

PRIVY COUNCIL.*

MAHOMED KHALEEL SHIRAZI AND SONS
(PLAINTIFFS), APPELLANTS,

1928,
February 4.

v.

LES TANNERIES LYONNAISES AND ANOTHER
(DEFENDANTS), RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Appeal to Privy Council—Competence—Suit in Original Jurisdiction—Absence of appeal to Appellate Jurisdiction—Additional Evidence on appeal—Code of Civil Procedure (Act V of 1908), Order XLI, r. 33 and s. 107.

A suit was brought against *A* and *B* in the Original Civil Jurisdiction of the Madras High Court. The trial Judge made a decree against *A* for a large sum with costs, and dismissed the suit as against *B*, but decreed that *B* should pay the plaintiffs' costs. *A* and *B* jointly appealed; the plaintiffs did not appeal. The Appellate Court made a decree reducing the sum payable by *A* and dismissing the suit as against *B*. The plaintiffs appealed to the Privy Council.

By Order XLI, rule 33, an Appellate Court may pass any such decree or order as the case may require including one in favour of a respondent or party who has not filed any appeal or objection.

Held that the present appeal, so far as *B* was concerned, being in effect an appeal direct from the trial Judge was not competent under the Code of Civil Procedure, 1908, or under the Letters Patent of the High Court; Order XLI, rule 33, was not intended to apply to such an appeal.

The power of an Appellate Court under section 107 of the Code of Civil Procedure, 1908, to admit additional evidence should be exercised with much caution, and only where the Court is satisfied that in the interests of justice the power should be exercised, and that the evidence would have been admissible at the trial.

* Present: VISCOUNT FINLAY, LORD BLANESBURGH, SIR JOHN EDGE and Mr. AMERU ALI.

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APPEAL (No. 30 of 1924) from a decree of the High Court in its Appellate Civil Jurisdiction (March 14, 1922) varying a decree of that Court in its Original Civil Jurisdiction (October 20, 1920). The suit was brought by the appellants in the High Court against the respondents and another defendant to recover money alleged to be due under two contracts for the sale of skins.

The facts relevant to this report are stated in that part of the judgment of the Judicial Committee here reported. The appeal as against the first respondent depended entirely upon the evidence and involved no question of law.

Sir George Lowndes, K.C., Kenworthy Brown and D. Chamier for the appellants.

Dunne, K.C., and Blanco White for respondent No. 1.

E. B. Raikes for respondent No. 2.

The JUDGMENT of their Lordships was delivered by

SIR JOHN
EDGE.

SIR JOHN EDGE.—This is an appeal by the plaintiffs, from a decree, dated 14th March 1922, of the High Court at Madras, which was made in its Appellate Civil Jurisdiction and varied a decree, dated 20th October 1920, of a Judge of the same Court, which was made in the Ordinary Original Civil Jurisdiction of the High Court.

The appeal arises in a suit which was instituted with the leave of the High Court on 3rd February 1919, in the Ordinary Original Civil Jurisdiction of the High Court by the plaintiffs, who live in the city of Madras, to obtain a decree against Les Tanneries Lyonnaises and their agent Monsieur J. Marret for money alleged to be due to the plaintiffs under a contract for the sale and delivery of goat skins under a contract of 25th May 1917, and under a contract of 26th January 1918, for the sale and delivery of sheep skins. There was another defendant to the suit named, C. Sowrimuthoorya

Oodayar, against whom no relief was claimed. The suit was tried and the decree of the trial Judge was made in the Ordinary Original Civil Jurisdiction of the High Court.

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The French company carries on business at Oullins, near Lyons, in France. Marret and Oodayar live at Pondicherry. The contract of 25th May 1917 was made by Marret as the agent of the French company with the plaintiffs in the city of Madras, and the money which might become due under it was payable at a bank in the city of Madras. The contract of 26th January 1918 was made by Marret at Pondicherry, and the money which might become due under it was payable to the plaintiffs at the bank in the city of Madras.

The trial Judge made, on 20th October 1920, a decree for Rs. 1,76,242-0-5, with interest thereon and for costs against the French company, and by his decree dismissed the suit against Marret and Oodayar, but decreed that Marret should pay to the plaintiffs taxed costs and interest thereon. The plaintiffs did not appeal to the High Court against the decree of the trial Judge dismissing the suit against Marret. They had obtained a decree against the French company for their entire claim, and with that they were then content. As appears by the record, the French company and Marret jointly appealed to the High Court against the decrees which had been made against them. On that appeal the High Court found that the French company was not liable to pay anything in respect of the claim under the contract of 26th January 1918, and by its decree modified the decree against them made in respect of their liability under the contract of 25th May 1917, with certain costs, and dismissed the suit against Marret and Oodayar. Against that decree of the High Court this appeal by the plaintiffs has been brought.

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In the High Court Marret on behalf of the French company and himself had filed a joint written statement.

In this appeal for the first time the French company and Marret are represented by different counsel instructed by separate firms of solicitors. Those learned counsel raised preliminary objections to the appeal, the consideration of which their Lordships decided should stand over until the arguments on the appeal had been heard. Their Lordships will now state what those preliminary objections were and what is their decision on them. Each of the learned counsel contended that the suit was not within the cognizance of the High Court in its Original Civil Jurisdiction. The learned counsel for Marret further contended that this appeal to His Majesty in Council is, in effect, an appeal against the decree of the trial Judge dismissing the suit as against Marret, from which decree the plaintiffs had not appealed, and that such an appeal was not allowed by the Code of Civil Procedure, 1908, or by the Letters Patent of the High Court.

As to the objection that the suit was not within the cognizance of the High Court in its Original Civil Jurisdiction, their Lordships find that the contract of 25th May 1917 was made in the city of Madras, and it was agreed that the money payable under that contract should be paid in the city of Madras, and that it was agreed that the money payable under the contract of 26th January 1918 should be paid in the city of Madras, and further find that the High Court, under its Letters Patent, gave leave to the plaintiffs to bring the suit in the Ordinary Original Civil Jurisdiction of the High Court, and consequently hold that the suit was within the cognizance of the High Court in its Ordinary Original Civil Jurisdiction, and disallow that objection. As to the objection especially raised by the

learned counsel for Marret, that as the plaintiffs had not appealed against the decree of the trial Judge dismissing the suit, excepting as to costs, against Marret, no appeal lay against him, their Lordships have been referred to the Code of Civil Procedure, Order XLI, rule 33, *Gangadhar Muradi v. Banabashi Padihari*(1), and *Bhaidas Shivdas v. Bai Gulab*(2). Their Lordships think that this appeal to His Majesty in Council, in so far as Marret is concerned, is, in effect, an appeal direct to His Majesty in Council from the decree of the trial Judge, which is not allowable under the Code of Civil Procedure, 1908, or under the Letters Patent of the High Court, and they hold that the Code of Civil Procedure, 1908, Order XLI, rule 33, was not intended to apply to such an appeal, and they accordingly decide that the appeal, so far as Marret is concerned, should be dismissed, but without costs.

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[The judgment then dealt with the appeal so far as it related to Les Tanneries Lyonnaises, and after considering the documentary and verbal evidence at length, held that the decree of the trial Judge should be restored. It was proved that Marret had not acted honestly. The judgment concluded as follows:—]

There is one other question raised by the appellants in this appeal. It relates to the admission in evidence by the Court of Appeal of documents which were not in evidence before the trial Judge. The High Court as a Court of Appeal in this suit had, under section 107 of the Code of Civil Procedure, 1908, power to take additional evidence. In their Lordships' opinion it is a power which should be exercised by a Court of Appeal with much caution and only in suits where it is satisfied

(1) (1914) 22 Cal. L.J., 390.

(2) (1921) I.L.R., 45 Bom., 718 (P.C.); 48 L.A., 181.

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that in the interests of justice it should be exercised, and that such additional evidence when admitted will be evidence which, if produced at the trial, would have been admissible. The additional evidence, admission of which is complained of on behalf of the appellants, however much it may have affected the judgments in the Court of Appeal, has not affected the judgment of their Lordships in the slightest degree.

Their Lordships will humbly advise His Majesty that the appeal, so far as it relates to Les Tanneries Lyonnaises, should be allowed, and the decree of the High Court in appeal should be set aside against both respondents, with costs payable by Les Tanneries Lyonnaises, and the decree of PHILLIPS, J., should be restored and affirmed, and that the appeal, so far as it relates to Monsieur J. Marret, should, save as aforesaid, be dismissed without costs. The respondents, Les Tanneries Lyonnaises, should pay to the appellants their costs in the High Court and in this appeal.

Solicitor for appellants—*Douglas Grant*.

Solicitors for respondent No. 1—*Thompson, Quarrel, and Alleneave*.

Solicitors for respondent No. 2—*Josselyn and Elwase*.

A.M.E.