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Costs of this application must be costs in the Regular Appeal, and, together with the other costs of that appeal, should be disposed of on the re-trial by the District Judge in such manner as may be just.

Order accordingly.

APPELLATE CIVIL.

(56)

Before Mr. Justice West and Mr. Justice Pinhey.

April 3. CHINTO JOSHI, APPLICANT, *v.* KRISHNAJI NARAYAN, OPPONENT.*

Civil Procedure Codes, Act VIII of 1859 *and Act X of* 1877—*Execution of a Decree—Appeal.*

Proceedings to execute a decree commenced when the former Code if Civil Procedure (Act VIII of 1859) was in force; but property belonging to the judgment-debtor was sold in pursuance of those proceedings on the 14th of November 1877 after the new Code (Act X of 1877) came into operation. Subsequently, at the instance of the applicant, the Court made an order, setting aside the sale on the ground of irregularity.

Held that this order was governed by the former Code, and was, consequently, not subject to appeal.

THIS was an application for the exercise of the High Court's extraordinary civil jurisdiction.

The material facts of the case are as follows:—

One Phadke obtained a decree against the applicant Chinto, and execution thereof caused certain property belonging to the latter to be sold on the 14th November 1877. By a petition, dated 11th December following, Chinto moved the Court of the Subordinate Judge, (first class,) at Ratnágiri to set aside the sale on the ground of its having been conducted in a manner calculated to cause him substantial injury, inasmuch as no due publicity had been given of the intented day of sale. The Subordinate Judge found this allegation proved, and made an order cancelling the sale. The Judge, on appeal, arrived at a different conclusion on the vidence, and reversed that order.

Shamrav Vithal for the applicant.—The order of the Judge is *ultra vires*, as no appeal lies, under Act VIII of 1859, against an order setting aside a sale. There is no doubt that proceedings for the execution of the decree began while that Code was in force, and the

*Extraordinary Application, No. 89 of 1879.

actual sale as well as the application for setting it aside and the order upon that application are so intimately connected with those proceedings as to form a part and parcel of them. The old Code does not provide an appeal against such an order; the action of the Judge was, therefore, without jurisdiction, and must be annulled.

Manekshah Jehangirshah for the opponent—The new Code came into operation on the 1st of October 1877, and the sale did not take place till more than a month afterwards. Even supposing that the sale was not governed by the provisions of the new Code, yet an application to set it aside was entirely a new and independent step, the sale having been quite completed. Section 588 of the new Code, cl. *(m)*, gives an appeal against orders confirming or setting aside a sale. The order of the Judge was, therefore, right and proper.

The judgment of the Court was delivered by

WEST, J.—The application for execution in this case was made while Act VIII of 1859 was in force. The proceedings under that application would, therefore, according to the provisions of Act I of 1868, be governed by Act VIII of 1859, notwithstanding its repeal and supersession by the new Code (Act X of 1877), which came into operation before effect had been given to the application by actual execution. It is argued, however, by Mr. Manekshah that the application made by the owner of the property sold in execution to set aside the sale being a wholly new step, was not a part of the proceedings governed by Act VIII of 1859. It was, he contends, as having been made after the new law came into operation, subject to the provisions of Act X of 1877. From one point of view, every application not essential or ancillary to the enquiry or the ministerial measures consequent on an initiative application already made to a Court in order to their completion may be regarded as a new proceeding, not a part of a proceeding already instituted. When judicial inquiry has reached its intended close in an adjudication, requiring thenceforward in theory only a ministerial or coercive exercise of authority to give it practical effect, the party who strives by an appeal to unsettle again the legal relation, which in itself has by the act of the Court become settled, may fairly be regarded as instituting

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a new proceeding. Such has been the view of some eminent authorities. But even on that point there have been opinions to the contrary, which are supported by the consideration that the legal pursuit of a remedy, suit, appeal, and second appeal are really but steps in a series of proceedings connected by an intrinsic unity. In the case of applications collateral to a suit during its pendency, incongruities which cannot have been intended, would, in some cases, arise upon the procedure on their being made subject to one Code, while the suit itself was governed by another, and thus, though such an application may in a sense be deemed the institution of a new proceeding, its intimate connection with the old enables that view of its character to prevail over the other as based on a general convenience and congruity, which the legislature is always supposed to aim at. In the present instance we have to deal with the case of a judgment-debtor, who got the sale of his property set aside for irregularity. The proceedings in execution had undoubtedly been begun under the old law. The application to set aside the sale was made after the new law had come into operation. If the application could be regarded as a wholly new proceeding, the new law must govern it; but though in one sense a new proceeding, seeing that the execution could have proceeded to its natural completion without it, it was yet, we think, so intimately connected with the proceedings in execution, that it ought properly to be regarded as a part of those proceedings. The sale was made subject to the old law and no others. The purchaser brought subject to these conditions, and suffered no wrong in having them applied to him. When, therefore, the Subordinate Judge had set aside the sale for irregularity, the right of appeal on the purchaser's part given by the new law did not arise to him, as it was not given by the older one. The District Judge, consequently, had not jurisdiction to entertain the appeal, and his order being set aside, that of the Subordinate Judge must be restored, with costs throughout on the opponent.

Order accordingly.