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N.P.A. CHETTIAR FIRM v. H.C. SHARMA.

OTTER, J.

and I see no reason to impose any terms upon them. The third issue is thus also answered. There will be judgment for the plaintiffs in the terms of the foregoing with costs. In view of the difficulty of the case, I allow the plaintiffs a special allowance of seven gold mohurs a day for every day after the first day.

I am asked by both advocates to deal with the question of the costs relating to the appointment of the Receiver. I am told that I reserved them—and I think this is so—though no note appears in the diary. It is true the defendant consented to the appointment, but not until a considerable time had passed, and after he had filed substantial objections. In view of this and also in view of his attitude in persisting in remaining in the building, thus preventing its completion, I order that he should pay to the plaintiff's these costs.

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## APPELLATE CIVIL.

*Before Mr. Justice Heald and Mr. Justice Mya Bu.*

1927

*Dec.* 5.

U BA PE AND ONE

*v.*

U PO SEIN AND OTHERS.*

*Order of Court confirming elections under scheme framed by it under the Civil Procedure Code, whether appealable—Civil Procedure Code (Act V of 1908), s. 92.*

*Held*, that where a Court reserves to itself the right to confirm elections held under a scheme framed by it under the provisions of s. 92 of the Civil Procedure Code and where application for confirmation is made by parties on one side in the suit and is opposed by parties on the other side, the order is a decree in the suit itself and is therefore appealable as a decree under the Code

*Abdul Shaker* v. *Abdul Rahiman*, 46 Mad. 148—*referred to. Balakrishna* v. *Vasudeva*, 40 Mad. 793 ; *Chunilal* v. *Ahmedabad Municipality*, 36 Bom. 47 ;

* Civil First Appeal No. 301 of 1926.

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*Kokka* v. *Chintlachervu*, 47 Mad. 369 ; *Lakshmanan* v. *Kannapa*, 50 Mad. 121 ; *Mahomed Esoof* v. *Mahomed Esoof*, 7 B.L.T. 298 ; *Minakshi* v. *Subramanya*, 11 Mad. 26 ; *Municipal Corporation of Rangoon* v. *Shakur*, 3 Ran. 560 ; *Municipality of Belgaum* v. *Rudrappa*, 40 Bom. 509 ; *National Telephone Co.* v. *Postmaster-General*, (1913) A.C. 546—*distinguished*.

*Thein Maung* for the appellants.

*Ba Shin* and *Maung Ni* for the respondents.

HEALD, J.—In Civil Regular Suit No. 94 of 1922 Maung Tu, who claimed to be one of the 56 founders of the Tilawka-marasein shrine at Kyaiklat and to be also one of the trustees and treasurers of the said shrine, and Po Sein, the present 1st respondent, who also claimed to be one of the trustees and treasurers of the shrine, sued 23 other persons who along with Maung Tu and Po Sein were alleged to have been duly elected to be trustees and treasurers of the shrine and who included the present 2nd, 3rd and 4th respondents, for the settlement of a scheme for the management of the shrine and its funds and for the formal appointment of all the parties to the suit to be trustees and treasurers of the shrine and its funds.

While the suit was pending, Maung Tu died and the present 2nd and 3rd respondents, who in the suit as originally instituted were the 1st and 2nd defendants, were added as plaintiffs.

As framed the suit was clearly intended to be a friendly and possibly a collusive suit, since all the parties to it belonged to one faction which claimed to have elected them as trustees, but a number of other persons, who represented another faction and who included the present appellants, filed a separate suit, against all the parties to the other suit and a number of other persons, in which they claimed that the two present appellants and eleven others had been elected to be trustees of the shrine and that they should be

appointed to be trustees by a scheme which they submitted to the Court for adoption.

The two suits were heard together and were in effect consolidated, the plaintiffs in the second suit being added as defendants in the first suit, which was thus converted into a contested suit between the representatives of the two factions, the two present appellants representing the faction which filed the second suit, and the respondents the faction which filed the earlier suit.

The Court settled a scheme which was embodied in its decree dated the 14th of May 1924.

Both factions appealed but this Court confirmed the scheme on the 17th of July 1925 in its Civil 1st Appeal No. 143 of 1924.

The scheme provides that there shall be 11 trustees, that they shall be elected by the permanent residents of Kyaiklat, being Buddhists and not less than 18 years of age, at an election to be held by the Subdivisional Officer of Kyaiklat, and that "the elected trustees shall be confirmed by the principal Civil Court of jurisdiction." It also provides that the first election must be held within two months from the 14th of May 1924.

On the 18th of June 1924, the two present appellants applied to the Subdivisional Officer of Kyaiklat to hold an election of trustees and he fixed the 13th of July 1924 as the date for the election.

The first three respondents applied for a postponement of the election on the ground of the pendency of the appeal in this Court, but the Subdivisional Officer refused to postpone the election without an order of the Court.

An election was held on the date fixed, and 11 trustees, including the 1st appellant but not including either the 2nd appellant or any of the respondents, were declared to have been duly elected.

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On the 2nd of August 1924, the 1st appellant filed an application in the District Court for confirmation of the election, but the matter was kept pending until after the decision of the appeal in this Court, and the application was not considered until the 4th of September 1925. This delay reflects no credit on the District Court.

Notices were then issued to the parties to the suit in which the scheme was settled and the first three respondents objected to the confirmation of the election and claimed that it should be declared to be invalid on the grounds that the Subdivisional Officer had undertaken to postpone the election with the result that their faction did not vote, and that elected candidates had not applied for confirmation of their election. After much further delay the District Court passed the order against which appellants claim to be entitled to appeal. In that order the Court refused to confirm the election of any of the trustees.

The first question which arises is whether or not any appeal lies against such an order and we have heard counsel at length on this question

Appellants' learned advocate says that it has always been the practice of this Court to accept such appeals but the only appeal to which he has referred us, namely Civil Miscellaneous Appeal No. 122 of 1926, is an appeal under Clause 13 of the Letters Patent and not under the Code and it does not follow that because an appeal lies under the Letters Patent from the judgment of a single Judge of this Court to a Bench of this Court, an appeal lies to this Court from an order of a District Court. In the latter case the right of appeal, if it exists, must be given by the Code of Civil Procedure, and if it is not so given no appeal lies.

A large number of cases have been cited before us by the learned advocates and it will be convenient to deal with them in order of date.

In the case of *Minakshi Naidu* v. *Subramanya Sastri* (1), which was a case in which a Civil Court acting under the provisions of section 10 of the Religious Endowments Act XX of 1863, had appointed a person to fill a vacancy among the members of a committee appointed under that Act, their Lordships of the Privy Council say "Their Lordships cannot assume that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by statute, or by some authority equivalent to a statute . . . . . In the opinion of their Lordships the tenth section places the right of appointing a member of the committee in the Civil Court not as a matter of ordinary civil jurisdiction, but because the officer who constitutes the Civil Court is sure to be one of weight and authority and with the best means of knowing the movements of local opinion and feeling, and one can hardly imagine a case in which it would be more desirable that the discretion should be exercised by a person acquainted with the district and with all the surroundings. The exercise of the discretion being so placed in the District Judge their Lordships are unable to find anything in the tenth section which confers a right of appeal. It has however been suggested that though there may be no right of appeal under the Pagoda Act itself, yet a right of appeal must be found in the general law, and their Lordships' attention has been particularly directed to section 540 of Act X of 1877 which gives a general right of appeal from decrees of Courts exercising original jurisdiction; the jurisdiction conferred

(1) (1887) 11 Mad. 26.

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by the Code (s. 10) is to try suits of a civil nature. The Act of 1877 contained, in its interpretation clause, a definition of the meaning of the word "decree," as used in that Act but this interpretation was modified by Act XII of 1879 and as modified the interpretation is as follows :—"Decree" means a formal expression of an adjudication upon any right, claim or defence, set up in a Civil Court where such adjudication decides the suit or the appeal. In the opinion of their Lordships there was no civil suit respecting the appointment, and it would be impossible to bring an order made by a District Judge pursuant to section 10 of the Pagoda Act within the general definition of a decree as contained in the Code and no other general law has been suggested." Appellants' learned advocate distinguishes that case from the present on the grounds that in the present case there is a civil suit which is brought under the Code and that the order in this case may be regarded either as a decree in the suit itself, or, if not as a decree in the suit, as falling within the present definition of the word "decree" as being an adjudication on a question arising between the parties relating to the execution of the decree and therefore as being the determination of a question within section 47 of the Code.

The next case to which we have been referred, the case of *Chunilal* v. *Ahmedabad Municipality* (1), is a case in which it was held that no appeal lies from an order of a District Court made under the provisions of section 160 of the Bombay District Municipal Act, which gives the District Court in certain circumstances, on the application of either of of the parties to a dispute in respect of compensation to be awarded under that Act for the compulsory

(1) (1911) 36 Bom. 47.

acquisition of land, power to determine the amount of compensation to be paid. The High Court held that section 160 did not itself give a right of appeal and that the order made by the District Court under that section could not be regarded as a "decree" within the definition of "decree" in the Code "because it is made not under the ordinary civil jurisdiction but under a special jurisdiction created by a special Act and the Act does not say that such order is a decree." Appellants' learned advocate distinguishes that case on the ground that the order in the present case is made under the ordinary civil jurisdiction given by the Code, and he says that the decision in that case has in effect been overruled by the decision of the House of Lords in the case of the *National Telephone Company* v. *Postmaster-General* (1).

In the *National Telephone Company's* case, it had been agreed between the parties that all questions and matters of difference referred to arbitration under the agreement by which the Postmaster-General was to buy the Company's plant should be referred to the Railway and Canal Commission. Jurisdiction in such cases was given to the Commission by section 1 of the Telegraph (Arbitration) Act, and that Act contained no provision for an appeal from the Commission's decisions. But the Railway and Canal Traffic Act, 1888, which established the Commission, provided that an appeal should lie from the Commission to the Court of Appeal. It was argued that the provision for an appeal did not apply to decisions of the Commission on a reference under the Telegraph (Arbitration) Act, but the House of Lords held that it did apply. I do not think that this decision, which turns on the wording

(1) (1913) A.C. 546.

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of the particular statutes mentioned, sheds any light on the question which s before us, or that it materially affects the decision in the Bombay case cited above.

In the case of the *Municipality of Belgaum* v. *Rudrappa* (1), the High Court of Bombay accepted the decision in *Chunilal's* case as good law and held that it had no power to revise the order of the District Court which was made under section 160 of the Bombay District Municipalities Act.

The case of *Balakrishna* v. *Vasudeva* (2) like *Minakshi's* case, dealt with an order of the District Court under section 10 of the "Pagoda Act," but the order was somewhat different from that made in the earlier case and the question which arose was not whether an appeal lay from the order but whether the order was open to revision by the High Court under section 115 of the Code. Their Lordships of the Privy Council held that it was open to revision, and this decision may be regarded as casting doubt on the correctness of the second of the Bombay decisions mentioned above. It may be noted, however, in view of the claim of appellants' learned advocate that if we hold that no appeal lies, we should regard the memorandum of appeal in this case as an application for revision, that their Lordships said "It will be observed that the section (section 115 of the Code) applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

The case of *Kokku* v. *Chintlachervu* (3), raised the question of the power of the High Court to deal in

(1) (1916) 40 Bom. 509. (2) (1917) 40 Mad. 793.
(3) (1923) 47 Mad. 369.

revision with orders of a District or Subordinate Judge made in exercise of the powers conferred by the rules made under the Madras Local Boards Act of 1920, and the High Court, holding that the District Judge acted not as a *persona designata* but in a judicial capacity, decided that it had powers of revision over their decisions, but at the same time drew attention to the dictum of their Lordships of the Privy Council quoted above as to the limits of the revisional jurisdiction.

The next case cited is a Full Bench ruling of this Court, namely, *The Municipal Corporation of Rangoon* v. *M. A. Shakur* (1). In the case it was held that the Chief Judge of the Rangoon Small Cause Court in exercising the powers conferred on him by section 14 of the Rangoon Municipal Act acts not as a Court but as a *persona designata* and that therefore the High Court has no power to revise orders passed by him under that section. That case was cited to support a suggestion that the District Judge in confirming or refusing to confirm elections under the scheme in this case acts as a *persona designata* but as I do not think that suggestion can be accepted, I need not consider this decision further.

Similar considerations apply to the Madras case of *Lakshmanan* v. *Kannapar* (2), in which the decision of this Court in the last-mentioned case was followed.

None of the cases cited before us deals with circumstances similar to those of the present case or with a suit filed under section 92 of the Code.

There is however a case in the Chief Court of Lower Burma, namely, *Mahomed Esoof* v. *Mahomed Esoof* (3), which was not officially reported, but which

(1) (1925) 3 Ran. 560. (2) (1926) 50 Mad. 121.
(3) Civil Misc. Appeal 112 of 1913, 7 B.L.T. 298.

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was in some respects similar to the present case and in which the question whether or not an appeal lies from the decision of the Court appointed by a scheme to confirm or refuse to confirm the election of a trustee under the scheme was considered. Unfortunately in that case, as in Civil Miscellaneous Appeal No. 122 of 1926 already mentioned, the appeal in question was not an appeal under the Code, but was an appeal under section 14 of eht Lower Burma Courts Act, the provisions of which were different from those of the Code. Unfortunately too the learned Judges differed on the question whether or not an appeal lay. Hartnoll, J., said "In the cases of *Dhamodarbhat* v. *Bhogilal Karsondas* (1) and *Prayag Doss Ji Varu* v. *Tirumala Suranga Charluvaru* (2), proceedings such as the present are pronounced to be proceedings in execution, and there seems to be no good reason for differing from that view. That being so, I consider that an appeal lies." Twomey, J., on the other hand seems to have regarded the Court appointed by the scheme to confirm elections as a *persona designata*. He said "The authority designated in Clause 4 (of the scheme), *viz.*, the Principal Court of Original Civil Jurisdiction, has appointed a person chosen at the meeting. It appears to me that the decision of that authority in the matter of the appointment is final and I see no reason to entertain an appeal from such an appointment as a matter arising in execution." That ruling therefore does not decide the question which arises in the present case.

I have read the two cases cited in that ruling and I am not satisfied that the Court's confirmation or refusal to confirm an election of trustees under powers given by a scheme is a matter of execution in the sense in which the word execution is used in the Code.

(1) 24 Bom. 45. (2) 28 Mad. 319.

It has been judicially recognised that in certain classes of suits the power of the Court which passed the decree to make orders in the suit does not come to an end when the decree is passed. In the case of *Abdul Shaker* v. *Abdul Rahiman* (1), which was a case of Specific Relief it was said that the Court which heard the suit keeps control over the action and has full power to make any just or necessary orders therein, that being the practice of the Courts of Chancery in England in similar suits. It has been repeatedly held that in suits under section 92 of the Code, which in England would have come before the Courts of Chancery, the Court which framed a scheme has power to vary it, see remarks to this effect in the case of *Prayag Doss Ji Varu* already cited, and the case of *Umashamnand* v. *Ravaneshvar* (2), which does not seem to have been officially reported, also the case of *Manadananda* v. *Tarakananda* (3).

It would appear therefore that in those suits also the Court is regarded as keeping control over the action, and it seems to me that where the Court reserves to itself the right to confirm elections held under a scheme framed by it and where application for confirmation is made by parties on one side in the suit and is opposed by parties on the other side, the order which the Court makes is not really an order in execution but is a decree in the suit itself and is therefore appealable as a decree under the Code.

I would therefore find that an appeal lies against the order in this case as a decree.

On this finding it becomes necessary to consider the case on the merits. (His Lordship confirmed

(1) (1922) 46 Mad. 148. (2) 43 I.C. 772.
(3) 76 I.C. 220.

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the elections of all the candidates except Maung Hla Baw.)

MYA BU, J.—I concur.

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## APPELLATE CRIMINAL.

*Before Mr. Justice Carr.*

1927

*Dec.* 5.

## KING-EMPEROR

*v.*

## MUTU ALAGI.*

*Burma Village Act (Burma Act VI of 1907), s. 20-A, and Rule 6 of the rules—Powers of the Deputy Commissioner under s. 23—Money-lender taking goods and chattels in pledge.*

*Held*, that a conviction by a Magistrate under the Burma Village Act is not an order under the Act, within the meaning of s. 23 of the Act; neither is a Magistrate when exercising jurisdiction as such "an authority subordinate to" the Deputy Commissioner.

*Held* accordingly that the Deputy Commissioner cannot revise a conviction by a Magistrate for an offence under the Burma Village Act.

*Held, also*, that a money-lender, genuinely carrying on business as such, does not commit an offence under sections 20-A of the Burma Village Act, by taking goods and chattels in pledge for advances of money on a promissory note or other document.

*A. Eggar*—(Government Advocate) for the Crown.

*McDonnell* for the respondent.

CARR, J.—The respondent, Mutu Alagi, was convicted by the Township Magistrate of Thegon of the "offence of receiving in pawn a gold ring—without a license in contravention of section 20-A of the Burma Village Act punishable under Rule 6 of the rules

* Criminal Appeal No. 1359 of 1927.