

decision in the former suit between Gopal, through whom the plaintiff claims, and Govind, through whom the defendant claims, was conclusive between the parties as to the insufficiency of the stamp, it having been decided in that suit that the document was insufficiently stamped. The Judge says that in the present case no question arises as to the admissibility of the document, and that the only question is as to its validity. It having been found in the former case to have been insufficiently stamped under Reg. XVIII of 1827, and that decision being, in his opinion *res judicata*, the document is, he thinks, absolutely ineffectual, and must be put out of consideration. He relies on the decision of this Court in *Girdhar Nagjishet v. Ganpat Moroba*. (1) Certainly under s. 10 of the Regulation no document requiring a stamp thereunder was valid unless duly stamped, and under Act XXXVI of 1860, which repealed the Regulation and under subsequent Stamp Acts passed before Act I of 1879 became law, the provisions of s. 10 of the Regulation still continued to apply to instruments executed while the [496] Regulation was in force. But a change in the law seems to have been made by Act I of 1879, which by giving in s. 3, cl. 5, a wider meaning to the word "chargeable," as used in the Act, than had been given to it in any of the prior Acts, brought within the scope of s. 34 all instruments to which otherwise the provision in s. 10 of the Regulation of 1827, to which we have referred, would have been applicable. There can be no question that s. 34 of Act I of 1879 applies to all instruments whenever executed, and it must be held to override the special provision of s. 10 of the Regulation as regards the instrument now in dispute, if it be assumed for the moment that it is not sufficiently stamped. That instrument having been admitted by the Subordinate Judge as duly stamped under the Regulation, it ought to have been held under cl. 3 of s. 34 of Act I of 1879 to have been duly stamped when it came under the consideration of the appellate Court. If that Court considered it to be insufficiently stamped, it could only question the decision of the Subordinate Judge under s. 50 of the Act. For the purposes of the appeal, it was bound to deal with it as duly stamped, and that being so, no question of its validity under the Regulation could arise. We must, therefore, reverse the decision of the District Judge and direct that the appeal be heard on the merits. Costs to abide the result.

Decree reversed, and case remanded.

13 B. 496.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

BALANATHA, (Original Plaintiff), Appellant v. BHIVANATHA (Original Defendant), Opponent.* [10th January, 1889.]

Civil Procedure Code (Act XIV of 1882) s. 629—Order on application to review—Appeal from decree as amended—Second appeal—Practice.

A second appeal lies against an order of a lower appellate Court passed under s. 629 of the Civil Procedure Code (Act XIV of 1882) where the appeal to the lower appellate Court has been, not from the order allowing a review, but [497]

* Second Appeal, No. 290 of 1887.
(1) 11 B.H.C.R. 129.

1889
 JAN. 10.
 APPEL.
 LATE
 CIVIL.

from the original decretal order itself as amended by the original Court on the application for review.

Than Singh v. Chandan Singh (1) distinguished.

Semle—The words of s. 629, "an order of the Court for rejecting the application shall be final," *prima facie* apply to the Court which has passed the original decree, but in spirit they would seem properly to apply also to an order of an appellate Court.

13 B. 496.

THIS was a second appeal from a decision of C. H. Jopp, Assistant Judge of Satara, reversing the decision of Rav Saheb Raghunath S. Tipnis, Subordinate Judge of Karad.

Suit for partition. The plaintiff claimed a half share of the ancestral property in the hands of the defendant, who was his brother. The prayer of the plaint was that the plaintiff's right should be declared; that partition should be made; and that possession of his half share should be given to the plaintiff. On the 31st March 1884, the Subordinate Judge of Karad, who tried the suit, made an order declaring that the plaintiff was the "owner of half of the ancestral property * * *" and that he was "entitled to enforce partition thereof."

On the 24th June 1884 the plaintiff applied for execution of the decree by partition and for possession of his share. The defendant resisted. On the 26th September 1884 the Subordinate Judge decided that, under the terms of the decree, possession could not be enforced. He directed that the plaintiff should apply for a review.

On the 17th November 1884 the plaintiff applied for a review, on the ground that, although the suit had been brought for partition and possession of the property, the order of the Court merely declared that the plaintiff "was entitled to partition." He alleged that the mistake in the order had not been discovered until the execution proceedings had been commenced, and contended that this excused the delay in applying for a review.

The Subordinate Judge admitted the plaintiff's application. He was also of opinion that under s. 206 of the Civil Procedure Code (Act XIV of 1882) he could amend the decree even if he rejected the application for review. He accordingly made the following order amending the decree:—

"[498] This suit is re-admitted on the file as for order in review; Petition No. 114 of 1884. I proceed to decide this suit at once. It is necessary to correct the clerical error in the decretal order. I, therefore, correct the order in so far as to insert "and do recover possession of his share by partition thereof" instead of the words 'and is entitled to partition thereof.' In other respects the order stands as it is."

The defendant appealed to the Assistant Judge, who reversed the order of the lower Court. He held that there was no "sufficient cause" for the delay in applying for a review, and he refused to permit the original decree of the 31st March, 1884, to be amended. The following is a portion of his judgment:—

"* * * The application for execution was presented within the period of ninety days, and it is clear that the plaintiff and his pleader, if they had exercised reasonable care and diligence, could have presented their application for review before the expiry of that period. At any rate, I do not think that 'a sufficient cause' has been shown for not making the application within time.

"The Subordinate Judge expressed the opinion that, even if he rejected the application for review, he could amend the decree under s. 206. But he did not reject the application. On the contrary he admitted it, and no order was made under s. 206 of the Civil Procedure Code. It is unnecessary for me to decide whether the lower Court has the power to amend the decree in the manner asked for under that section. It will be for the Subordinate Judge to find on this point should the plaintiff now apply for an amendment under s. 206."

From this order the plaintiff preferred a second appeal to the High Court.

Ganesh R. Kirloskar, for the respondent, raised a preliminary objection, that no second appeal would lie from such an order. The lower appellate Court rejected the plaintiff's application for review under s. 629 of the Code, and there is, therefore, no second appeal—*Than Singh v. Chundan Singh* (1).

[499] *Vishnu Krishna Bhatvadekar*, for the appellant.—A second appeal lies. The first appeal was not against the order of review, but against the decree as amended on review. The original application must be treated as one for correcting the decree under s. 206 of the Civil Procedure Code, and the Subordinate Judge dealt with it under ss. 629 and 206. The order of the lower appellate Court was one having the effect of restoring the decree to its original form, and there is, therefore, a second appeal. The Assistant Judge was wrong in reversing the lower Court's decision, as the Subordinate Judge had power, under s. 206 of the Civil Procedure Code, to correct mistakes in the decree whenever they were discovered of his own motion: see *Kharim Mahamed Jamal v. Rajooma* (2).

Ganesh R. Kirloskar, in reply :—The Subordinate Judge advised a review and dealt with the plaintiff's application under s. 629. He did not proceed under s. 206, which he only incidentally referred to. The Assistant Judge found that the plaintiff's application for review should not have been allowed after ninety days, as he had not shown "sufficient cause" for the delay. The second appeal, therefore, is virtually against an order rejecting an application for review. An order under s. 629 is not a decree, and is final. The lower appellate Court's order is made in exercise of discretion, and should not be disturbed in second appeal.

JUDGMENT.

SARGENT, C. J.—A preliminary objection has been taken that no second appeal lies in this case. That would have been so if the order now appealed against had been made on appeal from the order allowing review, as was the case in *Than Singh v. Chundan Singh* (1). Here, however, the appeal to the first appellate Court, as shown by the stamp and its express terms, is against the decretal order itself as amended by the Subordinate Judge after allowing the review, and the objection to the order granting the review was taken on that appeal as contemplated by s. 629. The present second appeal is therefore in form against a decree restoring the original decree, although the real objection [500] to it may be, not that the amendment is wrong, but that no amendment should have been allowed under the circumstances.

But it is further said that in any case the decree now appealed against, is final under s. 629, as it is, in terms, an order refusing the plaintiff's application. That section *prima facie* applies to the Court which has

1889
JAN. 10.
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APPEL-
LATE
CIVIL.
—
13 B. 496.

1889
 JAN. 10.
 APPEL-
 LATE
 CIVIL.
 13 B. 496.

passed the original decree, but it would, we are inclined to think, be properly deemed to apply according to its spirit to an order by the appellate Court. However, it is not now necessary to decide the point, as we have no doubt that the decision was a right one for the reasons given by the Assistant Judge. The Assistant Judge refused to consider the application made to him to amend the decree under s. 206, as that question was not, strictly speaking, before the Subordinate Judge, and at the most he only expressed an opinion. We think the Assistant Judge adopted, on the whole, the right course, and we must confirm the order with costs.

Decree confirmed.

13 B. 500.

APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and
 Mr. Justice Nanabhai Haridas.*

PARSOTAM VITHAL (*Plaintiff*) v. ABDUL REHMANBHAI (*Defendant*).*
 [23rd January, 1889.]

Service of summons—Application for fresh issue—Civil Procedure Code (Act XIV of 1882), ss. 99 A and 72—Limitation—Practice.

An application for a fresh summons to a defendant, the summons originally issued having been returned unserved, is within the period prescribed by s. 99A of the Civil Procedure Code (Act XIV of 1882), if made within one year from the date of the nazir's countersignature below the bailiff's endorsement of non-service, the nazir being the proper officer of the Court to whom under s. 72 of the Code the summons is delivered for service, and who is to return it to the Court if unserved.

THIS was a reference by Rav Saheb Harisukhram Manekram, Subordinate Judge of Viramgam, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

[501] The suit was registered on the 17th September, 1887, and the original summons to the defendant to appear and defend the suit, was on the same day issued for the 10th October 1887. It was delivered by the nazir to the bailiff on the 22nd September 1887. The bailiff went on the 7th October,—i.e., three days before the day of hearing—to serve it, but found that the defendant's house was locked. On the same day he made his return to that effect, but it was not presented to the proper officer of the Court till the day of hearing, in consequence of the nazir having declined to countersign it till that day. The bailiff had put the date 10th October 1887, just close to the date of the return, 7th October, 1887, to show when the nazir's countersignature was made. The application for fresh summons was presented on the 9th October, 1888.

The question referred by the Subordinate Judge for the High Court's decision was—

Whether an application for a fresh summons to a defendant, the case against whom has lain over under s. 99A of the Code of Civil Procedure, 1882, in consequence of the summons originally issued having been returned unserved, is within the period of limitation prescribed by the section, viz., one year, if it is made within a year of the date on which the summons was brought before the Court on the day of hearing fixed for the case?

* Civil Reference, No. 17 of 1888.