APPEAL FROM ORIGINAL CIVIL.

Before Derbyshire C. J. and Costello J.

GANGA DHAR BAGLA

1936
March 26, 27.

v.

KANTI CHANDRA MUKHERJI.*

Reference to Registrar—Special report—Judgment—Opinion of Judge, if judgment—Appeal—Letters Patent of Calcutta High Court, s. 15—Original Side Rules, Ch. XXVI, r. 50.

The opinion of a Judge, taken by the Registrar under r. 50, Chap. XXVI of the Original Side Rules, by way of a special report in a pending reference, is not a judgment, but merely a consultative opinion, from which no appeal lies under s. 15 of the Letters Patent. Nowhere in that rule is any authority given to the learned Judge to pronounce a judgment.

In re *Knight and Tabernacle Permanent Building Society* (1); *British Westinghouse Electric and Manufacturing Company* v. *Underground Electric Railway Company of London* (2) and *Ex parte County Council of Kent and Council of Dover. Ex parte County Council of Kent and Council of Sandwich* (3) relied on.

Per COSTELLO J. It is clear from s. 117 of the Code of Civil Procedure and still clearer from O. XLIX, r. 3, of the Code of Civil Procedure that both s. 104 and O. XLIII, r. 1, do apply to the High Court (Original Side).

In re *Dayabhai Jiwandas* v. *A. M. M. Murugappa Chettiar* (4) referred to.

The term "judgment" in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense.

Sevak Jeranchod Bhogilal v. *The Dakore Temple Committee* (5) followed.

APPEAL from an opinion of McNair J., under s. 15 of the Letters Patent, by the defendant.

The facts of the case and the arguments in the appeal appear sufficiently in the judgments.

*Appeal from Original Order, No. 67 of 1935, in Original Suit, No. 646 of 1931.

(1) [1892] 2 Q. B. 613.
(2) [1912] 3 K. B. 128.
(3) [1891] 1 Q. B. 725.
(4) (1935) I. L. R. 13 Ran. 457.
(5) (1925) 30 C. W. N 459.

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S. C. Bose and *S. N. Banerjee* (Jr.) for the appellant.

S. N. Banerjee (Sr.) and *H. C. Majumdar* for the respondent not called upon.

DERBYSHIRE C. J. This matter is brought before us by way of appeal from some proceedings, which took place before Mr. Justice McNair and terminated on June 7, 1935. Those proceedings arose in this way:—A mortgage suit was instituted on March 17, 1931, by Kanti Chandra Mukherji, Official Receiver, against a number of defendants—some of them named Bagla and some of them named Dalmia. By a decree of May 13, 1932, the Registrar of this Court was directed to take the usual accounts and in taking those mortgage accounts a question arose, whether certain payments alleged to have been made by the mortgagors should be appropriated against the capital or against the interest. The mortgagors sought to show that there was an agreement between themselves and the mortgagees, whereby certain payments were to be appropriated against the capital and not against the interest. The mortgagees objected that the proof of such an agreement was not competent by reason of s. 92 of the Evidence Act. The Registrar was of the opinion that this contention was correct. He was asked to make use of the provisions of r. 50 of Chap. XXVI of the Original Side Rules and to refer the question, whether such evidence should be admitted, for the opinion of the Court. Accordingly he did so. He says at p. 16 of the paper book in his special report:—

> Mr. Banerjee wishes to adduce evidence in support of his contention that there was an agreement in terms of which the mortgage deeds were varied. But, as I have stated that in my opinion s. 92 of the Indian Evidence Act must preclude such evidence, Mr. Banerjee has asked that I should make a special report under r. 50, Chap. XXVI, p. 319 of our Original Side Rules in order that the opinion of the Court on the question raised may be taken...........I am of opinion that it is desirable and convenient for all parties concerned that a special report should be submitted to the Court and directions obtained in regard to the manner in which the reference should proceed.

The matter came before McNair J. on June 7, 1935, and apparently it was argued before him. McNair J. began as follows :—

In this application the petitioner asks for the opinion of the Court on a question arising on a reference. The Registrar has made a special report under Chap. XXVI, r. 50 of the Rules and Orders of the Original Side of this Court for directions as to the manner in which the reference should proceed.

The learned Judge set out the facts and then he concluded as follows :—

I hold that the petitioner is not entitled to give evidence of the alleged subsequent oral agreement of January 6, 1925, and further that the Registrar is precluded by the terms of the decree from considering the alleged agreement in taking the accounts. The petitioner must pay the costs of the application. The receiver is entitled to his costs as between attorney and client.

From that it is sought to appeal to this Court.

The appeal is admittedly brought under s. 15 of the Letters Patent of this Court. For an appeal to be brought in that way it must be from a judgment of a Judge of this Court. Did Mr. Justice McNair give a judgment? In order to understand the position r. 50 of Chap. XXVI must be looked at. It reads :—

Any officer taking a reference may at any time, pending the reference or on its conclusion, apply for the opinion of the Court on any question which may arise on the reference and for such purpose may report specially. Such special report may be made at the instance of any of the parties or of the officer himself, and shall be brought before the Court or Judge, within such time and by such party as the officer shall direct, by motion on notice that such special report may be confirmed, discharged or varied or that any directions may be given thereon; and on the hearing of such motion the same may be confirmed, discharged or varied as the Court or Judge shall deem just, or such directions may be given as shall appear to be necessary or expedient in that behalf.

Where such special report is not brought before the Court or Judge in accordance with the directions given, the officer may himself place the same before the Court or Judge and such directions may be given as may be thought necessary.

Now, in my view, all that that rule does is to authorize the officer of the Court taking the reference (in this case, the Registrar) to apply for the opinion of the Court on a question arising in the reference. On that application the Court or Judge may give his

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opinion in the form that is contemplated by the rule itself. Nowhere in the rule is any authority given to the learned Judge to pronounce a judgment. In the case before us it is obvious that there were no materials before the learned Judge, on which he could be asked to pronounce a judgment.

A somewhat similar position arose in England under s. 19 of the Arbitration Act of 1889 and it came before the Courts of England for their consideration. The first case I would refer to is that of *In re Knight and Tabernacle Permanent Building Society* (1).

At p. 617 Lord Esher M. R. giving his judgment said :—

The enactment now in question (*i.e.*, s. 19 of the Arbitration Act of 1889) provides that "any referee, arbitrator, or umpire may at any "stage of the proceedings under a reference, and shall, if so directed by the "Court or a Judge, state in the form of a special case for the opinion of the "Court any question of law arising in the course of the reference". The words are not "for the 'determination' or 'decision' of the Court"; so that is not the *prima facie* difficulty which existed in the case where the statute spoke of the "decision of the Court". It appears to me that what the statute in terms provides for is an "opinion" of the Court to be given to the arbitrator or umpire; and that there is not to be any determination or decision which amounts to a judgment or order. Under these circumstances, I think that there is no appeal. I base my decision on the words of statute; but when I consider the result of holding otherwise, I am fortified in the conclusion at which I have arrived. It seems to me that it would be most inexpedient that, where an opinion is given by the Court under this statute in the course of a reference for the guidance of arbitrators, there should be an appeal which might be carried up to the House of Lords.

At p. 619 Bowen L. J. dealt with the same matter in a somewhat similar way. He said :—

Under s. 19, he (*i.e.*, arbitrator) may voluntarily take, or by order of the Court or a Judge he may be compelled to take, by means of a special case, the opinion of the Court for his guidance, and as a step for arriving at his own ultimate award in the matter, That is an interlocutory proceeding in the reference, and I do not think that it can have been intended that, whenever a case is stated under this section for the opinion of the Court, such opinion when taken is to be treated as an absolute determination of the rights of the parties with the result that there may be an appeal from it which may be carried to the House of Lords. If that were so, the opinion of the Court might be carried to the House of Lords, though it ultimately

(1) [1892] 2 Q. B. 613, 617, 619.

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decided nothing. It might turn out that, after the point of law had been carried to the House of Lords, it did not really arise. That is one reason, but not the only reason, for the conclusion that the jurisdiction of the Court under this section is consultative only. The section contemplates a proceeding by the arbitrator for the purpose of guiding himself as to the course he should pursue in the reference. He does not divest himself of his complete authority over the subject matter of the arbitration. He still remains the final Judge of law and fact. No doubt a fair and honest arbitrator would, in the absence of special circumstances, be bound in honesty and morality, after taking the opinion of the Court, to act upon such opinion. If he did not, it would at any rate be a matter calling for explanation on his part. But the arbitrator is still clothed with the final duty of determining the case. The opinion of the Court does not finally determine the case; it only binds the arbitrator in honesty or morals to act upon the law as the Court states it. There could be no appeal from his decision because he did not do so although it might be a ground for impeaching his award on the ground of misconduct if he did not. It appears to me that this consultative jurisdiction of the Court does not result in a decision which is equivalent to a judgment or order.

In my view the purpose and the essential wording of r. 50 is similar to that of s. 19 of the English Arbitration Act of 1889 and the same reasoning, which Lord Esher and Bowen L. J. applied, applies here.

It has been said during the course of the argument that unless an appeal lies on an occasion of this sort injustice may be done between the parties. What might happen hereafter is indicated by the case of *British Westinghouse Electric and Manufacturing Company* v. *Underground Electric Railway Company of London* (1). In that case the British Westinghouse Electric Company supplied machinery to the Electric Railway Company, which the latter said was unsatisfactory. An arbitration ensued and during the course of the arbitration the arbitrator asked for the opinion of the Court under s. 19 of the Arbitration Act of 1889. In the headnote it is stated :—

In an arbitration, in which the claimants claimed the balance of the price of their machines and the respondents counterclaimed for damages, the arbitrator, acting under the Arbitration Act, 1889, stated a special case for the opinion of the King's Bench Division, in which the question submitted was whether the respondents were entitled to recover from the claimants the cost of the purchase and installation of the P. machines. The King's

(1) [1912] 3 K. B. 128.

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Bench Division answered the question in the affirmative, and the arbitrator subsequently made his award, in which he incorporated the opinion expressed by the Court and adjudicated in favour of the respondents. An application was then made by the claimants to set aside the award on the ground that the opinion of the King's Bench Division was wrong, and being incorporated in the award constituted error on the face of the award; this application was refused :—

Held by Buckley and Kennedy L. JJ., Vaughan Williams L.J. dissenting, that, although the consultative opinion of the King's Bench Division was itself unappealable, the decision of the King's Bench Division refusing to set aside the award which incorporated that opinion was subject to appeal.

The case of *In re Knight and Tabernacle Building Society* (1) was approved.

In the present instance at a later stage in the reference the matter will come up before a learned Judge on report. It will then be open, in my view, to the mortgagors to raise the question whether the Registrar has, notwithstanding the opinion tendered to him by a Judge of this Court, come to a correct decision both on facts and on law. It may be that it will be said that the opinion of Mr. Justice McNair given on June 7, 1935, was a judgment against which an appeal ought to have been taken at once. In my opinion what Mr. Justice McNair did on June 7, 1935, was to deliver an opinion in accordance with the provisions of r. 50 of Chap. XXVI. He did not in my view give a judgment, he pronounced an opinion. That being so, no appeal lies under s. 15 of the Letters Patent and this appeal must be dismissed. The respondent Kanti Chandra Mukherji, Official Receiver, will get from the appellant his costs as between party and party and will realize the difference between the solicitor and client costs and the party and party costs from the estate of the Chamarias, whereof he is the receiver.

COSTELLO J. The proceedings, out of which this appeal arises, were commenced by a notice of motion dated March 7, 1935, by which the defendants in the

(1) [1892] 2 Q. B. 613.

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suit—*i.e.*, the mortgagors—gave notice that an application would be made to this Court on Monday, March 11, 1935—

(*a*) for opinion of this Court on the question arising on the reference and dealt with by the special report mentioned in the petition of the applicant intended to be used as grounds in support of this application, and (*b*) that such order may be made as to costs of this application as to this Hon'ble Court may seem fit.

We are told by Mr. S. C. Bose, who appears on behalf of the defendants, that what they were really asking for was an order from this Court that the decision of the Registrar with regard to the admissibility of evidence relating to an oral agreement dated January 6, 1925, should be set aside and that the applicant desired the Judge before whom the application came to give a direction that the Registrar in the reference should accept the evidence relating to the alleged oral agreement. Mr. Justice McNair having heard learned counsel for the parties and having considered the special report put in by the Registrar as referee under the provisions of r. 50, Chap. XXVI of the Rules of this Court came to the conclusion that:—

The decree (the preliminary decree which was made in the suit) limits the Régistrar to the taking of accounts in accordance with the terms of the mortgages and he is not entitled to take into account the alleged oral agreement.

The learned Judge said:—

I cannot agree with the petitioner's contention that it was unnecessary for him to set up this agreement until the accounts were actually being taken. If the agreement is to be taken as incorporated in the mortgages it should have been pleaded in the suit so that, if established, its purport might be embodied in the decree. I hold that the petitioner is not entitled to give evidence of the alleged subsequent oral agreement of January 6, 1925, and further that the Registrar is precluded by the terms of the decree from considering the alleged agreement in taking the accounts.

Then the learned Judge made an order with regard to costs. It seems to me abundantly clear that what the learned Judge was asked to do was merely to give an opinion under the provisions of r. 50, Chap. XXVI of the Rules of this Court, the material part of which reads thus:—

Any officer taking a reference may at any time, pending the reference or on its conclusion, apply for the opinion of the Court on any question which may arise on the reference and for such purpose may report specially.

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I agree with my Lord that the position which arose when the Registrar submitted the special report for the opinion of the Court was analogous to that arising under the provisions of s. 19 of the English Arbitration Act of 1889. It is also in my view analogous to the position which is dealt with in the case of Ex parte *County Council of Kent and Council of Dover.* Ex parte *Council of Kent and Council of Sandwich* (1) where it was held by the Court of Appeal that the jurisdiction of the High Court of Justice upon questions submitted to it under s. 29 of the Local Government Act, 1888, was consultative only and not judicial and accordingly no appeal lay from its decision to the Court of Appeal. Lord Halsbury L. C. at p. 728 says this:—

> Now, the language of s. 29 of the Local Government Act, 1888, which we have to construe, provides that the matter (which we shall describe presently) is to be "decided" by the High Court of Justice. If those words are to be taken by themselves, and without reference to the subject-matter dealt with in the section, they certainly imply no right of appeal. In the case of *Overseers of the Poor of Walsall* v. *London and North Western Railway Co.* (2), though the Court of Appeal was divided on the subject of whether an appeal existed in that case or not, no doubt was (nor, indeed, we think could be) expressed, that if the proceeding then in question had been purely of a consultative character no appeal would lie; but for reasons partly depending upon the forms of the procedure, which involved a rule quashing an order of sessions, the House of Lords ultimately held that an appeal did lie. Now, in this case (again postponing the consideration of the thing to be done under the section, and confining ourselves for the moment to the mere words), there is no rule; there is no order; there is no judgment; there is no decree. The word used in the section is decision.

I think that is a useful authority in the present case because, broadly speaking, the word "decision" is of a more definite and wider significance and certainly implies something nearer to "judgment" than the word which is used in r. 50, Chap. XXVI. Mr. Bose has endeavoured to persuade us that the expression of opinion contained in the last two paragraphs of the judgment delivered by Mr. Justice McNair on June 7, 1935, constitutes a "judgment" within the meaning of that expression as used in cl. 15 of the Letters Patent of this Court and Mr. Bose has

(1) [1891] 1 Q. B. 725, 728.

(2) (1878) 4 App. Cas. 30.

referred to a large number of authorities to reinforce his contention. I am entirely in agreement with what has fallen from my Lord the Chief Justice on this point. It is quite impossible for us to say that Mr. Justice McNair delivered a "judgment" within the meaning of that word, as used in cl. 15 of the Letters Patent.

Mr. Bose did not seek to argue that the formal order of June 7, 1935, was one of the appealable orders provided for in the Code of Civil Procedure. On the contrary he went so far as to aver with considerable vehemence—that neither s. 104 nor O. XLIII, r. 1 of the Civil Procedure Code has any application to the High Court. I would point out that it is clear from s. 117 of the Code of Civil Procedure and still clearer from O. XLIX, r. 3 of the Code of Civil Procedure that both s. 104 and O. XLIII, r. 1 do apply to the High Court. Sir Arthur Page, the Chief Justice of Burma, specifically dealt with this point in his judgment in *In re Dayabhai Jiwandas* v. *A. M. M. Murugappa Chettiar* (1). A part of the headnote of the report of that case is as follows :—

A final judgment is a decree in a suit by which all the matters at issue therein are decided. A preliminary or interlocutory judgment is a decree in a suit by which the right to the relief claimed in the suit is decided, but under which further proceedings are necessary before the suit in its entirety can be determined.

All other decisions are "orders" and are not "judgments" under the Letters Patent, or appealable as such.

An appeal does not exist in the nature of things. A right of appeal from any decision of any tribunal must be given by express enactment.

The next part of the headnote is taken from the passage in the judgment of the learned Chief Justice, which appears at p. 479 of the report, where he said:—

In many statutes in India, of course, a right of appeal from an order passed pursuant to the statute is expressly provided, and in such cases an appeal will lie on the terms and conditions therein prescribed. I will not pause to enumerate or discuss these enactments, although many such statutes

(1) (1935) I. L. R. 13 Ran. 457, 479.

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were cited at the bar. But, except where otherwise a right of appeal *ad hoc* is given under some statute or enactment having the force of a statute, the right of appeal from orders that do not amount to "judgments" is regulated by the provisions of the Code of Civil Procedure; (see s. 104 and O. XLIII, r. 1).

It follows that, if the view which we take of the construction of the term "judgment" in the Letters Patent is accepted and adopted, the problem under consideration is solved, for a ready test is provided for determining what decrees or orders are appealable; and if it is considered that any order in a proceeding to which the Code applies ought to be subject to appeal, and the order is not made appealable under the Code or any other enactment, by a simple amendment such an order could be brought within the ambit of those provisions in the Code under which it is enacted that an appeal shall lie from the orders therein referred to.

The learned Chief Justice is pointing out that as regards the High Court an appeal will lie from a Judge sitting on the Original Side in the case of those orders which are referred to in s. 104 and in O. XLIII, r. 1, Code of Civil Procedure, and an appeal will also lie from a Judge sitting on the Original Side of the High Court to a Bench of the High Court in a case where it can be said that the decision given by a Judge on the Original Side constitutes a "judgment" within the meaning of cl. 15 of the Letters Patent. It is only necessary to look at s. 104 and O. XLIII, r. 1 to see that an opinion given by a Judge upon a reference submitted by a referee under the provisions of r. 50, Chap. XXVI is not one of the orders referred to either in s. 104 or in O. XLIII, r. 1. Therefore, before it can be said that an appeal lies in a case of this kind, it is necessary to show that the decision, or more accurately the expression of opinion, is a "judgment" within the meaning of s. 15 of the Letters Patent.

I respectfully agree with the observations made by Sir John Edge in the course of delivering the judgment of the Judicial Committee of the Privy Council in the case of *Sevak Jeranchod Bhogilal* v. *The Dakore Temple Committee* (1), when he said :—

The term "judgment" in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense.

(1) (1925) 30 C. W.N. 459, 462.

Mr. Bose, for the purpose of his argument, accepted that definition, but he tried to persuade us that the utterance of Mr. Justice McNair on June 7th amounted to the making of a decree within the definition given in s. 2, sub-s. (*2*) of the Code of Civil Procedure. This is a contention which I am utterly unable to accept.

I quite agree with my Lord the Chief Justice that the pronouncement of Mr. Justice McNair was really no more than an expression of opinion which may be open to further consideration when the report of the learned Registrar shall come before the Court either by one side or the other taking exceptions to it or for the purpose of the mortgagee obtaining a final decree in the mortgage suit. There is one other case, to which I would refer, *viz.*, that of *Maneckji Rustomji* v. *H. H. Wadia* (1), where it was held that an order passed by a single Judge of the High Court referring back a report of the Official Referee for further consideration by him, is not a judgment and is not appealable under cl. 15 of the Letters Patent. It was pointed out by the Officiating Chief Justice that the report of the Official Referee is not a final order determining the rights of the parties, unless it is accepted by the Judge; and he is not bound to accept the report even though the parties had not filed objections to it under the Original Side Rules.

In my opinion, from no point of view whatever can it be said that the pronouncement of Mr. Justice McNair on June 7, 1935, amounted to a "judgment" within the meaning of cl. 15 of the Letters Patent.

I hold, therefore, that this appeal does not lie and should be rejected.

Appeal rejected.

Attorneys for appellants: *N. C. Mandal & Co.*

Attorneys for respondents: *Khaitan & Co.*

G. S.

(1) (1927) I. L. R. 51 Mad. 235.