been previously convicted, only got one year's rigorous imprisonment, the second accused would, in the ordinary course, have been sentenced to less than one year. For these reasons we think the sentence must be reduced to one year.

SHAH, J. :—I agree.

Sentence reduced.

R. R.

APPELLATE CIVIL.

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

SENNAJI KAPURCHAND (ORIGINAL DEFENDANT No. 1), APPELLANT *v.* PANNAJI DEVICHAND (ORIGINAL PLAINTIFF), RESPONDENT*.

1921. *September* 14.

Civil Procedure Code (Act V of 1908), section 10, Order XXXVIII, Rule 5 —Stay of suit—Attachment before judgment.

It is competent to the Court to pass interlocutory orders, e. g., orders for a Receiver, or an injunction or an attachment before judgment, where a suit has been stayed under section 10 of the Civil Procedure Code, 1908.

Before granting an attachment before judgment, under Order XXXVIII, Rule 5 of the Civil Procedure Code, 1908, the Court must be satisfied that the defendant with intent to obstruct or delay the execution of the decree that may be passed against him has brought himself within the terms of the rule. It is not sufficient that there are merely vague allegations that the defendant is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court.

APPEAL from Order passed by J. H. Betigiri, First Class Subordinate Judge at Dharwar.

In October 1918, the plaintiff filed a suit in the Court at Bellary against the defendants for dissolution of partnership and account.

* Appeals Nos. 23 and 26 from Order.

1921.

SENNAJI KAPURCHAND v. PANNAJI DEVICHAND.

In January 1919, the plaintiff filed another suit in the Court at Dharwar against the defendant to recover a sum of money as damages for breach of a contract. The same contract formed the subject matter in both suits.

On the application of the defendant the hearing of the Dharwar suit was stayed pending the disposal of the Bellary suit, under section 10 of the Civil Procedure Code.

The plaintiff then applied to the Dharwar Court for attachment before judgment on the following allegations :—

The defendant Dhoorajai had owned two shops—one at Bellary and the other at Adoni—dealing in yarn and shroff business. But of the two shops the shop at Adoni which had dealings to the extent of two or three lacs was closed about the last Divali holidays. As the property in the said shop has been disposed of nothing is left there. Besides this, the partnership shop at Bellary which had dealings to the extent of two or three lacs of rupees has almost closed its business and has dwindled itself into a very petty concern.

The defendant Sennaji Kapurchand's partnership shop dealing in yarn and money lending business has to receive moneys due from its customers. The said shop has got things of the worth of thirty and forty thousand rupees. The said defendant is about to recover the dues as early as possible and to remove the articles in the shop.

The immoveable property belonging to the defendant Dhooraji Krishnaji consists of two or three houses valued at not more than eight thousand rupees and the defendant has no other immoveable property in British India.

The Court made the order for attachment.

The defendants applied to the Court to raise the attachment but the Court dismissed the application on the following grounds :—

"My predecessor had stayed the proceedings in this suit under section 10 of the Civil Procedure Code and it was argued that in view of this stay, this Court was not competent to entertain and pass orders on an application under Order XXXVIII, Rule 5 made by the plaintiff. The effect of the above stay was, to my mind, to debar this Court from proceeding with the trial of the suit and the trial of a suit, so far as it can be defined,

consists in a judicial inquiry or adjudication the upshot of which is a decree or order one way or the other. This would be clear from the expressions tried, and decided" used in section 24 and often repeated in the several rules of Order XIV of the Civil Procedure Code. Looking to the scheme of the Civil Procedure Code, and looking to the fact that the supplemental proceedings in Chapter VI of the Civil Procedure Code embrace section 91, of the provisions in which, the following Orders XXXVIII to XL are mere elaborations, I cannot bring myself to believe that it is possible by any stretch of meaning or imagination to include the proceedings in Orders XXXVIII to XL above, in the word "trial" as used in section 10 of the Civil Procedure Code."

The defendants preferred separate appeals to the High Court.

Coyajee, with *G. S. Rao*, for the appellant (in Appeal No. 23 of 1920):—The proceedings in the suit were stayed and hence the Court could not resume proceedings to pass any interlocutory order. In the suit in the Court in Madras Presidency, any relief could be claimed.

On the merits, the order is not correct. The affidavits do not disclose any case to justify the attachment.

P. B. Shingne, for the appellant (in Appeal No. 26 of 1920).

Desai, with *G. N. Thakor* and *R. A. Jahagirdar*, for the respondent was only called upon to address on the merits of the case. The claim is for a large amount. On the affidavits, it is clear that the appellants were trying either to remove or dispose of their property. Hence, the order directing attachment is clearly proper.

MACLEOD, C. J.:—These appeals are from two orders made by the First Class Subordinate Judge of Dharwar in applications by the plaintiff for attachment before judgment against the three defendants. The appellants are the 1st defendant and the 2nd defendant.

1921.

SENNAJI KAPURCHAND v. PANNAJI DEVICHAND.

The first point taken was that as an order has been made under section 10 of the Civil Procedure Code staying the suit owing to the pendency of another suit between the same parties in the Court at Bellary, therefore no interlocutory order could be made in this suit. But under section 10 it is provided that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties. That does not prevent the Court from making interlocutory orders, such as orders for a receiver, or an injunction, or, as in this case, an order for attachment before judgment.

But on the merits it is perfectly clear that there were no grounds in this case for making an order under Order XXXVIII, Rule 5. We have often had to point out that under Rule 5 the Court must be satisfied that the defendant with intent to obstruct or delay the execution of the decree that may be passed against him has brought himself within the terms of the Rule; and it is not sufficient that there are merely vague allegations that the defendant is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court. In this case it is alleged against the 1st defendant that he was about to recover the dues of his shop as soon as possible and to remove the articles in the shop. It is also alleged against the 2nd defendant that he was closing two shops one at Bellary and the other at Adoni dealing in yarn and shroff business. But of the two shops the shop at Adoni which had dealings to the extent of two or three lacs was closed about the last Divali holidays. As the property in the said shop had been disposed of nothing was left there. Besides this, the partnership shop at Bellary which had dealings to the extent of two to three lacs had almost closed its business and had dwindled into a very petty

concern. [After dealing with the facts of the case the judgment ended:—]

The appeals, therefore, must be allowed, the attachment before judgment removed and the security discharged. The appellants must get their costs of the proceedings in this Court and in the Court below.

Appeals allowed.

R. R.

APPELLATE CIVIL.

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

BHUPAL TAVANAPPA KASTURI (ORIGINAL PLAINTIFF), APPELLANT *v.* TAVANAPPA GANGARAM KASTURI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

1921. *September* 16.

Hindu law—Maintenance—Adult co-parcener who cannot sue for partition can recover maintenance.

Under Hindu law, a member of a joint family who cannot sue for partition without the consent of certain members of that family can, if he is driven out of the family, sue for maintenance out of the family property.

FIRST appeal from the decision of J. T. Lawrence, Assistant Judge at Belgaum.

Suit to recover maintenance.

The plaintiff was a member of a joint Hindu family. The other members of the family were his father, his uncle, a cousin and a step-brother. The plaintiff was driven out of the family on the 15th May 1917.

The plaintiff sued to recover the amounts of his maintenance and marriage expenses from the defendants.

* First Appeal No. 96 of 1921.