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EMPEROR v. CHIMAN.

Generally speaking, we are very slow to interfere with any decision of a Police Patil. But having regard to the nature of the error in this case, I am of opinion that it would not be right to allow the decision to stand.

I would therefore make the Rule absolute and set aside the conviction and sentence.

HAYWARD, J. :—I agree. The case was not properly tried. The provisions of sections 9 to 11 of the Indian Oaths Act, 1873, have in their nature no application to criminal proceedings, as indicated in the case of *Queen-Empress* v. *Murarji Gokuldas*[1].

Rule made absolute.

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[1] (1888) 13 Bom. 389.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

SHRINIWAS KUPPUSWAMI MUDLIAR (ORIGINAL OPPONENT), APPELLANT *v.* M. C. WAZ (ORIGINAL APPLICANT), RESPONDENT*.

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March 3.

Civil Procedure Code (Act V of 1908), Order XLIII, Rule 1—Appeal from order—Order granting leave to sue Receiver for negligence—Appeal.

An appeal does not lie from an order granting leave to sue a Receiver for damages arising from his negligent discharge of duty.

APPEAL from an order passed by V. V. Pataskar, Additional First Class Subordinate Judge at Poona.

The facts appear sufficiently from the judgment of the learned Chief Justice.

B. J. Desai, with *S. Y. Abhyankar*, for the appellant.

Strangman, Advocate General, with *J. R. Gharpure*, for the respondent.

MACLEOD, C. J. :—The opponent, appellant in this case, was appointed Receiver in Suit No. 137 of 1913,

* Appeal from Order No. 35 of 1919.

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which was a partnership suit. He applied for leave to pass his accounts and receive his remuneration. On the 26th October 1917, the plaintiff's pleader in that suit raised objections that the Receiver had not done his work properly; that owing to the Receiver's conduct the defendant had misappropriated the goods to a great extent; that if the Receiver had done his duty carefully and punctually, and had properly made inventories of the goods, the goods could not have been misappropriated; that from the beginning the Receiver had been grossly negligent, and had also helped the defendant; and that under the circumstances he was not entitled to his fees for his services as Receiver, on the contrary, he was liable for the plaintiff's loss.

The record shows that, on the 22nd December 1917, the Subordinate Judge passed the following order:— The accounts submitted by the Receiver from time to time examined. I find everything correct and regular. I see no reason whatever to doubt the *bona fides* of the same. Hence I order that the amount claimed by the Receiver for his fees and the expenses incurred by him be paid over to him out of the balance in the hands of the Nazir.

I think it must be taken that the learned Subordinate Judge considered the objections raised by the plaintiff to the Receiver passing his accounts, and it was open to him under Order XL, Rule 4 to find that the Receiver had occasioned loss to the property by his wilful default or gross negligence, and if he had found that the Receiver had been guilty, he could have directed the Receiver's property to be attached and sold and the proceeds applied to make good the loss.

More than a year after that order was made, the applicant, plaintiff in Suit No. 137 of 1913, applied to the Subordinate Judge, a different Subordinate Judge, for

leave to sue the Receiver for damages caused to him by the negligence, laches, &c., of the Receiver. It is not suggested that the negligence, or laches of the Receiver was in any way different from the negligence and laches alleged when the Receiver applied to pass his accounts. The Court has granted leave, although I doubt whether if the application had been made to the same Subordinate Judge who had made the order of the 22nd December 1917, it would have been granted. All that the learned Subordinate Judge had before him when he passed this order was the allegation made by the applicant. Apparently the learned Judge did not consider that those allegations had been made on the previous occasion, and had been found to have no weight whatever by his predecessor.

The first question is whether an appeal from that order giving leave to sue the Receiver lies. Admittedly the order giving leave is not an order under the Code. But it is an order according to the practice of the Court. The Receiver is an officer of the Court, therefore any action taken against a Receiver without leave of the Court is contempt. But unfortunately section 104 of the Civil Procedure Code only provides for appeals against orders specified in that section. Therefore the preliminary objection that no appeal lies against this order must prevail.

Then it was suggested that we could deal with the matter under section 115 of the Code. But there also it is difficult to find that the learned Judge had exercised a jurisdiction not vested in him by law, or has failed to exercise a jurisdiction so vested, or has acted with material irregularity. He had jurisdiction to entertain the application, and it was in his discretion whether or not he should grant it. We cannot say that he acted with material irregularity in the exercise of his discretion.

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But it seems to us that an appeal lay against the order of the 22nd December 1917. Though the order was not against the Receiver, it was an order really refusing relief against the Receiver, so an appeal lay because under Order XLIII, Rule 1 there is an appeal against an order under Rule 4 of Order XL, and in *Zipru* v. *Hari Supdushet*[1], it was held that an order made upon an application under Rule 100 of Order XXI of the Civil Procedure Code, dismissing the application was an order made under Rule 101. So that where a Court is seized with a particular matter under a particular rule, and an order under that rule is appealable, the order made by the Court, whether it is a positive order or a negative order dismissing the application, is still appealable under Order XLIII, Rule 1. Therefore this order passing the Receiver's accounts was in fact a final order, and I should certainly like to express the opinion that the Court ought to protect its officers, and to see as far as possible that they are not pestered with actions by parties to the suit who are not satisfied with their conduct, when they had every opportunity of making allegations against the Receiver at the time his accounts were passed. I do not say that all actions against persons who act as Receivers are to be excluded after their accounts are passed. There may be cases where the misconduct of a Receiver has been concealed, and could not have been ascertained even with due inquiry before the accounts were passed. When the Receiver, applies to pass his accounts, then is the time for the parties to the suit to object to the accounts, and to make allegations of misconduct against the Receiver, and if the accounts are passed, in spite of those objections, then the matter, as far as I can see, is decisive against those parties as far as the allegations which are made against the Receiver at that time. The appeal will, therefore, be dismissed, but in the circumstances without costs.

[1] (1917) 42 Bom. 10.

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HEATON, J. :—I concur in the order proposed. The matter of real importance and interest which has been the subject of argument before us is whether a suit in the circumstances of this case will or will not lie against a Receiver. In my opinion the suit will not lie. A Receiver was appointed, and presented his accounts, and with it an application asking that his accounts be passed and his remuneration awarded to him, and in reply the plaintiff-respondent objected. His application in objection has been read out by my Lord the Chief Justice, and I need not repeat it. But it follows that there was before the Judge a matter in dispute etween the Receiver on the one hand and the plaintiff in the suit on the other, and this dispute concerned the performance of his duties by the Receiver, and the plaintiff alleged those very matters which the Judge, as is especially provided by Rule 4 of Order XL can take into account. The Judge of course considered whatever was placed before him when the matter came to be heard. The objections stated by the plaintiff were not made good. The accounts were passed, and the Receiver was allowed to have his remuneration.

Now, was the order then made by the Judge an order under Rule 4 of Order XL I consider that Order XL is somewhat imperfectly framed, but I feel no doubt whatever that the order I speak of was an order made under Rule 4. If we turn to section 94 of the Code, we find it is provided that in order to prevent the ends of justice from being defeated the Court may, if it is so prescribed, appoint a Receiver of any property and enforce the performance of his duties by attaching and selling his property. "So prescribed" means prescribed by the rules, and it is prescribed by the rules that a Receiver may be appointed, and it is further prescribed by the rules that the performance

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of his duties may be enforced by attaching and selling his property. That appears from Rule 4 of Order XL which I have already referred to. It is clear also that the order made by the Court was an order in a matter in which the Court had to determine whether the Receiver's duties had been properly performed, and if not, it was a matter in which the Court had power to enforce the proper performance, or as it may be otherwise stated, to punish the non-performance of the Receiver's duties by an order relating to his property. If that was the nature of the proceedings, then the order was either an order under Rule 4 of Order XL, or an order which you cannot possibly account for in any part of the Code. It certainly is an order which the Court must be empowered to make. That is quite plain. If you have a Receiver, the appointment of whom is provided for by the Code; and if he has to submit his accounts, and that is also provided for; the Court must necessarily have power to say whether those accounts are right or wrong, and whether it will accept them or not, and it is only to Rule 4 that you can ascribe the order which was made in this case. Therefore it was an appealable order. Where you have a tribunal especially pointed out, as here, which is the Court which appointed the Receiver; where you have an inquiry specifically indicated, and an inquiry is indicated here; where you have the power to make an order, such as there is here, and an appeal is provided for against that order, and that also is the case here; then you have an instance of a remedy and a tribunal which exclude what otherwise would be the ordinary remedy a suit. But having this special tribunal and special method laid down in the Code the suit is excluded. It was objected that the inquiry under Rule 4 was a summary inquiry. Well, if by summary inquiry is meant an inquiry which secures the usual

degree of fairness, and efficiency, and which gets rid of a good deal of formality, and delay, I have no objection to this inquiry being described as summary. But if it fulfils the conditions I have mentioned, instead of being inferior, it would actually be superior to the ordinary method of a suit. I do not suppose, I do not think there is any reason for supposing, that an inquiry made under Rule 4 of Order XL would in any material degree be either less fair or less efficient than a trial such as takes place in an ordinary suit. Once having arrived at the conclusion that a suit will not lie, that suffices for the purpose of this case, in which it is unnecessary to do more than express an opinion. For if a suit is hereafter presented, and I doubt whether it will be, it will of course be at once either rejected or dismissed by the Court to which it is presented. It is, therefore, quite superfluous for us to deal with the matter under section 115 of the Code of Civil Procedure : even if to do so were not open to the objection that it would be setting at naught the pronouncements which from time to time we have ourselves made, as to the scope of section 115. I agree, therefore, to the order proposed by my Lord the Chief Justice.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

SITARAM RAVAJI BHOSLE AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* KHANDU MAIRALA SHINDE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

1920. *March* 10.

Hindu Law—Alienation—Gift by a Hindu widow—Alienation voidable, not void—Mortgagee cannot dispute the validity of alienation—Reversioners alone can dispute the validity of grant.

* Second Appeal No. 567 of 1918.