(1872) 03 CAL CK 0008

Calcutta High Court

Case No: None

The Justices of The Peace for Calcutta		APPELLANT
	Vs	
The Oriental Gas Company (Limited)		RESPONDENT

Date of Decision: March 12, 1872

Judgement

Sir Richard Couch, Kt., C.J.

A preliminary objection was taken to the hearing of the appeal, on the ground that the order for the issuing of the mandamus was not a "judgment" within the meaning of clause 15 of the Letters Patent of 1865, and was therefore not open to appeal. We think that this objection is well-founded. Clause 15 provides that an appeal to the High Court shall lie "from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the said High Court." But the order of the learned Judge that the mandamus should issue is not a judgment. The mandamus which will be issued under it will not be a peremptory one, but merely to do certain things, or to show cause to the contrary; so that the order of the learned Judge does not determine any question whatever between the parties; it only initiates the proceedings by which the liability of the Justices to make compensation will be ascertained and determined. It was contended for the Justices, in support of the right of appeal, that the word "judgment" in clause 15 included any order affecting the interests of the parties, as was shown by the special limitation to a judgment "not being a sentence or order passed or made in any criminal "trial." But the orders in criminal cases here referred to are final orders, the alternative expression "sentence or order" being that which is almost invariably used in this country to describe the final result of a criminal trial, as may be seen in the Code of Criminal Procedure, particularly sections 387, 401, 405, and 417. 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--DeSouza v. Coles 3 Mad. H.C. Rep., 384. The Court there said that the word "judgment" in clause 15 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 Judges in that case seem, 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 (as the learned Judges of the Madras High Court point out) 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. Both classes are provided for in clauses 39 and 40 of the Charter. An order, such as that before us, which only authorizes a proceeding to be taken for the determination of the question between the parties, cannot be considered a judgment. It is, however, said that this Court has already put a wider construction upon the word "judgment" in clause 15 by entertaining appeals in cases where the plaint has been rejected as insufficient, or as showing that the claim is barred by limitation, and also in cases where orders have been made in execution. These however are both within the above definition of a judgment, and it by no means follows that, because we hold the order in the present case not to be appealable, we should be bound to hold the same in the cases referred to. For example, there is an obvious difference between an order for the admission of a plaint and an order for its rejection. The former determines nothing, but is merely the first step towards putting the case in a shape for determination. The latter determines finally so far as the Court which makes the order is concerned that the suit, as brought, will not lie. The decision, therefore, is a judgment in the proper sense of the term. It is also to be observed that this Court, though not governed by the CPC in the sense that the Courts of the mofussil are so, has nevertheless, under the authority of the Charter, declared "that all proceedings in civil cases which shall be brought before the Court, except proceedings in its admiralty, vice-admiralty, and matrimonial jurisdiction, and in its original testamentary and intestate jurisdiction, shall be regulated by Act VIII of 1859, and Act XXIII of 1861" (see Rule of April 4th, 1866); and we find that since this rule was made, it has been the practice to inquire into and determine the right of appeal by reference to the provisions of these two enactments. Thus, in the case of Chittoo Sheik v. Kazee Muzzur Hossein Hyde"s Rep. for 1864, 212, it was held by Norman and Levinge, JJ., that the refusal of a Judge to restrain the proceedings in a suit, on the ground that the costs of a previous suit had not been paid, was not open to appeal, because the order

was an interlocutory one, and did not fall (as was contended) within section 11 of Act XXIII of 1861 relating to the execution of a decree. So, in Apcar v. Howrah Bye 1 I.J., N.S., 237, it was held by Sir Barnes Peacock, C.J., and Morgan, J., that an appeal lay against a decree notwithstanding that it had been affirmed on review, inasmuch as section 378 of the CPC did not apply to judgments on review, but only to orders rejecting or admitting reviews. In Kumara Upendra Krishna Deb Bahadur v. Nabin Krishna Bose 3 B.L.R., O.C., 113, 117, a party was added on his own application as defendant to a suit, but the learned Judge who did so, refused to adjourn the case, in order that the party added might prepare his defence, thinking it unnecessary. After decree in favor of the plaintiff, both defendants appealed, and, amongst other objections, the original defendant objected to the addition of a party, whilst the added defendant objected to the refusal to postpone. In disposing of their objections, Sir Barnes Peacock, sitting with Mr. Justice Macpherson, quotes, verbatim, section 363 of the Code of Civil Procedure, and then holds, in accordance with the provisions of that section, that the first objection could not be entertained, because adding a party did not affect the merits of the suit; but that the second objection could, because the refusal to postpone, if erroneous or irregular, was a very important matter. These are the only cases we have been able to find in which the right of appeal on this side of the Court has been discussed; and in every case it has been determined with reference to the provisions of the Code of Civil Procedure. This seems to us to be a reasonable course. For, though the CPC was not by the second Charter made absolutely binding on this Court, it was clearly expected that so far as possible, it would be adopted by it, and, as before pointed out, this has been done.

2. We think that the proceeding by way of mandamus is a "proceeding in a civil case" within the meaning of the rule of the 4th of April, 1866. It is classed by English commentators amongst the remedies for private wrongs or civil injuries. Blacks tone says (3 Comm., 265) that, in cases within the statute 9 Ann 20 it is in the nature of an action; and it has no place in the Treatises on Pleas of the Crown by Sir Matthew Hale and Serjeant Hawkins. It is appended by modern English procedure to an ordinary civil action, and the ordinary Civil Procedure is (so far as may be) made expressly applicable to it (17 & 18 Vict., c. 125, s. 77); and we think it was intended by the rule of April 1866 already referred to, to make our own Civil Procedure (so far as may be) applicable to it also.

3. Reading, therefore (as this Court always has read it), clause 15 of the Charter in connection with the Code of Civil Procedure, we consider that the order of Mr. Justice Phear that the mandamus do issue, is not a judgment against which an appeal will lie.

4. It is further contended by the Advocate-General that, at least in regard to such cases as the present, where the party complaining might have a remedy by ordinary suit, the proceeding by way of writ of mandamus was obsolete, and that there was, in fact, no procedure by which the questions between the parties could be properly raised and tried: and, possibly, if this had been clear, it would have been proper for us to express our opinion that the present proceedings could not be maintained. But without entering at all into the question whether the party in this case had any other remedy, we think it

sufficient to say that there has never been any doubt that the High Court has still the power, which the Supreme Court certainly had, to issue a writ of mandamus in such cases as the present. The judgment of the Court is that the appeal be dismissed, and that the appellants do pay the respondents their costs to be taxed on scale No. 2.