1929

MA SEIN v. P.L.S.K FIRM.

RUTLEDGE, C.J., AND BROWN, J.

to proceed to attach the property and the instrument would clearly not be able to cause them any injury. It is not necessary in the present case for the plaintiff to ask to have the document cancelled and it does not seem to us that their plaint establishes any good cause for such relief. That being so, we are of opinion that the suit in its present form was not barred by the proviso to section 42 of the Specific Relief Act. We would note that this objection was not taken in the trial Court but was raised for the first time in this appeal.

On the merits of the case their Lordships agreed with the trial judge and dismissed the appeal with costs.

APPELLATE CIVIL.

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

1929

Apl. 8.

AH KWAY

v.

ADMINISTRATOR-GENERAL, BURMA AND ANOTHER.*

Letters Patent, Clause 13—*Refusal to stay proceedings under s.* 19 *of the Arbitration Act (IX of* 1899) *not a judgment—No appeal lies against the order.*

Held, that an order of the Original Side refusing to stay proceedings under the provisions of s. 19 of the Arbitration Act is not a 'judgment' within the meaning of clause 13 of the Letters Patent, and consequently no appeal lies against such order.

P.K.P.V.E. Chidambaram Chettyar v. *N.A. Chettyar Firm*, 6 Ran. 703—*followed.*

Sooniram v. *R. D. Tata & Co.*, 5 Ran. 451 (P.C.)—*distinguished.*

Joylall v. *Gopiram*, 47 Cal. 611—*dissented from.*

* Civil Miscellaneous Appeal No. 51 of 1929 from the order of the Original Side in Civil Regular No. 663 of 1928.

1929

AH KWAY v. THE ADMINISTRATOR-GENERAL, BURMA

N. M. Cowasjee for the appellant.

K. C. Bose and *P. B. Sen* for the respondents.

RUTLEDGE, C.J., and BROWN, J.—The respondent to this appeal is the Administrator-General of Burma as administrator of the estate of one Lee Woot Hong, deceased. He brought a suit on the Original Side of this Court against the appellant, Ah Kway for a declaration as to the share to which Lee Woot Hong's estate is entitled in a partnership business carried on with the appellant, for the taking of accounts and for the winding up of the partnership. Subsequently the 2nd respondent, Lee Way Pein, was added as a defendant to the suit in his claiming that he was a subsisting partner. Ah Kway did not file a written statement but made an application to the Court under the provisions of section 19 of the Indian Arbitration Act asking for a stay of proceedings. After hearing the parties on this application, the trial Judge passed orders refusing to stay proceedings and Ah Kway has now filed an appeal against this order.

It is contended on behalf of the 1st respondent that no appeal lies and reliance is placed on the Full Bench ruling of this Court in the case of *P.K.P.V.E. Chidambaram Chettyar and another* v. *N.A. Chettyar Firm* (1). It has been suggested on behalf of the appellant that we should not follow this Full Bench decision because a different view of the law was taken by their Lordships of the Privy Council in the case of *Sooniram Jeetmul* v. *R. D. Tata & Co.* (2). In that case a suit was brought on the Original Side of this Court and an objection was taken that the suit was not within the local jurisdiction of the Court. The trial Court overruled the objection and proceeded to deal with the case on the

(1) (1928) 6 Ran. 703. (2) C.M. 82 of 1925.

merits. An appeal against this decision was filed before a Bench of this Court, and the Bench held that an appeal did lie, but, eventually, dismissed the appeal on the merits. The defendants then applied to the Privy Council for special leave to appeal against the order of the Bench and special leave was given. The order granting special leave to appeal records that counsel had been heard in support of the application and in opposition thereto. If no appeal had lain in the first instance to a Bench of this Court that would have been a complete answer to the application for special leave to appeal to the Privy Council. It is contended therefore that the order of their Lordships admitting the appeal involved a finding that an appeal from the trial Judge to the appellate Bench did lie. We are unable, however, to accept this contention. In the order admitting the appeal there is no reference whatsoever to the question whether an appeal had lain in the first instance from the order of the trial Judge. The Privy Council finally decided the case against the appellants. Their judgment is reported at page 451 of Volume V, Indian Law Reports, Rangoon Series. There is no reference in their judgment to the question whether an appeal lay in the first instance from the order of the trial Judge. The appeal was dismissed on the merits and the respondents were not called on for a reply. It is quite clear, therefore, that at the hearing of the appeal the question whether an appeal had lain from the trial Judge was not considered. The order admitting the appeal did not involve any finding on any question in dispute. The final result of the appeal was against the appellants and we are unable to hold that the order of their Lordships of the Privy Council involved any finding on the question whether an appeal did lie in the first instance from the order of the trial Judge.

1929

AH KWAY v. ADMINISTRATOR-GENERAL, BURMA.

RUTLEDGE, C.J., AND BROWN, J.

Reference has also been made on behalf of the appellant to the case of *Joylall & Co.* v. *Gopiram Bhotica* (1). In that case a Bench of the Calcutta High Court did decide that an appeal would lie from an order refusing to stay proceedings under section 19 of the Arbitration Act. That is clearly an authority in favour of the view that the present appeal lies but it appears to us to be in conflict with the decision in the Full Bench case of *Chidambaram Chettiar.* In that case Ormiston, J., wrote a long judgment in which he discussed exhaustively the previous authorities on the point. The question referred for the decision of the Full Bench was " whether the finding that the parties intended to treat the document on which the suit was filed as an inland and not as a foreign instrument, and that the defendants in consequence cannot now rely upon any defects based upon its being a foreign instrument, a finding which had the effect of allowing the suit to proceed, amounts to a judgment within the meaning of Article 13 of the Letters Patent." The five Judges who composed the Bench were unanimously of opinion that the question referred should be answered in the negative.

At pages 709 and 710 in his judgment, Ormiston, J., sets forth three criteria which had been suggested as means for determining whether or not an order is appealable within the meaning of Clause 13. On page 710, he states as follows :—

" The first is that adopted by the Madras High Court in 1868, where a judgment is stated to have the meaning of ' any decision or determination affecting the rights or the interest of any suitor or applicant ' : The second is that adopted by the Calcutta High Court in 1872, and which on very many occasions has been described as classical. According to this view, ' judgment ' means ' a decision which affects the merits of the question between the

(1) (1920) 47 Cal. 611.

parties by determining some right or liability ' and it is immaterial whether it is final, or merely preliminary or interlocutory . . . The third criterion . . . . which may be described in contradistinction to the others as the modern view, being that laid down by the Chief Justice of the Madras High Court in 1910, and adopted by the late Chief Justice of this Court in 1924. According to this view, the test is whether or not the effect of the adjudication ' is to put an end to the suit or proceedings 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 ; if it has this effect the adjudication is a judgment ; otherwise not '."

After discussing the case law on the subject, the learned Judge came to the conclusion that this last test was the proper test to be applied. The order which was appealed against in that case was merely an order on one issue in the case and its effect was not to put an end to the trial of the suit or proceeding, but to allow it to continue.

The Officiating Chief Justice in a concurring judgment remarks, at page 738, " The finding with which we are concerned is one, in effect, which decides " that the suit is maintainable, and so paves the way for the determination of the main question between the parties.

It does not finally decide the rights of the parties and will be subject to attack on appeal, if the decree is ultimately against the appellant.

It is quite clear that according to the principles approved in that case the finding on a single issue in the trial of a case which does not finally determine the rights of the parties is not a judgment within the meaning of Clause 13 of the Letters Patent, and previous rulings of this Court to the effect that a preliminary finding whether the trial Court had jurisdiction to try the case is appealable were expressly dissented from. We are bound by this decision and

1929

AH KWAY v. ADMINISTRATOR-GENERAL, BURMA.

RUTLEDGE, C.J., AND BROWN, J.

we find ourselves unable to distinguish the question involved in the present appeal. The trial Court has decided to proceed with the trial of the case but it has not come to any decision on the merits of the dispute between the parties, and the effect of the order is not to put an end to the suit or proceeding. It cannot by its nature be an order which, if not complied with, would put an end to the suit or proceeding. When the trial Court has proceeded to try the suit on its merits and passed its final judgment thereon, an appeal will then lie and it will then be open to the appellant, if aggrieved by the final order, to raise the point that an adjournment should have been allowed under section 19 of the Arbitration Act. The effect of the order may be temporarily to deny the appellant the right to have the matter referred to arbitration, but it is not a final order on the point.

It is true that the order appealed against is not a decision on an issue in the case, but its effect is the same as if it were an order on an issue as to jurisdiction. It was expressly held in *Chidambaram Chettyar's* case that a preliminary order deciding that the Court had jurisdiction on an issue was not appealable, and it seems to us necessary to follow that the order appealed against here is also not appealable. We are, therefore, of opinion that the present appeal does not lie. The appeal is therefore dismissed with costs.