ORIGINAL CIVIL.

Before Sir John Heaton, Kt., Acting Chief Justice, and Mr. Justice Marten.

NARANDAS RAGHUNATHDAS, APPELLANTS AND DEFENDANTS v. SHANTILAL BHOLABHAI, RESPONDENTS AND DEFENDANTS*.

1920. *March* 19.

Letters Patent, 1865, clause 15—Appeal from order—Judgment—Suit instituted in High Court—Order of the trial Judge allowing plaintiffs leave to withdraw suit with liberty to take such action as they might be advised against the defendants—Order made after recording evidence and delivering judgment on the points arising in the case—Order appealable—Civil Procedure Code (Act V of 1908), Order XXIII, Rule 1, clause 2—Practice.

In a suit instituted in the High Court at Bombay the trial Judge heard the evidence and delivered a written judgment dealing with all the points raised in the case, and he came to the conclusion that on the case as then presented by the plaintiffs, the plaintiffs must fail. The trial judge ultimately made an order allowing the plaintiffs leave to withdraw their suit with liberty to take such action as they might be advised against the defendants. He made no order as to costs. The defendants appealed, and a preliminary objection was taken by the plaintiffs that no appeal lay from the order.

Held, over-ruling the objection, that the order of the trial Judge was a "judgment" within the meaning of clause 15 of the Letters Patent, and an appeal lay from the order.

The Justices of the Peace for Calcutta v. *The Oriental Gas Company*[a], distinguished and explained.

APPEAL from order of Macleod C. J. in a commercial cause.

On the 16th August 1918, the plaintiffs contracted to sell to the defendants 102 packages of Satin cloth manufactured by the Dinsha Mills. The contract stated that as the goods might be received after being manufactured, they were to be debited on the last day of each month. The plaintiffs alleged that on the 30th August 1918 they sent a delivery order to the defendants for 46 packages under the said contract but that

* O. C. J. Appeal No. 61 of 1919, Suit No. 79 of 1919.

[a] (1872) 8 Beng. L. R. 433 at p. 452.

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the defendants failed to tender the price of the goods and apply for delivery. The defendants denied that the plaintiffs were able to give delivery of the 46 packages of contract goods on the 30th August 1918, inasmuch as they never had in their possession goods for delivery which they had received from the Mills after the date of the contract.

The suit came on for hearing as a commercial cause before Macleod C. J. The learned Chief Justice heard the entire evidence and delivered a written judgment dealing with all the points arising in the case. His Lordship came to the conclusion that on the case then presented by the plaintiffs, the plaintiffs must fail as they had not tendered goods according to the terms of the contract. His Lordship, however, was of opinion that as the defendants had not determined the contract, the contract was still open and that the plaintiffs might still tender the goods, or alternatively base their case on the principle of *Braithwaite* v. *Foreign Hardwood Company*[1]. His Lordship concluded his judgment observing :—

"My best course is to allow the plaintiffs leave to withdraw their suit with liberty to take such action hereafter as they may be advised against the defendants...I think both parties have been in the wrong and so I make no order as to costs."

A formal order was in usual course drawn up, which ran as follows :—

"This Court doth order that the plaintiff firm be and they are at liberty to withdraw the suit and take such action hereafter as they may be advised".

The defendants appealed.

A preliminary objection was raised on behalf of the plaintiffs-respondents that no appeal lay from the order passed by Macleod C. J.

[1] [1905] 2 K. B. 543.

Kanga and *Desai*, for the respondents.

Ghaswalla and *Taraporewalla*, for the appellants.

HEATON, AG. C. J.:—The only point we are concerned with at the moment is, whether this appeal lies. For the purpose of discussing that point, one must make one or two assumptions. There was a suit in the High Court, which came before the Chief Justice and was disposed of by him, but although he had heard the evidence and had written a considered judgment as to a number of points that arose in the case, he did not decide the case on the merits. He said:—"My best course is to allow the plaintiffs leave to withdraw their suit with liberty to take such action hereafter as they may be advised against the defendants", and afterwards he added: "I think both parties have been in the wrong and so I make no order as to costs". Thereafter a formal order was drawn up, which said: "This Court doth order that the plaintiff firm be and they are at liberty to withdraw this suit and take such action hereafter as they may be advised."

The assumption I am making is that this was an order made under clause 2 of Rule 1 of Order XXIII, Civil Procedure Code.

It was suggested that the order made was not an order of that kind at all, but something altogether different. That may or may not be so. At present I say nothing whatever on that point. I assume that the order is an order under Rule 1 of Order XXIII, and then the question is whether an appeal lies against that order. If the case had been tried in the mofussil, I think it would be held that no appeal lay, and therefore we have to turn to clause 15 of the Letters Patent or Charter and see whether this pronouncement of the Judge is a judgment within the meaning of the words of that clause. It seems to me that it is a judgment.

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We have been referred by both sides, both by the appellant and the respondent, to a former Chief Justice's judgment in *Miya Mahomed* v. *Zorabi*[1], and that judgment sets out in a very useful form certain previous decisions, which no doubt have regulated for many years the view which has been taken by this High Court of the meaning of the word "judgment" under clause 15. The special words which have been relied on appear in a judgment of the Calcutta High Court of 1872 in the case of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company*[2]. There the Chief Justice said:

"We think that 'judgment' in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined."

Now that quotation, I have been told in argument, is a definition of the word 'judgment'. I very respectfully venture to say that it is nothing of the kind, but that it is only a description of what a judgment is—a very admirable description too—but it is a description written more particularly with reference to the special facts of the case in which it was delivered. It is not a definition and it does not completely describe a judgment for all purposes and in all cases.

In this case we have a pronouncement of the Judge, which puts an end to the suit; and, moreover, it puts an end to a suit in which evidence had been recorded and arguments heard and it seems to me, therefore, that it possesses what I conceive to be one of the most important and fundamental characteristics of a judgment. And it seems to me that howsoever you look at

(1) (1909) 11 Bom. L. R. 241. (2) (1872) 8 Beng. L. R. 433 at p. 452.

it, whether you regard it from the point of view of its importance or of its effect on the parties, from both those points of view also it possesses the characteristics of a judgment. I unhesitatingly say that it is a judgment.

There was one point which was raised in the argument, and I think it is a point of interest. It was suggested that where a plaintiff files a suit and before any notice is served on the defendant, the plaintiff applies to withdraw the suit with leave to file another, and the Court grants that leave, the Court's order would not be a "judgment" within clause 15 of the Letters Patent. Whether it would or would not, I do not propose at the present moment to say. It seems to me that even assuming that that would not be a judgment it does not follow that all orders allowing withdrawal with leave are not judgments. When you have the Court permitting withdrawal of the suit at the stage which this suit had reached; when evidence had been recorded; when both parties had been heard; when both parties had had an opportunity of saying what they had to say on this question of granting leave, then you have a very different state of affairs. I say both parties had an opportunity of saying what they had to say, because even if the suggestion of withdrawal came from the Bench, and if it came at the time the judgment was delivered, yet the parties or their representatives were present, and could there and then have said anything they liked in favour of or against the suggestion of the Judge.

So the possible difficulty (if it is a difficulty) which arises from the hypothetical case suggested is not to my mind a serious obstacle, and I still remain just as firmly of opinion as before that the pronouncement of the Court, with which we have to deal, is a judgment

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within the meaning of clause 15, and I think the preliminary objection taken to the appeal is of no validity.

MARTEN, J.:—At the trial of this suit some eight issues were raised, the trial lasted some three or four days, and judgment was reserved. On the case being called on for judgment, the learned trial Judge delivered a full judgment, dealing with all the points raised in the case, and he came to the conclusion that on the case as then presented by the plaintiffs, the plaintiffs must fail. He held in effect that the plaintiffs had not tendered goods of the contract quality and that therefore they could not sue for damages for breach of contract by the defendant to accept those goods. But he thought on the facts that the defendant had never determined the contract, and that consequently the contract was still open, and, therefore, the plaintiffs could still tender, or might still be able to tender, goods of the contract quality, or that alternatively the plaintiffs could base their case on the principle of *Braithwaite* v. *Foreign Hardwood Company*[a]. Then the actual result which the learned Judge arrived at was to give the plaintiffs liberty to withdraw their present suit and he made no order as to costs.

The result, so far as the defendant was concerned, was that there was an entirely abortive suit of which he had to bear his own costs. Against that decision, the appeal is brought, and it is objected that it is not an appealable order. That, I think, depends on what meaning is to be given to the word "judgment" in clause 15 of the Letters Patent.

The cases which have hitherto guided these Courts in considering what is a "judgment" have adopted as a working test words to the following effect, viz.,

[a] [1905] 2 K. B. 543.

"Where a pronouncement of the Judge affects the merits of the question between the parties by determining some right or liability" (see the cases of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company*[1] and *Miya Mahomed* v. *Zorabi*[2]. I respectfully and entirely concur with what my Lord the Chief Justice has said that whatever forms of words are used, one must consider the particular case in which they were first used. The above words were in fact first used in a case where the learned Judge had not got in contemplation the class of case we have to deal with here. But even if I apply those very words, it seems to me that this order of the trial Judge giving liberty to withdraw and to institute a fresh suit did affect the merits of the question between the parties by determining some right or liability. One result was this: The plaintiff was given liberty to do that which at that moment he could not do, viz., to institute a fresh suit in respect of the subject-matter of the action, and thereby to give the Court jurisdiction or power to hear the new suit which otherwise it would not be able to do. Unless that leave had been given, the suit would either have been withdrawn without leave, in which case no fresh suit could be instituted, having regard to Order XXIII, rule 1 (3), or else it would have been dismissed, in which case equally under sections 11 and 12 no fresh suit could have been instituted.

It must be borne in mind, too, that in the case in which the above working test was first adopted, the point was whether an order giving leave to sue under clause 12 of the Letters Patent was appealable: see *De Souza* v. *Coles*[3] and *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub*[4]. It was held

(1) (1872) 8 Beng. L. R. 433.
(2) (1909) 11 Bom. L. R. 241 at p. 244.
(3) (1868) 3 Mad. H. C. 384.
(4) (1874) 13 Beng. L. R. 91.

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that it was appealable, because it gave the Court a jurisdiction against the defendant which it otherwise would not possess. It seems to me that there is some analogy between that class of case and the one that we have got now to deal with. I have endeavoured to look at this case as a matter of principle, and not to be prejudiced by the late stage which this suit had reached, and by the fact that, *prima facie*, the order was an unusual one to make at that stage. Accordingly I have endeavoured to test the case from the same point of view as if a summons had been taken out before the trial for leave to withdraw the suit on certain terms. In the result I am of opinion that the decision which the learned Judge came to here was a judgment between the parties within the meaning of clause 15 of the Letters Patent; and that accordingly it is appealable.

That, in my opinion, is sufficient to dispose of this preliminary point, but there was a further point taken by Mr. Ghaswalla, which I think I ought to mention. He contended on the authority of *Kali Prasanna Sil* v. *Panchanan Nandi*[1] that in Order XXIII, rule 1, you must read sub-sections (*a*) and (*b*) of sub-rule 2 together, and that in effect the "other sufficient ground" in sub-section (*f*) must be *ejusdem generis* with "some formal defect" in sub-section (*a*). He then went on to say that what the learned Judge did here was in fact to give leave to the plaintiff to take new steps after the date of the judgment, viz., to tender new goods, and that could not possibly be *ejusdem generis* with any "formal defect" any more than in one of the cases cited it was permissible to allow the plaintiff to withdraw his suit in order to enable him to get more evidence: see *Bai Kashibai* v. *Shidapa Annapa*[2]. But I am not prepared to accept that argument on

(1) (1916) 44 Cal. 367.

(2) (1913) 37 Bom. 682.

the true construction of Order XXIII. I am very reluctant, speaking for myself, to fetter what appears to me to be the plain words of the Act, and although it may be that one has to read sub-sections (*a*) and (*b*) together I am as at present advised by no means satisfied that the *ejusdem generis* rule applies.

One of the other cases cited to us is a decision of Sir Basil Scott in *Mahipati* v. *Nathu*[1], but it really deals, I think, with the merits of the appeal, or what will be the merits of the appeal, viz., whether, if an appeal lies, it was proper for the Judge to give the liberty he did. I have not yet heard the appeal on its merits, and therefore I say nothing on this decision of Sir Basil Scott. It was a case where there was undoubtedly jurisdiction, because it was a case on revision from the mofussil. The only materiality of it on the present application is this: that in the mofussil the appellate Court has power to deal with orders of this nature in revision, whereas it is contended that similar orders made by Judges on the Original Side are not capable of revision by the appellate Court.

I respectfully agree with the Chief Justice in thinking that this preliminary objection fails.

Solicitors for appellants: Messrs. *Mehta, Dalpatram & Lalji.*

Solicitors for respondents: Messrs. *Motichand & Devidas.*

Preliminary objection overruled.

G. G. N.

[1] (1909) 33 Bom. 722 at p. 724.