

*Before Mr. Justice Prinsep and Mr. Justice Ghose.*

CHUNDI DUTT JHA (DEFENDANT) v. PUDMANUND SINGH  
BAHADUR AND OTHERS (PLAINTIFFS.) \*

1895  
May 14.

*Appeal to Privy Council—Application for leave to appeal—Civil Procedure Code (Act XIV of 1882), section 595—Letters Patent of the High Court, sections 39, 40—Order refusing the appointment of a Receiver in a suit.*

There is no appeal to Her Majesty in Council against an order refusing the appointment of a Receiver in a suit. Such order does not finally decide any matter which is directly at issue in the cause in respect to the right of the parties, and is not "final" within the meaning of clauses (a) and (b) of section 595 of the Civil Procedure Code and section 39 of the Letters Patent; nor is the matter a special case falling within the terms of clause (c) of section 59 of the Code or section 40 of the Letters Patent.

*Justices of the Peace for Calcutta v. Oriental Gas Company* (1); *Lutf Ali Khan v. Asgur Resa* (2); *Kishen Pershad Panday v. Tiluckdhari Lall* (3); and *Rahimbhoy Habibhoy v. Turner* (4) referred to.

THIS was an application for leave to appeal to Her Majesty in Council against the order of the High Court refusing to appoint a Receiver in a suit brought by the plaintiffs in the Court of the Subordinate Judge at Bhagalpur. The facts relating to the petition for appointment and the order of the High Court have been given in the report of the case in the High Court (5). The arguments and cases cited on both sides sufficiently appear in the judgment of the High Court.

Mr. Hill and Babu Taraknath Palit for the petitioner.

Babu Digambar Chatterjee and Babu Dwarknath Chakrabarty for the respondent.

The judgment of the High Court (PRINSEP and GHOSE, JJ.) was as follows:—

This is an application for a certificate to appeal to the Privy Council against an order of a Division Bench of this Court

\* Application for leave to appeal to H. M. in Council, No. 6 of 1895.

(1) 8 B. L. R., 433.

(2) I. L. R., 17 Calc., 455.

(3) I. L. R., 18 Calc., 182.

(4) I. L. R., 15 Bom., 155; L. R., 18 Ind. Ap., 6.

(5) I. L. R., 22 Calc., 459.

refusing the plaintiff in the suit the appointment of a Receiver in the terms required by him.

The application is opposed, and we have had considerable argument addressed to us as to whether this is a proper matter in which a certificate can be granted within the terms of section 596 of the Code of Civil Procedure, which embodies the provisions of sections 39 and 40 of the Letters Patent, 1865.

In order to entitle a party to a certificate under clauses (a) and (b), section 595 of the Code, or section 39 of the Letters Patent, it is necessary, in a matter of this description, that the order passed shall be a final decree, which, under the definition given in section 594 of the Code, may be a final judgment and order. It is contended by Mr. Hill, who appears for the petitioner, that the order of the Division Bench of this Court comes within the terms of clauses (a) and (b), section 595, or, if it falls short of that, the petitioner is entitled to appeal under the terms of section 40 of the Letters Patent, which are embodied in clause (c) of section 595. We have been referred to several cases in the reports bearing on this subject. The leading case in this Court is that of *The Justices of the Peace for Calcutta v. The Oriental Gas Company* (1), in which, on the interpretation of section 15 of the Letters Patent, the meaning of the expression "judgment" was determined. It was there declared that "judgment" "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 the preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined." So also in the case of *Lutf Ali Khan v. Asgur Reza* (2) it was held that an order, which determines the rights of the parties, is alone appealable under section 15 of the Letters Patent. And in the case of *Kishen Pershad Panday v. Tiluckahari Lall* (3) it was held that it must be an order deciding finally any question at issue in the cause, or the rights of any of the parties.

(1) 8 B. L. R., 493.

(2) I. L. R., 17 Calc., 455.

(3) I. L. R., 18 Calc., 182.

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Mr. Hill, however, contends that his client, the plaintiff in the suit, has the right to require the appointment of a Receiver so as to prevent waste; and that the refusal to grant him that right falls within the terms of the law as expressed in those cases. We are of opinion that the right to be determined is a right as expressed in the case of *Kishen Pershad Panday v. Tiluckdhari Lall*. The order in question must be one deciding finally the question at issue in the cause or the rights of any one of the parties. The appointment of a Receiver was not a matter directly in issue in the cause in respect to the rights of the parties as raised in that suit. It was as it were auxiliary to the decision of the suit in order to prevent any waste on the part of the defendant which might affect the rights which were then under determination. At the highest, the order can only be regarded as interlocutory, as falling within the terms of section 40 of the Letters Patent.

This matter has been recently considered by their Lordships of the Judicial Committee of the Privy Council in the case of *Rahimbhoy Habibhoy v. Turner* (1). It was there found that the proper test in order to determine the meaning of the words "final order or decree" is to be found in the determination of what was really the question before the Court when the decree or order was made. The report also shows that, in the course of the argument, Lord Macnaghten expressed the opinion that "final decree in section 595 does not mean last decree, but the decree determining rights finally"; by which we understand his Lordship to mean rights raised by the suit itself.

In this view, therefore, we are of opinion that the order in question does not fall within the terms of section 595, clauses (a) and (b) of the Code of Civil Procedure, or of section 39 of the Letters Patent; nor is this matter a special case within the terms of clause (c) of section 595, or section 40 of the Letters Patent. If, however, the order be regarded as an interlocutory order within the terms of section 40 of the Letters Patent, we cannot consider this a proper matter to be specially dealt with in appeal to the Privy Council. If we consider the

(1) I. L. R., 15 Bom., 155; L. R., 18 I. A., 6.

character of the order issued, and the result which might arise if an appeal were entertained by their Lordships in Council against an order of this description, we are led to conclude that it was not the intention of the Legislature that such an order should be appealable. It has here been determined that the plaintiff is not entitled to a Receiver in the terms desired by him. If he should obtain permission to appeal to the Privy Council, the trial of the suit would nevertheless proceed independently of the course of that appeal. It may so happen that the result of the trial might be that the plaintiff is found by both Courts in this country to have no merits in his case, and it may also possibly happen that, by reason of the nature of the suit and the judgments passed by the Courts in this country, the plaintiff might be without the right of an appeal to Her Majesty in Council by reason of there being concurrent judgments on questions of fact. So that there would then be an appeal to Her Majesty in Council as regards the question of the appointment of a Receiver when actually the suit itself is finally determined in this country against the plaintiff, and it would not be open to the plaintiff to appeal to the Privy Council on its merits. It seems to us that probably the Legislature had this in view when, in allowing an appeal against a refusal to appoint a Receiver under section 588 of the Code of Civil Procedure, it simultaneously declared that the order passed in appeal shall be final.

For these reasons the application for leave to appeal to Her Majesty in Council in this case is refused with costs.

S. C. C.

*Application refused.*

*Before Mr. Justice Norris and Mr. Justice Gordon.*

TARA PROSAD ROY (DECREE-HOLDER) *v.* BHOBODEB ROY (JUDGMENT-DEBTOR).\*

1895  
July 31.

*Mortgage—Execution of decree—Simple mortgage—Decree nisi—Order absolute—Transfer of Property Act (IV of 1882), sections 88, 89.*

A decree on a simple mortgage directing the sale of mortgaged property on default of payment within a fixed period is substantially a decree *nisi*

\* Appeal from Order No. 73 of 1895, against the order of A. F. Steinberg, Esq., Officiating Judge of Nuddia, dated the 5th of September 1894, reversing the order of Babu Bepin Pehary Chatterjee, Munsif of Chuadanga, dated the 24th of September 1895.