ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Melvill.

NAVIVAHOO (ORIGINAL DEFENDANT), APPELLANT, *v.* NAROTAMDAS CANDAS (ORIGINAL PLAINTIFF), RESPONDENT.* 1882 *September* 38.

Contempt—Committal for contempt—Jurisdiction of High Courts in India—Power to commit for contempt—Civil Procedure Code (Act XIV of 1882), *Sections* 136 *and* 591—*Right of appeal from order to commit for contempt.*

The High Courts in India possess the power of enforcing obedience to their orders by attachment for contempt.

An order for attachment for contempt is not an order in exercise of the High Court's civil jurisdiction, and, therefore, does not come within the provision of section 591 of the Civil Procedure Code. Contempts are in the nature of offences, and, therefore, under section 15 of the Letters Patent, 1865, an appeal lies from an order of committal for contempt.

In dealing with an appeal from such an order the Appellate Court will not go behind the order the disobedience to which constitutes the contempt.

APPEAL against an order made by Bayley, J., on 14th August, 1882, making absolute a *rule nisi* dated 9th February, 1882, calling on the defendant, Navivahoo, to show cause why a writ of attachment should not issue against her for contempt committed by her in disobeying the order of the Court made on the 23rd December, 1881, directing her to give inspection of books to the plaintiff.

By a trust deed executed on the 16th December, 1863, one Candas Narrandas (husband of the defendant, Navivahoo) conveyed certain property to trustees upon trust to invest the dividends, interest and profits thereof during his life and after his death; to hold the said trust fund upon trust (*inter alia*) out of the income, if no son or sons then living had attained the age of 16; to pay to his wife, Goolal, the monthly sum of Rs. 1,000 to be applied by her for the maintenance and education of the children of the said Candas Narrandas; and if at the death of the said Candas Narrandas there should be living a son of the age of 16, or when, and so soon as any son should attain that age, then to pay over the whole of such income to such son for life, &c., &c.

The said Goolal died shortly after the execution of the said deed, leaving the plaintiff, her son, an infant, her surviving. The

* Suit No. 448 of 1880.

1882

NAVIVAHOO v. NAROTAMDAS CANDAS.

settlor (Candas Narrandas) in 1866 married the first defendant, Navivahoo.

In 1871 Navivahoo filed a suit (No. 500 of 1871) describing herself as guardian of the plaintiff and of one Mangaldas, her son, against the then trustees, in which she prayed that the Court might fix a proper monthly sum to be allowed for the maintenance and education of the plaintiff and the said Mangaldas Candas, and that the said trustees might be ordered to pay the same out of the income of the trust premises to her. She alleged in the plaint that the said Candas Narrandas had no property to maintain and educate the said two children, and that there were no other funds available for that purpose.

On the 15th August, 1871, a decree by consent was made in the said suit in terms of the prayer of the plaint, and the trustees were ordered to pay to Navivahoo out of the income of the said trust funds the sum of Rs. 600 per month for the maintenance and education of the plaintiff and the said Mangaldas Candas. By an order in the suit made on the 19th December, 1874, the said allowance was reduced to Rs. 500 per month.

The present suit was filed against Navivahoo and the trustees by the plaintiff, who had recently attained his majority, to have the said decree and the subsequent order of the 19th December, 1874, declared to be null and void, and that the same might be set aside and execution thereof stayed; and the plaintiff also prayed that the defendants might be ordered to make good all monies paid out or recovered by them out of the said trust premises contrary to the provisions of the said trust indenture, and that Navivahoo might be ordered to account for the application of the monies received by her from the trustees.

The plaintiff alleged that the Court had been deceived and misled into passing the decree in Suit No. 500 of 1871, and, further, that Navivahoo had not applied the monies received by her from the trustees to the maintenance and education of the plaintiff.

On the 18th July the plaintiff obtained Judge's summons for the full and general inspection of all books, papers and documents

in her possession or control, and on the 23rd December, 1880, this summons was made absolute.

On the 9th February, 1882, a rule was obtained calling upon Navivahoo to show cause why an attachment should not issue against her for contempt of Court committed by her in disobeying the order of the 23rd December, 1881, and on the 14th August, 1882, this summons was made absolute and a writ of attachment for contempt was ordered to be issued against her.

From this order the defendant appealed.

The following were the grounds of appeal :—

"That the said learned Judge had no jurisdiction or power to make the said order.

"2. That the said learned Judge was in error in holding that any contempt of the said order, dated the 23rd December, 1881, had been committed.

"3. That the said learned Judge should have held that the defendant, Navivahoo, had produced and given inspection of all the books, papers and documents in her possession, power or control, relating to the subject-matter of this suit.

"4. That the said learned Judge should have held that the defendant, Navivahoo, had produced all the rough cash books in her possession, power or control, and that the defendant, Navivahoo, had not in her possession, power or control any fair cash books, ledgers or Bheta Khata Vahis.

"5. That the said learned Judge should not have made the said rule *nisi* absolute, but on the contrary should have discharged the said rule with costs.

"6. That the said learned Judge ought not, by the said order, dated 23rd December, 1881, to have ordered the defendant, Navivahoo, to produce and give inspection of the rough cash books for the Samvat years 1930-31 and 33, or fair cash books, Betta Khata Vahis and ledgers for the years 1926 to 1936.

"7. That the said learned Judge ought to have held that the said rough cash books were missing, and that the said cash books, Betta Khata Vahis and ledgers had not been kept.

1882

NAVIVAHOO v. NAROTAMDAS CANDAS.

"8. That the said order, dated the 23rd December, 1881, was against the weight of evidence."

Hon. *B. Lang* (Acting Advocate General) for the appellant.

Inverarity for the respondent.

Inverarity raised a preliminary point:—There is no appeal from this order. The application for inspection was made under section 134 of the Civil Procedure Code (Act X of 1877). That section contemplates the case of a party not admitting the possession of the documents of which inspection is sought. Bayley, J., however, decided that the defendant, Navivahoo, had possession of the books, &c., which we desired to inspect, and he made the order of the 23rd December, 1881. That order the defendant has disobeyed, and the order of the 14th August, 1882, has been made for her commitment. The grounds of appeal, Nos. 3, 4, 6, 7 and 8, are directed against the order of the 23rd December, 1881, and do not touch the order of attachment of the 14th August, 1882. The questions raised by them cannot be raised now, for two reasons: 1. There is no appeal given by the Code against any order made under Chapter X of the Code. 2. They are barred by limitation.

Next, we say, there is no appeal from the order of committal of the 14th August, 1882, against which the remaining grounds of appeal (Nos. 1, 2, 5) are directed. That order is clearly not a decree within the meaning of Section 2 of the Code. It is an *order* and, therefore, by section 591 there is no appeal from it, unless it is one of the appealable orders specified in section 588. This order, however, does not belong to any of the classes mentioned in that section. It does not fall under clause 29, for the power of the High Court to commit for contempt is not given by the Code but by Charter: *Martin* v. *Lawrence* (1). In England an order committing for contempt or refusing to commit for contempt is appealable; but there is nothing in the English Judicature Act corresponding to sections 588 and 591 of the Civil Procedure Code. Section 591 does not merely preclude an appeal from any order made under the Code but from any order made by the Court "in the exercise of its original jurisdiction."

(1) I. L. R., 4 Cal., 655.

This order, although no doubt involving penal consequences, was made under the original civil jurisdiction of the Court. If this were to be held an order made under the criminal jurisdiction of the Court so as to exempt it from the provisions of section 591, there might be an appeal from every order. A person would only have to disobey it, and then upon the issue of an order of commitment an appeal would lie.

Clause 29 of section 588 would apply to an order made under section 593, so also to an order under section 136. Section 136 appears to contemplate punishment by a Civil Court. The words used are not "shall be charged and tried", but "shall be deemed guilty". It would be useless for a Civil Court to "deem guilty" if it could not punish. But section 493 clearly shows that an order of commitment for contempt may be made by a Civil Court. Even, however, assuming such an order to be made in the exercise of the Court's original criminal jurisdiction and that an application to commit for contempt is in the nature of a criminal trial, there can be no appeal from such an order under clause 15 of the Letters Patent.

[SARGENT, C.J.—Can such an order as this "affect the decision of the case" under section 591 ?]

It might do so, for by section 136 a party in contempt is liable to have his defence struck out.

Again, we contend that, assuming an appeal lies, the only points for the Appellate Court are those raised by Nos. 1 and 2 of the grounds of appeal. In considering questions of contempt the Court cannot consider the merits of the order which has been disobeyed : *Sonabai* v. *Ahmedbhoy Hubibbhoy* (1) ; *Ressell* v. *East Anglian Railway Company*(2).

The following cases were also referred to in argument :— *Hassonbhoy* v. *Cowasji Jehangir Jussawala* (3) ; *Lechmere Charlton's Case* (4); *Wellesley's Case* (5) ; *Onslow's and Whalley's Case* (6).

(1) 9 Bom. H. C. Rep. *per* Green, J., at p. 412.

(2) 3 M. & G. 104 at p. 117 *per* Truro, L.J., at p. 124.

(3) *Supra*, page 1.

(4) 2 My. & Cr. 316.

(5) 2 Russ. & M. 642.

(6) L. R. 9 Q. B. 219.

1882

NAVIVAHOO v. NAROTAM-DAS CANDAS.

Hon. *B. Lang* (Acting Advocate General) and *Telang* for the appellant.—We contend that the Court has no power to make an order to commit for contempt, and, 2nd, if it has, then that such an order is appealable and has been improperly made in this case.

As to the first point, we say it is plain the Legislature did not intend to confer the power. The Code "consolidated and amended" the procedure of these Courts as stated in the preamble, and, since it was passed, the Courts have only the power allowed by it. The power they previously had, was taken away: Maxwell on Statutes, pp. 146, 148, 150. If that is not so, the High Court has the power to imprison for life for contempt, while the other Courts in India can only imprison for one month (see section 136 of the Civil Procedure Code and section 188 of the Penal Code).

The Civil Procedure Code of 1859 applied primarily only to Courts in the Mofussil and was applied to High Courts by subsequent rules, but the Code of 1877 applied to all Courts (see section 638) and was intended to lay down a uniform practice in all.

In England an order for inspection is appealable. It is not so in India. It is impossible that the Legislature could have intended to allow a single Judge so large a power in cases where there is no appeal: *Martin* v. *Lawrence* (1); *Reg.* v. *Ramdas* (2); *Jarmain* v. *Chatterton* (3). Compare also section 136 with the English Rules and Orders, Order XXXI, Rule 20. There is no precedent for an order of commitment by the Court of Chancery in such a case as this.

But, even if a Judge has power to make this order, there is an appeal. Section 591, which limits the right of appeal, only applies to orders made under the Code. If it extends to orders not made under the Code then there is no appeal (*e.g.*) from decisions in companies' cases. That has never been suggested. Clause 29 of section 588 gives an appeal in cases of injunction where imprisonment for six months is the punishment. It could

(1) I. L. R. 4 Calc. 655. (2) 12 Bom. H. C. Rep. 217 at p. 221.
(3) L. R. 20 Ch. Div. 493.

not have been intended to take it away in cases of contempt where the imprisonment may be for life. The Legislature clearly either did not intend the Courts to have the power to commit for contempt at all, or it intended such orders should not be included in section 591 of the Code. Section 591 should be read as if the words "made under this Code" followed the word "order".

[SARGENT, C.J.—But the Legislature has inserted the words "under this Code" in some sections, which seems to show that their omission from this section was intentional.]

The power to commit ought not to be exercised until the Court has exercised the special power given to it to enforce its order by section 136. The order for committal is only to be made in the last resort: *In re Clements*(1). It is in the nature of a criminal proceeding: Hawkin's Pleas of the Crown, Vol. II, p. 207, note.

We submit we have a right to go into the merits of the original order: *Cook* v. *Tanswell* (2); *Hurd* v. *Partington* (3).

[MELVILL, J., referred to section 622 of the Code.]

Inverarity in reply.—This Court cannot deal with the question of the jurisdiction of the Judge to make the order in question, unless it decides that the order is appealable. Section 622 of the Code does not apply to appeals. It is included in chapter XLVI of the Code which deals with the question of reference and revision. Nor does it apply to the High Court dealing with an order made by one of its own divisions, but to orders made by subordinate Courts. Further, it only applies where the "case (*i. e.* the suit) has been decided."

October 13th. SARGENT, C.J.—This is an appeal from an order made on the 14th May, 1882, by Mr. Justice Bayley, committing the appellant to prison for contempt of Court in not obeying an order of 23rd December, 1881, by which she was ordered to produce certain cash books and ledgers for the inspection of the respondent. A preliminary objection was taken that an appeal would not lie against the order. It was said that section 591 of the Civil Procedure Code (Act X) of 1877 provides that no appeal should

(1) 46 L. J. Ch. at p. 383. (2) 8 Taunt, 131.
(3) 12 Price 689.

1882

NAVIVAHOO v. NAROTAM-DAS CANDAS.

lie from any order passed by any Court in the exercise of its original jurisdiction except as provided in chapter XLIII and that the order in question is not to be found amongst those enumerated in section 588 from which an appeal is given. This would be true if the order in question had been passed in the exercise of its original *civil* jurisdiction; for that, we apprehend, must be the meaning of original jurisdiction in a Code of Civil Procedure. Contempts, however, are in the nature of an offence; and attachment, as Blackstone in his Commentaries says, is the immemorial method used by European Courts of punishing such offences. In Book VI, chapter XV, he enumerates the different forms of contempts, amongst which he mentions "those committed by parties to any suit or proceeding before the Court by disobedience to any rule or order made in the progress of a cause." An order of attachment for contempt cannot, therefore, be properly said to be an order in exercise of *civil* jurisdiction, and we do not think it can be regarded as being in the contemplation of the section in question. There is nothing, therefore, in the Civil Procedure Code which takes away the right of appeal given by section 15 of the Letters Patent which provides that an appeal shall lie in the case of every judgment by a single Judge of the High Court not being a sentence or order passed in a criminal trial.

As to the order of commitment it was contended for the appellant that it was made without jurisdiction, the power of committal for contempt having been taken away by the Civil Procedure Code of 1882 in this particular form of contempt. The question as to the jurisdiction of the High Court to commit for contempt came before the High Court of Calcutta in *Martin* v. *Lawrence* (1), where the plaintiff was ordered by the Court to pay a sum of money in an administration suit, and not having complied with the order, was committed for contempt. Garth, C.J., and White, J., held that the jurisdiction of the Court to commit for contempt in the particular instance was neither taken away or affected by the new Code of Civil Procedure. It was said, however, that the power of the High Court to commit for disobedience of any order under chapter X of the Civil Procedure Code as a contempt of Court was impliedly taken away by the express provisions contained

(1) I. L. R. 4 Calc. 655.

in section 136. It is a well-established rule of construction of Acts of Parliament in England that the jurisdiction of superior Courts is not to be deemed to have been taken away except by express words or clear implication : Maxwell on the Interpretation of Statutes, p. 107. And as all the high powers, which are the distinguishing marks of the superior Courts in England, were vested by Royal Charter in the Supreme Courts of India and subsequently in the present High Courts, the same rule of construction may be applied with equal propriety in determining whether those powers have been taken away by subsequent legislation.

Now, section 136 of the Civil Procedure Code provides that if a party fails to comply with any order under chapter X, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out and to be placed in the same position as if he had not appeared or answered ; and, lastly, that the party so failing to comply with the order shall also be deemed guilty of an offence under section 188 of the Indian Penal Code. It was contended that this last clause, which provides for the party's disobedience being treated as a criminal offence, impliedly excludes the summary power of punishing it as a contempt of Court. We cannot adopt that view of the section.

In the first place it appears to us to be not unreasonable to assume that if there had been any intention on the part of the Legislature to interfere with the very important and extensive powers of the High Courts of enforcing obedience of their orders by process of contempt, it would have been effected by express words and not left to be implied. Secondly, we think that there is no sufficient ground for such implication to be found in the section itself, and that the state of the law as regarded the Mofussil Courts before the new Civil Procedure Code came into force affords in itself an adequate explanation of the introduction of the provision in question without assuming any intention on the part of the Legislature to interfere with the jurisdiction of the High Courts in matters of contempt. Under the old Civil Procedure Code (Act VIII) of 1859 the power which the Mofussil Courts possessed of dealing with an act of disobedience,

1882

NAVIVAHOO v. NAROTAMDAS CANDAS.

such as the one in question, was given them by section 170 of that Code, which provided that the Court might pass judgment against the party so failing or refusing to produce the document or make such order in relation to the suit as the Court might think proper in the circumstances of the case. Under section 435 of the Criminal Procedure Code (Act X of 1872) the Court could also, where the offence was committed in its presence, summarily convict under section 175 of the Penal Code, which makes the omission to produce a document before a public servant by a person legally bound to produce such document an offence, and could sentence the offender to a fine not exceeding Rs. 200 and in default of payment send him to the civil jail for a month, unless the fine was sooner paid.

It is plain that section 175 of the Penal Code would not apply to many cases of non-compliance with orders under chapter X of the Civil Procedure Code (Act XIV) of 1882, which deals comprehensively with all questions relating to discovery, inspection and production of documents; and the object of the provision in section 136 of the Civil Procedure Code of 1882 would seem to be to provide generally for all cases of non-compliance with orders under chapter X of the Code being regarded as an offence by enacting that they shall be deemed to be offences under section 188 of the Penal Code which embraces all acts of disobedience to an order duly promulgated by a public servant.

We think that this view of the law can leave no reasonable doubt that the object the framers of the section had in view was exclusively to provide the Courts of the Mofussil with a remedy in all cases of disobedience of orders under chapter X of the Civil Procedure Code analogous to the one which they already possessed in the particular case contemplated by section 170 of the Civil Procedure Code of 1859.

Lastly, the very limited nature of the powers given by section 136 forbids this inference of any intention to take away the summary and unlimited power of attachment which the High Courts had possessed up to the passing of the Code; for it is to be remarked that not only is the period of punishment limited to one month, but as section 480 of the Criminal Procedure Code (Act X of 1882 does not apply to offences under section 188

1882

NAVIVAHOO v. NAROTAMDAS CANDAS.

the Penal Code, the offence contemplated by section 136 of the Civil Procedure Code cannot be dealt with summarily by the Civil Court, but will have to be tried under the general provisions of the Criminal Procedure Code.

As to the merits of the order of commitment, we are unable to find any authority for going behind the order the disobedience to which constitues the contempt. In the present case the appellant relies entirely upon the impropriety of that order, and upon the same grounds as she urged against its being made, and not upon any circumstances which might have supervened and have prevented her fulfilling it. If we were to hold otherwise, we should be virtually giving an appeal against the order of production of documents—an order which is not to be found amongst those enumerated in section 588. It may be said that an appeal against the order of commitment will, under those circumstances, be, as a rule, of little value; but that cannot, we think, be a reason for departing from the ordinary practice, however much it may be for exercising extreme caution in making orders of the nature of that appealed against.

Appeal dismissed with costs.

Attorneys for appellant.—Messrs. *Cleveland, Little and Nicholson.*

Attorneys for the respondent.—Messrs. *Ardesir and Hormasji.*

ORIGINAL CIVIL.

Before Mr. Justice Latham.

IN THE MATTER OF COWASJI BERAMJI LILAOOVALA, AN ALLEGED LUNATIC.

1882
October 2.

Lunacy—Act XXXIV of 1858, *Section* 1—*Unsound mind.*

The term "unsound mind" in section 1 of Act XXXIV of 1858 comprehends imbecility, whether congenital or arising from old age, as well as lunacy or mental alienation resulting from disease.

IN this case a petition was presented to the Court by Bezonji Cursetji Lilaoovala and Jamsetji Cursetji Lilaoovala, cousins of the alleged lunatic, praying that the Court would appoint some fit