

APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and
Mr. Justice Nánábhái Haridás.*

SAKHA'RA'M VITHAL, (ORIGINAL AUCTION-PURCHASER), APPELLANT, *v.*
BHIKU DAYA'RA'M AND ANOTHER, (ORIGINAL PLAINTIFF AND DEFEND-
ANT), RESPONDENTS.*

1887.
March 22.

*Appeal—Civil Procedure Code (Act XIV of 1882), Secs. 312 and 588, Cl. 16—
Order setting aside a sale, appeal from.*

An appeal does not lie from an order, setting aside a sale, passed under section 312, paragraph 2 of the Civil Procedure Code (Act XIV of 1882).

THIS was a second appeal from an order passed by M. B. Baker, District Judge of Násik.

A decree-holder presented an application to set aside a sale held in execution of his decree. The appellant, who was the auction-purchaser at the sale, opposed the application, but an order setting the sale aside was nevertheless made by the Subordinate Judge. From this order the appellant preferred an appeal to the District Judge, who rejected it. The following is a passage from his judgment:—

“In this case, the decree-holder presented an application to set aside a sale, and obtained an order in his favour. Against that order the auction-purchaser has appealed. Appeals against orders passed under the first paragraph of section 312, Civil Procedure Code (Act XIV of 1882), lie under section 589 to the High Court only. It would seem from section 588, clause (16), that no appeal lies from orders passed under the second paragraph of section 312. It has been argued that the order is a decree within the meaning of section 2, as being a matter between the parties within the meaning of section 244. I am of opinion that the order cannot come within section 244; for the auction-purchaser, was not a party to the suit, and cannot be regarded as a representative of the parties. If any appeal lies at all, it will lie to the High Court, and not to the District Court. The petition is, therefore, returned.”

From this order the appellant appealed to the High Court.

* Second Appeal, No. 634 of 1885.

1887.

SAKHARÁM
VITHAL
v.
BHIKU
DAYÁBÁM.

Shivráam Vithal Bhandárkar for the appellant:—There is no remedy by a separate suit, as the question in this case should be determined in execution proceeding. An auction-purchaser should be considered a representative of a party, and an order passed against him falls within section 244 of the Civil Procedure Code (Act XIV) of 1882—*Basti Ram v. Fattu*⁽¹⁾.

Mahádev Chinnúji A'pte, contra:—An auction-purchaser is not a party to a suit, nor a representative of the parties. By the former Code, (Act X. of 1877), an appeal was expressly given from an order under section 312 of the Code; but by the amending Act XII of 1879 that appeal was withdrawn, and under the present Code no appeal lies from the order made in this case. Section 312 of the Code is the same in language as it was in the Act of 1877; but clause (n) of section 588, which gives appeals from certain specified orders, differs in that it omits to mention the second clause of section 312. An appeal from an order of confirmation of sale lies to the High Court; and, supposing there is an appeal from order setting aside a sale, it lies to the District Court. So that appeals under one and the same section lie to different Courts. That could not be intended. A purchaser is not a representative either of the debtor or creditor when he claims against both. He is a mere stranger. This matter does not come under section 244.

SARGENT, C. J.:—The question which arises in this case is, whether, under the Civil Procedure Code as amended by the Act of 1879, an appeal lies from the present order. The Code of 1877, before the amendment, expressly gave an appeal from such an order; but from the subsequent amended Act of 1879, the second clause of section 312 has been omitted from section 588, which gives appeals from certain specified orders.

Section 589 provides that appeals from orders mentioned in clauses 15, 16 and 17 of section 588 shall lie to the High Court and from those mentioned in the remaining clauses to the Court to which ordinarily appeals lie. Clause 16 in distinct words gives an appeal under the "first part of section 312." It has been contended that such an order should be regarded as a decree,

as defined by section 2, and contemplated by section 244. Were we to consider it as a decree within the purview of section 244 an appeal from it will lie to the District Court, and the result would be to have appeals from under one and the same section to two different tribunals. We are, therefore, of opinion that the omission of clause 2 of section 312 from the amending Act of 1879 was intentional on the part of the Legislature, and that the appeal given under the Code of 1877 has been withdrawn by the amending Act. We, therefore, dismiss the appeal, leaving the appellant to whatever further course he may be advised to take, and confirm the order of the lower Court with costs.

1887.

SAKHARAM
VITHAL
&
BHIKU
DAYARAM.

APPELLATE CIVIL.

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

CHHOTIRAM, (ORIGINAL DEFENDANT), APPELLANT, *v.* NA'RA'YANDA'S,
(ORIGINAL PLAINTIFF), RESPONDENT.*

1887.

March 23.

Hindu law—Joint family—Manager—Sale of family property by manager when binding on an adult member of family absent at time of sale—Consent to such sale.

B. and C. were half-brothers and members of an undivided family. C. left his native place, and, in his absence, B. carried on the family business, and managed the family affairs. In order to raise money for the business and to provide for the marriage expenses of C.'s sisters, B. sold to the plaintiff a house which was part of the family property. On B.'s death, C. returned to his village, and refused to give up possession of the house to the plaintiff, who, accordingly, filed this suit. It was contended that B. could not sell the house so as to bind C. without his express assent.

Held, confirming the decree of the lower Appellate Court, that the sale was binding on C., who under the circumstances must be presumed to have intended that B. should continue as *de jure* and *de facto* manager to exercise such powers as the family necessities required.

THIS was a second appeal from a decision of J. B. Alcock, Assistant Judge of Khándesh.

Baldev and Chhotirám were half-brothers and members of an undivided Hindu family. Chhotirám while still a minor went away from his native place, and he remained absent after he had come of age. In his absence Baldev carried on the family business and managed the family affairs. On the 6th

* Second Appeal, No. 340 of 1884.