

## APPELLATE CIVIL—FULL BENCH.

*Before Sir John Wallis, Chief Justice, Mr. Justice Ayling and  
Mr. Justice Kumaraswami Sastri.*

1919,  
February 18.

KULASEKARA NAICKER AND THREE OTHERS (PLAINTIFFS  
Nos. 2 TO 5), APPELLANTS,

v.

JAGADAMBAL AMMAL AND FIVE OTHERS (DEFENDANTS  
Nos. 1, 2, 4, 5, 6 AND FIRST PLAINTIFF), RESPONDENTS.\*

*Appeal, right of—Letters Patent, cl. (15)—Judgment—Order as to costs only  
passed by a Judge of the High Court on its Original Side, whether a Judgment—  
Judgment, interpretation of —.*

An order as to costs, passed by a Judge of the High Court in the exercise of its original jurisdiction, is not the less a judgment within the meaning of clause (15) of the Letters Patent because it relates to costs only.

*Tuljaram Row v. Alagappa Chettiar* (1912) I.L.R., 35 Mad., 1 (F.B.), followed.

APPEAL against the judgment and decree of COURTS TROTTER, J., in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 308 of 1916.

The plaintiffs brought this suit in the Original Side of the High Court to set aside the adoption of the second defendant by the first defendant and to recover possession of the suit lands in the possession of the respective defendants, and for other reliefs. After issues were settled, the suit was withdrawn by the plaintiffs on condition of their paying the costs of the defendants, which was embodied in the order of Court, two sets of costs being allowed. The entire lands forming the subject-matter of the suit was valued at Rs. 59,000. Costs were taxed by the taxing officer at 5 per cent on the full value of the lands, viz., Rs. 59,000, in favour of defendants Nos. 1 and 2. The plaintiffs took out a summons for review of taxation before COURTS TROTTER, J., sitting in the Original Side of the High Court under rules 37 and 38 of the Original Side Fees Rules, and contended that the vakil's fees should be assessed on the value of only such of the lands as were sought to be recovered from the possession of the first and second defendants and that only 1½ per cent should be allowed as fees, as the case was withdrawn before trial, and they relied on the provisions of rule 32 of the Pleadings' Fees Rules. The

\* Original Side Appeal No. 69 of 1917.

learned Judge dismissed the application. Against the order of dismissal, the plaintiffs preferred this Letters Patent Appeal, which came on for hearing before WALLIS, C.J., and NAPIER, J., and the following

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ORDER OF REFERENCE TO A FULL BENCH was made by

WALLIS, C.J.—This is an appeal from an order of COURTS WALLIS, C.J. TROTTER, J., passed on review of taxation by the taxing officer under rules 37 and 38 of the Original Side Fees Rules. We find some difficulty in reconciling in *Saravana Mudaliar v. Rajagopala Chetty*(1), which decides that there is no appeal with the principles laid down in the Full Bench case in *Tuljaram Row v. Alagappa Chettiar*(2). We accordingly refer to a Full Bench the question whether in the present case an appeal lies as from a judgment under clause (15) of the Letters Patent.

ON THIS REFERENCE.—

*R. Subrahmanya Ayyar* for appellants.—The order as to costs is a judgment under clause (15) of the Letters Patent. The word 'judgment' has been interpreted recently by a Full Bench of this Court in *Tuljaram Row v. Alagappa Chettiar*(2). The appeal is perfectly competent. The order as to costs has been further embodied in the decree of the Court. The order is clearly a judgment within the meaning of clause(15) of the Letters Patent.

*A. Narasimha Achariar* for respondents Nos. 1 and 2.—An order for costs is not a judgment within clause (15) of the Letters Patent. It is not a matter dealing with the rights of the parties to the suit. It is incidental to the suit but it is not the subject-matter of the suit. The word 'judgment' has been interpreted in *Tuljaram Row v. Alagappa Chettiar*(2).

[WALLIS, C.J.—The taxing officer is very much like a Commissioner and his order is subject to a review. The Court then decides it. Why is it not a judgment?]

[KUMARASWAMI SASTRI, J.—The prayer in the plaint also contains a prayer for costs. It is as much a right in the suit as any other right.]

*Saravana Mudaliar v. Rajagopala Chetty*(1) decides that an order for cost is not a judgment. See judgment therein of BENSON, J.

(1) (1907) 17 M.L.J., 560.

(2) (1912) I.L.R., 35 Mad., 1 (F.B.).

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[WALLIS, C.J.—No reasons are given for that view.]  
Judgment is distinct from order. The suit has been disposed  
of already : an order for cost is not in the suit.

[KUMARASWAMI SASTRI, J.—No ; the suit is not disposed of  
till the costs are taxed and incorporated in the decree.]

There is a distinction between an order as to costs as  
incidental to a decree and an order as to costs standing alone.  
See *Numbermal Chettiar v. Krishnajeel*(1).

Here the order is further a consent order.

[WALLIS, C.J.—If the costs have been decided on wrong  
principles, will there not be an appeal?]

No ; there will not be an appeal unless the original order is  
itself an appealable order. Suppose an adjournment is granted  
conditional on payment of costs, it is not appealable.

[KUMARASWAMI SASTRI, J.—The taxation is a judicial order  
delegated to an officer. It must be taken as an order of the  
Judge. It is final. Why is it not a judgment?]

There is a distinction between order and judgment, recog-  
nized by KRISHNASWAMI AYYAR, J., in *Tuljaram Row v. Alagappa  
Chettiar*(2). The present order does not dispose of the suit ; it is  
merely a direction to the taxing officer to fix a certain amount as  
costs.

The OPINION of the Court was delivered by

WALLIS, C.J.

WALLIS, C.J.—Accepting the interpretation put upon the word  
“ judgment ” in clause (15) of the Letters Patent in *Tuljaram Row v.  
Alagappa Chettiar*(2), the most recent decision on the subject of a  
Full Bench of this Court, we think that an order as to costs is  
not the less a judgment within the meaning of clause (15) of  
the Letters Patent because it relates to costs only. We do not  
think that the observations of WHITE, C.J., in the later case,  
*Numbermal Chettiar v. Krishnajeel*(1), are opposed to this view.  
The earlier decision of the Full Bench in *Saravana Mudaliar  
v. Rajagopala Chetty*(3) was binding on the Bench in that case  
and the learned Chief Justice merely distinguished it by  
showing that it was inapplicable to the facts of that case. We  
answer the question in the affirmative.

K.R.

(1) (1914) 26 M.L.J., 356.

(2) (1912) L.L.R., 35 Mad., 1 (F.B.). (3) (1907) 17 M.L.J., 569.