

NARAYANAN
MOOSAD
v.
RAMAN
MOOSAD.

under the Mitakshara system. Each Chapter abounds in instances where the law under the Act is a deviation from the ordinary Mitakshara law and it is unnecessary to refer to them in any detail. I must therefore hold that, in the absence of an express provision abrogating the rule of "law, custom or usage" (by whatever name it may be called), which enabled a Nambudri Brahman to sue for the removal of a karnavan, that right exists in spite of the Act, and that the lower Court's order is right.

In the result the civil revision petition is dismissed.

K.W.R.

APPELLATE CIVIL.

Before Mr. Justice Cargenven and Mr. Justice King.

1935,
January 31.

SADAYA PADAYACHI AND ANOTHER (DEFENDANTS 1 AND 2),
APPELLANTS,

v.

CHINNASWAMI NAIDU (PLAINTIFF), RESPONDENT.*

Code of Civil Procedure (Act V of 1908), O. IX, r. 13—Ex parte decree—Application to set aside—Dismissal for default of—Application to set aside order of, and for restoration of original application—Order dismissing, on merits—Appeal from—Competency of—O. XLIII, r. 1 (c), and sec. 141 of Code—Applicability and effect of.

An application under Order IX, rule 13, of the Code of Civil Procedure to have an *ex parte* decree set aside was dismissed for default and an application made thereafter to have that order set aside and the original application restored was dismissed upon the merits.

Held that no appeal lay from the order made on the subsequent application.

* Appeal Against Order No. 347 of 1932.

APPEAL against the order of the Court of the Subordinate Judge of Cuddalore, dated 9th February 1931 and made in Interlocutory Application No. 215 of 1930 in Original Suit No. 53 of 1929.

SADAYA
PADAYACHI
v.
CHINNASWAMI
NAIDU.

M. S. Venkatarama Ayyar for appellants.

T. K. Sundararaman for *M. Patanjali Sastri* for respondent.

The JUDGMENT of the Court was delivered by CURGENVEN J.—We think that the preliminary objection taken by the respondent that no appeal will lie in this case must prevail. An *ex parte* decree was passed against the appellants and they applied under Order IX, rule 13, Civil Procedure Code, to have it set aside. This application was dismissed for their default. They then applied to have that order set aside and their application restored and this has been dismissed upon the merits. It is from this order that the appeal is preferred, and it is urged that it will lie under Order XLIII, rule 1(c), Civil Procedure Code, by force of the application of section 141 of the Code. That section provides that

“the procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction”;

and it has been invoked as sufficient warrant for the view held in two Madras cases, *Venkatanarasimha v. Suryanarayana*(1) and *Salar Beg v. Kotayya*(2), that the provisions of Order IX, rule 9, Civil Procedure Code, will apply to applications made under the same rule as well as to applications to set aside a dismissal of a suit. That however is not to say that the same section will avail to confer a right of appeal. It deals only

(1) A.I.R. 1926 Mad. 325.

(2) A.I.R. 1926 Mad. 654.

SADAYA
PADAYACHI
v.
CHINNASWAMI
NAIDU.
CURGENVEN J.

with procedure, whereas a right of appeal is a substantive right. Under section 104 of the Code such a right is enjoyed only in respect of orders specified in that section or in Order XLIII, rule 1. There is ample authority for this position; see *Chandar Sahai v. Durga Prasad*(1), *Sharif Husain v. Haidar Hussin and others*(2) and *Hara Kumar Mitter v. Murari Mohan Bose*(3). The case of *Jagdish Narain Prasad Singh v. Harbans Narain Singh*(4) is, we think, a decision in the same sense though the headnote is clearly wrong and the judgment is not very clearly expressed. The analogous question whether an appeal will lie against an application to set aside a dismissal not of a suit but of another application under the Code has been decided in *Jung Bahadur v. Mahadeo Prasad*(5), which related to the old Code and dealt with an application under what is now Order XXI, rule 90.

We must hold therefore that no appeal lies in cases of this nature and dismiss the appeal with costs.

A.S.V.

(1) (1924) I.L.R. 46 All. 538.

(2) A.I.R. 1922 All. 337.

(3) (1922) 69 I.C. 1003.

(4) (1917) 2 Pat. L.J. 720.

(5) (1903) I.L.R. 31 Calc. 207.