APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J. and Rankin J.

1926

April 20.

MEGHJEE MANSING

v.

KALOORAM LUCHMINARAIN.*

Appeal—Practice—Affidavit—High Court (Original Side) Rules, Ch. XIII (A) r. 3.

No appeal lies from an order dismissing an application for final judgment under Chapter XIII (A), r. 3 of the High Court (Original Side) Rules.

Form of affidavit to be used discussed.

Koramall Ramballav v. Mongilal Dalimchand (1) distinguished.

APPEAL by the plaintiff firm from an order of Buckland J.

In June 1925 Meghjee Mansing, the plaintiff firm, instituted this suit against Kalooram Luchminarain for recovery of Rs. 3,468-12, being the difference in price of 150,000 yards of Hessian cloth. The defendants entered appearance and thereafter the plaintiff firm took out a summons and made an application before Mr. Justice Buckland for final judgment for recovery of the amount under High Court (Original Side) Rules, Chapter XIII (A), rule 3, which runs as follows.

Where the defendant in any suit which is within the terms of Rule 1 has entered appearance, the plaintiff may, as regards any claim which is within the terms of Rule 1, on affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no defence to the claim, apply to the Judge for final judgment for the amount claimed, together with interest if any, or for the recovery of the land (with or without mesne profits) as the case may be and costs.

*Appeal from Original Order No. 13 of 1926 in suit No. 1699 of 1925.

(1) (1919) 23 C. W. N. 1017.

Provided that as against any defendant who has filed a written statement such application shall not be admissible unless the summons is taken out as in Rule 4 mentioned, within ten days after the entering of appearance.

The application was dismissed; thereupon the plaintiff appealed.

Mr. Langford James (with him *Mr. M. N. Kanjilal*), for the appellants. The requirements of Chapter XIII (A), rule 3 will be complied with, if in the petition reference is made to the plaint and the deponent swears that the allegations in the plaint are true to his knowledge. Moreover, in this case the facts are stated in the petition.

Mr. K. P. Khaitan, for the respondent. No appeal lies; the order does not finally decide any right between the parties: *Baldeodas Lohea* v. *Shubchurndas Goenka* (1). This is not a case for summary judgment as the defendant's affidavits disclose a sufficient defence to be tried.

Mr. Langford James, in reply. This application is similar to an application for judgment on admission under Order XII, rule 6: *Koramall Ramballav* v. *Mongilal Dalimchand* (2).

SANDERSON C. J. This is an appeal by the plaintiff against an order of my learned brother, Mr. Justice Buckland, made on the 11th of December 1925.

The matter came before the learned Judge by means of a summons under Chapter XIII(A) of the Rules of this Court on the Original Side. The learned Judge said that "this application must fail for "the reason that there is no affidavit of any one who "swears positively to the facts of the case. I have "but to repeat what I have said often before that it

(1) (1925) 30 C. W. N. 104. (2) (1919) 23 C. W. N. 1017.

1926

MEGHJEE MANSING v. KALOORAM LUCHMI-NARAIN.

SANDERSON C. J

"does not suffice to refer to the plaint and say that the "statements contained in it are true. The application "is dismissed with costs."

On the opening of the appeal, the learned advocate for the defendant took the point that no appeal would lie from the order of the learned Judge on the ground that it was not a judgment within clause 15 of the Letters Patent of this Court.

The order which the learned Judge made was in the form of a dismissal of the application for judgment made by the plaintiff. In effect, it was an order giving leave to the defendant to defend the suit, the consequence of which would be that the suit would be tried in the ordinary manner.

In my judgment, no appeal lies from that order. As I have said on several occasions, when the question whether an order is appealable or not arises, the Court must have regard to the particular facts of the case and the nature of the order.

When the learned Judge gives unconditional leave to defend, as in this case, on a summons under Chapter XIII(A) of the Original Side Rules, in my opinion, it is not a judgment within the meaning of clause 15 of the Letters Patent.

Reliance was placed by the learned advocate for the appellant upon a decision of this Court in the case of *Koramall Ramballav* v. *Mongilal Dalim Chand* (1). That is not an authority which covers the facts of this case. As I have already said each case must be decided on its own facts and the nature of the order.

That conclusion is sufficient to dispose of this appeal.

The learned advocate for the plaintiff, however argued strenuously that the learned Judge ought not to

(1) (1919) 23 C. W. N. 1017.

have dismissed the application on the ground on which the learned Judge relied, namely, that the affidavit was not sufficient.

I propose to say a word or two with regard to that, because, the point relating to the insufficiency of the affidavit may arise in future with regard to other cases. Rule 3 provides that there must be an affidavit by the plaintiff himself or by any other person who can swear positively to the facts verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no defence to the claim.

I am of opinion that the learned Judge was right in taking care that the affidavits in relation to summons under Chapter XIII(A) should be sufficient and in proper form.

There ought to be no difficulty on the part of legal practitioners dealing with this chapter, and the affidavit made on behalf of the plaintiff ought to be in accordance with the plain provisions of Chapter XIII(A), rule 3. The learned Judge, as I have already mentioned, said: "It does not suffice to refer to the "plaint and say that the statements contained in it are "true."

I agree with him to that extent. But he seems to have overlooked the fact that in this case the affidavit contained considerably more than a mere reference to the plaint. The affidavit was sworn by a member of the plaintiff's firm: it contains paragraphs setting out what was the cause of action, namely, the difference alleged to have been settled by a contract of the 12th December 1924. It was alleged that the defendants had no defence to the suit at all and had entered appearance only to delay the hearing of the suit and to gain time.

It was further alleged that the plaintiffs had been desirous of going to arbitration and that the

1926

MEGHJEE MANSING v. KALOORAM LUCHMI-NARAIN.

SANDARSON C. J.

defendant had taken up the position that there was no ground for arbitration, because there was no dispute between the parties.

A letter from the defendant to the Registrar of the Chamber of Commerce, dated May 19th, 1925, was set out in the affidavit in which the defendant said : "It "is a clear settlement contract by which we are to "pay to Messrs. Meghjee Mansing a difference of "Rs. 2-5 per cent. yards. Messrs. Meghjee Mansing "presented us the difference bill every month which "we accepted without protest. There is nothing for "the arbitrators to arbitrate upon, because there is no "dispute. Clause 12 of the contract provides arbitra-"tion by your tribunal if there is a dispute, but when "we admit their claim there is no dispute and conse-"quently no ground for arbitration."

It seems to me that there is a great deal more in that affidavit than a mere reference to the statements in the plaint and a further allegation that the statements are true.

With great respect to the learned Judge, I think it would have been better if he had considered the question on the merits instead of dismissing the application on the ground that the affidavit was insufficient.

I refer to this matter, so that in future when an application is made under Chapter XIII(A), care may be taken to see that the plaintiff's affidavit is in accordance with the provisions of the Rule.

On the ground that there is no right of appeal in this case, I am of opinion that the appeal should be dismissed with costs.

RANKIN J. I entirely agree.

Appeal dismissed.

Attorneys for the appellant: *Nan & Das.*

Attorneys for the respondent: *Khaitan & Co.*

N. G.