PRIVY COUNCIL.

*P.C. 1932

Dec. 19.

ABDUL RAHMAN, SINCE DECEASED (DEFENDANT)

v.

D. K. CASSIM & SONS (PLAINTIFFS) AND ANOTHER.

[On appeal from the High Court at Rangoon.]

Appeal to Privy Council—Competence of Appeal—"Final Order"—Code of Civil Procedure (V of 1908), s. 109 (a); Order XLI, r. 23.

An Order of an Appellate Court is not a "final order" within s. 109 (*a*) of the Code of Civil Procedure, 1908, relating to appeals to His Majesty in Council, unless it finally disposes of the rights of the parties in relation to the whole suit. Consequently, an appeal does not lie from an order under Order XLI, r. 23, reversing a decree which dismissed a suit upon a preliminary point and remanding the suit for trial.

The above principle involves no practical hardship, as, in a proper case, the Appellate Court can specially certify under s. 109 (*c*) that the case is a fit one for appeal.

Ramchandra Manjimal v. *Goverdhandas Vishindas Ratanchand*, (1920) I.L.R. 47 Cal. 198; L.R. 47 I.A. 124—*followed.*

Appeal (No. 30 of 1931) from an order of the High Court in its appellate jurisdiction (June 23, 1930) reversing a decree of Cunliffe J. and remanding a suit for trial.

The respondent firm instituted a suit in the High Court claiming damages from the appellant, since deceased, and the 2nd respondent. Shortly after the hearing commenced the firm was adjudicated insolvents upon their own petition, and thereupon the Official Assignee was joined as a plaintiff. As the Official Assignee declined to proceed with the suit in the absence of security Cunliffe J. made a decree dismissing it. Upon an appeal by the firm Page C.J. and Das J. held that the cause of action was personal and did not vest in the assignee; accordingly they set aside the decree and remanded the suit for trial. The appeal is reported at I.L.R. 8 Ran. 441.

* *Present:* LORD TOMLIN, LORD THANKERTON, LORD WRIGHT, SIR GEORGE LOWNDES and SIR DINSHAH MULLA.

The order of the Court, so far as material, was in the following terms : "It is ordered and decreed that the decree of this Court on the original side be and the same is hereby set aside and that the suit be remanded to this Court on the original side for trial on the merits . . . And it is further ordered that a copy of this decree be sent to the Collector, Rangoon . . ."

An application for a certificate that the case was fit for appeal to the Privy Council was heard by Carr and Cunliffe JJ. The learned Judges held that the order was a "final order" within the meaning of s. 109 (*b*), and as the requirements of s. 110 were complied with (in that the decree of the trial Judge had been reversed and the subject-matter exceeded Rs. 10,000) a certificate was granted.

1932. November 24. *Upjohn K. C.* and *Pennell* for the respondent firm. This appeal is not competent, as it is not from either a "decree" or "final order" within s. 109 (*b*) of the Code of Civil Procedure. The order appealed from was not a "decree," because the power to remand was under Order XLI, rule 23, which empowers the making of an "order." [Reference was made also to s. 2 (2) of the Code.] It was not a "final order" between the parties, because it did not "finally dispose of their rights, but left them to be determined by the Courts in the ordinary way" : *Ramchand Manjimal* v. *Goverdhandas Ratanchand* (1). [As to the English decisions reference was made to *Isaacs* v. *Salbstein* (2) and cases there mentioned.]

Dunne K.C. and *Leach* for the appellant. What is appealed from is a decree or final order in

(1) (1920) I.L.R. 47 Cal. 198 ; L.R. 47 I.A. 124. (2) [1916] 2 K.B. 139.

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that it finally determined between the parties that the appellant had a cause of action. The right of appeal is supported by the judgments of the Board in *Rahimbhoy Habibhoy* v. *Turner* (1) and *Muzhar Husein* v. *Bodha Bibi* (2). As in those cases the Court here, after adjudicating upon the cardinal question before it, had made an order of remand. What is appealed from described itself in terms as a "decree." *Ramchand Manjimal's* case (3) is distinguishable, because there the High Court determined as a matter of discretion merely that the dispute should not be referred to arbitration. The English decisions are not *in pari materia* and do not help.

Upjohn K.C. replied.

December 19. The judgment of their Lordships was delivered by

SIR GEORGE LOWNDES. The suit out of which this appeal arises was instituted in the name of the 1st respondent firm (hereinafter referred to as the 1st respondents) on the original side of the Rangoon High Court, alleging, in effect, a conspiracy between the two named defendants to ruin the business of the 1st respondents, and claiming Rs. 5,00,000 by way of damages. The first of the two defendants was the appellant, V. M. Abdul Rahman, now deceased, and represented by his heirs. The other was the 2nd respondent, who does not appear before the Board.

After the hearing of the suit had commenced in the trial Court the 1st respondents were—apparently

(1) (1890) I.L.R. 15 Bom. 155 ; L.R. 18 I.A. 6.
(2) (1894) I.L.R. 17 All. 112 ; L.R. 22 I.A. 1.
(3) (1920) I.L.R. 47 Cal. 198 ; L.R. 47 I.A. 124.

upon their own application—adjudicated insolvents. On this being brought to the notice of the Judge, he on the 13th February, 1929, adjourned the trial, and gave a month's time to the Official Assignee to consider whether he would proceed with the suit on behalf of the creditors. On the 11th March, 1929, the Judge being then engaged in the Criminal Sessions, the matter seems to have come before the Deputy Registrar, who enlarged the time till the 2nd April. On this date the Deputy Registrar gave a further extension to the 24th April and directed that the Official Assignee should "be brought on the record as plaintiff in the place of the insolvent plaintiffs," and the heading of the plaint was amended accordingly by the Assistant Registrar.

On the 24th April the matter was again mentioned to the Deputy Registrar, when counsel for the Official Assignee stated that "he had asked the insolvents to furnish him with security, but they had failed to do so." Whereupon counsel for the appellant asked that "the matter be placed before the Judge for the dismissal of the suit." This was done, and on the 29th April the suit was, by a decree of that date, dismissed. The decree was headed as in a suit between the Official Assignee, as assignee of the estate of the 1st respondents, and the defendants, but despite this fact and the amendment of the plaint above referred to the 1st respondents seem to have been treated as still parties to the proceedings, the Official Assignee disappearing from the stage altogether. They were given leave to appeal against the decree as paupers; their appeal was heard; the decree was set aside, and the suit was remanded to the original Court for trial on the merits. Against this order the present appeal has been brought to His Majesty in Council, upon a certificate of the High Court that

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the case fulfills the requirements of s. 110 of the Code of Civil Procedure, 1908. Before their Lordships a preliminary objection has been taken by the 1st respondents' counsel that the appeal is incompetent and that the certificate was wrongly granted. The ground of the objection is that the order of the Appellate Court was neither a decree nor a "final order" within s. 109 (*a*), and therefore not appealable under s. 110.

The grounds of the 1st respondents' appeal in India were, in effect, that their claim for damages was not property which vested under the Insolvency Act in the Official Assignee, that they were therefore entitled to continue the suit in their own names without his intervention; and that it had been wrongly dismissed.

It will be seen that this was in reality an objection that the Official Assignee ought not to have been brought on the record in their place, but there is nothing to show that any such contention was raised on their behalf before the dismissal of the suit. Indeed the point seems to have been first suggested on behalf of a creditor, who was in fact the father-in-law of one of the insolvents, when the trial Judge was actually delivering his judgment. It does not appear, however, to have been objected before the Appellate Court that the question was not open to the 1st respondents, or that they had ceased to be parties to the suit before the decree of the trial Judge was made, and their Lordships are not prepared now to take any account of the very apparent irregularities in the trial Court.

The judgment of the Appellate Court was delivered on the 23rd June, 1930. The learned Judges accepted the contention of the 1st respondents, holding that the

claim to damages did not vest in the Official Assignee. They accordingly, as already stated, set aside the dismissal of the suit, and remanded it for trial on the merits by the original Court.

It is, in their Lordships' opinion, clear that this was, under the Code of Civil Procedure, an order and not a decree. It must be taken, they think, to have been made under O. XLI, r. 23, the material part of which runs as follows :

> " Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may if it thinks fit, *by order*, remand the case . . . . "

The matter is put beyond question by O. XLIII, r. 1 (*u*), which gives a right of appeal from an " order " so made.

It remains to consider whether the order in question was a " final order " within the meaning of s. 109 (*a*), and this question is, their Lordships think, concluded by the judgment of this Board delivered by Lord Cave in *Ramchandra Manjimal* v. *Goverdhandas Vishindas Ratanchand* (1).

Upon the application for the certificate the matter was gone into at considerable length by the officiating Chief Justice and Ellis Cunliffe J., but by some mischance the authority just referred to was overlooked.

Two other cases before this Board were relied on by the learned Judges, *viz.*, *Rahimbhoy Habibhoy* v. *Turner* (2) and *Syed Muzhar Husein* v. *Bodha Bibi* (3). But both of these cases were decided with reference to the Civil Procedure Code of 1882, in which the wording of the relevant sections differed materially from that of the Code of 1908. Special leave to appeal was

(1) (1920) I.L.R. 47 Cal. 198 ; L.R. 47 I.A. 124.
(2) (1890) I.L.R. 15 Bom. 155 ; L.R. 18 I.A. 6.
(3) (1894) I.L.R. 17 All. 112 ; L.R. 22 I.A. 1.

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given in each of these cases on the ground that the suit had been fully tried in the Lower Court, and "the cardinal point" decided, leaving, in the one case, only a reference for accounts, and, in the other, only subordinate points for decision which should have been dealt with by the Appellate Court. In the first case it is clear that an appeal to His Majesty in Council would have lain as of right under the provisions of the present Code, and in the second that if the effect of the Appellate Court's decree had been (as in the present case) merely to remand the case for trial on the merits, different considerations would have applied. Their Lordships think, therefore, that neither of these authorities is applicable to the case now before them.

Turning to the judgment in *Ramchand Manjimal's* case (1), it will be apparent that the conditions there approximated very nearly to those of the present case. The question arose with reference to a series of suits upon cotton contracts, which had been stayed by the first Court under s. 19 of the Indian Arbitration Act, but in which the order for stay had been reversed on appeal, with the result that the suits went back for trial in the ordinary course. The Appellate Court being of opinion that its order was a "final order" within s. 109 (*a*) of the present Code gave a certificate under s. 110. At the hearing before the Board a preliminary objection was taken that the order in question was not a "final order" and that therefore the certificate was wrongly given and the appeals incompetent. The objection was upheld and the appeals were dismissed.

Lord Cave in delivering the judgment of the Board laid down, as the result of an examination of certain cases decided in the English Courts, that the test of

(1) (1920) I.L.R. 47 Cal. 198 ; L.R. 47 I.A. 124.

finality is whether the order "finally disposes of the rights of the parties," and he held that the order then under appeal did not finally dispose of those rights, but left them "to be determined by the Courts in the ordinary way." It should be noted that the Appellate Court in India was of opinion that the order it had made "went to the root of the suit, namely the jurisdiction of the Court to entertain it," and it was for this reason that the order was thought to be final and the certificate granted. But this was not sufficient. The finality must be a finality in relation to the suit. If, after the order, the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it under s. 109 (*a*) of the Code.

Their Lordships would only add that the enforcement of this principle involves no practical hardship, inasmuch as, in a proper case, it is always open to the Appellate Court to give a special certificate under s. 109 (*c*).

It was pointed out in argument that there is some divergence in the views expressed in the English cases upon which the judgment in *Ramchandra Manjimal's* case founds, and that no doubt is so, but the rule deduced for guidance under the Indian Act is clear and unambiguous, and must, their Lordships think, be decisive in all cases where the question is whether an order is appealable to His Majesty in Council under the provisions of the section in question.

In their Lordships' opinion it is impossible to distinguish the present case from that upon which Lord Cave pronounced. The effect of the order from which it is here sought to appeal was not to dispose finally of the rights of the parties. It no doubt decided an important, and even a vital, issue in the case, but it left the suit alive, and provided for its trial in the ordinary way.

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Their Lordships have thought it right to deal with this matter at some length, as there seems to have been a considerable divergence of opinion in some of the Indian Courts as to what is a final order under s. 109 (*a*), and they think that the decision in *Ramchandra Manjimal's* case must have been either overlooked or misunderstood.

For these reasons their Lordships think that the appeal is incompetent, and they will humbly advise His Majesty that it should be dismissed with costs.

Solicitor for appellants: *Cutler, Allingham and Ford.*

Solicitor for respondent No. 1: *J. E. Lambert.*

APPELLATE CIVIL.

Before Mr. Justice Das.

1933

Jan. 3.

YU HOCK TUN

v.

YU HOCK AND OTHERS. *

Minor plaintiff—Suit to declare mortgage void—Consequential relief—Court Fees Act (VII of 1870), s. 7, IV (c).

A minor plaintiff is entitled to sue for a bare declaration that a mortgage deed executed by him is void as against him. It is not necessary for him to ask for any consequential relief in such a suit and the provisions of clause 4 (*c*) of s. 7 of the Court Fees Act are not applicable.

Ba Maw for the appellant.

Paul for the respondent.

DAS, J.—This appeal must be allowed.

The plaintiff filed a suit alleging that he was a minor at the time of the execution of the mortgage deed and that therefore the mortgage deed was void as against him. If the plaintiff was a

* Civil Miscellaneous Appeal No. 96 of 1932 from the order of the District Court of Hanthawaddy in Civil Appeal No. 90 of 1931.