1895
March 18.

APPELLATE CIVIL.

Before Mr. Justice Burkitt and Mr. Justice Aikman.

R. WALL AND ANOTHER (PETITIONERS) *v.* J. E. HOWARD AND OTHERS (OPPOSITE PARTIES).*

Letters Patent s. 10, *Act No. VI of* 1882 (*Indian Companies Act*), s. 169—*Extension of time for serving notice of appeal—No appeal from order of High Court refusing extension—Discretionary order.*

No appeal will lie under s. 10 of the Letters Patent of the High Court of Judicature for the North-Western Provinces from an order of a single Judge of the Court refusing an application under s. 169 of Act No. VI of 1882 (Indian Companies Act) for extension of time for serving notice of an appeal under that Act; such order not being a judgment within the meaning of s. 10 of the Letters Patent. *Banno Bibi* v. *Mehdi Husain* (1), *Muhammad Naim-ullah Khan* v. *Ihsan-ullah Khan* (2), *Kishen Pershad Panday* v. *Tilukdhari Lall* (3), *Lutf Ali Khan* v. *Asgur Raza* (4), *Hurrish Chunder Chowdry* v. *Kali Sundari Debia* (5), *Mohabir Prosad Singh* v. *Adhikari Kunwar* (6), *Lane* v. *Esdaile* (7), *Kay* v. *Briggs* (8), *The Amstil* (9) and *Ex parte Stevenson* (10) referred to.

THE facts of this case are as follows :—

In 1894 a limited company, the Agra Savings Bank, was being wound up under the supervision of the Court of the District Judge of Allahabad. On the 14th of March 1894 certain shareholders of the Bank, amongst whom were the present appellants, filed a petition in the Court of the District Judge purporting to be under ss. 162 and 214 of the Indian Companies Act, 1882, and having for its object the institution of an inquiry into the conduct of certain directors and auditors of the said Bank in relation to the affairs of the Bank and the ultimate compelling of the directors and auditors named therein to contribute to the assets of the Bank compensation for moneys alleged to have been lost to the Bank through their negligence or misfeasance.

This petition was accepted by the Court, which thereupon framed certain issues to form the subject of an inquiry. Shortly after the

* Appeal No. 31 of 1894, under s. 10 of the Letters Patent, from an order of the *Hon'ble Mr. Justice Banerji*, dated the 21st of May 1894.

(1) I. L. R., 11 All. 375.
(2) I. L. R., 14 All. 226.
(3) I. L. R., 18 Calc 183.
(4) I. L. R., 17 Calc. 455.
(5) L. R., 10 I. A. 4.
(6) I.-L. R., 21 Calc. 473.
(7) L. R [1891] App. Cas. 210.
(8) L R. 22 Q. B. D., 343.
(9) L. R. 2 P. D. N. S., 186.
(10) L. R. [1892] Q. B. D. Vol. I, 294.

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framing of issues on this petition the then incumbent of the office of District Judge of Allahabad retired, and his successor, on the 30th of April, dismissed the petition, so far as it purported to be a petition under s. 214, on the ground that it was premature, and ordered the petitioners to pay costs. The hearing of the petition as a petition for an inquiry under s. 162 was continued for a short time, and then the Judge declined to grant further discovery and ordered the papers to be shelved.

The petitioners, before filing an appeal against the above orders of the District Judge dismissing their petition, applied to the High Court under s. 169 of the Indian Companies Act, 1882, for extension of time for filing their appeal and for giving notice of the appeal, having regard to the restricted period of limitation prescribed by that section; but they omitted to state the reasons which induced them to believe that it would be practically impossible to serve notice of their appeal within the time prescribed. On this application the following order was made :—

"Under s. 169 of Act VI of 1882, which has been referred to in this application, this Court has not in my judgment power to extend the time for filing an appeal from the order of the District Judge which is complained of by the applicants. The only time which the Court of appeal is empowered by that section to extend is the time within which notice of the appeal is required to be given by that section. I am therefore unable to grant the extension asked for as regards the period of limitation for appealing against the order of the Court below. As for the granting of an extension of the time for the service of notice, I am of opinion that such extension cannot be granted except for valid reasons. Such reasons have not been shown to exist in this case. The only reason given in the application is that a copy of the order complained of has not been obtained; but it has not been alleged or shown why the copy has not been obtained. I accordingly refuse this application."

The petitioners appealed against this order under s. 10 of the Letters Patent.

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Mr. *W. K. Porter* for the appellants.

Messrs. *A. Strachey* and *W. Wallach* for the respondents.

BURKITT J.—In this case an application was made to Mr. Justice Banerji under s. 169 of the Indian Companies Act (Act No. VI of 1882) to grant an extension of time for giving notice of an appeal against an order of the District Judge of Allahabad refusing an application under s. 214 of that Act. An extension of time for filing the appeal was also asked for. The learned Judge refused both applications being of opinion that no sufficient reason for granting them had been shown.

This is an appeal brought under s. 10 of the Letters Patent of this Court against that order of refusal.

Mr. *Strachey* for the respondent takes two preliminary objections against the hearing of the appeal. Firstly, he contends that no appeal lies, because, he says, the order under appeal is not a 'judgment' within the meaning of s. 10 of the Letters Patent, which gives a right of appeal from the judgment (not being a sentence or order passed or made in any criminal trial), of one Judge of the Court. Several cases were cited to us during the argument; but I do not think that they are all in point, as some of them turn on s. 591 of the Code of Civil Procedure. That section, however, is in my opinion not applicable to the present case. I think that section must be read with s. 588, and should be construed as if the words "under this Code" were inserted between the words "by any Court" and the words "in the exercise of." To hold otherwise would have the effect of abolishing many appeals given by Acts of the Legislature passed before Act No. XIV of 1882 came into force, *e.g.*, an appeal to the High Court from the District Judge in this very matter. I am therefore unable to say that the present appeal, which arises out of a right of appeal created by the Indian Companies Act (Act No. VI of 1882) in a matter entirely outside the Code of Civil Procedure, is forbidden by s. 591 of that Code.

In the case of *Banno Bibi* v. *Mehdi Husain* (1) it was held by this Court under ss. 588 and 591 of the Code of Civil Procedure,

(1) I. L. R., 11 All. 375.

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following certain cases in the Madras High Court that no appeal lay from an order of a single Judge refusing leave to appeal *in formâ pauperis*. For similar reasons in *Muhammad Naim-ullah* v. *Ihsan-ullah* (1) it was held that an order by a single Judge of the Court amending a decree passed in appeal by a divisional Bench of which he was the only member remaining in the Court was an order from which an appeal was excluded by Chapter XLIII of the Code of Civil Procedure. And in that case the learned Chief Justice defined the "judgment" referred to in s. 10 of the Letters Patent to be "the express decision of a Judge of the Court which leads up to and originates an order or decree," and he pointed out that it was impossible to read together Chapters XLIII and XLV, the latter being the chapter which treats of appeals to Her Majesty in Council.

The next case to which I would refer is that of *Kishen Pershad Panday* v. *Tilukdhari Lall* (2). There it was held that no appeal lay under s 15 of the Letters Patent of the Calcutta Court (corresponding with s. 10 of the Letters Patent of this Court) from an order of a single Judge refusing to extend the time for furnishing security for the costs of an appeal to Her Majesty in Council. The question before the High Court in that case was whether such an order is a "judgment" within the meaning of s. 15 of the Letters Patent. Like the order now under appeal before us the order in that case was one to which the provisions of ss. 588 and 591 of the Code of Civil Procedure did not apply. After citing and discussing several reported cases the learned Judges held that "where an order decides finally any question at issue in the case or the rights of any of the parties to the suit, it is appealable, otherwise not." Among the cases referred to in the judgment of the Court just cited was that of *Lutf Ali Khan* v. *Asgur Reza* (3). In that case the question was whether an appeal lay against an order of a Judge granting a certificate that the case was a fit one for appeal to the Privy Council, and it was held, after an examination of the case of *Hurrish Chunder Chowdry* v. *Kali Sundari Debia* (4) that, as the order under appeal was not one deciding, finally or otherwise, any

(1) I. L. R., 14 All., 226.
(2) I. L. R., 18 Calc., 183.
(3) I. L. R., 17 Calc, 455.
(4) L. R., 10 I. A., 4.

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question at issue in the case or the rights of any of the parties to the suit, it was not appealable. In *Hurrish Chunder Chowdry* v *Kali Sundari Debia* it was held that an appeal did lie from the order of a Judge refusing to send down for execution a decree of Her Majesty in Council. In the recent case of *Mohabir Prosad Singh* v. *Adhikari Kunwar* (1), which was an appeal against an order of a single Judge refusing to stay execution under s. 608 of the Code of Civil Procedure, it was held that "judgment in clause 15 of the Letters Patent means a decision which affects the merits of the question between the parties by determining some right or liability." In that view of the law the Court held that refusal to stay execution in the exercise of the discretion given by s. 608 to a Judge or Bench of the Court did not affect any "right or liability by determining any question which affects the merits of the dispute between the parties in any sense." In the already cited case of *Muhammad Naim-ullah Khan* v. *Ihsan-ullah Khan* (2) the meaning and effect of *Hurrish Chunder's* case are fully discussed, and I would add that, as the order of Mr. Justice Pontifex in that case decided that the decree of Her Majesty in Council could not be executed, it undoubtedly did decide a question at issue in the case and the right of the decree-holder to have execution of his decree. The order therefore would have been appealable under the rulings cited above.

In construing the word "judgment" in s. 10 of our Letters Patent, which were prepared in England and use the phraseology of the English Courts, it is impossible to give to it the restricted meaning of the word "judgment" as defined in the Code of Civil Procedure. As used in England it is wide enough to embrace the definitions of decree, judgment and order in that Code. The use of the words "sentence or order" in the exception as to criminal matters is significant. Now the order under appeal here certainly is not a decree nor appealable as such. It is an order by which the learned Judge in the exercise of his judicial discretion refused to grant to the appellants an indulgence which they could not claim as a matter of right. It did not decide any question at issue in the case

(1) I. L. R., 21 Calc. 473. (2) I. L. R., 14 All. 226.

nor the rights of any of the parties, nor did it lead up to or originate any order or decree. The order was complete in itself and did not require anything further to be done.

It is no doubt the case that the ultimate effect of the order may be to prevent the hearing of the appeal against the order of the District Judge passed under s. 214 of the Companies Act, the appellants not having complied with the requirements of s. 169 as to giving notice. That fact, however, does not in my opinion alter the position. On this matter some cases cited by the learned counsel for the respondents from the English Reports are most instructive. The Appellate Jurisdiction Act, 1876 (39 and 40 Vict., C.59) by s. 3, provided that an appeal should lie to the House of Lords "from any order or judgment" of the Court of Appeal in England. Nevertheless it was held by the House of Lords in *Lane* v. *Esdaile* (1) that no appeal lay from an order of the Court of Appeal refusing to grant special leave to appeal to it from a judgment of the High Court after the time limited for appealing had expired. By Rule 15 of Order LVIII the Court of Appeal had power to grant special leave, and the result of the refusal was to put an end to the appellate proceedings. But the House of Lords held that the order of the Court of Appeal refusing special leave to appeal was not a "judgment or order" within the meaning of s. 3 of the Appellate Jurisdiction Act. Lord Herschell is reported to have said:—"The matter was intrusted and intended to be intrusted to their (the Court of Appeal's) discretion, and the exercise of a discretion of that sort intrusted to them is not, within the true meaning of the Appellate Jurisdiction Act, an order or judgment from which there can be an appeal." In his judgment Lord Herschell cited with approval the case of *Kay* v. *Briggs* (2) in the Court of Appeal. In that case the Court of Appeal held, with reference to ss. 19 and 45 of the Judicature Act of 1873, that they had no power to overrule the discretion given by s. 45 of the Act to the Divisional Court to refuse special leave to appeal, notwithstanding that by s. 19 the Court of Appeal had jurisdiction to hear an appeal "from

(1) L. R., [1891] A. C., 210. (2) L. R., 22 Q. B. D., 343.

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any judgment or order" of the High Court. It was held that the real meaning of s. 45 is to confine the power to give leave to appeal absolutely to the Divisional Bench, and that the Court of Appeal had no jurisdiction to entertain the application, inasmuch as, if they allowed it, the special leave would be given, not by the Divisional Bench, but by the Court of Appeal, which was not the contingency on which s. 45 provided that the decision of the Divisional Bench should not be final. The decision in that case refusing to interfere with the discretion of the High Court had the same effect as the order in the case under appeal before us may have. It put an end to the intended appeal. In the judgment of the Master of the Rolls in *Kay* v. *Briggs* the case of "*The Amstil*" (2) was cited as being decisive against the application. In that case the Judge of the Admiralty Division had refused leave to appeal from a judgment of a County Court, leave being necessary because the period (ten days) within which the appeal could be brought had expired. On an appeal founded upon s. 19 of the Judicature Act to the Court of Appeal, Lord Justice James, with the concurrence of the other members of the court, is reported to have said:—"The statute enacts that an appeal from a County Court in an admiralty cause shall not be allowed unless an appeal is lodged within a certain time, but provides that the Judge of the Admiralty Division may allow it to proceed on sufficient cause being shown to his satisfaction for the omission. Cause has not been shown to his satisfaction, and I am of opinion that we have no jurisdiction to interfere." The inference to be drawn from the words just cited is (as in *Lane* v. *Esdaile*) that, as the Judge of the Admiralty Division was intrusted with a discretion to grant or to refuse leave to appeal, his order passed in the exercise of that discretion was not a judgment or order within the meaning of s. 19 of the Judicature Act. In that case also the effect of the order was to put an end to the appeal. That case is very much on all fours with the appeal before us. In the latter the learned Judge had a discretion to grant or to refuse the extension of time asked for. In the exercise of that discretion he refused the application, as

(2) L. R., 2 P. D. N. S., 186.

he held that the applicant had not made out sufficient reason to warrant his allowing the extension of time asked for.

I take it that the rule to be deduced from the above cases is that where a Court is invested with jurisdiction to do or to refuse to do a certain act the order passed in the exercise of its discretion in that matter is not a judgment or order within the meaning of s. 19 of the Judicature Act. Those cases no doubt all refer to the refusal of applications for special leave to appeal, but in *Lane* v. *Esdaile* and in the case of *The Amstil* the application practically asked for an extension of the time limited for appealing, as is the case here.

In the case of *Ex parte Stevenson* (1) it was pointed out by the Lord Chief Justice that the granting of leave to appeal to a jury under the provisions of the Statute 53 and 54, Vic. Cap. 70 was to be granted as the leave of the High Court, and not as the leave of the Judge at Chambers who granted it, and on appeal the Master of the Rolls (p. 611), relying on *Lane* v. *Esdaile*, laid down the proposition that "wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is from the very nature of the thing final and conclusive, and without appeal unless an appeal from it is expressly given." These words mean of course that the decision of such "legal authority" is not a "judgment or order" within the meaning of s. 19 of the Judicature Act. Now in the present case this Court as the Court of Appeal under s. 169 of the Indian Companies Act is the "legal authority" to which is given the power of extending the time for giving notice of an appeal under that section. By paragraph XII of Rule I of the Rules of Court a single Judge has been intrusted with power to hear and dispose of such an application as that made by the present appellants, just as the Judge at Chambers was empowered in the case last cited. The order passed by such single Judge is therefore the order of the High Court and is not subject to appeal "unless an appeal from it is expressly" given. No express appeal is anywhere provided unless it be by s. 10 of the Letters Patent.

(1) L. R. [1892,] 1 Q. B., 294; A. C. 609.

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On the whole, after carefully considering all the authorities set out above, I am of opinion that no appeal lies in the present case, firstly, because the order under appeal does not decide any question at issue in the case or any right of either party, and secondly, because the order, from which no appeal is expressly given, was passed in the exercise of his judicial discretion by the learned Judge in a matter in which, as representing the whole Court, he had power to decide whether the applicants had made out sufficient cause to his satisfaction for their omission to give notice of their appeal within the time limited by law. An order such as that passed in the present case is, I hold, not a "judgment" within the meaning of s. 10 of the Letters Patent.

The second preliminary objection taken by the learned counsel was that the hearing of this appeal was barred, because notice of it had not been given within three weeks from the date of the order appealed against.

But, as I have decided that no appeal lies from that order, I consider it to be quite unnecessary to discuss the question whether this appeal would or would not have been in time if an appeal were permitted by law.

I would refuse to hear this appeal and would dismiss it with costs.

AIKMAN, J.—Looking to the serious consequences which may result to a litigant from the rejection of an application under s. 169 of the Indian Companies Act for an extension of time, I should have been glad had I been able to hold that an appeal like the present was maintainable, but, as has been shown in the judgment just delivered by my brother Burkitt, the weight of authority both in this country and in England is entirely against so holding. I am therefore of opinion that no appeal lies, and I concur in the order proposed.

Appeal dismissed.