

APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J. and Richardson J.

HAJI MOHAMUDDIN & Co.

v.

THE EASTERN JAPAN TRADING Co.*

1922

July 20.

Attachment before Judgment—Conditional order in default of furnishing security—Appeal—Civil Procedure Code (Act V of 1908)—Order XXXVIII, rr. 5, 6,—Order XLIII, r. 1—Letters Patent, 1865, cl. 15.

In this suit, on the plaintiffs' application, an order was made in the first instance calling upon the defendants to show cause why they should not furnish security for the claim and costs of the plaintiffs or why in default their stock-in-trade at No. 55-11 Canning Street in the town of Calcutta should not be attached until the final determination of the suit or until the further order of the Court. The defendants appeared and showed cause and the following order was then made : " It is ordered that the defendant firm do at once give security to the satisfaction of the Registrar of this Court to the extent of the plaintiff firm's claim and costs in this suit and that in default thereof a writ of attachment do issue out of and under the seal of this Court commanding the Sheriff of Calcutta to attach until the final determination of this suit or until the further order of this Court the stock-in-trade of the defendant firm lying at No. 55-11 Canning Street." From this order the defendants appealed. It appeared that the defendants had complied with the order that they should deposit security :—

Held, that security having in fact been furnished, there was no operative order of attachment and that the remainder of the order being merely an order for the furnishing of security was not appealable either under the Civil Procedure Code or as a judgment under the Letters Patent, and that consequently the appeal should be dismissed.

APPEAL by the defendants, Haji Mohamuddin & Co.

This was an appeal from an interlocutory order made by Buckland J. against the defendant firm in

* Appeal from Original Civil No. 77 of 1922 in suit No. 1554 of 1922.

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the above suit. The suit was instituted by the plaintiff firm against the defendant firm for the recovery of a certain sum being the amount alleged to be due to them in respect of certain drafts drawn on the defendant firm and duly accepted by them, being the price of goods sold and delivered to the defendant firm. It was alleged that the defendant firm failed and neglected to honour the said drafts on maturity. The plaintiffs made an application to the learned Judge based upon affidavits in which they alleged that the defendants were disposing of their stock-in-trade lying at No. 55-11 Canning Street in the town of Calcutta with a view to obstruct or delay the execution of any decree that might be passed against them. The learned Judge thereupon made the following order, dated 8th May 1922: "It is ordered that the defendant firm being served with this order do on Monday the 15th day of May instant at the hour of 11 o'clock in the forenoon show cause before this Court why they should not furnish security for the claim and costs of the plaintiff firm in this suit and why in default thereof their stock-in-trade at No. 55-11 Canning Street, Calcutta, should not be attached until the final determination of this suit or until the further order of this Court etc." The defendants appeared and showed cause and thereafter the learned Judge delivered the following judgment:—

"Upon a consideration of the whole matter I think this rule should be made absolute. There is a conflict of evidence with regard to certain points dealt with by the affidavits but it is clear that the defendants had the goods and paid some money on account and have not paid the balance, the suit being, I am told, on drafts accepted by the defendants. Though there is a certain ambiguity which is not cleared up by the affidavit in reply as to the position of the godown from which the defendants have sold the goods, I think on the whole I accept the statements of Santosh Kumar Sen as to the defendants disposing of their goods. The result is that the rule will be made absolute with costs."

Thereupon, an order was drawn up in the following terms :

"It is ordered that the defendant firm do at once give security to the satisfaction of the Registrar of this Court to the extent of the plaintiff firm's claim and costs in this suit and that in default thereof a writ of attachment do issue out of and under the seal of this Court commanding the Sheriff of Calcutta to attach until the final determination of this suit or until the further order of this Court the stock-in-trade of the defendant firm lying at No. 55-11 Canning Street in the town of Calcutta etc."

From this judgment and order of Buckland J. the defendant firm appealed. It appeared that the defendant firm had complied with the order that they should deposit security to the satisfaction of the Registrar for the plaintiff firm's claim and costs in the suit.

Mr. B. K. Ghose, for the plaintiffs respondents, took the preliminary point that no appeal lay from the order of Buckland J. The right of appeal was a creature of statute and it was incumbent on the appellant to show that there was a statutory right of appeal. O. XLIII, r. 1 of the Civil Procedure Code provided for an appeal from an order under O. XXXVIII, rules 2, 3 and 6 but not under rule 5 of the same order. The order appealed against consisted of two parts. In so far as it directed an attachment of property, it was conditional and in the events that happened, it became infructuous, and there was no operative order of attachment from which an appeal would lie. The appeal was directed and must be treated as having been made against the other part of the order, namely an order for the furnishing of security under rule 5. It was submitted that such an order was not appealable either under the Civil Procedure Code or as a judgment under clause 15 of the Letters Patent.

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Sir B. C. Mitter, for the defendants appellants, contended that the order of Buckland J. on the application of the plaintiff decided a question which affected the rights of the plaintiff and was therefore a "judgment" within the meaning of clause 15 of the Letters Patent. The order in its present form could not have been made by the learned Judge without having recourse to rule 6 of Order XXXVIII and was therefore an appealable order within the meaning of O. XLIII. The decision in *Mathura Sundari Dasi v. Haran Chandra Saha* (1) was referred to.

SANDERSON C. J. This is an appeal from an order of my learned brother, Mr. Justice Buckland, against the defendants in a suit. The suit was brought for a balance alleged to be due in respect of certain drafts accepted by the defendants in consideration of certain goods, which had been supplied by the plaintiffs to the defendants. The plaintiffs made an application to the learned Judge, based upon an affidavit whereby the plaintiffs alleged that the defendants were disposing of their stock-in-trade with a view to obstruct or delay the execution of any decree which might be passed against them, and the learned Judge in the first instance made an order, dated the 8th May, 1922. By that order the defendants were called upon to show cause why they should not furnish security for the claim and costs of the plaintiffs or why, in default, their stock-in-trade at 55-11 Canning Street should not be attached until the final determination of the suit or until the further order of the Court, the plaintiffs by their advocate undertaking to indemnify the defendants from any damage which they might sustain by reason of the *ad interim* injunction thereafter mentioned.

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

The defendants appeared and put in affidavits and the matter was heard by the learned Judge and then he made the following order on the 25th May, 1922: "It is ordered that the defendant firm do at once give security to the satisfaction of the Registrar of this Court to the extent of the plaintiff firm's claim and costs in this suit and that in default thereof a writ of attachment do issue out of, and under the seal of, this Court commanding the Sheriff of Calcutta to attach until the final determination of this suit or until the further order of this Court the stock-in-trade of the defendant firm lying at No. 55-11, Canning Street."

The learned counsel for the plaintiffs who are the respondents in this Court, has raised the preliminary point that there is no appeal from this order. In my judgment, having regard to the form in which the order is drawn, there is an appeal from this order. The order in its present form could not have been made by the learned Judge without having recourse to rule 6, Order XXXVIII of the Code of Civil Procedure. By Order XLIII, rule 1, it is provided that an appeal shall lie from the following orders under the provisions of section 104 and clause (g) is: "an order under rule 2, rule 3 or rule 6 of Order XXXVIII." It is clear, therefore, that the Code provided that there should be an appeal where an order is made by a Court under Order XXXVIII, rule 6, attaching the property of one of the parties, and, in my judgment, it may be said that that is a judgment within the meaning of clause 15 of the Letters Patent from which an appeal lies to this Court. But it is necessary to examine the order more closely. The first order of the learned Judge may be divided into two parts. The defendants in the first instance were called upon to show cause why they should not

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furnish security and as regards this matter the final order of the learned Judge was, that they were directed to give security at once to the satisfaction of the Registrar. As far as that part of the order is concerned, in my judgment, it was made under the provisions of Order XXXVIII, rule 5. That order provides that in certain events and under certain conditions the Court may direct the defendant within a time to be fixed by it either to furnish security in such sum as may be specified in the order or to appear and show cause why he should not furnish security. In my judgment, Order XXXVIII, rule 5 gives the Court jurisdiction to call upon the defendant to show cause why he should not furnish security and if the defendant fails to show cause to the satisfaction of the Court, the Court has jurisdiction under that rule to direct him to furnish security within the time specified by the Court. Then Rule 6 provides that, "where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree, which may be passed in the suit, be attached." It seems to me that the only power which the Court has under that rule is to make an order for the attachment of the property. It is rule 5 which gives the Court power to direct security to be given and it is rule 6 which gives the Court power to attach the property; and it seems to me that this interpretation is borne out by the Form which is to be found in First Schedule, Appendix F, No. 7 of the Civil Procedure Code. It seems to me, therefore, that it was intended by those, who framed the Code, that where the Court confines its order to a direction that the defendant should give security within a fixed

time, there should be no appeal from that order inasmuch as Order XXXVIII, rule 5 is omitted from the provisions of Order XLIII, rule 1. But where the Court makes an order that the defendants' property should be attached before judgment, the Code provided that there should be an appeal inasmuch as Order XXXVIII, rule 6 is specifically mentioned in Order XLIII, rule 1. Consequently, in my judgment, taking the provisions of the Code of Civil Procedure as a guide, it may reasonably be held that the order, in so far as it directs the attachment of the property, is a judgment and is appealable, but in so far as it directs security to be furnished, it is not appealable.

In this case, the defendants have complied with the order that they should deposit security, and the result is that the other portion of the order, which directs the attachment of the property of the defendants, is infructuous and although it is, in my judgment, an appealable order, we are entitled to take the facts into consideration; and when it appears upon such consideration that the order as to the attachment of the property is infructuous inasmuch as the order for the security has been complied with, in my judgment, there is no course open to this Court except to dismiss the appeal.

The appeal is therefore dismissed with costs.

RICHARDSON J. I agree. Rule 6 of Order XXXVIII empowers the Court, in the events stated, to direct the attachment of the defendant's property. The power given by rule 5 to make an alternative order directing the defendant within a specified time to furnish security or to appear and show cause why he should not furnish security carries with it as an incident the power, after hearing the defendant, to confirm the

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order that security be furnished. Under its general powers the Court may then, if necessary, extend the time for the furnishing of the security.

Where the defendant fails to show cause why he should not furnish security, the Court may, under rule 5, direct finally that security be furnished or in the alternative, under rule 6, direct the attachment of the defendant's property. The power of attachment also exists if the required security is not furnished.

The provisions of the Code do not, in my opinion, contemplate an appeal from an order directing the defendant to furnish security. Rule 5 is omitted from Order XLIII, rule 1, clause (g). An appeal lies from an order of attachment made under rule 6.

In the present case the order may be appealable so far as it is a conditional order of attachment, but such an appeal would be necessarily infructuous, because, security having in fact been furnished, there is no operative order of attachment and the remainder of the order is merely an order for the furnishing of security not appealable either under the Code or as a judgment under the Letters Patent.

I agree with my Lord that the appeal should be dismissed.

Appeal dismissed.

Attorney for the appellants: *H. C. Bannerjee.*

Attorneys for the respondents: *N. C. Gupta & Co.*

A. P. B.