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occupancy will operate unfairly to the prejudice of other persons interested in the continuance of the occupancy, it shall be lawful for him, instead of selling the occupancy, to forfeit only the registered occupant's interest in the same, and to substitute the name of any such other person as registered occupant on his payment of all sums due on account of land revenue for the occupancy. The Collector apparently acted under the above section: it might obviously have been to the prejudice of the tenant in possession if there had been a sale of the occupancy. Had the tenant not succeeded in becoming the purchaser, he would have lost all rights under his lease and would have been ejected. By preventing a sale he preserved his rights. But he cannot be said to have at the same time put an end to the lease under which he was in possession.

For the above reasons, we are of opinion that the District Judge should have found in the affirmative on the first issue framed by him, *i.e.*, that the plaintiff was entitled to recover rent from defendant for the period subsequent to the forfeiture of occupancy; and we amend the decree by awarding rent for the full amount claimed, deduction being of course made of the Government assessment paid by defendant. Defendant must pay all the costs up to date.

Decree amended.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Crowe.

1899. *July* 3.

SANGAPPA (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHIVBASAWA (ORIGINAL DEFENDANT), RESPONDENT.*

Receiver—Subordinate Judge, power of, to appoint—Appeal from order of refusal of Subordinate Judge—Jurisdiction—Civil Procedure Code (Act XIV of 1882), Secs. 503 and 505.

A Subordinate Judge, when considering the expediency of the appointment of a receiver, is acting under section 503 of the Civil Procedure Code (Act XIV of 1882) as explained by section 505. When he does appoint, his order is passed under section 503, and when he refuses to take the necessary step preliminary

* Appeal, No. 6 of 1899, from order.

to appointment, his order is also made under that section. An appeal lies from such an order made by a Subordinate Judge.

Circumstances under which a receiver is appointed, considered.

John v. *John* (1) referred to.

APPEAL against the decision of Ráo Bahádur B. S. Joshi, First Class Subordinate Judge of Sholápur.

In a previous litigation between the parties to this suit it was held by the High Court(2) that the defendant had adopted the plaintiff, and that the adoption was valid and binding upon the defendant. The defendant appealed to the Privy Council and that appeal was now pending.

The plaintiff, as adopted son, brought this suit for possession of the property and applied to the Subordinate Judge that a receiver should be appointed, alleging that the defendant was negligent in her management, and was allowing the rent to fall into arrears, and that she being a pardanashin widow was wholly unfit to manage so large a property.

The Subordinate Judge rejected the application. The plaintiff appealed.

Mahadeo B. Chaubal for the respondent (defendant):—The appeal is made from the order of the Subordinate Judge, but no such appeal lies. Section 505 of the Civil Procedure Code gives the power to appoint a receiver only to the High Court or to a District Court. From orders made by them an appeal may lie, but not from an order of a Subordinate Judge refusing to nominate a receiver under clause 2 of section 505—*Birajan Kooer* v. *Ram Churn*(3); *Chunilal* v. *Sonibai*(4); *Venkatasami* v. *Stridavamma*(5).

As to the merits, we say no case for a receiver is proved—*Dastur Kekobad* v. *Navajbai*(6). We have not mismanaged the property. The right to the property is as yet undecided, as our appeal to the Privy Council is still pending.

(1) (1898) 2 Ch., 573.
(2) See P. J., 1896, p. 743.
(3) (1881) 7 Cal., 719.
(4) (1895) 21 Bom., 328.
(5) (1886) 10 Mad., 174.
(6) P. J., 1896, p. 286.

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Narayan G. Chandavarkar for the appellant:—As to the right to appeal, the case of *Gossain Dulmir* v. *Tekait Hetnarain*[1] is conclusive. Our adoption being held proved, we have a right to possession—*Sidheswari* v. *Abhoyeswari*[2]; *John* v. *John*[3]. A receiver will manage the property in the interest of both parties.

CANDY, J.:—Mr. Choubal has taken the preliminary objection that no appeal lies from the order of the Subordinate Judge refusing to recommend to the District Judge the appointment of a receiver. In *Subramanya* v. *Appasami*[4] the facts were very similar: the Subordinate Judge, in whose Court the suit was pending, refused to recommend the appointment of a receiver: plaintiff appealed to the High Court, and their Lordships held that the main question for their determination was whether an appeal would lie against an order of a Court refusing to exercise the power of appointing a receiver. This question was answered in the negative; but the authority of the decision is weakened by the fact that it was expressly overruled in the subsequent Full Bench case of *Venkatasami* v. *Stridavamma* [5].

Turning to the overruling authority quoted above, it will be seen that in that case the application for the appointment of a receiver was made to the District Court in which the suit was pending. The order refusing the application was passed under section 503, and the ruling of the Full Bench was that an order of refusal to appoint a receiver is an order under section 503 and is appealable under section 588 (24). This proposition, as regards an order of refusal, passed by a District Court, is unassailable, because the order must have been passed under section 503 and under no other section.

That does not directly touch the case before us, in which the order of the Judge of a Court subordinate to the District Court is as follows:—"I do not consider it expedient that a receiver should be appointed in the suit before me." Must that order have been passed under section 505, in which case no appeal is given by the Code? The other cases quoted do not help us.

(1) (1880) 6 Cal. L. R., 467.
(2) (1888) 15 Cal., 818.
(3) (1898) 2 Ch., 573.
(4) (1883) 6 Mad., 355.
(5) (1886) 10 Mad., 179.

In *Gossain Dulmir* v. *Tekait Hetnarain*(1) it was laid down that an order made by a Subordinate Judge dismissing an application for the appointment of a receiver *after obtaining sanction from the District Judge* is an order under section 503, and not under section 505, and, therefore, appealable. As Mr. Justice Parker said in Appeal against Order, 115 of 1885, reported in the note at pages 180-1 of Indian Law Reports, 10 Madras: "This would favour the view that after sanction given, it is the Subordinate Court which makes the order under section 503, and not the District Court, the Subordinate Court having been authorized thereto under section 505." That may be so; but that does not touch the question whether a Subordinate Court, refusing to ask sanction from the District Court, can be said to be passing an order under section 503. In *Birajan Koer* v. *Ram Churn Lall Mahata* (2), which has been quoted with approval by this Court in *Chunilal* v. *Sonibai*(3) it was held, as pointed out by Mr. Justice Parker in the case in the notes in I. L. R., 10 Mad., 180-1, that the first step taken by the Subordinate Judge is to nominate, and that from this proceeding there is no appeal: the Judge then approves, and under section 505 authorizes the appointment, and from this also there is no appeal: then the Subordinate Judge appoints the receiver previously nominated, and from this order there is an appeal. Thus (to still quote Mr. Justice Parker) this ruling also corroborates the view that the action of the District Court is not taken under section 503, but under section 505, and that the appeal is from the order of the Subordinate Court under section 503. Can the same principle be applied here? Can it be said that a Subordinate Judge, passing an order that he does not consider it expedient that a receiver should be appointed, is passing an order under section 503? If not, then we have this strange anomaly, that when a District Judge refuses to appoint a receiver, there is an appeal against his order of refusal, but when a Subordinate Judge refuses to nominate a receiver, there is no appeal from his order.

Mr. Choubal attempts to get over this anomaly by contending that a plaintiff, in such a case as the present, can always apply

(1) (1880) 6 C. L. R., 467. (2) (1881) 7 Cal., 719.

(3) (1895) 21 Bom., 323.

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to the District Judge. We do not agree with this contention. "The Court" in section 503 must be the Court in which the suit is pending, and we think that the correct way in which to regard the question is by holding that a Subordinate Judge, when considering the expediency of the appointment of a receiver, is really acting under section 503 as limited and explained by section 505. He cannot exercise the powers conferred by the chapter, that is, the powers of appointment of receivers, but he is enjoined on application to consider the expediency of the appointment of a receiver (section 505),—that is, he has to consider whether it appears to him to be necessary for the realization, &c., of the property to appoint a receiver (section 503), and though he has not the power till authorized by the District Judge under section 505 to appoint the receiver (section 503 (*a*)), still when he does appoint, his order is passed under section 503, and equally when he refuses to take the necessary steps preliminary to appointment his order is under section 503.

Turning, then, to the merits, we have to see whether it is expedient that a receiver should be appointed in this case, *i.e.*, whether it appears to be necessary for the realization, preservation, or better custody or management of the property, that a receiver should be appointed. We need not refer in detail to the litigation which has been going on between the parties. It is true that the present defendant has obtained leave to appeal to the Privy Council against the decision of this Court by which her title has been decisively denied. It may be that she will eventually succeed: all that we can say is that at present she has apparently no title. Then we must consider the fact that owing to the position of the parties the tenants are in a hazardous position and must be exposed to a double claim. It is impossible to read the judgments of the Court of Appeal in *John* v. *John*[1] without seeing that in England such a case as the present one would be pre-eminently considered as one in which it is "just and convenient" to appoint a receiver.

We must reverse the order of the Subordinate Judge and remand the case to him that he may nominate a fit person for

(1) (1898) 2 Ch., at p. 578.

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the appointment of receiver, and submit his name with the grounds for the nomination to the District Court. We may point out that under section 503 (*d*) power may be granted for the disposal of the rents and profits in such a way as to ensure a proper allowance to the defendant for such objects as the Court may think fit. Costs to be costs in the suit.

Order reversed and case remanded.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

SHITAWA (ORIGINAL DEFENDANT No. 1), APPELLANT, *v.* BHIMAPPA (ORIGINAL PLAINTIFF), RESPONDENT.*

1899.
July 3.

Evidence—Commissioner appointed to prepare a map—Civil Procedure Code (Act XIV of 1882), *Sec.* 392—*Statements of village officers made to such commissioner and recorded by him—Practice.*

In a suit as to a right of way a commissioner was appointed under section 392 of the Civil Procedure Code to prepare a map of the locality in question.

Held, that the statements of the village officers made to him with regard to the right of way were inadmissible in evidence.

SECOND appeal from the decision of T. Walker, District Judge of Dhárwár, varying the decree of Ráo Sáheb N. B. Muzumdar, Subordinate Judge of Gadag.

The plaintiff sued for a declaration that certain land belonged to him and also for an injunction restraining the defendants from interfering with a certain right of way which he claimed. In the course of the proceedings, a commissioner was appointed under section 392 of the Civil Procedure Code (Act XIV of 1882) for the purpose of making a map of the locality showing the land in dispute and the direction of the right of way claimed by the plaintiff. The Subordinate Judge allowed the plaintiff's claim to the land, but refused the injunction prayed for.

On appeal by the plaintiff the Judge granted the injunction, holding that the right of way was proved. He based his decision on certain statements made to the commissioner appointed under section 392. In his judgment he said:—

* Second Appeal, No. 340 of 1898.