CALCUTTA HIGH COURT

Lea Badin

Vs

Upendra Mohan Roy Choudhury

(Patterson,J.)

17.09.1934

JUDGMENT

Patterson,J.

1. The order from which this appeal has been preferred was made by Cunliffe., J. discharging an interim receiver appointed ex parte on the plaintiff's application pending her suit laid on the basis of an indenture of hypothecation. The order amounts to one rejecting an application to appoint a receiver. A preliminary objection has been taken to the competency of the appeal.

2. Under Clause 15, Letters Patent, there in unqualified right of appeal from the judgment of a single Judge on the Original Side. As regards the meaning of the word judgment as used in the clause, Courts in this, country have taken different views. So far as this Court is concerned the leading case on the point is that of Justices of the Peace of *Calcutta v. Orient Gas Co*[1]. in which. Couch C.J. said, We think 'judgment' in C1.15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be 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.

3. In more decisions than one of this Court this definition of 'judgment' given by Couch, C.J. has been described as classical; and yet in a long course of decisions this Court has repeatedly expressed the view that the definition is not absolutely exhaustive Mt. Brij *Commaree v. Ramrick Dass*[2] *Gour Mohon v. Nayan Manjuri*[3] *Mathura Sundari v. Haran Chandra*[4] *Budhulal v. Chattu Gope*[5] *and Ramendra Nath v. Braijendra Nath*[6] Treating this definition as not of an inflexing character and yet not expressly purporting to extend it, the Court has in numerous cases emphasized the necessity of scrutinizing the nature of the decision in each particular case in order to find out whether the decision amounts to a 'judgment' within the meaning of the clause. It may be observed that Couch, C.J. himself in he case of *Hadjee Ismail v. Hadjee, Mahomed*[7]held that an appeal lies under the clause from an order refusing to grant leave to the plaintiff to sue under Clause 12, Letters Patent, giving as his reason: It is not a mere 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. 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.

4. This reason, it must be admitted, would hardly bring the case within the definition given in Justices of the Peace of *Calcutta v. Orient Gas Co.*[8] because it is perfectly clear that the "right or liability" contemplated by the definition in that case must mean some right or liability which was the subject-matter of the controversy in the suit or proceeding. And we must respectfully dissent from those decisions which have held or have proceeded on the supposition that the expression "right or liability" in that case was not meant to be restricted to the controversy in the suit or the proceeding itself (e.g. *Chandi v. Jnianendra*[9] *In Kali Sundari v. Harish Chunder*[10]. an order refusing to transmit for execution an order of His Majesty in Council was held to be open to appeal under the clause. This decision was affirmed by the Judicial Committee on the ground that it came within the meaning of the word "judgment" in that clause because the transmission of the record was not a merely ministerial proceeding, and the Judge who had made the order had in fact exercised a judicial discretion and had come to a decision of great importance which, if it remained, would entirely conclude any rights of the decree-holder for an execution in the suit: *Harish Chunder v. Kali Soondery*[11]. It is not impossible to bring this reasoning within the definition in Justices of the Peace of Calcutta v. Orient Gas Co. (1872) 17 WR 364,(Supra) but in some cases an attempt has been made to treat it as the foundation for a doctrine that where a question of jurisdiction is involved there is a right of appeal, e.g. Ramendra Nath v. Braijendra Nath 1918 Cal 858. This view however is one with which we do not agree. Garth, C.J. in the case of Ebrahim v. Fuckrnnissa (1879) 4 Cal 531 laid down a definition in these words: I think the word 'judgment' means a judgment or decree which decides the case one way or the other in its entirety, and that it does not mean a decision or order of an interlocutory character which merely decides some isolated point not affecting the merits or the result of the entire suit.

5. It would seem that orders excluded by this definition from the category of judgments would also be excluded by the definition of Justices of the Peace of Calcutta v. Orient Gas Co. (1872) 17 WR 364(supra), but that this definition would bring within its scope orders which would put in peril the finality of a decision in favour of a party as "affecting the merits or the result of the entire suit a view which has been doubted in the decision of this Court in the case of *Brojo Gopal v. Amar Chandra*[12] In the last mentioned case the correctness of the decision in the case of *Sarat Chandra v. Maihar Stone and Lime Co. Ltd*[13]. in which it was held that an order setting aside an abatement is a judgment within the meaning of the clause, was also doubted. An examination of the decisions bearing upon the question reveals a position, which has been admitted in many of the more recent decisions, that judicial opinion in this Court has not been either uniform or consistent as regards the meaning of the word judgment' as used in the clause, and that the decisions are not easy to be reconciled.

6. The result could not have been otherwise when the Court purporting to take its stand upon the definition given in Justices of the Peace of Calcutta v. Orient Gas Co. (1872) 17 WR 364(Supra) has, in each particular case, sought to bring the relevant order within its scope, not unoften by using logic which, it has to be said within the utmost respect, is not sound. This conflict of authority has been pointed out in several cases amongst which reference may be made to the cases of *Mathura Sundari v. Haran Chandra*[14], *Budhulal v. Chattu Gope*[15] *and Brojo Gopal v. Amar Chandra 1929 Cal 214(supra). In Madras, White, C.J., in the Pull Bench decision in Tuljaram Rao v. Alagappa* [16]said:

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.

7. He laid down three tests for determining whether an order is a judgment within the meaning of the corresponding clause of the Madras Letters Patent. They are the following: (1) If its effect 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 (2) if the non-compliance therewith will have the effect of putting an end to such suit or proceeding; or (3) if it is passed in an independent proceeding which is ancillary to the suit (not instituted as a step towards judgment, but with a view to rendering the judgment effective when obtained), e.g., an order on an application for temporary injunction or for the appointment of a receiver.

Mookerjee, J.,

8. In several decisions of his, when characterizing the definition of Couch, C.J., in Justices of the Peace of Calcutta v. Orient Gas Co. (1872) 17 WR 364(Supra) as too narrow has referred to Tuljaram Rao v. Alagappa (1912) 35 Mad 1(Supra), and in at least one decision of his has, applying the tests laid down in the latter case, held a particular order to be a judgment' as it satisfied the third of the said tests: *Hadjee Ismail v. Hadjee, Mahomed*[17]. To remove the incongruity which appears in the decision of this Court and to lay down some definite rule by which orders might be tested when it has to be determined whether or not they are 'judgments' within the meaning of the clause, this Court will some day have to abandon its fond adherence to the antiquated definition of Couch, C.J., and boldly acknowledge its allegiance to the tests laid down by White, C.J. For the purposes of the present case however it is not necessary to go so far. As an order refusing to appoint a receiver, it comes, within the words of the third test of White, C.J., and is indeed one of the illustrations to the test which he himself has given.

9. As an order refusing an application for the appointment of a receiver based on a provision in the indenture of hypothecation, that on a breach of any one of the covenants contained therein the plaintiffs assignor would be entitled to have a receiver appointed, the order has determined a right which is one of the matters in the controversy itself, and so it satisfies the definition of Couch, C.J., as well. The order appealed from in this case is, in our opinion, a 'judgment' within the meaning of Clause 15, Letters Patent. We may add that there are decisions of this Court in which orders discharging or refusing to discharge a receiver appointed in a suit, after the suit had come to an end or had become infructuous, have been held to be judgments,' and so appealable: e.g., *Mt. Brij Commaree v. Ramrick Dass*[18] and Baidyanath Sen v. Rajendra Nath Sen 1930 Cal 803. But there is another and a far simpler ground on which it must be held that an appeal is competent. The order in the present case is one for which a right of appeal is provided in Clause (s), Rule 1, Order 43 of the Code. Under the present Code (Act 5 of 1908) it cannot be contended that the Code and the Rules made under it do not apply to an appeal from a learned Judge of the High Court; such a contention was elaborately dealt with and repelled in the case of *Mathura Sundari v. Haran Chandra 1916 Cal 361(Supra).*

10. Turning now to the merits of the appeal, we must say that we are unable to find any sufficient ground on which the order of the Court below may be supported. We have' been referred by learned Counsel for the respondent to a judgment of the said Court in another suit, to which the present appellant was no party, as containing reasons which would justify the present order. We have read that judgment, but we cannot see how what has been said therein touches the

controversy in the present suit and may in any way affect the question of appointment of a receiver which has been asked for on the strength of a stipulation contained in the indenture. That there has been a breach of at least two of the covenants in the indenture is a fact which must be held to have been prima facie established. It is possible that there has also been some deterioration of the security for which the defendants are responsible; but on this point we do not consider it necessary to express any definite opinion.

11. The defence is that the covenants are not enforceable or, at any rate, are not enforceable in their entirety. That defence will have to be considered at the hearing of the suit itself; and it is far from clear that it can be regarded as well-founded at the present stage. The breach having been prima facie established it is clearly just that a receiver should be appointed, for that is what the parties had bargained for in the indenture itself. We are not satisfied that any circumstance exists which may be taken as indicating that the appointment of a receiver would be anything but convenient; indeed, the parties themselves appear to have considered in their contract that it would be convenient. The appeal, in our judgment, should be allowed, and we order accordingly. The order of Cunliffe, J., is set aside and it is ordered that the Official Receiver do forthwith take possession as prayed for on behalf of the appellant. The appellant will have her costs of this appeal and of the costs of the application in the Court below. The receiver will take possession before the order is drawn up and on counsel's endorsement only.

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12. I agree.

Cases Referred.

1(1872) 17 WR 364
2(1901) 5 CWN 781
31922 Cal 172
41916 Cal 361
51918 Cal 850
61918 Cal 858
7(1874) 21 WR 303
8(1872) 17 WR 364
91919 Cal 667
10(1881) 6 Cal 594
11(1883) 9 Cal 482
121929 Cal 214
131922 Cal 335
141916 Cal 361
151918 Cal 850
16(1912) 35 Mad 1
17(1874) 21 WR 303
18(1901) 5 CWN 781