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doubt as to its jurisdiction to take cognizance of the case, that a reference can be made under the section.

JENKINS, C. J.:—We cannot deal with this under section 646A, which applies to a case before judgment. We cannot, therefore, deal with the reference. But we can under section 622 deal with the order of the Subordinate Judge, A. P. His order was clearly wrong. The case having been tried by the Subordinate Judge with Small Cause Court powers, which is a different Court from that of the Subordinate Judge exercising his ordinary powers (section 33 of Provincial Small Cause Courts Act), no appeal lay to the District Court. The defendant, who wished to appeal to the District Court, should have been told to apply to the High Court under section 25 of the Provincial Small Cause Courts Act. This is the course which should now be taken by the party aggrieved by the decision of the Subordinate Judge with Small Cause Court powers.

We set aside the order of the Subordinate Judge, A. P., dated 10th August, 1899.

APPELLATE CIVIL.

Before Sir J. H. Jenkins, Kt., Chief Justice, and Mr. Justice Cundy.

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DAGDU JAITRAM, DECEASED, BY HIS HEIR HIS SON KHUSHAL (ORIGINAL DEFENDANT), APPELLANT, v. CHANDRABHAN BIN SHIVRAM MARWADI AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), Secs. 244, 549 and 647, explanation—Execution—Appeal by defendant against the order granting execution—Appellant required to give security for the costs of the appeal and of the original suit.

The Court can require an appellant from an order made under section 244 of the Civil Procedure Code (Act XIV of 1882) in execution of a decree to give security for the costs of the appeal and of the original suit.

SECOND appeal from the decision of J. B. Alcock, District Judge of Násik, dismissing an appeal against an order passed by Ráo Bahádur D. G. Gharpure, First Class Subordinate Judge, in execution of a decree.

* Second Appeal, No. 563 of 1899.

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The plaintiffs obtained a decree against the defendant for possession of certain immoveable property and applied for execution. The defendant objected to the execution on the ground of fraud on plaintiffs' part in getting the decree. The Court over-ruled the defendant's objection and granted execution. The defendant appealed, and the appellate Court, on the application of the plaintiffs (respondents) under section 549 of the Civil Procedure Code (Act XIV of 1882), called upon the appellant (defendant) to furnish due security for the costs of the appeal and the original suit before proceeding with the appeal. Two months' time was granted for furnishing the security. Against the said order requiring the defendant to furnish security, he presented an application to the High Court for revision under section 622 of the Civil Procedure Code (Act XIV of 1882). Before the disposal of the application by the High Court, the Judge dismissed the defendant's appeal which was pending before him, as no security was furnished within two months. Against the order dismissing the appeal the defendant preferred the present second appeal.

N. P. Patankar for the appellant (defendant):—The appeal before the Judge was not an appeal from a decree in a suit, but from an order in the matter of an application. The order was a decree in an application and not in a suit. The expression 'of the original suit' in section 549 of the Civil Procedure Code has, therefore, no application in the present case. The order, therefore, should have been confined to the costs of the appeal, or, at the most, to the costs of the appeal in addition to the costs of the original application for execution. We submit that the word "suit" should, in this case, be interpreted to refer to the application made before the Subordinate Judge. Suit should be understood to mean such proceedings in which an order has been made by the Court of first instance and an appeal against that order. Under the circumstances of the present case the term "suit" cannot be taken to refer to the original suit the decree in which is sought to be executed. For the purposes of appeals under section 244 of the Civil Procedure Code, the words 'of the original suit' must be taken to mean 'of the original application' also.

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The next point is that section 549 of the Civil Procedure Code does not apply to applications in an execution proceeding. The explanation added to section 647 expressly excludes such applications.

Ráo Bahádur *Ghanasham N. Nadkarni*, for the respondents (plaintiffs):—The explanation to section 647 of the Civil Procedure Code lays down that applications for execution of decrees are proceedings in suits. Section 549 is, therefore, applicable. The explanation to section 647 also shows that execution proceedings are simply the continuation of the original suit. Therefore the costs of the original suit would include the costs of the execution proceedings.

The application under section 622 cannot be maintained, because an order of dismissal under section 549 is appealable.

JENKINS, C. J.:—The only point in this case is, whether the Court can require an appellant from an order under section 244 of the Civil Procedure Code, to give security for the costs of the appeal and of the original suit. It is contended that the Court has no such power, on two grounds. First, it is said that proceedings in execution are excluded from the operation of section 647 by the explanation to it, and that as a result neither section 549 nor Chapter XLI, of which it forms part, is applicable to an appeal from an order in execution. But the answer to this is clear; there is no necessity to have recourse to section 647. Chapter XLI deals with appeals from decrees, and by section 2 of the Code decree means (among other things) an order determining any question mentioned or referred to in section 244, so that it is clear that Chapter XLI and section 549 (of which it forms part) is applicable to an appeal from an order under section 244. The other ground on which the appellant relies is that security for costs of the original suit cannot be ordered except on an appeal from a decree in the original suit, and in any case not in an appeal from an order in execution. But I fail to see, in the arguments that have been advanced, any reason to withhold from the words of the section their clear and manifest meaning.

It has been argued for the respondents that the costs of the original suit include costs of execution, and there is much to be said

in favour of that view. As, however, the point does not, under the circumstances of the case, arise for decision, I refrain from expressing any opinion on it. From the conclusion at which I have arrived, it follows that the order of the lower appellate Court must be confirmed and the appeal dismissed with costs. The appellant will have liberty to apply to the lower Appellate Court for re-admission of the appeal on furnishing the necessary security for costs.

CANDY, J. :—I am of opinion that section 647 does not apply ; these execution proceedings are proceedings in the suit, the order refusing stay of execution was a “decree,” and, therefore, an appeal lay, and section 549 applies without any reference to section 647 or any other section. I am also of opinion that the words in section 549 “or of the original suit” must refer primarily to the original suit in which the decree was passed, in execution of which the order appealed against was passed. They may also refer to the costs recited in the order in the execution proceedings, which are proceedings in the suit. In the present case the order appealed against was without mention of costs, but this fact did not prevent the District Judge from demanding costs of the original suit. This is the only point which has been raised. I would, therefore, dismiss with costs both the appeal and the application for the exercise of extraordinary jurisdiction.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Kt., Chief Justice, and Mr. Justice Ranade.

VITHALRAO KRISHNA VINCHURKAR (ORIGINAL PLAINTIFF), APPELLANT, v. RAMRAO KRISHNA VINCHURKAR (ORIGINAL DEFENDANT), RESPONDENT; AND RAMRAO KRISHNA VINCHURKAR (ORIGINAL DEFENDANT), APPELLANT, v. VITHALRAO KRISHNA VINCHURKAR (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Deceased nephew—Inheritance—Uncles of whole blood and half blood—Preference—Manu—Mitaksharā—Mayukha—Viramitrodaya—Smṛiti Chandrika—Madanparijat—Dayabhag.

For the purpose of inheritance, an uncle of the whole blood is not entitled to preference over one of the half blood.

* Cross Appeals, Nos. 81 and 106 of 1898.

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