

CALCUTTA HIGH COURT

Chittaranjan Mondal

Vs.

Sankar Prosad Sahani

L.P.A.T. No. 3178 of 1971 in Civil Rule 3439(F) of 1971

(Sankar Prasad Mitra and A.K. Janah, JJ.)

18.05.1972

JUDGMENT

Sankar Prasad Mitra, J.

1. This Rule is against an order of Amaresh Roy, J. made on the 23rd November, 1971. The plaintiff instituted an Ejectment Suit in the City Civil Court. By its judgment delivered on July 12, 1971, the City Civil Court passed a decree for ejectment. The tenant-defendant preferred an appeal to this Court. It was Appeal No.2365 of 1971. In this appeal the tenant-defendant made an application for an injunction restraining the plaintiff from executing the ejectment decree. This application for injunction came up for hearing before Amaresh Roy, J. and His Lordship dismissed the application on the 23rd November 1971. Against this order of dismissal the tenant-defendant has preferred a Letters Patent Appeal and this Rule has been obtained in connection with that appeal.

2. Mr. Roy Choudhury appearing for the plaintiff in the Ejectment Suit has raised a preliminary objection. He says that the order of Amaresh Roy, J. dismissing the application for injunction is not a 'judgment' within the meaning of Clause 15 of the Letters Patent. The order according to Mr. Roy Choudhury does not affect the merits of the controversy between the parties nor does it determine any right or liability of any of the parties. In other words, the order does not decide either wholly or partly any of the matters in dispute in the suit itself. Mr. Roy Choudhury contends that the word 'judgment' in Clause 15 of the Letters Patent means a judgment or decree which decides the case one way or the other either in its entirety or in part. It does not, says Mr. Roy Choudhury, mean a decision or order of an interlocutory character, which merely decides some isolated point not affecting the merits of the case. Learned Counsel has referred us to a large number of decisions in support of his contention as aforesaid. We do not intend to deal with all the cases cited. For our purpose in this matter it is necessary to mention the decision of Sir Richard Couch, C.J., in the Justices of *Peace v. The Oriental Gas Co^l*. Couch, C.J. has stated:

"We think '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 final, or preliminary or interlocutory, the difference between them being that a

¹(1872) 8 Beng LR 433

final judgment determines the whole cause or suit and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined".

3. This view of Couch, C.J. has been considered from time to time by numerous decisions by this Court as well as other High Courts and the definition of 'judgment' which the learned Chief Justice gave was variedly interpreted. In a Full Bench decision of the Madras High Court in *Tuljaram Row v. Alagappa*², White, C.J. has considered the view of Couch, C.J. and has stated: "The test seems to me to be not what is the form of adjudication but what is its effect in the suit or proceeding in which it is made."

4. White, C.J. has laid down three tests for determining whether an order is a 'judgment' within the meaning of the corresponding clause of the Madras Letters Patent. These tests are as follows:-

- (1) If its effect is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned; or
- (2) if the non-compliance therewith will have the effect to put an end to such suit or proceeding; or
- (3) if it is passed in an independent proceeding which is ancillary to the suit (not instituted as a step towards judgment, but with a view to rendering the judgment effective when obtained) e.g., an order on an application for temporary injunction or for the appointment of a receiver.

5. Mookerjee, J. (sitting with Patterson, J.) in *Lea Badin v. Upendra Mohan Roy Chaudhury*³, had to deal with an order made by a single Judge on the Original Side of this Court discharging an interim receiver appointed ex parte. His Lordship was of the view that the order was appealable. It was a 'judgment' within the meaning of clause 15 of the Letters Patent It is also appealable under Order 43, Rule 1 of the Code of Civil Procedure. Mookerjee, J. has considered extensively the view of Sir Richard Couch, C.J. and that of White, C.J. of the Madras High Court. His Lordship presiding over this Division Bench has expressed the hope that some day this Court would "abandon its fond adherence to the antiquated definition of Couch, C.J. and boldly acknowledge its allegiance to the tests laid down by White. C.J."

6. This is a Division Bench judgment therefore, that followed the third principle laid down by White, C.J. and held that the order in question was appealable.

7. In another Division Bench in *Shorab Merwanji Modi v. Mansata Film Distributors*⁴. Chakravarti, C.J., has stated that even Sir Richard Couch himself did not adhere to the strict construction which he had laid down in his subsequent decisions. Chakravarti, C.J., is inclined to treat the Madras test as only a variant of the Calcutta test. More or less the same view was adopted in the Division Bench Judgment of this Court delivered by P.N. Mookerjee, J., in *Mohammed Felumeah v. S. Mondal*⁵, P.N. Mookerjee, J. has stated in paragraph 18 of the judgment at page 587 that the strict construction of the Calcutta test to which Chakravarti, C.J., referred, is no longer pertinent after the Supreme Court's

observation in Asrumati's case, AIR 1953 Supreme Court 198.

8. The position, therefore, is that in the present state of the law it is open to us to apply the third test of White, C.J. to the facts of this case. The order of Amaresh Roy, J. refusing to grant an injunction restraining execution of the judgment decree was passed in an independent proceeding which was ancillary to the appeal and as such it is a 'judgment' within the meaning of Clause 15 of the Letters Patent. We hold that this is an appealable order.

9. By consent of parties the appeal is also treated as in the day's list and this Rule and the appeal are disposed of as follows:

- (1) there will be an order of injunction restraining the plaintiff in the ejectment suit from executing the ejectment decree passed by the City Civil Court till the disposal of F.A.T. No.2365 of 1971;
- (2) the tenant-defendant is directed to deposit in the City Civil Court by the 30th June 1972 all arrears of rent upto April 1972 if such arrears have not already been deposited with the Tikha Controller;
- (3) the tenant-defendant will deposit in the City Civil Court the sum of Rs. 38 payable by him in respect of the month of May 1972 on or before the 15th June, 1972 and would go on depositing the said sum month by month according to the English Calendar on or before the 15th day of the following month;
- (4) the plaintiff in the Ejectment Suit will be at liberty to withdraw all sums deposited in terms of this order in the City Civil Court as also deposits, if any, made with the Tikha Controller;
- (5) this order is made without prejudice to the rights and contentions of both the parties;
- (6) there will be no order as to costs of this rule and the appeal out of which this Rule arises;
- (7) the hearing of the main appeal may be expedited.

Janah, J.

10. I agree.
Appeal allowed.