APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Rachhpal Singh

BENI MADHO RAO AND OTHERS (APPLICANTS) *v.* SRI RAM-CHANDRAJI MAHARAJ (OPPOSITE PARTY)* 1936 October, 9

Letters Patent, section 10—"*Judgment*"—*Order from which no appeal lies—Civil Procedure Code, order XXII, rule* 5—*Order deciding which of rival claimants is legal representative of deceased party—No final adjudication of the rights of the parties—Civil Procedure Code, order I, rule* 10; *order XLI, rule* 20—*Joining parties as* pro forma *respondents in the interests of justice.*

An order passed under order XXII, rule 5, read with rule 9, of the Civil Procedure Code, deciding which of several rival claimants is the legal representative of a deceased party to an appeal to be brought on the record, is not an order appealable under the Code; it is not a final adjudication of the rights of the several persons, and does not come within the meaning of the word "judgment" in section 10 of the Letters Patent and no appeal lies therefrom under that section.

The other claimants may, if they are apprehensive of fraud or collusion in the conduct of the case by the person who has been selected as the legal representative, apply to be made *pro forma* defendants or respondents, and the court may, in the interests of justice, so implead them under order I, rule 10 or order XLI, rule 20.

Sir *Syed Wazir Hasan* and Messrs. *M. L. Chaturvedi* and *S. M. Salman*, for the appellants.

The respondent was not represented.

SULAIMAN, C.J., and RACHHPAL SINGH, J.:—A preliminary objection is taken to the hearing of this appeal that no appeal under clause 10 of the Letters Patent lies at all. In a first appeal which was pending before a learned Judge of this Court one of the parties died and two sets of claimants filed applications to be brought on the record as his legal representatives. The learned Judge after going into the matter at considerable length came to the conclusion that the contesting

*Appeal No. 103 of 1935 under section 10 of the Letters Patent.

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respondent should be considered as the legal representative of the deceased and accordingly dismissed the application of the present appellants. The present appeal has been preferred from this order.

The first question is whether the order appealed against was a judgment within the meaning of clause 10 of the Letters Patent. When the old Code of Civil Procedure was in force there were observations made in a Full Bench case of this Court, *Muhammad Naimullah Khan* v. *Ihsan-ullah Khan* (1), which might suggest that judgments within the meaning of clause 10 would be orders under the Code of Civil Procedure which were appealable, and not those which were not appealable; but there was no such clear decision.

In *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee* (2) their Lordships of the Privy Council in the course of their judgment remarked that the term "judgment" in the Letters Patent of the High Court meant in civil cases a decree and not a judgment in the ordinary sense. Their Lordships were obviously drawing a distinction between a decree and judgment as contemplated in the Code of Civil Procedure in which the judgment contains the reasons and the decree embodies the final order which governs the rights of the parties.

This case was considered by a Full Bench of this Court in *Sital Din* v. *Anant Ram* (3), and it was held that an appeal lay from an order of remand passed by a single Judge of this Court, although such an order under the Code of Civil Procedure would be an order of remand and not a decree as defined in section 2 of the Code of Civil Procedure.

In a recent Full Bench case of this Court, namely *Shahzadi Begam* v. *Alakh Nath* (4), it was pointed out that in consequence of the view expressed in *Sital Din's* case it could not be held that no appeal would lie from

(1) (1892) I.L.R., 14 All., 226.
(2) (1925) 23 A.L.J., 555(558).
(3) (1933) I.L.R., 55 All., 326.
(4) (1935) I.L.R., 57 All., 983.

an appealable order which did not amount to a decree under the Code of Civil Procedure. It was also pointed out that the observations made in certain earlier cases, that an order which is not appealable under the Code of Civil Procedure would not be a judgment within the meaning of the Letters Patent, could not be considered as containing any exact definition of judgment, but a mere rough rule of interpretation.

There can be no doubt that a narrow construction has been put on the word "judgment" in the Letters Patent, and since the observation made by their Lordships of the Privy Council in *Sevak Jeranchod's* case (1) the word "judgment" cannot be taken in its widest scope.

It is quite clear that if this dispute had arisen in the trial court and an order had been passed by that court, no appeal would have lain to the High Court from an order substituting the contesting respondent as the legal representative of the deceased. An order of this kind is not made an appealable order under the Code. There is no greater hardship if a similar order of a learned Judge of this Court is not appealable. That may not be an absolute test, but it certainly furnishes a guidance. It has been held recently by a Bench of this Court, in *Antu Rai* v. *Ram Kinkar Rai* (2), that an order declaring a particular person as the legal representative of the deceased would not operate as *res judicata* between the claimants in a subsequent suit, though of course for the purposes of the subject-matter of the dispute in that case the question as between the claimants and the opposite party would not be allowed to be re-agitated. No authority of this Court has been cited on behalf of the appellants to show that this Court has entertained any appeal from an order which was not appealable under the Code of Civil Procedure, since the pronouncement of their Lordships of the Privy Council. In the case of *Sital Din* v. *Anant Ram* (3) the order was

(1) (1925) 23 A.L.J., 555. (2) (1935) I.L.R., 58 All., 734.
(3) (1933) I.L.R., 55 All., 326.

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of remand which would have been appealable under the Code if passed by the lower court. In *Shahzadi Begam* v. *Alakh Nath* (1) the appeal was not admitted from an order which would not have been appealable in such cases.

The learned counsel for the appellants relies on the case of *Shivji Poonja* v. *Ramjimal Babulal* (2). But that was a case of an appeal from an order refusing to set aside an award, which, if made by the lower court, would have been appealable under section 104 of the Code of Civil Procedure.

A Bench of the Calcutta High Court, in *Durga Prasad* v. *Kanti Chandra Mukherji* (3), entertained an appeal from an order refusing to stay a suit under section 10 of the Code of Civil Procedure, and the Rangoon High Court in *C. E. Dooply* v. *M. E. Moolla* (4) entertained a Letters Patent appeal from an order refusing to implead certain applicants as parties to a suit under section 92 of the Code of Civil Procedure. With great respect, we are unable to agree that the word "judgment" in the Letters Patent could be extended to such cases.

So far as the two rival claimants are concerned, the question as to who is the legal representative of the deceased has not been finally adjudicated upon and can be re-agitated as between them. It is, therefore, not a final adjudication of the rights of the parties by the court at all. All that was necessary was to bring on the record some person who was found to be the legal representative of the deceased so that the case may be proceeded with and the rights of the opposite party finally determined. We are accordingly of the opinion that in view of the rulings of this Court no Letters Patent appeal would lie from an order of this kind.

It has been urged on behalf of the appellants that there would be a great hardship on persons in their

(1) (1935) I.L.R., 57 All., 983.
(2) (1930) I.L.R., 55 Bom., 452.
(3) (1934) I.L.R., 61 Cal., 670.
(4) (1927) I.L.R., 5 Ran., 263.

position if no appeal were allowed, inasmuch as the appeal would be decided in their absence and they may be very seriously prejudiced, particularly if the rival claimant secretly colludes with the respondent or allows the appeal to be dismissed for want of prosecution or for default of appearance. It seems to us that an appeal cannot be entertained on a mere ground like this. Under section 107, sub-section (2), an appellate court possesses all the powers which the original court possesses, subject to any conditions and limitations that may be prescribed in the Code. Under order I, rule 10, sub-rule (2) power is conferred on the original court in certain circumstances to implead a fresh party or implead a new person as a party. Where a person is sought to be impleaded against his will, who was not a party in the court below, the position would be different, for under order XLI, rule 20 such a power could not be exercised by the appellate court so as to enable it later on to pass a decree against him: see the cases of *Pachkauri Raut* v. *Ram Khilawan Chaube* (1), and *Shiam Lal Joti Prasad* v. *Dhanpat Rai* (2). But where the party concerned himself applies to be made a *pro forma* defendant or *pro forma* respondent in order to prevent fraud or collusion, without asking for a fresh opportunity to file a written statement or produce evidence, the case may stand on a different footing and the court may in the interests of justice implead him. We, therefore, do not think that this consideration should weigh against the view which has prevailed in this Court that the word "judgment" used in the Letters Patent is used in a restricted sense and does not cover all cases of orders passed by a single Judge of the High Court.

We think that the preliminary objection prevails and we accordingly dismiss the appeal with costs.

(1) (1914) I.L.R., 37 All., 57. (2) (1925) I.L.R., 47 All., 853.