APPELLATE CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

1905. *July* 25.

SHA VADILAL HAKAMCHAND (ORIGINAL DEFENDANT 2), APPELLANT, *v.* SHA FULCHAND UMEDRAM (ORIGINAL DEFENDANT 1), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), sections 623 and 626—Order in execution—Decree—Review—Order rejecting application for review—Appeal.

An order in execution, being a decree under the Civil Procedure Code (Act XIV of 1882), was passed on the 20th November 1902 and a supplementary order as to costs was made on the 20th December following. On the 3rd August 1903 the party aggrieved by the latter order applied under section 623 of the Civil Procedure Code for a review of judgment. Notice was issued to the opposite party and the application for review was heard with the result that the Judge after disposing of certain technical objections proceeded to deal with the case on the merits and having done so he rejected the application for review with costs on the 14th September 1903. Against the said order the applicant having appealed,

Held that the order rejecting the application for review was not appealable. The proper procedure would be to appeal from the order of the 20th December 1902 relating to costs.

A petition of review involves three stages of procedure. The first stage commences ordinarily with an *ex parte* application under section 623 of the Civil Procedure Code. The Court may then either reject the application at once, or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage the rule may either be admitted or rejected and the hearing of the rule may involve to some extent an investigation into the merits. If the rule is discharged then the case ends. If, on the other hand, the rule is made absolute, then the third stage is reached. The case is re-heard on the merits and may result in a repetition of the former decree or some variation of it. Though in one aspect the result is the same whether the rule be discharged or on the re-hearing the original decree be repeated, in law there is a material difference, for in the latter case, the whole matter having been re-opened, there is a fresh decree. In the former case the parties are relegated to, and still rest, on the old decree.

SECOND APPEAL from the decision of Lallubhai P. Parekh, Judge of the Court of Small Causes at Ahmedabad, with appellate powers, amending the order of Chandulal Mathuradas, First Class

* Second appeal No. 157 of 1905.

Subordinate Judge of Ahmedabad, in an application for the review of an order as to costs.

One Bhogilal Khemchand brought a suit for partition against his co-parceners Fulchand Umedram and Vadilal Hakamchand in the Court of the First Class Subordinate Judge of Ahmedabad and obtained a decree awarding him a third share in certain properties. Subsequently in execution of the decree the Subordinate Judge effected a partition and awarded certain properties to each of the parties. At the said partition a shop which was in the possession of Fulchand Umedram fell to the share of Vadilal Hakamchand and he presented a darkhast, No. 754 of 1902, for the recovery of the shop. The First Class Subordinate Judge made an order for the delivery of the shop on the 20th November 1902 and at the same time valued the shop at Rs. 825 and ordered Vadilal to pay the Court-fee stamps on the said sum. Vadilal having accordingly paid the Court-fee stamps amounting to Rs. 62-4-0, the darkhast was disposed of on the 20th December 1902. In disposing of the darkhast the Judge saddled Fulchand with costs including Rs. 62-4-0 paid by Vadilal as Court-fee stamps on the value of the shop. Against the said order as to costs Fulchand presented an application for review on the 3rd August 1903. A *rule nisi* was issued requiring Vadilal to show cause why the application should not be granted and he resisted the application on the ground that it was time-barred under Article 173, Schedule II, of the Limitation Act (XV of 1877). The Subordinate Judge over-ruled the said plea, and on the 14th September 1903 dismissed the application on the following ground:—

> As to the merits I do not think that the applicant can succeed. Mr. Karpurram has thrown all costs on the applicant Fulchand and Vadilal's darkhast was due to Fulchand's default. He raised frivolous objections in Vadilal's application for execution and I consider the order made is a good one. The application for review is rejected with costs.

On appeal by Fulchand the Appellate Judge amended the said order in the following terms:—

> I then hold * * that the order dated 20th December 1902 made by the First Class Subordinate Judge should be revised by ordering the appellant to bear the costs of the darkhast and the respondent to bear the costs of the Court-fees on the value of the shop.

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I then allow this appeal to the extent shown above and amend the order of the lower Court dated 20th December 1902, and order that out of the costs of Rs. 67-1-0 dealt with in the darkhast, the appellant shall pay Rs. 4-13-0 only to the respondent and the respondent shall bear the rest, *viz.*, Rs. 62-4-0. The costs of the application for review and of this appea shall be borne by the respondent.

The applicant Vadilal (original defendant 2) preferred a second appeal.

L. A. Shah appeared for the appellant (applicant, defendant 2):—The order of the Judge in appeal is wrong. The order of the 14th September 1903 was not appealable, section 629 of the Civil Procedure Code. The first Court having rejected the application for review, the appellate Court, in entertaining the appeal, either exercised jurisdiction not vested in it, or it acted on the assumption that the application was granted by the first Court, but it was not so. The only order appealable, if at all, was that passed on the 20th December 1902. But now an appeal against that order would be too late.

Trikamlal R. Desai appeared for the respondent (opponent, defendant 1) :—The order of the 14th September 1903 was appealable because strictly speaking the application for review was not rejected, but on the contrary a *rule nisi* was issued and after hearing arguments the Court disallowed the technical objections raised by the appellant and then it rejected our application on the merits. The Court in a sense allowed the review.

[JENKINS, C. J.—How do you say that the application for review was granted when the Judge says in so many words "the application for review is rejected" ?]

We submit that in a petition for review there are two stages. The first stage ends when a *rule nisi* is issued and the opponent is heard against the application. As soon as this is done, that is, the opponent's objections, if any, are disposed of and the Court proceeds to the merits of the case, the second stage commences. An order made after the commencement of the second stage would have the effect of a decree and would be appealable even if the original decree be confirmed by the order. The endorsement of the Court on our application for review was to the effect that

the application was granted and the objections to it were disallowed. The Court then proceeded to discuss the merits and having done so it afterwards rejected the application. The order of rejection was a fresh decree repeating the order of the 20th December 1902. Therefore that order was appealable under section 244 of the Civil Procedure Code. If it be held that the order was not appealable and that an appeal ought to have been preferred against the order of the 20th December 1902, then, under section 5(A) of the Limitation Act the delay in the presentation of the appeal from that order may be excused.

Shah in reply:—The appeal may be treated as an appeal from the order dated the 20th December 1902.

JENKINS, C. J.:—This is an appeal from a decree of the District Court of Ahmedabad and the objection taken is that the lower appellate Court treated the appeal to it as an appeal from an order of the 14th of September 1903 whereas, in fact, no appeal would lie from that order. The facts are shortly these:—An order in execution, being a decree under the Code, was passed on the 20th of November 1902, and in supplement of it a further order as to costs was made on the 20th December 1902. On the 3rd of August 1903, the present respondent before us, considering himself aggrieved, applied, under section 623 of the Civil Procedure Code, for a review of judgment.

Notice was issued to the opposite party and the application for review was heard with the result that the Judge, after disposing of certain technical objections, proceeded, as he indicated, to deal with the case on the merits, and having done so, he rejected the application for review with costs on the 14th of September 1903.

The present respondent appealed from this order, and the lower appellate Court on appeal passed the order of which complaint is now made.

It is argued for the appellant before us that the order of the 14th of September 1903 was under section 629 a final order inasmuch as it was one rejecting the application and the only order from which an appeal could lie was the order of the 20th of

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December 1902, and an appeal from that, it is said, would be barred by limitation.

The whole point is whether the adjudication on the 14th September 1903 was made upon a re-hearing or was merely an order for rejection. In order to determine this point we must have regard to the various stages through which an application for review may pass. It commences ordinarily with an *ex parte* application under section 623 of the Civil Procedure Code. The Court then may either reject the application at once, or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage the rule may either be admitted or rejected; and it is obvious that the hearing of this rule may involve, to some extent, an investigation into the merits. If the rule is discharged then the case ends. If, on the other hand, the rule is made absolute, then the third stage is reached; the case is reheard on the merits and may result in a repetition of the former decree or in some variation of it. Though in one aspect the result is the same whether the rule be discharged or on the re-hearing the original decree be repeated, in law there is a material difference, for, in the latter case, the whole matter having been re-opened, there is a fresh decree. In the former case the parties are relegated to, and still rest on, the old decree. The order appropriate to a discharge of the rule is the rejection of the application as provided by section 626, Civil Procedure Code; and it is impossible to read Mr. Chandulal's judgment without being impressed with the idea that he designedly chose his language so as to bring his order within section 626. His order is "the application for review is rejected with costs," and our opinion is that Mr. Chandulal's order was one passed in the second stage of the review proceedings on the hearing of the rule for a review, and not one in the third stage on the re-hearing of the whole case.

It follows from this that no appeal lay from the order of the 14th of September 1903, and, as we have already indicated, that the proper procedure would be an appeal from the order of 20th December 1902.

The difficulty in the way of an appeal from that order is that any appeal now must be considerably out of time. But that is a defect which can be excused, if sufficient cause be shown, but

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it cannot be excused by us as we are not the proper Court to entertain that application.

Mr. Shah has conceded, for the purpose of avoiding complication and additional expense, that the appeal to the District Court of Ahmedabad should be treated as an appeal from the order of the 20th December 1902, and not from that of the 14th September 1903. This to some extent simplifies the matters, and the proper order for us now to pass is that we reverse the decree of the District Court of Ahmedabad, and send back the case in order that it may be there determined whether on the footing of the appeal being one from the order of the 20th of December 1902, it is one which should be admitted.

The costs in the lower Court and in this Court will abide the result.

Decree reversed and case sent back.

G. B. R.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

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February 20.

VADILAL SAKALCHAND AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* G. F. BURDITT AND COMPANY (ORIGINAL DEFENDANTS), RESPONDENTS.*

Trade mark—Seller's design—Rights of manufacturer—Partnership—Dissolution—Partner continuing the business—Right to sue in respect of trade mark.

In the year 1892 M designed a label for goods ordered by his firm C. J. & Co. from J. F. A. & Co., the London manufacturers. The label consisted of a youth and girl in fancy dress and goods bearing the label became known in Bombay and up country as "Jori Mal."

By M's request the name of C. J. & Co. was printed on the border of the label in Persian and Gujaráti characters.

In 1897, M's partner having retired from the firm, M, the 4th plaintiff, continued the business of C. J. & Co., with the other plaintiffs, under the name, style and firm of V. & Co.

* Suit No. 205 of 1903, Appeal No. 1371.