APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1904.
April 13.

DAYARAM JAGJIVAN (ORIGINAL DEFENDANT), APPELLANT, *v.* GOVARDHANDAS DAYARAM (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), sections 278—283, 622—Execution of decree—Order—Appeal—Order passed without jurisdiction—Grounds for non-interference in extraordinary jurisdiction.

An order passed under section 280 of the Civil Procedure Code (Act XIV of 1882) is not appealable.

Where the order of the lower Appellate Court was passed without jurisdiction the High Court declined to interfere under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) on the ground that the plaintiff, to whom relief was granted by the lower Appellate Court, would, if the application were allowed, be obliged to bring a suit to establish the right which he claimed to the property in dispute, after the expiry of the period of limitation within which he was entitled to bring that suit.

SECOND APPEAL from the decision of R. S. Tipnis, District Judge of Thána, reversing the order of M. J. Yajnik, Subordinate Judge of Dahanu, in an execution proceeding.

The plaintiff obtained a money decree, No. 17520 of 1900, in the Court of Small Causes at Bombay against the defendant and four others. The decree was sent to the Court of the Subordinate Judge of Dahanu for execution and the lands and houses mentioned in the application for execution, *darkhast* No. 331 of 1901, were attached. Thereupon, the defendant, one of the judgment-debtors, applied to raise the attachment on the ground that the said property did not belong to him personally, but he was merely a trustee in possession, the property being assigned to religious purposes towards which the income was devoted and therefore the said property was not liable to attachment and sale.

The plaintiff (decree-holder) replied that he was not aware of the assignment; that the property was not used for charitable purposes; that the judgment-debtors were the owners of it and received the income thereof, and that the deed of assignment, if proved, was a fraudulent and colourable transaction.

* Second Appeal No. 479 of 1903.

The Subordinate Judge held that the applicant had settled upon himself the property in question as trustee for charitable purposes. He, therefore, removed the attachment.

On appeal by the plaintiff the Judge reversed the order holding that though the assignment to religious purposes was proved, it was made with intent to defraud or defeat or delay the defendant's creditors; that the transfer was voidable at the option of the plaintiff, and that the property was liable to attachment and sale in execution of the plaintiff's decree.

The defendant preferred a second appeal.

D. W. Pilgaumkar, for the appellant (defendant) :—Our first contention is that the order of the first Court releasing the property from attachment was passed under section 280 of the Civil Procedure Code and an order passed under that section is not appealable under section 283 of the Code. The Judge had therefore no jurisdiction to entertain the appeal.

[JENKINS, C. J. :—If so, how can you come up here in second appeal ?]

There are precedents of the Calcutta Courts.

[JENKINS, C. J. :—Section 283 is quite explicit.]

We beg permission to convert the second appeal into an application under the extraordinary jurisdiction (section 622 of the Civil Procedure Code) and contend that the order of the first Court being conclusive, the Judge had no jurisdiction to hear the appeal.

R. R. Desai for the respondent (plaintiff) was not called upon.

JENKINS, C. J. :—A decree having been passed against certain defendants, of whom the present appellant was one, the respondent in this appeal applied for the attachment of certain property and an order was passed in his favour. Thereupon, Dayaram, the present appellant, applied to raise this attachment, not as judgment-debtor, but as the representative of a *sadavrat*, to whom he said this property belonged. It is clear, therefore, that he set up no personal right in himself, and it follows that the application was one to which section 278 of the Code of Civil Procedure and the sections that immediately follow it apply.

1904.

DAYARAM v. GOVARDHANDAS.

The Court before whom the application came decided in Dayaram's favour.

The plaintiff thereupon appealed, and the District Court decided in his favour: now a second appeal is brought here. But this second appeal will not lie on the appellant's own showing, becasue his first objection is that the lower Court ought to have held that no appeal lay in this case. That objection in our opinion is a sound one. Accordingly we have allowed the appellant to take the only course properly open to him, and have allowed this appeal to be treated as an application to us under section 622 of the Civil Procedure Code, and what we have to decide is whether so treating this proceeding we ought to set aside the order of the District Judge.

We are of opinion that it was passed without jurisdiction; but the present appellant took no such objection before the District Court and if we were now to set aside the order of the District Court, it would have the effect of placing the present respondent in the position of being obliged to bring a suit to establish the right which he claims to the property in dispute though the period within which he was entitled to bring that suit has elapsed; in other words we should be placing him under an obligation to bring a suit that, *primâ facie*, would be barred by article 11 of the Limitation Act. No doubt the Court before whom that suit might come might be disposed to excuse delay, but we can give Mr. Desai's client no assurance that this would be the result, and under the circumstances we think it would be unjust to the respondent to set aside the order of the District Court. The result of our declining to interfere is obviously the lesser of the two evils, because as far as we can at present see the appellant before us will not be met by any plea of limitation which would, unless excused, be a bar in the way of a suit by the respondent, though on this we refrain from expressing any positive opinion.

Accordingly, treating this as an application for our interference under section 622 of the Code, we dismiss it, with costs.