MUTHUSAMI MUDALIAR v. NALLAKU-LANTHA MUDALIAR.

also a share is claimed. In his written statement defendant did not object to the suit as under-valued. Having regard to section 11 of the Suits Valuation Act VII of 1889, we are not at liberty to entertain this objection at this stage, as on the merits we are of opinion that appellant has not been prejudiced.

The third objection is that the share decreed to the plaintiff includes shares due to other partners in the indigo business, who were not members of the family, who failed to realize their shares within the statutory period.

Appellant's contention is that such shares should be treated as his self-acquisition; on the other hand respondents alleged in the plaint that the shares were surrendered in favour of themselves and appellant. Though this is found not to be proved, plaintiff has been held to be entitled to participate in such shares also, on the ground that they constitute gains made by first defendant, while he continued in management of the indigo business on behalf of the family with a view to winding up that business.

It has been contended on behalf of appellant that this is not the case stated in the plaint. We find, however, that the fourth issue is wide enough to raise the question, and we cannot say appellant has been prejudiced.

The appeal fails on all points and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1894. December 4.

SEETARAMAYYA (PLAINTIFF), APPELLANT,

v.

VENKATARAZU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Regulation XXIX of 1802, *s.* 7—*Zamindari karnam—Order of succession to hereditary office.*

A woman, who had been appointed to succeed her husband, the holder of the hereditary office of karnam in a zamindari, died leaving the defendant, her daughter's son, and the plaintiff, the son of her late husband's paternal uncle:

Held, that the defendant was entitled to succeed in preference to the plaintiff.

SECOND APPEAL against the decree of C. Suri Ayyar, Subordinate Judge of Cocanada, in appeal suit No. 25 of 1893, confirming the

* Second Appeal No. 1017 of 1894.

SEETARAMAYYA v. VENKATARAZU.

decree of T. Varadarajulu Nayadu, District Munsif of Peddapur, in original suit No. 399 of 1891.

The plaintiff sued to have cancelled the appointment of defendant No. 1 to the office of karnam to which he had been appointed by the zamindars who were defendants Nos. 2 and 3 and to have himself appointed to that office. The last holder of the office was Bhagamma, who had been appointed in succession to her husband, deceased: she who died leaving defendant No. 1, the son of her daughter, and the plaintiff, the son of her late husband's paternal uncle.

The District Munsif dismissed the suit and his decree was affirmed on appeal by the Subordinate Judge.

The plaintiff preferred this second appeal.

Venkatarama Sarma for appellant.

Sriramulu Sastri for respondent No. 3.

JUDGMENT.—The decision of the Subordinate Judge is correct. It is in accordance with the decision in *Krishnamma* v. *Papa*(1), where it was held that a daughter's son was to be preferred to a brother's son, on the ground that the "heirs of the preceding "karnam" in section 7 of Regulation XXIX of 1802, mean his next of kin according to the order of succession of the several grades of legal heirs, and not heirs in the order of succession to undivided divisible ancestral property.

This appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

1894. October 29. November 13.

SUBBA SASTRI AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

BALACHANDRA SASTRI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 562, 588, 590, 591—Order of remand—Right of appeal.

On an appeal from a decree of a District Munsif, it appeared that he had decided all the issues framed in the suit, but in the opinion of the District Judge he had based

(1) 4 M.H.C.R., 234.

* Second Appeal No. 1176 of 1894.

SUBBA SASTRI v. BALACHANDRA SASTRI.

his judgment upon evidence improperly taken. The District Judge remanded the case to be retried, and in the event a decree was passed dismissing the suit which was affirmed on appeal by the Subordinate Judge :

Held, on second appeal, that the order of remand was illegal and, although it had not been appealed against, the subsequent proceedings should be treated as non-existent, and the appeal to the District Court should be remanded to be disposed of in accordance with law.

SECOND APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in appeal suit No. 443 of 1893, affirming the decree of V. T. Subramania Pillai, District Munsif of Kumbakonam, in original suit No. 16 of 1891.

This was a suit for injunction. The plaintiff obtained a decree in the Court of the District Munsif of Kumbakonam, but this decree was reversed in appeal suit No. 72 of 1892 by the District Judge, who directed a trial *de novo* on the ground that the trial before the District Munsif had been irregular for the reasons that the Munsif had issued a commission immediately on the filing of the plaint before the defendants had notice of the suit and based his judgment partly on the report of the Commissioner which was submitted before the defendants had notice of the suit, and further because there was incorporated in the decree a description of boundaries which was filed after the judgment had been delivered and which differed from the boundaries mentioned in the plaint. The suit having been reheard by the then District Munsif of Kumbakonam, a decree was passed for the defendants.

The plaintiffs preferred an appeal to the Subordinate Judge, which was dismissed, and they preferred this second appeal.

Pattabhirama Ayyar for appellants.

Mr. *E. Norton* for respondents.

JUDGMENT.—We are of opinion that the order of remand passed by the District Judge in appeal No. 72 of 1892 was illegal. The suit had not been decided by the District Munsif upon any preliminary point; on the contrary he had decided all the six issues framed; and if he had based his judgment upon evidence improperly taken, it was open to the District Judge to exclude that evidence or to call for or take further evidence.

It is open to the appellants to take this objection now, although they might have appealed against the order of remand (section 591, Code of Civil Procedure; see also *Savitri* v. *Ramji*(1)).

(1) I.L.R., 14 Bom., 232.

The order having been *ultra vires*, the subsequent proceedings are also *ultra vires* and must be treated as non-existent—*Rameshur Singh* v. *Sheodin Singh*(1)).

We must set aside the decree of the Subordinate Judge and the second decree of the District Munsif and remand the original appeal No. 72 of 1892 to the file of the District Court of Tanjore to be disposed of according to law.

The costs hitherto incurred will abide the event.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Parker and Mr. Justice Subramania Ayyar.

1894. March 30, May 2. 1895. March, 11, May 1, 2.

HUSANANNA (DEFENDANT), APPELLANT,

v.

LINGANNA (PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *ss.* 525, 526—*Arbitration without intervention of Court—Application for decree in terms of award—Denial of submission to arbitration and genuineness of award.*

An appeal lies against a decree passed upon an award under Civil Procedure Code, sections 525, 526, when the cause shown against the filing of the award has denied the submission to arbitration and the genuineness of the award.

SECOND APPEAL against the decree of M. R. Weld, District Judge of Kurnool, in appeal suit No. 39 of 1892, affirming the decree of V. Ranga Rau, District Munsif of Nandyal, in original suit No. 117 of 1890.

Suit under Civil Procedure Code, section 525, that an award to be filed in Court. The other party to the alleged arbitration, said to have resulted in the award, was joined as defendant and alleged as cause against the filing of the award, that there had been no reference to the arbitration and that the award was not genuine.

The District Munsif held that there had been an arbitration, which resulted in the award, and passed a decree as prayed.

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(1) I.L.R., 12 All., 510.

* Second Appeal No. 1764 of 1893.