APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

1932

Nov. 21.

V. R. M. RAMAN CHETTYAR

v.

BANK OF CHETTINAD, LIMITED.*

Judgment—Letters Patent, clause 13—Mortgage suit—Property outside jurisdiction—Order as to jurisdiction—Appeal—Effect of Order.

In a mortgage suit filed in the High Court in respect of immoveable property situate outside its jurisdiction the defendant raised the preliminary objection that the Court had no jurisdiction to try the suit. The Court held that it had, and thereafter decided the suit on the merits. The defendant appealed only against the preliminary order regarding jurisdiction.

Held that the order was not a judgment within clause 13 of the Letters Patent. The effect of the order was merely to determine that the Court had jurisdiction to try the suit; it neither finally decided the rights of the parties nor put an end to the suit.

P.K.P.V.E. Chettyar v. *N. A. Chettyar Firm*, I.L.R. 6 Ran. 703; *T. V. Tuljaram Row* v *M.K.R.V. Chettyar*, I.L.R. 35 Mad. 1—*followed.*

Whether a particular order is a judgment or not depends upon the effect of the order as made.

Kalyanwalla for the appellants. This is a suit on an equitable mortgage against a non-resident defendant, in respect of properties situate outside the jurisdiction of this Court. The Court held that such a suit was a mere money suit and consequently the Court had jurisdiction to try it. Since the only defence raised in the case was one of jurisdiction, the order deciding that the Court was competent to try the suit is a judgment under clause 13 of the Letters Patent. Under that clause, even an interlocutory order may amount to a judgment. An order deciding that a particular Court has jurisdiction to try a case does not merely regulate procedure; but it has the effect of giving jurisdiction to a Court which would not otherwise have it. Such

* Civil Miscellaneous Appeal No. 85 of 1932 from the order of this Court on the Original Side in Civil Regular Suit No. 414 of 1931.

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an order is therefore appealable as a judgment. *Hajee Tar Mohamed* v. *Zulaikha Bai* (1). Though this case was overruled in *P.K.P.V.E. Chidambaram Chettyar* v. *N. A. Chettyar* (2) yet there are observations in the latter Full Bench case to support this view. Moreover, the case of *Soniram Jeetmul* v. *R. D. Tata* (3) decided by the Privy Council was not brought to the notice of the Judges who decided *P.K.P.V.E. Chidambaram Chettyar's* case. The fact that the Privy Council gave special leave to the appellant to appeal against a point of jurisdiction is sufficient to show that such an appeal is competent.

An order which compels the defendants who are not within the jurisdiction of the Court to come in and defend the suit or, if they do not, to make them liable to have an *ex-parte* decree passed against them is an order that has the effect of determining some right or liability and is therefore appealable as a judgment. See *Hadjee Ismail* v. *Hadjee Mohamed* (4) and *Yeo Eng Byan* v. *Beng Seng & Co.* (5). This latter case was not overruled by the Full Bench.

[PAGE, C.J. If the Court had decided that it had *no* jurisdiction it might then have been argued that the effect of the order was to put an end to the proceedings and that the order would be a judgment. As it stands, does not the order as made merely have the effect of paving the way for the final adjudication of the suit?]

The order as made is not merely a procedural order. It puts an end to the right of the appellant

(1) I.L.R. 5 Ran. 782.
(2) I.L.R. 6 Ran. 703.
(3) I.L.R. 5 Ran. 451.
(4) 13 Ben. L.R. 91, 101.
(5) I.L.R. 2 Ran. 469, 473.

to have the suit dismissed as against him in this particular Court. In *Municipal Officer, Aden* v. *Abdul Karim* (1) an order transferring a case from the Court of the Resident at Aden to the Bombay High Court was held to be appealable, because the question was one of jurisdiction which goes to the root of the matter.

In the present case, in addition to the prayer that the suit be dismissed for want of jurisdiction another prayer was added that the leave granted to the plaintiff to sue (under clause 10 of the Letters Patent) be revoked. The prayer was not granted and an important right of the appellant has therefore been determined; namely, his right not to be sued in a particular Court. See *Ebrahim* v. *Fuckhrunissa Begum* (2).

Even looking at the case from the point of view of *U Nyo* v. *Ma Pwa Thein* (3), the order as to jurisdiction had the effect of deciding the cardinal issue in the suit as no defence was raised on the merits.

N. M. Cowasjee for the respondents. The order as made is not a final order, for the respondent had to prove his case thereafter. The order merely decided one of the issues in the case, and to hold that a case is appealable piecemeal from the decision of each of the issues would neither be advisable nor feasible. The appellant, instead of appealing against the final decree passed in the case, is merely adopting a device to save court-fees by appealing against the preliminary order.

The "cardinal issue" in the case was not whether the Court had jurisdiction, but how much was due on the mortgage.

The fact that leave to sue was properly given or not was not argued before the lower Court. The

(1) I.L.R. 28 Bom. 292. (2) I.L.R. 4 Cal. 335.
(3) I.L.R. 10 Ran. 335.

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plaint stated that the whole of the cause of action arose in Rangoon, and it is only in cases where part of the cause of action arises within the jurisdiction of the Court that leave to sue is necessary. But the Court merely granted leave *ex abundanti cautela*.

The effect of the order, and not its form, should serve as a test to determine whether it is appealable as a judgment. A mere preliminary or interlocutory order is not a judgment. See *Tuljaram Row* v. *Alagappa* (1). A finding that a suit is maintainable and should proceed is not a judgment. *Shri Goverdhanlalji* v. *Shri Chandraprabhavati* (2).

PAGE, C.J.—This is a mortgage suit in respect of immoveable property situate outside the ordinary original civil jurisdiction of the High Court.

An application under clause 10 of the Letters Patent for leave to institute the suit was granted, and against the order passed upon that application no appeal has been filed.

By a preliminary written statement the defendants 2 (*a*) and 2 (*b*) pleaded "that this Hon'ble Court has no jurisdiction to try this suit inasmuch as the property alleged to be mortgaged is wholly situate beyond the jurisdiction of this Hon'ble Court and the defendants are also residing beyond the jurisdiction of this Hon'ble Court".

On the 15th of March 1932 at the hearing of the issue whether the Court had jurisdiction to try the suit, Das J. held

"that a mortgage suit is not a suit for land, and therefore this Court has jurisdiction to try the suit, as part of the cause of action arose in Rangoon and leave to sue in Rangoon has been given. The case will now proceed to trial".

(1) I.L.R. 35 Mad. 1. (2) 92 I.C. 552.

The learned advocate for the appellant stated that thereafter the appellant applied for leave to file a further written statement on the merits, and that application was rejected.

In the diary of the learned trial Judge on the 15th of March 1932 an entry appears :

" By consent, fix this and the other case C.R.415-31 for hearing on 18th March 1932."

Three adjournments subsequently were granted on the plaintiffs' application to enable them to call witnesses for the purpose of proving their case.

On the 6th of May 1932 the plaintiffs adduced oral testimony in support of their claim, but the defendants did not appear, and a decree was passed in favour of the plaintiffs. Against that decree no appeal has been preferred.

On the 23rd of April 1932, however, the appellant, who was the defendant 2 (*a*) in the suit, had filed the present appeal under clause 13 of the Letters Patent against the order that Das J. had passed on the 15th of March 1932.

A preliminary objection has been taken on behalf of the respondents that the order from which it is sought to appeal is not a "judgment" within clause 13 of the Letters Patent, and that an appeal from the said order does not lie. In my opinion the preliminary objection must prevail. The Judges of this Court, being a Divisional Bench, are not at liberty to express any opinion that they may entertain as to the meaning of the term "judgment" in clause 13 of the Letters Patent, because, in my opinion, the case is governed by the decision of the Full Bench in *P.K.P.V.E. Chidambaram Chettyar and another* v. *N. A. Chettyar Firm* (1).

(1) (1928) I.L.R. 6 Ran. 703.

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In that case Ormiston J., who delivered the leading judgment, held that

"the test enunciated by Sir Arnold White C.J. and adopted in *Yeo Eng Byan* v. *Beng Seng & Co.* (1), the keynote of which is finality in relation to the Court passing the order, has the merit of simplicity and, as pointed out by Sir Shadi Lal C.J. in *Ruldu Singh* v. *Sanwal Singh* (2), affords a working rule in respect of the great majority of interlocutory orders. I am of the opinion that in the decision of the question referred to us it should be applied. And, in applying it, I am fortified by the opinion of Sir Richard Garth C.J. in *Ebrahim* v. *Fuckhrunissa Begum* (3) that the decision on an issue which has the effect of allowing a suit to proceed does not 'affect the merits or result of the whole suit' in that it does not decide the case one way or another, and is, therefore, not a 'judgment'. Put in another way, it does not 'shut out' the defendant."

Pratt O.C.J. in the same case added

"that it is not desirable on general principles that a suit should be tried piecemeal, and a decision on an issue to the effect that the trial of the suit should proceed does not amount to a judgment. As held by Robinson C.J. in *Yeo Eng Byan* v. *Beng Seng & Co.* (1) an order which merely paves the way for the determination of the question between the parties cannot be considered to be a judgment. 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."

In *T. V. Tuljaram Row* v. *M.K.R.V. Alagappa Chettiar* (4) Arnold White C.J. held that

"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

(1) (1924) I.L.R. 2 Ran. 469.
(2) (1922) I.L.R. 3 Lah. 188.
(3) (1878) I.L.R. 4 Cal. 531.
(4) (1910) I.L.R. 35 Mad. 1 at p. 7.

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 a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent."

Now applying the test laid down by the Full Bench in *P.K.P.V.E. Chidambaram Chettyar and another* v. *N. A. Chettyar Firm* (1) to the facts of the present case, it appears to me to be clear that the order from which the appeal has been preferred is not a "judgment" within clause 13 of the Letters Patent, and upon that ground the appeal must be dismissed.

The effect of the order as made is merely to determine that the Court has jurisdiction to try the suit; it does not, and does not purport to, "finally decide the rights of the parties" or "to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned".

I am further of opinion that it is highly undesirable, as has happened in some cases, that the Court should attempt to enumerate the orders that do and those that do not amount to a "judgment" within clause 13 of the Letters Patent. Each case turns on its own facts, and whether any particular order is a "judgment" or not depends upon the effect of the order as made.

The issue of jurisdiction was not the sole matter to be determined in the present suit, and the learned advocate for the appellant conceded that a decree could not have been drawn up in favour of the respondents based solely upon the order under appeal, and that it still remained for the respondents to satisfy the Court as to the validity of the mortgage and the *quantum* of the mortgage debt. The finding

(1) (1928) I.L.R. 6 Ran. 703.

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that the Court had jurisdiction to try the suit could have been challenged in an appeal from the decree that was subsequently passed, if the appellant had elected to prefer an appeal from that decree, which finally disposed of the rights of the appellant.

Applying the test laid down by the Full Bench in *P.K.P.V.E. Chidambaram Chettyar and another* v. *N. A. Chettyar Firm* (1), in my opinion, the order under appeal is not a "judgment" within clause 13 of the Letters Patent.

For these reasons the appeal is dismissed with costs.

MYA BU, J.—I agree.

LETTERS PATENT APPEAL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

1932

Nov. 25.

R.M.A.R.M. CHETTYAR FIRM

v.

U HTAW.*

Proof of Mortgage—Transfer of Property Act (IV of 1882), ss. 3, 59—Evidence Act (I of 1872), s. 68, proviso—Attesting witness, when not called—Necessity of proving due execution aliunde.

In the case of a mortgage in the form prescribed under s. 59 of the Transfer of Property Act, as amended by Act XX of 1929 and Act V of 1930, in the absence of an admission by the defendant in that behalf it is incumbent upon the plaintiff in a mortgage suit to prove to the satisfaction of the Court that the document upon which he relies as being an instrument of mortgage was registered, signed by the mortgagor, and attested by at least two witnesses.

Where the due execution of such a mortgage is not specifically denied the proviso to section 68 of the Evidence Act only removes the necessity of calling an attesting witness to prove execution. It does not relieve the party of the

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(1) (1928) I.L.R. 6 Ran. 703.

* Letters Patent Appeal No. 4 of 1932 arising out of Special Civil 2nd Appeal No. 198 of 1931 from the judgment of the District Court of Myaungmya in Civil Appeal No. 15 of 1931.