The attachment of the debt, *quâ* debt, was necessary not so much, if at all, in the interest of the judgment debtor as of the judgment creditor; and as a matter of fact no payment of the money due was made to a third party. And it was not contended that it would be necessary where attachments have been made both under s. 258 and under s. 274 that whatever is attached should be sold both as a debt or movable property and also as immovable property; and a sale of the interest put up to sale as immovable property might, and in the present case at all events did, in my opinion, convey all that was capable of being sold; and that, as my learned colleague has put it, was the interest of the mortgagee in the hypothecated property,—that interest consisting of the right to realize the amount due under the hypothecation deed; and the right of the appellant was to have that property sold in satisfaction of the amount due under Exhibit A.

I also am therefore of opinion that the sale of such interest as defendant No. 1 had in the property mortgaged was, in the circumstances of this case, a valid sale.

I have nothing to add in other respects to the judgment of my learned colleague, in which I entirely concur as regards the other questions arising and disposed of by him.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Kernan, Mr. Justice Muttusámi Ayyar, Mr. Justice Brandt and Mr. Justice Parker.

VENKATASÁMI (PLAINTIFF), APPELLANT,

and

STRÍDAVAMMA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1886. August 16. December 23.

Receiver, appointment of—Appealable order—Civil Procedure Code, ss. 503, 505, 588.

An order rejecting an application to appoint a Receiver is an order passed under s. 503, and is therefore appealable under s. 588, cl. 24, of the Code of Civil Procedure.—*Subramanya* v. *Appasami*, I.L.R., 6 Mad., 355, overruled.

IN suit No. 12 of 1884 in the District Court of Kistna the plain-

* Appeal against Order 66 of 1886.

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tiff, Makarla Venkatasámi Nayudu, applied for the appointment of a Receiver under s. 503 of the Code of Civil Procedure.

The application was dismissed with costs.

Against this order plaintiff appealed to the High Court.

Mr. *Grant* for appellant.

Bháshyam Ayyangár and *Ánandácharlu* for respondents.

The case was heard on the 16th August 1886, and on the 23rd August the Court (Collins, C.J., and Parker, J.) delivered the following

ORDER:—The petitioner appeals against an order of the District Court of Kistna, refusing to appoint a Receiver under s. 503 of the Code of Civil Procedure. The petitioner has by litigation established his status as an adopted son, and the suit is for recovery of movable property valued at over a lakh of rupees. Defendant No. 1 has given a list of movables to the value of Rs. 2,560 only and the petitioner prays that a Receiver be appointed to take charge of the property in suit pending the taking of an account.

It is objected that an order refusing to appoint a Receiver is not appealable under s. 503 of the Code of Civil Procedure—*Subramanya* v. *Appasámi*.(1)

We have ascertained that one of the learned Judges who decided that case (Muttusámi Ayyar, J.) has subsequently entertained doubts of the correctness of the ruling, and we find that the High Court of Calcutta has ruled that an order refusing to appoint a Receiver is appealable.—*Gossain Dulmír Puri* v. *Tekait Hetnarain*.(2)

It has been held both by this Court in Appeal against Order 115 of 1885,(3) and by the Calcutta Court in *Birajan Kooer* v.

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(1) I.L.R., 6 Mad., 355. (2) 6 Cal. L.R., 467.

(3) APPEAL AGAINST ORDER 115 OF 1885.

PARKER, J (Muttusámi Ayyar, J., concurring).—The Subordinate Judge in Original Suit No. 17 of 1885 nominated under s. 505 of the Code of Civil Procedure a certain person to be appointed as a Receiver. The District Judge expressed an opinion that the suit would not lie in its present form and refused to sanction the appointment of any Receiver. This appeal is presented against the order of the District Judge, and it is objected that the order of the District Judge is passed under s. 505 of the Code of Civil Procedure, from which s. 588 of the Code of Civil Procedure provides no appeal.

Against this it is urged by the learned Advocate-General that as the power conferred by chapter XXXVI can only be exercised by High Courts and District

Ram Churn Lall Mahata,(1) that no appeal lies from an order passed under s. 505, and in the latter case it was held that a District Court ought to decide on the necessity for the appointment of a Receiver on a reference from a Subordinate Court, before authorizing the Subordinate Judge to appoint a Receiver.

By analogy when the appellate authority is the High Court it

Courts, the order of the District Judge must be regarded as an order passed by the District Court under s. 503, and is therefore subject to appeal.

It has already been held by this Court in *Subramanya* v. *Appasámi* (I.L.R., 6 Mad., 355), that an order refusing to appoint a Receiver under s. 503 is not appealable, but it does not appear that the same question is raised in the present case. There a Subordinate Judge refused to make an order under s. 503, which in any case he could not do unless authorized by the District Court under s. 505. But here the order of the District Court is clearly passed under the last clause of s. 505. It has been held in *Birajan Kooer* v. *Ram Churn Lall Mahata* (I.L.R., 7 Cal., 719) that the concluding words "or pass such other order as it thinks fit," authorize the District Court not only to decide the fitness of the person nominated, but also the necessity for the appointment of a Receiver at all.

In the present case no order has been passed under s. 503, either by the Subordinate Court or by the District Court. The Subordinate Judge proposed to pass an order under that section and solicited sanction, but the sanction was refused.

The question therefore does not arise whether if the District Judge had approved the nominee and accorded sanction to the Subordinate Judge to make an order under s. 503, that order would be the order of the Subordinate Court or of the District Court.

I understand the argument of the learned Advocate-General to be that the order would be that of the District Court which would be exercising its powers by delegating them.

I find from the notes to Mr. Justice O'Kinealy's Code of Civil Procedure (pages 386, 387) that this subject was considered in the cases *Gossain Dulmir* v. *Tokait Hetnarain* (6 C.L.R., 467) and *Birajan Kooer* v. *Ram Churn Lall Mahata* (I.L.R., 7 Cal., 719). In the former of those cases it was laid down that an order made by a Subordinate Judge dismissing an application for the appointment of a Receiver *after obtaining sanction from the District Judge* is an order under s. 503, and not under s. 505, and therefore appealable. This would favor the view that after sanction given, it is the Subordinate Court which makes the order under s. 503 and not the District Court, the Subordinate Court having been authorized thereto under s. 505. In the latter case it was held that the first step taken by the Subordinate Judge was to nominate and that from this proceeding there is no appeal. The Judge then approves and under s. 505 authorizes the appointment, and from this also there is no appeal. Then the Subordinate Judge *appoints* the Receiver previously nominated, and from this order there is an appeal. Thus this ruling also corroborates the view that the action of the District Court is not taken under s. 503 but under s. 505, and that the appeal is from the order of the Subordinate Court under s. 503. Applying these principles to the present case it would follow that no order refusing to appoint a Receiver under s. 503 has been made either by the Subordinate Court or by the District Court, and therefore no question arises as to the correctness of the ruling in I.L.R., 6 Mad., 355. The Subordinate Judge has in fact passed no order at all. He solicited sanction to pass an order under s. 503. The District Judge under s. 505 refused to accord that sanction (or refused to delegate his power). From that refusal there is no appeal.

I would dismiss this appeal with costs.

(1) I.L.R., 7 Cal., 719.

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may be argued that a similar power exists, and that an application made under s. 503 can only be disposed of by an order passed under that section, which is appealable under s. 588, cl. (24).

Against this it may be urged that when orders are passed refusing applications under certain sections they have been elsewhere made expressly appealable—see s. 588, cls. (7), (8), (9), (16), (20), (27).

As our learned colleague has doubts of the correctness of the Madras decision, and the Calcutta Court has taken a different view, we refer for the decision of the Full Bench the question—

"Is an order refusing to appoint a Receiver under s. 503 of the Code of Civil Procedure appealable under s. 588, cl. (24)?"

On the 13th October the case was heard by the Full Bench (Collins, C.J., Kernan, Muttusámi Ayyar, Brandt and Parker, JJ.).

Mr. *Grant* and *Sadagópachárlyar* for appellant.

Bháshyam Ayyangár and *Ánandácharlu* for respondents.

PARKER, J. (the Chief Justice, Kernan and Muttusámi Ayyar, JJ., concurring).—The question referred is whether an order refusing to appoint a Receiver under s. 503 of the Code of Civil Procedure is appealable under s. 588, cl. (24).

In support of an affirmative answer we are referred to *Beasut Hossein* v. *Hadjee Abdoollah*,(1) in which it was said by the Privy Council in a question raised under the 76th section of the Registration Act that the words "no appeal lies from any order under this section" must be taken to exclude not only an appeal when the Judge directs the Registrar to register a deed, but also one when the application for registration is rejected. Their Lordships observed that there would be great difficulty in saying that an order of rejection did not fall within the term "an order made under this section."

Similarly the High Court of Calcutta in *Nubbi Buksh* v. *Chasni*(2) held that an order refusing an application to be made an insolvent must be considered to be one made under s. 351 of the Code of Civil Procedure, and appealable under s. 588, cl. (17). It was observed that s. 351 (like s. 503) did not expressly authorize the Court to refuse the application, but from the language of the section it was obviously within the Court's power to refuse it, and therefore that an order of refusal must be taken to be made under

(1) L.R., 3 I.A., 221. (2) I.L.R., 6 Cal., 168.

the section. Exactly the same reasoning would apply to the application for the appointment of a Receiver under s. 503.

We find also that the same High Court has ruled that an order refusing to appoint a Receiver is appealable—*Gossain Dulmir Puri* v. *Tekait Hetnarain.*(1) This decision is not however reported in the authorized Indian Law Reports.

Against this it is urged that it is the policy of the law to give an appeal only when extraordinary powers are exercised and not when the exercise is refused, and we are referred to cls. (7), (8), (9), (16), (20), (27) of s. 588 in proof of the theory that where the Legislature intended an appeal to be given against a refusal it was careful to give that appeal by express enactment.

If the contention that the Legislature did not intend to make the refusal to exercise a power appealable were to be allowed, it would follow that there could be no appeal in the case of a refusal to remove a person under s. 503(*b*) when such person had misappropriated property committed to his custody. We are bound to place a reasonable construction upon an Act, and the Legislature certainly could not have intended to enact this. But if an appeal would lie from a refusal to exercise a power under s. 503(*b*), I can see no sufficient reason why there should not be an appeal from a refusal to exercise a power under s. 503(*a*). The consequences of an improper refusal might be no less disastrous.

I am not insensible to the difficulty suggested by the other clauses of s. 588, but I would point out with respect to most of them, *e.g.*, cls. (8), (9), (20), (27), that when an order is granted it becomes appealable in the further progress of the suit, and hence it was necessary for the Legislature to make the order of refusal specially appealable, since the effect of the order was to stop the further progress of the suit.

The absence of an appeal from an order under s. 505 is no argument for the absence of an appeal from a refusal to act under s. 503, since in the former case the District Court merely authorizes a Subordinate Court to act, and when it has acted there is an appeal from the order passed—see *Birajan Kooer* v. *Ram Churn Lall Mahata.*(2)

I would answer to the Division Bench that an order of refusal

(1) 6 Cal. L.R., 467. (2) I.L.R., 7 Cal., 719.

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to appoint a Receiver is an order under s. 503 of the Code of Civil Procedure, and is appealable under s. 588, cl. (24). I would therefore overrule *Subramanya* v. *Appasámi*.(1) I am fortified in this opinion by the fact that one of the learned Judges who decided the case (Muttusámi Ayyar, J.) is himself not now satisfied with the correctness of that decision.

BRANDT, J.—I concur. An order or proceeding recording a refusal to appoint a Receiver is certainly "an order under s. 503 of the Code of Civil Procedure;" and orders "under" that and other sections are appealable under the provisions of s. 588, cl. (24).

The principle adverted to in *Beasut Hossein* v. *Hadjee Abdoollah*(2) appears to me to be applicable in the case before us, not the less so because the order or orders under consideration in that case related to direction for registration of, and refusal to register deeds. The power to make an affirmative order implies (in the words of the learned Judges who decided the case reported on) the power to make an order refusing to exercise powers.

There is no doubt considerable force in the arguments advanced by the learned pleader on the other side. It was pointed out that under the Civil Procedure Code of 1859 no appeal lay against an order refusing to appoint a Receiver, while an appeal allowed against an order making such an appointment; and that under s. 94 of that Code an appeal against orders made under the two preceding sections was open to the defendant only; and it was suggested that the intention was to allow an appeal only when the extraordinary powers given were exercised, and not when a Court refused to exercise them; and that the same intention is to be inferred from the manner in which the present Code is expressed, as it now stands, after amendments.

If regard be had to principles and to expediency it is obviously most important that a valuable property should not run the risk of being ruined because a Court has declined to exercise a power which, if the discretion given were properly used, it should have exercised.

Reference was also made to the fact that an appeal is expressly allowed from an order refusing to issue an injunction; to the wording of ss. 351, 492, 493, 496, 497, 502 and 505, and to

(1) I.L.R., 6 Mad., 355. (2) L.R., 3 I.A., 225.

cls. (9), (11), (16) and (20) of s. 588, as showing that generally when the Act allows an appeal against proceedings recording refusal to make an order it does so in express terms. VENKATASÁMI v. STRÍDÁVAMMA.

Mr. Justice Parker has noticed the inferences which may be drawn from the provisions of ss. 503, 505, and from cls. (8), (9), (20) and (27) of s. 588, and it would be quite possible to meet many of the objections taken on behalf of the respondent, though possibly not all of them. It appears to me however unnecessary to go into details; there may be some slight inconsistencies in the Code of Civil Procedure discoverable by acute minds; but I see no reason to think that the Legislature intended not to allow an appeal against an order under s. 503 refusing to appoint a Receiver, and I think it is more consonant with the general principles of the Code, and with the rules of construction, as well as with the wording of cl. (24) of s. 588, to hold that an appeal does lie in the case before us, than to hold that it does not.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Brandt.

RÁMAYYANGÁR AND ANOTHER (PLAINTIFFS), APPELLANTS,

and

KRISHNAYYANGÁR AND ANOTHER (DEFENDANTS), RESPONDENTS. *

1886. August 18.

Civil Procedure Code, s. 539—Sanction granted to two persons separately to institute suit in respect of breach of charitable trust.

R. instituted a suit with the Collector's sanction to compel the performance of a charitable trust; D. was subsequently joined as plaintiff, having also obtained the Collector's sanction to institute the suit:

Held that the sanction obtained by D. related back to the institution of the suit.

APPEAL from the decree of J. C. Hughesdon, District Judge of Tinnevelly, in suit No. 7 of 1885, dismissing the suit on the ground that the plaint, as filed, had not been sanctioned by the Collector as required by s. 539 of the Code of Civil Procedure.

Párthasáradhi Ayyangár for appellants.

Respondents did not appear.

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* Appeal 70 of 1886.