

APPELLATE CIVIL.

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

A.S. CHETTIAR FIRM

v.

V.T. VEERAPPA CHETTIAR.*

1935

Jan. 15.

Judgment—Letters Patent, Clause 13—Leave to defend upon terms—Civil Procedure Code (Act V of 1908), O. 37, r. 3—Appeal against order—Order as a ground of appeal from decree—Civil Procedure Code (Act V of 1908), s. 105.

An order granting leave to the defendant under the provisions of Order 37, r. 3, of the Civil Procedure Code to defend the suit upon certain terms as to payment into Court and the furnishing of security and on the condition that on his failure to comply with the terms leave to defend would be withdrawn and the plaintiff entitled to his decree, is not a "judgment" within clause 13 of the Letters Patent. The order merely regulated the procedure in the suit, and did not determine any right or liability as between the parties in the suit, and no appeal lies from such an order.

Sukhlal v. Eastern Bank, Ltd., I.L.R. 42 Cal. 735—*followed*.

Ramanlal v. Chimantal, I.L.R. 56 Bom. 268—*dissented from*.

It is open however to the appellant to canvass the validity of the order under s. 105 of the Civil Procedure Code when he appeals against the decree.

Madanlal v. Kedarnath, 32 Bom. L.R. 660—*referred to*.

Basu for the respondent. An order was passed in this case granting leave to the defendant to defend the suit under the provisions of Order 37 of the Code of Civil Procedure on certain conditions. The conditions were not fulfilled, and on default a decree was passed as prayed. Such an order is not a "judgment" within the meaning of cl. 13 of the Letters Patent and is not appealable.

[PAGE, C.J. Such an order merely regulates the procedure of the Court.]

That is so. *Sukhlal Chundermull v. Eastern Bank* (1) is directly in point. *Radh Kissen Goenka v.*

* Civil First Appeal No. 121 of 1934 from the order and judgment of this Court on the Original Side in Civil Regular No. 295 of 1934.

(1) I.L.R. 42 Cal. 735.

1935
 A.S.
 CHETTIAR
 FIRM
 v.
 V.T.
 VEERAPPA
 CHETTIAR.

Thakursi Das Khemka (1), which was an appeal from an order requiring the defendant to furnish security in a similar case, did not deal specifically with the right of appeal. In *Ramanlal Shantilal v. Chimantal Damodardas* (2), the Court took a contrary view; and in *Madanlal Lachmandas v. Kedarnath* (3) the appeal was from the final order passed in the case.

Munshi for the appellant. The appeal is, in fact, from both the preliminary and the final order passed in the case. There can be no dispute that the decree passed in favour of the plaintiff is a "judgment" under cl. 13. One of the main defences to the suit was that the Court had no jurisdiction as the promissory note was executed outside its jurisdiction, and if this fact had been allowed to be proved Order 37 would not have applied, because that Order does not extend to the mofussil. The result of the order was to refuse leave to the defendant to defend the suit.

PAGE, C.J.—This appeal is dismissed.

The suit was brought to recover the amount due under a promissory note executed by the first defendant firm, of which it was alleged that the ~~second and~~ third defendants were partners.

The suit was launched pursuant to Order 37 of the Civil Procedure Code. The defendants filed affidavits in support of an application for leave to appear and defend the suit, in which they alleged (1) that the promissory note in suit had been executed at Dedaye and not at Rangoon, and (2) that they had in fact paid Rs. 1,000 towards the amount due under the promissory note. The plaintiffs filed a counter-affidavit in which it was asserted that the

(1) I.L.R. 53 Cal. 412.

(2) I.L.R. 56 Bom. 268.

(3) 32 Bom. L.R. 661.

promissory note was executed, as it purported to be executed on the face of it, at Rangoon and not at Dedaye as alleged by the defendants. As regards the alleged payment of Rs. 1,000, it was stated in the counter-affidavit that neither this sum nor any part thereof had been paid by the defendants as alleged.

Now, the promissory note purported to have been executed in Rangoon, and in the circumstances Leach J. passed the following order on the 3rd July 1934 :

“ I will grant the defendants leave to defend provided that they pay into Court within one week the sum of Rs. 3,696-1-6 and furnish security for the balance of the claim to the satisfaction of the Court. In the event of the defendants failing to pay the amount in Court within the time stipulated or failing to furnish security leave to defend will be withdrawn and the plaintiff firm will be entitled to a decree for the full amount claimed.”

The defendants having wholly failed to comply with the terms of the order of the 3rd July 1934 Leach J. passed a decree for the full amount in favour of the plaintiffs on the 11th July 1934. The defendants now appeal from the order of the 3rd July 1934, and also from the decree of the 11th July 1934.

In my opinion no appeal lies from the order of the 3rd of July 1934. To entitle the defendants to appeal from that order it is incumbent upon them to satisfy the Court that the order of the 3rd of July 1934 was a “ judgment ” within clause 13 of the Letters Patent. In my opinion it was not. It was an order which merely regulated the procedure in the suit and did not determine any right or liability as between the parties in the suit. The view which I take is in consonance with that taken by Jenkins C.J. and Woodroffe J. in *Sukhlal Chundermull v.*

1935

A.S.
CHETTIAR
FIRMV.T.
VEERAPPA
CHETTIAR.

PAGE, C.J.

1935
 A.S.
 CHETTIAR
 FIRM
 v.
 V.T.
 VEERAPPA
 CHETTIAR.
 PAGE, C.J.

Eastern Bank, Ltd. (1), with which I respectfully agree. Our attention has been called to *Ramanlal Shantilal & Co. v. Chimanlal Damodardas* (2) in which a Bench of the Bombay High Court (Beaumont C.J. and Rangnekar J.) held that an order passed under Order 37, rule 3, "directing that upon the defendants depositing in Court a sum of Rs. 5,000 on or before September 24, 1931, the defendants be and they are hereby granted leave to appear and defend this suit" was a judgment within clause 15 of the Letters Patent of the Bombay High Court.

The ground upon which that judgment was passed was that, inasmuch as an order absolutely refusing an application for leave to defend was a "judgment" it was obvious that a conditional order would stand on the same footing (*per* Rangnekar J., *ibid*, p. 274). With all due deference it appears to me that the two orders differ *toto caelo*. An order refusing absolutely an application for leave to defend is an order which finally disposes of the rights of the parties. All that remains to be done is that the order should be worked out in accordance with law. On the other hand I am of opinion that an order such as the one under consideration in that case or in the present case does not determine any of the rights of the parties in the suit. In my opinion the decision of Jenkins C.J. and Woodroffe J. in *Sukhlal Chundermull v. Eastern Bank, Ltd.* (1) must be preferred to the decision of the Bombay High Court in *Ramanlal Shantilal & Co. v. Chimanlal Damodardas* (2); and in my opinion no appeal lies from the order of the 3rd of July 1934. On the other hand I am of opinion that an appeal does lie from the decree passed on the 11th July 1934. It cannot be disputed

(1) (1915) I.L.R. 42 Cal. 735.

(2) (1931) I.L.R. 56 Bom. 268.

that the decree finally determined the right of the parties, and is therefore a "judgment" within the meaning of clause 13 of the Letters Patent.

The only remaining question is whether at the hearing of an appeal from the decree of the 11th of July 1934 it is open to the appellant to canvass the validity of the order of the 3rd of July 1934 upon which the decree is based. I am disposed to think that the appellant is at liberty to do so [section 105 of the Code of Civil Procedure and *Madanlal Lachmandas v. Kedarnath Shersinghdas* (1)]. On the merits there is no substance in the appeal.

For these reasons, in my opinion, the appeal fails and must be dismissed with costs.

MYA BU, J.—I agree.

INCOME-TAX REFERENCE.

*Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Mosely, and
Mr. Justice Ba U.*

IN RE THE COMMISSIONER OF INCOME-TAX, BURMA

v.

M.A.L. CHETTIAR FIRM.*

1935

A.S.
CHETTIAR
FIRM

v.
V.T.

VEERAPPA
CHETTIAR.

PAGE, C.J.

1935

Jan. 28.

Income-tax—Chettiar money-lenders—Mercantile system of accounting—Interest added to principal amount—Fresh promissory note for principal and interest—Interest as income.

The chettiar money-lenders in Rangoon generally adopt the mercantile system of accounting in transactions with their non-chettiar customers. On the acceptance of a new promissory note the creditors treat the interest which forms part of the capital loan under the new promissory note as having been received by the creditors from their debtors. In effect, they give up the right to recover the loan and interest under the old transaction in consideration of the obligations undertaken by the debtors under the new promissory note representing the interest due under the old loan which is capitalized for the purposes of the new transaction. They invest the old interest as capital in the new loan.

(1) 32 Bom. L R. 660 at p. 663.

* Civil Reference No. 6 of 1934.