APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Butler.

RAMAN NAMBYAR AND FOUR OTHERS (APPELLANTS), APPELLANTS,

1934, February 14.

v.

KIZHAKKEKOOTIL PULASSERI THEKKE KOVILAKATH UNNIKATUNGI NEDUNGETHIRIPAD *styled* RAYIRAM NAMAN AND FOUR OTHERS (RESPONDENTS), RESPONDENTS.*

Order—Appeal from—Right of—Test of—What Court purported to do and not what it should have done.

When a Judge purports to act under an Order which is appealable, an appeal lies, even though he ought to have acted on some other Order which is not appealable. The right of appeal is determined by what the Court purported to do, and not by what the Court should have done.

APPEAL under Clause 15 of the Letters Patent against the judgment of CURGENVEN J., dated 21st October 1931 and passed in Appeal against Order No. 248 of 1929 preferred to the High Court against the order of the Court of the Subordinate Judge of South Malabar at Ottapalem dated 26th November 1928 and made in Original S it No. 7 of 1928.

C. S. Venkatachariar for *C. S. Swaminathan* for appellants.

K. Kuttikrishna Menon and *K. Kunhikrishnan Nair* for respondents.

The JUDGMENT of the Court was delivered by JACKSON J.—In the case under appeal the learned Judge passed an order under rule 21 of Order XI which is appealable under Order XLIII, rule 1. This Court on civil miscellaneous appeal held that JACKSON J.

* Letters Patent Appeal No. 104 of 1931.

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JACKSON J.

the order should have been one following upon non-compliance with Order VI, rule 5, which presumably would be under section 151. The question for our determination is whether when a Judge purports to act under an Order which is appealable, an appeal lies, even though he ought to have acted on some other Order which is not appealable. No doubt in considering whether an appeal is admissible the Court always looks to the substance rather than the form of the order so as not to deny a party his right of appeal. But it would be a very dangerous analogy to deny a party the right of appeal on the ground that only the substance and not the form can be looked into. Because, although the form may be technically wrong, until it is appealed against, it is substantially effective. That is to say, a party confronted with an order purporting to be under rule 21 of Order XI is bound by that order unless he appeals against it, and it will be an absolute negation of justice when he does appeal to tell him that he has no appeal because it ought to have been an order under some other rule. This principle which in itself is fairly obvious is abundantly supported by the reported cases of which it is only necessary to cite *Nasir Khan* v. *Itwari*(1), *Basumati Debi* v. *Taritbasani Dasi*(2), *Agent, Bengal Nagpur Railway* v. *Behari Lal Dutt*(3) and *Gopal Singh* v. *Mangal Singh*(4). The learned Judge who has decided the last of these cases puts the matter clearly and succinctly :

"It has been urged by Counsel for the respondent that the remand is not under Order XLI, rule 23, but under section

(1) (1923) I.L.R. 45 All. 669.
(2) (1918) 31 C.L.J. 354.
(3) (1925) I.L.R. 52 Calc. 783.
(4) (1927) 107 I.C. 284.

151 and, therefore, no appeal lies. But the right of appeal is determined by what the Court purported to do, and not by what the Court should have done and, therefore, this objection has no force."

JACKSON J.

We therefore find that an appeal lies and the Subordinate Judge will be directed, if necessary, to put his order into proper form. We say, if necessary, because it has been suggested that in the present circumstances this question has become academic ; but that is a matter upon which we have no precise information. The appellant is allowed his costs in this appeal. The costs in the appeal before CURGENVEN J. will abide the result.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

PEDDA VENKATA REDDI AND ANOTHER (DEFENDANTS), APPELLANTS,

1933, November 24.

v.

VITTA HUSSAIN SETTI (PLAINTIFF), RESPONDENT.*

Indian Stamp Act (II of 1899), sec. 36—Applicability of, to documents which form the foundation of the suit—Promissory note admitted as a bond on payment of penalty—Effect of.

In a suit on a document described as a "promissory note bond" the trial Court found that the document was a "bond" within the meaning of the term under the Indian Stamp Act and levied a penalty on the document and admitted it in evidence.

Held, in appeal, that, even assuming that the suit document was a promissory note, it having been admitted in evidence by

* Appeal No. 26 of 1929.