

MINAKSHI-
SUNDRUM
PILLAI
v.
AYYATHORAI.

“(4) That he was actuated by an indirect motive in preferring the charge.”

This second appeal came on for final disposal, and the Court delivered the following judgment:—

JUDGMENT.—We must accept the finding. We cannot say that the Judge dealing with the whole evidence has omitted to take into account that the burden of proof was on the plaintiff.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

NAGAMONEY MUDALIAR (DEFENDANT), APPELLANT,

v.

JANAKIRAM MUDALIAR (PLAINTIFF), RESPONDENT.*

1894.
August 7.
December 5.

Letters Patent—Clause 12—Whether an order under this clause may form the subject of an issue for trial in the suit.

The legality of an order granting permission to institute a suit under clause 12 of the Letters Patent may form the subject of an issue for trial in the suit so instituted.

APPEAL from the decree of Shephard, J., sitting on the original side of the High Court in civil suit No. 391 of 1892.

This was a suit for redemption of a mortgage. Leave to sue under clause 12, Letters Patent, was granted, but a preliminary issue was taken as to whether the Court had jurisdiction in the case, the mortgage property being alleged to be beyond the Court's local jurisdiction. This issue was decided against the defendant on the ground that the leave to sue stood uncanceled. The defendant preferred this appeal.

Sivagnana Mudaliar for appellants.

Subramanya Ayyar for respondents.

BEST, J.—This is an appeal against the order of Mr. Justice Shephard, deciding against the defendant, the preliminary issue “whether this Court has jurisdiction in the case, the mortgage

* Original side appeal No. 34 of 1893.

“property being alleged to be situated beyond the Court’s local jurisdiction.”

NAGAMONEY
MUDALIAR
*
JANAKIRAM
MUDALIAR.

The learned Judge says, “In the face of the leave which stands uncancelled I must decide for plaintiff.”

The cases cited before the learned Judge appear to have been *DeSousa v. Ccles*(1) and *Vythelinga Mudelly v. Cundasawmy Mudelly*(2).

In the former it was held that an appeal lies from the decision of a Judge refusing an application made under clause 12 of the Letters Patent for leave to institute in this Court a suit on a cause of action which arises in part only within the local limits of this Court’s jurisdiction. In *Vythelinga Mudelly v. Cundasawmy Mudelly*(2) it was held that where such an application was refused by one Judge, it was not proper for another Judge in Chambers to grant the application when renewed on precisely the same grounds.

The above two decisions are authority for the propositions (1) that an order of a Judge refusing an application under clause 12 of the Letters Patent is appealable, and (2) that such order of refusal by one Judge cannot be superseded by another Judge in Chambers. But neither of them is in point when the question is whether an order granting permission to institute a suit under clause 12 may form the subject of an issue for trial in the suit so instituted.

In the present case the leave to sue was granted by the Registrar in exercise of the power conferred on him under sections 637 and 652 of the Code of Civil Procedure “and all other powers thereunto enabling;” see appendix 1 of the rules published in the *Fort St. George Gazette Supplement*, dated 16th June 1891.

The order was passed *ex parte* without even issue of notice to the defendant.

Under these circumstances it seems to me that defendant was entitled to take the objection in his answer to the plaint, and that the question is one that should be decided as an issue in the suit.

I would, therefore, allow this appeal and setting aside the order of the learned Judge, remand the issue for disposal on the merits.

The cost of this appeal will abide and follow the result.

MUTTUSAMI AYYAR, J.—I concur.

(1) 3 M.H.C.R., 384.

(2) 8 M.H.C.R., 21.