

(2015) 09 AHC CK 0209

In the Allahabad High Court

Case No : Special Appeal Nos. 1140, 1137, 1099 and 1145 of 2008

Ashutosh Shrotriya and Others

APPELLANT

Vs

Vice-Chancellor, Dr. B.R. Ambedkar University and Others

RESPONDENT

Date of Decision : 04-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, 11, 2, 2(9)
Constitution of India, 1950 — Article 225, 226, 227
Contempt of Courts Act, 1971 — Section 19
Government of India Act, 1935 — Section 105, 107, 108, 229
Industrial Disputes Act, 1947 — Section 17-B
Uttar Pradesh High Court (Abolition of Letters Patent Appeals) Act, 1962 — Section 3, 5

Citation : (2015) 8 ADJ 248 : (2015) 6 ALJ 383 : (2015) 5 AWC 5371 : (2015) 4 UPLBEC 2673

Hon'ble Judges : D.Y. Chandrachud, C.J., Dilip Gupta and Yashwant Varma, JJ.

Bench : Full Bench

Advocate : V.D. Dubey, for the Appellant; C.B. Yadav, Addl. A.G., Shashank Shekar, Addl. C.S.C., Sanjay Kumar Singh, Manish Goel and Rahul Agarwal, for the Respondent

Judgement

Dr. D.Y. Chandrachud, C.J.

The issue

1. The reference to the Full Bench has been occasioned by a referring order of a Division Bench dated 15 September 2008. The following questions have been formulated for decision:

"(1) Where a learned Single Judge while hearing a writ petition calls for counter and rejoinder affidavits, but does not pass any order on the stay application either granting or refusing a stay, will the order amount to a refusal of interim relief to the petitioner either temporarily or impliedly and a "judgment" within the meaning of Chapter VIII Rule 5 of the Rules of the Court, 1952;

(2) Does an order which adversely affects the valuable rights of a party by a

temporary or implied refusal of interim relief have the trappings of a judgment."

The appellants sought a writ in the nature of mandamus directing the University to permit them to appear for counselling for admission to the Master of Social Work Diploma Course for 2008-09. A part of the relief sought was a direction calling for the answer sheets of the entrance test which was held on 28 June 2008.

2. The appellants averred in the writ petition that counselling was to be held on 31 August 2008. The learned Single Judge while entertaining the writ petition, passed the following order on 1 September 2008:

"Sri S.K. Singh has accepted notice on behalf of respondents. He prays for and is granted two weeks" time to file counter affidavit.

List on 16 September 2008."

3. A special appeal, Special Appeal No. 1140 of 2008, was filed against the order of the learned Single Judge. The Division Bench, while considering the special appeal noted that the issue is whether there is a judgment within the meaning of Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952, Rules of Court when a Single Judge while hearing a writ petition calls for counter and rejoinder affidavits but does not pass any order on the application for stay, either granting or refusing stay. In other words, would this amount to a refusal of an interim order temporarily or impliedly, thereby amounting to a judgment within the meaning of Chapter VIII Rule 5.

History: Clause 10 of the Letters Patent and Chapter VIII Rule 5 of the Rules of Court

4. Before we deal with the body of precedent on the subject, it would be worthwhile to briefly trace the history of the incorporation of Chapter VIII Rule 5. In understanding the ambit of the expression "judgment" it is necessary to bear in mind the evolution of the Letters Patent and its association with the Amalgamation Order of 1948 and the Rules of Court. Both have to be analysed together.

(i) Chapter VIII Rule 5

5. Rule 5 of Chapter VIII, as it stands at present, reads as follows:

"5. Special appeal.--An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of appellate jurisdiction) in respect of a decree or order made by a Court subject to the superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of superintendence or in the exercise of criminal jurisdiction or in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award-(a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to

any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution or (b) of the Government or any Officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act of one Judge."

6. In tracing its history, we must, at the outset, acknowledge the contribution made by two judgments of this Court, the first by a Bench of four Judges in *The Notified Area Committee and Another Vs. Sri Ram Singhasan Prasad Kalwar*, and the other by a Division Bench in *Vajara Yojna Seed Farm and Others Vs. Presiding Officer, Labour Court II and Another*, .

(ii) Letters Patent

7. The Letters Patent of 17 March 1866 provided for the constitution of the High Court of Judicature at Allahabad, the civil jurisdiction of the High Court and, among other things, for intra Court appeals from judgments of the Judges of the Court. Clause 10 of the Letters Patent provided as follows:

"10. And we do further ordain that an appeal shall lie to the said High Court of Judicature at Allahabad from the judgment (not being a judgment passed in the exercise of appellate jurisdiction by a Court subject to the Superintendence of the said High Court and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of Superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of Criminal Jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 105 of the Government of India Act, and that notwithstanding anything herein before provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, made on or after the first day of February one thousand nine hundred and twenty nine in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the Superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of the Judges of the said High Court or of such Division Court shall be to us. Our heirs or successors or Our on Their Privy Council, as hereinafter provided."

(iii) Amalgamation Order

8. In exercise of the powers conferred by Section 229 of the Government of India Act, 1935, the United Provinces High Courts (Amalgamation) Order, 1948, Amalgamation Order, was issued and published by the Government of India in the Gazette Extraordinary on 19 July 1948. On 26 July 1948, the High Court of Judicature at Allahabad and the Chief Court of Oudh were amalgamated resulting in the creation of a new High Court. Clause 7 of the Amalgamation Order provided that the new High Court shall have, in respect of the whole of the United Provinces, all such original, appellate and other jurisdiction as, under the

law in force immediately before the appointed day, was exercisable in respect of any part in that Province by either of the existing High Courts. Clause 15 of the Amalgamation Order provided that the law in force immediately before the appointed day relating to appeals of His Majesty in Council or to the Federal Court from the High Court in Allahabad and the Judges and Division Courts thereof shall, with necessary modifications apply in relation to the new High Court. Though the Letters Patent ceased to have effect as a result of Clause 17(a) of the Amalgamation Order, the jurisdiction of the High Court to hear special appeals from judgments of Single Judges was continued by virtue of Clauses 7 and 15 of the Amalgamation Order. Clause 13 of the Amalgamation Order provided that the law in force on the date 25 July 1948 relating to the powers of the Division Courts of the former High Court would apply in relation to the new High Court.

(iv) Article 225

9. After the Constitution came into force, Article 225 , which dealt with the jurisdiction of the existing High Courts, provided as follows:

"225. Jurisdiction of existing High Courts.--Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make Rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:

Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction."

10. Article 225 had the effect of keeping alive the Amalgamation Order and, in consequence, the applicability of Clause 10 of the Letters Patent. The effect of Article 225 was that the jurisdiction of, and the law administered in any existing High Court would be the same as immediately before the commencement of the Constitution, subject to the provisions of the Constitution and the provisions of any law of the appropriate legislature by virtue of powers conferred on that legislature by the Constitution.

11. Chapter VIII Rule 5 of the Rules of Court, as it was originally framed, provided for a special appeal in the following terms:

"5. An appeal shall lie to the Court from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order

made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the Court, and not being an order made in the exercise of revisional jurisdiction, and not being an order passed or made in the exercise of its power of superintendence, or in the exercise of Criminal Jurisdiction of one Judge, and an appeal shall lie to the Court from a judgment of one Judge made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the Court, where the Judge who passed the judgment declares that the case is a fit one for appeal."

(v) Abolition of Letters Patent

12. In 1962, the state legislature enacted the Uttar Pradesh High Court (Abolition of Letters Patent Appeals) Act, 1962, U.P. Act No. 14 of 1962. By virtue of the provisions of Section 3, the legislature enacted the abolition of special appeals from a judgment or order of one Judge of the High Court made in the exercise of appellate jurisdiction in respect of a decree or order made by a Court subject to the superintendence of the High Court. Section 3 provided as follows:

"3.(1) No appeal, arising from a suit or proceeding instituted or commenced, whether prior or subsequent to the enforcement of this Act, shall lie to the High Court from a judgment or order of one Judge of the High Court, made in the exercise of appellate jurisdiction, in respect of a decree or order made by a Court, subject to the superintendence of the High Court, anything to the contrary contained in Clause 10 of the Letters Patent of Her Majesty, dated the 17th March, 1866, read with Clause 17 of the U.P. High Courts (Amalgamation) Order, 1948, or in any other law, notwithstanding.

(2) Notwithstanding anything contained in sub-section (1) all appeals pending before the High Court on the date immediately preceding the date of enforcement of this Act shall continue to lie and be heard and disposed of as hereto before, as if this Act had not been brought into force."

13. Following the provisions of U.P. Act 14 of 1962, the Rules of Court were also amended by a notification dated 6 November 1963. Further amendments were made in 1972 and 1975 to U.P. Act 14 of 1962. In 1981 the Uttar Pradesh High Court (Abolition of Letters Patent Appeals) (Amendment) Act, 1981 was enacted with a view to abolishing Letters Patent appeals against the judgments or orders of a Single Judge under Article 226 or Article 227 in respect of any judgment, order or award of the subordinate Courts, tribunals, or statutory arbitrators made in exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act relating to any of the matters enumerated in the State List or the Concurrent List to the Seventh Schedule of the Constitution or in respect of any order made in exercise of the appellate or revisional jurisdiction under any such Act, by the State Government or by any officer or authority. Section 5 of U.P. Act 14 of 1962 was substituted by the following provisions by Amending Act 12 of 1981:

"5. Abolition of Letters Patent Appeals in certain other cases.--(1)

Notwithstanding anything to the contrary contained in Clause 10 of the Letters Patent of Her Majesty, dated March 17, 1866 read with Clauses 7 and 17 of the U.P. High Courts (Amalgamation) Order, 1948, or in any other law, no appeal arising from an application or proceeding, instituted or commenced whether prior or subsequent to the commencement of the Uttar Pradesh High Court (Abolition of Letters Patent Appeals) (Amendment) Act, 1981, shall lie to the High Court from a judgment or order of one Judge of the High Court, made in the exercise of jurisdiction conferred by Articles 226 or 227 of the Constitution, in respect of any judgment, order or awards-

(a) of a Tribunal, Court or Statutory Arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution, or

(b) of the Government or any officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act.

(2) Notwithstanding anything contained in sub-section (1), all appeals of the nature referred to in that sub-section pending before the High Court immediately before the commencement of the Uttar Pradesh High Court (Abolition of Letters Patent Appeals) (Amendment) Act, 1981, shall be heard and disposed of as if that sub-section had not been enacted."

14. In consequence, Chapter VIII Rule 5 of the Rules of Court was amended by a notification dated 27 July 1983 which was published in the Gazettee on 13 August 1983 to make the provision for special appeals under Chapter VIII Rule 5 accord with the provisions of Section 5 of the Amending Act of 1981.

The meaning of "judgment"

15. The essence of the reference which has been made by the Division Bench in the present case, turns upon the meaning of the expression judgment" in Chapter VIII Rule 5. An appeal lies, first and foremost, from a judgment. Rule 5 then proceeds to lay down the excepted categories or exclusions where a special appeal will not be maintainable. The exclusions, which have been specified in Rule 5, are:

"(i) A judgment passed in the exercise of the appellate jurisdiction in respect of a decree or order made by a Court subject to the superintendence of the Court;

(ii) An order made in the exercise of revisional jurisdiction;

(iii) An order made in the exercise of the power of superintendence;

(iv) An order made in the exercise of criminal jurisdiction;

(v) An order made in the exercise of jurisdiction conferred by Articles 226 or 227 of the Constitution in respect of any judgment, order or award:

(a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or Central Act, with respect to a matter contained in the State List or the Concurrent List to the Seventh Schedule of the Constitution; or

(b) of the government or any officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act."

16. The issue before the Court is whether an order of a Single Judge on a petition under Articles 226 or 227 of the Constitution, merely directing the filing of a counter affidavit within a stipulated period and a rejoinder thereafter, would constitute a judgment within the meaning of Chapter VIII Rule 5 of the Rules of the Court.

17. The issue as to what constitutes a judgment within the meaning of the Letters Patent of the High Courts came up initially before the Supreme Court in *Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others*, . That was a case where an application had been presented by the plaintiff in a suit instituted before the Court of the Subordinate Judge, on the Original side of the High Court of Calcutta under Clause 13 of the Letters Patent, praying for the transfer of the suit to the High Court to be tried in its extraordinary jurisdiction. A Single Judge of the High Court allowed the application. In appeal, a Division Bench of the High Court held that the order appealed against was not a judgment within the meaning of Clause 15 of the Letters Patent. The Bench of four learned Judges of the Supreme Court held that there was a wide divergence of judicial opinion on the subject and the scope of the word "judgment" as it occurred in Clause 15 of the Letters Patent of the Calcutta High Court and in the corresponding clauses of the Letters Patent of other High Courts, which may warrant a determination in an appropriate case. However, it was held that in none of the cases was an order of the character which the Supreme Court had before it, been regarded as a "judgment" within the meaning of Clause 15 of the Letters Patent. The appeal was accordingly dismissed.

18. Eventually, it was in the 1981 decision in *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, , that the issue as to when a decision of a Single Judge could be regarded as a "judgment" within the meaning of Clause 15 of the Letters Patent of the Bombay High Court came to be considered and resolved. A considerable body of law has emerged in following and interpreting the decision. Since we would have to advert to those decisions, we begin by stating the principles which emerge from *Shah Babulal Khimji*.

19. The first principle which has been laid down by the Supreme Court is that though the Letters Patent did not make an attempt to define what is meant by the expression "judgment", since the Letters Patent was a special law, it was not appropriate to project the definition of the expression "judgment" appearing in Section 2(9) of the Code of Civil Procedure, 1908, CPC, into the meaning of that

expression for the purposes of the Letters Patent. Under Section 2(9) , the expression judgment" is defined to mean "a statement given by the Judge on the grounds of a decree or order." In the view of the Supreme Court, the concept of a judgment" as defined in the CPC was rather narrow and the limitations which are contained in sub-section (9) of Section 2 while defining the expression "decree" cannot be physically imported into the definition of the expression judgment" for the purposes of Clause 15 of the Letters Patent which has advisedly not used the term "order" or "decree". Consequently, it was held that the word judgment" for the purposes of Clause 15 should receive a wider and more liberal interpretation than the expression judgment" in the CPC.

20. The second important principle which emerges from the judgment in Shah Babulal Khimji is that a judgment" imports a concept of finality in a broader and not in a narrower sense. A judgment can be of three kinds:

- "(i) a final judgment;
- (ii) a preliminary judgment; and
- (iii) an intermediary or interlocutory judgment."

21. The reference in the present case, essentially turns on what categories of interlocutory judgments would fall within the ambit of the expression judgment" for the purpose of Chapter VIII Rule 5. Interlocutory orders governed by Clauses (a) to (w) of Order XLIII Rule 1 CPC contain a quality of finality and would hence be judgments which would be appealable under the Letters Patent. But, in addition, there may be interlocutory orders which are not covered by Order XLIII Rule 1 but may also possess a characteristic of finality. Dealing with this aspect, the Supreme Court observed that:

"(3) Intermediary or Interlocutory judgment.- Most of the interlocutory orders which contain the quality of finality are clearly specified in clause (a) to (w) of Order 43 Rule 1 and have already been held by us to be judgments within the meaning of the Letters Patent and, therefore, appealable. There may also be interlocutory orders which are not covered by Order 43 Rule 1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote."

22. The third principle which was laid down in Shah Babulal Khimji is that in the course of a trial, the trial Judge may pass a number of orders of a procedural or routine nature. Some of these orders may even cause a degree of inconvenience to one party or the other, such as an order refusing an adjournment or an order refusing to summon a witness or document. Such orders, the Supreme Court held, are purely interlocutory and are not judgments because it would always be open to a party aggrieved to make a grievance against the order passed, in an

appeal arising out of the final judgment of the trial Judge.

23. The fourth principle which emerges from the judgment of the Supreme Court in Shah Babulal Khimji is that every interlocutory order" is not a judgment". Only certain categories of interlocutory orders can be regarded as judgments:

"...every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned."

(emphasis supplied)

The Supreme Court ruled that an interlocutory order to be a judgment must contain traits and trappings of finality, either when it decides the questions in controversy in an ancillary proceeding or in the suit itself or in a part of the proceedings.

24. The next important decision to which a reference has to be made, is a judgment of two learned Judges of the Supreme Court in Employer in Relation to Management of Central Mine Planning and Design Institute Ltd. Vs. Union of India and Another, . That was a case where a learned Single Judge, on an application under Section 17-B of the Industrial Disputes Act, 1947, directed the employer to pay to the workmen the full wages last drawn by them on the date on which they were terminated from service. The Supreme Court observed that the Division Bench of the High Court erred in coming to the conclusion that the directions of the learned Single Judge did not constitute a judgment" within the meaning of Clause 10 of the Letters Patent of the Patna High Court. After following the earlier decision in Shah Babulal Khimji, the Supreme Court formulated the following test:

"...to determine the question whether an interlocutory order passed by one Judge of a High Court falls within the meaning of "judgment" for purposes of Letters Patent the test is: Whether the order is a final determination affecting vital and valuable rights and obligations of the parties concerned. This has to be ascertained on the facts of each case."

The order of the learned Single Judge was held to have determined the entitlement of the workmen to receive benefits and imposed an obligation on the employer to pay those benefits under Section 17-B and was held to be a judgment within the meaning of Clause 10 of the Letters Patent.

25. In Midnapore Peoples" Co-op. Bank Ltd. and Others Vs. Chunilal Nanda and Others, , the issues, which among others, came up before the Supreme Court were:

"(i) Where the High Court in a contempt proceedings renders a decision on the merits of a dispute between the parties, either by an interlocutory order or final judgment, whether that would be appealable under Section 19 of the Contempt

of Courts Act, 1971 and if not, what would be the remedy to the person aggrieved; and

(ii) Where such a decision on merits is rendered by an interlocutory order of a learned Single Judge, whether an intra-court appeal would be maintainable under Clause 15 of the Letters Patent of the High Court of Calcutta."

The Supreme Court observed that interlocutory or interim orders which are passed during the pendency of a case would fall under one or the other of the following categories:

"(i) Orders which finally decide a question or issue in controversy in the main case;

(ii) Orders which finally decide an issue which materially and directly affects the final decision in the main case;

(iii) Orders which finally decide a collateral issue or question which is not the subject-matter of the main case;

(iv) Routine orders which are passed to facilitate the progress of the case till its culmination in the final judgment;

(v) Orders which may cause some inconvenience or some prejudice to a party, but which do not finally determine the rights and obligations of the parties."

The Supreme Court held that the expression judgment" in Clause 15 of the Letters Patent will, besides covering judgments as defined in Section 2(9) of CPC and orders enumerated under Order XLIII Rule 1 , also cover other orders which though they may not finally and conclusively determine the rights of parties with regard to all or any of the matters in controversy, may finally decide some collateral matters which affect the vital and valuable rights and obligations of the parties. Interlocutory orders which fell under categories (i) to (iii) above were held to be judgments" whereas, orders falling under categories (iv) and (v) were held not to be judgments" for the purpose of filing appeals provided under the Letters Patent.

We now formulate the governing principles:

"(i) The expression judgment" was advisedly not defined in the Letters Patents of various High Courts which conferred a right of appeal against a judgment of a Single Judge to a Division Bench of that Court;

(ii) The expression judgment" is not to be construed in the narrower sense in which the expression judgment", "decree" or "order" is defined in the CPC, but must receive a broad and liberal construction;

(iii) Every order passed by a trial Judge on the Original side of a High Court exercising original jurisdiction or, for that matter, by a learned Single Judge exercising the writ jurisdiction, would not amount to a judgment. If every order were construed to be a judgment, that would result in opening a flood of appeals

and there would be no end to the number of orders which could be appealable under the Letters Patent;

(iv) Any interlocutory order to constitute a judgment, must possess the characteristic of finality in the sense that it must adversely affect a valuable right of a party or decide an important aspect of the trial in an ancillary proceeding. In order to constitute a judgment", the adverse effect on a party must be direct and immediate and not indirect or remote;

(v) In order to constitute a judgment, an interlocutory order must: (a) decide a matter of moment; or (b) affect vital and valuable rights of the parties and must also work serious injustice to the party concerned:

(vi) On the other hand, orders passed in the course of the proceedings of a routine nature, would not constitute a judgment even if they result in some element of inconvenience or hardship to one party or the other. Routine orders which are passed by a Single Judge to facilitate the progress of a case may cause some element of inconvenience or prejudice to a party but do not constitute a judgment" because they do not finally determine the rights or obligations of the parties. Procedural orders in aid of the progression of a case or to facilitate a decision are not judgments."

26. Now, it is in the background of these principles that we need to deal with the issue as to whether an order of a Single Judge, in the exercise of writ jurisdiction, calling for the filing of a counter affidavit and a rejoinder, must in all circumstances without exception be treated as orders merely facilitating the progress of the case and not constituting a judgment. Where a judge requires the filing of a counter affidavit by the respondent and a rejoinder by the petitioner in response, this is in the nature of a procedural direction to enable the Court to have a full disclosure of the underlying facts and issues so as to facilitate a decision. The object of such a direction is to enable the Single Judge to be apprised of facts relevant and material to arriving at a considered view. Such a direction is in aid of the progression of the case. It does not decide the matter or issue in controversy. The lis continues to remain pending before the Single Judge. The Court would apply its mind to the merits of the controversy, for the purpose of deciding an application for interim relief and eventually for the final disposal of the writ proceedings after affidavits are filed. This is a procedural order and not a judgment.

27. At least three judgments of the Division Benches of this Court have construed directions of this nature not to constitute judgment" for the purpose of Chapter VIII Rule 5 of the Rules of the Court. The first decision was of a Division Bench of this Court in Mohd. Hashim Vs. Board of Madarsa Education and Another, . In the writ proceedings, a learned Single Judge issued directions for the filing of a counter affidavit and rejoinder affidavit and the case was directed to be listed after the expiry of the period mentioned in the order. No order appears to have been passed on the stay application filed together with the writ

petition. The grievance of the original petitioner, who was in a special appeal, was that the order of the learned Single Judge amounted to a rejection of the prayer for stay rendering the writ petition infructuous. From the judgment of the Division Bench, it appears that the case related to examinations which were scheduled to be held with effect from 31 May 2008. When the writ petition was filed before the learned Single Judge who passed an order on 13 May 2008, it was stated that the examinations were expected to be held in the last week of May 2008. Before the Division Bench, it was stated that the examinations were now scheduled from 31 May 2008 and the fate of nearly two hundred students who had submitted their examination forms would be adversely affected. The Division Bench held that there was no judgment by which the appellant had been aggrieved and hence the special appeal was not maintainable. It was left open to the appellant to move an application before the learned Single Judge and the special appeal was dismissed.

28. The second judgment of a Division Bench in Committee of Management of National Integrated Medical Association v. State of U.P., 2009(1) ADJ 144 (DB), arose out of an order which was passed by the Prescribed Authority in the exercise of jurisdiction under Section 25 of the Societies Registration Act, 1860. The learned Single Judge directed, while issuing notice, that the case be listed after six weeks. The Division Bench, in special appeal, noted that the stay application had neither been allowed nor rejected. The Division Bench held that since the Prescribed Authority was a Tribunal while exercising jurisdiction under Section 25, a special appeal was barred under Chapter VIII Rule 5. The Division Bench also held that the order which was passed by the learned Single Judge was not an order deciding an interim application nor was any issue decided which may adversely affect a valuable right of the parties and hence, the special appeal would not be maintainable. The Division Bench held as follows:

"...routine orders which are passed to facilitate the progress of the case are not "judgment" which are appealable under the Letters Patent. The impugned order dated 17.9.2008 as extracted above clearly indicates that the said order is not an order deciding the interim application of the appellants nor any issue has been decided by the said order which may adversely affect the valuable right of the parties...."

The Division Bench rejected the submission that the application for interim relief must be deemed to have been rejected on the basis of the provisions of Explanation V to Section 11 of the CPC. In the view of the Division Bench, the order impugned was a "normal routine order" passed during the progress of the case and did not affect the valuable right of any party and was hence not appealable.

29. The third judgment of the Division Bench is in Sri Ghisai Ram Krishak Vidyalaya Samiti Vs. State of U.P., . In this case, a challenge was addressed to an order passed by the Deputy Registrar, Firms, Societies & Chits on 8 July 2014. The learned Single Judge, by an order dated 24 July 2014 directed that the

petition be listed in the following week when the prayer for interim relief would be considered. Subsequently, when the petition came up, a consequential order had been passed by the District Basic Education Officer on 21 July 2014 and in order to challenge that order the writ petition was sought to be amended. On 15 October 2014, the learned Single Judge merely directed that a counter affidavit and rejoinder be filed. It was this order dated 15 October 2014 that was sought to be challenged on the ground that it effectively amounted to the denial of interim relief since the tenure of the appellant Committee was to expire on 31 October 2014. The Division Bench held that the order of the learned Single Judge, as it stood, did not contain any decision. In order to be an order which was appealable under Chapter VIII Rule 5 of the Rules of the Court, there had to be an order adversely affecting the rights of a party touching the quality of finality or adversity. The Division Bench observed as follows:

"...There is however another category of situations which is very common as in the present case where it is routine in procedure and is otherwise compulsory or expedient in the interest of justice to postpone or defer passing of an order for having a grip of facts and law, dependant upon cross-pleadings of the adversaries. The elements, of observance of the principles of natural justice are attracted and have to be adhered. The Court, therefore, has to decipher the exact situation prevailing in a particular matter before it proceeds to apply the principles attracted as each case may have different facts. However, in such types of cases, ordinarily, it would be not wrong to presume that there is no decision amounting to a judgment."

In the view of the Division Bench, all that had happened was that the case was adjourned for the filing of affidavits. The order of the learned Single Judge dated 15 October 2014 was held not to be a judgment.

30. A close analysis of the facts of each of the three cases, which have been adverted to above, would indicate that at least in the first two cases, the Division Bench, while holding that special appeal was not maintainable, had due regard to the nature of the order and the facts of the case out of which the order of the learned Single Judge had arisen. In the first decision in Mohd Hashim (*supra*), the Division Bench noted that when the learned Single Judge had initially been moved on 13 May 2008, it was stated that the examinations were to commence in the last week of May. It was subsequently and before the Division Bench in appeal, that it was sought to be stated that the examinations were scheduled on 31 May 2008 (thereby making out a case of urgency). This was evidently not a fact of which the learned Single Judge was apprised since it appears from a reading of the judgment that it was the Division Bench which was sought to be moved on the ground that there was a pressing urgency warranting the grant of interim relief. The Division Bench in this set of facts held that the proper remedy for the appellant was to move the learned Single Judge and hence the appeal was held not to be maintainable. The second judgment of the Division Bench in Committee of Management of National Integrated Medical Association (*supra*)

involved plain and simple an order passed under Section 25 of the Societies Registration Act 1860 by the Prescribed Authority which was in question before the learned Single Judge. The Division Bench observed that the order of the learned Single Judge calling for the filing of pleadings in response to the petition had not decided any issue which may adversely affect a valuable right of the parties and was hence not appealable. The finding that the appeal was not maintainable in both these cases would, on a proper appreciation of the nature of the two decisions of the Division Bench, indicate that it was in the facts of each individual case that the appeal was held not to be maintainable. What was in issue in both the cases was purely a procedural order against which no special appeal would be maintainable under Chapter VIII Rule 5.

31. In the third decision in Ghisai Ram Krishak Vidyalaya Samiti, the Division Bench has held that an order which merely calls for the filing of a counter and a rejoinder would, in no circumstances, be regarded as an appealable order. The Division Bench held that merely because this would delay the disposal of the application for interim relief - the hearing of the application being deferred until after a reply of rejoinder is filed - does not constitute the order appealed against a judgment. This line of reasoning of the Division Bench appears from the following observations in paragraphs 48 and 49 of the judgment:

"...The case being adjourned with a direction to exchange affidavits causing a delay on account of this processual compulsory requirement, cannot be inferred to mean a refusal to pass an order. There is nothing hidden or undecipherable so as to construe it as a decision amounting to a judgment. There is, therefore, no mystery that requires any probe or discovery to unravel more than what is actually written and clearly intended. It is not possible to read between the lines when there is not even a remote exercise of discretion to make out a ground of appeal. Thus, in our considered opinion, the impugned order dated 15.10.2014 does not fall within the meaning of the word judgment" or an order as contemplated in Chapter VIII Rule 5 of the 1952 Rules so as to make this appeal competent against such an order.

....

...To put it simple, the proceedings before the learned Single Judge where it is alleged that the passing of an interim order has been withheld by itself in view of the terminology of the impugned order, may not be a ground for maintaining an appeal, but at the same time it may be a ground for pressing for an interim relief or disposal of the entire dispute on issues of jurisdiction or violation of principles of natural justice before the learned Single Judge in the background of the case where the appellant was ousted and was deprived from functioning till the end of his tenure."

In the earlier part of the decision, the Division Bench observed that an order which is merely of a procedural nature calling for the filing of a reply to enable the Court to have a proper factual basis for considering the controversy, would

not be amenable to an appeal under Chapter VIII Rule 5 of the Rules of Court. This statement of law is consistent with the law laid down by the Supreme Court in *Shah Babulal Khinji* which indicates that orders passed by the Court of a routine nature in a proceeding would not be a judgment even if they cause some inconvenience to a party. In *Midnapore Peoples" Coop Bank Ltd.*, the Supreme Court once again emphasised that orders which are passed to facilitate the progress of the case till the culmination of the matter in a final judgment are not amenable to being called "a judgment". Similarly, orders which may cause some inconvenience or prejudice but do not finally determine rights or obligations of parties would not amount to a judgment.

32. There is another vital principle which is involved here. The High Court is a Court of record. The Court in its judicial proceedings speaks through its orders. The order of a Court reflects the position of what was urged and what was decided. Where a Single Judge has passed only a procedural direction calling for a reply or counter, it would be correct and fair to proceed on the basis that the hearing of the prayer for interim relief has been deferred until a counter has been filed. A party cannot be permitted to urge a submission contrary to the record in appeal. If the grievance of a party is that the Single Judge has not considered a submission which was urged and an argument is not reflected in the record, the remedy is to apply to that very judge who is passing or has passed the order to record a submission urged. Not having done so, a party cannot be allowed to ordinarily urge in appeal that what is a procedural direction also involves a failure to consider an application for interim relief or to deal with a submission raised. A party may rest content with a mere deferment of a hearing so as to allow a counter to be filed. The party cannot be allowed to turn around and maintain an appeal on the specious ground that the procedural direction of the Single Judge amounts to a denial of interim relief. This would destroy the sanctity of the judicial process. Chapter VIII Rule 5 is a provision for an intra Court appeal from one judge of the High Court to a Division Bench of the same Court. Single judges are judges of the Court and not Courts subordinate to the High Court. They control the procedure of the Courts over which they preside though consistent with judicial objectivity and fairness. That is the rationale why a procedural direction in the progress of a petition is not appealable under Chapter VIII Rule 5. It decides no issue of fact or law and is not a judgment.

33. The area which both the judgments in *Shah Babulal Khinji* and *Midnapore Peoples" Coop Bank Ltd.* leave open to be considered is whether the order which is sought to be placed in issue in appeal, though passed at an interlocutory stage, is of a nature that would affect the vital and valuable rights of parties and work serious injustice to the party concerned. An order, which has the consequence of adversely affecting the valuable rights of a party has the characteristics or trappings of finality and has, therefore, been held to be a judgment" which is amenable to the appellate jurisdiction. For the purpose of this proceeding, it would not be appropriate for the Court to draw an exhaustive catalogue of the circumstances in which an order of the learned Single Judge

declining to even take note of a prayer for interim relief may result in an irreversible situation or irretrievable injustice that would affect valuable and substantive rights of a party to the lis. Ultimately, as the Supreme Court held in the decision in Central Mine Planning and Design Institute, whether the order is a final determination affecting vital and valuable rights and obligations of the parties concerned has to be ascertained on the facts of each case. Evidently, there is a clear category of cases where an order is purely of a processual nature in aid of the final progression of a case and which neither determines nor has the effect of determining vital and substantive rights as between the contesting parties. The test to be applied is whether the order of the learned Single Judge has trappings of finality in the sense that the consequence of the order is to affect vital and valuable rights of the parties and to cause or work serious injustice to the party concerned. The judgments of the Supreme Court leave it open to the appellate Court to determine in the facts of each case whether these tests which have been laid down consistently for defining the ambit of the expression judgment" are fulfilled in the facts of each case. The judgment in Ghisai Ram Krishak Vidyalaya Samiti cannot be read as taking away the discretion of the appellate Court and its unquestioned jurisdiction to enquire into the maintainability of an appeal on the tests which have been laid down by the Supreme Court.

34. We may also note a judgment of a Division Bench of this Court in Society Madarsa Mazahir Uloom Mubarak Shah Vs. Muzaffar Hussain, . In that case, an application was made for the registration of a society under the Societies Registration Act, 1860. An objection was filed by the respondent before the Assistant Registrar, alleging that a waqf had been created in the name of the Madarsa and was registered with the U.P. Sunni Central Waqf Board. This objection was repelled and the society was directed to be registered. In a writ petition, the High Court directed the Assistant Registrar to refer the question of registration to the State Government which, in turn, rejected the objection of the respondent and, hence, the appellant was held entitled to registration. This order was challenged by the respondent in a writ petition on which only notice was issued but no interim stay was granted. The appellant was granted registration thereafter, after which an application for renewal was submitted. The Deputy Registrar allowed the application for renewal of the certificate of registration. This order was challenged in a writ petition and the learned Single Judge stayed the operation of the order. The Division Bench held that the appeal was not maintainable. The Division Bench also held that in certain cases at the time when writ petitions are entertained, the valuable rights of the other side may be affected by passing what is called "a pre-hearing judgment." However, if after furnishing an opportunity to the respondents, the Court passes an order making an arrangement till the dispute is decided so as to preserve the status quo, such an order will not have the quality of finality. There are certain observations in the judgment of the Division Bench which appear to be of an excessively broad nature. For instance, the Division Bench held that "mere" grant of an order of

stay or vacating an order of stay does not decide any controversy on which parties are at issue. The Division Bench also adverted to an earlier unreported decision in support of the principle that an order granting or refusing to grant stay does not constitute a judgment". These observations of the Division Bench would, in our view, be rather broadly stated and may not be in accord with the judgments of the Supreme Court which we have referred to above. Ultimately, however, the Division Bench observed that in each case, the nature of the order will have to be examined and the effect of the order passed would have to be considered on whether it determines a right or liability of the parties so as to be treated as a judgment". This judgment was followed subsequently by another Division Bench in *Chhatra Dhari Prasad v. Anil Kumar Gautam*, 2007 (3) ADJ 85 (DB). Both these decisions, it must be clarified, cannot be held to lay down a principle of law that though an interlocutory order of the learned Single Judge is of such a nature that would adversely affect the right of a party or decide an important aspect of the trial in an ancillary proceeding, that it would yet not be amenable to a special appeal. On the contrary, the law as laid down by the Supreme Court in *Shah Babulal Khirnji* is that an interlocutory order which decides matters of moment or affects the valuable rights of the parties and works serious prejudice to the parties concerned would constitute a judgment" and would be amenable to a special appeal.

35. We, accordingly, are of the view that a direction issued by the learned Single Judge in the course of the hearing of a writ petition, calling for the filing of a counter and a rejoinder or, in other words, for the completion of pleadings is a direction of a procedural nature, in aid of the ultimate progression of the case. The object and purpose of such a direction is to enable the Single Judge to have the considered benefit of a response to the petition so as to enable the Court to deal with an application of an interlocutory nature upon a fair consideration of the rival perspectives and eventually for the purpose of the disposal of the case at the final stage. A purely procedural direction of this nature would ordinarily not be amenable to the remedy of a special appeal even if the consequence of the issuance of such a direction is to cause some inconvenience or prejudice to one or other party. The Court, in order to decide a lis, either at the interlocutory or at a final stage, would generally require the benefit of a response filed by a party which would be affected by the order which is sought and the reliefs which are claimed. Compliance with the principles of natural justice is as much a safeguard for the parties as it is for the Court of having considered the matter in all its perspectives before rendering a final decision. If a party to the proceeding seeks to press an application for ad interim relief even before a reply is filed on grounds of extreme urgency or on the ground that the situation would be irreversibly altered or that irretrievable injustice would result unless a protective order is passed, such a submission must be urged before the Single Judge. If such a submission is urged, it must be recorded and dealt with however briefly to obviate a grievance that an application for ad interim relief was pressed but not dealt with. A purely procedural direction of calling for a counter affidavit and

rejoinder would not be amenable to a special appeal since it decides no rights and does not affect the vital and substantive rights of parties. However, the appellate Court has the unquestioned jurisdiction to decide whether the direction is of a procedural nature against which a special appeal is not maintainable or whether the interlocutory order decides matters of moment or affects vital and valuable rights of parties and works serious injustice to the party concerned. Where the Division Bench in a special appeal is of the view that the order of the learned Single Judge is not just a procedural direction but would result in a grave detriment to substantive rights of an irreversible nature, the jurisdiction of the Court is wide enough to intervene at the behest of an aggrieved litigant. The Rules of Court are in aid of justice. We, therefore, affirm the principle that a purely processual order of the nature upon which the reference is made would not be amenable to a special appeal not being a judgment. The Division Bench will have to decide in the facts of each case, the nature of the order passed by a Single Judge while determining whether the appeal is maintainable.

36. In view of the aforesaid discussions, we answer the question of law referred to the Full Bench by holding that, an order of a learned Single Judge upon a petition under Articles 226 or 227 of the Constitution only calling for counter and rejoinder affidavits is merely a procedural order in aid of the progression of the case. An order of this nature which is purely of a procedural nature in aid of the progression of the case and to enable the Court to form a considered view after a counter affidavit and a rejoinder are filed would not be amenable to a special appeal under Chapter VIII Rule 5. Such an order does not decide anything nor does it have the trappings of finality. If a party to the proceedings seeks to press an application for ad interim relief of a protective nature even before a counter affidavit is filed, on the ground that a situation of irretrievable injustice may result or that its substantive rights would be adversely affected in the meantime, such an argument must be addressed before the Single Judge. If such an argument is urged, it should be dealt with however briefly, consistent with the stage of the case, by the Single Judge. It is for the Division Bench hearing the special appeal to consider whether the order decides matters of moment or is of such a nature that would affect the vital and valuable rights of the parties and causes serious injustice to the concerned party.

37. The reference to the Full Bench shall accordingly stand answered in the aforesaid terms. All these special appeals shall now be placed before the appropriate Bench according to the roster of work for final disposal in the light of this judgment. Before we conclude, the Court would like to express its appreciation of the able assistance rendered to the Court by the learned counsel appearing for the appellants, the learned Additional Advocate General appearing for the State, and by Shri Manish Goel and Shri Rahul Agarwal who were appointed by the Court as *amicus curiae*.