APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Brown.

JAMAL BROTHERS & Co. LTD.

v.

CHIP MOH & Co.*

1927

May 11.

Judgment—Order under Rule 58 (1) *of Order* 21, *Civil Procedure Code not final adjudication of rights—Letters Patent, clause* 13, *not applicable.*

Held, that an order under Rule 58 (1) of Order 21 of the Civil Procedure Code merely decides that a certain summary remedy given by the Code is not available to the appellant and that accordingly it is not a final adjudication of the rights of the parties.

Held, that such an order does not amount to a judgment within the meaning of clause 13 of the Letters Patent.

Ma Than Myint v. *Maung Ba Thein*, 4 Ran. 20; *P. Abdool Gafoor* v. *The Official Assignee*, 3 Ran. 605; *Sabitri Thakurain* v. *Savi*, 48 Cal. 481; *Yeo Eng Byan* v. *Beng Seng & Co.*, 2 Ran. 469—*followed.*

Sabhapathi Chetti v. *Narayanasami Chetti*, 25 Mad. 555—*dissented from.*

Clark—for Appellants.

Keith and Maung Tin—for Respondents.

RUTLEDGE, C.J.—A preliminary objection has been taken in these cases that no appeal lies.

For the appellants it is urged that the order appealed from is a final order, in that it determines the rights between the parties to apply under the provisions of the Code of Civil Procedure for the removal of attachment, and reliance is placed upon a decision of the Madras High Court in the case of *Sabhapathi Chetti and others* v. *Narayanasami Chetti* (1).

A comparison of the words of Order XXI, Rules 58 and 63 of the Code of Civil Procedure, in my opinion, makes it clear that the order appealed from

* Civil Miscellaneous Appeals Nos. 27 to 31 of 1927.

(1) (1902) 25 Mad. 555.

1927

JAMAL BROTHERS & CO., LTD. v. CHIP MOH & CO.

RUTLEDGE, C.J.

is not a "judgment" within the meaning of clause 13 of the Letters Patent.

The learned trial Judge has rejected the appellants' application under the proviso to Order XXI, Rule 58, sub-rule (1) of the Code of Civil Procedure, on the ground that the claim was unnecessarily delayed.

Rule 63 states : "Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

It is quite clear that, if this application had first been made in the District Court, that Court's order would not have been appealable to the High Court, and that the appellants' only remedy would have been to file a regular suit. It would be rather anomalous if, in these circumstances, the appellants could have a right of appeal from an order of a Judge of the High Court, which they could not have in the case of a District Court.

I may note that, though the judgment of the Madras High Court, already referred to, is an authority in the appellants' favour, that decision has been, in certain respects, disapproved of by their Lordships of the Privy Council in the case of *Sabitri Thakurain* v. *Savi* (2).

This Court, on the question of what is a "judgment" within the meaning of the Letters Patent, has on two occasions had to differ from the views taken by the Madras High Court, namely, in *P. Abdul Gaffoor* v. *The Official Assignee* (3), and in *Ma Than Myit and two* v. *Maung Ba Thein* (4). The decision of a bench of this Court in *Yeo Eng Byan*

(2) (1921) 48 Cal. 481 at p. 490. (3) (1925) 3 Ran. 605.
(4) (1926) 4 Ran. 20.

v. *Beng Seng & Co. and others* (5), has been uniformly followed, and at page 473, the late Chief Justice, quoting a passage from a judgment of Sir Arnold White, C.J., observed :—

> "I agree that a decision which affects the merits of the question between the parties by determining some 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."

And Mr. Justice Brown at page 475 referring to the order in that case observed :—

> "It does not purport finally to decide any of the rights between the parties."

Applying the same criteria to the present case, it seems clear that the learned Judge has not finally decided any of the rights between the parties. He has merely held that a certain summary remedy given by the Code of Civil Procedure is not available to the appellants, because of unnecessary delay. This order leaves open to the appellants the right which is specifically laid down in the Code, namely, the right of bringing a regular suit and having the question in issue finally decided. It consequently cannot be a "judgment" within the meaning of clause 13 of the Letters Patent, as interpreted by the decisions of this Court already referred to.

The appeals must accordingly be dismissed with costs, one gold mohur in each case.

BROWN, J.—I concur.

(5) (1924) 2 Ran. 469.