

**(1953) 02 GUJ CK 0004**  
**In the Gujarat High Court**

**Case No :** Civil Miscellaneous Applns. No's. 58 and 59 of 1952

Bombay Steam Navigation Co. Ltd.

APPELLANT

Vs

Damodar Savailal

RESPONDENT

**Date of Decision :** 04-02-1953

**Acts Referred:**

Arbitration Act, 1940 — Section 19  
Civil Procedure Code, 1908 (CPC) — Order 45 Rule 3, 109 , 110  
Constitution of India, 1950 — Article 132, 133, 133(1), 134, 136  
Government of India Act, 1935 — Section 205 , 205(1)  
Income Tax Act, 1961 — Section 66

**Citation :** (1953) 02 GUJ CK 0004

**Hon'ble Judges :** Shah, C.J;Chhatpar, J;Baxi, J

**Bench :** Full Bench

**Advocate :** H.C. Shah, for the Appellant; G.B. Joshi and A.R. Baxi, General, for the Respondent

## **Judgement**

Chhatpar, J.—The above two petitions are being deal with together as the facts and points of law are similar. They are petitions under Order 45, Rule 3, CPC for leave to appeal to the Supreme Court from the order of the Full Bench of this Court deciding a preliminary question against the Petitioners and remanding the cases to the trial Court for disposal in accordance with law.

The opponent in both the matters had filed suits against the applicant Steamship Navigation Co., for recovery of Rs. 167-3-6 in one case and Rs. 140-0-0 in the other for compensation or damages for short delivery of goods carried under bills of lading containing similar conditions. The Defendant denied liability and one of the defences taken was based upon Clause 19 of the Bill of Lading to the effect that the Plaintiff had not served the Defendant with notices of claim within 14 days as required by this clause and the Plaintiff's suits were, therefore, liable to be dismissed. Another plea raised was that the Plaintiff's suits were time barred, under Clause (6) of Article 3, Carriage of. Goods by Sea Act, 1925, being instituted after one year. The written statements thereafter denied the damages

claimed and further raised a contention that the Plaintiff was not in any circumstances entitled to the claims under Clause 15 of the Bill of Lading. The Plaintiff admitted that notices of 14 days of the claim were not given to the Defendant. A preliminary issue was raised in each of the cases by the trial Court whether for want of notices alleged to be necessary by the Defendant company in accordance with Clause 19 of the Bill of Lading, the Plaintiff's suits were liable to be dismissed. The trial Court accepted the plea of the Defendant on this count and dismissed the two suits. This decision was challenged by the Plaintiff in revision application which came before me as a Single Judge and I referred the two matters to the Full Bench expressing my disagreement with a prior decision of this Court given by the learned Chief Justice of this Court in a similar matter in favour of the Defendant company. The Full Bench held that Clause 19 of the Bill of Lading was not applicable to the present case and it also expressed its opinion that in case it was pleaded that it did apply, the clause would be repugnant to Clause 8 of Article 3, Carriage of Goods by Sea Act, 1925 and therefore void. The Full Bench, therefore, set aside the decisions of the trial Court and remanded the two cases to it for disposal in accordance with law on the rest of the pleas raised by the Defendant. The two cases are still pending. The Defendant now wishes to appeal to the Supreme Court from the decision of the Full Bench and prays for certificates that the cases are fit for appeal to the Supreme Court. To the petitions similar objections are filed by the Plaintiff to the effect that the question involved is not of public importance and the amount in each case is under Rs. 200/-. He also raised an objection that there was no provision of any appeal against a revision application.

2. At the hearing we raised Anr. question which appeared to go to the very root of the matter whether the orders were appealable not being final orders, and we issued notice to the Advocate General as the decision involved interpretation of certain Articles of the Constitution.

3. Now Order 45, Rule 3, Code of Civil Procedure, has to be read in conjunction with Sections 109 and 110, CPC Section 109 as recently amended after the Constitution of India reads as under:

Subject to the provisions in Chap. 4 of Part 5 of the Constitution and such rules as may, from time to time, be made by the Supreme Court regarding appeals from the Courts of the States, and to the provisions hereinafter contained, an appeal shall lie to the Supreme Court

(a) from any judgment, decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction.

(b) from any judgment, decree or final order passed by a High Court in the exercise of original civil jurisdiction; and

(c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to the Supreme Court."

The Petitioner seeks our certificates under Clause (c) of Section 109 on the ground that the orders are fit for appeal to the Supreme Court. But the opening words of the section make it subject to the provisions of Chap. 4 part 5 of the Constitution and we have, therefore, to refer to Article 133 of the Constitution which provides for appeals to the Supreme Court in civil proceedings. The preceding Article 132 provides for appeals to the Supreme Court when the case involves a substantial question of law as to the interpretation of the Constitution and applies to civil, criminal and other proceedings, while Article 134 provides for appeals to the Supreme Court In criminal proceedings.

4. Article 133 says:

133(1). An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India, if the High Court certifies....

(a) ... ..

(b) ... ..

(c) that the case is a fit one for appeal to the Supreme Court. ... ..

The article does not give a right of appeal from every order but only from a final order. The word "final" does not precede the word "order" in Section 109(c), CPC Nevertheless, as this Section has to be construed subject to the provisions of Article 133, an appeal u/s 109(c), CPC to the Supreme Court, when it is an appeal from an order, must be from a final order and not any order as it could have been under the CPC in force before the Constitution came into being and the CPC was amended in consequence thereof.

5. The objection of the opponent that an appeal does not lie from an order passed by the High Court in revision has no substance. Article 133(1)(c) of the Constitution makes no distinction between an order passed in appeal and revision, the words being that any judgment, decree or final order is appealable, if the case is fit for appeal. If any authority is needed I may refer to the case of- AIR 1949 239 (Privy Council) , wherein it was clearly held that orders passed in revision do not fall within Clause (a) of Section 109, CPC similar to Article 133(1)(c), but Section 109(c) corresponding to Article 133(1)(c) is wide enough to cover an appeal from an order made in revision. The Madras High Court similarly held in the case of- R.M.A.R.A. Adaikappa Chettiar Vs. S. Ramaraja Thevar (died) and Another, , relying upon-Balakrishna Udayar v. Vasudeva Ayyar AIR 1917 PC 71 (C) and-Lachmi Narain v. Bal Makund AIR 1924 PC 198 (D) where appeals were in fact entertained by the Privy Council from orders passed in revision; this ruling lays down further that Section 109(c) contemplates special cases in which the matter in dispute is not measurable in money and the questions involved are of great public or private importance; and for this proposition reliance is placed on two Privy Council cases reported in-Radhakrishna Aiyar v. Swaminatha Aiyar AIR 1921 PC 25 (E) and-Banarsi Prosad v. Kashi Krishna 23 All 227 (F).

6. I now deal with the most important point in the cases whether the order passed in each of the two matters is a final order. The words "final order" appear in Section 109(a) and (b), CPC and fortunately we have case law on the subject, though it is not quite uniform in the interpretation of the words. Mr. Shah, the learned advocate for the Petitioner Company has contended that what is not an interlocutory order is a final order. Interlocutory orders have no concern with rights of the parties or merits of the case. Any order according to him which decides any matter on merits of the case must to that extent be considered a final order. It is also contended that a substantial decision is alone sufficient and it is not necessary that the litigation should come to an end by the order in question.

In an early decision of the Privy Council in the case of-Rahimbhoy Habibbhoy v. C.A. Turner 15 Bom 155 (G) their Lordships of the Privy Council construed an order holding the Defendant accountable and directing accounts to be taken as sufficient to be considered a final order observing:

It is true that the decree that was made does not declare in terms the liability of the Defendant, but it directs accounts to be taken which he was contending ought not to be taken at all; and it must be held that the decree contains within itself an assertion that, if a balance is found against the Defendant on those accounts, the Defendant is bound to pay it. Therefore the form of the decree is exactly as if it affirmed the liability of the Defendant to pay something on each one of these claims, if only the arithmetical result of the account should be worked out against him. Now the question of liability was the sole question in dispute at the hearing of the cause, and it is the cardinal point of the suit. The arithmetical result is only a consequence of the liability. The test question in issue was the liability, and that has been determined by this decree against the Defendant, in such a way that in this suit it is final.

In the case of-Saiyid Muzhar Hossein v. Mt. Bodha Bibi 17 All 112 (H), leave to appeal was refused by the High Court on the ground that the order was not final; it was one of remand. The Privy Council relying upon the earlier case cited above granted leave observing that the order establishing liability was one which could not have been questioned again in the suit and that it was the cardinal point in the suit. It was, therefore, construed to be a final order. But the Privy Council in-Ramchand Manjimal v. Firm Goverdhandas Vishandas Ratanchand AIR 1920 PC 86 (I), following the cases of-Salaman v. Warner (1891) 1 QB 734 (J) and-Bozson v. Attricham Urban Council (No. 1), (1903) 1 KB 547 (K) held that an order is final if it finally disposes of rights of the parties; in that case an order refusing stay of suit u/s 19, Arbitration Act was held not to be final as it did not finally dispose of those rights but left them to be determined by the Courts in the ordinary way.

This ruling was followed by the case of-Abdul Rahman v. D.K. Cassim and Sons AIR 1939 PC 58 (L), wherein their Lordships in clear terms laid down that an order was not final unless it finally disposed of the rights of the parties in relation

to the whole suit, and referring to the case of Ramchand Manjimal, their Lordships observed:

Lord Cave in delivering the judgment of the Board laid down, as the result of an examination of certain cases decided in the English Courts, that the test of finality is whether the order "finally disposes of the rights of the parties", and he held that the order then under appeal did not finally dispose of those rights, but left them "to be determined by the Courts in the ordinary way." It should be noted that the Appellate Court in India was of opinion that the order it had made "went to the root of the suit, namely the jurisdiction of the Court to entertain it", and it was for this reason that the order was thought to be final and the certificate granted. But this was not sufficient. The finality must be a finality in relation to the suit. If, after the order, the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it u/s 109(a) of the Code.

Their Lordships would only add that the enforcement of this principle involves to practical hardship, inasmuch as, in a proper case, it is always open to the Appellate Court to give a special certificate u/s 109(c).

This decision finally puts an end to all prior notions of what should be construed as a final order.

The Federal Court in - AIR 1949 1 (Federal Court) construed similarly the words "final order" as that which finally determines the points in dispute and brings the case to an end and observed:

To constitute a final order it is not sufficient merely to decide an important or even a vital issue in the case, but the decision must not keep the matter alive and provide for its trial in the ordinary way.

I, therefore, hold that the order passed in each of the two cases is not a final order.

7. Mr. Shah, the learned Advocate for the Petitioner Company raised a further contention that the orders come within the purview of the word "judgment". The Constitution refers to "judgment, decree or final order" and the word "final" is not prefixed to the word "judgment" as it is to the word "order." In the Letters Patent of the Bombay, Allahabad and Calcutta High Courts, appeals are provided from final judgments, decrees and final orders. In the Government of India Act, 1935, Section 205 referred to "judgment, decree or final order" from which an appeal lay to the Federal Court if the case involved a substantial question of law as to the interpretation of the Act etc. Under the English Law, judgment is almost equivalent to a decree and both judgment and decree can be final or interlocutory according as they do or do not finally determine the rights of the parties and conclusively dispose of the whole matter in dispute. Under the Code of Civil Procedure, judgment is defined as the statement given by the Judge of the grounds of a decree or order. An order means the formal expression of any

decision of a civil Court which is not a decree and a decree means the formal expression which so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in suit and may be either preliminary or final. But we have to construe the words "judgment, decree or final order" as used in the Constitution.

Sulaiman J. in the case of- AIR 1939 43 (Federal Court) has given a very learned discussion on the meaning of "judgment" in civil cases. His view was that the word "judgment" could not be taken in its widest possible sense so as to include every order which terminates a proceeding pending in a High Court so, far as that Court is concerned, but must have relation to the final adjudication of the matter in dispute between the parties. A judgment must partake of the nature of finality attributed to a decree and a final order when it is used in conjunction with the words "decree and, final order", else the word "decree or final order" would become superfluous, as every decision of the High Court in any proceeding pending before it would be construed as a judgment whether or not it finally puts an end to the litigation between the parties.

In AIR 1949 1 (Federal Court) cited above, their Lordships of the Federal Court also construed the term "judgment" and referred to the case law on the point particularly the decision in-"Dr. Hori Ram Singh's case (N)". The conclusion arrived at was that the term "judgment" indicates a final decision on the merits of the dispute before the Court. I may also refer to the following remarks in-Mohammad Amin Bros. Ltd., v. Dominion of India AIR 1950 FC 77 at p. 79 (O):

Lastly, it was urged by Mr. Setalvad, though somewhat faintly, that even if the order appealed against is not a final one, it could still be regarded as a judgment and as such would come within the purview of. Section 205(1), Government of India Act. In English Courts the word "judgment" is used in the same sense as a "decree" in the CPC and it means the declaration or final determination of the rights of the parties in the matter brought before the Court; vide - AIR 1949 1 (Federal Court) ". According to the definition given in the Code of Civil Procedure, a judgment is the statement of reasons given by a Judge on which a decree or order is based. If the order which is made in this case is an interlocutory order, the judgment must necessarily be held to be an interlocutory judgment and the collocation of the words "judgment, decree or final order" in Section 205(1), Government of India Act, makes it clear that no appeal is provided for against an interlocutory judgment or order.

Some recent decisions of the High Courts in India following the decisions of the Privy Council and of the Federal Court may be referred to. The Calcutta High Court in- Chandra Singh Dudhuria and Others Vs. The Midnapore Zemindary Co. Ltd., , held that an order of remand could not be described as a final order and therefore no appeal lay from it to the Supreme Court under Article 133 of the Constitution. At p. 302 while discussing whether the word "judgment" must be differentiated from the words "decree and final order", Harries C.J. observed:

If what is sought to be appealed from is neither a decree nor a final order, then it appears to me there can be no appeal because a judgment had been delivered in the case. If appeals lay from all judgments then the words "decree or final order" were unnecessary and it appears to me that if this Court holds that the order sought to be appealed from is not a final order, then no appeal can lie because there was a judgment upon which the order sought to be appealed from was drawn up. It is unnecessary in this case to consider in detail what meaning should be given to the word "judgment" in Article 133 of the Constitution, but it does not seem to me that a meaning cannot be given to it so that a party would have a right to appeal from an order which was not final, though Article 133 only gives a right to appeal from a final order. To give the word "judgment" too wide a meaning would be to give a right of appeal from an order which was not final and from a formal adjudication which could not be described as a decree. Whatever meaning is given to the word "judgment" it must be some meaning which would give effect to the words following namely, "decree or final order". In my view, as the order in question is not a final order no appeal would lie under Article 133 of the Constitution though there was a judgment of this Court upon which the order was based.

The Bombay High Court in- *Jamnadas Prabhudas Vs. Commissioner of Income Tax, Bombay City*, , while holding that the expression "judgment, decree or final order" did not apply to a decision given by the High Court u/s 66, Income Tax Act, made some remarks as to the meaning of the word "judgment". It was observed that the expression "judgment, decree or final order" used in Article 133(1) of the Constitution was used in its English sense, which meant a final declaration or determination of the rights of parties and it also meant a decision given on merits. "Judgment, decree or final order" is a compendious expression and each one of the parts of this expression bears the same connotation, viz. that there is an adjudication by the Court upon the rights of the parties who appear before it; judgment must not be read in this context in contradistinction to "decree or final order". At p. 481 Chagla C.J. observed:

Emphasis is also placed by Sir Jamshedji on the fact that whereas "order" is qualified by "final", "judgment" is not so qualified. We do not come across the expression "final judgment, decree or order" for instance in Clause 39, Letters Patent. But if the expression "judgment" itself connotes a final adjudication by the Court upon the rights of parties, the adjective "final" which acted as a prefix to the word "judgment" was really tautologous and "judgment" by itself without the qualifying expression "final" still retains the same connotation of finality. This expression has also been used in the Government of India Act in Section 205, and that section provided for appeals to the Federal. Court from any judgment, decree or final order of a High Court in British India where the High Court certified that the case involved a substantial question of law as to the interpretation of the Government of India Act or any order in Council made under the Act, and that expression has also come in for interpretation and the interpretation put upon Section 205 has been that the judgment there means a

final declaration or determination of rights of parties, and it is difficult to hold that our constitution makers with Section 205 before them when they used the same language that was used in Section 205 used it with a different meaning in Article 133(1).

The Full Bench decision of the Allahabad High Court in- Fateh Kunwar Vs. Durbijai Singh, , cited by the learned Advocate for the Petitioners has little relevancy as what was decided by the majority of the Judges was that the judgment, "decree or final order appealed from in Article 133 did not necessarily refer to the judgment, decree or final order of the High Court in its entirety but meant that part of the judgment, decree or final order of the High Court, which was the subject matter of the proposed appeal. The point decided was with reference to the value of the subject matter.

8. I, therefore, hold that the orders sought to be questioned by the present Petitioners are not final orders nor can they fall within the word "judgment" used in Article 133 of the Constitution. It is with some reluctance that I have to come to this conclusion that the present Constitution which has otherwise extended the jurisdiction of the highest Court of appeal in other respects and has even provided for a direct approach to it in the shape of petitions for writs etc., has taken away a right of appeal which formerly was available to the litigant. Undoubtedly under the former law appeals from the orders in question would have lain to the Privy Council u/s 109(c), Code of Civil Procedure, then in force. One way out of the difficulty may be to construe the phrase "any judgment, decree or final order in a civil proceeding of a High Court" as meaning any judgment, decree or final order passed in the particular proceeding pending before the High Court, which may be an appeal, a revision or any other proceeding and distinguish- AIR 1939 43 (Federal Court) , remarks at pp. 47 and 48 and- AIR 1949 1 (Federal Court) , remarks at p. 5, where similar argument was repelled on the ground that the words "in a civil proceeding of a High Court" were not in the CPC nor in the Government of India Act, 1935. The words "of a High Court" may have been construed as governing the words "Civil proceeding" and not "any judgment, decree or final order", there being no commas after "order" and "proceeding", and the expression not being "any judgment, decree or final order of a High Court in a civil proceeding". But the word "proceeding" has been used not only in Article 133 but in the preceding Article 132 and there the expression used is "any judgment, decree or final order of a High Court in the territory of India in a civil, criminal or other proceeding". The word "proceeding" in Article 132 must mean the proceeding that started in the Court of the original jurisdiction and not the particular proceeding pending i.e. appeal or revision in the High Court. And this interpretation is clear from the Explanation to Article 132 giving an extended definition of the expression "final order" as including an order deciding an issue which if decided in favour of the Appellant would be sufficient for the disposal of the case. The explanation would be unnecessary if the word "proceeding" meant the particular proceeding pending before the High Court.

The word must be construed in the same sense in Articles 132, 133 and 134. If the present orders in the two petitions would have involved a substantial question of law as to the interpretation of the Constitution, they would no doubt have come within the extended definition of the words "final order" in Explanation to Article 132 in spite of the fact that they were merely orders of remand which did not finally put an end to the suits. A similar explanation containing the extended definition of "final order" does not appear in the succeeding Article 133. So it appears that the Constitution makers had kept this distinction that whereas in certain cases an appeal would lie under Article 132 from orders which are not final in the ordinary sense, there was no right of appeal in similar cases falling under Article 133. Probably this distinction was advisedly kept in the Constitution, as Article 136 provides for a special leave to appeal from any judgment, decree, determination, sentence or order (which need not be final) in any cause or matter passed or made by any Court or tribunal in India. That is, although a litigant may have no right to ask for a certificate from the High Court, he can nevertheless apply for special leave to the Supreme Court under Article 136. This concludes the discussion as regards the preliminary question whether the present petitions should be dismissed in "limine", as the orders are not final orders within the meaning of Article 133. If I were inclined to construe them otherwise, I would have granted a certificate of fitness under Clause (c) of Article 133, as the question involved is of considerable importance and covers good many cases. We are informed that several cases are pending in the Courts of Saurashtra and our Full Bench decision is likely to affect the decisions of other High Courts, where the interpretation of similar bills of lading may be involved. At least one of the Judges of this Court was at one time of the view contrary to that of the Full Bench and that is also a material question when we are judging the importance of the points involved in the cases. But as I hold that I am powerless to grant the certificates under Article 133, I dismiss the two petitions with costs.

Shah, C.J.

9. I agree.

Baxi, J.

10. I agree.