

1929 - the absence of a final order, he had no right or title left in the land.

DATTATRAYA
JAYARAM
P.
SECRETARY OF
STATE FOR INDIA
IN COUNCIL

Murphy J.

Finally, it has been urged that section 212 of the Land Revenue Code bars the jurisdiction of the Civil Court in this matter. A finding on this point is not necessary for the decision of this appeal, which, we think, must fail on other grounds. But, it seems to us that section 212 does not really bar the suit. The provisions of the section are:—

"Wherever in this Act it is declared that a decision or order shall be final, such expression shall be deemed to mean that no appeal lies from such decision or order.

The Governor in Council alone shall be competent to modify, annul, or reverse any such decision or order under the provisions of the last preceding section."

I think, speaking for myself, that the reference here to finality is confined to finality under the Land Revenue Code, for there are no words expressly excluding the jurisdiction of the Civil Courts as in the sections of Acts framed to that end. But, as I have already stated, since the appeal fails upon the merits, it is not necessary to discuss this question further.

We confirm the lower Court's decree and dismiss this appeal with costs. There will be two sets of costs.

Decree confirmed.

B. G. R.

APPELLATE CIVIL.

Before Sir Norman Kemp, Kt., Acting Chief Justice, and Mr. Justice Murphy.

HAJI ABAADI HASSAN AND SONS, BY THE MANAGING PARTNER ABDUL HAMID HAJI ABDUL (ORIGINAL DEFENDANT), APPELLANT v. A. BESSE, FRENCH MERCHANT (ORIGINAL PLAINTIFF), RESPONDENT.*

Aden Court's Act (II of 1864), section 8—Civil Procedure Code (Act V of 1908), Order XXI, rule 50—Appeal to the Resident—Reference to the High Court whether competent.

Under section 8 of the Aden Court's Act a reference lies to the High Court from an order passed by the Resident in appeal in proceedings taken under Order XXI, rule 50 of the Civil Procedure Code.

*Civil Reference No. 22 of 1927.

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July 25.

Abdulla Mahomed Yehia Jabli v. Salem Mesha Menahint Mesha,⁽¹⁾ distinguished.

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REFERENCE under section 8 of the Aden Court's Act.

The plaintiff filed a suit at Aden for the price of a certain quantity of petrol supplied to the firm of Haji Abadi and Sons. The suit was filed against the Company through its managing partner Abdul Hamid. A decree was passed and subsequently under Order XXI, rule 50 of Civil Procedure Code, proceedings were taken against one Haji Hassan, father of Abdul Hamid. Haji Hassan denied that he was a partner in the firm and contended that he was a partner in another firm Haji Abadi Hassan. The trial Court found against this contention and held that he was a partner in the firm of Haji Abadi and Sons and that finding was upheld in appeal. As the value of the subject-matter of the suit in appeal was over Rs. 1,000, the Resident at the request of the parties made a reference to the High Court under section 8 of the Aden Act.

Ratanlal Runchhoddas, with *R. J. Thakor*, for the appellant.

K. N. Koyajee, for the respondent.

KEMP, Ag. C. J.:—This is a reference under the Aden Act II of 1864. Under section 8 of that Act the value of the subject-matter of the suit in appeal being over Rs. 1,000 the Resident had to accede to the request of the applicant to refer the case to this Court.

This application arises out of a suit filed at Aden for the price of a certain quantity of petrol supplied to the firm of Haji Abadi & Sons. The suit was filed against the company through its managing partner, Abdul Hamid. A decree was passed and subsequently under Order XXI, rule 50, proceedings

⁽¹⁾ (1927) Civ. Ref. No. 253 of 1926 decided by Crump and Baker JJ. on 15th March 1927 (unrep.).

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were taken against one Haji Abadi bin Hassan, father of Abdul Hamid. Haji Abadi Hassan denied that he was a partner in the firm and said that he was a partner in another firm Haji Abadi Hassan. The trial Court found against this contention and held that he was a partner and that finding has been confirmed in appeal, but the Resident under the circumstances I have mentioned has referred the case to us for a decision on the question whether the evidence proves Haji Abadi Hassan was a partner in the firm of Haji Abadi & Sons.

A preliminary point has been taken that under section 8 no such reference can lie because the appeal was not in a suit, but an appeal from an order passed under Order XXI, rule 50, which it is alleged is an execution proceeding, and the case of *Abdulla Mahomed Yehia Jabli v. Salem Mesha Menahim Mesha*⁽¹⁾ was cited in support of this contention. But that was a case where clearly the order was one passed in execution. It concerned the sale under a mortgage decree of the mortgaged property and therefore could not properly be considered an order in a suit. In the present case, although we feel that the matter is not entirely free from doubt, we are of opinion that this reference lies. In the first place, Order XXX of the Civil Procedure Code, which entitles partners to be sued in the firm's name, is merely a matter of convenience and not intended to take away any rights and liabilities of partners prior to the introduction of that procedure. If we sustain the objection we would have to hold that the effect of this procedure is to deprive a defendant who has not been served as a partner in the firm of the right to demand a reference under the Aden Act which he would have had if he had been served

⁽¹⁾ (1927) Civ. Ref. No. 253 of 1926 decided by Crump and Baker JJ. on 15th March 1927 (unrep.).

as a partner. This affects the liability of that partner, and that was certainly not the intention of the procedure laid down in Order XXX. The Aden Act of 1864 obviously did not contemplate when section 8 was enacted that in 1908 a new procedure under Order XXX of the Code would be introduced.

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Then again, the right to deny partnership and ask for a reference cannot depend upon the plaintiff's election whether the individual claiming to be a partner should be served with the writ of summons or not. It would be giving the plaintiff that option if we were to hold that in the present case no right to a reference existed. All that a plaintiff would have to do would be to sue the firm and not to serve a particular defendant, alleged by him to be a partner. The issue as to partnership would not then be determined in the suit, but would be determined after the decree against the firm. The practice on the Original Side of this High Court now adopted is as follows:—

Where a defendant denies that he is a partner, a specific issue is framed before the passing of the decree against the firm and that issue is tried in the suit and there is therefore an adjudication prior to the decree. No question of his liability in execution therefore arises. Under the circumstances it is inequitable to hold that a reference does not lie at the instance of the applicant.

Further, Order XXI, rule 50, provides in sub-rule (3) that the order passed under that rule shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

Assuming, therefore, that a reference lies, the evidence in this case shows, we think, that the decision is correct. It is all on one side. The learned trial Judge saw the applicant in the box, and disbelieved him. The two suit firms are in the same building and

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neither firm pays rent to the other. Abdul Hamid is a young man and unlikely to be doing business himself and he lives in the same house as his father. Then there are the bills which bear the names of Haji Abadi & Sons, which are signed by Abdul Hamid, which show that Abdul Hamid was concerned with the firm of which his father says he was not a partner. The excuse given for this fact is very feeble, viz., that Abdul Hamid managed to get pieces of this note-paper. Then there is the fact that Haji Abdul appears to purchase property, viz., motor-cars in the names of his minor children. The probable object of that is to conceal that property from his creditors. So far as the books are concerned, Haji Abadi says that he has no books of the firm. All these are pure questions of fact and we decline to interfere.

A copy of this judgment to be transmitted to the Registrar of the Judicial Assistant's Court at Aden under the seal of this Court and the signature of the Registrar.

Costs of this reference to be payable by the applicant.

Decree confirmed.

B. G. R.

APPELLATE CIVIL.

Before Mr. Justice Madgavkar.

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July 31.

HASAPPA ADOPTIVE FATHER GURUBASAPPA KITTUR AND ANOTHER.
(ORIGINAL PLAINTIFFS), APPELLANTS v. TAYAWA KOM VIRUPAXAPPA AND
OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Dekhan Agriculturists' Relief Act (XVII of 1879), section 10A—Indian Evidence Act (I of 1872), section 91—Deed ostensibly a sale—Prior unregistered deed to reconvey—Admissibility of oral evidence to prove real nature of transaction not excluded by such deed.

When there is a registered deed which is an ostensible sale and there is also an unregistered document, bearing a date previous to the registered document and containing an agreement to reconvey both documents forming one

*Second Appeal No. 537 of 1927.