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those words exclude execution cases from the purview of the section. We are, therefore, of opinion that the Munsif's Court had jurisdiction to execute the decree.

The appeal is accordingly dismissed with costs.

A. S. M. A.

*Appeal dismissed.*

## APPEAL FROM ORIGINAL CIVIL.

*Before Mookerjee, Acting C. J., and Fletcher J.*

KHATIZAN

*v.*

SONAIRAM DAULATRAM.\*

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 April 23.

*Appeal—Transfer—Order for transfer of a suit—"Judgment"—Letters Patent (1865) cls. 13 and 15.*

An order for transfer of a suit to the High Court, under clause 13 of the Letters Patent, is not appealable.

*Ismail Soleman Bhamji v. Mahomed Khan* (1), *The Justices of the Peace for Calcutta v. The Oriental Gas Company* (2) referred to.

*Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub* (3) distinguished.

APPEAL from an order of Greaves J.

Sonairam Daulatram, the defendant No. 1, had, under a decree in a Small Cause Court suit, attached certain properties belonging to Abdul Gaffur, the defendant No. 2, in which the plaintiff claimed a half share. The plaintiffs, appellants, had filed a suit in the High Court for a declaration that they are entitled to a half share in the properties and specific performance

\* Appeal from Original Civil No. 40 of 1920, in suit No. 34 of 1920.

(1) (1891) I. L. R. 18 Cal. 296.      (2) (1872) 8 B. L. R. 433.

(3) (1874) 13 B. L. R. 91.

of an agreement to lease. They had also filed a claim suit in the Calcutta Small Causes Court and thereby the sale of the huts were stayed. Thereafter, Sonairam Daulatram applied to the High Court and obtained an order of transfer of the Small Cause Court claim suit and liberty to proceed with the sale. The plaintiffs appealed against that order.

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*Mr. B. L. Mitter* (with him *Mr. K. P. Khaitan*), for the respondents. No appeal lies against an order of transfer under clause 13 of the Letters Patent. It is not a "judgment" within the meaning of clause 15 of the Letters Patent and is not appealable.

*Mr. S. R. Banerjee*, for the appellant. The order under appeal is a "judgment." This is not an order for mere transfer. It adjudicates on my rights by giving liberty to proceed with the sale.

MOOKERJEE, A. C. J. This is an appeal against an order made by Mr. Justice Greaves under clause 13 of the Letters Patent for the transfer of a claim suit from the Calcutta Small Cause Court to this Court.

A preliminary objection has been taken on behalf of the respondent that the appeal is incompetent, inasmuch as the order is not a "judgment" within the meaning of clause 15 of the Letters Patent.

There can be no question, in our opinion, that the proceeding which has been transferred is a suit within the meaning of clause 13 of the Letters Patent. It was pointed out by Mr. Justice Wilson in the case of *Ismail Soleman Bhamji v. Mahomed Khan* (1), that under the rules of the Small Cause Court, claims are not tried summarily; they are dealt with just as suits are: and we find that the proceeding is described and

(1) (1891) I. L. R. 18 Calc. 296.

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is numbered as a suit pending in the Calcutta Court of Small Causes. The only question consequently is, whether the order of transfer is a "judgment." We are of opinion that the answer must be in the negative.

In the case of the *Justices of the Peace for Calcutta v. The Oriental Gas Company* (1), Sir Richard Couch C. J. said: "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." In the case before us, the order for transfer does not involve a decision which affects the merits of the question between the parties, nor does it determine some right or liability. We do not overlook the later decision in the case of *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub* (2), where it was ruled that an order granting leave to sue, to the plaintiff, under clause 12 of the Letters Patent is a "judgment" and is appealable under clause 15. It was explained that an order granting leave to sue was not a mere formal order or an order merely regulating the procedure in the suit, but one that had the effect of giving a jurisdiction to the Court which it otherwise would not have and, from this point of view, it might fairly be said to determine some right between the parties, namely the right to sue in a particular Court, and to compel the defendants who were not within its jurisdiction to come in and defend the suit, or if they did not, to make them liable to have a decree passed against them in their absence. These reasons obviously are not

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

(2) (1874) 13 B. L. R. 91.

applicable to a case of the description now before us.

It has been contended, however, that the order under appeal not only directs the transfer of the suit, but also declares that the defendant firm will be at liberty to proceed with the sale in execution of the decree of the Small Cause Court, made in a previous suit. This declaration is merely ancillary to the order for transfer, and cannot be deemed appealable irrespective of the character of the primary order. We are accordingly of opinion, upon a construction of clauses 13 and 15, that the order is not appealable.

It is worthy of mention that our attention has not been drawn to any case in which an appeal has been entertained from an order of this description. Orders for transfer have frequently been made for years past and many of them are to be found in the reports: but there is no trace that an appeal has ever been successfully maintained against an order for transfer under clause 13 of the Letters Patent.

The result is that the appeal is dismissed with costs.

The Rule is discharged with costs.

FLETCHER J. I agree.

N. G.

*Appeal dismissed.*

Attorney for the appellants: *E. P. Swinhoe.*

Attorneys for the respondents: *Khaitan & Co.*

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