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Court : Chennai

Decided On : Mar-17-1953

Reported in : AIR1954Mad334; (1953)2MLJ354

Judge : Rajamannar, C.J. and ;Venkatarama Ayyar, J.

Acts : High Court Rules; High Court Orders; Madras Original Side Rules - Order 7, Rule 1; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 37, Rule 2

Appeal No. : O.S. Appeal No. 40 of 1952

Appellant : Simrathmull and anr.

Respondent : Jugraj and anr.

Advocate for Def. : M.S. Venkatarama Ayyar and ;N.C. Rangaswami, Advs.

Advocate for Pet/Ap. : V.S. Rangachari, Adv.

Disposition : Appeal dismissed

Judgement :

1. The respondents in this appeal instituted in the original side of this court a suit, C. S. No. 400 of 1949, for the recovery of a sum of Rs. 10731-13-0 together with interest due thereon upto date of payment from the appellants. They filed the suit under Order 7 of the Original Side Rules which corresponds to Order 37, Civil P. C. The suit was Instituted on the Judgment of a foreign Court (The District Court of

Jodhpur) which the plaintiffs had obtained against the defendants.

The appellants took out two applications before the Master, namely, an application for leave to defend and an application for treating the suit as an ordinary suit. We are not concerned in this appeal with the former application as it remains still undisposed of. The Master allowed the latter application holding that a suit based on a foreign judgment did not fall within the class of suits included under Order 7, Rule 1 of the Original Side Rules. The plaintiffs filed an appeal against this order of the Master to the learned Judge in Chambers, Krisbnaswami Nayudu J. He allowed the appeal and dismissed the application made by the defendants. He was of the opinion that the suit had been properly instituted under Order 7 of the Original Side rules. It is against this order of the learned Judge that the above O. S. Appeal has been filed by the defendants.

2. A preliminary objection was taken on behalf of the plaintiffs respondents that no appeal lay as the order was not a Judgment within the meaning of that term in Clause 16 of the Letters Patent. No direct authority on the question which falls for decision in this case was brought to our notice by counsel on either side.

The leading authority is the ruling of the Pull Bench in -- 'Tuljaram Rao v. Alagappa Chettiar', 35 Mad 1 (PB) (A). The test laid down therein by White C. J. which has often been cited in later decisions, is as follows:

"The test seems to me to be not what is the form of the adjudication but what is its effect in the suit, or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause."

It appears to me to be clear that the order in question does not fulfil the condition laid down above. The effect of this order is certainly not to put an end to the suit or proceeding. Nor can this order be treated as an order on an independent proceeding ancillary to the suit such as, for example, an order on an application for

interim Injunction or for the appointment of a receiver, which might be a judgment within the meaning of the clause.

3. The test laid down in this case has been followed by this court in dealing with Several classes of orders. It was held in -- 'Surya Rao v. Rama-rao', AIR 1927 Mad 846 (B), that an order of a single Judge of the High Court refusing to revoke an order granting leave to sue on the original side of the High Court is not appealable under Clause 15 if the question of the jurisdiction of the High Court to entertain the suit is still open to the defendant and can be raised on an appropriate issue at the trial of the suit. An order refusing to transfer a suit or proceeding pending in one court to another court has been held to be not a judgment. -- 'Narasareddi v. Tar Mohammed', A. I. R. 1928 Mad 209 (C); and -- 'Kondayya v. Official Receiver, Nellore', (D). Interlocutory; orders like an order transposing a defendant as a plaintiff -- 'Official Assignee v. Ramalingappa', AIR 1928 Mad 554 (E); an order adding a party -- 'Rama-swami v. Kanniappa', AIR 1930 Mad 987 (P) and an order referring back a report of the Official Referee to him -- 'Maneckji v. H. H. Wadia', AIR 1923 Mad 470 (G) have all been held by this court, to be not judgments within the meaning of that clause, in all these cases the suit or proceeding was not put an end to and could continue though the party aggrieved by the order did suffer an in-jury for the time.

4. There is one decision of the Bombay High Court which I think is very much in point, namely -- 'Manilal v. Manilal', A. I. R. 1925 Bom 159 (H). The plaintiff therein, a share broker, filed a suit in the High Court of Bombay on the original side as a summary suit. The defendant took out a summons for an order that the suit be removed from the list of summary suite or in the alternative that the defendant do have liberty to defend the suit and file his written statement. The plaintiff took out another summons for deleting from the title of the plaint the word "summary" and for transferring the same to the list of short cause suits. This he did evidently because he realised that treated as a summary suit it was barred under Article 5, Limitation Act.

Both the applications were heard together by Mulla J. who allowed the plaintiff's application and directed that the suit be removed from the list of summary suits

and that it be placed on board for trial as a contested short cause. The defendant appealed. The learned Judges Macleod C. J. and Crump J. upheld a preliminary objection that the appeal was not competent, because the order appealed against was not a judgment. Macleod C. J. observed thus:

"He (Mulla J.) also pointed out that the only result of the amendment would be to deprive the plaintiff of the advantages which would accrue to him from the suit being entered as a summary suit. It would not convert the suit into another suit of a different character. The order under appeal therefore is an order regulating the procedure according to which the suit is to be tried. It does not in any way affect the merits of the questions at issue between the par-ties by determining some right or liability. As Mr. Mulla points out in his 7th Edn. of the Civil Procedure Code page 1046 all the High Courts are agreed that no appeal lies from such an order."

The principle of this case will govern the present case also.

5. I came across a ruling of the Court of Appeal in England in -- 'Sea Insurance Co, Ltd. v. Carr', (1901) 1-Q. B. 7 (I); which made me pause. It was held therein that an appeal will lie to the court of appeal against an order for entry of a cause in the commercial list if it be not a commercial cause. On the plaintiff's application Mathew, J. made an order directing that the action should be transferred to the commercial list. The court of Appeal gave leave to appeal against the order. An objection was taken that the order could not be the subject of an appeal. But the objection was overruled. In my opinion this decision will not be applicable to the present case because the relevant provision in England is as follows:

"In the King's Bench decisions, except in matters of practice and procedure the appeal from a decision of the Judge at Chambers shall be to a Divisional Court."

It appears that even in matters of practice and procedure an appeal would lie (vide -- 'In re Shoe-smith (1938) 2-K. B. 637 (J)' where it was held that an appeal from an order of a Judge at Chambers giving leave under the Mental Treatment Act of 1930 to bring an action against the orders of a certified institution under the Mental Deficiency Act was an appeal in a matter of practice and procedure and therefore lay to the Court of Appeal).

6. Following the view consistently taken by the court ever since '35 Mad 1 (FB) (A)', I hold that the appeal is not competent and must be dismissed with costs in the cause.

7. There is one other aspect of the matter which I should not omit to mention. A question arose whether the defendants would have the right to challenge the correctness of the order under appeal at any later stage. The defendants have already filed an application for leave to defend. If that is granted, the defendants may not be any longer interested in getting the present order vacated. But in case leave to defend is refused, then a decree will follow. Against the decree the defendants would undoubtedly have a right of appeal. I think that in the appeal the defendants may also take the ground that the suit was not properly brought under Order 7 of the Original Side rules. This is on the principle embodied in Section 105, C. P. C. In -- 'A. S. Chettyar firm v. V. T. Veerappa Chettyar', AIR 1935 Rang 245 (K) this principle was applied in a case analogous to the case on hand. It was held there that an order granting conditional leave to defend to a defendant was not a judgment as the order merely regulated the procedure in the suit. But it was further held that it was open to the defendant to canvass the validity of the order under Section 105, C. P. C. when he appeals against the decree, The decision in -- 'Madanlal Lachmandas v. Kedarnath', A. J. R. 1930 Bom 364 at p. 365 (L) is another instance of the application of this principle. The defendants will therefore be entitled to canvass the correctness of the order now under appeal in the appeal against the decree.

Venkatarama Ayyar, J.

8. I agree.

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