

1900  
JUNE 28.  
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APPELLATE  
CIVIL.  
—  
28 C. 81.

upon the addition to s. 647, Civil Procedure Code, made by the amending Act VI of 1892, and upon the cases of *Mansab Ali v. Nihal Chand* (1), *Jagarnath Singh v. Budhan* (2), and *Anwar Ali v. Jaffer Ali* (3).

The judgment-debtors now appeal; and on their behalf it has been urged that the District Judge's decision is wrong and that an appeal did lie to him.

We think that this plea must prevail. The order of the Subordinate Judge of Monghyr appears to have been passed under s. 244, clause (c) of the Code of Civil Procedure, being an order determining a question "relating to the execution, discharge or satisfaction of a decree." That being so, it was a decree within the meaning of s. 2 of the Code of Civil Procedure, and an appeal would lie under the addition to s. 540, made by the amending Act VII of 1888.

The learned pleader for the respondent in this case contends that the order passed by the Subordinate Judge was not an order passed *ex parte*. If that be so, then there was an appeal under s. 540 without the addition made to it by Act VII of 1888, while, if it is an *ex parte* order, then an appeal lies under the addition to the section. So that in either case an appeal lies.

With regard to the provisions of s. 647, which the District Judge has referred to, we would only say that the explanation [84] added to that section by Act VI of 1892 must be read with the addition to s. 540 made by Act VII of 1888.

As for the cases referred to by the District Judge, that officer has apparently overlooked the fact that they relate to orders with regard to appeals, and not with regard to original suits or proceedings. The learned pleader for the appellants in this case has called our attention to the reasoning of the Judge who decided the case of *Mansab Ali v. Nihal Chand* (4). According to that learned Judge an order dismissing a suit for default is to be regarded in exactly the same light as an order dismissing an appeal for default. But this case seems to have been decided according to the law as prevalent before the addition made to s. 540 by the amending Act VII of 1888, or at all events without reference to the clause so added. For this reason, this case cannot, in our opinion, be relied on.

On these grounds we decree this appeal and remand the case to the lower Appellate Court in order that it may be disposed of on the merits.

The costs will abide the result.

*Appeal allowed and case remanded.*

28 C. 84.

### MATRIMONIAL JURISDICTION.

*Before Mr. Justice Harington.*

OUTHWAITE v. OUTHWAITE AND DIAZ. [13th December, 1900.]

*Costs—Suit for dissolution of marriage—Costs between party and party—Costs between attorney and client—Liability of Co-respondent—Damages—Divorce Act (IV of 1869) s. 45—Civil Procedure Code (Act XIV of 1882), s. 220—Practice*

Where a husband obtained an order for dissolution of marriage and costs but no damages were asked for by the petitioner against the co-respondent, it was ordered that the costs granted should include costs as between attorney and client.

(1) (1893) I. L. R., 15 All. 859.  
(2) (1895) I. L. R. 23 Cal. 115.

(3) (1896) I. L. R. 23 Cal. 827.  
(4) (1898) I. L. R. 15 All. 859.

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THE husband petitioned for dissolution of marriage by reason [86] of his wife's adultery with the co-respondent. Costs but no damages, were asked for against the co-respondent.

The respondent entered an appearance, but did not file an answer or defend the suit. The co-respondent, however, neither entered an appearance nor defended the suit.

The Court gave a decree *nisi* with costs against the co-respondent.

*Mr. Knight*, for the petitioner, asked for costs as between attorney and client. On principle the petitioner is entitled to an indemnity from the co-respondent. In this case no damages are claimed, but under the English practice the party and party costs are given. Where damages are recovered the usual order is that the amount of the difference between the party and party and client and party costs be given to the petitioner out of the damages before they are settled or dealt with according to the order of the Court. *Browne's Divorce Practice*, 5th Edition, p. 202, deals with the disposition of damages. [HARINGTON, J.—Have I jurisdiction to make the order you ask for?] Clearly s. 45 of the Indian Divorce Act provides that the Code of Civil Procedure shall regulate the procedure. Ch. XVIII of the Code of Civil Procedure deals with the question of costs. S. 220 could hardly in terms be wider. It gives the Court power to award costs in any manner it thinks fit. Moreover, though the principle of taxation in the Ecclesiastical Courts, which regulates the taxation in matrimonial suits here, was as between party and party, yet that term had a far different construction put upon it from that which obtained in the Common Law Courts.

HARINGTON, J.—I will make the order.

Attorneys for the petitioners : Messrs. *Leslie & Hinds*.

28 C. 86.

## [86] APPELLATE CIVIL.

*Before Mr. Justice Ghose and Mr. Justice Harington.*

DEO NARAIN CHOWDHURY AND OTHERS (*Plaintiffs*) v. C. R. H.

WEBB AND ANOTHER (*Defendants*). \* [19th June 1900.]

*Limitation—Bengal Tenancy Act (VIII of 1885), art. 8, sch. III and s. 184—Limitation Act XV of 1877, sch. II, Art. 47—Attachment under s. 146 of the Criminal Procedure Code—Appellate Court, power of, to take cognizance of limitation for the first time—Suit to recover possession of land by occupancy-raiyat.*

On the 9th of February, 1895, the plaintiff was dispossessed from his *raiya* lands, and on the 31st of May, 1895, those lands were attached under s. 146 of the Code of Criminal Procedure; and on the 31st of May 1897, the plaintiff instituted a suit to recover possession of the same:

*Held*, that the suit was barred by limitation under art. 8, sch. III of the Bengal Tenancy Act: and the limitation having already commenced to run from the 9th February, 1895, *i.e.*, from the date of the actual dispossession, the plaintiff could not have a fresh start of limitation from the date of the subsequent attachment by the Criminal Court.

*Held*, further, that the lower Appellate Court was empowered to take cognizance of the question of limitation under s. 4 of the Limitation Act, and s. 184 of the Bengal Tenancy Act, though it had not been raised as a defence

\* Appeal from Appellate Decree No. 1881 of 1898, against the decree of Babu Bhagwan Chandra Chatterjee, Subordinate Judge of Tirhoot, dated the 11th of August, 1898, reversing the decree of Babu Jaya Prasad Pande, Munsif of Samastipur, dated the 17th of December, 1897.