

money can in such circumstances mean only the amount actually due under the deed, in this instance the amount of the original loan. From this point of view also the plaintiff is entitled to the relief sought.

I would therefore dismiss this appeal with costs.
LENTAIGNE, J.—I concur.

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APPELLATE CIVIL.

Before Mr. Justice Pratt and Mr. Justice MacCalli.

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v.

TIN TIN.*

Practice—Order granting permission to administratrix to sell immoveable property, whether appeal lies from—Probate and Administration Act (V of 1881), section 86—Civil Procedure Code (V of 1908), section 105—Considerations which should guide the Court in granting permission to sell immoveable property.

Held, that an appeal lies from an order of the District Judge granting permission to an administrator to sell immoveable property and that section 105, Civil Procedure Code, did not appear to affect the provision of section 86, Probate and Administration Act.

Per PRATT, J.—“It was not desirable that permission should be given to sell immoveable properties not in the possession of the administratrix, to some of which third parties claimed an absolute title and others of which were subject to ostensible encumbrances, unless it was proved that other properties, not the subject of contention, were unavailable for sale.

The Court ought also to have satisfied itself that the sales were necessary and in the interest of the estate as a whole.”

Abiram Dass v. Gopal Dass, 17 Cal., 48; *Brojo Nath Pal v. Dasmoy Dassee*, 2, C.L.R., 589—*referred to*.

Uma Charan Dass v. Mukhtakeshi Dasi, 28 Cal., 149—*followed*.

Kalimuddin v. Maharui, 39 Cal., 566—*dissented from*.

Lutter—for the Appellants.

Sanyal—for the Respondents.

PRATT, J.—This is an appeal against an order of the District Court granting permission to the Adminis-

* Civil Miscellaneous Appeal Nos. 66 and 67 of 1923 from the order of the District Court, Mandalay, in Civil Miscellaneous case No. 172 of 1920.

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tratrix of an estate to sell certain landed properties belonging to the estate.

Relying on *Kalimuddin v. Maharui* (1) a preliminary objection has been taken that no appeal lies.

It was held by a bench of the Calcutta High Court in the case cited that no appeal lies against an order of a District Judge assigning a bond under section 79 of the Probate and Administration Act.

It was rightly pointed out that section 86 of the Act enacts that every order of a District Judge under the Act shall be subject to appeal to the High Court under the rules contained in the Code of Civil Procedure applicable to appeals; but it was held that one of those rules is to be found under section 105 of the Code, which lays down that "save as otherwise expressly provided" no appeal shall lie from any order. The inference was accordingly drawn that as there is no express provision in the Code for an appeal from an order assigning a bond it followed that no appeal lay against the order assigning a bond.

I find myself unable to agree with this view, which does not appear to me to be based on a correct interpretation of the word "rule" as used in section 86. To my mind the word 'rules' in the section in question relates to rules of procedure regarding appeals laid down in the Civil Procedure Code. The words "save as otherwise expressly provided" in section 105 of the Code would seem to directly contemplate appeals from orders of a character provided for elsewhere than in the Civil Procedure Code, and to include appeals allowed under other laws such as the Probate and Administration Act.

The obvious meaning of section 86 of the Act, I take to be, that all orders made by the District Judge

(1) (1912) 39 Cal., 566.

or District Delegate by virtue of the powers conferred upon him thereunder are subject to appeal in accordance with the rules of *procedure* laid down in the Code of Civil Procedure.

I do not think the rulings referred to in *Kalimuddin v. Maharui* justify the construction placed upon section 86 therein. In *Brojo Nath Pal v. Dasmony Dasse* (2) it was held that no appeal lay against an order reopening a case on the ground that it was an order passed in the course of a suit prior to decree.

Regarding a contested application for probate as a suit, it is a tenable position that no appeal would lie against an interlocutory order, which was not final and did not decide the merits, since there would ultimately be an appeal against the decree in the course of which the order complained of could be made a ground of attack. Or, as it was put in a later Calcutta ruling the order in that case was found to be an order admitting a review of judgment, and such an order is not appealable under the Code of Civil Procedure.

In *Abiram Dass v. Gopal Dass* (3) an order admitting a respondent as caveator was held to be appealable on the ground that it had the same effect as an order making him a defendant in the suit.

It will thus be seen that in the two cases upon which the bench relied in *Kalimuddin v. Maharui* (1) the appeal was held to be admissible or not on the ground that the order, which it was sought to reverse in each instance, was of a character expressly dealt with under the provisions of the Code relating to orders in suits. These cases do not therefore seem to be authorities for holding that an order granting permission to sell estate property is not subject to appeal,

(2) (1892) 2 C.L.R., 589.

(3) (1890) 17 Cal., 48.

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since the Civil Procedure Code does not make provisions regarding orders permitting the sale of property by an administrator under the Probate and Administration Act.

In *Uma Charan Dass v. Muktakeshi Dasi* (4) a bench of three judges of the same Court held that an appeal lies to the High Court against an order passed by a District Judge or Delegate granting permission to an executor or administrator to dispose of immovable property under section 90 of the Probate and Administration Act.

A wide interpretation was equitably placed upon the word 'hereby' in section 86.

The position taken was that such an order was appealable as passed under powers conferred by the Probate and Administration Act, and it was there pointed out that section 86 of the Act says that every order made by a District Judge or District Delegate by virtue of the powers thereby conferred shall be subject to appeal to the High Court.

In view of this definite statement of the content of the section it does not seem to me a justifiable criticism to say that the effect of the words "Under the rules contained in the Code of Civil Procedure" does not seem to have been considered, and I see no reason to suppose these words were overlooked.

I consider that the decision in *Uma Charan Dass* (4) is good authority for holding that the present appeal lies.

Section 86 of the Act as it stands allows the appeal and there is no express provision of the Civil Procedure Code, of which I am aware, which takes away the right.

(4) (1901) 28 Cal., 149.

Turning to the merits of the appeal before us,—the administratrix Tin Tin, who had obtained letters of administration in accordance with the orders of this Court on appeal from the Mandalay District Court's order in Miscellaneous (Administration) proceeding No. 172 of 1920 has obtained from the District Court permission to sell certain lands as part of the estate. The application for permission to sell was opposed with regard to certain lands by Haji Pu and three others, the appellants in appeal No. 66 of this court, on the ground that they had purchased these lands from Maung Thu Tin and Ma The, heirs to the deceased U Ye Din, owner of the estate.

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With regard to other lands, Maung Saw and Maung Ni, appellants in appeal No. 67, opposed the sale on the ground that they were in possession by virtue of a mortgage from the late Tin Tin Gyi, eldest son of the deceased U Ye Din. The District Court overruled the objections without enquiring into their merits and allowed the sale.

It should be remarked that both the transactions regarding the land took place prior to the grant of letters to Tin Tin, whose application for letters was dismissed by the District Court on the ground that she had not proved her status as adopted daughter of U Ye Din, but was subsequently granted on appeal by a Bench of this Court, which found the adoption proved.

It is not legally necessary for letters of administration to estate of a Burman Buddhist to be taken out.

The natural children of U Ye Din denied Tin Tin's status as adopted daughter and unless that was established she was not an heir to the deceased and had no interest in his estate. They partitioned the estate between them.

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Application for permission to sell the lands in dispute was made on the ground that Tin Tin was in need of money to defray the expenses incurred in the letters of administration proceedings and for her maintenance.

The Court ought to have inquired into the truth of her allegations and the necessity for the sale before granting permission.

The estate was an extensive one and included valuable moveable property.

It was not desirable that permission should be given to sell immoveable properties not in the possession of the administratrix, to some of which third parties claimed an absolute title, and others of which were subject to ostensible encumbrances, unless it was proved that other properties, not the subject of contention, were unavailable for sale.

The Court ought also to have satisfied itself that the sales were necessary and in the interests of the estate as a whole.

It has not done so. I do not consider the necessity for the sale has been established. I would set aside the order with costs. Advocate's fees 3 gold mohurs in each appeal.

It will be open to respondent, if she considers it desirable, of course to make a fresh application to the court for sale of estate property, when the court will pass orders after due enquiry in the light of the remarks made in this appeal.

MACCOLL, J.—I concur.