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elsewhere by the Code ; its object is to make applicable to proceedings other than suits and appeals the mode of trial and procedure incidental and ancillary thereto. The explanation added to the section says that that section does not apply to applications for the execution of decrees. An appeal is a substantial right and not a mere matter of procedure. No appeal lies against an order rejecting an application purporting to have been made under s. 103 for reviving an application made under s. 311 of Code which had been dismissed for non-appearance : *Ningappa v. Gangawa* (1), *Raja v. Srinivasa* (2) and *Hurreenath Koondoo v. Modhoo Soodun Saha* (3).

[209] *Babu Joy Gopal Ghose* for the appellants. By s. 647 the procedure of the Code has been made applicable to all proceedings other than suits and appeals ; hence s. 102 and s. 103 are applicable to applications made under s. 311 of the Code. By operations of s. 588 coupled with s. 647 an appeal lies from an order rejecting the application for reviving an application made under s. 311 which had been dismissed for default.

GHOSE AND PRATT, JJ. We think that the preliminary objection raised on behalf of the respondent in this case must prevail, namely, that no appeal lies against the order of the Court below, rejecting the application of the judgment-debtor purporting to be one under s. 103, Code of Civil Procedure, for the purpose of reviving an application made under section 311 of the Code which had been dismissed for non-appearance of the judgment-debtor. The Code does not provide an appeal against such an order. The question of the right of appeal in such a case seems to have been considered in the cases of *Ningappa v. Gangawa* (1) and *Raja v. Srinivasa* (2). In the first mentioned case, the principle underlying a decision of this Court in the case of *Hurreenath Koondoo v. Modhoo Soodun Saha* (3) seems to have been approved of ; and, following the views expressed in these cases, we hold that no appeal lies in this case. The appeal is accordingly dismissed. We make no order as to costs.

This order will not affect the compromise which seems to have been entered into between two of the appellants and the respondents.

The said compromise will be recorded.

*Appeal dismissed.*

31 C. 210.

[210] APPELLATE CIVIL.

*Before Mr. Justice Ghose and Mr. Justice Pratt.*

NAGESHWAR PROSAD SINGH *v.* RUDRA PROKASH SINGH.\*

[27th August, 1903].

*Lunatic—Lunacy Act (XXXV of 1858), s. 23—Adjudication of lunacy upon evidence—Admission by the alleged lunatic.*

It is necessary for the Court to adjudge, upon evidence, a person to be a lunatic within the meaning of s. 23 of the Lunacy Act (XXXV of 1858), before passing an order as to the management of his property and for the guardianship of his person ; it cannot proceed upon an admission made by the person who is alleged to be a lunatic.

APPEAL by Nageshwar Prosad, the opposite party.

\* Appeal from Order, No. 508 of 1901, against the order of H. Holmwood, District Judge of Gaya, dated Oct. 11, 1901.

(1) (1885) I. L. R. 10 Bom. 433.

(3) (1873) 19 W. R. 122.

(2) (1888) I. L. R. 11 Mad. 319.

On the 1st of February 1901, the respondent, Rudra Prokash Singh, filed a petition in the Court of the District Judge of Gaya alleging that the appellant, Nageshwar Prosad Singh, was a lunatic and a person of unsound mind, incapable of managing his own affairs, and that he had a minor son Debi Prosad aged about 7 years, and that the estate of the said alleged lunatic was under the management of one Lal Behary Singh who was mismanaging the affairs of the estate, and praying for an inquiry under the Lunacy Act, XXXV of 1858, and appointment of a proper and fit person as manager of the estate of the said alleged lunatic and his minor son.

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On the 20th of April 1901 the appellant filed a petition in which he stated that he had placed himself under the medical observation of the Civil Surgeon and the Assistant Surgeon of Gaya, who by their certificates, which were annexed to the petition, had certified that he (the appellant) was neither a lunatic nor an idiot, but a man of weak mind, and was not capable of managing the details of business connected with his estate, and that therefore Act XXXV of 1858 had no application to his case; [211] he denied that his manager Lal Behary Singh was mismanaging the affairs of the estate, and prayed that he might not be declared a lunatic, and that the petition of the respondent Rudra Prokash might be rejected.

On the 27th of August 1901, the appellant filed another petition in which he stated that though he was neither a lunatic nor an idiot and the provisions of Act XXXV of 1858 did not apply to his case, he admitted that the medical certificates were correct, and desired that the Court should act upon them without examining the witnesses and, in order to avoid litigation, prayed that the said Lal Behary Singh should be dismissed and one Karamdeo Narain Singh appointed manager in his place.

On the same date, *i.e.*, 27th of August 1901, the District Judge made the following order:—

“The objector admits the medical certificates, and says he is willing that the Court should act upon them. He files a petition to that effect, and offers to dismiss Lal Behary Singh. The parties should get a manager they can both agree on. Babu Karamdeo Narain Singh, mother's brother's son of the alleged lunatic, a wealthy zemindar, is suggested by the objector. Let the parties have a week to agree on a manager. The petition I see is defective in one point. It does not admit the disability to manage his own affairs found by the Doctors. It also makes allegations against the petitioner on the ground that he is seeking to manage the estate himself which is not the case.

The petition will be returned for amendment by inserting the admission that the medical certificates are correct and the Court can act on them without examining the witnesses.”

On the 3rd of September 1901, the respondent filed another petition in which he objected to the appointment of the said Karamdeo Narain Singh as manager by making various allegations against him, and prayed that one of the three gentlemen nominated by him should be appointed.

On the 28th of September 1901, the District Judge made the following order:—

“The only question is, who is the most suitable person to be appointed manager and guardian.

I must have an affidavit from all the parties showing a complete list of all the blood relations, male adults, now living of the minor and the lunatic. I must inspect all their evidence of income and landed property and apply some kind of educational test to each. The only possible guardian of the person I could accept, as the record now stands, is Rudra Prokash Singh himself, and in that case, the estate would have to be managed by an altogether independent manager.”

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[212] On the 5th of October 1901 the, appellant filed another petition in which he stated that he could not be governed by Act XXXV of 1858, inasmuch as he was not found to be a lunatic, that he was free to appoint any competent person as manager of his estate, that Rudra Prokash or any other person could not object to the appointment of a competent manager by him, and he prayed that the application of Rudra Prokash should be dismissed. Thereupon the District Judge, on the 11th of October 1901, made the following order:—

“ It is too late now for the applicant to say he is fit to manage the affairs of the minor son. It has been finally ruled that he is not, on his own petition of admission. Different pleaders appear with different objections in the two analogous cases on every date of hearing, and it is impossible to get them to agree to anything.

The nearest relatives on the lists filed will be requested in their order of propinquity to take charge of the property. It will be first offered to Ajodhya Prosad Singh who is the nearest relative admitted by both sides and has never yet been objected to.”

On the 14th of January 1902, the respondent, Rudra Prokash made another application for an order appointing him guardian of the person of the appellant and his minor son in pursuance of the said order of 28th September 1901 : whereupon the District Judge, on the 18th of January 1902, made the following order:—

“ The propositus has never been declared a lunatic, but only incompetent to manage his own affairs and those of the minors. No guardian is necessary for his person. The minors should live with their mother if they have one, but no permanent arrangement can be made for their guardianship till a guardian of their property is appointed.”

*Dr. Ashutosh Mookerjee, Babu Biraj Mohan Mazumdar and Babu Sarat Chandra Basack* for the appellant.

*Dr. Rash Behary Ghose, Babu Umakali Mukerjee and Babu Makhan Lall* for the respondent.

GHOSE AND PRATT, JJ. The short point which arises in this appeal is whether the District Judge was justified in passing various orders which culminated in the final order of the 11th October 1901 and which is in these terms:—“ The nearest relatives on the lists filed will be requested in their order of propinquity [213] to take charge of the property. It will be first offered to Ajodhya Prosad Singh, who is the nearest relative admitted by both sides who has never yet been objected to.” It appears clearly from the proceedings on the record and also from what has been stated by the Judge himself on the 18th January 1902, that Nageshwar Prosad Singh has never yet been adjudged a lunatic under section 7 of Act XXXV of 1858. It is necessary for the Court to adjudge a person to be a lunatic within the meaning of section 23 of that Act, before an order can be passed as to the management of his property and for the guardianship of his person. In the present case, such an adjudication has not been come to. We must, therefore, set aside the order of the lower Court and send back the case to the District Judge for disposal according to law. It is clear that the learned Judge cannot proceed upon an admission made by a person who is supposed to be a lunatic, though he would be justified in examining him personally. He must come to a decision upon evidence. Under the circumstances of the case, we direct that Ajodhya Prosad Singh do receive his costs from the appellant. We assess the hearing fee at one gold mohur. We make no order as regards the costs of the other parties.

*Case remanded.*