RAGHAVA CHARIAR v. MURUGESA MUDALI.

WALLACE, J.

Mohun Thakur v. *Rai Uma Nath Chowdury*(1) are, in my view, no bar to the Court interfering to cancel the sale, even though no party has applied for cancellation, when the Court discovers in the course of the proceedings, that the decree-holder (auction-purchaser) deliberately misled it, and profited thereby to the disadvantage of the judgment-debtor or the judgment-debtor's creditors.

K.R.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, K.C., Chief Justice.

1922, December 4.

PERUMAL CHETTY, APPELLANT,

v.

KANDASAMI CHETTY, RESPONDENT.*

Court fees—Decision in contentious probate suit on Original Side—Appeal from decision—Court fee thereon—"Final judgment" in Serial No. 35, Appendix II, of Original Side Rules.

The decision of a Judge on the Original Side in a contentious probate suit is a "final judgment" within Serial No. 35 of Appendix II of the Original Side Rules and hence the Court-fee on an Appeal from the decision is as therein provided Rs. 150. Definition of "final judgment" of Lord SELBORNE, L.C., in *Ex parte Moore, In re Faithful* (1885) 14 Q.B.D., 627 at 633 and of Lord ESHER, M. R. in *Onslow* v. *Commissioners of Inland Revenue* (1890) 25 Q.B.D., 465, followed.

REFERENCE under section 5 of the Court Fees Act (VII of 1890) in Original Side Appeal sought to be preferred against the order and judgment of the Honourable Mr. Justice KRISHNAN, dated the 31st of March

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(1) (1893) I.L.R., 20 Calc., 8.

* Stamp Register No. 8201 of 1922.

1922, passed in the exercise of the ordinary original Testamentary Jurisdiction of the High Court in the matter of the Will of Gopi Ammal, deceased, in T.O.S. No. 2 of 1921 in O.P. No. 77 of 1921.

The facts are given in the Judgment.

G. Krishnaswami Ayyar for appellant, referred to Serial Nos. 35 and 36, Appendix II, of the Original Side Rules. The decision is only an "order," not a "final judgment" within Serial No. 35. It comes under the category of "any other judgment or order" as provided by Serial No. 36. This is the practice as regards probate appeals from the mufassal. Every order may be a judgment but not a "final judgment." A probate proceeding begins by the filing of a petition and there is no plaint. There is no claim made as in a suit. The rules only provide that on an objection, i.e., a caveat, the procedure prescribed for suits shall apply. That cannot make it a suit; see the judgment of COTTON, L.J., in *Ex parte Chinery*(1); see the explanation of this case in *Mallikarjunadu Setti* v. *Lingamurthi Pantulu*(2); see also *Mahomed Ishack Sahib* v. *Mahomed Moideen*(3).

The Advocate-General (*C. P. Ramaswami Ayyar*) for the Crown.—The rules expressly say that on objection the petitioner shall be treated as a plaintiff and the caveator as a defendant. Throughout, the procedure prescribed is that prescribed for a suit. There is provision for costs. In a probate proceeding, a claim is made by executors that the Will is genuine and that the testator's estate vests in them by virtue of the Will. The claims of the legatees to the various legacies depend also on the genuineness of the Will. On an opposition to the genuineness of the Will the Judge finally adjudges the claims of both parties. The decision

(1) (1884) 12 Q.B.D., 342 at 345. (2) (1902) I.L.R., 25 Mad., 244 at 276, 277
(3) (1922) I.L.R., 45 Mad., 849.

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is thus a "final judgment" within Serial No. 35 of the rules as in an ordinary suit. See the definition of "final judgment" in *Ex parte Moore, In re Faithful*(1), *In re Alexander, Ex parte Alexander*(2), *Onslow* v. *Commissioners of Inland Revenue*(3). The words "final judgment" in the rules must be understood only in the sense indicated in these decisions. The Appeal from the decision is filed only under clause 15 of the Letters Patent which allows an Appeal only from judgments. The decision cannot be a "judgment" for the purpose of Appeal and an "order" for the purpose of Court-fees. He distinguished the cases quoted by the appellant.

JUDGMENT.

This is a matter which, acting under section 5 of the Court Fees Act VII of 1870, I have referred to myself to decide, the difference having arisen between the officer whose duty it is to see that any fee is paid and the suitor as to the necessity of payment of the fee.

The question is whether the decision of a Judge sitting on the Original Side in a contentious probate suit is a final judgment, so that a memorandum of appeal from it comes under serial No. 35 of Appendix II of the Original Side Rules as being from a "final judgment" or under serial No. 36 as being from "any other judgment or order." The nature of the proceedings in contested probate suits is clear from an examination of the rules on the Original Side. By rule 474 where a caveat had been entered, the petition which had been previously issued by those claiming to be the legal personal representatives to obtain the probate and the caveat, shall be numbered and registered as a suit, in which the petitioner shall be the plaintiff and the caveator shall be

(1) (1885) 14 Q.B.D., 627, 633.
(2) [1892] 1 Q.B., 216.
(3) (1890) 25 Q.B.D., 465.

the defendant. Later sections provide that the petition and the caveat are to be taken as the plaint and the written statement of the defendant respectively and there are provisions made for the hearing of the matter, and for the payment of costs. It is argued that the decision arrived at by the learned Judge who tries the matter as a suit is not a final judgment, and this argument is based on a passage in *Ex parte Chinery*(1) in the judgment of COTTON, L.J. In that case he had to consider the meaning of the words "final judgment" in section 4 of the Bankruptcy Act, 1883, which ran

"If a creditor has obtained a final judgment against him for any amount, execution whereon has not been stayed, and if a bankruptcy notice has been issued the Court may make a receiving order."

COTTON, L.J., observes:

"I think we ought to give to the words 'final judgment' in this sub-section their strict and proper meaning, i.e., judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established unless there is something to show an intention to use the words in a more extended sense."

But these words have been explained by Lord SELBORNE, L.C., in *Ex parte Moore, In re Faithful*(2) as being expressions to be

"taken in connexion with the particular facts of the case in relation to which they are used,"

and he gave another definition of "final judgment" to this effect:

"To constitute an order a final judgment nothing more is necessary than that there should be a proper *litis contestatio* and a final adjudication between the parties to it on the merits."

That was followed in *In re Alexander, Ex parte Alexander*(3) and in *Onslow* v. *Commissioners of Inland*

(1) (1884) 12 Q.B.D., 342 at p. 345. (2) (1885) 14 Q.B.D., 627, 633.
(3) [1892] 1 Q.B., 216.

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Revenue(1) where Lord ESHER, M.R., states the same thing more concisely. He says,

"A 'judgment' is a decision obtained in an action and every other decision is an order."

In my judgment, the definitions of Lord SELBORNE and of Lord ESHER are those that apply in the proper interpretation of the words in the Appendix to the Original Side Rules. There must be a final decision between the parties to a suit. Here by the rules there was a suit. The petition and the caveat were numbered and registered as a suit. The petitioner was the plaintiff and the caveator was the defendant. It follows, in my judgment, that the decision between those parties was a judgment. That it was final I have not the least doubt.

It is worth observing that the Appeal from that decision must be under clause 15 of the Letters Patent because it is only there that one finds a right of Appeal from the Original Side, and that right of Appeal is limited to judgments. From this it follows that, if this decision is not a judgment, there is no Appeal, and it would indeed be a remarkable thing if no appeal lay from such a decision. Indeed in this case the appellant is driven to contend, that for the purpose of paying Court-fees it is not a judgment at all, but for the purpose of an Appeal, it is a judgment.

I wish to say one word about the decision of my brother, COUTTS TROTTER, J., in *Mahomed Ishack Sahib* v. *Mahomed Moideen*(2). In that case there was an Appeal against an order on an application under the Guardian and Wards Act. The learned Judge said:

"If any one were asked whether this was a judgment or an order, he would certainly say it was an order"

and he held that it was an order and a final order. Applying his language I should say, if any one were

(1) (1890) 25 Q.B.D., 465. (2) (1922) I.L.R., 45 Mad., 849.

asked whether this was a judgment or an order, he would certainly say it was a judgment, it being quite different from an order on an application to a Court under the Guardian and Wards Act.

It was argued in that case that serial No. 35 in Appendix II was intended to include final orders in the word "judgment" and the learned Judge held that it did not. The Advocate-General in this case wishes it to be understood that he reserves the right to raise that point again hereafter. In the view that I take it is unnecessary for me to decide it. I only wish to say that I express no opinion on the subject whatever.

For these reasons the direction must be that the Court-fee payable on this Memorandum of Appeal is Rs. 150.

Attorney for the Crown—Moresby, Government Solicitor.

N.R.

APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, K.C., Chief Justice and Mr. Justice Wallace.

THATTAN KUNHI KUTTI AND ANOTHER (PLAINTIFF AND PARTY APPELLANT), APPELLANTS

1922, November 30.

v.

THATTAN RAMAN AND SIXTEEN OTHERS (DEFENDANTS), RESPONDENTS.*

Makkattayam law—Thattans (goldsmiths) of North Malabar—Partibility of joint family property amongst them.

The Thattans (goldsmiths) of North Malabar who follow Makkatayam law are governed by the ordinary Hindu law; hence amongst them joint family property is partible until a

* Second Appeal No. 2092 of 1920.