APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice*, *and Mr. Justice Wallace.*

1927, May 4.

SRI RAJAH RAO VENKATAKUMARA MAHIPATHI SURYA RAO BAHADUR VARU, MAHARAJA OF PITHAPURAM (DEFENDANT), APPELLANT,

v.

SRI RAJAH RAO VENKATA MAHIPATHI GANGADHARA RAMA RAO BAHADUR (PLAINTIFF), RESPONDENT.*

Letters Patent, cl. 15—*Judgment—Leave to sue on the Original Side, granted—Application to revoke leave—Order of refusal, whether and when appealable.*

An order of a single Judge of the High Court refusing to revoke an order granting leave to sue on the Original Side of the High Court, *is not appealable*, under clause 15 of the Letters Patent, if the question of jurisdiction of the High Court to entertain the suit is still open to the defendant and can be raised on an appropriate issue at the trial of the suit; but if the order has finally shut out the defendant from thereafter pleading that the suit should have been dismissed on the point of jurisdiction, then the order is a judgment and is appealable—*Tuljaram* v. *Alagappa Chettiar*, (1912) I.L.R., 35 Mad., 1, applied.

APPEAL from the judgment of SRINIVASA AYYANGAR, J., passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in Civil Suit No. 242 of 1926.

This appeal arises out of an application by the defendant (the Maharaja of Pittapuram) to revoke an order granting leave to the plaintiff to sue on the Original Side of the High Court to recover the zamindari of

* Original Side Appeal No. 51 of 1926.

Pithapuram, including in the suit a bungalow called "Dunmore House" within the jurisdiction of the Original Side of the High Court. The learned Judge refused to revoke the *ex parte* order granting leave to sue. The defendant preferred this appeal under the Letters Patent against the order of refusal.

Nugent Grant (with *C. Rama Rao* and *V. C. Gopalaratnam*) for respondent, took a preliminary objection that no appeal lay under clause 15 of the Letters Patent, as the order appealed against was not a judgment. An order granting leave is not a judgment, though an order refusing leave may be a judgment: See *Official Assignee of Madras* v. *Ramalingappa*(1); *Tuljaram* v. *Alagappa Chettiar*(2); *Harish Chunder Chaudhry* v. *Kali Sundari Debi*(3); *In the matter of the petition of Kali Soondary Dobia*(4) and *DeSouza* v. *Coles*(5).

A. Krishnaswami Ayyar (with him *Vere Mockett, P. Kameswara Rao, V. Radhakrishnayya* and *S. Venkatesa Ayyangar*) for appellant.—An appeal lies against the order, as it is a judgment. The learned Judge decided a question of jurisdiction to sue, in granting leave. He adjudicated on the right to sue in the High Court, which suit but for leave would not lie in the High Court. It is a barred claim elsewhere and ought not to be allowed to be sued in the High Court. See *Hadjee Ismail Hadjee Habeeb* v. *Hadjee Muhomed Hadjee Joosub*(6); *Vaghoji* v. *Camaji*(7); *Tuljaram* v. *Alagappa Chettiar*(2); *Krishna Reddy* v. *Thanikachala Mudaly*(8). The Court, before granting leave must decide whether the plaintiff has a real cause of action or makes only a bogus allegation to give jurisdiction: *Harendra Lal Roy Chowdhuri* v. *Haridusi Debi*(9); See *Johnson* v. *Taylor Brothers & Company, Ltd.*(10); *Hemelryck* v. *William Lyall Shipbuilding Co., Ltd.*(11); *Rosler* v. *Hilbery*(12); *Societé Generale de Paris* v. *Dreyfus Brothers*(13).

The bungalow, which is alleged to be bought by defendant as a trespasser out of the income of the zamindari property does

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(1) (1926) I.L.R., 49 Mad., 539.
(2) (1912) I.L.R., 35 Mad., 1.
(3) (1882) I.L.R., 9 Calc., 482 (P.C.).
(4) (1881) I.L.R., 6 Calc., 594.
(5) (1868) 3 M.H.C., 384.
(6) (1874) 13 Beng. L.R., 91.
(7) (1905) I.L.R., 29 Bom., 249.
(8) (1924) I.L.R., 47 Mad., 136.
(9) (1904) I.L.R., 41 Calc., 972 (P.C.).
(10) [1920] A.C., 144.
(11) [1921] 1 A.C., 698.
(12) [1925] 1 Ch., 250.
(13) (1888) 37 Ch.D., 215.

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not become zamindari property: see *Ran Bijai Bahadur Singh* v. *Jagatpal Singh*(1).

The JUDGMENT of the Court was delivered by

WALLACE, J.—This is an appeal against the order of SRINIVASA AYYANGAR, J., refusing to revoke an order giving leave to sue on the Original Side of this Court. The plaintiff is suing to recover from the defendant possession of certain zamindari property. All the property except a bungalow called "Dunmore House" is outside the jurisdiction of this Court. He filed his suit on the Original Side on what is stated to be the last day before it would be barred here by limitation. Leave to sue was asked for *ex parte* without notice to the defendant, and, in view of the urgency of the matter, was granted by the learned Judge. Later on the defendant put in an application to revoke the leave, principally on the ground that the inclusion of "Dunmore House" was specious and *malafide* being a mere device to give the High Court a fictitious jurisdiction in order to get round the bar of limitation, since the suit was already barred by time in the mufassal and could not have been entertained unless this Court was persuaded to entertain it. The learned Judge has refused to revoke his order and the defendant comes up here on appeal.

The learned Judge in his order says: "I cannot possibly hold the inclusion of the claim in respect of Dunmore House as *bona fide*" and has "practically no doubt" that Dunmore House "has been included in the plaint merely for the purpose of making it appear that some portion of the land claimed was situate within the jurisdiction of this Court," and he holds that the present case is "undoubtedly a fit and proper case in which, ordinarily speaking, leave to institute the suit should not have been granted and therefore a proper

(1) (1891) I.L.R., 18 Calc., 111 (P.C.).

case in which the leave granted *ex parte* should be revoked." But because of some special circumstances he refused to revoke his order, these circumstances being chiefly (*a*) concern for the plaintiff because he had paid a large Court fee which he will lose as it has not been the practice of this Court to return a plaint, (*b*) concern for the defendant because he may, if the leave is revoked, be driven to face another suit in another Court and (*c*) the desirability that the suit should not be disposed of by a Mufassal Subordinate Judge. It will be observed that these special circumstances have nothing to do with the question of jurisdiction or limitation. The first is an appeal *ad misericordiam*. The second is not put forward by the defendant himself and the third pre-supposes that the suit is maintainable, that is, is not barred by limitation in the Mufassal Court, while the *ex parte* order was obtained on the footing that the suit would be barred by time in the Mufassal Court.

However the main point argued before us is whether an appeal lies at all against such an order. An order refusing to revoke a grant *ex parte* of leave to sue is in essence an order granting after contest leave to sue. Now, if the plaintiff's suit was really on the date of presentation here barred by time in the mufassal, and if the *ex parte* leave to sue ought not, as the learned Judge holds, to have been given in the first instance, but if nevertheless the learned Judge has decided finally, even if he has decided wrongly, that he has jurisdiction to entertain the suit, then, plaintiff's suit being on a proper application of the law still-born the grant of leave to sue is giving life to a dead suit, and inflicting on defendant an injury *prima facie* irreparable, unless an appeal lies.

As to whether an appeal does lie, the only direct authorities on this question are in *Hadjee Ismail Hadjee*

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Habbeeb v. *Hadjee Mahomed Hadjee Joosub*(1), where the Calcutta High Court held that an appeal lies from an order granting leave to the plaintiff to sue and in *Vaghoji* v. *Camaji*(2) where it was held that an appeal lay against an order on the Original Side dismissing an application to rescind a leave to sue granted. In the latter case it was held that the order then under appeal being on the question of whether the suit was one for land so as to come under clause 12 of the Letters Patent, was decisive.

Without laying down any general proposition that a leave to sue is always a judgment under clause 15 of the Letters Patent and therefore subject to appeal, we think that in any particular case the proper test as to whether the order is or is not a judgment has been laid down by the late Chief Justice Sir ARNOLD WHITE in *Tuljaram* v. *Alagappa Chettiar*(3) a ruling which has been consistently adopted in this Court as laying down the guiding principle. There at page 7 he says:

> "The test seems to me to be not what is the form of the adjudication but what is its effect in a suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause."

In that view it appears to us that it cannot be maintained with reason that the grant of leave to sue is not a judgment within the meaning of clause 15 of the Letters Patent, if the order has *finally* shut out the defendant from now pleading or being heard on the question that the suit should have been so dismissed on

(1) (1874) 13 Beng. L.R., 91. (2) (1905) I.L.R., 29 Bom., 249.
(3) (1912) I.L.R., 35 Mad., 1.

the point of jurisdiction. If this refusal to dismiss the suit is in effect a final judgment against a dismissal of the suit on the ground of jurisdiction, a judgment which cannot be attacked in appeal because the matter of jurisdiction will not *ex hypothesi* be made a matter of issue in the suit, then it will in our view be a judgment within the scope of the test set out in 35 Madras. But if the question of the jurisdiction of this Court to entertain the suit is still open for decision at the trial of the suit, then in our view the order passed is not of a final nature and would not be a judgment. Mr. Grant for the plaintiff stated before us that the plaintiff's position was that the question of jurisdiction is still open for decision on an appropriate issue in the suit. The defendant's learned Vakil was doubtful if that was so and whether the order granting leave to sue did not finally dispose of the question of jurisdiction. That we think is not necessarily so. A Court has always jurisdiction to try on an appropriate issue in a suit whether it has jurisdiction or not to try the suit, that is, to set in motion the process by which the various points at issue between the parties including that of jurisdiction fall to be decided.

In the present case the leave of the Court has been obtained under clause 12 of the Letters Patent on the footing that part of the property sued for is situated within the local limits of the Original Jurisdiction of this Court. But, if subsequently on a full trial on the point it appears that the inclusion of Dunmore House was not due to a *bona fide* claim to that house but was merely a device by which the law of limitation might be evaded, the Court has power still to give the proper relief. It appears to us therefore that the order under appeal is not a judgment within clause 15 and an

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appeal does not therefore lie. It would be well if in the trial of the suit this question of jurisdiction be tried and decided as a preliminary issue. We therefore dismiss the appeal but make no order as to costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Devadoss.

1927, February 16.

THE OFFICIAL ASSIGNEE OF BOMBAY (SECOND DEFENDANT), APPELLANT,

v.

ORLA KUNA MUNA SUNDARACHARI AND OTHERS (PLAINTIFFS AND FOURTH DEFENDANT), RESPONDENTS.*

Mortgage—Suit for sale in a Sub-Court—Suit against Official Assignee and insolvent mortgagor—Transaction, fraudulent under sec. 53 of Transfer of Property Act—Presidency Towns Insolvency Act (III of 1909), ss. 4, 7, 55 and 56—Jurisdiction of Sub-Court to determine question under sec. 55 of the latter Act—Special Act—Special forum, Insolvency Court—Provincial Insolvency Act (V of 1920), ss. 53 and 54—Jurisdiction of Civil Courts to determine questions raised under either Act.

Any question as to the invalidity of a transaction, raised by the Official Assignee under the special provisions contained in sections 55 and 56 of the Presidency Towns Insolvency Act, can be determined only by the Insolvency Court constituted under the Act, and not by the ordinary Civil Court.

The principle of the decisions holding that only Insolvency Courts have jurisdiction to determine questions under sections 53 and 54 of the Provincial Insolvency Act, should be applied to cases falling under sections 55 and 56 of the Presidency

* Appeal No. 85 of 1925.