APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Ayyangar.

OTTAPURAKKAL THAZATH SUPPI AND TWO OTHERS (PETITIONERS IN CIVIL REVISION PETITION NO. 772 OF 1912), APPELLANTS,

v.

SAYID ALABI MASHUR KOYAUNA KOYA KUNHI KOYA (RESPONDENT IN CIVIL REVISION PETITION NO. 772 OF 1912), RESPONDENT.*

1916. February 23 and March 15.

30 M.L.J. 523

Civil Procedure Code (Act V of 1908), O. XLIII, r. 1 (r) and O. XXXIX, r. 2, cl. (3)—Interlocutory injunction, disobedience of—Order declining to arrest or attach property—Appealability—Petition to commit while suit pending—Order thereon after dismissal of suit, legality of—Imprisonment, order of, without first ordering attachment, illegal.

An appeal lies under Order XLIII, rule 1, clause (r) of the Civil Procedure Code (Act V of 1908), from an order declining to order arrest or attachment of property for disobedience of an interlocutory injunction and the Appellate Court can on appeal pass the order which the lower Court should have passed.

Where the injunction was disobeyed and the application to commit was put in while the suit was pending, the fact that the order on the application was made after the suit was dismissed does not affect the powers of the Court to take action for the breach.

The Court can in its discretion order either arrest or attachment of property and is not bound in the first instance to attach and then only order imprisonment.

APPEAL under clause 15 of the Letters Patent against the judgment and order of OLDFIELD, J., in Letters Patent Appeal No. 100 of 1913, preferred against the judgment and order of MILLER, J., in Civil Revision Petition No. 772 of 1912, preferred against the order of S. G. ROBERTS, the District Judge of North Malabar, in Civil Miscellaneous Appeal No. 10 of 1912 against Civil Miscellaneous Petition No. 82 of 1911 in Original Suit No. 952 of 1909 on the file of L. R. ANANTHANARAYANA AYYAR, the District Munsif of Badagara.

The following facts of the case are taken from the judgment of OLDFIELD, J.—"The District Munsif granted a temporary injunction and the appellants as they eventually admitted, disobeyed

* Letters Patent Appeal No. 345 of 1914.

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it. Whilst the suit was still pending and the injunction was still in force, the District Munsif was moved to deal with their disobedience, but at the request of the parties he adjourned the petition with the suit until the latter had been disposed of, when on the 30th September 1911 he dismissed it on the ground that whether or no disobedience had taken place the case was not one for punishment. On appeal the District Judge remanded it for readmission and disposal. The District Munsif then considered it sufficient to express his grave disapproval and order the appellants to pay the respondent's costs. The District Judge S. G. ROBERTS imprisoned the appellants for one month."

MILLER, J., declined to interfere on revision. Against this order, Letters Patent Appeal No. 100 of 1913 was preferred.

OLDFIELD and TYABJI, JJ., differed and the appeal was dismissed. Thereupon the present Letters Patent appeal was filed.

J. L. Rosario for the appellants.—Four questions arise: (1) Is there any appeal against an order refusing to commit under Order XXXIX, rule 2 (3)? (2) If there be an appeal, has the Appellate Court power to pass an order under rule 2 (3)? (3) Can either the first Court or the Appellate Court pass an order under rule 2 (3) in this case? (4) Can the Court pass an order for committal without directing an attachment? Before dealing with these questions a preliminary question arises whether the power given under rule 2 (3) is in the nature of a provision for punishment for disobedience or in order to enforce obedience to the injunction.

Under Order XXXIX, rule 2, clause (3), the power was intended to be exercised for enforcing obedience of the injunction —the wording of that clause makes this clear. It may be said that by omitting the words "may be enforced" which appear in section 493 of the old Code the legislature intended that under rule 2 (3) the power was to be exercised by way of punishment; but if sub-rules (3) and (4) be examined it will be found that the power is to be exercised only when the injunction is in force; for clause (4) says that the attachment is to remain in force for one year only; at the end of which time if the disobedience continue the property is to be sold, etc. If the attachment is to be by way of punishment why should the sale at the end of the year be dependent on the disobedience continuing? So also why should the Court have power in

the case of committal to direct release of the offender before expiry of the term of punishment? Both these circumstances point to the fact that the power was to be exercised to enforce obedience. In this case the injunction had been dissolved by dismissal of the suit before the Munsif passed his order refusing to commit. There was therefore no injunction in force which the party was bound to obey. Further it is curious that this power is given under rule 2 (3). There is no similar provision for disobedience of an injunction granted under Order XXXIX, rule 1. Under the old Code, section 493, clause(3), applied to both sections expressly and that express provision has been taken away from the corresponding provision under the new Code. If this provision be one of a punitive nature, why this difference?.

Order XLIII, rule 1 (*r*), provides for an appeal against orders passed under Order XXXIX, rules 1, 2, 4 and 10, and the argument is that this being an order under rule 2 (3) is an order under rule 2 and therefore appealable. Here again rules 1 and 2 say that the Court may "by order" grant the injunction —the words "by order" do not appear in sub-rule (3). Why is this?

Further section 104 (1) (*h*) gives an appeal in cases of orders directing the arrest or detention in the civil prison of any person, and an order passed under this section is final under section 104 (2). If therefore any appeal is allowed against an order of committal under Order XXXIX, rule 2 (3), and the Appellate Court passes an order for arrest or detention, that order is final, and the party aggrieved has no appeal. Why should there be this anomaly?

Section 107 lays down the powers of an Appellate Court, and those powers are subject to such conditions and limitations as may be prescribed. Under Order XXXIX, rule 2 (3), the power to pass the order of committal is vested in the Court granting the injunction, and it has been held can only be exercised by that Court alone. Therefore the power of the Appellate Court is limited thereby, and this is only in consonance with the view that the Court against which the contempt has been committed is the best judge as to how its authority can be vindicated. Reading the Appellate Court's powers in this way would obviate the anomaly referred to above.

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This depends on the question whether the power is punitive. If it is not but is intended only for the enforcement of the injunction, then as there was no injunction to be obeyed at the date when the Munsif passed the order no such order could be made.

The language of sub-rule (3) shows that the Court can only order committal in conjunction with an order for attachment—power is not given to order attachment—or arrest and committal or both. And this strengthens the view that the power given is not intended as punitive but as one intended to compel obedience.

A. Sundaram for the respondent.—An appeal lies even from an order *refusing* to arrest: see *Lachmi Narain* v. *Ramcharan Das*(1). Compare *Venkatasami* v. *Stridevamma*(2). The change of wording in the new Code does not show any real departure from the old Code. The Code gives an Appellate Court all the powers of the First Court and it passes only the order which the First Court should have passed. The Code which gives the power to punish contempts does not say that it ceases on failure of suit. The Code has given the Court both the powers and in the absence of any express provision to the contrary, "imprisonment" can be ordered before or along with "attachment."

WALLIS, C.J.

WALLIS, C.J.—The main question in this appeal is whether under Order XLIII, rule 1 (*r*), an appeal lay to the District Court from the refusal of the District Munsif to take action under Order XXXIX, rule 2 (3), for an alleged breach of a temporary injunction granted under Order XXXIX, rule 2 (2). It is quite clear that an appeal lay in a similar case under section 94 of Act VIII of 1859, and also under section 588 (24) of the Code of 1882 which corresponds to Order XLIII, rule 1 (*r*), and that such appeals lay not only from orders in exercise of the powers conferred by the section but also from orders refusing to exercise such powers. It is also clear that refusal by the Court to take action on the breach of an injunction might seriously prejudice the party in whose favour the injunction had been granted, and it is said to be unlikely that the legislature intended to affect such right of appeal when it recast the language of section 493 of the old Code when

(1) (1913) I.L.R., 35 All., 425. (2) (1887) I.L.R., 10 Mad., 179.

re-enacting it in the present Code. The alteration is that, whereas in section 493 it was provided generally that in case of disobedience the injunction might be enforced by imprisonment or attachment, it is provided in Order XXXIX, rule 2 (3), that the Court granting the injunction may order the attachment or imprisonment; and it is said that these words constitute a prescribed limitation under section 107 of the power which the Appellate Court would otherwise have under that section to pass the order which might have been passed by the Court of First Instance. In support of this contention attention was called to section 104 (*h*) which provides for an appeal from an order under any of the provisions of the Code imposing fine or detention otherwise than in the execution of a decree and to the provision in section 104 (2) that no appeal shall lie from any order passed in appeal under this section, which by virtue of sub-section (1) (*h*) includes orders made on appeal under Order XLIII, rule 1 (*r*), and it was suggested that the alteration in Order XXXIX, rule 2 (3), was introduced to prevent an order of imprisonment being made by the Appellate Court from which there is no further appeal under the section. If, however, this was the object of alteration, it goes further than was necessary, as the rule would equally prohibit appeals from a refusal to order attachment. Further if it had been desired to restrict the right of appeal from orders under Order XXXIX, rule 2, in this way, nothing would have been easier than to say so expressly in Order XLIII, rule 1 (*r*), which is the provision dealing with appeals from orders under the rule in question instead of in Order XXXIX, rule 2, which deals with original orders. It is not in my opinion permissible to read the words "the Court granting the injunction" as restricting the right of appeal, unless they would otherwise have no effect, whereas they may have the effect of preventing original applications in respect of breaches of the injunction being made to any other Court than that which granted the injunction, as for instance in the case of the injunction having been granted by the original Court and the breach having occurred after an appeal had been preferred or possibly after the case had been transferred.

As regards the other points taken, whereas here, the injunction was disobeyed and the application to commit was put in while the suit was pending but the order was made after the suit was dismissed, that does not in my opinion affect the powers of the

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Court to take action for the breach. Lastly, there is in my opinion no foundation for the contention that the Court can only make an order of imprisonment after an order of attachment.

I am therefore of opinion that the appeal lay to the District Judge and that he had the jurisdiction to pass the order. Mr. Justice MILLER has refused to revise that order and I am not prepared in this case to interfere in appeal with the exercise of his discretion. In the result the appeal is dismissed with costs.

ABDUR RAHIM, J.—I agree.

ABDUR RAHIM, J. SRINIVASA AYYANGAR, J.

SRINIVASA AYYANGAR, J.—Three points are raised by Mr. Rosario in this appeal: (1) that no appeal lies from the order of the District Munsif declining to order arrest or attachment of property for disobedience of an interlocutory injunction, (2) that when the Appellate Court interfered the injunction had ceased to exist by reason of the dismissal of the suit in the first Court, and (3) that the Court had no right to order arrest and imprisonment without first ordering attachment of property.

General jurisdiction to make interlocutory orders in pending suits is conferred by section 94 of the Code. Detailed provision for the exercise of such jurisdiction is to be found in Orders XXXVIII, XXXIX and XL. Order XXXIX relates to interlocutory injunctions. General jurisdiction to entertain appeals from orders is conferred by section 104 of the Code. Order XLIII, rule 1, makes provision for appeals from orders made under rules as provided for in clause (1) of section 104. Under clause (*r*) of rule 1 of Order XLIII, an appeal is allowed from an order under rule 2. The injunction in the present case was granted under Order XXXIX, rule 2, by the District Munsif. The application for arrest and attachment was also made under clause (3) of rule 2 to the Court which granted the injunction (i.e., the Munsif). The order in question passed by the Munsif declining to order arrest or attachment under clause (3) of rule 2 is obviously an order under rule 2 and would therefore be appealable. But it was argued that the introduction of the words "the Court which granted the injunction" in clause (3) of rule 2 showed that an order under that clause can only be passed by the Court which granted the injunction and no other Court even in appeal can do so. This construction ignores the fundamental rule that an Appellate Court only passes the order which the first Court should have passed. In many cases applications are made and

in all cases suits filed in trial Court whose duty it is to pass orders or make decrees. And in appeals where the Appellate Courts interfere they only pass such orders as the first Court should have passed (section 107, Civil Procedure Code). The introduction of the words "the Court which granted the injunction" in the new Code—words which are not to be found in the corresponding section 493 of the old Code—is merely due to the change in the method of drafting. It is to be observed that the words "may be enforced" found in section 493 have been omitted in the corresponding rule and the omission has necessitated the re-drafting of the rule in the form in which it now stands. An order for attachment of the property or imprisonments of the person of a party guilty of disobedience of an injunction is not strictly speaking *enforcing the order of injunction*. It is really a punishment for past disobedience. That was probably the reason for the omission of the words. Full scope can be given to the words "Court granting the injunction" by construing them as applicable to the original petition. For example if an injunction is granted by an Appellate Court, pending an appeal from a decree, the application to enforce that injunction in the case of breach could be made only to the Appellate Court. For in that case the trial Court before whom no action is pending would not be in a position to entertain an application. That must be the result even under the old Code. It is clear that disobedience of an order of injunction passed in appeal could not be punished by the Court which tried the suit as section 36 or 37 corresponding to section 649 of the old Code does not apply. Where the business of one Court is transferred to another, the Court to which the business is so transferred may, I think under section 150, entertain an original application for attachment or arrest under clause (3) of rule 2 of Order XXXIX. Attention was drawn to section 104 which provides an appeal in cases of fine and imprisonments. That provision was made *in the body of the Code* in analogy to the similar provision in Judicature Act of 1894 (which allows an appeal without leave in all cases where the liberty of the subject is concerned) to prevent the right being taken away by rules passed by superior Courts by virtue of their rule-making power. In the absence of such a provision in the body of the Code it would be possible for the High Courts after consulting the Rule Committee to abolish the right of

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appeal in the cases provided for by Order XLIII, rule 1, including orders under Order XXXVIII, rule 4, and Order XXXIX, rule 2, clause (3). The argument of Mr. Rosario, if correct, leads to this result. That an order passed by the first Court for attachment of the property and its sale is not appealable as also orders declining to commit or attach property. In England it is now settled that an appeal lies in cases where the first Court declines to order committal or sequestration of property [see *Jarmain* v. *Chatterton*(1)], though of course the Appellate Court would not ordinarily interfere with the "discretion exercised by the first Court."

The view which I have set forth above is fully supported by a passage in High on injunctions, section 1431, where the learned author says: "An appeal from a final injunction does not suspend its operation and the doing of the act enjoined may be punished as contempt, notwithstanding such appeal. And an appeal from an injunctional order does not deprive the Court granting the writ, of the right to punish for contempt for its violation and the lower Court and not the reviewing Court is the proper tribunal to entertain such proceeding. Where the Court of Appeals of the State has jurisdiction to grant a supersedeas to an order of an inferior Court dissolving an injunction and defendants after the granting of such supersedeas proceed to the commission of the act forbidden by the injunction such action is a contempt of the Court of Appeals and may be punished upon proceedings in that Court."

As regards the second question, the breach of the injunction occurred when the injunction was in force and also when the application was made. The dissolution of the injunction owing to the dismissal of the action which happened long after the application could in no way excuse the party who had already disobeyed it: see *Eastern Trust Company* v. *McKenzie Mann & Co., Ltd.* (2).

As to the third point, I think in spite of the difference in the language the meaning is the same. The Court can in its discretion order either arrest or attachment of property and is not bound in the first instance to attach and then only order imprisonment. Mr. Rosario's contention leads to this result. That the Court has power to order attachment alone or

(1) (1882) 20 Ch.D., 493. (2) (1915) A.C., 750.

attachment and imprisonment but not imprisonment alone. It is to be observed that the contention is not that it is only if the attachment proves infructious in compelling future obedience, the writ of committal is to be issued. In England the usual order in cases of disobedience of an injunction by natural persons is attachment of the person or committal; while sequestration is the usual order passed in cases of disobedience by corporations (see Oswald on Contempt, page 223). The former practice seems to have been that unless there was a previous issue of *a writ of attachment* sequestration will not issue but now attachment and sequestration may issue concurrently. I therefore agree to the order proposed.

C.M.N.

APPELLATE CIVIL.

Before Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

1915. August 2 and 3.

PADMA KRISHNA CHETTIAR *alias* KRISHNA IYER (DEFENDANT), PETITIONER,

v.

NAGAMANI AMMAL (PLAINTIFF), RESPONDENT.*

Promissory note by guardian of minor, not signing as such, whether binding on minor's estate—Negotiable Instruments Act (XXVI of 1881), ss. 28 and 30, scope of.

A negotiable instrument executed by the guardian of a Hindu minor for purposes binding on the minor is enforceable against the minor's estate though the instrument was not signed by the executant in his capacity as guardian. The minor is not personally liable on the instrument.

The case is governed by the principles of Hindu Law and sections 28 and 30 of the Negotiable Instruments Act (XXVI of 1881) are not applicable.

Subramania Aiyar v. *Arumuga Chetty* (1903) I.L.R., 26 Mad., 330, followed.

PETITION under section 25 of the Provincial Small Cause Courts Act (IX of 1887) praying the High Court to revise the decree of A. S. BALASUBRAHMANYA AYYAR, the Subordinate Judge of Kumbakonam, in Small Cause Suit No. 692 of 1913.

The facts of the case appear from the judgment.

K. Bhashyam Ayyangar for the appellant.

T. R. Venkatarama Sastriyar, V. S. Govindachariyar and *V. S. Kallabhiran Ayyangar* for the respondent.

* Civil Revision Petition No. 879 of 1913.