APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Darwood.

1927
Aug. 11.

HAJEE TAR MAHOMED AND THREE
v.
ZULAIKHA BAI.*

Letters Patent, Clause 13—Appeal lies against finding of High Court that it has jurisdiction to entertain a suit.

Held, that an appeal lies under the Letters Patent against the finding of the High Court that it has jurisdiction to hear and decide a suit, although no appeal lies against a similar finding of a Court other than the High Court, under the Civil Procedure Code.

De Souza v. *Coles*, 3 Mad. H.C. Reports 384; *Habbeeb* v. *Joosub*, 13 Bengal Law Reports 91; *Soonirain* v. *Tata*, C.M. Ap. 82 of 1925 H.C. Rangoon —*followed*.

Burjorjee—for Appellants.

HEALD AND DARWOOD, JJ.—Respondent, claiming to be widow of one Esak Vally Mohamed, sued appellants on the Original Side of this Court, with the leave of the Court for administration of Esak's estate by the Court. She alleged that Esak and appellants were partners in a business carried on at Rangoon and at Kyaukme in the Northern Shan States and that Esak left property both in Rangoon and at Kyaukme.

Appellants took a preliminary objection that the Original Side of this Court had no jurisdiction because the business of the partnership, or as they called it the joint family business, was not carried on at Rangoon and because Esak left no property in Rangoon.

The learned Judge tried as a preliminary issue the question whether or not this Court had jurisdiction. That question involved a decision on

* Civil Miscellaneous Appeal No. 124 of 1927.

matters of fact, and after hearing the evidence produced by the parties concerning those matters of fact, the learned Judge came to the conclusion that the business was one of selling goods bought in Rangoon, that there was always a partner or representative of the partnership in Rangoon and a place of business in Rangoon, that some of the goods bought in Rangoon were sent for sale to Kyaukme and Hsipaw in the Northern Shan States, where Esak lived and represented the firm, that other goods bought in Rangoon were sold in Rangoon, that the banking accounts and the money of the business were kept in Rangoon, and that therefore the business of the partnership was carried on partly at least in Rangoon. The learned Judge therefore found that this Court on its Original Side had jurisdiction to hear and decide the suit.

Appellants claimed to be entitled to appeal against that finding, which was a finding on a preliminary issue, on the ground that it was a "judgment" within the meaning of Clause 13 of the Letters Patent, and they allege that the learned Judge's finding on the facts and his decision on the questions of law which arose were erroneous.

A similar question of the right of appeal arose in a recent case in this Court, *Sooniram Jeetmull* v. *R. D. Tata** (Civil Miscellaneous Appeal No. 82 of 1925), which was also an appeal against a finding of a Judge on the Original Side that this Court had jurisdiction. The decision on that question was given in these words :—"A preliminary objection was taken that no appeal lay. We overruled this objection on the authority of *DeSouza* v. *Coles* (3 Mad. H. C. Reports, p. 384) and *H. I. H. Habbeeb* v. *H. M. H.*

[* Reported in 5 Ran. 451, but not on the question of appeal.—*Ed.*]

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Joosub (13 Bengal Law Reports, p. 91)." It would seem therefore that an appeal does lie against such a finding under the Letters Patent although it would not lie against a similar finding of a Court other than the High Court under the Code, the reason given by the learned Chief Justice in *Habbeeb* v. *Joosub* being that " It is not a mere formal order or an order merely regulating the procedure in the suit but one that has the effect of giving a jurisdiction to the Court which it otherwise would not have. And it may fairly be said to determine some right between them, *viz.*, the right to sue in a particular Court and to compel the defendants who are not within the jurisdiction to come in and defend the suit or if they do not, to make them liable to have a decree passed against them in their absence." It may be noted that this decision cast some doubt on some of the reasons given by the learned Judges for their decision in the case of *De Souza* v. *Coles*, and that the case of *De Souza* v. *Coles* was an appeal not ~~from~~ finding that the Court had jurisdiction but from an order refusing to give leave to institute the suit in the High Court, that order being one which, if it stood, finally disposed of the suit so far as the High Court was concerned. It is however clearly desirable that an appeal should lie since otherwise much time and money might be wasted in a Court which might ultimately be found to have no jurisdiction.

But assuming that an appeal does lie against the learned Judge's finding that the High Court had jurisdiction, we are of opinion that on the evidence the appeal must fail.

The evidence in our opinion clearly supports the conclusion ha the principal place of business was in Rangoon, that the accounts of the business were kept in Rangoon, and that the part of the

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business which was carried on by Esak at Kyaukme and Hsipaw in the Shan States was a branch.

We are therefore of opinion that leave to file the suit on the Original Side was rightly given and that this Court has jurisdiction.

The appeal is accordingly dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Chari.

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Aug. 11.

MAUNG BA TU
v.
MA THET SU AND THREE OTHERS.*

Civil Procedure Code (Act V of 1908), O. 9, r. 9—Fresh suit in respect of same cause of action, though mode of relief is varied, will not lie—Partition suits, whether rule applies to—Incidents of the right to claim partition—Buddhist Law and Hindu Law—Whether Burmese Buddhist heir can file such partition suit in respect of his ancestor's property.

Held, that a suit will be barred under the provisions of Order 9, rule 9, of the Civil Procedure Code, if the cause of action in the suit is the same as that in the previous suit, that has been dismissed for default of appearance of the plaintiff, though a different relief is claimed in the subsequent suit. The rule does not apply to partition suits for the right to partition is a legal incident of a joint tenancy, and if the parties continue to be in possession after the first decree, the continuance of the joint possession after the decree gives rise to a fresh cause of action.

In a partition suit proper, plaintiff seeks to convert his joint ownership and joint possession of the whole property into separate property and separate possession of a portion of the property. Partition signifies the surrender of a portion of a joint right in exchange for a similar right from the co-sharer. A partition suit lies only if the parties have (1) unity of interest or title in the property sought to be partitioned, and (2) unity of possession.

The estate of a deceased Burman Buddhist vests in his heirs on his death, but there is no analogy between their position and that of the co-parceners of a joint Hindu family under the Hindu Law. In the former case the estate does not vest collectively or jointly, but each heir gets a definite fraction in every portion of the estate of the deceased ancestor, which vests in him separately and individually which he is entitled to claim. He cannot be deemed to be with his co-heirs a joint owner or joint tenant of the property nor is he entitled to joint possession of the property with them. A Burman Buddhist heir is not

* Civil Regular Suit No. 163 of 1927.