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February 16

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

BANNO BIBI AND OTHERS (PETITIONERS) *v.* MEHDI HUSAIN AND OTHERS (OPPOSITE PARTIES).*

Practice—Letters Patent, N.-W. P., s. 10—Appeal from single Judge—"Judgment"—Interlocutory order—Order refusing leave to appeal in formâ pauperis *—Civil Procedure Code, ss.* 588, 591, 632.

Under ss. 588 and 591 of the Civil Procedure Code, no appeal lies, under s. 10 of the Letters Patent for the High Court for the North-Western Provinces, from an order of a single Judge refusing an application for leave to appeal *in formâ pauperis*. *Achaya* v. *Ratnavelu* (1) and *in re Rajagopal* (2) followed. *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (3) distinguished.

THE facts of this case are sufficiently stated in the judgment of Edge, C. J.

Pandit *Moti Lal Nehru*, for the appellants.

Mr. *W. M. Colvin*, for the respondents.

EDGE, C. J.—This is an appeal under s. 10 of the Letters Patent from an order of our brother Straight refusing an application for leave to appeal *in formâ pauperis*. Mr. *Colvin* on behalf of the respondent has taken a preliminary objection that the appeal will not lie. Ordinarily, and unless there is something in the Code of Civil Procedure to take away the appeal, an appeal lies under s. 10 of the Letters Patent from a judgment or order, not being a sentence or order passed or made in a criminal trial, of one Judge of this Court. On behalf of the appellant Mr. *Moti Lal* has cited a judgment of the Privy Council in *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi* (3) and he has referred more particularly to a passage at p. 494, where it is said—"It only remains to observe that their Lordships do not think that s. 588 of Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this, where the appeal is from one of the Judges of the Court to the full Court." I do not understand their Lordships there to have held that s. 588 of the Civil Procedure Code does not apply at all to appeals attempted to be brought to the Full Court, from an order passed by a Judge of the Court. I think

* Appeal No. 25 of 1888 under s. 10, Letters Patent.
(1) I. L. R., 9 Mad., 253. (2) I. L. R., 9 Mad., 447.
(3) I. L. R., 9 Calc., 482.

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they were restricting their observations to the case before them. In that case the question arose from a so-called order of Pontifex, J., in respect of an order of the Privy Council for execution. Mr. Justice Pontifex considered that the decree as it then stood was not susceptible of execution, and refused to transmit the decree to the Court below. An appeal was preferred under s. 15 of the Letters Patent of the Calcutta High Court. Two of the Judges of that Court differed from the Chief Justice; the Chief Justice thinking that Mr. Justice Pontifex's order was merely ministerial, and the other two Judges apparently thinking that his proceeding was more than ministerial. Mr. Justice Mitter pointed out that Pontifex, J., ought to have acted under s. 244 of Act X of 1877. Those two Judges considered that an appeal lay under s. 15, Letters Patent.

With regard to that case my observation is this, that apparently Mr. Justice Mitter considered that Mr. Justice Pontifex must have taken action or ought to have acted under s. 244 or 245 of the then Code. If Mr. Justice Pontifex was acting under those sections, it was quite obvious that an appeal would lie. If he was not acting under those execution sections of the Code, but under s. 610 of the Code, I have difficulty in seeing how s. 588, Civil Procedure Code, could have applied to what he did. The term "an order" as defined in the present Code of 1882 would hardly be applicable to any direction which the Judge might give under s. 610, Civil Procedure Code. In the present Code an order is defined as "the formal expression of any decision of a Civil Court which is not a decree as above defined."

As I understand it, under s. 610, all that a Judge has to do is to transmit the decree and give such direction as may be required, &c. I come to the conclusion that the case in the Privy Council does not apply to this case. On the other hand, we have two cases in the Indian Law Reports, 9 Madras, which I think bear directly on the present case.

The first of those cases is *Achaya* v. *Ratnavelu* (1) in which Mr. Justice Muthusami Ayyar, in a very careful and elaborate judgment,

(1) I. L. R., 9 Mad., 253.

shows how the Code of Civil Procedure has affected s. 15 of the Letters Patent. The next case is *in re Rajagopal and others* (1) in which the present Chief Justice and Mr. Justice Parker held that an order passed under s. 592 of the Code of Civil Procedure, rejecting an application to appeal as a pauper, is not appealable. That was an appeal from an order of one of the Judges of that Court, who rejected an application to appeal as a pauper. In my opinion the correct view of the law as applicable to such cases is to be found in the two cases of the Indian Law Reports, 9 Madras, and is a view which we ought to follow. I may observe that considerable difference exists between s. 588 of the present Code and s. 588 of Act X of 1877, which was the Act under consideration in the case before the Judicial Committee. In my opinion this appeal should be dismissed with costs.

TYRRELL, J.—I am entirely of the same opinion (2).

Appeal dismissed.

(1) I. L. R., 9 Mad., 447.

(2) This appears to be the first decision of this High Court upon the effect of ss. 588, 591 and 632 of the Civil Procedure Code, on s. 10 of the Letters Patent. In the other High Courts, a similar construction has been placed on the corresponding clauses of their Letters Patent. The following cases were decided when the Civil Procedure Code of 1859 was in force, s. 363 of which prohibited appeals from interlocutory orders:—*Apcar* v. *Howah Bye* (1 Ind. Jur. N. S., 337); *Kumara Upendra Krishna Deb Bahadur* v. *Nubin Krishna Bose* (8 B. L. R., O. C., at p. 117); *Raka Bibi* v. *Khaja Muhomed Umar Khan* (4 B. L. R., A. C., 10); *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (8 B. L. R., 433); *Soubai* v. *Ahmedbai Habibhai* (9 Bom. H. C. Rep. 398); *Mowla Buksh* v. *Kishen Pertab Sahi* (I. L. R., 1 Calc., 102); *Somasundaram Chetti* v. *The Administrator-General* (I. L. R., 1 Mad., 148). The effect of these cases was (*a*) that appeals under the clauses of the other Letters Patent corresponding with s. 10 of the Letters Patent for this High Court, were treated as subject to the provisions of the Code of 1859 generally; (*b*) that the term "judgment" in the clauses under consideration was understood in the sense of a final adjudication or "decree" as defined in s. 2 of the present Code. The only ruling in which the term was applied in a sense comprehending orders of every description, final or interlocutory, and without reference to the provisions of the Code, was *De Souza* v. *Coles* (Mad. H. C. Rep., 384), which has never been followed to its full extent.

The cases decided (in addition to those mentioned by Edge, C. J.) since the coming into force of the Code of 1877 and in particular s. 588 making certain interlocutory orders appealable, are *Howard* v. *Wilson* (I. L. R., 4 Calc., 231); *Ebrahim* v. *Fukhrunnissa Begam* (I. L. R., 4 Calc., 531); *Kali Kristo Paul* v. *Ramchunder Nag* (I. L. R., 8 Calc., 147), and *Navivahoo* v. *Narotamdas Camdas* (I. L. R., 7 Bom., 5). Their effect, stated shortly, appears to be that a decision, to be a "judgment" within s. 10 of the Letters Patent, either must be a "decree" as defined in s. 2 of the present Code, or if an order not amounting to a decree, must be one of those specified in s. 588.