

(1909) 02 BOM CK 0009
In the Bombay High Court

Miya Mahomed Haji Jan Mahomed

APPELLANT

Vs

Zorabi

RESPONDENT

Date of Decision : 05-02-1909

Acts Referred:

Letters Patent Act, 1865 — Clause 15

Citation : 2 Ind. Cas. 157

Hon'ble Judges : Basil Scott, C.J.; Russell, J

Bench : Division Bench

Judgement

Basil Scott, C.J.—This is an appeal against an order passed by Mr. Justice Macleod sitting in Chambers, directing the issue of a commission for the examination of various witnesses in the suit including the plaintiffs at Moulmein.

2. An objection has been taken that no appeal lies.

3. It is contended for the appellants that an appeal does lie on the ground that the order of Mr. Justice Macleod was a judgment within the meaning of Clause 15 of the Letters Patent.

4. The meaning to be attributed to the word "judgment" was discussed as early as 1872 by the Calcutta High Court in the case of *The Justices of the Peace for Calcutta v. The Oriental Gas Company* 8 B.L.R. 433 : 17 W.R. 364. The Chief Justice of Bengal in that case discussed the previous case of *DeSouza v. Coles* 3 M.H.C. 384 a decision of the High Court of Madras, in these terms. He said:

A decision of the High Court of Madras was also referred to, in which, it was held that the refusal of a Judge to give leave to institute a suit on the original side of the Court under Clause 12 of the Charter was a judgment, and as such, appealable under Clause 15. The Court there said that the word "judgment" in Clause 16 could not be limited to the final judgment in a suit, nor indeed to a judgment in a suit at all, but must be held to have the more general meaning of any decision or determination affecting the right or the interest of any suitor or applicant;" and again, "Where the language giving the, appeal is so general in its

terms as that contained in the 15th Clause of the Charter, it is, we think, impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from". We are not, however, prepared to go to this extent. Such an interpretation would, as it seems to us, and as the learned Judge in that case seems to admit, put it in the power of a vexatious litigant to appeal against all the discretionary orders which the Judge of original jurisdiction may make in the course of the suit; and with no result, as such orders would have to be, as a matter of course, confirmed. It would also give a far more extensive right of appeal against the orders of a Judge of original jurisdiction in this Court than exists against the orders of a Judge of original jurisdiction in the mofussil; which we do not think at all probable that Her Majesty intended. 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.

5. That decision was followed by a decision of the same Court in Hadjee Ismael Hadjee Hubeeb v. Hadjee Mahomed Hadjee Joosub 13 B.L.R. 91 : 21 W.R. 303. In that case Sir Richard Couch said:

It was held by the High Court at Madras in DeSouza v. Coles 3 M.H.C. 384 that an order made under this clause of the Charter was subject to appeal. We may not agree in all the reasons which the learned Judges of that Court gave for their decision, but we do agree in the conclusion that this is an appealable order. It is of great importance to the parties. It is not a more formal order, or an order merely regulating the procedure in the suit, but one that has the effect of giving a jurisdiction to the Court which it otherwise would not have. And it may fairly be said to determine some right between them, viz., the right to sue in a particular Court, and to compel the defendants who are not within its jurisdiction to come in and defend the suit, or if they do not, to make them liable to have a decree passed against them in their absence.

6. For a considerable number of years in this Court those two decisions have to my knowledge been regarded as the leading decisions to be followed on the question whether an order in any particular case is a judgment" within the meaning of Clause 15 of the Letters Patent. In the case of Jehangir v. The Secretary of State (1909) 2 Ind. Cas. 150 the late Chief Justice held that there was no appeal against an order relating to trial of issues on the ground that in the words of Sir Richard Couch in Hadjee Ismael's case 13 B.L.R. 91 : 21 W.R. 303 it was an order merely regulating the procedure in the suit.

7. In the present case the order made merely regulates the procedure to be followed in the examination of witnesses. The principle is the same even though some of these witnesses are party plaintiffs, for the same rule as to granting commissions must apply in regard to plaintiffs as to any other witnesses

although "it may be more strictly applied. That being so it seems to me that the order is one which is not a "judgment" within the meaning of Clause 15. I do not say that an order passed u/s 383 of the CPC of 1882 could not in any case amount to a judgment. For in such a case as Maruthamuthu Pillai v. Krishnamachariar 30 M. 143 where the refusal of an application by the plaintiff for a commission to examine witnesses would result in the dismissal of the suit owing to the inability of the plaintiff to adduce any evidence, his right to have his case heard upon evidence would be denied and that would be a decision of a right which would amount to a judgment according to the Bengal case to which I have referred. We have been referred by counsel for the appellant to a decision in Veerabadran Chetty v. Natdraja Desikar 28 M. 28 but in that case it will be seen that the learned Judges took the more extended view of the meaning of the word judgment" which has always been adopted in Madras since the case of -De Souza v. Coles 3 M.H.C. 384 but which has been rejected in this Court.

8. For those reasons I am of opinion that there is no appeal and we must, therefore, dismiss the appeal with costs.

Russell, J.

9. I am of the same opinion.