

her home had the possibility of this suit in his mind, and yet he did not give her the option of staying for it. I think he is, under the circumstances, bound to offer to bring her back, in order that she may make her defence in the best way. The case in England cannot come on till November, but it may then be heard. I cannot postpone the Indian suit till after that date, as that would virtually be granting the stay which I say ought not to be granted. But I do not think the petitioner will be very much aggrieved if I fix a date which will enable the lady to come out here, and to escape the violence of the monsoon for herself and her child. The suit will be set down peremptorily on the 15th September, first on the list. I think the petitioner should pay the expenses of the lady's voyage.

Attorneys for petitioner :—Messrs. *Craigie, Lynch and Owen.*

Attorneys for respondent :—Messrs. *Hore, Conroy and Brown.*

Attorney for co-respondent :—Mr. *A. F. Turner.*

1886.

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THORNTON.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

NINGA'PPA', APPLICANT, v. GANGA'WA', OPPONENT.*

Civil Procedure Code (Act XIV of 1882), Secs. 102, 103, 588, 647—Appeal from an order refusing to set aside an order under section 102 dismissing an application under section 311.

1885.
November 26.

Section 647 of the Code of Civil Procedure (Act XIV of 1882), when read with clause (8) of section 588, does not give a right of appeal to a judgment-debtor, whose application to set aside a sale of his property has been dismissed under section 102, and whose application to set the dismissal aside has been refused under section 103.

Section 647 is not intended to confer any rights of appeal not expressly given elsewhere by the Code.

THIS was an application, under the extraordinary jurisdiction of the High Court, against the order of J. L. Johnston, Acting Judge of Dhárwár, in Appeal No. 26 of 1884.

The applicant purchased certain property belonging to the opponent Gangáwá at a Court sale held in execution of a decree

* Application under Extraordinary Jurisdiction, No. 97 of 1885.

1886.

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against the latter. Gangáwá applied, under section 311 of the Civil Procedure Code (Act XIV of 1882), to have the sale set aside, on the ground of material irregularity. The Subordinate Judge dismissed her application for default of appearance on the 24th July, 1884, under section 102 of the Civil Procedure Code (XIV of 1882). Subsequently Gangáwá applied, under section 103, to set aside the order of dismissal. The Subordinate Judge rejected this application, no sufficient cause being shown for her failure to appear on the 24th July, 1884. Gangáwá then appealed to the District Judge, who held that he had jurisdiction to hear the appeal under section 588, clause 8. On the merits, he reversed the order of the Subordinate Judge, and directed him to dispose of the application of the 24th July, 1884. Thereupon Ningáppá applied to the High Court, under its extraordinary jurisdiction, on the ground that the District Court had no jurisdiction to hear the appeal.

Ganesh Rámchandra Kírkoskar for applicant.

V. Gopál Bhandárkar for opponent.

BIRDWOOD, J. :—We are of opinion that section 647 of the Code of Civil Procedure (XIV of 1882), when read with clause (8) of section 588, does not give a right of appeal to a judgment-debtor, whose application to set aside a sale of his property has been dismissed under section 102, and whose application to set the dismissal aside has been refused under section 103. The effect of section 647 is, no doubt, to make the provisions of sections 102 and 103 applicable to a proceeding taken under section 311, but an order rejecting an application made under section 103, in such a proceeding, is not an order rejecting an application for an order to set aside "the dismissal of a suit," from which an appeal is provided by clause (8) of section 588. We do not think that section 647 is intended to confer any rights of appeal not expressly given elsewhere by the Code. Its object is rather to apply to proceedings, other than suits and appeals, "the procedure, that is, the mode of trial and the procedure incidental and ancillary thereto," which the Code provides for suits and appeals generally—*Hureenath Koondoo v. Modhoo Soodun Saha*⁽¹⁾.

(1) 19 Calc. W. R. Civ. Rul., 122.

The order of the District Judge, in appeal, setting aside the Subordinate Judge's order, dismissing opponent's application under section 103, is annulled; and the Subordinate Judge's order is restored. Costs on the opponent.

1885.

NENGÁPPÁ
v.
GANGÁWÁ.

Order of the Appellate Court reversed.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

SHIREKULI TIMA'PA' HEGDA', (ORIGINAL PLAINTIFF), APPELLANT, v.
MAHA'BLYA AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

1886.

March 9.

Penalty—Consent decree.

A consent decree provided that the defendant should retain possession of certain land in perpetuity on payment of a fixed annual rent to the plaintiff, but that the plaintiff might re-enter in case the defendant failed to pay the rent. The rent was not paid, and the transferee of the plaintiff's interest under the decree sued for possession. The defendant contended that the above clause in the decree was a penal stipulation which the Court would not enforce.

Held, that the doctrine of penalties was not applicable to stipulations contained in decrees, and that the plaintiff was entitled to recover.

SECOND appeal from the decision of Satyendranáth Tagore, District Judge of Kánara, confirming the decree of Ráv Sáheb Vishvanáth Vaikunth Wág, Subordinate Judge at Sirsi.

This action was instituted by plaintiff to recover possession of certain land, together with two years' arrears of rent. Plaintiff alleged that in a partition-suit brought by one Venkápá against the third defendant's father and others, a decree was passed by consent, whereby the father of the third defendant was allowed to retain possession of the lands now sued for, on condition of paying a fixed annual rent to Venkápá in perpetuity. The decree contained a stipulation that the plaintiff in that suit might re-enter in case the land were alienated, or in case the tenant failed to pay the rent. Plaintiff in the present suit stated that he had purchased the decree from one Sheshgiri, to whom it had been transferred by Venkápá, and he claimed to recover

* Second Appeal, No. 133 of 1884.