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provision for accountability by the mortgagor as we have already noticed, and the circumstances of the case leave no room for accountability by the mortgagee, inasmuch as the mortgagee never went into possession of the mortgaged property, but received an annual rent in lieu of the rents and profits.

These are all the considerations which have been advanced to us on the one side and the other, and on a review of all of them we are satisfied that the weight of evidence is in favour of the view which commended itself to the learned Judge of the lower appellate Court. His decree must therefore be affirmed and this appeal dismissed with costs.

Decree affirmed.

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APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Hayward.

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BAI ATRANI, WIDOW OF THAKUR KUNVER SAHEB BAPU SAHEB (ORIGINAL DEFENDANT No. 1) APPLICANT, *v.* DEEPSING BARIA THAKOR (ORIGINAL PLAINTIFF) OPPONENT.*

Civil Procedure Code (Act V of 1908), section 115—High Court—Extraordinary Civil Jurisdiction—Temporary injunction restraining a Hindu widow from adopting—Application against the order—'Case' meaning of—Jurisdiction under section 5 of Bombay Regulation II of 1827—High Courts Act (24 and 25 Vic., Ch. 104), section 9—General Repealing Act (XII of 1873.)

In the course of a pending suit, the first Court granted a temporary injunction restraining defendant No. 1 from making an adoption; but afterwards dissolved it. On appeal, the District Judge granted the temporary injunction. The defendant No. 1 having applied to the High Court against the order, a

* Civil extraordinary application No. 43 of 1915.

preliminary objection was taken that the application was not competent under section 115 of the Civil Procedure Code :—

Held, overruling the objection, that the application was competent under section 115 of the Civil Procedure Code (Act V of 1908), as the order was a "case decided in which no appeal lies" within the meaning of the section.

Held, further, that the order was open to consideration under the wider provisions of section 5 of Regulation II of 1827, continued in force by virtue of section 9 of the High Courts Act 1861, and saved from repeal by the operative sections of the General Repealing Act (XII of 1873).

Per BATCHELOR J.—"The word 'case,' which occurs in section 115 of the Civil Procedure Code (Act V of 1908), is a word of wide or comprehensive import and clearly covers a far larger area than would be covered by such a word as 'suit' or 'appeal.'"

"Inasmuch as section 115 is merely an empowering section granting certain jurisdiction to the High Court, and as the use or exercise of that jurisdiction will, within the prescribed limits, be regulated by the discretion of the High Court, the section ought to receive rather a liberal than a narrow interpretation."

THIS was an application under extraordinary jurisdiction against an order granting a temporary injunction passed by B. C. Kennedy, District Judge of Ahmedabad, in appeal from an order passed by B. G. Tolat, Subordinate Judge at Godhra.

The plaintiff sued to have it declared that he was entitled to the Talukdari estate of Sonipur and Bhamaria as the son (legitimate or illegitimate) of the late Thakor Kunvar Saheb. He also prayed for a permanent injunction against defendants Nos. 1 to 3, who were widows of the late Thakor restraining them from making any adoption. The plaintiff also applied for a temporary injunction restraining the defendants from making any adoption pending the disposal of the suit. The Subordinate Judge granted the temporary injunction.

The defendant No. 1 in showing cause against the order contended *inter alia* that the plaintiff was not a son of the late Thakor; that she was authorized to make adoption by the late Thakor by his registered will; and that the injunction would operate greatly to her prejudice.

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The Subordinate Judge dissolved the injunction, on the following grounds :—

If the plaintiff is really the son of the deceased Thakor the intended adoption by defendant No. 1 will confer no civil rights on the adopted son. That adoption will be null and void as no person having a male issue can make a valid adoption. If, on the other hand, the plaintiff is not found to be the son of the late Thakor, he has no cause of action and has nothing to lose. The balance of inconvenience is more on the side of the defendant No. 1 than to the plaintiff. Courts generally decline to grant a temporary injunction if the plaint and affidavits filed by parties show, on the face of them, that the case is not one for a perpetual injunction or for specific performance. Court doubts whether perpetual injunction could at all be granted under section 54 of the Indian Specific Relief Act under the circumstances appearing from the pleadings of the case. It is the inherent right of every Hindu widow to make an adoption unless she is expressly forbidden to do so by her husband. In this case the husband of defendant No. 1 specially gives her an authority to adopt under his registered will. That direction may not be fulfulled, in case defendant No. 1 or the mother of the son to be given in adoption dies in the meanwhile. The fact that serious results, among Hindus, may occur from the prevention of an adoption ought to incline the Court to proceed with caution. No case of an injunction to restrain an adoption has been shown to me by the plaintiff. The pleader for defendant No. 1 relies on 13 Bom. p. 56. The Court under the circumstances of the case thinks that this is not a fit case wherein injunction should be allowed to continue. It may be stated that an adopted son is a recognised substitute for a natural son. He comes in with all the rights and privileges of a natural son; now the question is, can the Courts grant an injunction to a man restraining him to get or have a natural son? The reply is evidently in the negative. It follows then that no such injunction can be granted to restrain an adoption.

The plaintiff having appealed against the order, the District Judge reversed the order and granted the injunction on the following grounds :—

The question is whether this is a proper case. I do not propose to go into the facts and record findings on them, even *prima facie*. Plaintiff alleges he is a *dasiputra*. Defendant No. 1 denies this and says also that even if defendant is a *dasiputra* he cannot succeed to an impartible Raj.

Defendant No. 1 sets up a will authorising her to adopt. The plaintiff denies the validity of this will. But the defendant No. 1 would, it seems, in any case, have the power to adopt. An so in her absence the other widows would,

under certain conditions, have the same right. The Thakor being well provided with widows it does not seem as if there was any peril to the spiritual welfare of the deceased from the adoption being postponed.

On the other hand, it does appear as if the adoption might prejudice the plaintiff. The boy adopted could not be adopted without the sanction and approval of the Collector and this would, in the eyes of the tenants and retainers, act as a sort of representation that Government disbelieved the case of the plaintiff. The nature of the suit would be entirely changed. The point at issue is whether the defendant No. 1 can legally adopt. It is undesirable, in my opinion, that the plaintiff should be forced to get a declaration that an already performed adoption is illegal and recover the estate from the possession of a boy so adopted. With the possible inconvenience to the adopted boy and his family I have no concern. We have had examples, however, that the claims of a next heir have led to great trouble and litigation even after the question of heirship has been settled.

The defendant No. 1 applied to the High Court.

At the hearing, a preliminary objection was raised by the opponents that no application could be entertained by the High Court against an order granting an interlocutory injunction.

H. C. Coyajee, with *G. N. Thakore*, for the opponent, in support of the preliminary objection.—The injunction having been granted by way of interlocutory order pending the hearing of a case the present application to the High Court is not competent under section 115 of the Civil Procedure Code. The hearing of the suit has just commenced : there has been no "case" which has been "decided." See *Chattar Singh* v. *Lekhraj Singh*[1]; *In re Nizam of Hyderabad*[2]; *Farid Ahmad* v. *Dulari Bibi*[3] ; *Nand Ram* v. *Bhopal Singh*[4] ; *Damodar* v. *Ragunath*[5] ; *Motilal Kashibhai* v. *Nana*[6]. There would be no end to litigation if every interlocutory order is subject to the application to the High Court.

(1) (1883) 5 All. 293.
(2) (1886) 9 Mad. 256.
(3) (1884) 6 All. 233.
(4) (1912) 34 All. 592.
(5) (1902) 26 Bom. 551.
(6) (1892) 18 Bom. 35.

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G. S. Rao for the applicant.—The present application is perfectly competent under section 115 of the Civil Procedure Code. See *Dhapi* v. *Ram Pershad* [1]. The word "case" is a term of wide import: it is much wider than the words 'suit' or 'appeal'. The case of *Motilal Kashibhai* v. *Nana* [2] is in my favour.

Further, the High Court has also the power to interfere under Bombay Regulation II of 1827, section 5. It is still in force. See section 9 of the High Courts Act, and Act XII of 1873, section 1, paragraph 3.

Coyajee in reply.—The case of *Motilal Kashibhai* v. *Nana* [2] is not against me. In that case there was no appeal under section 585 of the Civil Procedure Code (Act XIV of 1882). Here, there is an appeal under section 104 and Order XLIII of the Civil Procedure Code (Act V of 1908).

The powers of the High Court under Regulation II of 1827 have to be sparingly exercised. See *Shiva Nathaji* v. *Joma Kashinath* [3] and *Mahadaji Govind* v. *Sonu bin Davlata* [4].

[The application was then heard on the merits.]

BATCHELOR J.:—This application arises in the course of a pending suit in which the plaintiff claims to be the son, or at least the *dasiputra*, of a certain deceased Thakor; with his plaint the plaintiff presented an application praying for an injunction against the Thakor's senior widow, restraining her from making an adoption pending the decision of his status. The learned Subordinate Judge at first granted a temporary injunction against the widow, but afterwards, for reasons with which we are not at present concerned, he dissolved it. The plaintiff appealed to the District Judge, who has granted a temporary injunction

(1) (1887) 14 Cal. 768.
(2) (1892) 18 Bom. 35
(3) (1883) 7 Bom. 341.
(4) (1872) 9 B. H. C. R. 249.

restraining the widow from adopting pending the decision of this suit. This application is made in order that the District Judge's injunction should be revised by this Court.

Mr. Coyaji for the plaintiff takes the preliminary point that the application is not competent under section 115 of the Civil Procedure Code, and he relies mainly upon such cases as *Chattar Singh* v. *Lekhraj Singh*[1], *In re Nizam of Hyderabad*[2] and *Farid Ahmad* v. *Dulari Bibi*[3], where the Courts have held that there is no jurisdiction under section 115 to revise an interlocutory order when there is an appeal from the final decree thereafter to be passed. These Allahabad cases were, however, considered in *Dhapi* v. *Ram Pershad*[4], where the learned Judges of the Calcutta High Court took a different view, and, having regard to the comprehensiveness of the word 'case' occurring in section 115 and to the possibility of grave injustice which might result from the adoption of the other principle, decided that under section 115 of the Code the Court had jurisdiction to revise an interlocutory order. This decision was considered by Sir Charles Sargent and Mr. Justice Candy in *Motilal Kashibhai* v. *Nana*[5] which took a course between the two extremes, and which admittedly lays down the law applicable in this Presidency to the present point. The learned Chief Justice concedes for the purpose of argument that the word 'case' may be wide enough to include an interlocutory order, but he points out that a word of such general import must be controlled by the purpose with which the section was framed. That purpose, he observes, was clearly to enable a party to obtain the rectification of a decision or order of a lower Court by the

(1) (1883) 5 All. 293.
(2) (1886) 9 Mad. 256.
(3) (1884) 6 All. 233.
(4) (1887) 14 Cal. 768.
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High Court when there would otherwise be no remedy. In the facts then before the Court a remedy was supplied by section 591 of the Code of 1882, and on that ground it was decided that the revisional jurisdiction of the Court could not successfully be invoked. Mr. Rao contends that this decision in *Motilàl's case* [1] is in favour of the present petitioner, inasmuch as in the circumstances of this application the applicant has no other remedy available to him, and may, if this petition is summarily dismissed, be exposed to injustice, otherwise incapable of remedy. It appears to me that this contention should prevail.

I make no attempt to fasten any formal definition upon the word 'case' which occurs in section 115. I note only that, as was held in *Motilal Kashibhai* v. *Nana*[1], it is a word of wide or comprehensive import and clearly covers a far larger area than would be covered by such a word as "suit" or "appeal." There is, therefore, in my opinion, nothing incongruous or repugnant in holding that the word "case" may cover such an order as we have here, restraining a Hindu widow from adopting. I am further of opinion that inasmuch as section 115 is merely an empowering section granting certain jurisdiction to the High Court, and as the use or exercise of that jurisdiction will, within the prescribed limits, be regulated by the discretion of the High Court, the section ought to receive rather a liberal than a narrow interpretation.

Reverting now to Sir Charles Sargent's decision in *Motilal's case* [1], it is necessary to say that the present section 115 of our Code is a reproduction of section 622 of the Code of 1882 and that the old section 591 reappears without alteration in the present section 105. We must, therefore, in accordance with the Chief Justice's ruling,

[1] (1892) 18 Bom. 35.

enquire whether in this particular case a remedy against the order of injunction was supplied to the present petitioner by section 105 of the Code. To understand section 105, reference first must be made to section 104, which specifies the orders from which a first appeal is permitted; while section 105, as the marginal description shows, refers to "other orders." Under clause (*i*) of sub-section 1 of section 104 it is enacted that an appeal is allowed from any order made under rules from which an appeal is expressly allowed by rules. To ascertain which are the Orders here referred to, we must turn to Order XLIII, Rule 1, which describes the orders from which an appeal lies. Clause (*r*) of this rule mentions an order under Rules 1 and 2 of Order XXXIX, and these rules provide for the grant of a temporary injunction in such a case as that now before us. It follows, therefore, that the District Judge's order falls within the scope of section 104 of the Code and is, therefore, in my opinion, excluded from the scope of section 105. If that is so, then it clearly cannot be said that the petitioner had against this order a remedy supplied to him by section 105. Mr. Coyaji answers that there was, under section 104, a single appeal from the original order made by the Subordinate Judge; but that order was in the petitioner's favour, and, unless this application can now be considered, the petitioner has no remedy against the order of which alone she complains. And it seems to me impossible to say that the injury caused by the order, if it is wrong, may not be irremediable; for, the petitioner, or the boy chosen for adoption, may well die long before this ligitation reaches its end. That being so, I think that, consistently with the ruling in *Motilal Kashibhai* v. *Nana*[1], we ought to hold that this application is competent under section 115.

[1] (1892) 18 Bom. 35.

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I think also that Mr. Rao's alternative contention must be conceded that the application is in any event within the extraordinary jurisdiction vested in this Court. That jurisdiction is derived from Regulation II of 1827 which empowered the Sadar Diwanee Adalut to exercise general superintendence over all Subordinate Courts. By section 9 of the High Courts Act the jurisdiction thus originally granted to the Sadar Diwanee Adalut was transferred to the High Court when that Court was constituted in 1861. It is true that the Regulation of 1827 was repealed in 1873 by Act XII of that year. But the third paragraph of the first section of the Repealing Act provides that "it shall not affect any...established jurisdiction, form...or procedure or existing usage, custom or privilege...notwithstanding that the same respectively may have been in any manner affirmed, recognized or derived, by, in, or from any enactment hereby repealed." It follows, I think, that the jurisdiction established in the Sadar Diwanee Adalut in 1827 and in the High Court in 1861 was not affected by the repeal of the Regulation in 1873.

On these grounds I am of opinion that this Court has jurisdiction to entertain the application which, therefore, should be considered on its merits.

The only remaining question is, whether the injunction, which the learned District Judge granted to the plaintiff, can be allowed to stand. I think not. We have had a learned and exhaustive argument, and in the course of it it has been admitted at the Bar that there is no instance in the Reports where a Court has restrained a Hindu widow from adopting to her deceased husband. I will not say that the Court has no jurisdiction to grant such an injunction in any conceivable circumstances, but I think I may safely say that in the circumstances now before us there is no justification for

such an order. The order is made in a suit which involves a claim to a very large estate, and it is extremely probable that the litigation may ultimately find its way to the Privy Council in which event it would be a sanguine estimate to suppose that the controversy will be terminated within the next three or four years. Yet throughout that period this widow will be debarred from adopting, if the injunction is to be maintained. During that period it is, as I have said, possible that the widow may die. It is possible also that the boy selected for adoption and, as we are told, approved by the Collector, may also die. If things are thus left for the indefinite period of the duration of this litigation, it appears to me probable that the widow may never be able to exercise her inherent right of benefiting her deceased husband's soul by making this adoption to him. In the meanwhile the estate which is in the hands of the Collector, is in no danger. On the other hand, I cannot discern any real or grave inconvenience to which the plaintiff will be put by discharging the injunction. The plaintiff either is or is not the legally recognized son of the Thakor. If he is not, he cannot suffer from the adoption. If he is, he is equally saved from prejudice, because the adoption would in that event be void.

I think that all considerations, not only of present convenience but of present justice, are so overwhelmingly in favour of the widow that we ought, in our extraordinary jurisdiction, to discharge the order of the learned Judge below. In my judgment, therefore, the injunction should be dissolved, and the widow should have the costs of this application throughout.

HAYWARD, J.:—I concur. The question briefly is, whether an order granting a temporary injunction on

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first appeal is a "case decided in which no appeal lies" within the meaning of section 115 of the Civil Procedure Code.

Now, it seems to me clear that such an order must be held to be a "case decided" in view of the very wide meaning ordinarily attachable to that word.

Next such an order is an order passed under clause (*i*) of sub-section 1 of secton 104, and no appeal lies from such an order by virtue of sub-section 2 of section 104. But it must further be considered, whether such an order is one affecting the decision of the suit in which it was made and so an order which could be questioned on the final appeal from the decree under section 105.

It appears to me it is not. It stands by itself. It is an order having force temporarily only pending the suit. It cannot be said to be an order affecting the decision of the suit and could, therefore, not be called in question upon final appeal from the decree under section 105. For these reasons it seems to me that such an order must be held to be a "case decided in which no appeal lies" within the meaning of section 115 of the Civil Procedure Code.

I also concur that the order would be open to consideration under the still wider provisions of section 5 of Regulation II of 1827, continued in force by virtue of section 9 of the High Courts Act of 1861. Those provisions have been saved from repeal by the operative sections of the General Repealing Act (XII of 1873). This has been indicated in the decisions holding that proceedings under the Mamlatdars Courts' Act are subject to the supervision of this Court, a jurisdiction which has been impliedly recognized in section 24 of the Mamlatdars Courts' Act of 1906.

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It seems to me, therefore, on both these grounds that this application is open to consideration by this Court.

Rule made absolute.

R. R.

CRIMINAL APPELLATE.

Before Mr. Justice Batchelor and Mr. Justice Hayward.

EMPEROR *v.* JIVRAM DANKARJI.*

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July 29.

Criminal Procedure Code (Act V of 1898), section 403—Previous acquittal—Subsequent trial how far barred—Penal Code (Act XLV of 1860), sections 467, 109, 471.

The accused was tried before a Court of Session for abetment of forgery in relation to a document under sections 467 and 109 of the Indian Penal Code; and was acquitted. He was again tried before the Court of Session for using as genuine the same forged document, under section 471 of the Indian Penal Code. It was objected that the previous acquittal was a bar to the second trial under section 403 of the Criminal Procedure Code:—

Held, overruling the contention, that sub-section 1 of section 403 of the Criminal Procedure Code did not apply to the case, inasmuch as the case was not one contemplated by section 236, that is to say, a case where, upon the facts proved, it was doubtful what should be the true view of the offence constituted.

Held, further, that the case fell under sub-clause (2) of section 403, for the series of acts beginning with the forgery and ending with the user of the forged document in the Civil Court to support the civil claim must be regarded as so connected together as to form the same transaction, or carrying through of a single predetermined plan, so that under section 235 (1) it would have been competent to try the accused for both offences at the same trial.

Held, also, that the case fell under sub-section 4 of section 403, because the Court which acquitted the prisoner on the charge of abetment of forgery was not competent to try the offence under section 471 of the Indian Penal Code, inasmuch as at the time of the earlier trial no sanction for the prosecution under section 471 had been given under section 195 of the Criminal Procedure Code.

* Criminal Appeal No. 226 of 1915.