

(1933) 11 BOM CK 0004
In the Bombay High Court
Case No : O.C.J. Appeal No. 56 of 1933

Dhanbai Burjorji Cooper

APPELLANT

Vs

Bablibai Shapurji Sorabji

RESPONDENT

Date of Decision : 30-11-1933

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 4
Letters Patent Act, 1865 — Clause 15

Citation : AIR 1934 Bom 168 : (1934) 36 BOMLR 272 : 152 Ind. Cas. 264

Hon'ble Judges : John Beaumont, J; Barlee, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

John Beaumont, Kt., C.J.—This is an appeal from a decision of Mr. Justice Rangnekar by which he refused to the appellant, who is defendant No. 7, her claim to take the evidence of witnesses in Goa on commission. The suit is a testamentary suit in which the plaintiffs are setting up a will as executors. The respondents contest the will. The present appellant is a relative, and her claim is that she will be interested in the estate if the will is set aside. She desired to produce the evidence of witnesses who are in Goa. She, therefore, took out a summons asking for an order that the witnesses might be examined on commission, and that summons was dismissed by Mr. Justice Rangnekar. We arranged to hear as a preliminary issue the question whether an appeal lies from an order refusing a commission. That question turns on the meaning of the word "judgment" in Clause 15 of the Letters Patent, a question which has been discussed a great many times in this Court. The rule which this Court acts upon is that which was originally stated in *The Justices of the Peace for Calcutta v. The Oriental Gas Company* (1872) 8 Beng. L.R.433 namely, 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 is not, however, always easy to apply that rule. Here Mr. Daphtary for the appellant contends that he is entitled as a matter of right to an order for the taking of this evidence on commission.

The order is asked for under Order XXVI, Rule 4, which provides that any Court may in any suit issue a commission for the examination of any person resident beyond the local limits of its jurisdiction. The language appears to confer a discretion upon the Court, and not to give a statutory right to a party. Mr. Daphtary referred us to the decision in *Jagannatha Sastri v. Sarathambal Ammal* ILR (1922) Mad. 574 in which Mr. Justice Wallis did express the view that a party had a statutory right to take on commission the evidence of a witness who was resident more than two hundred miles from the Court, though in that case it was not necessary for him to go as far as that, because he held further that if there was a judicial discretion, the discretion of the lower Court had been wrongly exercised. I am, however, clearly of opinion that the view indicated in that case that a party has a statutory right to an order for taking evidence on commission is not well-founded. On such application the Court has to consider not only the claim of the party who desires to take evidence on commission, but the rights of the opposite party. If evidence is taken on commission, the opposite party is deprived of the right of cross-examining the witnesses before the Judge who has to determine the suit, and that, in the case of an unreliable witness, is a very valuable privilege. Moreover, in some countries no cross-examination at all is allowed in the case of evidence taken on commission. The Court, therefore, has to consider what is the right thing to do on the particular facts of each case, and, in my view, it is impossible to say that a party asking for a commission is entitled as of right to an order. If that is so, it is difficult to see how an order refusing a commission can be an order affecting the merits of the question between the parties by determining some right. No doubt the appellant is deprived by the order of the right to give this evidence in the particular way in which she desires to give it, and it may be that it will be impossible for her to get the evidence in any other way, but the order is purely an interlocutory order relating to procedure. If the suit is heard and determined against the present appellant, she will have a right to appeal, and she may no doubt then contend that the order refusing a commission was wrong. Her rights are not finally determined by the present order. Therefore, apart from authority, I should feel no doubt that an order refusing a commission is not a "judgment" within Clause 15 of the Letters Patent. Referring to the authorities, there are decisions of other High Courts in that sense. In the case of *Tuljaram Row v. Alagappa Chettiar* ILR (1910) Mad. 1 there are clear dicta that an order refusing a commission is not appealable. The case of *Toremull Ditsook v. Kunj Lall* (1919) 31 C.L.J. 162 is a decision of the Calcutta High Court on the exact point, holding that such an order is not appealable, though in that case there does not seem to have been any substantial argument on the point. Then there are two decisions of the Rangoon High Court, *Mahomed Hussani v. Hoosain Hamadanee & Co.* ILR (1925) Ran. 292 and *P. Abdul Gaffor v. The Official Assignee* ILR (1925) Ran. 605 to the same effect. So far as this High Court is concerned, there is the decision in *Miya Mahomed v. Zorabi* (1909) 11 Bom. L.R. 241 that no appeal lies from an order directing a commission. In that case Sir Basil Scott, who delivered the leading judgment, did suggest that possibly an appeal might lie from an order refusing a

commission if the evidence sought to be taken on commission went to the root of the case. But that opinion was based on the decision in *Maruthamuthu Pillai v. Krishnamachariar* ILR (1906) Mad. 143 which has since been disapproved by a full bench of the Madras High Court in the case to which I have referred, *Tuljaram Row v. Alagappa Chettiar*, There is no other reported decision of this High Court. There is an unreported decision to which we have been referred, *Bishun Narayan Bhargava v. The Union Bank of India Ltd.* O.C.J. Appeal No. 76 of 1925 : Suit No. 148 of 1925. Macleod C.J. and Coyajee J.?November 16, 1925, in which again it was suggested that an appeal might lie if the evidence sought to be taken on commission went to the root of the appellant's case. In my opinion the decision cannot turn on any question as to the materiality of the evidence sought to be taken on commission; either the order refusing a commission is a Judgment within Clause 15, and appealable, or it not a judgment, in which case it is not appealable. In my opinion is a judgment, and we must, therefore, allow the preliminary point and dismiss the appeal with costs.