

[APPELLATE CIVIL.]

Before Mr. Justice Melville and Mr. Justice Kemball.

DALPATBHAI BHAGUBHAI (PLAINTIFF), APPLICANT, v. AMARSANG
KHEMA'BHAI AND ANOTHER (DEFENDANTS), OPPONENTS.*

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March 20.

The Code of Civil Procedure (Act X. of 1877), Sections 2, 244, 540, and 588—

Appeal—Execution of a decree—Judicial proceeding.

There is no appeal against an order made under section 244 of the Code of Civil Procedure (Act X. of 1877) determining questions between the parties to a suit as to the amount of mesne profits recovered by the plaintiff subsequently to the decree and as to the amount payable on account of the costs of execution of that decree.

The term "judicial proceeding," as used in section 2 of the Code of Civil Procedure (Act X. of 1877), must be understood to mean a judicial proceeding of the same nature as a suit or such proceedings as are referred to in sections 333, 522, 526 and 531 of the Code. The definition given in the Code of Criminal Procedure (Act X. of 1872) is not applicable.

THIS was an appeal from an order passed by RAO BAHADUR Chintaman Sakharam Chitnis, Subordinate Judge, First Class, at Kheda, in the district of Ahmedabad, in the matter of the execution of decree No. 976 of 1876 on the file of the Court.

The facts of the case are as follows :—

On the 26th of June 1876 the applicant Dalpatbhai Bhagubhai obtained in the Court of the Subordinate Judge, First Class, at Kheda, a decree against 15 persons (the present opponents and others). That decree directed that the plaintiff, the said applicant, should recover from the defendants personally, as well as from the lands mortgaged by them to the plaintiff, Rs. 7,900 and the costs of the suit. On the 1st of August 1876, the plaintiff made an application for the execution of this decree, and got the lands sold; but the sale was set aside on the ground of irregularities, and an order for a re-sale was made. On the 24th March following, this application was allowed to be withdrawn, at the instance of the plaintiff, who was permitted to make a fresh application.

The plaintiff, thereupon, on the 26th of April 1877, made the present application, in which, besides asking for the principal sum decreed with interest, he prayed that Rs. 110, being the costs of his first application, and Rs. 300, interest on the principal sum up to the date of his second application, should be given to him by

* Appeal No. 2 of 1878 from an order.

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attachment and sale of the mortgaged lands and for the imprisonment of four of the judgment-debtors, two of whom opposed this application.

On the 25th of June 1877, the opponents deposited in Court Rs. 8,936, the full amount demanded by the plaintiff under protest, and objected that the present application was unnecessary and malicious, and that they should not be saddled with the cost of the first application, and they also claimed a deduction of the amount of profit, received by the plaintiff, who had already been put into possession of the mortgaged lands.

The Subordinate Judge allowed both these objections, and directed that, out of the sum deposited, Rs. 460 should be deducted, and the balance of Rs. 8,476 paid to the plaintiff in full satisfaction of his decree. This order was made on the 8th of October 1877, that is, a week after the new Civil Procedure Code (Act X. of 1877) came into operation.

On the 14th of January following, the plaintiff appealed to the High Court, and a notice was issued to the opponents, subject to any objections which might be taken by them, at the hearing as to the admissibility of an appeal, under section 588 of Act X. of 1877, against an order of this kind.

Pándurang Balibhadra for the opponents:—The order objected to, involves a question arising between the parties to the suit in which the decree was passed, and relates to the execution of that decree. It, therefore, falls within section 244 of the Code. Clause (j) of section 588, which allows appeals from orders as distinguished from decrees, enacts an important condition to the admissibility of an appeal from orders, under section 244, viz., that the orders objected to must be of the same nature with appealable orders made in the course of a suit. What these appealable orders are, should be gathered from the other clauses of section 588, which does not refer to orders made upon a determination of the merits of the execution proceedings as in this case.

Nagindás Tulsidás and *Goculdás Káhándás* for the applicant:—The order we object to, is in the nature of a decree, which is explained in section 2 of the Code to mean a formal order of the Court in which the result of the decision of a suit or other judicial

proceeding is embodied. We submit that the proceeding by the Subordinate Judge was clearly a judicial proceeding, the essential characteristics of which are the capability of receiving evidence and passing a judgment upon it. Section 540 gives an appeal from decrees which should be allowed in this case; for otherwise the result would be to exclude appeals from important orders, and allow them from comparatively unimportant ones.

Pándurang Balibhadra in reply :—Where the Legislature has expressed its intention unmistakably, as in this matter, it is not for the Court to reconcile inconsistent enactments. Every order embodying the result of a judicial proceeding cannot be a decree. If that were so, the Legislature need not have taken the trouble to enact section 588 at all, and specify in detail the various appealable orders. Section 540 would have been quite sufficient to carry out their object.

Cur. adv. vult.

The judgment of the Court was delivered by

MELVILL, J.:—This is an application of appeal against an order of the First Class Subordinate Judge of Kheda made subsequently to the date on which the new Code of Civil Procedure came into force, by which the Subordinate Judge determined two questions arising between the parties to a suit, viz., first, the amount of mesne profits which the plaintiff had recovered from certain mortgaged property subsequently to decree, and, secondly, the amount payable on account of the costs of execution. The final order of the Subordinate Judge was that, out of a sum of money deposited by the defendant, Rs. 8,476 should be paid to the plaintiff in full satisfaction of his decree, and the balance restored to the defendant.

Against this order the plaintiff wishes to appeal, and the appeal was admitted provisionally, subject to any objection which the defendant might take to its admissibility under the provisions of the new Code.

After hearing arguments on both sides we have come to the conclusion that no appeal lies in this matter. The Subordinate Judge's order is an order, under section 244, as to questions relating to execution of a decree, and, therefore, under section 588,

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clause (j), is appealable, if it be of the same nature with appealable orders made in the course of a suit. The "appealable orders made in the course of a suit" must be taken to be the orders mentioned in other clauses of section 588 as appealable. They are generally interlocutory orders, not going to the merits of any question arising in the suit. The present order is not of such a nature, and, therefore, no right of appeal can be derived from the provisions of section 588.

But it has been argued that under section 540 an appeal lies from all decrees, and that the definition of the term "decree" in section 2 of the Code is sufficiently wide to include the order of the Subordinate Judge in this case. That definition is as follows:—

"Decree" means the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied.

The term "judicial proceeding" is not defined, and it is, no doubt, susceptible of very wide extension. If the definition contained in the Code of Criminal Procedure were adopted, it would mean "any proceeding in the course of which evidence is or may be taken, or in which any judgment, sentence, or final order, is passed on recorded evidence." Under such a definition most orders made by a civil Court, including many of those specified in section 588, would be decrees, and appealable as such, and, therefore, if such a definition had been intended, no such orders would have been mentioned in section 588, which forms part of a chapter which was evidently intended to deal with orders which are not decrees. We think that, in the definition of the term "decree" the expression, "suit or other judicial proceeding," must, according to a common rule of construction, be understood as meaning a suit or other judicial proceeding of the same nature as a suit. Moreover, the definition limits the term "decree" to a "formal order in which the result of the decision is embodied;" and this indicates that it applies only to those orders which the law requires to be drawn up after a decision has been recorded in a particular formal manner, *i.e.*, to those orders, or their like, which are described as decrees, and of which the form is given in section 206 of the Code. The law requires that such

formal orders shall be drawn up, not only in ordinary suits but also in certain other proceedings which are not instituted as suits, and are not, strictly speaking, suits, though they are numbered and registered as if they were suits, and are investigated in the same manner and with the like power as if they were suits. Such are proceedings in reference to resistance to execution; in regard to which the Code prescribes (section 333) that the order passed shall be in the nature of and shall have the same force as a decree in a suit." Similarly, in the case of agreements to refer to arbitration otherwise than in a suit, in the case of references to arbitration without the intervention of a Court (chapter XXXVII.), and in the case of proceedings on agreement of parties (chapter XXXVIII.), the proceedings are not, strictly speaking, suits; but the law requires that a decree shall be made "in the same way as in an ordinary suit" (sections 522, 526, 531). These may be the "other judicial proceedings" to which the Code refers in the definition of "decree"; although, as such proceedings are to be numbered and registered as suits, the insertion of the words "other judicial proceedings" was, perhaps, hardly necessary, as the word "suit" would have included these. But, however this may be, we feel compelled to the conclusion that orders made in execution, of the nature of that now under consideration, cannot be included in those formal orders in which the decision of the suit or other judicial proceeding is embodied, to which reference is made in the definition of the term "decree".

It may appear that we have entered at unnecessary length into our reasons for refusing to put an obviously forced construction upon a term which has such a well-established meaning as the word "decree". The truth is, that we have been unwilling to reject that construction, except on the strongest ground of necessity, because it affords the only possible means of holding that the Legislature did not intend to deprive parties of the right to appeal against the orders ordinarily made in regard to the execution of decrees. Such orders are of the highest importance, quite as important, in many instances, as the decree itself. A Subordinate Judge may, for example, decide that an application for execution is barred by lapse of time. His reasons may be quite erroneous; yet the decree-holder cannot appeal, and he is

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thus deprived of the whole fruits of his litigation. But such seems to have been the deliberate intention of the Legislature. In the draft Bill published in the *Gazette of India* of the 14th October 1876, section 588 gave a right of appeal against all orders under section 244 as to questions relating to the execution of decrees, and the Select Committee reported (page 1209) that this provision had been advisedly introduced. The words of limitation, viz., "of the same nature with appealable orders made in the course of a suit," were subsequently inserted, and apparently without any republication of the section in its altered form. In the draft Bill, referred to this Court for its opinion, the words above quoted found no place. Considering the great importance of these words, and the havoc which they make of previously existing rights of appeal, we cannot help thinking that, if an opportunity of discussing them had been afforded to the public and the Courts, such arguments might have been advanced as would have induced the Legislature to reconsider them. As it is, we have no choice but to give effect to the declared intention of the Legislature; and we accordingly dismiss this appeal with costs.

Appeal dismissed.

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Before Mr. Justice Melvill and Mr. Justice Kemball.

March 26.

NURSINGDA'S RUGHUNA'THDA'S (PLAINTIFF) v. TULSIRA'M BIN DOULATRA'M (DEFENDANT).*

Code of Civil Procedure (Act X. of 1877), Section 268—Attachment and sale of bonds—Courts of Small Causes.

Under the provisions of section 268 of the Code of Civil Procedure (Act X. of 1877) bonds cannot be sold till the end of six months from the date of attachment.

A Court of Small Causes cannot appoint a receiver. Bonds, therefore, on which recovery will be time-barred before the date on which a sale can legally be made, cannot be made available for satisfaction of the judgment-creditor's debt.

THIS was a reference by Madan Shrikishnaji, Judge of the Court of Small Causes at Puna. He submitted the case with the following remarks:—

* Small Cause Court Reference No. 1 of 1878.