APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice, and Mr. Justice Pakenham Walsh.

1930, November 13.

V. ADINARAYANA CHETTI (RESPONDENT-FIRST DEFENDANT), PETITIONER,

v.

KOPPARAM NARASIMHA CHETTI AND ANOTHER (PETITIONERS-PLAINTIFFS), RESPONDENTS. *

Code of Civil Procedure (Act V of 1908), sec. 2—Decree—Order in substance a decree—Appeal—Maintainability—Order styled a "decretal order"—Effect of.

If in substance an order passed in an original suit is a "decree" as defined by section 2 of the Code of Civil Procedure and therefore appealable, the fact that the Court styles it an "order" or "decretal order", from which the Code allows no appeal, will not make it non-appealable.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908) and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Vellore, dated 22nd December 1924 and made in Interlocutory Application No. 107 of 1924 in Original Suit No. 14 of 1923.

A. C. Sampath Ayyangar for petitioner.

S. Varadachari for respondents.

JUDGMENT.

BEASLEY C.J.

BEASLEY C.J.—Two worshippers of the Sri Kannyakaparameswari temple in Wallajah filed a suit, Original Suit No. 14 of 1913, in the Court of the Subordinate Judge, Vellore, praying for the settlement of a scheme for the proper management of the temple and its

* Civil Revision Petition No. 1399 of 1925.

ADINARAYANA CHETTI v. NARASIMHA CHETTI.

BEASLEY C.J.

properties, for the appointment of a fit and proper person as the trustee, for an account by the first defendant of his management of the trust properties belonging to the temple, for a direction to the second defendant to hand over the jewels belonging to the temple to the trustee so appointed, and for a direction to the third defendant to hand over the account books relating to the temple and its properties in his possession. It was alleged in the plaint that, in consequence of the irregular and improper conduct on the part of the first defendant and his supporters, the public worship in the temple had ceased to be performed daily. A written statement was filed on behalf of the defendants but the suit was compromised and a compromise decree passed on the 30th November 1923. By that decree, a scheme was settled, approved and annexed to the decree, and by that scheme, two members of the Komati caste were to be elected trustees by the majority at a general meeting of the members of the community, subject to the confirmation of the Court. Two trustees were duly elected and their election was confirmed by the Court on the 26th July 1924. In the decree, there is a direction that either the plaintiffs or the first defendant should apply for the appointment of a commissioner to go into the accounts as between the defendants and the temple, and that the newly elected trustees are to take possession of the temple and its properties only on payment to the first defendant of whatever sum that might be found due by the commissioner to all or any of the defendants. In pursuance of this decree, the plaintiffs filed a petition, Civil Miscellaneous Petition No. 107 of 1924, in the Subordinate Judge's Court asking for the appointment of a commissioner to take the accounts of the defendants, and on the 15th March 1924 by consent a commissioner was appointed. The commission was

returned on the 18th November 1924, and, both sides having filed objections to the commissioner's report, the Subordinate Judge gave his decision upon it on the 22nd December 1924. It was ordered and declared that no amount was due by the temple to any of the defendants, and that the third defendant owed Rs. 197–2–3 and the first defendant Rs. 2,202–5–5 to it, and it was further ordered that the first defendant was to pay to the temple trustees on behalf of the temple the sum already stated, that the third defendant was likewise to pay the sum found due by him, and that both the first and the third defendants were to pay to the temple trustees on behalf of the temple Rs. 140–4–0, being their costs of the petition, and finally, that the trustees of the temple were to execute the decree on behalf of the temple only on payment of Rs. 217–7–0, being the court-fee on the amounts decreed. It must be mentioned that endorsed on the back of the final order is "decretal order", and that the learned Subordinate Judge's considered decision is headed "order". The first defendant has now filed this civil revision petition against the before-mentioned order of the learned Subordinate Judge.

Mr. Varadachari, on behalf of the respondents to this petition, takes the preliminary objection that no civil revision petition lies, because, in his submission, the order of the learned Subordinate Judge is a "decree" from which there is an appeal, and therefore it is not open to the petitioner to come to the High Court by way of revision. For the petitioner, it is argued that the proceedings in the learned Subordinate Judge's Court were by way of a petition, that his order was an "order" and not a "decree", and that hence, there being no appeal, the petitioner's only remedy is by way of a revision petition to the High Court. In

ADINARAYANA CHETTI v. NARASIMHA CHETTI.

BEASLEY C.J.

support of his argument it is pointed out that the application for the appointment of a commissioner was made by a civil miscellaneous petition, that the learned Subordinate Judge's order is headed " order " and that, when the learned Subordinate Judge's order was drawn up, it was drawn up as a decretal order. These things, it is argued, show that it was not a " decree " but merely an " order." It is further contended that in the mofussil such matters as are left over for determination after the decree is passed, such as the appointment of a commissioner as in this case, are usually dealt with on a petition, and that, even assuming that such a practice is irregular and the learned Subordinate Judge should not have adopted such a practice, he has done so and delivered an order, and that therefore the right of the petitioner to come by way of a revision petition cannot be defeated. A number of cases were referred to by the learned Counsel for the petitioner in support of his argument which, to put it shortly, is that, where the Court purports to act under a certain provision although not entitled to do so, it must be taken to have assumed its jurisdiction under that provision. One of the cases relied upon is *Bilas Singh* v. *King Emperor*(1), where it was decided that, where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order could not be defeated on the ground that the order was made without jurisdiction. It must be noted that, in that case, the action of the Court was to deprive the applicant of his right of appeal. In the present case, that is not the position at all. The action of the learned Subordinate Judge in passing the order, if it can be described as an order, does not deprive the petitioner

(1) A.I.R. 1925 All. 737.

of a remedy. In *Khamasa Bewa* v. *Promotho Nath Roy*(1), the question again was whether the litigant was by excess of jurisdiction deprived of his right to appeal, and it was held that he was not. What happened in that case was that a suit was instituted in a Court the presiding officer of which, at the time of the institution of the suit, had no Small Cause Court powers. It was held nevertheless that an appeal lay to the District Judge. In *Karam Nawaz* v. *Runka*(2), it was held by a single Judge that the right of appeal is determined not by what the Court should have done but what the Court did or purported to do. Another case relied upon is a Full Bench decision of this High Court, namely, *Muthiah Chettiar* v. *Govinddoss Krishnadoss*(3). There, an order, which purported to be passed under Order XXII, rule 10 of the Code of Civil Procedure, was held to be an appealable order though on the facts the order should not have been passed under that rule. In *Abdul Rahiman Saheb* v. *Ganapathi Bhatta*(4), the Judge had no power to pass orders under section 492 of the Code of Civil Procedure, 1882, as regards the issue of an injunction, and, under section 503 of that Code, as regards the appointment of a receiver, and it was held, that as orders under both the sections were appealable, the High Court was not barred from treating the orders as having been passed thereunder for the purpose of entertaining an appeal against those orders. That, again, was a perfectly clear case, because the Judge had passed an order attaching property, in itself an order seriously affecting the property of a person, and had also appointed a receiver, and neither of those orders could be made without such orders being subject to an appeal. Here, again, it was the question of whether or not by

(1) (1919) 51 I.C. 967.
(2) A.I.R. 1929 Lah. 376.
(3) (1921) I.L.R. 44 Mad. 919.
(4) (1900) I.L.R. 23 Mad. 517.

ADINARAYANA CHETTI v. NARASIMHA CHETTI.

BEASLEY C.J.

the adoption of a wrong procedure by a Court the litigant was to be deprived of his remedy. That is not the case here. In *Nasir Khan* v. *Itwari*(1), it was held that the right of appeal does not depend on what a Court ought to have done but on what it actually did. In that case the Court dismissed an appeal on the merits, although it ought to have dismissed it not on the merits but for default of appearance by the appellant. No appeal lay from an order dismissing the appeal for default. The matter is quite shortly dealt with on page 670 in the judgment of the Court as follows:—

> "The right of appeal does not depend on what the Court ought to have done but on what it actually did. What it actually did was to pass a decree on the merits. Against such a decree the law allows an appeal . . . The respondent's reasoning would deprive the aggrieved party of the right of appeal just in those cases in which it is most needed."

It is contended that these cases are strong support of the petitioner's argument. It is argued that the order, the subject of this revision petition, was on the face of it an order, that it does not conform to the form of a final decree passed after a preliminary decree directing the taking of an account, and that, as before mentioned, it is described by the Subordinate Judge as an "order" and is embodied in the decree as a "decretal order". It is argued therefore that the learned Subordinate Judge purported to pass an "order" from which there is no appeal and which can only be revised by means of a petition, and that, however wrong he may have been in doing so, that is what he has done and not what he should have done. It is further pointed out that the order is stamped as a decretal order under article 7 of Schedule I to the Court-fees Act, that

(1) (1923) I.L.R. 45 All. 669.

section 96 of the Code of Civil Procedure has no application here as that only gives the right of appeal from a decree but that section 105 applies. In reply, Mr. Varadachari contends that the order of the learned Subordinate Judge by what it does was clearly a "decree" as defined in section 2 of the Code of Civil Procedure, because it conclusively determined the rights of parties with regard to the matters in controversy in the suit and was a final determination of such matters, and with that contention I entirely agree. The order of the learned Subordinate Judge just begins by reciting what the decree provided for, namely, the taking of the accounts, and states "It is to give effect to this direction in the decree that an application was made to the Court by the plaintiffs to appoint a commissioner. The commissioner has now submitted his report. Objections have been filed to it on either side" and so on. He then gives his decision with regard to the commissioner's findings. It is just as if the learned Subordinate Judge had treated the matter as one where a preliminary decree had been passed. He ends up by stating, "There will therefore be a declaration to the effect that there is no amount due by the temple to any of the defendants and that on the other hand the third defendant owes Rs. 197–2–3 and the first defendant Rs. 2,202–5–5 to it, and a direction requiring the said defendants 1 and 3 to pay the temple trustees on behalf of the temple the sums respectively due by them as aforesaid with costs, subject to this decree being liable to be executed only upon the payment of the adequate court-fee upon the amounts decreed." There was no mistake here, and it is clear that the learned Subordinate Judge intended to finally dispose of the matter between the parties and that his order was to be a "decree." On the face of it, it was a decree, and

ADINARAYANA CHETTI v. NARASIMHA CHETTI.

BEASLEY C.J.

no one could possibly have been misled. The mere fact that the learned Subordinate Judge's judgment is headed "order" does not make his judgment any the less a judgment, nor does the fact that the office chose to endorse upon the decree that it was a "decretal order" make any difference. The test to be applied is what it was, and it completely satisfies the definition of a "decree" in the Code of Civil Procedure. In my opinion, paragraph 2 of the learned Subordinate Judge's order is conclusive of the matter, and there can be no ground whatever for saying that he purported to act under a non-appealable procedure. This being so, the authorities referred to by the petitioner have no application whatever. It is probable that no commissioner was appointed by the decree of the 30th November 1923, because that was a compromise decree, and that it was left to the parties to agree upon the commissioner. Otherwise, no doubt, the decree would have directed the taking of the accounts by a named person and not left it to the parties to apply afterwards for the appointment of a commissioner to take the accounts. The learned Counsel for the petitioner has asked the Court to be allowed to alter the petition into an appeal, but I am not disposed to accede to that request, as I think it is clear that the procedure of coming by way of a civil revision petition has been adopted in order to save court-fees.

This civil revision petition must be dismissed with costs.

PAKENHAM WALSH J.—I agree and have nothing to add.

A.S.V.