CALCUTTA HIGH COURT

Mohammed Felumeah

Vs.

S. Mondal

A.F.O.O. No. 342 of 1959

(P.N. Mookerjee and S.K. Niyogi, JJ.)

04.01.1960

JUDGMENT

P.N. Mookerjee, J.

1. This appeal is directed against an order of our learned brother Sinha, J., modifying an ad interim injunction, issued by Bose, J., when issuing a Rule Nisi (Civil Rule 858 of 1959) for certain writs in the nature of Certiorari, Mandamus, Prohibition, etc., specified therein. The appellant before us was the petitioner in the aforesaid Rule and he obtained the same, calling upon the respondents to show cause why the writs aforesaid should not issue and, pending the hearing of the Rule, he also obtained an ad interim injunction, restraining the respondents Nos. 1 to 4 and 6 from, inter alia, granting any license to respondent No. 5 (for his cinema) on C.S. plot No. 5971, pending the disposal of the Rule.

2. To the aforesaid Rule affidavits-in-opposition were filed by respondents Nos. 1, 2 and 3 and respondent No. 4 on May 23 and June 4, 1959, respectively and two affidavits-in-reply were also filed by and/or on behalf of the appellant on June 29 and July 1, 1959.

3. In the meantime, on June 1, 1959, respondent No. 5 had applied for vacating the interim order of injunction and, to that application, there was an affidavit-in opposition, filed on behalf of the appellant on 12-6-1959, and, to that, again, there was a reply by and on behalf of the applicant, respondent No. 5, on 19-6-1959.

4. The above application was, eventually, allowed in part by Sinha, J. and he varied and modified the interim injunction, issued by Bose, J., by directing that the said injunction would be

> "dissolved excepting this that no permanent license shall be granted to opposite party No. 5 until the disposal of the Rule but a temporary license may be granted." and excepting further that the "status quo" should
> "be maintained with regard to the constructions that is to say, there will be no further construction either with regard to the cinema or with regard to the mosque, till the

disposal of the Rule." Sinha, J., further directed that the necessary or the usual affidavits should be completed within three weeks and he also gave the parties express "liberty to mention for an early date of hearing" of the Rule. Against the above modification, or, more precisely, against the permission, given by Sinha, J., as aforesaid, for grant of "temporary license", the present appeal has been filed by the petitioner-appellant and he seeks restoration of the original interim order of injunction of Bose, J., in that behalf.

5. To the maintainability of the appeal, an objection has been taken on behalf of the respondents and this preliminary objection has been urged on a two-fold ground, namely, (i) that the order in question was made by consent and, hence, it is not appealable in law and (ii) that it is not a 'judgment' under or within the meaning of clause 15 of the Letters Patent of this Court, so as to be appealable under that clause, that being, admittedly, the only provision, under which the instant appeal may be maintained (vide Chairman. Budge Budge *Municipality v. Mangru Mia*[1]*,*

6. The appeal is also resisted on the merits and the respondents contend that, so far at least, as the matter of "temporary license" is concerned, the appellant has no prima facie case for an injunction and the balance of convenience also is. plainly, against the appellant and in favor of the respondents and. accordingly, Sinha, J., was entirely right in discharging the ad interim or temporary injunction to that extent.

7. So far as the above preliminary objection is concerned, the first ground, namely, the ground of consent cannot be accepted in the facts and circumstances before us. Sinha, J.'s order, which is under appeal, does not purport to be a consent order and there is nothing in it to indicate that it was made on consent. The respondents' suggestion on the point that, as a matter of fact, the said order was made on consent was stoutly denied on behalf of the appellant and Mr. Borooah, who appeared for the appellant in the Court below, categorically stated before us that he never consented to the order, as passed by Sinha, J. There is also nothing in any of the affidavits before us, asserting, in particular and in a sufficient manner, that the order in question was, in fact, a consent order. In the circumstances, no safe inference on the point in favor of the respondents can be made merely from the form of the order which undoubtedly, is very brief and contains, practically speaking, no reasons of discussion, however much that particular feature may tend to support the respondents' submission on the point. We would, accordingly, over-rule the first ground, urged in support of the respondents' preliminary objection to the maintainability of the appeal.

8. On the other ground too, the said preliminary objection cannot, in the ultimate analysis, be upheld as a matter of law. It is, as we have said above, an accepted position before us that the instant appeal can be maintained, only if the impugned order of Sinha, J., be a 'judgment' within the meaning of clause 15 of our Letters Patent and the point necessarily arises as to what, in law, such a judgment connotes. The point is not altogether free from difficulty but, having given the matter our fullest consideration, in the light of the relevant authorities, which, again, to say the least, do not all or always speak with one voice, we are inclined to hold in favor of the appellant on this particular point.

9. What is meant by 'judgment', as used in clause 15 of the Letters Patent of this Court, or in the corresponding clause or clauses of the Letters Patents of the other High Courts, has

[1]57 Cal WN 25: AIR 1953 Cal 433 (SB)

often arisen for consideration and divergent views have been expressed from time to time by the different High Courts as to the meaning and scope of the said term. On the one extreme, we have the opinion of the Madras High Court in one of its earliest decisions on the point, namely, in the case of *De Souza v. Coles*[2], that it is impossible to prescribe any limit to the right of appeal, founded upon the nature of the order or decree, appealed from, suggesting - or, at least purporting to suggest, - thereby that the word 'judgment' in clause 15 of the Letters Patent should better be left undefined and, in each case, it should be construed with reference to the particular order (decision) before the Court, its form and substance and the context and circumstances, in which it is passed, such construction, however, being the most liberal so as to permit and support an unrestricted right of appeal, while a Full Bench of seven learned Judges of the Rangoon High Court (vide *Dayabhai v. Murugappa Chettiar*[3],), went to the other extreme by construing it narrowly as being equivalent to a 'decree' under the Civil Procedure Code in its strict and technical sense. Either extreme has its own adherents, but, oftener than not, Judges have chosen to follow a middle course and to adopt a via media and the preponderance of judicial opinion hovers round the two leading decisions on this point, one of this Court in the case of Justices of the *Peace for Calcutta v. Oriental Gas Co. Ltd*[4]., as far back as 1872 and the other, a Full Bench decision of the Madras High Court in the case of *Tuljaram v. Alagappa*[5], delivered some years later, that is, in the year 1910, - which two decisions, however, as between themselves too, disclose some sort of difference, though agreeing broadly on most of the major issues. The point was raised before the Supreme Court in the recent case of *Asrumati Debi v. Rupendra Deb*[6], and a decision was sought to be obtained from that Supreme authority on the wide divergence of judicial opinion, noticed hereinbefore, but their Lordships of the Supreme Court left the point open after noticing and emphasizing the different aspects, from which the matter had, till then, been considered and also adverting to the current conflict of judicial opinion on the point with some attempt to reconcile the prevalent Calcutta and Madras views, as represented by the two leading decisions of the said two Courts, to which particular reference has already been made by us. The difference in the two views, however, did not go unnoticed, as their Lordships, at one place of their judgment (vide p. 323 (of SCA)), referred to certain Calcutta decisions (*Mathura Sundari v. Haran Chandra*[7] *Chandi Charan v. Jnanendra*[8], and *Lea Badin v. Upendra Mohan Roy*[9]), as showing a marked leaning towards the Madras view."

10. In 17 Suth WR 364 : 8 Beng LR 433, the test of a judgment within the meaning of the relevant clause (clause 15) of the Letters Patent was laid down by Sir Richard Couch, the then Chief Justice of this Court, delivering the judgment of the Court (Couch, C. J. and Markby, J.) in the following terms :

> "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 tie determined."

[2]3 Mad HCR 384 [4]17 Suth WR 364: 8 Beng LR 433 [6]1953 SCA 319

[3] ILR 13 Rang 457: AIR 1935 Ran 267 [5] ILR 35 Mad 1 [7] ILR 43 Cal 857 : AIR 1916 Cal 361

[8]29 Cal LJ 225 at p. 229: AIR 1919 Cal 667 at p. 668

[9]39 Cal WN 155: AIR 1935 Cal 35

11. In the Madras case, ILR 35 Mad 1 (FB), Chief Justice White, sitting with Krishnaswami Ayyar and Ayling JJ., did not, apparently, accept the above definition in all its strictness and

rigidity - or, as, in any sense, inflexible and exhaustive - and sought to make it more comprehensive by laying down the test in the following terms :

> "An adjudication is a judgment within the meaning of the clause, if its effect, whatever its form may be and whatever may be the nature of the application, in 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.....It is not necessary that the decision must affect the merits by determining some right or liability and the decision may be a judgment for the purposes of the section (clause) though it does not affect the merits of the suit or proceeding and does not determine any question of right, raised in the suit or proceeding..... An Order on an independent proceeding which is ancillary to the suit (not initiated as a step towards judgment but with a view to rendering the judgment effective, if obtained) e.g., an order on an application for an interim injunction or for the appointment of a receiver, is a 'judgment' within the meaning of the clause and an order on a matter of discretion, or, in the exercise of discretion, is appealable, if the effect of the adjudication is to dispose of the suit or the proceeding, so far as the Court making the adjudication is concerned." Sir Arnold White added a caution by way of a rider to the effect that
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> "an adjudication on an application which is nothing more than a step towards obtaining final adjudication in the suit is not a judgment within the meaning of the Letters Patent." This was necessary, as, otherwise, as pointed out by the Supreme Court in Asrumati's case, 1953 SCA 319 , (supra), the above definition would cover
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> "not only decisions in suits or actions but orders in any other proceeding as well which starts with applications", and
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> "it may be said that any final order, passed on an application in the course of a suit, for example, granting or refusing a party's prayer for adjournment of a suit or for examination of a witness, would also come within the meaning of the definition."

12. The extracts quoted above from Tuljaram's case, ILR 35 Mad 1 (FB), represent what is usually spoken of as the Madras view of the term 'judgment' in clause 15 of the Letters Patent. On a plain reading, that view appears to be somewhat inconsistent with Couch C. J.'s definition of the said term, given above. That apparent conflict, however, will at once disappear, if Couch C. J.'s definition be not really exhaustive or inflexible. To that enquiry, then, we shall immediately turn.

13. Now, so far as this Court is concerned, there is a considerable body of judicial opinion, which, while holding that Sir Richard Couch's above definition is classical and of pre-eminent practical importance and usefulness, has consistently refused to regard it as, in any sense, exhaustive or inflexible. Indeed, in essence and truth, it has been accepted merely as the starting point on a broad open field, stretched in front of it in all its vastness and immense magnitude and Judges have always endeavoured to extend it and expand the different aspects of the term and to give it a wide and extended meaning, though, of course, within certain limits. That indeed, was

attempted to be done in a long series of Calcutta cases, following in somewhat quick succession at one stage, viz., *Mt. Brij Coomaree v. Ramrick Dass*[10], *Budhulal v. Chattu Gope*[11], *Ramendra Nath Roy v. Brojendra Nath*[12], and *Murlidhar Chamaria v. M. R. Dalmia*[13]. See also *Joylal and Co. v. Gopiram Bhotica*[14], and *Gour Mohan Mullick v. Nayan Manjuri Dassi*[15], Similar attempts are also discernible in some of the later or more recent decisions of this Court, including the Letters Patent Bench decision in the case of *Brojo Gopal Roy v. Amar Chandra*[16], and the subsequent Bench decision in the case of 39 Cal WN 155 : AIR 1935 Calcutta 35, in which latter case, the learned Judges characterized Couch C. J.'s definition as 'antiquated' and pleaded for a broader and more liberal and progressive outlook.

14. The Supreme Court, also in the case cited, did not, apparently, regard the difference between the above two points of view as, in any way, fundamental, as will appear from the following passage in their Lordships' judgment at p. 326 of the report. After referring to the above "classic" or "classical" definition of Sir Richard Couch in the leading Calcutta case, 17 Suth WR 364, their Lordships proceeded to observe as follows :

> "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. This view which is implied in the observation of Sir Richard Couch. C. J., quoted above, has been really made the basis of the definition of 'judgment' by Sir Arnold White. C. J., in the Full Bench decision of the Madras High Court, to which reference has been made. Vide ILR 35 Mad 1."

and their Lordships appear to have treated it as a difference, not fundamental but arising only in the working out of the details, so that the Madras view may, at the worst, be regarded as an extension, - or as permitting an extension, - of Sir Richard Couch's definition. That may very well support the view that the definition of Sir Richard Couch is not exhaustive. If that be the proper approach, many of the difficulties would disappear and many apparently irreconcilable decisions would be at once and easily reconciled and what is more important for our present purpose, the seeming conflict between 17 Suth WR 364 and ILR 35 Mad 1, would be effectively resolved.

15. It is needless to mention that the Rangoon view on the point ILR 13 Rang 457 : AIR 1935 Rangoon 267 (FB)), namely, that judgment under the Letters Patent, means 'decree' under the Code of Civil Procedure, does not command, itself to us. It is too narrow and has not very rightly, found favor with the majority of the High Courts and the decisions, which purport to follow the Rangoon view, are outweighed and outnumbered by other

[10] 5 Cal WN 781 at p. 794, ILR 43 Cal 857 : AIR 1916 Cal 361
[11] ILR 44 Cal 804 at p. 811: AIR 1918 Cal 850 at p. 852
[12] ILR 45 Cal 111 at p. 128 : AIR 1918 Cal 858 at p. 861
[13] ILR 45 Cal 818: AIR 1919 Cal 97
[14] ILR 47 Cal 611: AIR 1920 Cal685
[15] 26 Cal WN 242: AIR 1922 Cal172

[16]32 Cal WN 935: AIR 1929 Cal 214 (FB)
decisions. As we have said above, we do not agree with the Rangoon view and, as the trend of judicial decisions, also, is overwhelmingly against it and no sufficient or compelling reason demands its acceptance, we deem it unnecessary to discuss it further. We may, however, point out with the greatest respect, that this Court has all along refused to adopt the narrow construction, favored by the seven Rangoon Judges, who, in so doing, had to overrule an earlier, though, of course, a smaller Full Bench of six Judges, of the same High Court in *Chidambaram Chettyar v. N. A. Chettyar Firm*[17], We may add also that, of the three Privy Council cases (*Mt. Sabitri Thakurain v. Savi*[18], *Tata Iron and Steel Co. 'Ltd v. Chief Revenue Authority of Bombay*[19], and *Sevak Jeranchod Bhogilal v. Dakore Temple Committee*[20],), on which particular reliance was placed by their Lordships of the Rangoon High Court for supporting their above view, the last two were cases under clause 39 of the Letters Patent, which uses the terms 'final judgment, decree or order,' this showing that the real emphasis of the Judicial Committee was on finality and formality vis-a-vis 'judgment' under the Code which has to he followed by a 'decree' (The final and formal document). (See in this connection *Sital Din v. Anant Ram*[21]) and the first appears to be no authority for the proposition of the learned Judges of the Rangoon High Court but may even support the contrary.

16. The choice, indeed, lies between the Calcutta view in 17 Suth WR 364 and the Madras view in ILR 35 Mad 1 (FB) if, of course, they are fundamentally different and irreconcilable. But the choice is at once made, if they are reconcilable and not in real conflict. One way of reconciling the said two decisions has been noted above, favoured as it is by the Supreme Court's observation is, quoted hereinbefore. We are inclined to accept it as a perfectly legitimate view of the said two leading decisions, although with the greatest respect, we would point out that determination of some right or liability, which, according to Sir Richard Couch, C. J., was an essential ingredient and an essential feature of a 'judgment' under the clause in question, does not, - and we say this with the utmost respect, - notwithstanding the Supreme Court's purported observations to the contrary, appear to have been accepted by White C. J. as a necessary requisite for the purpose. But the difference in this respect does not affect us in the present case, as, even according to the definition of Sir Richard Couch, C. J., as interpreted by the Supreme Court, we have to look to the particular proceeding for applying the test of 'judgment' and it will be wrong to say that the determination of rights or liabilities, envisaged by Sir Richard Couch, must necessarily refer to the merits of the controversies in the suit. This, indeed, is emphasized by the Supreme Court. That was also the view taken by Sir Asutosh Mukherjee, sitting with Beachcroft, J., in the case of 29 Cal LJ 225 at pp. 229-230 : AIR 1919 Calcutta 667 at p. 668. It was also pointed out by Chief Justice Chakravartti in one of the recent cases of this Court, *Shorab Merwanji Modi v. Mansata Film Distributors*[22], that even Sir Richard Couch himself did not adhere to the above strict construction of the test, laid down by him.

17. From the above point of view, Chakravartti C. J. was inclined, like the Supreme Court, to treat the Madras test as only a variant of the Calcutta test and he summed up his total reaction on this particular question in his own inimitable way and unsurpassable language in the following lines:

[17] ILR 6 Rang 703: AIR 1929 Ran 41
[18]48 Ind App 76
[19]50 Ind App 212
[20] AIR 1925 PC 155
[21] AIRS 1933 All 262 (FB)
[22]61 Cal WN 559 at p. 565 : AIR 1957 Cal 727 at p. 731

"Whether or not an appeal lies under clause 15 of the Letters Patent from any particular order depends upon whether the order is a 'judgment' within the meaning of clause 15. The term 'judgment' has been defined in the Civil Procedure Code , but that definition does not apply to the word as occurring in the Letters Patent. The language of the Letters Patent which were issued in 1865 is not the language of the Indian Legislature, but the language of English lawyers as it was in use amongst them before the words 'judgment' 'decree' and 'order' came to be clearly differentiated after the passing of the Judicature Acts. If one wanted to ascertain what the framers of the Letters Patent had really in mind when they used the word 'judgment' one would perhaps have to make a search in the vocabulary of the old English lawyers, as appearing in contemporary rules and judicial decisions. But such search is no longer necessary because, by reason of judicial interpretation, the term as used in the Letters Patents (of the Indian High Courts have now acquired an Indian Meaning. The two leading decisions are 8 Beng LR 433. a decision of this Court given in 1872 and ILR 35 Mad 1, a decision of the Madras High Court, given in 1910. To that must now be added the decision of the Supreme Court in 1953 SCR 1159 which is itself an interpretation of the two leading High Court decisions in their application to a particular type of order. All other decisions that can be found in the books justify themselves by referring to one or other of the above decisions or some part or other of them.

"The test, according to the Calcutta decision, is that in order to be a 'judgment', a decision must affect "the merits of the question between the parties by determining some right or liability", although it may be either a final judgment, determining the whole cause or suit or a preliminary or interlocutory judgment determining only a part of it, leaving ether matters to be determined. The Madras test is not wholly different but is a variant of the Calcutta test. According to it, the effect of the order on the relevant suit or proceeding must be seen and if the effect is to put an end to the suit or proceeding so far as the Court making the order is concerned, or if the effect be such that in case the order is not complied with, the suit or proceeding will end, it will be a 'judgment'. To that test there is a corrollary. If the order is made on an independent proceeding which is ancillary to the suit and aims at rendering the judgment effective, in case a judgment is obtained such as application for ad interim injunction or for the appointment of Receiver, then such an order also will be a 'judgment'. It will be seen that the second type of order admitted by the Madras test into the category of 'judgment' will not terminate the suit or proceeding, nor can it strictly be said that it will affect the merits of the question between the parties by determining some right or liability as required by the Calcutta test. On a strict construction of the Calcutta test, the right or liability must mean some right or liability which is a subject-matter of controversy in the suit or proceeding, but, in its application to individual cases, that strict construction has not been adhered to and was indeed, often departed from by Couch C. J. himself who was the author of the test. Orders concerning the jurisdiction of the Court to entertain a suit, as distinguished from matters of the actual dispute between the parties, were held by him to come within the category of judgments."

18. The strict construction of the Calcutta test, to which Chakravartti. C. J., referred, is no longer pertinent after the Supreme Court's observation in Asrumati's case, 1953 SCA 319 : 1953 SCR 1159 , (supra), which we have quoted and underlined and which must be taken to have overruled the contrary opinion in Lea Badin's case, Supra, 39 Cal WN 155 at p. 156 : (AIR 1935 Calcutta 35 at pp. 35-36), but apart from that, Chakravartti C. J.'s admirable summing up of the position with the single addition that Couch C. J.'s "classic" definition is not exhaustive or inflexible, gives a fairly accurate account of the law on the point and its relevant context, barring, of course, the two extreme views, which to our mind, have practically lost all their importance.

19. To end the above discussion, we would just point out one thing more, namely, that the recent decision of this Court in *Jagannath v. Amarendra*[23]. and the earlier decision of the Privy Council in AIR 1925 PC 155, should not be misread as limiting the term 'judgment' in clause 15 of the Letters Patent to 'decrees' under the Civil Procedure Code , but should be read as equating the said two terms to emphasize their distinction from 'judgment' under the Code and their elements of formality and finality. It is to be remembered also that 61 Cal WN 841 : AIR 1957 Calcutta 479, to that extent that it is relevant for our present purpose, was actually considering the scope of section 12 of the Indian Limitation Act in relation to 'judgment' under clause 15 of the Letters Patent and the Privy Council was really concerned with clause 39 of the Letters Patent in Sevak Jeranchod's case, AIR 1925 PC 155, as we have explained above.

20. If then, as held above, the Madras test is only a variant of the Calcutta test and there is no real difference between the said two views, there can be no question that the order of Sinha, J., hereunder appeal, would be a 'judgment' under Clause 15 of the Letters Patent. Even assuming, however, that the two views and the two tests are different and not reconcilable, the position here would not be materially altered. The Madras view, of course, winch, on the face of it is more liberal and comprehensive and more pronounced, - and indeed, express on the point of injunction orders and proceedings, - would, even on its plainest reading, support the present appeal. The proceeding before Sinha, J., may well be regarded as an independent proceeding as distinguished from a purely ancillary and subsidiary proceeding, which is intended merely as a step in aid of the progress of the suit, to bring it within the term 'proceeding' relevant for purposes of 'judgment' under clause 15 of the Letters Patent, as contemplated by Sir Arnold White. It will also be a proceeding, as mentioned in the test, laid down by Sir Richard Couch, in the light of the Supreme Court's observations on the point. It is, no doubt, started by an application in the suit, but it has a career and a course of its own and is a distinct and independent proceeding, which has really no effect on the progress of the suit itself and it will be a proceeding within the meaning of the said term under either of the above two definitions. It is true that it will have no effect on the ultimate decision of the suit, however much it may affect the subject-matter thereof, during its pendency and until its disposal, by preserving the said subject-matter for the final adjudication in the suit, but that will be of no consequence - and will not affect its character as aforesaid, - in view of the Supreme Court's observation in the lines, quoted and underlined above, from Asrumati's case, 1953 SCA 319 : 1953 SCR 1159 Supra.

21. Confining our attention, then, to the proceeding before Sinha, J., it will at once be noted that it was a proceeding for modification of the interim injunction, granted by Bose, J., in the main writ proceeding. When the modification proceeding was initiated before

[23]61 Cal WN 841 : AIR 1957 Cal 479

Sinha, J., the respondents, or, more accurately, respondents other than respondent No. 5, were, under the interim injunction or restraint order, issued by Bose, J., prohibited from granting any license, permanent or temporary, to the said respondent No. 5 until the disposal of the Writ Rule. That certainly meant an obligation on the part of the said other respondents which reacted adversely on the rights of respondent No. 5 in the matter and the purpose of the modification proceeding, started by the said respondent No. 5 before Sinha, J., was to free himself and the other respondents from the said obligation, so that his own rights in the matter might remain unfettered and unaffected. In a sense, the appellant also had a right in law, namely, to see that the interim injunction was obeyed by the respondents concerned and the consequential restriction on respondent No. 5's right may not be affected. The modification proceeding, therefore, involved the determination of the rights and liabilities of the parties in regard to the subject-matter of the Writ proceeding under and as a result of the injunction order, issued by Bose, J. with the further question of their modification on such determination and necessary regulation or adjustment of the said rights and liabilities for and during the pendency of the Rule. The determination would, no doubt, be for a temporary period, that this, during the pendency of the Writ Rule, but, for that period, that determination would be final and would govern the parties, Bose, J., issued the interim injunction ex parte at the instance of the appellant with express liberty to the respondents to apply to the Court for its modification and the respondents had, undoubtedly, the right to approach the Court for such modification. But that only meant that, in case of such application, the order on the same will be the final order of the trial Court in the matter. This final order was made by Sinha J., in the presence of both parties and his decision was thus a final determination, so far as the original Court is concerned, in regard to the rights of the parties in respect of the subject-matter of the proceeding, pending the disposal of the Writ Rule. It was not the less final because it was for a limited period (vide in this connection *Saraju Prasad Singh v. Gangaprasad Shah*[24],) and that temporary character should not affect the true legal position, Sinha, J.'s order, therefore, has the requisite finality - and also, as seen above, the other necessary elements, - to constitute it a 'judgment' within the meaning of clause 15 of the Letters Patent.

22. For holding as above, we have applied the Calcutta and the Madras tests and found that both the said tests have been satisfied. We have also pointed out that the Rangoon view is too narrow and the earlier Madras view too wide. We do not, however, deem it necessary here to say whether the outer limit of 'judgment' under clause 15 of the Letters Patent should extend beyond White C. J.'s definition but such a possibility may have to be reckoned on a comparison of clauses 15 and 39 of the Letters Patent.

23. The conclusion, then, is that the order of Sinha, J., would satisfy the test of 'judgment', as laid down by Sir Richard Couch in the leading case 17 Suth WR 364, supra. White, C. J.'s test is obviously more comprehensive and there can be little doubt that Sinha, J.'s order would plainly come within that test as well and may even come within the specific illustrations, given by the learned Chief Justice, of 'judgment' under clause 15 of the Letters Patent, mentioning, in terms, "injunction order" as one of them. Thus, in any view of the matter, the instant appeal would be maintainable.

24. To the above list of cases must be added the recent decision of this Court in the case

[24] AIR 1951 Cal 446

of *Gopiram Agarwalla v. First Additional Income-tax Officer*[25], which would substantially support the view of 'judgment' (as used in clause 15 of our Letters Patent), as taken above by us

and a further and greater importance of that case AIR 1959 Calcutta 420, is that it has duly and fully explained why, in spite of the test, laid down as aforesaid, by Sir Richard Couch, the actual decision in the particular case before him was held not to come within the said test. This aspect of the matter appears to have been overlooked, by Sir Arnold White and to have escaped his notice and attention, - possibly because the relevant materials were not before him - when he doubted the correctness of the Calcutta decision (17 Suth WR 364. supra) and felt difficulty in following it (vide ILR 35 Mad 1 at p. 9 (FB)).

25. In the above view we would hold that Sinha, J.'s order would be appealable in law and the respondents' preliminary objection must fail.

26. Coming now to the merits, we have first to consider the question of prima facie case. That, obviously, arises with regard to the grant of "temporary license". Sinha, J., dissolved the interim injunction order and refused it in regard to the "temporary license" and the propriety of this decision is challenged in this appeal.

27. What, indeed, was meant by the learned Judge by the expression "temporary license" is not very clear. Under the Act in question, namely, the West Bengal Cinemas (Regulation) Act, 1954, (West Bengal Act XXXIX of 1954) and the relevant Rules, framed thereunder, namely, the West Bengal Cinemas (Regulation of Public Exhibition) Rules. 1956, three kinds of licenses are contemplated, viz., "licenses for permanent cinemas" "licenses for temporary indoor cinemas" and "licenses for temporary open-air cinemas (vide Rule 8), of which the last or the third type has no relevance in the present case. If now, by "temporary license" Sinha, J., meant the "license for temporary indoor cinemas", as mentioned above, an important objection of the respondents would at once disappear. It is to be noticed that, under the Act and the Rules, framed thereunder, certain conditions have been laid down or attached as requisites for grants of "licenses for permanent cinemas" and also "licenses for temporary indoor cinemas". One of such conditions, - and that alone is relevant for our present purpose, - is that the proposed cinema should not be situate within a quarter of a mile of a place of worship. The latter would, obviously, include a mosque and the appellant's case is that there is a mosque within a quarter of a mile of the applicant-respondent's (respondent No. 5's) proposed cinema. The above condition is common to both permanent and temporary license grants, so far as they are relevant for our present purpose, and, as the statute contemplates no other type of license, relevant as aforesaid, it may very well be contended that the "temporary license", meant by Sinha, J., was nothing but the "temporary indoor license", or the "license for temporary indoor cinema", as mentioned above. It may also be contended that the Act does not contemplate the granting of a "permanent license", - and that is also an expression, used by Sinha, J., in his aforesaid order, - for a temporary period and no such grant can be made under the Act. In the above view, the temporary license, mentioned by Sinha, J., merely meant a "temporary license", as contemplated by the Act, that is, a temporary indoor license, or a "license for temporary indoor cinema", as stated hereinbefore. It is important to remember this, as one of the main submissions of the respondents has been that the new proviso to Rule 6, which was added by the

[25] AIR 1959 Col 420

amendment, made in June, 1957, would apply to this case and would negative the appellant's plea of prima facie case and that submission, as we shall presently see, would lose all force if "temporary license", mentioned in Sinha, J.'s impugned order, bears the above meaning. If, as aforesaid, a "temporary license" means a "license for a temporary indoor cinema", the new

proviso to Rule 6 would be wholly irrelevant and would lose its importance, so far as the present stage or proceeding is concerned. Grants of "licenses for temporary indoor cinemas" are governed by Rules 8. 9 etc. and there the new or the added proviso to Rule 6 does not come into the picture at all. Looking at the matter from this point of view, the respondents' objection to the appellant's prima facie case cannot be made out by seeking recourse to the proviso.

28. Even assuming, however, that, by temporary license. Sinha, J., meant license for a permanent cinema for a temporary period, that is, during the pendancy of the Rule, the ultimate position in law would not be altered. On the materials before us as we shall presently see, a prima facie case appears to have been made out that, but for or apart from the above new proviso, there would be violation of one of the Rules, regarding the grant of licenses for permanent cinemas and the said proviso, on the affidavits before us, cannot be applied, as it has not been sufficiently established by the said affidavits that there was, prior to the introduction of the said new proviso, a permanent cinema house already constructed wholly or partly.

29. In the above view taking the expression "temporary license" in either of its above two senses, the new proviso to Rule 6 would not assist. the respondents or stand in the way of the appellant's prima facie case, if otherwise the same has been made out. The point, then, will depend on the particular question whether the appellant has been able to establish a prima facie case that there is a mosque within a quarter of a mile of the proposed cinema site.

30. The alleged mosque is stated to be situate in C. S. plot No. 5667. This is, no doubt, disputed on two grounds, namely, (a) the alleged mosque is not a mosque at all and (b) it is not on C. S. plot No. 5667. Prima facie, but prima facie only, this objection is untenable in view of certain materials before us. What would be the actual position on the further materials (affidavits) which, as we are told by the parties, have been filed before Sinha, J., during the pendency of this appeal, is not a matter for our consideration in this proceeding. On the affidavits before the Court, so far as they are disclosed by the records before us, a serious controversy appears to exist on either of the above two branches of the respondents' aforesaid objection, but, for our present purpose, it is neither necessary nor will it be proper to enter into a detailed discussion of the same and, in our opinion, on the materials before us, the records of the proceedings, including the police report, under Section 144 of the Code of Criminal Procedure, between the principal parties interested, are sufficient to establish a prima facie case, for the purpose of the present proceeding, that there is a mosque on C. S. plot No. 5667, as alleged by the appellant. It is to be noted, in the above connection, that, about the alleged mosque, the respondents' specific case is that it is not a permanent mosque in that it is not and has not a permanent structure, but, prima facie at least, - and, here, again, we confine ourselves only to that prima facie position, - the existence of a permanent structure does not seem, to be necessary for a place of worship, be it a mosque or otherwise which, alone, is mentioned in the statute.

31. As to the location of the alleged mosque also, the respondents' case is on the materials before us, - and speaking again, prima facie, - not very consistent, they having, at one time, alleged that the said mosque had been shifted from C. S. plot No. 5667, where it originally stood within the prohibited distance of a quarter of a mile from the proposed cinema and at a later stage, affirming its location in that very dag but alleging that it was at a distance of more than the said prohibited quarter of a mile from C. S. plot No. 5971, where the proposed cinema is or is sought to be set up. But the police report and the trend of the section 144 proceeding, which was fought up to the appellate stage, appears to support the view that there is a mosque, built, seven or eight years

ago, on the disputed C. S. plot No. 5667 and that the same has not been shifted. This is a finding only for purposes of the present proceeding and should not be extended further, as we have or have had no opportunity of looking into the further materials (affidavits) which have been filed before Sinha, J., during the pendency of this appeal. That, then, is the prima facie position and it does not appear to have been sufficiently displaced by the affidavits before us. As we have indicated hereinbefore, some further affidavits were filed before Sinha, J., they are not in the records before us and we make no comments with regard to the same. What would be the true and legitimate conclusion on the point or points involved, in the ultimate or final analysis, in the light of the entire materials on record, including the said subsequent affidavits, would be a matter for decision in the Rule itself and we express no opinion on the same. We would only hold that, for a temporary injunction, pending the hearing of the Rule a sufficient prima facie case has been made out by the appellant and we would decide this point in his favor accordingly.

32. The question of balance of convenience poses a more difficult problem, but, in our opinion, in the facts and circumstances of this case, that question also should be answered in favor of the appellant. The granting of injunction may, of course, amount to some financial loss to the respondents, but, by refusing it, we would, if the Rule succeeds ultimately, be permitting contravention or infringement of a statute, which, by section 7, appears to provide for penal consequences for such infringement and we would thus be placing this Court in the embarrassing position of sanctioning the virtual commission of an offence under its own order. It is to be noted also that, if the appellant ultimately succeeds in the Writ Rule and if, in the meantime, the "temporary license" be granted and cinema shows be carried on in contravention of the statute, he will suffer irreparable injury, as the injury that will be caused to him by such contravention will not be measurable in money. In this context and having regard to the fact that, on the materials before us, the respondents' financial loss, if any, in case of grant of injunction, would not be very considerable and their prejudice, even from the financial point of view, may even be greater, in case the injunction be refused now and "temporary license" permitted to be granted and cinema shows carried on thereunder, if they ultimately fail in the Writ Rule, we do not think that the balance of convenience really lies in favor of the respondents.

33. Before we conclude, it is necessary to advert to one other aspect of the matter. It has been urged and urged very strongly, that the order of Sinha, J., is a discretionary order and so it should not be interfered with in appeal. On this particular question, the position in law is well-settled. It is true that, ordinarily, the discretion, exercised by the learned trial Judge, is not, - and is not to be, - interfered with in appeal. But that rule is not an absolute one and it has its exceptions. The law on the point has been fully considered in
two of the leading English decisions (vide *Heyman v. Darwins Ltd*[26]*.,* namely, *Evans v. Bartlam*[27]*,* and *Charles Osenton and Co. v. Johnston*[28]*,* and very recently, by this Court in the case of *Serajuddin and Co. v. Michael Golodetz*[29]. The present case, in our opinion, falls within the exceptions and so the respondents' above objection would not be a strong one. As we have remarked earlier, the order of Sinha, J., is very brief. It contains no discussion and no reason also for variation and modification of the order of interim injunction, made by Bose, J. It is not clear whether all the aspects, from which we have considered the matter above were placed before Sinha, J., or, whether he had an opportunity of considering the same. In these circumstances, having regard, inter alia, to the form of the order, we do not think that the appeal should fail simply because the said impugned order is a discretionary order.

34. We would, accordingly allow this appeal, set aside the order of Sinha, J., so far as it modified Bose, J.'s injunction order by permitting grant of "temporary license" pending the hearing of the Rule and restore Bose, J.'s interim order, prohibiting issue of license, both permanent and temporary, until the disposal of the Rule.

35. We need only state that it is pre-eminently a case, where the hearing of the main Writ Rule should be expedited as much as possible and, if no insuperable difficulty intervenes and if it be convenient for the Court, the said Writ Rule may be taken up for hearing at an early date. We actually save the parties liberty to take all steps for making the Rule ready for hearing, even while this appeal was pending and to mention the same before the appropriate Court for early hearing. That liberty does not appear to have been fully availed of by the parties, but it is plainly, in the interest of all concerned, that the Writ Rule should be disposed of as early as possible. That was also the view of Sinha, J., when he modified Bose, J.'s interim injunction order and, but for the attitude of the parties, the Writ Rule, probably, would have been disposed of by this time. Whatever might have been the reason of this delay and whatever may have had happened in the past, let now appropriate steps be taken immediately for an early disposal of the Writ Rule.

36. We would also add that no observation and no finding in this judgment will prejudice either of the parties at the final hearing of the Writ Rule.

37. Costs of this appeal will abide the final result of the Rule, hearing-fee being assessed at 5 (five) gold mohurs.

Niyogi, J.

38. I agree.

Appeal allowed.

[26](1942) AC 356)
[27](1937) AC 473
[28](1942) AC 130
[29]63 Cal WN 717 : AIR 1960 Cal 47