CALCUTTA HIGH COURT

Union of India

Vs.

Khetra Mohan Banerjee

A.F.O.D. No. 116 of 1955

(K.C. Das Gupta C.J. and H.K. Bose, J.)

04.06.1959

JUDGMENT

K.C. Das Gupta, C.J.

1. This appeal is from a decision by Mitter, J. in a suit brought by the respondent Khetra Mohan Banerjee, a contractor, against the appellant the Union of India for a sum of money said to be due to him for work done in accordance with a contract, by which the learned Judge after recording his decision on several of the issues has directed a reference for the ascertainment of the amount due and payable by the defendant to the plaintiff, after

> "(1) ascertaining on evidence the market rate for 145 items of work out of the 170 items done by the contractor;
> (2) ascertaining the increase in labour charges in respect of the excess quantities of work done under the remaining 25 items; and
> (3) determining the quantity of work done under the different items on the basis of the measurement books, Exhibit 'C' series and the correspondence which the plaintiff addressed to the authorities, the Referee being given liberty to rectify "arithmetical and other manifest mistakes." and ordered payment of interest at 6 per cent on the amount found due from 30-1-47.

2. Briefly stated the plaintiff's case as mentioned in the plaint was that tender having been invited on behalf of the Government of India, Public Works Department, in P.W. D. Form No. 6 lor construction of 20 officers' quarters in Calcutta, he submitted his tender and this was accepted, but that ultimately he signed contract documents in P. W. D. Form No. 7; that after work was commenced on and from the 11th of May 1945 on plans and specifications and drawings which were given to him on the 11th of May 1945, the work he was asked to do and which he actually executed differed considerably from the original plans, specifications and drawings and that 145 items of the 170 items altogether executed being absolutely new and different, he is entitled to get his remuneration for these items on the basis of rates and analysis submitted by him. For the remaining 25 items the plaintiff claimed remuneration at 15 per cent over the tender rates "on

account of the increase of wages of labor etc." His case was that the analyses submitted by the plaintiff had been accepted on behalf of the Government of India and/or Governor General in Council and his claim at 15 per cent increase had also been so accepted. The total amount due, according to him, for the work done on the basis of the rates as claimed applied to the quantity of work done for the different items, amounted to Rs. 6,02,475/-. After giving credit to Government for the sum of Rs. 1,66,040-7-0 said to have been received in the shape of materials and Rs. 1,46,136-4-0 received by cheques, he put his claim at a sum of Rs. 3,11, 895-5-0 and for recovery of this amount he brought the present suit. The defence contention was that the plaintiff was bound by the terms of the agreement as executed by him in P. W. D. Form No. 7 but that he was not entitled to the rates submitted by him as analyses rates as these analyses were never accepted. The defendant also denied that the plaintiff was entitled to an enhanced rate of 15 per cent over the tender rates in respect of any item. It was, further, urged that the work done fell under 116 items - 27 of the items being contained in the schedule to the agreement, 16 being altered items of work done under clause 12, 4 being substituted items of work under clause 12A and 69 more being additional items of work done under clause 12A of the agreement. The defendant contended that on the rates accepted and sanctioned by the competent authority after due consideration of the analyses of rates submitted by the plaintiff, the plaintiff was entitled for his work to a sum of Rs. 3,55,009/- out of which he had already received Rs. 2,03,397-4-0 towards materials supplied for work and Rs. 1,46,139-4-0 by cheques and only an amount of Rs. 6,472-8-0 remained due to the plaintiff. It appears that at the trial the plaintiff based his case on the contract as in P. W. D. Form No. 7 and claimed analyses rates for 145 items on the basis of clause No. 12 in (hat contract and an enhanced rate for 25 items on the basis of clause 12A thereof. It also does not appear to have been seriously disputed that 145 items of work were work of the nature for which the contractor was entitled to submit analysis rates within 7 days of the placing of the order therefore. The question raised in issue no. 2 was, therefore, the most important question raised, namely, whether the analyses of rates submitted by the plaintiff were accepted by the defendant and whether these analyses were binding on the defendant. Both parts of the question were answered by the learned Judge in the affirmative. The answers given by him to the different issues were as follows :-

> "Issue No. 1 - The contract between the parties was embodied in the document referred to in this suit as P. W. D. Form No. 7.
>
> Issue No. 2 - The analyses of rates submitted by the plaintiff must in my view be held to have been accepted by the defendant. The rates mentioned in the analyses were binding upon the defendant provided there were no arithmetical or other manifest mistakes. In view of the extremely fair attitude taken up by the learned standing counsel on behalf of the defendant that the plaintiff should be paid for the work concerned at reasonable rates which I regard as market rates and in view of my direction in that regard the finding that the analyses were binding upon the defendant is of little practical effect.
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> Issue No. 3 - It is common case that 25 items of work were done as per schedule to the contract. In paragraph 10 of the written statement it is stated that 27 items of work were in accordance with the schedule to the tender. This is a mistake. It should be 25 as paragraph 12 shows. The plaintiff furnished a list showing what items were done according to the schedule to the tender. This statement is supported by the plaintiff's evidence and can, therefore, be taken as containing items of work for which the rates quoted in the tender

should be applicable. If the plaintiff is able to prove his case under clause 12A then he will be entitled to add not more than 15 per cent on account of labor charges for excess quantities alone.

Issue No. 4 - The rest of the items, 145 in number must come under clause 12 of the contract, I have already indicated the method to be employed in determining the value of this quantity of work.

Issue No. 5 - I have already dealt with this topic. It is not necessary to answer the issue as framed. I have also held that there was no need for any decision final or otherwise by the Superintending Engineer.

Issue No. 6 - I have already indicated what the plaintiffs present case is under clause 12A of the contract.

Issue No. 7 - My comments with regard to this issue are those I have already made in connection with issue No. 5. It being common case that the rights of the parties are to be governed by contract, issue No. 8 does not arise for consideration.

Issues Nos. 8 and 9 - As above.

Issue No. 10 - If the plaintiff can prove the rise in the labor charges, he would be entitled to get a percentage added depending upon the extent of the rise but as he has not claimed anything more than 15% he can only get up to 15%.

Issue No. 11 - It transpired in the course of the plaintiffs evidence that Government had not given the plaintiff credit for quantities of materials taken away by them. This is a comparatively simple matter and can be dealt with in the reference upon both sides adducing evidence as to what are called "recoveries". The value of the recoveries will be determined by the Referee on the basis of the rates which are given in the tender except as to logs of wood the value as to which must be determined upon evidence. The value to be determined must in this case depend upon the current market rates.

"There is no question of want of jurisdiction to try the suit. Mr. Hazra contended that issues Nos. 5 and 7 did not arise. Whether that is so or not is immaterial in view of my finding that the analyses of rates concerned must be deemed to have been accepted by the defendant.

"With regard to the quantity of work clone by the plaintiff its determination appears to me to be also a simple matter. The plaintiff as I have said before accepts the measurements mentioned in the measurement books Ex. C scries although and rightly he does not accept any remarks that may be there or the description of the work in other words, its nomenclature. In addition to the measurement books there is the correspondence which the plaintiff addressed to the authorities pointing out that the quantum of certain other work was not entered in the measurement books. I have already referred to the chart which the plaintiff put in about this extra quantity of work. The parties are at liberty to point out and the Referee is at liberty to rectify arithmetical and other manifest mistakes."

3. Three main points were raised in the appeal. The first is that the learned Judge was wrong in his conclusion that the analysis-rates were accepted by the defendant or that they were binding on

the defendant and that in any case the learned Judge was not entitled to ask the Referee to ascertain the market rate. Next it was urged that the learned Judge was wrong in his conclusion that the plaintiff was entitled to an extra not exceeding 15 per cent. on the basis of increase in labour charges, provided such increase was proved; thirdly it was urged that the learned Judge was wrong in directing the Referee to take into consideration correspondence addressed by the plaintiff to the authorities in ascertaining the quantity of work done. Objection was also taken to the Judge's directions about interest and sale-tax and to the directions about the correspondence being examined as regards the quantity of work done.

4. Before we cap proceed to the consideration of the merits of the appeal, it is necessary to consider the preliminary objection raised on behalf of the respondent. The objection is that the decision by the learned Judge docs not amount to a judgment within the meaning of Clause 15 of the Letters Patent. It is urged that not only does it not finally adjudicate the matters in controversy between the parties, but that it does not even amount to a preliminary decision of the substantial matters in issue leaving subsidiary matters to be worked out. As is well known, there is considerable divergence of views between this High Court and other High Courts in India as regards the connotation of the word "judgment" in Clause 15 of the Letters Patent. In the recent case of *Asrumati Debi v. Kumar Rupendra Deb*[1], the Supreme Court had occasion to refer to this divergence of opinion but has not made its own pronouncement in the matter, as it was unnecessary to do so on the facts of the particular case. That presents no difficulty to us, as so far as this Court is concerned, the pronouncement of Sir Richard Couch and other Judges in Justices of the *Peace for Calcutta v. Oriental Gas Co. Ltd*[2]. in this question has always been accepted as the guide. The material portion of this pronouncement is in these words :-

> "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." Commenting on the words used by Sir Richard Couch, Mukherjea, J. pointed out in Asrumati Debt's case AIR 1953 Supreme Court 198 :-
> "It cannot be said, therefore that according to Sir Richard Couch every judicial pronouncement on a right or liability between the parties is to be regarded as a 'judgment', for in that case there would be any number of judgments in the course of a suit or proceeding, each one of which could be challenged by way of appeal. The judgment must be the final pronouncement which puts an end to the proceeding so far as the Court dealing with it is concerned. It certainly involves the determination of some right or liability, though it may not be necessary that there must be a decision on the merits."

It often happens that as regards the merits about the right or liability, the parties are at issue on several different questions, some of which can be considered the cardinal issues and the rest supplementary issues in the sense that they involve only the working out the result of the decision of the cardinal issues. Of the cardinal issues also there may be several. It will be an intolerable situation if every order deciding one of the several cardinal issues is considered a judgment and therefore appealable. In that case there would be an appeal in respect of each of

these issues and the result would be fair to neither party nor to the Courts of law. In the light of the observations of Mukherjea, J. mentioned above, it seems to me reasonable to think that it is only where all the cardinal issues in the particular matter being considered by the Court is being determined that a

[1] AIR 1953 SC 198
[2] 8 Beng LR 433

judgment can be said to have came into existence; where along with the determination of these cardinal issues the subsidiary issues are also being determined so that there is a final adjudication of every matter in issue, the judgment is a final judgment. Where only the cardinal issues are being determined and subsidiary issues are left for further determination, it is an interlocutory judgment.

5. Thus where in a suit for ejectment the parties are at issue as regards the sufficiency of the notice, as regards the service of the notice and as regards the existence of the grounds which would disentitle the tenant from protection from ejectment decree as under a special law, an order determining only the sufficiency of the notice or about the validity of notice or as regards only the existence of grounds which would disentitle the tenant, would not be a judgment at all. The decision must embrace all these cardinal issues before it can deserve the status of a judgment, within Clause 15. The law, however, recognises cases where even after the disposal of the cardinal issues other matters have to be worked out before the whole case or suit can be determined. A number of such cases are mentioned in Order 20 of the Civil Procedure Code, as cases where a preliminary decree ought to be made at first and a final decree at a later stage. Dr. Gupta has contended that the cases mentioned in these rules of the Civil Procedure Code are the only cases that can arise of cardinal issues being determined and other matters being left to be worked out subsequently and that the decision appealed from, not being covered by any of the rules mentioned in the Civil Procedure Code which mention cases where preliminary decrees ought to be made the order should not be held to be preliminary or interlocutory judgment.

6. I am unable to agree that these rules in Order 20 of the Civil Procedure Code give exhaustive list of all classes where preliminary judgments may be delivered by the Court. Reference may be made in this connection to the weighty observations of the bench consisting of Mookerjee, J. and Rankin, J. in *Peary Mohan Mookerjee v. Manohar Mookerjee*[3], in these words :-

> "It is not essential that an adjudication should be covered by one of the specific cases of preliminary decrees mentioned in Order 20 of the Code in order that it may form the basis of a final decree; those cases are illustrations of preliminary decrees and help us in determining the true meaning of the definition of the term "decree." Whether the order made by the Judge possesses the qualities of a decree, preliminary or final or partly preliminary and partly final, clearly depends upon its contents."

7. Looking at the contents of the order that was made by Mitter, J. in this case, I am of opinion that in so far the order directed a reference for the ascertainment of the market rate and also in so far as it made a reference for the ascertainment of the extent of the rise in labour rates, if any and thus deliberately refrained from deciding the cardinal matter in controversy, namely, as regards the rates at which the contractor was entitled to payment, there was no adjudication of the real matters in controversy and so the decision was not a judgment within the rule laid down by Sir

Richard Couch.

8. If that was all, I would be prepared to accept the preliminary objection raised by Dr.
[3]27 Cal WN 989 : AIR 1924 Cal160
Gupta. Complication is, however, introduced into the matter by the fact that the order now appealed from, apart from making reference on the points indicated above, also made a reference as regards the quantity of work actually done. This part of the order should reasonably be held to be in accordance with Order 20 Rule 16 and if it stood alone would, in my opinion, satisfy the requirement of a judgment within the meaning of Clause 15 of the Letters Patent. As, however, was pointed out by the Privy Council in *Ahmed Musaji Saleji v. Hashim Ebrahim Saleji*[4], in these words :

> "The Code makes no provision for something which is neither a decree nor an order, nor for anything which is both, neither does it provide that one adjudication by the Court can be resolved into divers elements, some of which are decrees and some orders."

In that case, a suit to wind up a partnership and to have accounts taken, the membership of the firm was in dispute, certain persons being by the plaintiff alleged to be partners and by the defendants to have been only employees remunerated by the share of the profits - Fletcher, J. made an order on the 30th of August 1909 declaring

> "that the partnership was dissolved on 1st July 1907 and referring to the Assistant Referee of the Court (a) to inquire who were the partners entitled to share in the assets and goodwill of the partnership business; and (b) to take an account of the dealing of the parties with the partnership business without disturbing any settled account. The decree further declared that if the respondents Ismail Ebrahim. Saleji and Yusuf Musaji Saleji and the appellant Mahomed Musaji Saleji should be found not entitled to share in the assets and goodwill of the partnership, they were nevertheless entitled to share in the profits of the business up to the date of the dissolution of the partnership.'" From this order none of the parties appealed. After the Assistant Referee made his report on 3rd July 1911, a number of exceptions were filed by 3 of the defendants which were all heard by Fletcher, J. and discharged with costs and the report was confirmed by a decree dated 22-4-1912. In the appeal from that decree the question was raised on behalf of the defendants that the Judge ought not to have referred to the Assistant Referee to ascertain who were the members of the partnership. The Court of appeal held that no appeal having been preferred from the original order making the reference, no objection could be taken then. The learned Judges agreed that the trial Judge made a mistake in delegating to the Assistant Referee the decision of the complicated question involved in the first enquiry and that the question involved should have been determined by the learned Judge himself before the preliminary decree. It was held, however, that in spite of this the order made should be considered a preliminary decree and consequently no appeal having been preferred therefrom, section 97 of the Code was a bar to the appeal against the final decree. Their Lordships of the Privy Council agreed with this view and after making the

observations to which I have already referred, said :

"This was in substance a decree; it did not cease to be such, because a subordinate part of it, if correctly made, might have been separately made as an order."

9. I am of opinion, that we are bound by the above decision of the Privy Council to hold

[4] ILR 42 Cal 914

that the order made by the learned Judge in the present case should also be considered as a whole a preliminary decree and thus a judgment within the meaning of clause 15 of the Letters Patent. On that ground I think the preliminary objection should fail.

10. Coming to the merits of the appeal it appears that on the question of acceptance of the analysis rates and such acceptance being binding on the defendant, the decision depends on a construction of clause 12 of the contract. The clause which has been fully set out in the judgment appealed from, clearly means, in my opinion, that when work for which no rate is specified in the contract or is not entered in the schedule of rates, the contractor has the right to inform the Engineer-in-Charge of the rate which it is his intention to charge for such class of work and that this right has to be exercised within 7 days of his receipt of the order. The Engineer-in-Charge has the right not to agree to this rate, but if he does not agree, it is his duty to inform, the contractor of such non-acceptance and to cancel his order; and if such cancellation is made, the portion of the work already carried out will be paid at rates as may be fixed by the Engineer-in-Charge and in case of dispute, at rates as may be decided upon by the Superintending Engineer of the circle. From the words used in this clause it is, in my opinion, reasonable to conclude that the intention of the parties was that if no cancellation order is given, it will be presumed that the rate as quoted by the contractor has been accepted. That is the view taken by the learned Judge who has held that in the circumstances of the present case the Engineer-in-Charge by not having intimated rejection of the rates quoted by the contractor must be presumed to have accepted the same. In my opinion that decision is entirely right.

11. The only other question raised as regards these rates as quoted by the contractor - referred to as analysis rates - is that in any case the contractor had not made these quotations within 7 days of the placing of the order. The oral testimony of the plaintiff is that in every case he made his quotation within 7 days from the date of the order. Against this there was the oral testimony of the Engineer-in-Charge Mr. Guha, which the learned Judge could not believe. After having been taken by Mr. Sen through the relevant portions of the evidence, I have no hesitation in agreeing with the learned trial Judge that the plaintiff's case that these quotations were sent within 7 days from the receipt of the order to do that particular item of work is true. The conduct of the Engineer-in-Charge in not raising any objection at any stage that the quotations were not received within 7 days and the further fact that in the written statement filed by the defendant there was no suggestion that these analysis rates had been sent within 7 days from the date of receipt of the work, are strong factors which support the plaintiff's version.

12. I am, therefore, of opinion that the learned Judge was right in his conclusion that the analysis rates were accepted and were binding on the defendant.

13. I have found it difficult to understand why in spite of this the learned Judge thought it necessary to order a reference. It appears to me that it was at the request of the defendant that he

did so in spite of the fact that his finding that the analysis rates were accepted entitled the plaintiff to payment at those rates for these 145 items of work. In my opinion, the learned Judge made an error in ordering reference on this point but the error is one in favor of the defendant. The plaintiff not having challenged the correctness of the order for reference by appeal or by cross-objection, the order must be allowed to stand.
14. I have found it difficult to understand the objection of the learned counsel for the appellant that even if the learned Judge was right in ordering a reference for the ascertainment of reasonable rates, he was wrong in thinking that reasonable rates were identical with the market rates. In the absence of anything to the contrary it would ordinarily be right to think that the prevailing market rate at any point of time is the reasonable rate. There is, in my opinion, no substance in the objection raised by the appellant that enquiry should have been ordered for the ascertainment of the reasonable rate as distinct from the market rate.

15. The next point raised in the appeal is that the learned Judge erred in making a reference for the ascertainment of a rise in labor rates as regards "excess quantities under 25 items" included in the tender. It appears that clause 12A which originally formed part of the contract form was superseded by a new clause 12A. In my opinion the learned Judge was right in thinking that it was the new clause 12A which was included in the present contract so that the contractor would be entitled to claim revision of rates in respect of rise in price of labour also provided, he made such a claim within 7 days.

16. It is urged on behalf of the appellant that the plaintiff has not shown that any such claim was made within 7 days from the date of the receipt of the order. This objection that the claim was not made within 7 days does not appear to have been raised before the learned Judge nor has it been mentioned in the grounds of appeal. The issues as framed did not specifically raise this question. In consideration of all the circumstances I have come to the conclusion that the appellant should not be allowed to raise this objection in this Court for the first time.

17. The appellant next contends that the learned Judge erred in law in directing that upon the amount to be found by the Referee as due to the contractor interest at 6 per cent will run from the 30th January 1947. The suit was brought on the 24th of March 1948. No objection can, therefore, be taken to the order for interest on the amount found due as from the date of the institution of the suit. The interest will be not on the amount found by the Referee due to the contractor but the amount which Court decrees as due to the contractor. As regards the period, the 30th January 1947 to the date of the institution of the suit, it is however difficult to support the order for payment of interest. In *B. N. Rly. Co. Ltd. v. Ruttanji Ramji*[5], which was also a case for recovery of a sum on account of work done under contract, it was found the original contract rates had been abandoned and that the price of the work done had to be determined by the Court on the basis of fair and reasonable rates. It was found that the Railway was liable to pay the amount thus assessed to the plaintiffs on the 26th of July 1925 and the plaintiffs claimed interest on the money for the period during which it was withheld from them. As regards the period from July 26, 1925 up to the date of the institution of the suit the Privy Council held that the interest could not be allowed. Their Lordships pointed out that interest for the period prior to the date of the suit may be awarded if there is an agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of law, or under the provision of any substantive law entitling the plaintiff to recover interest. In that case there was neither usage nor any contract, express or implied, to justify the award of interest. Under the Interest Act, XXXII of 1839, the Court may

allow interest to the plaintiff if the amount claimed is a sum certain which is payable at a certain time by

[5]65 Ind App 66

virtue of a written instrument. The Interest Act, also, contained a proviso that "interest shall be payable in all cases in which it is now payable by law." After stating that this proviso applies to cases in which the Court of Equity exercises jurisdiction to allow interest, their Lordships pointed out that mere detention of money due under a contract would not attract any rule of equity and consequently though the amount due had been detained for over a year prior to the date of the institution of the suit it was not a case where interest was payable by law.

18. In my judgment we are bound by this authority to hold that on the facts of the present case also no interest can be allowed for the period from the 30th January 1947 to the date of the institution of the suit in November 1948. It has to be noticed also that it was not stated in the plaint that notice under the Interest Act was given and no issue was framed on that question. Interest cannot, therefore, be ordered under the Interest Act. It is impossible again to say in the face of the above authority that the mere detention of the amount due attracts any rule which would have been applied in a Court of Equity.

19. My conclusion is that the order of the learned Judge in so far as it allowed interest for the period from 30th January 1917 to the date of the institution of the suit cannot be sustained.

20. Objection was next taken to the order of the learned Judge directing the Special Referee to "calculate the Sales Tax payable in respect of work done by the plaintiff as per Bengal Sales Tax Act." It is pointed out that no claim for sales tax in respect of work done by the plaintiff was claimed in the plaint nor was an issue framed. In my opinion there is substance in this contention and the order of the learned Judge directing the Referee to calculate sales tax according to the Bengal Sales Tax Act cannot be sustained.

21. Lastly it is contended that the learned Judge is wrong in making an order that the costs of the reference should be paid by the defendant. The practice in such matters - in my opinion the practice is in accordance with law and good sense - is to reserve the costs of reference till the result of the reference is known. It is at that stage that the Court is in a position to decide whether the plaintiff should pay the costs or the defendant should pay the costs or each should pay part of the costs. I can find no circumstance which would justify any departure from the practice. The learned Judge's order as regards the costs of the reference being paid by the defendant should, therefore, be set aside.

22. It was further argued that the learned Judge was not justified in directing the Referee to consider the correspondence that passed between the parties as regards certain quantities of work done even though such work does not appear in the measurement book. On a reasonable reading of the judgment of Mitter, J. it appears to me that the fact that the measurement books did not contain a full record of all the work done by the plaintiff and that some work mentioned in letters addressed by the plaintiff to the Engineer-in-Charge or other officers was done in addition to what is recorded in the measurement book was not challenged before the learned Judge. I am unable to see anything on the record to indicate that the learned Judge was wrong in taking this view. It is impossible, therefore, to interfere with the direction given to the Referee to consider the correspondence which the plaintiff addressed to the authorities pointing out the quantum of

certain other work not entered in the measurement books.
23. On the above findings I would allow the appeal in part and modify the decree made by the learned Judge in the following manner :

> (1) the defendant would be liable to pay interest at 6 per cent per annum on amount due to the plaintiff from the date of the institution of the suit until realisation and not from 30th January 1947.
> (2) The direction of the learned Judge as regards sales tax be set aside.
> (3) The order of the learned Judge directing the defendant to pay the costs of the reference be set aside. The question of costs for reference be reserved. Subject to the modifications mentioned above, the decree of the learned Judge will stand.

24. Parties will bear their own costs in this Court. Certified for two Counsel. The interim stay will stand vacated.

H. K. Bose, J.

25. This appeal arises out of a contractor's suit for price of work done and labour and materials supplied.

26. In March 1945 tenders were invited on behalf of the Government of India, Public Works Department, for construction of certain temporary buildings for officers' quarters in Calcutta. The plaintiff who carries on business of a Building Contractor at 16, Mangoe Lane, Calcutta, submitted his tender containing rates, specifications and schedule of the quantities of work to be done and this tender was accepted on behalf of the Government of India. Although the tender was for construction of temporary structures with Raneegunje tiles roofing or corrugated iron-sheets roofing, the plans, specifications and drawings which were actually handed up to the plaintiff when he commenced work on 11th May 1945 were for construction of permanent buildings for the said officers' quarters and the plaintiff was requested to undertake this work of an entirety different nature. The plaintiff from time to time submitted analysis of rates for the work he was entrusted with and during the progress of the work he signed the contract instruments in P. W. D. Form No. 7 on 13th July 1945. The case of the plaintiff is that he signed the contract documents without prejudice to his right that he was entitled to receive remuneration on the basis of analysis of rates submitted by him. On the 24th August, 1945, the plaintiff pointed out that due to labour charges having increased in the meantime he was constrained to ask for an increase in the labour rate by 15 per cent over and above the estimated rate of tender as also in the labour rate of works for which analysis had been submitted by the plaintiff. It appears that the plaintiff had to do 145 items of extra work over and above 25 items of work which were scheduled in the Original tender which had been invited. The work was completed in December 1945. After giving credits for the payments which had been made by the Government from time to time the plaintiff on 5th April 1948 filed the suit out of which this appeal arises for decree for Rs. 3,11,895/5/- and alternatively for accounts and inquiries and decree for the amount that may be found due, together with interest and costs.

27. The Issues that were raised before the learned trial Judge were as follows:

1. What was the contract between the parties?
2. Where the analysis of rates submitted by the plaintiff accepted by the defendant as alleged in the plaint? Were the said analysis binding upon the defendant?
3. Were any items of work done under the contract as per its Schedule? If so, what are those items and what is the value thereof as per the schedule?
4. Were any items of work done under clause 12 of the Contract? If so, what are those items and what are the respective rates at which such items of work are to be paid for and what is the total value thereof?
5. Were rates in respect of any such items agreed to by the Engineer-in-Charge? Was there any final decision regarding the same or any of them?
6. Were any items of work done under clause 12A of the Contract? If so, what are those items and what are the respective rates at which such items of work are to be paid for and what is the total value thereof?
7. Were rates in respect of any of such items agreed to by the Engineer-in-Charge? Was there any final decision regarding the same or any of them?
8. Were any items of work done outside the contract, being work not covered by the Schedule to the contract and also not covered by clause 12 and clause 12A of the contract? What is the value thereof at market or reasonable rates?
9. Is the plaintiff entitled to any payment in respect of such outside work? If so, upon what basis?
10. Is the plaintiff entitled to get up to 15 per cent over the estimated rates as claimed in paragraph 14 of the plaint?
11. What materials and services were supplied by the Government? What is the value thereof?
12. To what relief, if any, is the plaintiff entitled?

28. An additional issue as to jurisdiction was also raised to the following effect:
Has this Court jurisdiction to try any part of the cause of action in this Suit?

29. The learned Judge has given his decision on all the Issues and he passed a decree directing a reference and appointed a special referee to report within a period of two months from the date of the issue of the Writ, the amount due and payable by the defendant to the plaintiff. The learned Judge by his decree also gave certain directions for payment of interest and costs.

30. The material portion of the decree that has been actually drawn up and is dated the 30th March, 1954, is as follows :

> "it is ordered and decreed that the further hearing of this suit be adjourned and that it be referred to Mr. B. N. Chawdhuri, B. E., M.I.E., M. R.

S.I. (London) Engineer .... to take ....the account following that is to say :

> (a) An account of the quantity of work done by the plaintiff in respect of twentyfive items of tender work and one hundred and forty five items of work hereinafter mentioned with reference to the five measurement books being Ex. C in this Sun etc...............
> (b) An account as to what sum is due and payable by the defendant to the plaintiff for twentyfive items of work done by him pursuant to the tender in the said plaint in this suit mentioned and in taking such account the said Special Referee do allow the rates

mentioned in the Schedule of the said tender less seven and half per cent and he do also allow an increase of fifteen per cent for labor only in respect of quantities of work in excess of those mentioned in the said tender provided there had been an increase of labor charges at that lime in the market.

(c) An account as to what sum is due and payable by the defendant to the plaintiff for one hundred and forty five items of new work done by him in the said plaint mentioned and in taking such account the said Special Referee do determine the rates for the said items of work in conformity with the then prevailing market rates.

(d) An account of the "recoveries" in respect of materials supplied and services rendered by the defendant to the plaintiff and in taking such account the said Special Referee do determine the value of such "recoveries" on the basis of the rates given in the said tender except as to logs of wood the value whereof is to be determined by him at the prevailing market rates. and it is further ordered and decreed that the said Special Referee do circulate the sale tax payable under Bengal Sales Tax Act in respect of the works done by the plaintiff...........and it is further ordered and decreed that the defendant shall be liable to pay interest on the sum to be found due to the plaintiff on taking of accounts as aforesaid at the rate of 6 per cent per annum from the 30th January, 1947 until realization and it is further ordered and decreed that the defendant do pay to the plaintiff his costs of this suit and of the reference herein............... and this Court doth reserve the consideration of all further directions until after the said Special Referee taking the aforesaid account shall have made his report............"

31. A preliminary objection has been raised as to the maintainability of the appeal. It is argued that the decision of the learned trial Judge is not a "judgment" within the meaning of Clause 15 of the Letters Patent nor can it be regarded as a preliminary or a final decree from which an appeal lies. It is submitted that the preliminary decrees which a Court can pass are enumerated in or. 20, Rules 12 to 18 and in or. 34 of the Civil Procedure Code and the Court has no power to pass any other kind of preliminary decree not contemplated by the Code. It is pointed out that the decree or order as drawn up shows that the learned trial judge has adjourned the further hearing of the suit and he has delegated the matter of determination of the rates and increase of labor charges and other matters to the Special Referee. So the suit is still pending before the trial Court and as the two matters, namely, ascertainment of rates and the increase of labor charges cannot properly form the subject matter of delegation to a Referee the decree by which these matters were delegated for determination by the Referee cannot be regarded as a preliminary decree. Reference has also been made to Chapter XXVI of the Original Side Rules of the Calcutta High Court to show that the rules do not confer any power on the Court to pass new kinds of preliminary decrees.

32. Now the expression "Decree" has been defined in Section 2(2) of the Code of Civil Procedure as the

> "formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in

controversy in the Suit and may be either preliminary or final."

33. In the Explanation which is appended to this definition of the decree it is stated that :

> "A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

34. The pronouncement of Sir Richard Couch C.J. as to the meaning of the expression "Judgment" in Clause 15 of the Letters Patent of the Calcutta High Court in the oft-cited case of 8 Beng LR 433 and from which later cases of this Court have drawn their inspiration is as follows :

> "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."

Later on the learned Chief Justice further observed : "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."

35. The Supreme Court in the case of AIR 1953 Supreme Court 198 has referred to this decision of Sir Richard Couch and the two Full Bench decisions of the Madras High Court and the Rangoon High Court reported in *Tuljaram v. Alagappa*[6], and *Dayabhai Jivandas v. Murugappa*[7], where Sri Arnold White C.J. and Page C.J. have attempted to formulate a comprehensive definition of the word "Judgment", as appearing in the different Letters Patent.

36. Dr. Atul Gupta referred to the decision of the Judicial Committee reported in ***Abdul Rahman v. D. K. Cassim and Sons, 60 Ind App 78 : (AIR 1933 PC 581*** and also to the cases referred to in that decision and submitted that if a suit is still a live suit in which the rights of the parties have still to be determined, then notwithstanding that some vital issues have been decided, no appeal will lie.

37. I am unable to see why the decision of the learned trial Judge in the case before us cannot be regarded as a Preliminary Decree. It is provided in or. 20, R. 16 of the Code of Civil Procedure that :

> "In a suit for an account of pecuniary transactions between a principal and an agent and in every other suit not hereinbefore provided for where it is necessary in order to ascertain the amount of money due to or from any party, that an account

[6] ILR 35 Mad 1

[7] ILR 13 Rang 457: AIR 1935 Ran 267 (FB)

should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit." It is, therefore, clear that the expression "in every other suit not hereinbefore provided for "empowers the Court to pass a preliminary decree directing taking of accounts even in suits which are not suits for an account between a principal and an agent.

38. It is a long standing practice of the original side of this High Court to pass decrees in the nature of preliminary decrees directing references or inquiries which involve questions of detail which it would be wasting the time of the Court to investigate. Chapter xxvi of the Original Side Rules is designed to meet such a purpose. In the case of *D. N. Ghose and Bros. v. Popat Narain Bros*[8]., Jenkins C. J. and Woodroffe J. pointed out that as a general rule splitting up of the trial into two enquiries - first as to the right and secondly as to the amount of damages was not desirable but sending an action to a referee might be necessary in some cases where an inquiry would involve questions of detail and investigation by the Court would entail considerable loss of time of the Court.

39. As I have pointed out already there is an alternative prayer for accounts and enquiries in the plaint filed by the respondent, before us. The decree passed by the learned trial Judge directing certain accounts to be taken has apparently been passed in terms of this prayer in the plaint. A decree of this nature has been construed as a Preliminary decree by Chakravartti C.J. in the case of *National Textiles v. Premraj Ganpatraj*[9], In this case the claim was by an agent against principal for commission in respect of certain commission agency dealings. Reference was directed to determine what amount was due by the defendant to the plaintiff in respect of dealings which had taken place between 1st January, 1949 and 18th December 1950 and further hearing of the suit was adjourned. It was held that this was a preliminary decree for accounts, though normally an agent cannot get a decree for accounts against a principal, because a principal is under no statutory obligation to render accounts to his agent and he becomes an accounting party only in special circumstances or under a definite contract or under a trade usage.

40. It has been pointed out that the Civil Procedure Code is not exhaustive and there may be preliminary decrees other than those contemplated by Order 20, Rules 12 to 18 of the Code. Thus in the case of 27 Cal W.N. 989 : AIR 1924 Calcutta 160 after the passing of a preliminary decree for accounts the Court passed a further order determining the period and the mode of accounting and it was held that the order was a preliminary decree within the meaning of Section 2(2) of the Code and was appealable as such.

41. Aushutosh Mookerjee J. observed at pages 992-993 (of Cal WN) as follows :

> "The order which has now been made is in essence a preliminary decree in the supplementary proceeding and will lead up to the final decree to be made therein. It is not essential that an adjudication should be covered by one of the specific Cases of preliminary decrees mentioned in or. XX of the Code in order that it may form the basis of a final decree; those cases are illustrations of preliminary decrees and help us in

determining the true meaning of the definition of the term "decree".

[8] ILR 42 Cal 819 : AIR 1916 Cal 566

[9] AIR 1958 Cal 284

Whether the order made by the judge possesses the qualities of a decree, preliminary or final or partly preliminary and party final clearly depends upon its contents."

42. Now in the case before us the learned trial Judge has directed taking of accounts on the footing of certain measurements for ascertainment of the amount due to the plaintiff. This portion of the decree clearly falls within or. 20, R. 16 of the Code and is a preliminary decree. It may be that the directions upon the Special Referee to determine the market rate or as to whether there had been an increase in the rate of labour charges are matters which cannot strictly form the subject-matter of a preliminary decree but these directions having been incorporated in the decree part of which clearly satisfies the test of a preliminary decree, are to be deemed as part of that decree and an appeal lies from the entire decree and if no appeal is preferred the party aggrieved may be precluded under Section 97 of the Code of Civil Procedure from questioning the correctness of these directions in any appeal which may be preferred from the final decree. The Privy Council has pointed out that extraneous directions forming part of a preliminary decree have to be questioned in the appeal from the preliminary decree of which such directions form part, for otherwise, the party aggrieved may be debarred from disputing their correctness in the appeal preferred against the final decree. In other words what the Privy council laid down is that these extraneous directions are also to be treated as preliminary decree. (See ILR 42 Cal. 914).

43. It was contended that the fact that the further hearing of the suit is adjourned indicates that there has been no "judgment" whether preliminary or final nor any decree which can be regarded as preliminary or final. It may be pointed out, however, that this direction as to adjournment of the suit is not an unknown feature in preliminary decrees. Reference may be made to Forms Nos. 17 and 21 of Preliminary decrees as given in Appendix D of the Code of Civil Procedure - clause 15 and the last clause respectively.

44. In my view, the decree passed by the learned Judge is a preliminary decree and the appeal is therefore competent.

45. The other questions raised by Dr. Gupta as to whether the decision of the learned Judge is a "judgment" within the meaning of Clause 15 of the Letters Patent and as to what is the true scope and implications of the expression "judgment" as used in the Letters Patent are questions which have not received satisfactory solution from the Courts. Some of the decisions have already been referred to. The Federal Court of India also in the case of *Kuppuswami Rao v. the King*[10], after dealing with the decisions of the Judicial Committee reported in *Firm Ramchand Manjimal v. Firm Goverdhandas Vishandas Ratanchand*[11], pointed out that in England, in civil actions, a decree is understood to be the same as a judgment and as there may be a preliminary decree so there may be a preliminary judgment (p. 188 of FCR) and observed :

"In our opinion the decisions of the Courts in India show that the word "judgment" as in England means the determination of the rights of the parties in the matter brought before the Court." (page 189 of FCR) .

[10] 1947 FCR 180

[11]47 Ind App 124: (AIR 1920 PC 86 and 60 Ind App 76 (p. 186 of FCR)

46. In the case of *Mohammed Amin Bros. Ltd. v. Dominion of India*[12], the Federal Court had again to consider the meaning of the expressions "judgment" and "Final Order" as occurring in Section 205(1) of the Government of India Act, 1935, but no additional light is thrown on the point.

47. The principal test which has been applied in determining whether a decision in a suit is a "judgment", or not is whether all the cardinal or vital issues have been decided finally or the suit is still a live suit in which the rights of the parties have still to be determined.

48. If the matters affecting the rights of the parties in controversy have been finally disposed of by the decision it is a final judgment but if some matters which have relation to the working out of the rights adjudicated upon, are outstanding and have not been finally disposed of by the decision, such decision is a preliminary judgment or decree and a final judgment and decree is necessary to put an end to the suit. It is not necessary, however, to pursue this discussion any further, as in my view, the decision of the learned judge is a preliminary decree and is appealable as such.

49. With regard to the merits of the appeal the points urged on behalf of the appellant have been dealt with exhaustively in the judgment of my Lord the Chief Justice and I do not think it necessary to deal with them separately.

50. I agree with my Lord the Chief Justice chat the appeal should be allowed in part and the decree of the learned trial Judge should stand subject to the modifications stated in my Lord's judgment.

51. Each party will bear and pay his or its own costs of this appeal.

Appeal allowed partly.

[12] ILR (1951) 1 Cal. 364