1936

MA KYIN HLAING v. MAUNG KYIN SWE.

BA U, J.

or Chinese Customary Law applies to a marriage between a Chinese Buddhist man and a Chinese Buddhist woman.

If reference is now made to the evidence produced in this case I have no doubt, in my mind that the marriage between the parties is a valid one. The evidence produced in the case shows clearly that the parties lived together as husband and wife for some time and they were accepted as such by their relations and friends. There is no reliable evidence to prove that the petitioner refused to live with respondent.

For these reasons I set aside the order of the Magistrate and allow a maintenance allowance of Rs. 20 a month with effect from the date of the institution of this case, that is, the 25th January 1936.

APPELLATE CIVIL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Leach.

1937

Jan. 21.

HAJEE SHAKUL HAMID AND OTHERS

v.

K. MOHAMED IBRAHIM.*

Judgment—Letters Patent, clause 13—Scheme for management of mosque—Scheme embodied in final decree—Order directing trustees to hold meeting to fill up vacancies—Order not a judgment—Appeals from Original Side—Civil Procedure Code (Act V of 1908), ss. 2, 96.

An order directing the trustees of a mosque to call a meeting for the election of new trustees to fill up vacancies in accordance with the provisions of the scheme of management which had been settled in a suit on the Original Side of this Court and embodied in its final decree is not a judgment within clause 13 of the Letters Patent, and is not appealable.

In re Dayabhai v. Murugappa Chettyar, I.L.R. 13 Ran. 457, followed.

Appeals from the Original Side of the High Court are governed by clause 13 of the Letters Patent and not by s. 96 of the Civil Procedure Code, and s. 2 of the Code has no application. The order in question was only a consequential

* Civil First Appeal No. 131 of 1936 from the order of this Court on the Original Side in Civil Regular No. 264 of 1933.

1937

HAJEE SHAKUL HAMID v. K. MOHAMED IBRAHIM.

order directing the trustees to do what they were required by the scheme, and so it was neither a "judgment" nor a "decree."

Debendra Nath Das v. *Mansingh*, I.L.R. 43 Cal. 90 ; *Sabhapathi Chetti* v. *Narayanasamy Chetti*, I.L.R. 25 Mad. 555, referred to.

Doctor for the respondent. A preliminary objection to this appeal is that it does not lie. The order appealed against is not a judgment within clause 13 of the Letters Patent. See *In re Dayabhai* v. *A.M. Murugappa Chettyar* (1).

P. K. Basu for the appellant. The Privy Council has allowed an appeal against an order passed under s. 610 of the Civil Procedure Code of 1877 (now O. 45, r. 15) although it was not a decree or an appealable order under the Code. *Harrish Chunder* v. *Kali Debia* (2). The case was cited in *In re Dayabhai*, but it is not mentioned in the judgment.

[ROBERTS, C.J. We are bound by the decision of the Full Bench which must be deemed to have considered it.]

In *U Ba Pe* v. *U Po Sein* (3) an order confirming the election of a trustee after the framing of the scheme by the Court was held to be a decree and appealable as such. See the observations at p. 107. The framing of a scheme does not put an end to the suit. The Court is called upon from time to time to exercise its powers under the scheme. An order passed in accordance with the provisions of the scheme is a part and parcel of the Court's decree.

The order is also a decree within s. 2 (2) of the Code, and an appeal lies against it under s. 96 of the Code.

(1) I.L.R. 13 Ran. 457. (2) 10 I.A. 4.
(3) I.L.R. 6 Ran. 97.

[LEACH, J. The right of appeal from the Original Side of the High Court is given by clause 13 of the Letters Patent, and not by s. 96 of the Civil Procedure Code.]

The Code applies to the High Court. See ss. 116, 117, 120 ; *Sabitri* v. *Savi* (1).

LEACH, J.—A preliminary objection has been taken to this appeal. It is contended on behalf of the respondent that the order appealed against does not constitute a judgment within the meaning of clause 13 of the Letters Patent. In order to appreciate the argument it is necessary to refer to what has gone before. In Civil Regular Suit No. 264 of 1933 the Court was asked to remove the then trustees of the Chulia Mosque, Rangoon, to appoint new trustees and resettle the scheme of management which had been settled in a previous suit. The plaintiffs were successful. New trustees were appointed and the scheme was re-settled. The new scheme provided for the election of trustees by Chulia Mohamedans in Rangoon, and clause 27 set out the procedure to be followed when a vacancy occurred. Two vacancies occurred after the new trustees had been appointed, and the respondent applied to the Court for an order directing the continuing trustees to call a meeting for the election of two new trustees in accordance with the provisions of the scheme. The case came before Ba U J. who granted the application. The appellants object to the order which was passed, but Mr. Doctor on behalf of the respondent says that it is not a judgment within the meaning of clause 13 of the Letters Patent and is, therefore not, appealable.

(1) I.L.R. 48 Cal. 481.

1937

HAJEE SHAKUL HAMID v. K. MOHAMED IBRAHIM.

LEACH, J.

In the case of *In re Dayabhai Jiwandas* v. *A.M.M. Murugappa Chettyar* (1) a Full Bench of this Court considered and decided what is meant by the word " judgment " in clause 13. It was held that the word means a decree in a suit by which the rights of the parties at issue in the suit are determined. A judgment may be a final judgment or it may be merely interlocutory. A final judgment is a decree in a suit by which all the matters at issue therein are decided ; an interlocutory judgment is a decree in a suit by which the right to the relief claimed in the suit is decided, but under which further proceedings are necessary before the suit in its entirety can be determined. All other decisions are " orders " and not " judgments " under the Letters Patent, or appealable as such. I may say in passing that the definition of the word " judgment " to be found in this case is more restricted than the definitions which have been accepted by other High Courts in India, but the decision is binding on us and the present case must be decided in the light of the decision.

In Civil Regular Suit No. 264 of 1933 there was a preliminary judgment directing that new trustees should be appointed and the scheme re-settled. New trustees were subsequently appointed and the scheme was re-settled. When these things were done the matters in controversy between the parties in the suit were finally decided, and therefore it seems to me that there can be no doubt that the order now appealed against cannot be regarded as a judgment. But Mr. Basu contends that it is appealable all the same. He says that the order constitutes a decree within the meaning of section 2 of the Code of Civil Procedure and that consequently an appeal lies under section 96. This argument, however, loses sight of the fact that section 96

(1) (1935) I.L.R. 13 Ran. 457.

does not apply to appeals from decrees passed by a High Court in exercise of its original jurisdiction, but provides for appeals from other Courts exercising original jurisdiction. The Original Side of a High Court is just as much the High Court as the Appellate Side, and rights of appeal are given not by the Code but by clause 13 of the Letters Patent. If authority is wanted for this view it is to be found in the case of *Debendra Nath Das* v. *Bibudhendra Mansingh* (1) and in *Sabhapathi Chetti* v. *Narayanasami Chetti* (2). Therefore even if the order now under appeal came within the definition of a decree to be found in section 2 of the Code of Civil Procedure—it must not be taken that I accept the argument that it does—it cannot be appealable under section 96.

To be appealable the order must be a " judgment " within the meaning of clause 13 of the Letters Patent, and in my opinion, as I have already indicated, it cannot be classified as such. In this case there was a preliminary judgment directing the appointment of new trustees and the re-settlement of the scheme and therefore a preliminary decree. The orders appointing new trustees and settling the scheme constituted the final decree. Mr. Basu has argued that as the scheme provided the procedure to be followed when a vacancy occurred on the board of trustees and also provided that Chulia Mohamedans could apply to the Court in connection with the appointment of a trustee, any order made on such an application must be taken to be part of the final decree. If Mr. Basu's argument were correct it would mean that such a case as this would never end ; the suit would always be pending. The order which the learned Judge has passed is an order directing the trustees to do what they are required by

(1) (1915) I.L.R. 43 Cal. 90. (2) (1901) I.L.R. 25 Mad. 555.

1937

HAJEE SHAKUL HAMID v. K. MOHAMED IBRAHIM.

LEACH, J.

the scheme which was embodied in the final decree, and from whatever point one looks at the matter it is perfectly clear that the order is not a *judgment* within the meaning of clause 13 of the Letters Patent, or even a decree within the meaning of section 2 of the Code of Civil Procedure.

For the reasons indicated I would accept the argument advanced by Mr. Doctor and would reject the appeal with costs four gold mohurs.

ROBERTS, C.J.—I agree. At one time during the argument I entertained some doubt as to whether the decree was final or could be said to be partly final and partly preliminary within the meaning of section 2 of the Civil Procedure Code, and whether therefore the order of Ba U J. was really in the nature of a final decree respecting matters which had still been left undisposed of at the time of the settlement of the scheme ; but I am persuaded that such is not the correct view. If it were to prevail, as my learned brother has said, there could be no finality at all in suits of this nature, and I regard the order of Ba U J. as a consequential order merely passed subsequent to a final decree by my learned brother Leach in this suit.