1895.

DAGREE v. PACOTTI SAN JAO.

On the authority of these decisions, the learned Judge in the Division Court passed a decree against the appellant, and I am of opinion for the reasons already given that his decision was according to law, and that the present appeal must be dismissed with costs.

Appeal dismissed.

Attorneys for appellant:—Messrs. *Wádia and Gándhi.*

Attorneys for respondent:—Messrs. *Chalk, Walker and Smetham.*

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

1894. *September* 10.

BA'I DEVKORE (ORIGINAL PETITIONER), APPLICANT, *v.* LA'LCHAND JIVANDA'S AND ANOTHER (ORIGINAL OPPONENTS), OPPONENTS.*

Succession Certificate Act (VII of 1889), Secs. 9 and 19—Order granting certificate on the applicant's furnishing security—No appeal from such order—Practice—Procedure—Discretion—Jurisdiction—Civil Procedure Code (Act XIV of 1882), Sec. 622—Extraordinary jurisdiction.

The widow of a deceased person having applied for a certificate under the Succession Certificate Act (VII of 1889), the Judge ordered the certificate to issue on the applicant's furnishing security under section 9 of the Act.

Held that such an order was not an order "granting, refusing or revoking a certificate" within the meaning of section 19 of the Act, and was, therefore, not appealable.

Bhagwáni v. *Manni Lál* (1) followed.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) to reverse the order of R. S. Tipnis, Assistant Judge, F. P., of Broach.

Applicant Bái Devkore applied under Act VII of 1889 to the Subordinate Judge for a certificate of succession to her husband, Mánekchand Jivandás, who died on the 16th December, 1892.

The opponents were brothers of the deceased Mánekchand. They objected to her obtaining the certificate unless substantial security were required from her, as they alleged she had been wasting the property in which they had a reversionary interest.

The Subordinate Judge ordered that a certificate should issue

* Application No. 3 of 1894 under the extraordinary jurisdiction.

(1) I. L. R., 13 All., 214.

on the applicant furnishing security under section 9 of the Act (VII of 1889).

The applicant appealed to the District Court on the ground that no security should be required from her. The Judge rejected the appeal, holding that the order was not appealable, not being one contemplated by section 19, sub-section 1 of the Act.

The applicant then applied to the High Court under its extraordinary jurisdiction, and obtained a rule *nisi* calling upon the opponents to show cause why the order of the District Judge regarding the appeal should not be set aside.

Goverdhanrám M. Tripáthi appeared for the applicant in support of the rule:—The Judge was wrong in holding that the order of the Subordinate Judge was not appealable. The order of the Subrodinate Judge giving us a certificate was a final order and is, therefore, appealable. The Judge should have heard the appeal and disposed of the case on its merits.

We further contend that the applicant is not liable to give security. She has succeeded to her deceased husband's estate by right of inheritance and has full right over his moveables. A rightful owner cannot be asked to give security for property to which he is fully entitled. The order is irregular, and should be reversed.

Chimanlál H. Setalvad appeared for the opponents to show cause:—The order is not appealable—*Bhagwáni* v. *Manni Lal*[1]. The Subordinate Judge has exercised his discretion in requiring security, and such an order should not be set aside under the extraordinary jurisdiction.

Goverdhanrám, in reply.

BAYLEY, Acting C. J.:—This was an application for a certificate of succession under Act VII of 1889 made by Bái Devkore, widow of Mánekchand Jivandás, the petitioner, alleging that her husband died on the 16th December, 1892, at Anklesvar, and that she was his heiress.

The application was opposed by the brothers of her deceased husband, and they alleged that the petitioner had wasted some

(1) I. L. R., 13 All., 214.

1894.

Bá'i Devkore v. Lálchand Jivanda's.

property of the deceased, and that no certificate should be issued to her without taking substantial security from her.

The Subordinate Judge of Anklesvar ordered a certificate to issue on the petitioner furnishing security under section 9 of Act VII of 1889. That section enacts that the Court 'may require as a condition precedent to the granting of a certificate, that the person to whom it proposes to make the grant shall give to the Judge of the Court, to enure for the benefit of the Judge for the time being, a bond with one or more surety or sureties, or other sufficient security, for rendering an account of debts and securities received by him and for indemnity of persons who may be entitled to the whole or any part of those debts and securities.' The petitioner appealed to the District Court of Broach on two grounds:— 1, that the order requiring security was erroneous, as she was the absolute owner of the moveables of her husband; 2, that the Legislature did not intend that security should be required from absolute owners by right of heirship.

The pleader for the respondents in the District Court took the preliminary objection that no appeal lay from the order of the Subordinate Judge. On referring to the rojnáma I find it there stated that the pleader for the appellant said that she was not going to give security until the decision in the appeal was given.

When the appeal came on for hearing before the Assistant Judge of Broach, F. P., he held that the order of the Subordinate Judge was neither one for granting a certificate, nor for refusing it, and that on the authority of *Bhagwáni* v. *Manni Lál*[1] no appeal lay against an order made under that Act requiring that security should be given. That case was decided in 1891 by Edge, C. J., and Straight, J., who agreeing with Mahmood, J., held that where on an application for a certificate of succession under Act VII of 1889 an order was made granting the certificate conditionally on the applicant's furnishing security, such order was not an order "granting, refusing or revoking a certificate" within the meaning of section 19 of the Act, and that, therefore, no appeal would lie therefrom.

Bái Devkore then petitioned the High Court, praying for the exercise of its revisional powers under section 622 of the Civil

(1) I. L. R., 13 All., 214.

Procedure Code, apparently on the ground that the lower appellate Court had failed to exercise a jurisdiction vested in it by law. The petition was rejected by Mr. Justice Ránade, but upon an appeal being made under the Letters Patent of the High Court, my learned colleague and I, thinking that the points raised were worthy of argument, restored the application to the file, and directed notice to issue to the opponents.

Mr. Goverdhanrám, who appeared for Bái Devkore on the hearing before us, endeavoured to distinguish the case of *Bhagwáni* v. *Manni Lal* (1) from the present one. There are, no doubt, some points of difference between the two cases, but I think they are immaterial, and that in principle the cases are the same. There, as here, the order was conditional, and was not, in my opinion, one granting or refusing the certificate. That decision appears to me to be a correct one, and one which this Court may well follow. The Assistant Judge was, therefore, I think, fully justified in holding that no appeal lay, and in rejecting it with costs.

It will be noticed that the appeal to the District Court of Broach was on the ground that the order requiring security was erroneous, and that such security ought not to have been required from Bái Devkore. In the petition to the High Court, this Court is asked to reverse the decisions of both the lower Courts, and also to hold either that the security ought not to have been ordered, or that the appeal did lie. With regard to the latter prayer, I have already expressed my opinion that there is no ground for the interference of this Court.

Ought then this Court, in pursuance of the powers conferred on it by section 622 of the Civil Procedure Code, to hold that security ought not to have been ordered by the Subordinate Judge? The question of security was one purely for the discretion of the Subordinate Judge. Whether the exercise of such discretion could be reviewed or interfered with, came up for decision in the High Court in a case I referred to during the argument—*Mhalsabái* v. *Vithoba Gulve* (2) decided by Sir M. Sausse, C. J., Hebbert and Forbes, JJ., in 1862. That was an appeal from an order of

(1) I. L. R., 13 All., 214. (2) 7 Bom. H. C. Rep., Appx., 26.

1894.

BA'I DEVKORE v. LÁLCHAND JIVANDA'S.

the District Judge of Thána granting a certificate under Act XXVII of 1860 to Vithoba K. Gulve enabling him to get in the debts and outstandings due to the deceased. Section 5 of that Act, which enabled the Court 'to take such security as it shall think necessary from any person to whom it shall grant a certificate,' was very similar in its terms to section 9 of the Succession Certificate Act, 1889 (Act VII of 1889). When granting the certificate the Judge did not require any security from the respondent under section 5 of the Act (XXVII of 1860). Mr. Westropp in arguing the appeal for the appellant contended that if the Judge below had exercised an unwise discretion in refusing to require security, the High Court as a Court of extraordinary and superintending jurisdiction would review it. In the judgment of the Court, after time taken to consider, the Judges say: 'This Act gives the Court a discretion in taking security from the person to whom the certificate is granted, and so did Act XIX of 1841; and the whole course of legislation on this subject proceeds on the assumption that the Court below is to exercise its discretion, and we do not think we should be justified in interfering with that discretion,' p. 30. In *Kirani Ahmedula* v. *Subabhat* (1) West and Nánábhai Haridás, JJ., asserted the appellate Court's power to interfere with the discretion of the District Judge of Kánara who had refused to restore an appeal to the file of the District Court, and they set aside the order of that Judge who had rejected the application on the ground that the appellant had not satisfactorily accounted for the absence of his pleader without leave of the Court.

That decision, however, seems to me to stand on a different footing from *Mhalsabái* v. *Vithoba Gulve*(2), and there have been several cases in recent years in England where the right of a Court of Appeal to interfere with a judicial discretion has been distinctly recognized. I will refer to the one in which the facts most nearly approach those of the present case, as it was a question whether security ought or ought not to be given, *viz.*, *Ex parte Marshall* (3) decided by the Court of Appeal in 1877. Sir George Jessel, M. R., in his judgment said that the Registrar in the first

(1) I. L. R., 8 Bom., 28. (2) 7 Bom. H. C. Rep., Appx., 26. (3) 5 Ch. D., 873.

instance, and the Chief Judge in Bankruptcy in the second instance 'in the exercise of the judicial discretion reposed in them have decided that security should be given by the alleged debtor for the debt and costs as a condition of his being at liberty to defend an action. No doubt the Court of Appeal can, if it thinks fit, reverse the decision so come to, but before interfering with the exercise of a judicial discretion, the Court must be satisfied not merely that it would itself have arrived at a different conclusion in the first instance, but that the discretion has been clearly improperly exercised.' Lord Coleridge, C. J., was of the same opinion. Baggallay, L. J., said: 'It would require a strong case to induce a Judge of Appeal to reverse a decision upon a matter of discretion.'

In *Golding* v. *Wharton Salt Works Company*[1] decided by the Court of Appeal in 1876 Lord Justice James said: 'The Court of Appeal in Chancery has laid down over and over again that, on a question which depends on the discretion of the Judge, the Court of Appeal does not in general interfere with that discretion. Not that the Court of Appeal has not complete jurisdiction over such cases, or that the decision of the Court below would not be overruled where serious injustice would result from that decision, but as a general rule the Court of Appeal declines to interfere.'

In the present case I do not collect from the judgment of the Assistant Judge that the allegation of the opponents that the applicant had wasted some property of the deceased was denied by her, or that she produced any evidence to controvert such allegation, and her ground of complaint to District Court was that the order requiring her to give security ought not to have been made, as she was the absolute owner of the moveables of her husband. So doubtless she was, but such moveables would be liable for any debts that her husband left. The proceedings now before the Court do not show whether or not he left any debts. He may have done so, or he may not. The Subordinate Judge in the exercise of his discretion thought it necessary to require, as a condition precedent to the granting of a certificate, that Bái Devkore, to whom he proposed to make the grant, should give security.

(1) 1 Q. B. D., 374.

1894.

BA'I DEVKORE v. LA'LCHAND JIVANDA'S.

We have no right to assume, and we have no materials before us to enable us to hold, that he acted improperly in inserting such condition in the order he made. The question was one entirely within the jurisdiction and powers of the Subordinate Judge.

It must be borne in mind that this matter comes before the Court under section 622 of the Civil Procedure Code (XIV of 1882) and the Judicial Committee of the Privy Council have said in *Rajah Amir Hassan Khan* v. *Sheo Baksh Singh* (1): "The question is, did the Judges of the lower Courts in this case in the exercise of their jurisdiction act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity.

I am, therefore, of opinion, that the applicant has failed in showing that this Court ought to interfere in her behalf in the exercise of its extraordinary jurisdiction, and that the rule *nisi* obtained by her in June last must be discharged with costs.

FULTON, J.:—Though when this application was argued I was doubtful whether the order of the Subordinate Judge was not one granting or refusing the certificate prayed for and, therefore, open to appeal to the District Court, I now feel satisfied that the Assistant Judge, F. P., was right in following *Bhagwáni* v. *Manni Lal* (2) and holding that no appeal lay against the order of the Subordinate Judge requiring the petitioner to furnish security under section 9 of Act VII of 1889 as a condition precedent to granting her a certificate.

I also concur with the learned Chief Justice in thinking that this Court cannot under section 622, Civil Procedure Code, interfere with the discretion of the Subordinate Judge in making the order for security of which the applicant complains.

It may be that when the Subordinate Judge makes a final order granting or refusing the certificate, such order, if unfavourable to the applicant, and the grounds on which it is based, will be

(1) L. R., 11 Ind. App., 237. (2) I. L. R., 13 All., 214.

appealable under section 26, and the question as to the propriety of the order requiring security may then arise for the consideration of the District Court, but at present there is no reason for our interference.

I, therefore, concur in discharging the rule with costs.

Rule discharged.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

THE MUNICIPALITY OF THE CITY OF POONA (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* VA'MAN RA'JA'RA'M GHOLAP (ORIGINAL DEFENDANT), RESPONDENT.*

1894 *September* 12.

Easement—Right of way—Purchase of land adjoining purchaser's land—Way of access—Way of necessity—Sale-deed—Construction—Circumstances existing at the time of the sale.

A person purchasing a plot adjoining his own land, and having access to the plot through his land, cannot acquire a way of necessity over his vendor's land of which the plot formed a part. The fact that if the plot had been sold to a third person, he would have acquired a way of necessity, does not affect the question.

Where a portion of an estate is sold, a right of way leading to such portion may be created by the use of general words, provided that the circumstances existing at the time of the sale were such as to justify the belief that such was the intention of the parties.

Where the words used in a Maráthi deed of sale were "*sarva hakk wa sambandh*" (*i. e.*, all rights and accompaniments),

Held that the words in themselves, apart from the circumstances at the time of the sale, did not include a right of way over the vendor's property as conveyed along with the portion of the land sold; but if there was an old path leading across the vendor's adjoining ground to the plot sold, and the purposes for which the plot was sold, and the conduct of the parties were such as to justify an inference that by the use of these words it was the intention of the parties to convey the right to use the path, it would be open to the Judge to find as a fact that such was the intention.

SECOND appeal from the decision of W. H. Crowe, District Judge of Poona, affirming the decree of Ráo Bahádur Chunilál M., First Class Subordinate Judge.

A plot of open land at Poona, known as Anjir Bágh, belonged originally to one Khásgiwála. Part of it, which adjoined the defendant's dwelling-house, was sold by him to the defendant for

* Second Appeal, No. 504 of 1892.