Ahmedbhái* decides that interlocutory orders are not appealable; this order is interlocutory, being simply a direction to the Commissioner to take the account in a particular way, and it is clearly "prior to decree" within the meaning of Section 363 of the Civil Procedure Code, because the Code contemplates no other decree than the final decree. The practice adopted by the defendant, no doubt, was that reserved by the rules of the Court, but, however that may be, this case must be governed by the decisions of the Courts of Bombay and Calcutta in the two cases already cited. The order now sought to be appealed against is not decretal in its nature, even assuming the order of reference to be so. If the order of reference is not a decree, then this order, being "prior to decree," is not appealable under Section 363 of the Civil Procedure Code. If the order of reference be a decree, then, with regard to the order now sought to be appealed against, the plaintiff ought to have proceeded under Act XXIII. of 1861, for it would be an "order in execution of a decree." But the order of reference itself was not decretal, for no account was prayed either in the plaint or written statement. The new Rule No. 1, at p. 38 of the Rules of this Court (*f*), shows how far the old Equity

(*f*) "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 the 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 Stat. 24 and 25 Vic., Chap. CIV., or to the Letters Patent continuing this Court, bearing date the 28th day of December in the 29th 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 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 said 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 are, or hereafter shall be, modified by this Court, under and in conformity with the said 37th Section of the Letters Patent granted by Her said Majesty in pursuance of the said Stat. 24 and 25 Vic., Chap. CIV.,

Rules followed by the late Supreme Court are to be applied in this Court. The old Equity practice of allowing appeals from interlocutory orders is contrary to the Letters Patent and contrary to the Civil Procedure Code. [He cited *Petition of Court of Wards (g)*.] The order sought to be appealed against is not final, nor even decretal, but is simply a direction to the Commissioner to take the account in the way already ordered by the order of reference, which he had misinterpreted. But what the plaintiff is seeking to do by appealing against this order is to appeal against the order of reference after allowing the time for so doing to elapse. If this order is appealable, then whenever an order is passed, during the pendency of proceedings, to parties to whom liberty to apply is reserved, it would be open to the other side to say that such orders are decrees, and to claim to be allowed to appeal from them, whereby litigation would be indefinitely protracted and great inconvenience occasioned.

Inverarity, in reply:—Such inconvenience does not seem to be experienced in England, where appeals are allowed from orders made on applications to vary or discharge the chief clerk's certificate: Daniell's Chancery Practice, 1226. Moreover, in this country the Letters Patent of 1865, Clause 40, clearly contemplate the admissibility of appeals on interlocutory matters.

WESTROPP, C.J.:—The Commissioner decided that the principle on which the account was to be taken was that the plaintiff should be at liberty to show that the defendants' payments had been made in respect of matters other than those included in the account ordered to be taken by the order of 20th December 1873. This decision materially affects the merits of the case, and of course the reversal of that decision would also do so to an equal degree. With this

and the Stat. 28 and 29 Vic., Chap. XV. Nothing hereinbefore contained shall affect Chap. XVIII. of the Rules of this Court, made on the 25th day of November 1867, regulating the 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.

(g) 7 Calc. W. R. 222.

1875.

HIRJI JINA' v. NA'RRAN MULJI.

important question affecting the case, the defendants' attorney obtained the certificate from the Commissioner. The practice, by which the Commissioner is entitled to give such a certificate, was an old and most useful practice in the Master's office, resting on the Equity Rule No. 371 (*h*) of the late Supreme Court. The object of that rule was to enable parties to bring important questions before the Court as early as possible. It was for the curtailment of expense and avoidance of protracted litigation. By the practice of this Court, exceptions are argued to separate certificates of the Commissioner, just as in the late Supreme Court on the Equity Side to certificates of the Master, and the orders made on such exceptions are equivalent to decrees. The old Equity Rules have to a certain extent been applied in this Court to suits under the Civil Procedure Code, and are recognised in the new rule of this Court made in 1872, to be found at p. 38 of the Rules of the High Court. The Civil Procedure Code must here be considered in conjunction with the rules and practice of this Court. According to those rules and practice, this Court may split its decree, and there can be in a suit as many decrees as there are separate certificates of the Master on which the Court has passed orders. Experience has long since shown that separate certificates will not be granted on such light grounds, or so frequently in the course of a cause, as to produce the inconvenience and delay suggested in the argument for the defendant. Rule 371 has worked quite in the opposite direction, and been most conducive to the prevention of the waste of both time and money. That rule clearly contemplated that orders of decretal character should be obtained between the decree of reference and the final decree on the Master's report. The order now sought to be appealed against would be a decretal order made on the certificate of the Commissioner, for if that order be not decretal matter, it is impossible to say what is. The order also most materially affects the plaintiff's rights. There

(*h*) "In all matters referred to him, the Master shall be at liberty, upon the application of any party interested, to make a separate report or reports from time to time, as to him shall seem expedient; the costs of such separate reports to be in the discretion of the Court."

is nothing in Section 363 of the Civil Procedure Code excluding such an order, for it is a decree *pro tanto*. It cannot be said to be "prior to a decree," for there has already been a decree to take the account, and, moreover, the order is itself a decree. The two cases relied on by the defendant are not applicable in the present instance, for neither of the orders from which an appeal was sought in those cases was decretal in its nature. In *The Justices of the Peace of Calcutta* v. *The Oriental Gas Company*, the Calcutta High Court held that it was by its own rule limited to consider the *mandamus* as a proceeding under the Civil Procedure Code. In *Sonábhái* v. *Ahmedbhái*, the order sought to be appealed against was one made in chambers for the production of books—a mere matter of procedure, not a question as to the rights of the parties. On the other hand, there is a case, reported at 2 Ind. Jur. 205, in which there was a partial decree, just as there is in this case, and it was held to be appealable. We have been referred to Act XXIII. of 1861. The only section of that Act which seems at all capable of application to the present case is Section 38, which provides that in all "miscellaneous proceedings" the procedure prescribed by the Civil Procedure Code shall be followed *as far as it can be*. I do not consider that the proceedings with regard to the Commissioner's certificate were "miscellaneous" within the meaning of that section. They were proceedings in the regular course of the suit, viz., in that stage of it when it was in the Commissioner's office for the purpose of having the account taken. We are of opinion that it would be highly disadvantageous to suitors if an appeal did not lie in such a case as the present, the appeal must, therefore, be allowed, and will come on for argument on the merits in due course. Costs of the preliminary point argued before us to-day are reserved until the disposal of the appeal.

SARGENT, J. :—I agree that this order is appealable, and should not have thought it necessary to add anything to the remarks of the Chief Justice, had it not been for the argument which the learned Advocate-General based on my

1875.

HIRJI JINA' v. NA'RRAN MULJI.

judgment in the case of *Sonábhái* v. *Ahmedbhái*. At page 408 I am reported as saying that "the effect of the rules made under the 2nd letters Patent is that the Code of Procedure is again incorporated in the letters Patent." It is clear from the context that the words "so far as the same is applicable" have been inadvertently omitted. Having then regard to the long-established practice of this Court, if Section 363 of the Civil Procedure Code is to be applied, the word "decree" must be held to include the decree of reference, in which case the order of 19th December 1874, which is now sought to be appealed against, having been made after the decree of reference, is not one "prior to decree," and being one which decidedly affects the merits of the case is, therefore, appealable.

[APPELLATE CIVIL JURISDICTION.]

April 5.

Special Appeal No. 111 *of* 1874.

MAHA'BALAYA' BIN PARMA'YA' and another. } *Plaintiffs and Appellants.*

TIMAYA' BIN APPAYA' and two others. } *Defendants and Respondents.*

Undivided Hindu family—Ancestral property—Attachment and sale of the interest of one of the co-parceners in the undivided estate—Partition—Possession.

The purchaser at a court's sale of the right, title, and interest of one of the co-parceners in the undivided estate, by his certificate, under Section 259 of the Civil Procedure Code, can take no more than the interest of such co-parcener in the property disposed of, as a member of the united family.

Course pointed out as to the ascertainment of what that interest is, and how the transaction can be made good for the benefit of the purchaser of a co-parcener's interest in a particular piece of property, forming only a part of the common estate.

Where, however, the purchaser got into possession and held it with such an accompanying right as the judgment-debtor could transfer to him:

Held that the purchaser was in as a tenant in common with the judgment-debtor's co-parceners, and that they were entitled to possession in common with him, and might enforce their right for a share of the enjoyment, or for a