

LETTERS PATENT APPEAL.

*Before Sir Shadi Lal, Chief Justice and Mr. Justice
Broadway.*

SHIBBA MAL AND ANOTHER (PLAINTIFFS)

Appellants

versus

RUP NARAIN (DEFENDANT) Respondent.

Letters Patent Appeal No. 196 of 1927.

Letters Patent Appeal—' Judgment '—whether synonymous with ' decree '—Appeal from the order of a Single Judge, staying further proceedings during pendency of appeal from preliminary decree—Final decree—whether trial Court competent to pass—while appeal against preliminary decree is pending.

Held, that the expression ' judgment ' as used in clause 10 of the Letters Patent of the Lahore High Court is not synonymous with the word ' decree ' as defined in section 2 of the Civil Procedure Code.

And, that an order passed by a Single Bench on an application filed by the appellant against a preliminary decree, for staying further proceedings in pursuance of that decree pending the decision of the appeal, amounts to a ' judgment ' within the meaning of clause 10 of the Letters Patent.

Badri Das-Janaki Das v. Mathanmal (1), followed.

Sevak Jeranchod Bhogilal v. The Dakore Temple Committee (2), explained and distinguished.

Held further, that the mere fact that an appeal from the preliminary decree is pending in the Appellate Court does not preclude the trial Court from passing a final decree.

Lalman v. Shiam Singh (3), dissented from.

Appeal under clause 10 of the Letters Patent from the order of Mr. Justice Dalip Singh, dated the 14th November, 1927.

(1) 1922, A. I. R. (Lah.), 185. (2) (1922) 59 Mad. L. J. 25 (P. C.).

(3) 1926, A. I. R. (All.) 291.

MOTI SAGAR and BISHAN NARAIN, for Appellants.
 KISHAN DAYAL and BHAWANI SINGH PURI, for
 Respondent.

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JUDGMENT.

SIR SHADI LAL C.J.—On the 2nd August, 1927, the Subordinate Judge of Delhi granted a preliminary decree for sale on a mortgage effected by the defendant in favour of the plaintiffs. From that decree the defendant preferred an appeal to the High Court, which has not yet been decided. He also made an application that further proceedings in pursuance of the decree be stayed pending the decision of the appeal. This application was granted by Mr. Justice Dalip Singh, and against the order passed by him the plaintiffs have preferred the present appeal under clause 10 of the Letters Patent.

Mr. Kishan Dayal for the defendant-respondent raises the preliminary objection that the order of the learned Judge restraining the trial Court from passing a final decree during the pendency of the appeal does not amount to a 'judgment' within the meaning of the aforesaid clause. In support of his contention the learned counsel cites a judgment of the Privy Council in *Sewak Jeranchod Bhogilal v. the Dakore Temple Committee* (1). We are told that that judgment, though delivered in March, 1925, has not been reported in any authorized report, and that it is printed in the 49th Volume of the Madras Law Journal at page 25 *et seq.* The report of the case shows that a scheme for the management of a temple in the district of Ahmedabad was confirmed by the Privy Council, and that the managing committee constituted in pursuance of that scheme was empowered to

(1) (1925) 49 Mad. L. J. 25 (P. C.).

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frame certain rules, which with some modifications were sanctioned by the District Judge. Certain persons appealed from the order of sanction to the High Court, and the High Court treating the order as one passed under section 47 of the Civil Procedure Code heard and determined the appeal. It also granted a certificate to the appellants under section 110 of the Civil Procedure Code that the case was a fit one for appeal to His Majesty in Council. The Judicial Committee of the Privy Council held that the sanction given by the District Judge to the rules did not amount to an order under section 47 of the Civil Procedure Code, and that no appeal lay to the High Court from the order granting sanction. Their Lordships, after stating that there was no right of appeal to His Majesty in Council from the judgment of the High Court or from the decree which was drawn up, except on the sole ground that the judgment or the decree was incompetent, observed that the term 'judgment' in the Letters Patent of the High Court means in civil cases 'a decree and not a judgment in the ordinary sense.' They then pointed out that the appeal to His Majesty in Council should not have been admitted, but nevertheless accepted the appeal and set aside the order of the High Court.

Now, the learned counsel on both sides are unable to explain why their Lordships of the Privy Council, after holding that no appeal was competent, not only heard the appeal but accepted it. Mr. Kishen Dayal places his reliance upon the solitary sentence in the judgment of the Privy Council, which says that the term 'judgment' in the Letters Patent of the High Court means in civil cases 'a decree and not a judgment in the ordinary sense,' and urges that no appeal lies under clause 10 from an adjudi-

eration unless it amounts to a 'decree' as defined by section 2 of the Civil Procedure Code. This contention runs counter to the views of all the High Courts in India, which have never placed such a narrow construction upon the term 'judgment.' It must be remembered that their Lordships of the Privy Council were dealing with clause 39 of the Letters Patent of the Bombay High Court, which provides for an appeal to the Privy Council from a 'final judgment, decree or order,' and that the clause which gives the right of appeal from a Single Judge to a Division Bench makes no mention of the word 'final.' The Privy Council apparently intended to point out that the word 'judgment' as used in clause 39 is not to be taken in the sense in which that expression is used in the Civil Procedure Code; where a distinction is drawn between a judgment and a decree. The observations relied upon by Mr. Kishan Dayal may not be free from ambiguity; but there can be no doubt that the expression 'judgment' as used in clause 10 of the Letters Patent cannot be held to be synonymous with the word 'decree,' and that there is no warrant for curtailing the scope of that clause in the manner suggested by him. Indeed, it has been expressly decided by a Division Bench of this Court in *The Firm Badri Das-Janki Das v. Mathanmal* (1), that an order rejecting an application for staying further proceedings in pursuance of a preliminary decree amounts to a 'judgment' In view of this authority, which is admitted to be on all fours with the present case, the preliminary objection must be overruled.

Coming now to the merits, I am not prepared to endorse the proposition that as soon as an appeal from a preliminary decree has been preferred, the trial

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Court becomes *functus officio* and has no authority to pass a final decree. It is true that the *terminus a quo* for the period of limitation prescribed for an application to make a final decree is the date of the preliminary decree made by the appellate Court and not the date of the decree of the original Court, which has merged in that of the appellate Court. There is, however, no authority beyond an unreported judgment of the Allahabad High Court in *Lalman v. Shiam Singh* (1), for the contention that when an appeal has been preferred from a preliminary decree, a final decree can be passed only after the preliminary decree has been confirmed or varied or affirmed by the appellate Court.

It is to be observed that there is a divergence of opinion among the High Courts on the question of whether an appeal against the preliminary decree can be heard when a final decree has in the meanwhile been passed, but no appeal has been brought against it. Now, if the final decree passed during the pendency of an appeal from the preliminary decree is altogether *ultra vires*, then such an invalid document should be altogether ignored and it could not constitute a bar to the hearing of an appeal against the preliminary decree. In that case there should be no difference of opinion on the question stated above.

While I hold that the mere fact that an appeal from a preliminary decree is pending in this Court does not preclude the trial Court from passing a final decree, I consider that there is no adequate ground for interfering with the discretion of the Single Judge who has stayed further proceedings to be taken in pursuance of the preliminary decree.

(1) 1926, A. I. R. (All.) 291.

The affidavit made by the appellants, however, shows that the immoveable property in the town of Delhi is depreciating in value, and that if the interest on the amount decreed by the trial Judge accumulates during the period of the pendency of the appeal in this Court, the claim of the mortgagees may not be fully satisfied by the sale of the mortgaged property. The mortgagor should, therefore, be put on terms, and I accordingly allow the appeal so far as to make the order of the Single Judge conditional upon the judgment debtor furnishing satisfactory security for the payment of the amount by which the price realized by the sale of the property may fall short of the sum found to be due to the decree-holders.

I leave the parties to bear their own costs in this Court.

BROADWAY J.—I concur.

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A. N. C.

Appeal partly accepted.

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