

## APPELLATE CIVIL.

*Before Sir Sydney Robinson, C.J., and Mr. Justice Brown.*

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*v.*

BENG SENG & CO. AND OTHERS.\*

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July 23.

*Letters Patent, clause 13—Order giving directions to the Commissioner appointed to take accounts, an order regulating procedure and not giving a final decision as to the rights of parties, whether appealable—“Judgment” within the meaning of clause 13, Letters Patent.*

In a suit for a partnership account, the Commissioner appointed to take the accounts made an application, to the Judge on the Original Side of the High Court, for directions as to whether he should go only into the accounts filed by the 4th defendant, the accounting party, or should also go into the accounts of certain transactions that had taken place between the 1st and 4th defendants. The Court thereupon passed an order giving the directions asked for and against this order the 1st defendant appealed.

*Held*, that the order of the Court, giving directions being merely an order regulating procedure and not being one giving a final adjudication of the rights of the parties, was not a “Judgment” within the provision of clause 13 of the Burma Letters Patent and, therefore, was not appealable.

*Hadjee Ismail Hadjee Habbbeh v. Hadjee Mohamed Hadjee Iosub*, 13 Bengal L.R., 91; *Ramendra Nath Roy v. Brajendra Nath Das*, 45 C.d., 111; *T.V. Tuljaram Row v. M.K.R.P. Atagapa Chettiar*, 35 Mad., 1; *The Justices of the Peace for Calcutta v. The Oriental Gas Company, Limited*, 8 Bengal L.R., 483—*followed*.

This was a miscellaneous appeal against an order of the High Court passed in its Original Civil Jurisdiction in a suit for partnership accounts. The Commissioner appointed to take the accounts having made a reference to the Court, order was passed directing the extent to which his enquiry should be confined. It was against this order that the 1st defendant preferred his appeal and the same came for disposal before a Division Bench composed of Robinson, C.J. and Brown, J. Question was raised at the hearing

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\* Civil Miscellaneous Appeal No. 51 of 1924 against the order of this Court on the Original Side in Civil Regular No. 396 of 1922.

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before their Lordships as to whether the order in question was a "Judgment" withing the meaning of clause 13 of the Letters Patent. The facts arising appear fully in the judgment of the learned Chief Justice reported below :—

*Burjorjee with Vertannes*—for the Appellant.

*Das*—for the Respondents.

ROBINSON, C.J.—The question we have to decide now is whether the appeal sought is competent under clause 13 of the Letters Patent of this Court.

A suit was brought for the dissolution of a partnership and for an account to be taken of the partnership, and praying that the plaintiffs' share therein be ascertained and paid to them.

By consent a preliminary decree for an account was passed. It declares the partnership to be dissolved, and orders that all proper accounts of the said partnership be taken. The Official Referee was appointed Commissioner to take the accounts of the partnership.

It appears that the 4th defendant had financed the partnership, and that he managed it and kept the accounts. It further appears that the 1st defendant had purchased rice from the partnership for which he had to pay ; also that the 4th defendant had obtained freight from a Shipping Company, which was managed by the 1st defendant, and that he owed money to the Shipping Company for that freight, or that the 1st defendant had paid this money for him and he owed the money to the 1st defendant. The 4th defendant, being the accounting party, submitted the accounts to the Commissioner.

With regard to those accounts, certain questions arose before the Commissioner, and, as regards those matters, he applied to the Court for directions, and

the order giving directions is the order from which the present appeal is sought.

In his report the Commissioner sets out the facts of this debt due by the 4th defendant to the 1st defendant, and that the accounts before him showed that the 4th defendant's debt had been adjusted against the money due by the 1st defendant to the partnership in the partnership accounts. He points out that the plaintiff and the 4th defendant appear to be friendly with each other, and that the first three defendants are the parties on the other side. The plaintiff did not object to the accounts filed by the 4th defendant, but the 1st defendant brought in certain objections, claiming credit for items alleged to be due to him for freight.

The Commissioner pointed out that these were not questions arising in the partnership accounts, though they had been included in the accounts in the shape of adjustments. He suggested that, if the parties consented, it might be possible for him to go into the question of these adjustments; but counsel for the 4th defendant demurred to this.

At the next hearing counsel for the plaintiff filed two objections to the Commissioner's going into the adjustments on the ground that the questions as to freight are entirely between the 1st and 4th defendants and have no relationship to the partnership whatsoever. He, therefore, asked directions as to whether "I, as Commissioner for taking the accounts directed to be taken by the preliminary decree dated the 4th June 1923 should go into the accounts brought in before me by the 4th defendants as they stand . . . or whether defendants four and the plaintiff or the one or other of them is entitled to bring in an amended account of the amount due for rice by defendant one to the partnership and

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interest thereon without reference to any questions arising between the 1st and 4th defendants in respect of freight due by the latter to the former."

The order passed, giving directions, sets out :—

"The debt owing by the 4th defendant to the 1st defendant is in no sense a partnership matter. It is merely a debt of a private nature owing by one partner to another and not to the partnership. Under these circumstances this is not a debt which can be adjusted as between the 4th and 1st defendants, the debt owing by the 1st defendant being one owing to the partnership and the 4th defendant's debt being one owing to the 1st defendant."

The question as to what are "judgments" within the meaning of clause 13 of the Letters Patent has been the subject of much consideration by various High Courts. The leading case is that of *The Justices of the Peace for Calcutta v. Oriental Gas Company, Limited* (1). At page 452 of the judgment, Couch, C.J., says:—"We think that 'judgment' in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined. Both classes are provided for in clauses 39 and 40 of the Charter. An order, such as that before us, which only authorizes a proceeding to be taken for the determination of the question between the parties, cannot be considered a judgment."

In *Ramendra Nath Roy v Brajandra Nath Dass* (2),

(1) (1817) 8 Bengal L.R., 433.

(2) (1918) 45 Cal., 111.

it has been pointed out by Mookerjee, J., (page 126), that "It is plain that the true test to be applied in the solution of the question of the competence of the appeal is, not the form of the adjudication but its real effect on the suit or proceeding in which it has been made." And he refers to the dictum of Couch, C.J., in *Hadjee Ismail Hadjee Habbeeb v Hadjee Mahomed Hadjee Joosub* (3), where the learned Chief Justice said: "The order, . . . . ., was of great importance to the parties, was not a mere formal order or an order merely regulating the procedure in the suit but one that had the effect of giving a jurisdiction to the Court which it otherwise would not have; it might fairly be said to determine some right between the parties, namely, the right to sue in a particular Court."

In *T.V. Tuljaram Row v. M.K.R.V. Alagappa Chettiar* (4), Sir Arnold White, C.J., said (page 7): "The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent."

With these dicta I am in general agreement. I agree that a decision which affects the merits of the question between the parties by determining some

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(3) (1874) 13 Bengal L.R., 91.

(4) (1912) 35 Mad., 1.

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right or liability may rightly be held to be a "judgment"; and I think that an order which merely paves the way for the determination of the question between the parties cannot be considered to be a "judgment"; nor can a mere formal order merely regulating the procedure in the suit, or one which is nothing more than a step towards obtaining a final adjudication.

I think that the order must have direct reference to the suit that is before the Court, and it is plain that in this case all that the preliminary decree ordered was that the accounts of the partnership should be taken. The Commissioner had power only to deal with the accounts of the partnership; he was not authorized under the decree, which was a consent decree, or under the order of his appointment, to go into any accounts other than the partnership accounts. What he asked for was directions, he being in doubt as to how he should carry on his duties, and the order that has been passed does not decide on the merits of the suit for the dissolution of partnership, nor does it decide the rights or liabilities of the parties to the suit so far as the partnership is concerned. It is merely an order facilitating the examination of the accounts and confining the enquiry to the particular purpose of the suit.

It cannot be that the framers of the Letters Patent intended to allow appeals which do not arise directly from the suit itself. The decision as to these adjustments would not be a decision affecting the partnership accounts, nor would it affect in any way any rights of the partners, except certain rights and liabilities as between two of them, arising out of matters entirely foreign to the partnership.

Under these circumstances I am of opinion that no appeal lies from the order in question, and that

this appeal must stand dismissed with costs. Advocate's fees ten gold mohurs.

BROWN, J.—I agree in holding that the order appealed against is not a judgment, and that an appeal did not lie.

The order merely states that private debts cannot be adjusted in the partnership. It would appear from the proceedings of the Referee as though this has been interpreted by him as meaning that such debts which had previously been shown as adjusted must now be readjusted. If this be the meaning of the order, then the order would appear to have far reaching effects; but the order itself does not say this, and it is not a final decision on this point. It is only in the nature of general instructions to the Referee as to the procedure to be adopted by him, and it is not in any way a final pronouncement as to the rights of the parties. It does not purport finally to decide any of the rights between the parties. It is couched in general terms, and it is impossible to say at this stage what precise effect, if any, it will have on the final decision in the suit. It is an order regulating the procedure in the suit rather than an order determining any right between the parties. I therefore agree in the order proposed.

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