Appellate Jurisdiction (a)

Miscellaneous Special Appeal No. 8 *of* 1868.

VIRASAMY MUDA'LI.....*Special Appellant.*

MANOMMANY AMMA'L.....*Special Respondent.*

Miscellaneous Special Appeal No. 70 *of* 1868.

VENKATA BALAKRISHNA CHETTI and another...*Spl. Appelts.*

SIVJI VIJIARAGUNADHA VALAJI KRISHNA GOPALER..*Spl. Respt.*

A Special Appeal lies to the High Court from orders passed by Lower Appellate Courts on application for execution of decrees.

The day on which an application for execution is made is not to be reckoned in computing the three years alluded to in Section 19, Act XIV of 1859.

An order dismissing an appeal for default under Section 346 of the Civil Procedure Code is not a new decree from the date of which the period of limitation begins to run anew.

The appearance of the person in whose favour a judgment is given, as respondent on an appeal, is not an act done for the purpose of keeping the judgment in force within the meaning of Section 19, Act XIV of 1859.

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THESE were Special Appeals from orders passed by the Civil Courts of Chingleput and Tranquebar (as Appellate Courts), on applications for the execution of decrees.

Mayne for Petitioner in Civil Petition 8 of 1868.

Rangiah Nayudu for Counter Petitioner in do.

Miller for Petitioner in Civil Petition 70 of 1868.

In these petitions the Court delivered the following

JUDGMENT :—The first question in both these cases is whether a special appeal lies to this Court from an order passed by a Civil Judge on appeal from an order of a Lower Court made on application for execution of a decree.

No such appeal has been allowed in this Court, at all events since the date of the proceedings passed by the late Sadr Court on the 12th April 1860, which have been published in the Rules of Practice of this Court ; but doubts having been entertained by several of the Judges as to the

(a) Present : Scotland, C. J. and Bittleston and Collett, JJ.

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correctness of the practice which has thus been established, and the High Court of Calcutta having held that such an appeal does lie, it was thought desirable that the question should be re-considered ; and it having been fully argued before us we are prepared now to state the conclusion at which we have arrived. That conclusion is that we concur with the High Court at Calcutta in thinking that a special appeal does lie in these cases.

The question depends upon the proper construction of Section 372 of the Civil Procedure Code, for that is the only Section which gives a special appeal ; and of course without an enactment of the legislature it cannot exist.

That section gives a special appeal from all "*decisions* passed in *regular* appeal by the Courts subordinate to the Sadr Court." The words themselves are large enough according to their ordinary meaning to include the case in question ; for a Civil Judge's order made on appeal from an order of a Lower Court relating to the execution of a decree embodies his "*decision*" on the matter, and the appeal is "*regular*" if it be brought and prosecuted according to the rules by law established.

But the question really is whether the words "*decisions* passed in *regular* appeal" have acquired in the course of Indian Legislation on the subject a more limited meaning, and whether they must be understood in the Civil Procedure Code as applicable only to decrees passed by an Appellate Court upon appeal from a decree of a Court of First Instance in an original suit.

In the earlier Madras Regulations relating to appeals (4 of 1802, Section 12, and 5 of 1802, Section 10), we do not find any provision for special appeals ; which appear to be first mentioned in Regulation VII of 1809, Sections 26 and 29. But there are clauses relating to summary appeals which are also repeated in later enactments.

At all events as early as 1816, in Regulation XV of that year, we meet with very nearly the same terms as are used in the Civil Procedure Code ; in Section 3, the cases in which a special appeal will lie are specified ; and

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in Section 4 the language is that a party dissatisfied with "a *Judgment* on a regular appeal" and "desirous of a second or special appeal" may present his petition; and then the enactment goes on to provide that if it be a proper case, "the Court will admit the special appeal and proceed to investigate the *suit*."

In Section 5 of that Regulation provision is also made for a summary appeal to the Sadr Court from "the orders or decrees of the Provincial Courts, in the case of their refusing to admit either an original suit or an appeal *regularly cognisable* by them," or in case of their dismissing such suit or appeal without investigating the merits.

The inference which may, we think, properly be drawn from this Regulation is, that at that time the special appeal was only given from such "*judgments*" as were passed upon appeal from *decrees* in original suits; but that the term "*regular* appeal" was adopted merely in contra-distinction to the term special appeal. The special appeal is the appeal on certain special grounds and is a second appeal. The regular appeal is an appeal in which any ground of objection is open to the appellant; it is the first appeal and applies generally to the whole decision. It would be more appropriately called a general than a regular appeal.

Act III of 1843 for amending the rules of special appeals has the very same words as the Civil Procedure Code. It gives the special appeal from all decisions passed on regular appeals in the Civil Courts; but there is nothing certainly in that Act to indicate any intention of the Legislature at that time to extend the right of special appeal to any other case than that of decrees in suits.

It is to be observed that throughout this Legislation, there is no provision at all respecting any appeal from orders made in the course of a suit, or from orders made in execution of decrees, excepting only the clauses as to summary appeals to which reference has been made.

But in Act VII of 1843, which abolished the Provincial Courts, in this Presidency, there is a Section (14)

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relating to the execution of the decrees of the Zillah Courts and of the Sadr Court by the Subordinate Judges and Principal Sadr Amíns upon a reference to them, which has this *proviso*. "Provided that an appeal shall lie from any *order* passed by a Subordinate Judge or Principal Sadr Amín, under such reference to the Zillah Court in the first instance, *and, secondly, a special appeal to the Sadr Adálat.*"

And in Clauses 8 and 9 of that Act which relate to appeals to the Zillah Courts and to the Sadr Court, the words used are in the former case, "from all decrees or *orders* of Subordinate Civil Courts, &c., and of Sadr Amíns and District Munsifs in cases in which appeals are now allowable," and in the latter "appeals regular and summary from decisions and orders of the Zillah Courts." It is clear, therefore, that a special appeal against an order passed in execution of a decree was a proceeding known to the law before the passing of the Code; and we will now return to a consideration of the Code itself, upon the construction of which the determination of the question depends. Now the Code has special provisions relating to appeals from orders. It expressly gives *an* appeal from orders rejecting plaints (Section 36); from orders for arrest before judgment (Section 76); from orders for attachment of property before judgment (Section 85); from orders for injunctions (Section 94); and in other cases (as under Section 119) prior to decree.

Then there is a general provision (Section 363) (which must of course be qualified by excepting the specific cases in which an appeal is expressly given) in these terms;—"No appeal shall lie from any order passed in the course of a suit and relating thereto prior to decree; but if the decree be appealed against, any error, defect, or irregularity in any such order affecting the merits of the case or the jurisdiction of the Court may be set forth as a ground of objection in the memorandum of appeal."

The effect of this Section is that if an appeal be brought against a decree, and one ground of objection be a substantial error or defect in passing an order affecting the merits, that ground of objection may be taken before a second

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Court on special appeal. Is it probable then that the Legislature intended to make the decision of the first Appellate Court *final* with respect to the orders from which an appeal is expressly given ? Take the case of an order rejecting a plaint on the ground that the plaintiff has no cause of action, or that his suit is barred by the law of limitation; the decision in such a case concludes the plaintiff wholly and finally. Seeing what the Code provides in other cases, can it be supposed that the intention was to limit him to one appeal ?

Then, as to orders passed after decree, Section 354 says, " No appeal shall lie from any order passed after decree and relating to execution except as is hereinbefore expressly provided."

One previous express provision is contained in Section 283, which enacted that all questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the institution of the suit and the execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, shall be determined by order of the Court executing the decree and not by separate suit and *the order passed by the Court shall be open to appeal.*

This Section has been repealed by Act XXIII of 1861 and Section 11 of that Act substituted for it. No doubt Section 11 is now to be read as part of the Code; but as regards the question under discussion, the new Section makes no difference ; it only increases the importance of the question by inserting the words " and any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree," and making all such questions determinable in like manner and the determination subject to the like appeal.

Now here again take the case of an order relating to mesne profits, reserved for adjustment in execution of the

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decree. If the question had been disposed of in and by the decree, and the award of refusal of mesne profits was complained of as contrary to law or usage, or as affected on the merits by some error of procedure, the complainant would clearly be entitled to a second or special appeal as well as to a first, or general, or regular appeal. Could the Legislature have intended that, if the very same question was determined by an order in execution, the party aggrieved should be tied down to the first appeal? It would, we think, be strange if the Legislature had so said.

There is only one other general Section (366) applicable to all appeals from orders. It provides that *when an appeal* from any order is allowed, the period for preferring the appeal and the procedure thereon shall be in all respects the same as in an appeal from a decree.

If the language of the subsequent special appeal clause (372) had been such as to exclude from its operation any orders other than decrees, this 366th Section could not, we think, have been construed so as to control the 372nd Section, but when we find (as stated at the outset) that the words used in the latter Section are large enough to include special appeals from orders other than decrees, then the 366th Section operates to make the procedure the same; and gets rid of a difficulty arising from the language of Section 373, which requires an application for admission of a special appeal to be accompanied by copies of the judgments and decrees. At all events the introduction of those words in Section 373 appears to us an insufficient ground for narrowing the construction of Section 372, when the whole scheme of the Act seems to us to lead irresistibly to the inference that the Legislature intended to place all appealable orders on the same footing as decrees with respect to the right of appeal.

There is nothing in the amending Act (XXIII of 1861) at all at variance with this view; but it is rather strengthened than otherwise by Section 27 of that Act, which, in certain suits, prohibits a special appeal "from any *decision* or *order* passed on regular appeal."

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The 35th Section of Act XXIII of 1861 is the only other Section which has any bearing on the question. It authorises the Sadr Court to call for the record of any case decided on appeal by a Subordinate Court "in which no *further* appeal shall lie to the Sadr Court," from which words it might be inferred that there are cases in which an appeal would lie to the Subordinate Court only, but then the Section itself applies only to cases in which the Subordinate Court in hearing the appeal has exercised a jurisdiction not vested in it by law. The object is to provide for cases in which a Subordinate Court has assumed an appellate jurisdiction, which did not belong to it, and in which (the matter not being appealable at all) there could be no further appeal to the Sadr Court. The language is not very happy, and in the substituted Section in the proposed new Code which was sometime ago before the Legislative Council, we observe that the word "further" is omitted. We were referred to a decision of the late Sadr Court of Agra, which is later than, and opposed to, that of the High Court of Calcutta, and shews that Judges of experience even after reading the judgment of the High Court of Calcutta, may arrive at a different conclusion upon this question. We must, however, form our own opinion upon the proper construction of the Code; and after carefully weighing all the provisions which seem to us to throw any light on the subject, we are led to the conviction that orders appealable under the Code are, like decrees, subject to a special as well as a general appeal.

It remains therefore for us to dispose of these special appeals on the grounds applicable to each.

In Special Appeal 8 of 1868, the application for execution was rejected both by the District Munsif and the Civil Judge on the ground that it was barred by the law of limitation.

The application for execution was made on the 1st December 1866; and if (as is stated in the present memorandum of special appeal) a decree confirming the decree of the Lower Appellate Court had been passed by this Court on the 1st December 1863, we should have considered that

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the application for execution was made in time. Assuming the case to be governed by Section 20, and not by Section 19 of the Limitation Act, the Court is prohibited from issuing execution "unless some proceedings shall have been "taken to enforce such judgment, decree, or order, or to "keep the same in force, within 3 years next preceding the "application for such execution."

This language is of course inaccurate, as applied to the case of an application for execution within the first period of 3 years from the passing of the decree, because the obvious meaning is that the date of the decree itself is to be the first starting point, from which the period of 3 years is to be reckoned. In that case, therefore, the decree must have been passed within 3 years next preceding the application and the effect of the words "next preceding the application is, in our opinion, to exclude the day on which the application is made. Applying that rule to the present case the 1st December 1866, the day of the application is excluded and 3 years next preceding must therefore include the 1st December 1863, on which day the decree was said to have been passed.

It appears however that, in fact, there was no decree of affirmance passed by this Court on 1st December 1863. But there was an order dismissing the appeal for want of prosecution and giving costs to the respondent who appeared by vakil to oppose the special appeal.

Now an order dismissing an appeal for default under Section 346 of the Civil Procedure Code, is not, as it appears to us, a new decree, from the date of which the period of limitation would begin to run anew, and in this opinion we are confirmed by the decision of a full bench in the High Court of Calcutta in case 583 of 1866 decided on 31st May 1867 (7 Cal. W. R. 521, Civil Rulings.)

In this case, therefore, the decree to be enforced was that of the Civil Judge reversing the original decree, and as that decree was passed on the 22nd September 1862, the application for execution, made 1st December 1866, would be clearly out of time, unless the appearance of the special respondent by vakil on 1st December 1863, was a

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proceeding to enforce or keep in force the decree of the Lower Appellate Court. In the case already referred to, the High Court of Calcutta has held that it is so saying "if, upon the application for review or the petition of appeal, "the person in whose favour the original judgment was "given, appears in person or by vakil (whether voluntarily "or upon service of notice) to oppose the application, files "a vakalatnáma, or does anything for the purpose of pre- "venting the Appellate Court or the Court of Review from "setting the judgment aside, we think that within the "fair interpretation of the words, such act, being an act of "the person in whose favor the judgment has been given "for the purpose of preventing it from being set aside, is an "act done for the purpose of keeping the judgment in "force." We are unable to concur in this view. The Section requires that some proceeding shall have been taken within 3 years to enforce the decree or to keep the same in force, and bearing in mind that an appeal does not of itself operate as a stay of execution, and that, pending an appeal, the decree-holder is at liberty to take any proceedings which the law allows, for enforcing or keeping in force his decree, we think that his merely resisting an application to set aside the decree cannot be regarded as such a proceeding. It seems to us that the proceeding intended by the Section is a proceeding in which the decree-holder is the actor, and a proceeding taken *boná fide* for the purpose of obtaining execution or of preventing the effect of lapse of time. In the present case, so much of the application to the Lower Courts as related to the execution of the decree passed in Regular Appeal in September 1862, was properly rejected as barred by the law of limitation; but, as regards the order of this Court for payment of the respondent's costs, the application for execution was within the 3 years; and to that extent, the decisions of the Lower Courts must be reversed; each party should bear his own costs of this appeal. In Special Appeal 70 of 1868, the facts were that the plaintiff, a Zemindar, brought the suit for possession of a village, and under the decrees of the Lower Courts obtained possession, pending an appeal by the 6th defendant to this Court. In this Court, the decree of the Lower Courts was reversed, and upon appeal to the Privy Council the

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decree of this Court was affirmed. In the decree of the Privy Council, no direction was given as to mesne profits: but the 6th defendant, having been put in possession of the village, applied to the Principal Sadr Amín for an award of mesne profits amounting to 92,000 Rupees for the nine years from 1856 to 1864, during which the plaintiff had been in possession, under the reversed decrees. The Principal Sadr Amín upon this application awarded to the 6th defendant 60,000 and odd Rupees, and from this decision the plaintiff appealed to the Civil Judge, who reduced the amount to about Rupees 2,000.

The 6th defendant now appeals specially on the ground of absence of jurisdiction in both the Lower Courts.

The objection to the jurisdiction is now made by the very same person, whose application set the Original Court in motion, and who did not object to the jurisdiction of the Lower Appellate Court; but it is, we think, unnecessary to say in this case whether under those circumstances the objection is or is not open to the special appellant; because upon a consideration of Section 283 of the Civil Procedure Code and Section 11 of the amending Act, which has been substituted for it, we are of opinion that the Lower Courts had jurisdiction. The words of both Sections are large enough to include this case; they are, so far as they apply to this case, "that all questions regarding the amount of any mesne profits or interest which may be payable in respect of the subject-matter of a suit, between the date of the institution of the suit and execution of the decree, shall be determined by order of the Court executing the decree and not by separate suit." This Section, therefore, is not limited in terms to mesne profits payable to the plaintiff: and where, as in this case, a defendant is turned out of possession in the course of a suit, by virtue of the decree of a Lower Court, and is kept out of possession until that decree has been reversed by the Appellate Court, it seems to us that justice requires that the Court executing the decree of the Appellate Court, which is the operative decree in the suit, should not only restore to the defendant his former possession, but give him the mesne profits for the period

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during which he has been wrongfully kept out of possession; otherwise the reversed decree has an operation which according to the decree of the Appellate Court it ought not to have; and a successful defendant is by means of the suit deprived of the possession of his property for a time and left to obtain redress in another suit, in which he must appear as plaintiff instead of defendant. In truth the decree of the Appellate Court, even though no express mention of mesne profits be made in it, cannot be said to be effectually executed unless the defendant be restored as nearly as possible to the position in which he stood when the suit was instituted. Section 362 of the Code requires that application for execution of the decree of an Appellate Court shall be made to the Court which passed the first decree in the suit, and shall be executed by that Court in the manner and according to the rules thereinbefore contained for the execution of original decrees; and it is clear therefore that Section 283 of the Code formerly, and now Section 11 of the amending Act, is as applicable to the execution of the decree of the Appellate Court as of the original decree.

The decree of the Appellate Court may be in its terms simply a reversal of the original decree; but if, under the original decree, one of the parties has been turned out of possession and the other put into possession, then the execution of the decree of the Appellate Court certainly requires the restoration of the possession, and, as connected with that restoration, a return of the profits received during the time the wrongful possession lasted.

We find nothing in the Code at variance with this view, and the consequence is, that the decision of the Civil Judge must be affirmed with costs; for on special appeal we cannot, of course, enter upon a consideration of the evidence as to the amount of mesne profits.