APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J. and Woodroffe J.

1917

Dec. 17.

MURALIDHAR CHAMARIA

v.

M. R. DALMIA.*

Appeal—Jurisdiction—Written statement, order refusing leave to file—"Judgment"—Letters Patent, 1865, cl. 15—Rules and Orders of High Court, Chap. XIV, r. 3.

No appeal lies from an order made by a Judge sitting on the Original Side, refusing an application by a defendant for leave to file his written statement. Such an order is not a "judgment" within the meaning of clause 15 of the Letters Patent of 1865.

The Justices of the Peace for Calcutta v. *The Oriental Gas Company* (1) referred to.

Mathura Sundari Dasi v. *Haran Chandra Saha* (2) distinguished.

THIS was an appeal from an order made by GREAVES J. refusing an application by the defendant for leave to file his written statement.

On the 14th August 1917, Messrs. M. R. Dalmia & Co. brought a suit against Muralidhar Chamaria praying for a decree that the defendant be ordered, *inter alia*, to return certain scrip alleged to have been taken by him on loan or to pay the value thereof estimated at Rs. 27,300. The plaint was served on the defendant on the 21st August and the defendant was required to file his written statement within two weeks from the date of such service. The defendant put in appearance on the 29th August but failed to file his written statement. On the 26th November,

* Appeal from Original Civil No. 93 of 1917, in Suit No. 954 of 1917.

(1) (1872) 8 B. L. R. 433.

(2) (1915) I. L. R. 43 Calc. 857.

on the application of the plaintiffs an order was passed by the Registrar directing that the defendant should file his written statement within a week and that in default the suit should be transferred to the list of undefended causes. The defendant failed to file his written statement within the time prescribed, and on the 10th December applied to Greaves J. for leave to file his written statement denying the plaintiffs' claim and offered to pay costs. The application was refused. From this order the present appeal was preferred.

Mr. C. C. Ghose (with him *Mr. S. C. Bose*), for the appellant. An appeal lies from the order of Greaves J. It is a "judgment" within the meaning of clause 15 of the Letters Patent, as it finally adjudicates on the right of the defendant to file his written statement: *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (1), *Mathura Sundari Dasi* v. *Haran Chandra Saha* (2). I admit that it will be open to the defendant on appeal from the decree to challenge the correctness of the present order. Even where there is irregularity in putting in a defence, the Court will not disregard it: *Gibbings* v. *Strong* (3).

Mr. Langford James (with him *Mr. B. K. Ghosh*), for the respondents. No appeal lies from the order of Greaves J. It is not a "judgment" within the meaning of clause 15 of the Letters Patent. The effect of the order is set out in rule 3 of Chapter XIV of the Rules and Orders of the High Court. There has been no adjudication on the merits of the case: *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (1), *Kishen Pershad Panday* v. *Tiluckdhari Lall* (4), and *Gobinda Lal Das* v. *Shiba Das Chatterjee* (5).

(1) (1872) 8 B. L. R. 433.
(2) (1915) I. L. R. 43 Calc. 857.
(3) (1884) L. R. 26 Ch. D. 66.
(4) (1890) I. L. R. 18 Calc. 182.
(5) (1906) I. L. R. 33 Calc. 1323.

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SANDERSON C. J. This is an appeal from an order which was made by my learned brother Mr. Justice Greaves on the 10th of December this year, by which he refused an application by the defendant for leave to file his written statement.

The material dates are as follows: The plaint was filed on the 14th of August 1917: it was served on the defendant on the 21st of August, and the defendant was required to put in his written statement within two weeks from the date of service, so that he should have filed his written statement on or about the 4th of September this year. I ought to have mentioned that the defendant appeared on the 29th of August. He did not put in his written statement within the specified time: and on the 26th of November the plaintiff applied for an order that the defendant should be required to file his written statement: and on that date the Registrar made the following order: "It is ordered that the defendant do within one week from the date hereof file his written statement in this suit and that in default thereof this suit be transferred from the list of defended suits to the list of undefended suits". The time for filing the written statement expired on the 3rd of December 1917, and by that time the defendant did not file his written statement. On the 10th of December, the defendant made the application to Mr. Justice Greaves to which I have already referred, and it was upon that application that the learned Judge refused leave to him to file his written statement.

Now, the first matter that we have to consider in this case is whether there is any right of appeal from the order of the learned Judge.

It is contended by the learned counsel for the appellant, Mr. C. C. Ghose, that Mr. Justice Greaves' order is a "judgment" within the meaning of clause

15 of the Letters Patent, and he bases his argument upon the ground that it finally decides a right which the defendant had, of filing his written statement, and after he obtained that right, of appearing by counsel at the hearing of the suit, of calling evidence at the hearing of the suit, and having his case fully investigated.

The result of the order of the Registrar, which was made on the 26th of November 1917, is described in rule 3, chapter XIV of the Rules of the High Court, Original Side (page 189 of Mr. Hechle's Book, 1914 edition). It is this: "Where a suit is heard *ex parte* against any defendant, such defendant may be allowed to cross-examine, in person, the plaintiff's witnesses, and to address the Court, but, unless the Court otherwise specially orders, evidence will not be received on his behalf, nor will he be allowed the assistance of counsel or attorney".

Now, the definition of "judgment" in clause 15 of the Letters Patent has been referred to so often that I think one of the learned Judges said that it has become classical. It is that which is to be found in the judgment of Sir Richard Couch, in the case of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (1), where he says: "We think that 'judgment' in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined"

Now, the question is whether, having regard to that definition (which, it is true, has been said to

(1) (1872) 8 B. L. R. 433, 452.

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be not exhaustive), the order which was made in the case would come within the meaning of the word "judgment". Does this order affect the merits of the question between the parties by determining some right? It is to be noticed that the right of the defendant to put in his written statement had gone—he ought to have put it in on or about the 4th of September—but then there was an order of the Court allowing him further time, which time expired on the 3rd of December, and he was asking the learned Judge to revive, if I may use the word, the right which had passed away. But there is a further consideration which affects my mind, and it is this: I fail to understand how it can be said that the refusal of the learned Judge to allow the defendant to file his written statement can be said to affect the merits of the question between the parties by determining some right. It has been pointed out during the course of the argument that this order of the learned Judge does not decide the merits of the question between the parties: the case has to be tried on the merits. It is true that it has to be tried as an undefended suit: but the defendant has a right of appearing in person, and cross-examining the witnesses called for the plaintiff. He may obtain leave of the Judge to appear by counsel, and to call witnesses. At all events, the matter has to be investigated and judicially determined, and it may be that the plaintiff may fail in the suit. On the other hand, it may be that the plaintiff may succeed in the suit, and, if he succeeds in the suit, the defendant will have a right of appeal against the decree which will be passed against him: and, it has been admitted by the learned counsel for the appellant, Mr. C. C. Ghose, that if that should happen, the appellant would be entitled at the hearing of the appeal from the final decree, to challenge the

correctness of the order which my learned brother, Mr. Justice Greaves, made on the 10th of December.

Under these circumstances, I do not think that the order of Mr. Justice Greaves refusing leave to the defendant to file his written statement is a "judgment" within the meaning of clause 15 of the Letters Patent.

There is only one other word which I wish to add. Reliance was placed upon the case of *Muthura Sundari Dassi* v. *Haran Chandra Saha* (1), and it was argued that the decision in that case covered the present one. I do not agree with that. I think that the facts in that case were entirely different; and that it does not cover the case now under consideration. For these reasons I think that this appeal should be dismissed with costs.

WOODROFFE J. There is yet no final decision on the merits of the case: it is not certain that there will be a decision adverse to the defendant; for, even if the suit were heard *ex parte*, it does not follow that the plaintiff will get a decree.

Nextly, the Court can give the special leave referred to in Chapter XIV, rule 3, of the Original Side Rules, if the appellant before us appears in Court and asks the Judge to exercise the powers under that rule. It may be under those circumstances that the determination of the question which has been argued before us to-day will prove wholly unnecessary—a circumstance which to my mind indicates that this is not an order against which there is a present right of appeal.

Nextly, in my opinion, the appeal from a decree opens out the question of the correctness of all interlocutory orders passed in the suit leading up to such a decree, unless any principle intervenes similar to that

(1) (1915) I. L. R. 43 Calc. 857.

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indicated in section 97 of the Code of Civil Procedure, with regard to a preliminary decree. In the present case, if there is a decree against the defendant, I am clearly of opinion that it will be open to him on an appeal from the decree to challenge the order which he now appeals from. If it be said that owing to the suit being heard *ex parte* the evidence is all one way, the obvious answer seems to me to be that if the evidence is all one way it is because he should have been allowed to give his evidence, and that therefore he should be entitled to question the validity of the order by which the suit took this *ex parte* form.

It may be noted that there is no appeal from such an order as that now before us, in the case of the mofussil Courts, no appeal having been provided by the Civil Procedure Code, a circumstance which has some bearing upon the question whether this is the kind of order against which an appeal should be held to be under the Letters Patent. If, however, it were to be held that it was not open to the defendant in an appeal from the decree to raise the question of the validity of the order now in dispute, it would follow as regards cases in the mofussil that practically a suit might be decided against a party without any right of appeal. As, therefore, in my opinion, this order can be challenged in any appeal from the final decree in this case, that is another reason why we should hold that no appeal lies.

I, therefore, hold that no appeal lies, and that this appeal should be dismissed with costs.

J. C. *Appeal dismissed.*

Attorneys for the appellant : *Dey & Kshatriya.*

Attorneys for the respondents : *O. C. Ganguly & Co.*