

(1922) 04 MAD CK 0017
In the Madras High Court

Kannayalal Bhoya

APPELLANT

Vs

Balaram Paramasukdoss

RESPONDENT

Date of Decision : 27-04-1922

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 13(2)

Citation : (1922) 16 LW 608 : (1922) 43 MLJ 480

Hon'ble Judges : Walter Schwabe, C.J.;Walter Salis Schwabe, J;Coutts Trotter, J

Bench : Full Bench

Judgement

Walter Salis Schwabe, K.C., C.J.—In this case the matter comes before us on appeal from an order of Phillips, J. It arose in this way. An

issue or issues were framed and he directed that a particular issue should be tried before the trial of the rest of the suit. He tried that issue and he

gave a decision upon the hearing of that trial, and he gave it in what is called a judgment. Speaking for myself, I do not see how it could be called

anything else. There was an issue directly to be tried; we have got the decision of a Judge upon matters in issue in the action between the parties;

and I have tried to find some other mode of expressing what he did and I could find none - he gave his judgment. The English cases are quite clear

as far as the distinction between "judgment" and "order" is concerned and the guiding principle is that a decision is a judgment which is given in an

action - see *Exparte Chinery* (1884) 12 Q.B.D. 342 and *Onslow v. Commissioner of Inland Revenue* (1890) 25 Q.B.D. 465. The matter here is

to be decided under Clause 15 of the Letters Patent where the right of appeal is from a judgment of the Original Side. There have been a

considerable number of cases on that point here and attempts have been made to give an exhaustive definition of the meaning of the word

judgment"" in that section, particularly in *Tuljaram Rao v. Alagappa Chettiyar* 21 M.L.J. 1 (F.B.) and *Kulasekhara Naicker v. Jagadambal Ammal*

36 M.L.J. 351 the attempted definitions not having been identical. But I think they are all of them wide enough to cover the facts of this case, and I

do not propose to attempt to add a further definition to those which have already been given in other cases. The preliminary objection fails.

Coutts Trotter, J.

2. I am of the same opinion. I have never been very clear either in English courts or in these as to the precise differentia between a ""judgment"" and

an ""order.

3. On the whole the balance of my mind is to regard this as resulting in something which is properly called a judgment, because it might result in

shutting out the defendant from the court altogether.

JUDGEMENT

Walter Schwabe, C.J.—In these five, suits orders were made under Order VI-A of the Original Side Rules that the defendants should find

security for the amount claimed. There is no appeal from that order. Four of the suits were on documents known as Shah Jog hundies, and the fifth,

O.S.S. NO. 356 of 1921, was on another different document, which, on the face of it, purports to be an acknowledgment of indebtedness and a

promise to pay interest. Security was furnished and the case was proceeded with. Then, on the application of the defendant, certain issues were set

down for trial, one of the issues being whether or not these documents were negotiable instruments. It has been held by the learned Judge who

heard this matter, without hearing any evidence and without giving an opportunity which was asked for adducing evidence, that they were not

negotiable instruments, and he accordingly ordered all the security to be repaid to the defendant with costs up to date to be paid by the plaintiff and

that the action should proceed, as though they had never been lodged under the terms of that order as ordinary suits.

2. As regards four of these documents, in my judgment, the documents in question were negotiable instruments, I think they come directly within

the definition in Section 13(2) of the Negotiable Instruments Act of 1881, as amended by the Negotiable Instruments Act of 1914, as being

payable in the alternative to one of several payees. But, whether this is right or

not, they are, in my judgment still covered by Rule 63A of the Original Side Rules for although those rules are entitled ""Procedure on Negotiable Instruments"" and Rule 62 refers to suits on negotiable instruments, it is clear from the wording of Rule 63A that it was intended that all documents in the nature of negotiable instruments, specifically described in Rule 63A as ""Bills of Exchange, Hundis or Promissory Notes"" should be included and that the framers of that rule were not considering the question of how far a particular Bill of Exchange might be negotiable or what the restrictions might be on its negotiability provided it came under the description of Promissory Note, Bill of Exchange or Hundi, which were all intended to be included within the very useful powers given by that order. To take the extreme instance of a cheque or other bill of exchange payable ""to A. B. only"" and marked ""not negotiable"", in my view this procedure would apply as the document is a bill of exchange, though the particular bill of exchange is not negotiable. On those grounds I think that the decision of the learned Judge in respect of the four actions is wrong.

3. As regards the fifth action, the position is rather curious. The learned Judge did not consider it separately but it is included in the decision that the documents are not negotiable instruments; but this has been decided in the absence of evidence which, may well be available at a proper trial of the matter to the effect that that form of document is recognised among these people as being a negotiable instrument passing by delivery from hand to hand. If a man writes to another a definite statement in this formal way that he owes a certain amount and that he agrees to pay interest on it, it is quite conceivable, though I am expressing no opinion upon it, that it is intended that it should be a document that he can transfer by delivery. How that may be it is impossible to say without evidence on the point. That being so I think that the judgment in respect of that document too is wrong, and the learned Judge was wrong to find as he did find without evidence, that this was not a negotiable instrument.

4. I think the right view is that the position must be the same as it was before the orders under appeal. Security was ordered for the whole amount of the five actions. The defendant, who knows perfectly well what document No. 2 is, did not choose to appeal from that order. He cannot have

that order reversed or varied by a judgment on a preliminary point, which judgment I think should be reversed. It therefore follows that the proper

order to make is to allow all these appeals with costs and to direct that the money or security taken out of court by the respondent be forthwith

replaced.

5. I think that the best course in respect of these cases is that all the five cases should be tried together as though they were ordinary suits. We

have expressed our decision that four of the documents are negotiable instruments. As regards the fifth it should be open to discussion whether it is

a negotiable instrument. It may be by custom negotiable. Further the plaintiff may have a cause of action on it even if not negotiable. It is better that

all the five should be tried together as ordinary suits and disposed of.

6. The costs of the preliminary hearing before Phillips, J. must be repaid, and they must be costs in the cause. The defendant must put back into

court within 14 days the Government Promissory Notes of the face of value of Rs. 24,000 or pay into court that amount in rupees even if the time

falls within the vacation; and in default of such payment, the appellant would be entitled to a decree for the full amount and he will be at liberty to

apply to the vacation Judge to give him such a decree. The defendant also will have liberty to apply to him.

Coutts Trotter, J.

7. I am of the same opinion. I do not up to this moment understand how it was that Phillips, J. persuaded himself that, by framing a preliminary

issue of this nature, he could overrule an unappealed Order of Kumaraswami Sastri, J. That is my first view.

8. In the next place I am unable to follow the order and judgment which appear to hold that a Shah Jog Hundi of this form is not a negotiable

instrument. It seems to me that there are many reasons for supposing that it is, I am perfectly content to take it that the words payable to any

"shah" (which was translated "a respectable person") are so vague and indefinite as to be incapable of enforcement in a court of law and,

therefore, the instrument stands as payable to Khanya Lalji, the drawee. With regard to the instrument in suit No. 366 I wish to guard myself

against saying that I am convinced that, even if there were evidence produced to show that it was treated as a negotiable instrument, that would be

conclusive. I only desire to say that an opportunity should be given to call such evidence, if it is available, and the court should consider, having heard the evidence, if it is produced, whether in law it would be sufficient to confer negotiability upon such instruments. I take it that, even if you have evidence that a certain instrument is treated as a promissory note, if its language is such that, by no conceivable acceptance of the words in their ordinary significance, could not be so construed, the court might have to say that, in spite of the proof of the existence of the custom, the custom was so entirely at variance with the tenor of the instrument as to be unreasonable. For the rest I agree with my Lord.