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ORIGINAL CIVIL.

5 B. 45=5 Ind. Jur. 424.

## ORIGINAL CIVIL.

*Before Sir Charles Sargent, Justice, and Mr. Justice M. Melvill.*

5 B. 45=5 Ind. Jur. 424.

MITHIBAI (*Plaintiff*) *v.* LIMJI NOWROJI BANAJI AND OTHERS (*Defendants*); HARRIVULLUBHDAS CALLIANDAS (*Original Defendant*), *Appellant v.* ARDASAR FRAMJI MOOS (*Receiver and Respondent*).* [3rd December, 1880.]

*Practice—Appeal—Order refusing to remove a Receiver—Civil Procedure Code—Act X of* 1877, *ss.* 2, 244, 503, 540, 588—*Act XXIII of* 1861, *s.* 11.

By a decree in an administration suit, A. was appointed Receiver "to manage the estate." A. died, and by a subsequent order B. was appointed Receiver. One of the defendants in the suit applied to have B. removed from the office of Receiver on the ground of his alleged mismanagement of the estate. The application was refused.

*Held* that the order of refusal was appealable, whether the former Code or the present Code of Civil Procedure was deemed to be applicable, being an order made in respect of a question arising between the parties to a suit relating to the execution of the decree.

[R., 14 C.L.J. 489 (492)=12 Ind. Cas. 745; 17 Ind. Cas. 583=(1912) M.W.N. 1208.]

APPEAL against an order of Bayley, J., dated the 8th October, 1880, refusing an application made by the appellant for the removal of the respondent from the office of Receiver in the suit.

**[46]** This was an administration suit filed by one Mithibai against Limji Nowroji Banaji and others, wherein the plaintiff prayed for the usual relief. The appellant was subsequently made a defendant, being the assignee of the property of one of the original defendants. The case came on for hearing on the 24th February 1872, and on that day a decree was made referring the suit to the Commissioner to take the necessary accounts. By that decree Mr. H. Gamble was "appointed sole Receiver without giving security to manage the said estate."

On Mr. Gamble's death the respondent, Ardasar Framji Moos, was, by order of Court, dated 25th June 1877, appointed Receiver. In September, 1880, a motion was made to the Court, on behalf of the defendant (appellant) Harrivullubhdas Calliandas, for an order that Ardasar Framji Moos might be removed from the office of the Receiver and that some fit and proper person might be appointed to act as Receiver in his stead." This motion was refused on the 8th October, 1880, and Harrivullubhdas Calliandas, thereupon, filed an appeal against the order of refusal.

By agreement of the parties the case now came on for argument of a preliminary point, *viz.*, whether the order of the 8th October, 1880, refusing to remove the Receiver, was appealable.

*Latham* and *Inverarity*, for appellant.—We contend that an appeal lies, whether the order be regarded as made under the former Code of Civil Procedure (Act VIII of 1859) or under the new Code (Act X of 1877). In order to ascertain which Code applies, it is necessary to construe the word "proceedings" in the last clause of s. 3 of the Civil Procedure Code (Act X of 1877). If it is interpreted as referring *in the aggregate* to the various steps taken in a suit subsequently to decree, then this question will be governed by the old Code, inasmuch as the inquiry and taking of

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accounts in the course of which the present matter has arisen, were commenced and pending in the Commissioner's office on the 1st October, 1877; but if each step in this course of the inquiry and taking of account is held to be a separate *proceeding* within the meaning of the word as used in the section, then the point for determination must be decided under the new Code, Act X of 1877.

[47] If the case is governed by the former Code, this order is appealable (1st) under s. 11 of Act XXIII of 1861. This is a question relating to the execution of the decree by which the Receiver was appointed. He was appointed to manage the estate and the application for his removal was based on his alleged mismanagement. (2nd)—This order is expressly appealable under ss. 92, 93, 94, of Act VIII of 1859.

If the case is governed by the new Code, Act X of 1877, this order is also appealable under ss. 2, 244, and 540, the latter of which refers to questions relating to execution of decrees. By s. 2 orders made under s. 244 are decrees and from all decrees an appeal lies under s. 540.

Again, under ss. 503 and 588 of the new Code, such an order as the present is expressly made appealable. There are three classes of orders dealt with in s. 588. *First.*—Orders only appealable when granted, *e.g.*, orders referred to in cls. (1) and (4). In this class there is no appeal if the order is refused. *Second.*—When the order is an order of refusal, *e.g.*, the orders referred to in cls. (20) and (27). In this class there is no appeal if the application be granted. *Third.*—Cases in which an appeal is given whether the order made is one granting or refusing an application, *e.g.*, orders made under cl. (24). The present order comes under the last class.

The Advocate-General (*Hon. J. Marriott*) and *Farran* for the respondents.—Section 588 does not give an appeal from an order refusing to appoint a Receiver. Such an order is not one made under s. 503. Section 492 gives the Court express power to refuse an injunction, and, therefore, an order refusing an injunction is an order made under the section and is appealable under s. 588. Section 244 of Act X of 1877 refers only to final decrees, as is shown by the other sections of the chapter, and there has been no final decree in this suit.

This is not a matter arising in execution of the decree. The decree appointed Mr. Gamble to be Receiver. The respondent was appointed by a separate and subsequent order. Any proceedings against him would be taken under that order, and not under the decree.

## JUDGMENT.

[48] SARGENT, J.—We think an appeal lies from this order as being an order upon a question arising between the parties to a suit relating to the execution of a decree. Adopting that view of the case, it is unnecessary for us to decide whether the point is one to be dealt with under the former Code or under the present Code of Civil Procedure, inasmuch as both of them contain provisions which authorize an appeal from orders of that nature. Here the Receiver was appointed by the decree to manage the estate. The management of the estate, therefore, was a matter relating to the execution of the decree, and the present question between the parties is as to whether the estate is being properly managed by the Receiver in compliance with the terms of that decree. It has been argued that the management directed by the decree was management by Mr. Gamble and not by the respondent; but we think that the subsequent order under which the

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respondent was appointed Receiver must be regarded as incorporated into the decree in substitution of that part of it by which Mr. Gamble was originally appointed.

We are of opinion, therefore, that this order is appelable under either Code of Civil Procedure, the question between appellant and the respondent being a question between parties to the suit relating to the execution of the decree.

Attorneys for the appellant.—Messrs. *Craigie, Lynch* and *Owen.*

Attorneys for the respondent.—Messrs. *Tobin* and *Roughton.*

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**5 B.48 (P.C.)=7 I.A. 181=4 Sar. P.C.J. 173=3 Suth. P.C.J. 778=3 Shome L.R. 217=4 Ind. Jur. 472=7 C.L.R. 320.**

## PRIVY COUNCIL.

PRESENT:

*Sir J. W. Colvile, Sir B. Peacock, Sir. M. E. Smith, and Sir R. P. Collier.*

[*On appeal from the High Court, Bombay.*]

LAKSHMAN DADA NAIK (*Original Defendant*), *Appellant v.* RAMCHANDRA DADA NAIK (*Original Plaintiff*), *Respondent.*

[6th, 7th and 11th May, 1880.]

*Hindu Law—Mitakshara—Alienability by a co-parcener of his undivided share of ancestral estate—Will—Limitaton Act XIV of* 1859—*s.* 1, *cl.* 13—Res judicata—*Act VIII of* 1859, *s.* 2.

A Hindu of the Southern Maratha Country, having two sons undivided from him, died in 1871 leaving a will disposing of ancestral estate substantially in favour of his second son excluding the elder who claimed his share in this [49] suit. In 1861, a suit brought by this elder son against his father and brother to obtain a declaration of his right to a partition of the ancestral estate was dismissed on the ground that he had no right in his father's lifetime to compel a partition of moveables; and that as to the immoveable, the claim failed because they were situated beyond the jurisdiction of the Court.

*Held*, first that the suit was not barred under Act VIII of 1859, s. 2; the proceedings of 1861 not having amounted to an adjudication between the brothers as to their rights in the estate arising on their father's death.

Secondly: that the suit was not barred under the Limitation Act XIV of 1859, s. 1, cl. 13. As to the immoveables; setting aside the fact that the plaintiff had remained in possession of one of the houses of the family which had been treated by the father as continuing to be part of the joint property, the decision of 1861, based as to the immoveables in the absence of jurisdiction to declare partition of them, caused this part of the claim to fall under the provisions of Act XIV of 1859, s. 14. As to the moveables; assuming that they could, on the question of limitation, be treated as distinct from the moveable, and that no payment had been made within twelve years before this suit by the ancestral banking firm to the plaintiff, the adjudication of 1861, whether in law correct or incorrect, had been that the elder son could not assert his rights in the movables until his father's death. The defendant in this suit, who had taken the benefit of that judgment, could not now insist that it did not suspend the running of limitation on the ground that his brothers might have appealed from it, if erroneous.

So far, also, as the father's interest was concerned, the succession only opened on his death.

Thirdly; it having been contended that, as a father and his sons were during his life co-parceners in the family estate, one of such co-parceners being able, according to the decisions of the Courts, by act *inter vivos* to make an alienation of his undivided share binding on the others, it followed that the father might dispose by will of his one-third share.