APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1892. *January* 11.

SHRI VISHVA'MBHAR PANDIT, APPLICANT, *v.* SHRI VA'SUDEV PANDIT, OPPONENT.*

Administrators appointed by the Court—Order to deliver property—Regulation VIII of 1827, *Sec.* 9—"*Determined*"—"*Finally determined*"—*Right of appeal —Illegal order—Jurisdiction—Civil Procedure Code (Act XIV of* 1882), *Sec.* 622—*Extraordinary jurisdiction.*

Section 9 of Regulation VIII of 1827 empowers the District Court to make an order directing the administrators appointed under the Regulation to make over the property, when "it has been determined" between the rival claimants who is the heir of the deceased; but, to give full effect to the object of the Regulation, the word "determined" must be understood "finally determined."

Where the Judge considered that he was bound to make an order directing administrators appointed under Regulation VIII of 1827 to make over the property of the deceased to one of the rival claimants who was judicially declared to be the heir of the deceased,

Held that, so long as the party against whom the decision in the matter of the rival claims was given, had a right of appeal, the order of the Judge was one which he could not make under the Regulation, and that in exercising his jurisdiction under the Regulation he had exercised it illegally and that being so, the High Court had power, under section 622 of the Civil Procedure Code (Act XIV of 1882), to interfere in the exercise of its extraordinary jurisdiction.

THIS was a civil application under the High Court's extraordinary jurisdiction, section 622 of the Civil Procedure Code (Act XIV of 1882), against an order passed by Dr. A. D. Pollen, District Judge of Poona.

The application was made under the following circumstances:—

One Tátia Mahárâj died in the year 1866 possessed of considerable property consisting of *inám* villages situate partly in British and partly in Kolhápur Territory. Tátia Mahárâj had left him surviving two widows, who died in the year 1887. After the death of the widows, disputes arose between Shri Vishvámbhar Pandit *alias* Nána Mahárâj and Shri Vásudev Pandit *alias* Bába Mahárâj, who set up their rival claims to the right of succession to the property of the deceased Tátia Mahárâj. The former set up his title as the reversionary heir and the latter as the adopted son of Tátia Mahárâj. Owing to the disputes the

* Civil Application, No. 249 of 1891, under Extraordinary Jurisdiction.

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District Judge of Poona appointed the Collectors of Poona and Belgaum to act as administrators of the deceased's estate in British territory under section 9 of Regulation VIII of 1827 until the right of succession was determined by a Civil Court. Shri Vásudev Pandit *alias* Bába Maháráj thereupon filed a suit in the Court of the First Class Subordinate Judge of Poona to establish his title by adoption to the estate of the deceased. The suit having been decided in favour of Shri Vásudev Pandit *alias* Bába Maháráj, he applied to the District Court for an order that the property, which was in the possession and management of the administrators, should be delivered over to him, and the District Judge granted the application on the 1st December, 1891. On the 4th December, Vishvámbhar *alias* Nána Maháráj presented an application to the District Judge, stating that he intended to prefer an appeal against the decree of the Subordinate Judge, and praying that the *ex-parte* order which was passed on the application of Shri Vásudev Pandit *alias* Bába Maháráj, directing delivery of property to him, should be cancelled, and that the management and possession of the administrators should be continued. On the said application the District Judge passed the following order:—

"The administrator is only authorized to manage the property till the right of succession is determined, and when it is determined, as it has been in this case, the Judge is bound to direct the administrator to deliver over the property to the rightful heir. Application rejected."

Against the order of the District Court Vishvámbhar Pandit *alias* Nána Maháráj applied to the High Court.

Latham (Advocate General with *Ganpat Sadáshiv Ráo*) for the applicant:—Section 9 of Regulation VIII of 1827 contemplates that the order for the delivery of property should be made after the dispute between the rival claimants is "finally" determined. The word in the section is "determined," but, unless it be held to mean "finally determined," there would be no end to confusion, and the object of the Regulation will be defeated. We have presented an appeal to this Court against the decree of the Subordinate Judge, and till the appeal is disposed of, the

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question as to who has the preferential right to succeed to the property remains open and cannot be considered to have been "determined." The District Judge has taken an erroneous view of the section, and his order, being both irregular and illegal, should be set aside—*Sakamva* v. *Martyava* (1); *Jugobundhu* v. *Jadu Ghose* (2).

Mahádev Chimnáji Apte for the opponent:—The language of section 9 of the Regulation is quite clear and there is no ambiguity about it. When the question between the rival claimants is once decided, the District Court has got no power under the section to keep the property under the custody of the administrator. The Court cannot interfere with the order of the District Judge, because under section 622 of the Civil Procedure Code (Act XIV of 1882) which is applicable to the present case, it can interfere with the lower Court's order only when that Court has failed to exercise or has exceeded its jurisdiction or has acted with material irregularity.

[SARGENT, C. J.:—But the Judge has not properly construed section 9 of the Regulation. Improper construction of a section is an illegality which must be taken notice of under the extraordinary jurisdiction.]

This Court is always very chary in exercising its extraordinary jurisdiction. It has been often held that a decision based upon a wrong view of law cannot be set aright under the extraordinary jurisdiction. Such has been the invariable practice of this Court.

SARGENT, C. J.:—The District Judge considered that he was bound to make the order of the 1st December, 1891, directing the administrators appointed under Regulation VIII of 1827 to make over the property of the late Tátia Mahárâj to Shri Vásudev after he had been judicially declared by the First Class Subordinate Judge in Suit No. 324 of 1888 to be the heir of the deceased. Section 9 of the Regulation doubtless provides for this being done when it "has been determined" between the rival claimants who is the heir; but to give full effect to the object of the Regu-

(1) P. J., 1887, p. 52. (*Vide* note, p. 711 *infra*.)
(2) I. L. R., 15 Calc., 47.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1892. *January* 12.

KA'LIDA'S FAKIRCHAND AND ANOTHER, (ORIGINAL APPLICANTS), APPELLANTS, *v.* BA'I MA'HA'LI, (ORIGINAL OPPONENT), RESPONDENT.*

Remand order, carrying out of—Duty of the Court to which the case is remanded—Succession Certificate Act (VII of 1889), Sec. 1—Certificate—Probate.

Kálidás Fakirchand and Karsandás Amirchand applied to the District Court for a certificate of administration under section 6 of Act VII of 1889 to enable them to collect the debts due to one Punja Jagjivan, deceased. They alleged that Punja had made a will appointing them trustees to collect his debts. Bái Máháli also applied for a certificate on the ground that she was Punja's heir. She disputed the genuineness of the alleged will. The District Judge rejected both the applications on the ground that the validity of the will could not be settled in a summary proceeding. On appeal the High Court remanded the matter for rehearing, holding that the District Judge had jurisdiction to decide upon the genuineness of the will. At the rehearing Bái Máháli withdrew her application, but the Judge held that as Kálidás and Karsandás claimed a certificate as executors of the will and not as heirs, they should take out probate of the will. He, therefore, refused their application. On appeal to the High Court,

Held, that the duty of the District Judge in carrying out the remand order of the High Court was confined exclusively to determining whether the applicant or the heir was entitled to the certificate, and that he could not refuse the certificate simply because the applicants might have asked for probate, as the case did not fall under clause 4 of section 1 of *Act VII of 1889*.

THIS was an appeal from an order of J. B. Alcock, District Judge of Surat.

The appellants Kálidás Fakirchand and Karsandás Amichand on the one hand and the respondent Bái Maháli on the other presented two applications to the District Court praying for a certificate of administration, under section 6 of Act VII of 1889, to enable them to collect the debts due to one Punja Jagjiwan, deceased. Kalidás and Karsandás applied for the certificate on the ground that the deceased had made a will appointing them trustees to collect his debts. Bái Maháli in her application disputed the genuineness of the will, and prayed for the certificate, on the ground that she was the natural heir of the deceased.

The District Judge rejected both the applications and observed: "It is obvious that the question whether this will is opera-

* Appeal No. 132 of 1891.

tive, cannot be settled in a summary proceeding, as the fact of execution, the state of the testator's mind, and the propriety of the will are called in question, and these points involve further questions with regard to caste factions, the relations of the parties, and so forth.

"This being so, the question arises, should a certificate be granted to the persons claiming under a will, the validity of which is impugned, or to the natural heir, or to neither?

"I am of opinion that the certificate should be granted to neither."

Against the order of the District Court the applicants presented cross appeals to the High Court, which, holding that the District Judge had jurisdiction to go into the question of the genuineness or otherwise of the will, reversed the order and remanded the matter for a re-hearing (1).

On remand the District Judge passed the following order:—"A preliminary objection has been raised on behalf of Bái Maháli, that the applicants in No. 10 of 1890, *viz.*, Kálidás and Karsandás, ought to take out probate of the will under Act V of 1881. As these applicants claim a certificate merely as executors of the will made by deceased, and not as heirs, I hold * * that they must take out probate of the will, and this application must be refused with costs.

"Bái Maháli withdraws her application No. 24 of 1890."

Kálidás and Karsandás appealed to the High Court.

Motilál Mugutlál Munshi for the appellants:—The District Judge was wrong in allowing the question of probate to be raised. In our application we prayed that a certificate under the Succession Certificate Act (VII of 1889) should be given to us. It was not necessary to make an application for probate—*Bhagvansang* v. *Bechardás* (2); *Shaik Moosa* v. *Shaik Essa* (3). The High Court having on the previous occasion directed the District Court to re-hear the application on the merits, we submit that that Court could not travel beyond the order and reject our application in a summary way.

(1) P. J. for 1891, p. 13. (2) I. L. R., 6 Bom., 73.

(3) I. L. R., 8 Bom., 241.

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Govardhanrám Mádhavrám Tripáthi for the respondent:—Sections 4, 5 and 21 of the Succession Certificate Act seem to give superiority to the provisions of the Probate Act (V of 1881), and that being so, the lower Court was right in insisting upon the appellants taking out probate. The words used in the sections being "may grant," it is not compulsory upon the Court to grant a certificate; it may refuse to grant one under certain circumstances, as in the present case.

SARGENT, C. J.:—The duty of the District Judge in carrying out the remand order of the High Court was confined exclusively to determining whether the applicants or the heir of the deceased was entitled to the certificate. Moreover, the District Judge could not refuse the certificate simply because the applicants might have asked for probate, as the case does not fall under section 1, clause (4) of the Succession Certificate Act, 1889. We must, therefore, reverse the order of the Court below and send back the case for a fresh decision. Costs to abide the result.

Order reversed and case sent back.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Telang.

1892. *January* 19.

BÁI SA'RI, (ORIGINAL DEFENDANT), APPELLANT, *v.* SANKLA HIRA'CHAND, (ORIGINAL PLAINTIFF), RESPONDENT.*

Limitation Act (XV of 1877), Arts. 34 and 35 of Schedule II, Sec. 23—Suit for restitution of conjugal rights—Wife's refusal to return to her husband—Continuing wrong—Limitation.

The refusal of a wife to return to her husband, and allow him the exercise of conjugal rights, constitutes a continuing wrong giving rise to constantly recurring causes of action on demand and refusal.

Suits for the recovery of a wife or for the restitution of conjugal rights, though governed by articles 34 and 35 of Schedule II of the Limitation Act (XV of 1877), are not thereby taken out of the operation of section 23 of the Act.

SECOND appeal from the decision of V. R. Inámdár, Acting Joint Judge of Ahmedabad, in Appeal No. 72 of 1889 of the District File.

This was a suit for restitution of conjugal rights.

The principal defence to the suit was that it was barred by limitation.

*Second Appeal, No. 767 of 1890.