

(1968) 08 CAL CK 0025
In the Calcutta High Court

Brahmaputra Tea Co. Ltd.

APPELLANT

Vs

Turner Morrison and Co. Ltd. and Another

RESPONDENT

Date of Decision : 21-08-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115, 151, 92
Companies Act, 1956 — Section 215

Citation : (1968) 08 CAL CK 0025

Hon'ble Judges : Sisir Kumar Mukherjea, J;Ajit Nath Roy, J

Bench : Division Bench

Judgement

Mr. Justice Ajit Nath Roy, J.—This appeal is from the order of Mukherjee, J. dated 24 July, 1968.

2. The order was passed on the notice of motion taken out by Brahmaputra Tea Co. Ltd., inter alia, for an order that Brahmaputra Tea Co. Ltd. be added as a party.

3. The learned Judge was pleased to hold that the Brahmaputra Tea Co. Ltd. was neither a necessary nor a proper party and therefore was not entitled to be added as a party to the suit.

4. The suit to which Brahmaputra Tea Co. Ltd. applied to be added as a party was instituted in the month of November, 1965. The Plaintiff Turner Morrison & Co. Ltd. filed this suit against Hungerford Investment Trust Ltd. The Plaintiff in the suit claimed a decree for Rs. 1,27,67,052.16 and a declaration that the Plaintiff has a first and paramount lien and charge on 2,295 shares in the Plaintiff company held by the Defendant and on all dividends payable to the Defendant in respect thereof, for the aforesaid sum and for possession of the said shares and a decree directing the sale of the shares and appropriation of the proceeds of sale in protanto satisfaction of the claim of the Plaintiff. Broadly stated the Plaintiff's claim is that the Plaintiff made payments totaling Rs. 79,70,802 as mentioned in paragraph 4 of the plaint as agent or on behalf of or for the benefit of the Defendant. The payments were made in consequence of assessment

orders made by the income tax Authorities on the income of the Defendant company. The Plaintiff also claimed interest on the said payments amounting to Rs. 47,98,250.15.

5. The Defendant filed a written statement and denied the claim of the Plaintiff.

6. The Appellant Brahmaputra Tea Co. Ltd. in the application for being added as a party alleged that prior to 16 January, 1968 Nirmaljit Singh Hoon and/or Star International (Ship Owners) Ltd. were beneficial owners of the shares of Romanigo Holdings S.A.H. and of the Romanigo subsidiary companies. The further allegations are that on or about 16 January, 1968 an agreement was entered into between Hoon on the one hand and Varma on the other and alternatively acting for and on behalf of Star International (Ship Owners) Ltd., whereby Hoon agreed to sell and Varma agreed to purchase Hoon's interest in the Romanigo Holdings S.A.H. a company incorporated in Luxembourg which has subsidiary companies incorporated in England, Singapore and India. The subsidiary companies incorporated in England, Singapore and India. The subsidiary companies are Turner Morrison, Graham Group of Companies Ltd. and Hungerford Investment Trust Ltd. The agreement dated 16 January, 1968 provides payment of pounds 2,25,000 on dates fully mentioned in the agreement and the first payment was to be made on 15 February, 1968 for the sum of pounds 75,000. Payments were to be made to Barelays Bank Limited, Marble Arch Branch, London to the credit of Hoon's account. The other payments were to be made on 31 December 1968, 30 December. 1969, 31st December 1970 for the sum of pounds 50,000 on each date. The other important provisions of the agreement were that Hoon and Varma irrevocably appointed Robert Cames as stakeholder documents of title covering their interests in Romanigo which would be retained by Cames up to 15 February, 1968. If by 15 February, 1968 Varma would pay Hoon pounds 75,000 Garmes would thereafter retain the said documents of title and would have full authority to act on behalf of Romanigo in the management of the subsidiary companies in connection with the appointment and/or dismissal of Directors and Liquidators, acting therein on the instructions of Varma and not on those of Hoon but Garmes would retain possession of the title documents until all the payments were made to Hoon. If on the other hand, payment of pounds 75,000 was not made to Hoon by 15 February, 1968, then Garmes would pass over to Antoine Richard the said documents of title and would not solely on the instruction of Hoon and not on those of Varma and Varma would be deemed permanently to have relinquished every part of his interest in Romanigo. Another important clause in the agreement was that upon Varma paying to Hoon pounds 75,000 not later than 15 February, 1968, Varma or his assignees would forthwith indemnify Hoon against any claim which might be made against Hoon arising out of the Indemnities given by Hoon on 7 June, 1963 to the Executors of Nigel Turner (deceased) and John Turner (deceased). In case of management and control reverting to Hoon for non payment of the sums mentioned in the agreement the claims and indemnities would revert to Hoon. Another important clause was that if Varma did not make payments mentioned in

the agreement on due dates the agreement would be null and void by virtue of default and any payment made by Varma would be forfeited.

7. On or about 27 January, 1968 another agreement was made between the Appellant Brahmaputra Tea Co. Ltd. on the one hand and Sukhdev Varma on the other. In that agreement it was recited that Hoon and Varma were associated in the ownership of Romanigo Holdings S.A.H. a company incorporated in Luxembourg to which reference has already been made in the earlier argument dated 16 January, 1968. Under the 27 January, 1968 agreement, in consideration of payment of 3,25,000 pounds by Brahmaputra Tea Co. Ltd. to Varma the latter agreed to assign, sell and transfer to the Brahmaputra Tea Co. Ltd. the right title and interest in the agreement dated 16 January, 1968 as also his own right title and interest in the said companies including all assets, shares, loans and advances in the said companies. Payments were to be made on or before 15 February, 1968 for 75,000 pounds on or before 31 December, 1968. 31 December, 1969, 31 December, 1970, 31 December, 1971 and 31 March, 1972 for the sum of 50,000 pounds on each due date. Payments were to be made to the credit of Hoon's account at Barclays Bank Limited, Marble Arch Branch, London to the extent of 2,25,000 pounds together with interest on 1,50,000 pounds from 15 February, 1968 mentioned in 16 January, 1968 agreement. The agreement further provided that upon payment of 75,000 pounds as provided Carmes would retain the custody of the documents of title and would have full authority to act on behalf of Ramanigo in the management of the subsidiary companies particularly in connection with the appointment and/or dismissal of Directors and Liquidators, acting therein on the instructions of Brahmaputra Tea Co. Ltd. and not on those of Hoon or Varma in accordance with the said Agreement dated 16 January, 1968. Another important term was that upon Brahmaputra Tea Co. Ltd. paying to Varma 75,000 pounds in terms of the said Agreement dated 16 January, 1968, Brahmaputra Tea Co. Ltd. or its assignees would indemnify Hoon against any claim which might be made against Hoon arising out of the Indemnities given by Hoon on 7 June, 1963 to the executors of Higel Turner (deceased) and John Turner (deceased) and Brahmaputra Tea Co. Ltd. would be entitled to all benefits that might arise from such indemnities or original purchase of Turners' interests in the said companies. It was further provided that Varma would give indemnity to Hoon as required under the Agreement dated 16 January, 1968 in the event Hoon did not accept the indemnity of Brahmaputra Tea Co. Ltd. provided however that in such case Brahmaputra Tea Co. Ltd. would give counter indemnity to Varma in terms thereof.

8. The indemnity dated 7 June, 1963 to which reference has been made will appear at page of the paper book. It may be stated here that the appeal was by consent of parties heard on the materials appearing in part 1 and part 2 of the paper book filed. The 7 June, 1963. Agreement of Indemnity is between Mrs. M.T. Turner for herself and as Executor of J.G. Turner (deceased) described as first vendor, C. B. Hopwood and M.I. Makin as Executors of N.F. Turner

(deceased) described as the second vendors and R.N. Walker described as the third vendor and Nirmaljit Singh Hoon and Romanigo Holding S.A.H. as purchasers. The purchasers namely Nirmaljit Singh Hoon and Romanigo Holding S.A.H. jointly and severally agreed to indemnify the second vendors from/against all liability and undertook to procure their release in respect of any money owing by the Estate of N.F. Turner to Grahams Shipping & Trading Co. Ltd., Grahams Trading Co. (India) Ltd. (Sterling Company), Grahams Trading Co. (India) Ltd. (Rupees Company) and Turner Morrison & Co. Ltd. and further agreed to indemnify the first and the second vendors namely Mrs. M.T. Turner and C. B. Hopwood and each of said N.F. Turner and the said J.G. Turner to pay any Indian Income Tax or Super Tax payable or recoverable under the Indian Income tax Acts by or from Hungerford Investment Trust Ltd. and/or Turner Morrison & Co. Ltd. and damages and ancillary relief and from the against any liability and expenses resulting from such action or legal or other costs incurred in connection therewith including damages.

9. On the basis of these two Agreement dated 16 January, 1968 and 27 January, 1968 the Appellant Brahmaputra Tea Co. Ltd. alleged that there was a subsequent oral agreement between Varma and Brahmaputra Tea Co. Ltd. with the knowledge and approval of Hoon that Brahmaputra Tea Co. Ltd. would pay 50,000 pounds to Barclays Bank Ltd., Marble Arch Branch, London to the credit of Hoon and 25,000 pounds to Star International (Shipowners) Ltd. for and on behalf of Sukhdev Varma and Star International Ltd. The Appellant Brahmaputra Tea Co. Ltd. alleged that in breach of agreement Hoon and Varma failed to lodge with Carmes as stakeholder documents of title covering interest in Romanigo Holdings. The Appellant alleged that under the agreement dated 27 January, 1968 as from making of the first payment of 75,000 pounds Varma would exercise no control over Romanigo Holdings and would not interfere with the running or management of Romanigo Holdings, and that under the previous Agreement dated 16 January, 1968 on the payment of 75,000 pounds to Hoon would exercise no control over Romanigo Holdings or Romanigo subsidiary companies and would not interfere with the running or management of the Romanigo Holdings.

10. The Appellant alleged in the application that the Appellant filed a statement of claim on or about 10 April, 1968 in the High Court. Queen's Bench Division, London against Hoon. Varma and Star International (Shipowners) Ltd. and endorsed a writ for an order for specific performance of agreement in writing dated respectively 16 and 27 January, 1968, an injunction as set out in the statement of claim and an order for appointment of receiver for the sum of 50,000 pounds and further orders. The Appellant made an application in the High Court of Justice, Queen's Bench Division, London for an injunction restraining Hoon, Varma and Star International (Shipowners) Ltd. from continuing to act as they did so till then to prevent the applicant Brahmaputra Tea Co. Ltd. being of the rights under the agreements dated 27 January, 1968 and 16 January, 1968.

11. In paragraph 20 following of the application the Appellant alleged that the Appellant agreed to acquire interests of Hoon and Varma in Romanigo Holdings S.A.H. and all the subsidiaries which include Hungerford Investment Trust Ltd. and the continuation of any activity without reference to the Appellant on the part of Nirmaljit Singh Hoon or any other liquidator of the said Hungerford Investment Trust Ltd. was highly prejudicial and detrimental to the interest of the Appellant. The Appellant further alleged that the Appellant was vitally interested in this suit by virtue of the said Agreement dated 27 January, 1968 and that the Appellant was a necessary party to the suit.

12. Detailed arguments were advanced by both parties as to the merits and demerits of the two Agreements dated 16 January, 1968 and 27 January, 1968. The arguments centred on three principal points. First, whether there was payment in accordance with the terms of the two agreements. Secondly, whether an Indemnity was given in accordance with the terms in the two agreements. Thirdly, whether the clause in both the agreements requiring Hoon in the case of 16 January, 1968 Agreement and Varma in the case of 27 January, 1968 Agreement not to have any part in the control of Romanigo Holdings on the first payment of 75,000 pounds was valid. The rival contentions were those. According to the Appellant 75,000 pounds had been paid. It was said that 50,000 pounds in any event was paid to Hoon at the Barclays Bank Ltd., Marble Arch Branch, London and 25,000 pounds was paid to Star International (Shipowners) Ltd. in accordance with the subsequent oral agreement. The contention on behalf of the Respondent on the other hand was that 75,000 pounds was not paid and the oral agreement to pay the balance of 25,000 pounds was impeached.

13. With regard to Indemnity it was contended on behalf of the Appellant that Indemnity was given and reliance was placed on the agreement as well as materials appearing at pages 37, 52, 150, 159, 168, 169 and 214 of the paper book. It was said that on or about between 27 and 29 days of February, 1968 the Appellant arranged to deliver indemnity and that the Appellant sent on indemnity. It was said that Hoon in his affidavit did not state that he did not receive any indemnity. The receipt dated 11 March, 1968 appearing at page 150 of the paper book was strongly relied only by the Appellant to contend that 75,000 pounds had not only been paid but also that there was an extension of time for giving indemnity in acceptable form and it was said that there was nothing to show that Hoon demanded indemnity from Varma. Finally it was said that no reasons were advanced for the non-acceptance of indemnity. The Respondent's contention were first that the Appellant gave no evidence of giving or indemnity, secondly, that the alleged receipt dated 11 March, 1968 at page 150 of the paper book the affidavit of Tayler at page 160 of the paper book also showed that no indemnity was given and the alleged indemnity at page 162 of the paper book was not accepted as alleged by Hoon in paragraph 14 of his affidavit at page 205 of the paper book.

14. With regard to the clause for control of Romanigo Holdings it was contended

on behalf of the Respondent that the clause offended the provisions contained in the Indian Companies Act. It was also said that the Appellants did not allege that under the foreign law those clauses were valid. It was also contended that the Appellant did not after any evidence of foreign law and therefore, the presumption would be that foreign law would be the same as the Indian Law and therefore Mr. Advocate-General on behalf of the Appellant that the specific point had not been taken or else the Appellant would have shown what the foreign law is and the Appellant would have justified the agreement to be in consonance with foreign law.

15. These three points bristle with controversies. There are disputes questions of fact. There are also disputed questions of law. These questions do not form and subject-matter of this suit. This feature has to be kept in the forefront. On the contrary, these matters are the subject-matter of the action pending in England. It is not desirable that I should express any opinion on the rival contentions of the parties on these aspects.

16. Mr. Advocate-General contended that there was a prima facie case that there was an agreement and therefore the Appellant had sufficient interest. Emphasis was placed by Mr. Advocate-General on the lien claimed by the Plaintiff in the suit against the Defendant in respect of the shares held by the Defendant and it was said that if the shares were sold, the Appellant would be affected by that. The Appellant if so advised would be able to contest the sale in properly constituted proceedings.

17. The most important question in this appeal is whether the appeal is competent or not. Mr. Advocate-General appearing on behalf of the Appellant contended the addition of parties was covered not only by the provisions contained in Order 1, Rule 10 of the Code but that parties were added under the inherent jurisdiction of the Court. It was said that when a stranger would apply for being added as a party to the suit the position of a stranger would be different to that of a party applying for the addition of a party to a suit. In the trial court the application was laid to be on the basis of Order 1, Rule 10 of the Code of Civil Procedure.

18. Mr. Advocate-General on behalf of the Appellant contended that the position of a stranger would be different for the reason that in determining the rights of a stranger the application would be an original proceeding and therefore, if there was determination of rights and liabilities of the stranger in that proceeding there would be a judgment within the meaning of Clause 15 of the Letters Patent. Mr. Advocate-General relied on the decisions in (1) AIR 1927 180 (Rangoon) , (2) Behari Lal Shaha Vs. Jnanendra Nath Bhattacharjea , (3) Badu Lal v. Chattu Gope reported in 21 CWN 269 and (4) Levy Brothers & Knowles Ltd. v. Subodh Kumar Dey reported in 21 CWN 894 as illustration of the power of the Court to add parties.

19. In the Rangoon case a suit was filed u/s 92 of the Code of Civil Procedure. It

was observed that a decree u/s 92 of the Code would bind all parties. In the Rangoon case the Appellant made an application to be made party to the suit instituted u/s 92 of the Code of Civil Procedure. It was said interest he Rangoon case that in an ordinary suit in personal a refusal to join a party might very well be not appealable as the party might not be bound by the decree that might be passed but a suit u/s 92 of the Code would operate in rem and an order amounting to refusing to join persons as parties would finally adjudicate and conclude the matter so far as those persons were concerned. The ration there was that in a suit in rem instituted u/s 92 of the CPC the refusal to add a party would amount to a judgment. The two distinctive features in the Rangoon case are - first, that it was a suit u/s 92 and a decision in such suit would be a decree in rem as opposed to a decree in personal and secondly, that the refusal to join a person as a party to such a suit would adjudicate or conclude the matter as far as the person was concerned and therefore it would be a judgment. In the present case there was no aspect of a decree in rem and therefore, the Rangoon case is of no application.

20. Behari Lal Shaha Vs. Jnanendra Nath Bhattacharjea related to a suit where the Plaintiff sued the Defendant for accounts in respect of wine shops on the footing of master and servant and in the alternative as a partner. The finding of the trial court was on appeal set aside and the Plaintiff was given a decree for accounts against the Defendant as agent. On second appeal to the High Court a remand was ordered to the District Judge that the facts would have to be investigated before the legal relation between the parties would be determined to be that of agent. It was held that the effect of the decision of the single Judge on second appeal being to deprive the Plaintiff of the benefit of the decree made in his favour of the District Judge and to reopen the entire controversy between the parties it was a judgment within the meaning of Clause 15 of the Letters Patent. It will appear from the observation at page 924 of the Report (21 CWN) that the effect of the decision was to terminate the appeal and to vacate the decree and therefore it was a judgment. In other words the decree made by the District Judge was vacated and therefore, it amounted to a judgment by reason of variation or vacation of the decree. In the present case, I am unable to hold that the decision in Behari Lal Shaha Vs. Jnanendra Nath Bhattacharjea is of any aid to the Appellant because there is no question of variation or vacation of the decree.

21. The decision in Badu Lal v. Chattu Gope reported in 21 CWN 269 on which Mr. Advocate-General relied related to an application for sanction to prosecute. The Appellant filed a suit against the Respondent for the recovery of money. The Respondent was a resident in Bihar and the Appellant therefore, applied for leave to sue and swore that the money was lent at Calcutta. At the hearing the Appellant agreed to be bound the denial on oath of the Respondents. The Respondent denied the claim on oath and the suit was dismissed. An application was made for the sanction to prosecute the Appellant. The application was dismissed by a judge of the Small Causes Court on the ground that the

application for leave to sue in the course of which the affidavit was affirmed, was not a judicial proceeding. An application was then made u/s 115 of the Code of this Court to set aside the order of the Small Causes Court. The High Court ordered an enquiry by the Small Causes Court. An appeal was preferred from the other passed by the learned Judge sitting singly to the Appellate Court. It was held that the order of the learned Judge was a judgment within the meaning of Clause 15 of the Letters Patent. Sanderson, C.J. said at page 273 of the Report on the preliminary question which was argued as to whether there was a right of appeal or not: "The Plaintiff was alleging on the one hand and that the statements were not made in the course of a judicial proceedings, the prosecution on the other hand was alleging that they were made in the course of a judicial proceeding. It may be said that this was the main question between the parties. If the learned Judge had come to the conclusion that the statements were not made in the course of a judicial proceedings, that would have put an end to the matter, and the application would be dismissed. This case therefore, comes within the exact words of the learned Chief Justice Couch when he said: "It means a decision which affects the merits of the question between the parties by determining some right or liability" . . . "As I have pointed out, the decision of the question as to whether the statements were made in the courses of a judicial proceeding, was one which affected the merits of result of the entire matter, for if it had been decided in one way, viz. in favour of the applicant's contention, it would have put an end to the proceedings altogether." As has been pointed out in the Bench decision reported in 21 CWN 269 there was a decision on the merits of the matter in controversy between parties as to whether there was statement or not upon which there would or would not be sanction to prosecute. This decision does not therefore, help the Appellant.

22. Mr. Advocate-General relied on the decision in Levy Brothers & Knowles Ltd. v. Subodh Kumar Dey reported in 31 CWN 894. In that case there was a voluntary winding up and certain creditors satisfied liquidators as to the validity of their claim by ordinary methods of a creditor's proof of debt. The liquidator applied to the Court u/s 215 of the Indian Companies Act for direction that the liquidator might admit the claim. The creditors were not parties to that application. The Court made an order that the liquidator was not to admit the claim until the creditors had proved it in a regular suit. The creditors themselves moved the Judge in the Companies Jurisdiction for various forms of relief. The learned Judge refused to disturb the order made by the Court on the liquidators application. It was held that the order of the learned Judge in the winding up amounted to a refusal to the creditors of their important right to establish their claim in the winding up proceeding and it was therefore a judgment under Clause 15 of the Letters Patent. Mr. Advocate-General relied on this decision in support of his contention that the Appellant in the present case wanted to be added as a party and to be heard in aid of interest and therefore the refusal of the application would be a judgment. I am unable to accept that contention. In a company matter in winding up the creditors offered to prove their claim. The

liquidator asked for direction in winding up and the directions affected the creditor's proof of claims. The liquidator did not give notice to the creditors. The creditors asked for recalling or modification of the order previously made. There was a refusal of the order asked for and on behalf of the creditors. The creditors having been interested in winding up, they gave proof of their debts in winding up. Any refusal of their rights in winding up and relegating them to a suit would be a right or matter affecting the merits of the controversy between the parties. This decision is of no assistance to the Appellant.

23. Mr. Advocate-General contended that a shareholder would also have right in certain cases to be added as a party for the ends of justice and refusal of that prayer would also be a judgment. Reliance was placed on the decision in (5) *Russel v. Wakefield Waterworks Company* reported in 20 Equity Cases 474 and the observation at page 480 of the Report. In the *Wakefield's* case a shareholder filed a bill in chancery on behalf of himself and other shareholders against the directors and promoters of a bill in Parliament for rival purpose, alleging and illegal payment of the Company's money to promoters to buy off their opposition. A demurrer was taken to the bill that the payment was not alleged to be ultra vires. It was held that there being no allegation that the Company would not sue it was not a case in which the suit could be maintained in that form. The demurrer was allowed with leave to amend. There is an observation that there is always an exception to the general rule that the company is not an individual and the corporator must sue when the trust funds of the company have been misapplied. I am unable to accept that there is any application of the principle in *Wakefield's* case to the facts and circumstances of the present case.

24. The prominent question is as to what is a judgment. There I can do no better than refer to the decision of the Supreme Court in (6) *Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others*, (also reported in). The question in *Rani Ashrumati's* case was whether an order made under Clause 13 of the Letters Patent was or was not a judgment the meaning of Clause 15 of the Letters Patent. Reference was made to the observation of Couch, C.J. in the oft-cited case of (7) *The Justices of The Peace for Calcutta v. The Oriental Gas Company Ltd.* reported in 8 Bengal Law Reports, at page 433. Those observations are as follows: - "The word "judgment" in Clause 15 of the Letters Patent of 1965 means a decision, whether final, or preliminary, or interlocutory, which affects the merits of the question between the parties by determining some right or liability." The Supreme Court referred to the views of the Calcutta, Madras and Rangoon High Courts and thereafter said 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 35 Mad 1(FB) (E). According to White, C.J. to find out whether an order is a "judgment" or not, we have to look to its effect upon the particular suit or proceeding in which it is made. If its effect is to terminate the suit or proceeding, the decision would be a "judgment" but not otherwise. As this definition covers not only decisions in suit or actions but "order" in other proceeding as well which start with applications, it may be said that any final order passed on an application in the course of a suit, e.g. granting or refusing a party's prayer for adjournment of a suit or for examination of a witness, would also come within the definition. This seems to be the reason why the learned Chief Justice qualifies the general proposition laid down above by stating that "an adjudication on an application, which is nothing more than a step towards obtaining a final adjudication in the suit, is not a judgment within the meaning of Letters Patent."

25. Mr. Advocate-General relied on the observation of Supreme Court appearing at page 1165 of SCR 1963 and in paragraph 10 at page of M.G. Agarwal Vs. State of Maharashtra, that it would rank as a judgment if there was determination of some right or liability though it did not decide the case on merits. The observation of the Supreme Court on the meaning of "judgment" is immediately thereafter stated to be the final pronouncement of the Court the effect of which is to dispose of or terminate the suit or proceeding. In other words, the emphasis that the Supreme Court put upon the meaning of the word judgment is that the effect of a judgment within the meaning of Clause 15 of the Letters Patent is to terminate the suit or proceeding. The two contentions of Mr. Advocate-General were - first, that the dismissal of the application as far as the stranger was concerned terminated the proceedings and secondly it determined the merits of the parties in those proceedings. The effect of the order dismissing the application is not to put an end to the suit. The application is in the suit and the effect of the order is not to terminate the suit. The application does not determine right or liability. The application is not an original proceeding. I am, therefore, unable to accept the contention of Mr. Advocate-General that the appeal is competent.

26. There is an important reason why the appeal should fail. The test is to whether a person can claim to be added as a party or not is whether a person should have been originally pleaded as a necessary or proper party to the suit. It must be restated that the two agreements of January, 1968 are not the subject-matter of the suit. Mr. Advocate-General contended that there were three reasons which gave the Appellant the right to be added as a party to the suit. First, that under the agreements the Appellant had the obligation of giving indemnity, secondly, the Appellant had the right to control the subsidiaries and thirdly, the lien claimed by the Plaintiff on the shares in the suit would cause loss of control of the subsidiaries to which the Appellant became entitled under the

two agreements. It was said that the control that the Appellant acquired under the agreements was in relation to the management and therefore the Appellant as the controlling authority had a right to apply to be added as a party to direct the affairs of the subsidiaries. It was also said that the right to control was being resisted by the liquidator Hoon who was in-charge of the conduct of the Defendants. It was said that there was substantial interest of the Appellant in relation to the control over subsidiaries and if it was not protected, there would be loss of substantial interest in relation to subsidiaries. It was said that shares were part of properties in the subsidiaries and therefore loss of shares would mean loss of control over the Plaintiff.

27. Provisions contained in Order 1, Rule 10 relate either to parties themselves applying for addition of parties or the Court suo motu making a party the Plaintiff or Defendant to the suit. The application of the Appellant was not supported at the hearing of the appeal as one coming within the ambit of Order 1, Rule 10. There is no difference on principle between a party and a stranger applying under Order 1, Rule 10 of the Code. It was said to come within the inherent power of the Court. It may be stated here that any order passed under the inherent jurisdiction of the Court is not appealable. That view has been taken by the Supreme Court in the case of (8) Keshardeo Chamria Vs. Radha Kissen Chamria and Others, . It is also the settled law as will appear in the Bench decision in (9) Bibijan Bibi's case reported in AIR 1917 Cal 627 that no appeal lies from an order dismissing an application for addition of a party. It may be stated here that the Plaintiff denied in the trial court right of the Appellant to be added as a party but at the hearing of the appeal the Plaintiff did not oppose. Counsel for the Respondent criticized the Plaintiff in the suit and the Appellant to be helping each other and referred to the decree dated 25 February, 1964 in Suit No. 600 of 1961 in this Court where Haridas Mundra obtained an injunction restraining Hungerford Investment Trust from exercising voting rights except in accordance with the wishes of Mundra. Counsel for the Respondent said that in view of that injunction and the decree in that suit Hungerford could not sell shares to any excepting Haridas Mundra and could not vote except in accordance with the wishes of Haridas Mundra. It was therefore said that Hungerford Investment Trust Ltd. was not effective in regard to voting on the strength of shares held by Hungerford in Turner Morrison.

28. The Appellant in the petition referred to the agreements dated 16 January, 1968 and 27 January, 1968 and thereafter alleged that the Appellant agreed to acquire interest of Hoon and the Romanigo Holdings in the subsidiaries and contended that the activity of Hoon without reference to the Appellant and any other liquidator of Hungerford Investment Trust Ltd. would be prejudicial and detrimental to the interest of the Appellant. The Appellant referred to the suit instituted in the Court of Queen's Bench Division in England and it appears that thereafter there has been an order in that action as will appear at page 57 of Part I of the Paper Book. The order is dated 24th June, 1968. As a result of the order the Plaintiffs in the suit gave an undertaking to pay into court by the due

dates the amount mentioned in the agreement and the first Defendant Hoon gave an undertaking that 51 percent shareholding in turner Morrison & Company Limited held by Hungerford Investments Trust Limited (in Liquidation) would not be dealt with until the disposal of the London suit by 10 February, 1969 or until judgment therein. The rights and liabilities of the parties, forming subject-matter of the suit for specific performance in London are dealt with by the Interlocutory Order in Queen's Bench Division dated 24 June, 1968 and these are not the subject-matter of this suit.

29. Counsel on behalf of the Respondent advanced two contentions which require consideration. First, that the agreements dated 16 January, 1968, 27 January, 1968 require payment on due dates and unless and until the payments are made there will be no complete right. Secondly, it was alleged that Varma was adjudicated bankrupt in London in December, 1967. The rival contentions were that according to the Appellant even after the order of adjudication of bankruptcy u/s 47 of the English Bankruptcy Act an agreement entered into by a bankrupt was protected whereas counsel for the Respondent contended that Sections 37, 38 and 155 of the English Bankruptcy Act did not protect executory and incomplete contracts. It is true that all these points will be gone into the London Suit but these two features of the contract not being completed and the fact of bankruptcy are of substantial importance to indicate as the learned Judge in the trial court rightly held that the alleged rights of the Appellant were inchoate not matured.

30. The controversies between the parties as to the agreements cannot be said to be the subject for determination in the suit. The Appellant in the application apart from alleging the controlling interest acquired under the agreements in relation to the subsidiaries did not alleged any other grounds as to why the Appellant would be a necessary or proper party to this suit. The controversies in this suit are the right of the Plaintiff to recover the various sums of money paid on behalf of the Defendant in respect of income tax dues. The Appellant was not a necessary party or party to the suit. An effective decree can be passed in the suit in the absence of the Appellant. The Appellant has no right or interest in the suit.

31. Counsel for the Respondent rightly contended that the lien claimed by the Plaintiff in the suit would not concern the Appellant. The reason given was that neither a shareholder nor a creditor has an interest in the assets of the co. Counsel for the Respondent contended that the Appellant had no interest in the assets of Hungerford Investment Trust Limited and therefore, the Appellant would not be entitled to intervene. Reliance was placed on the decision in (10) Macaura v. Northern Assurance Company Limited and Ors. reported in (1925) Appellate Court 619 on the observations at pages 625-626 of the Report. The Macaura's case the owner of the timber estate sold the whole of the timber of their own to a timber company in consideration and fully paid up shares in the company. Subsequently by policies effected in his own name with several

insurance companies he insured the timber against fire. The greater part of the timber having been destroyed by fire he sued the Insurance Company to recover the loss, but the actions were stayed and the matter was referred to arbitration in pursuance of conditions contained in the policies. The claimant was the sole shareholder in the company and was also a creditor of the company to a large extent. The arbitrator held that the claimant had no insurable interest in the goods insured and is allowed the claim. The House of Lords held that claimant had not either as a shareholder or as a creditor any insurable interest in the goods, Lord Buckmaster said: "Turning new to his position as shareholder, this must be independent of the extent of his share interest. If he were entitled on insure holding all the shares in the company each shareholder would be equally entitled, if the shares were all in separate hands. Now, as shareholder has any right to any item of property owned by the company for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up. "Lord Wrenbury in the same case said that the corporator even if he holds all the shares is not the corporation, and that neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation.

32. In the case of (11) South Wales Traffic Licensing Authority ex parte EBBW Valo Urban District Council reported in (1951) AELR 806, a private company provided a passenger road transport service under a road service licence which contained a condition prescribing the limits of fares to be charged. The Transport Act, 1947 came into operation. Under powers conferred by the Act the British Transport Commission acquired all the shares, save two, of the company which continued to maintain the service in question. The company applied under the Road Traffic Act to the licensing authority for a variation of the conditions attached to their road service licence to enable them to charge increased fares. One of the provisions of the Transport Act said that certain sections were not to apply to any passenger road transport service provided by the Commission or by any person acting as agent for the Commission. The question was whether the shares of the company owned by the Commission and the control of the company being vested in the Commission, the Commission and the company were distinct legal entities. It was held that in the absence of a contract of agency, the company could not be said to be the agent of the Commission. The Commission did not itself provide the service but secured or promoted its provision by the company. In the light of these facts Cohen, J. relied on these observations of Lord Goddard, C.J.: "It seems to me, when one gives Section 65 the ordinary meaning of the English language, that the Transport Commission, having acquired the whole of the undertaking and share holding of this company and running the omnibuses of the company for the purpose of providing a passenger service through the EBBW Valo, are providing a road transport service. The vehicles are not their own. They still belong to the legal entity which is the company, but it seems to me that the commission are, in effect, providing the

road passenger transport though I am rather inclined to think that the Red & white Services in the circumstances are acting as agents for the commission." The well-known case of (12) *Salomon v. Salomon & Company*, (1897) Appellate Court 22 was also relied on in the South Traffic Licencing Authority's case to lay emphasis on the point that where there is what is commonly called on the men company was a different entity from the men who held the whole of the shares. Counsel appearing for the Appellant rightly contended that subject-matter of the suit is a claim against Hungerford Investment Trust Ltd. and the shareholders of that company or the Appellants under the alleged agreements dated 16 January or 27 January, 1968 have no interest in the subject-matter of the suit.

33. It should be stated here that some arguments were advance by counsel for the Respondent that the application for addition was barred by delay. It was said that if the agreements had been made in the month of January, 1968 the Appellants went to institute the suit for specific performance in London and having failed to obtain an order for injunction made the application for addition of party. Delay is a question of fact which will depend on the circumstances of the case. Delay by itself might not have been fetal in the present case if the Appellant would have had rights in the subject-matter of the suit to be added as a party and if explanation for the delay was found adequate.

34. Various arguments were advanced by both the parties as to certain proceedings in Geneva with regard to certain documents. In view of the fact that the subject-matter of the agreements is not the subject-matter of the suit, I do not desire to express any opinion on the rival contentions between the parties.

35. In my opinion the appeal is incompetent for the reasons indicated earlier and the Appellant has no right to be added as a party to the suit. The decision of the learned Judge is affirmed.

36. In the result of the appeal fails. It is dismissed with costs. Interim orders are all vacated. Mr. Advocate-General prays for a stay of operation of this order. The prayer is refused.

Mukherjee, J.

It is no reflection on counsel who have argued the case with fairness and ability that it seems to me that the claim of the Appellant to be added as a party to the suit is untenable and a trifle absurd.

37. The suit has been brought by Turner Morrison & Co. Ltd. against Hungerford Investment Trust Ltd. (in voluntary liquidation) for recovery of monies which the Plaintiff claims to have paid on behalf of or for the benefit of the Defendants for a declaration of lien on the shares held by the Defendant in the Plaintiff company in respect of the Plaintiff's claim and for sale of those shares in pro tanto satisfaction of the Plaintiff's dues. The Appellant, Brahmaputra Tea Co. Ltd. applied for being added as a party to the suit. The application was dismissed by P. B. Mukherjee, J. From that order, the Appellant has come up on appeal.

38. It transpires that the Plaintiff company is a subsidiary of the Defendant company which is a company incorporated under the laws of Singapore. The Defendant company in its turn is a subsidiary of Turner Morrison & Graham Group of Companies Ltd. which is a subsidiary of Romanigo Holdings S.A.H. a company incorporated in Luxembourg. The Appellant's case is that Sukhdev Varma and N. S. Hoon are associated in the ownership of Romanigo Holdings S.A.H. which presumably means that they are shareholders of the Luxembourg company. It may be that they hold the majority of shares in the company although such an averment is not to be found in the petition.

39. By an Agreement dated January 16, 1968 Mr. Hoon agreed to sell and Mr. Varma agreed to buy Mr. Hoon's interest not only in Romanigo Holdings S.A.H. of which Mr. Hoon is a shareholder but also his interest in the subsidiary companies. It is not contended that he has any interest in the assets of the subsidiary companies independently of his holdings in Romanigo. Mr. Hoon, it may be pointed out, is one of the four liquidators of the Defendant company.

40. A share holder has no legal interest in the assets of a company even if he happens to be the beneficial owner of all the shares. Moreover, a parent company and a subsidiary company are distinct legal entities. A parent company does not have a legal interest in the assets of its subsidiary companies, for the rule that a company is distinct from its members applies equally to the separate companies of a group. Reference may be made in this connection to *Macaura v. Northern Assurance Co.*, 1925 Appellate Court 619, *R v. South Wales Traffic Licensing Authority*, (1951) 1 All Easter Railway 506 and *Gower's Modern Company Law*, 2nd Edn. P. 66. It is difficult to see what is exactly his interest in the subsidiary companies which Mr. Hoon as a shareholder of the present company sought to transfer to Mr. Varma by the Agreement of January 16. Be that as it may, under the Agreement, Mr. Varma became entitled, on certain terms and conditions, to the interest of Mr. Hoon in present company and in its subsidiaries. The Agreement provided that on payment of 75,000 pounds within a specified period all documents of title by which presumably share certificates are meant, were to be lodged with Mr. Carmes as a stakeholder which Mr. Carmes was to retain at least until 15th February, 1968. If by that time Mr. Varma paid Mr. Hoon 75,000 pounds in the manner provided in the said Agreement, Mr. Carmes was to retain the said documents of title and to have full authority to act on behalf of Romanigo in the Management of the subsidiary companies in connection with the appointment and/or dismissal of Directors and Liquidators, acting therein on the instructions of Mr. Varma and not on those of Mr. Hoon. It appears from the Agreement that Mr. Varma is not a director of any of the companies. Mr. Hoon is the Chairman of Turner Morrison and Graham Group of Companies, which as I have said, is a subsidiary of Romanigo.

41. By Clause 6 of the Agreement it is provided that upon Mr. Varma paying to Mr. Hoon the first instalment of 75,000 pounds within the stipulated date Mr. Varma or his assignee were to forthwith indemnify Mr. Hoon against any claims

which might be against Mr. Hoon arising out of the indemnities given by Mr. Hoon on June 7, 1963 to the executors of Higell Turner and John Turner.

42. By another Agreement dated January 27, 1968 Mr. Varma agreed to assign his right title and interest in the Agreement of January 16, 1968 and also his right title and interest in Romanigo and its subsidiaries to Brahmaputra Tea Co. Ltd., the Appellant before us. The terms of the Agreement of January 16 were substantially the same as those of the Agreement of January 16 as they had to be. Clause 6 of the Agreement of January 27 provided that upon payment of the sum of 75,000 pounds by Brahmaputra Tea Co. Ltd. to Mr. Hoon, Mr. Carmes was to retain the custody of the documents of title of Romanigo and to have all full authority to act on behalf of Romanigo in the management of the subsidiary companies particularly in connection with the appointment or dismissal of Directors and Liquidators, acting with therein on the instruction of Brahmaputra Tea Co. Ltd. Clause 7 provided that upon Brahmaputra Tea Co. Ltd. paying to Mr. Varma the sum of Rs. 75,000 pounds in terms of the Agreement of January 16, Brahmaputra Tea Co. or its assignees were to indemnify Mr. Hoon against any claim which might be made against Mr. Hoon arising out of the indemnities given by Mr. Hoon to the executors of the Turners. Clause 11 provided that Mr. Varma was to give indemnity to Mr. Hoon as required under the Agreement of January 16, in the event Mr. Hoon did not accept the indemnity of Brahmaputra Tea Co.

43. The Appellant claims to have paid 75,000 pounds to or to the order of Mr. Hoon in compliance with the terms of the Agreements of January 16 and January 27. The Appellant also contends that Mr. Hoon has not only received the Letter of Indemnity dated February 20, 1968 executed by the Appellant in favour of Mr. Hoon but has also, in substance, accepted the said indemnity. The Defendant stoutly denies that the payment has been made or that Mr. Hoon has accepted the Indemnity said to have been given by the Appellant. The Appellant contends that as the Appellant has given the indemnity which has been accepted by Mr. Hoon, the indemnity has become effective and if the suit is decreed against the Defendant, Mr. Hoon may be called upon to indemnify the executors of the Turners in respect of the decree and in that event, the Appellant may be required to indemnify Mr. Hoon. The applicant also contends that having regard to the payment of 75000 pounds made by them to Mr. Hoon, the Appellant is entitled to instruct Mr. Carmes to act on behalf of Romanigo in the matter of management of the Defendant company in accordance with the Appellant's instructions as contemplated in Clause 6 of the Agreement of January 27. It is also claimed that the Appellant, having regard to its entitlement to shares in Romanigo under the Agreement has an interest in the Defendant company and if a decree is passed against the Defendant company in the present suit and a lien is declared on the holdings of the Defendant company in the Plaintiff company, the Appellant will suffer serious prejudice.

44. The contentions of the Appellant on the basis of which it claims to be added as a party to the suit arise out of the Agreements and fall under two heads -

rights the Appellant claims as one who is entitled to be a shareholder of the holding company under the Agreement in the exercise of which its voice should be heard in the conduct of the defence of the suit and rights to which Mr. Hoon is personally entitled under the Agreement in January 16, in respect of which the Appellant who is the assignee of those rights will suffer prejudice if he is not permitted to participate in the defence. The contention that the Appellant as a shareholder of the holding company will suffer prejudice if a decree for the large sum of money which is claimed in the suit is passed against the Defendant company and a lien is declared on the holdings of the Defendant company in the Plaintiff company has to be considered. As I have already said, even if the claim of the Appellant to be a shareholder of Romanigo is conceded, it cannot be said that the Appellant as a shareholder or even as the holder of the controlling interest in the holding company has any interest or at least any legal interest in the assets of the subsidiary companies. The Appellant is not even a shareholder of the Defendant company. I do not intend to say that if the Appellant were a shareholder of the Defendant company that would be itself have made any difference. I am stressing that fact only because I feel, that after all, a shareholder of a company has a greater right to have his voice heard in the affairs of the company than the shareholders of a holding company of which the company is a subsidiary. In fact the shareholder of a holding company cannot be heard in the conduct of affairs of a subsidiary company. He must speak, if he can speak at all, through the holding company. If he has no locus standi to speak in the conduct of affairs of a subsidiary company, I feel to see how and why he should be added as a party to an action brought against the subsidiary company.

45. On the basis of the Appellant's personal rights and obligations under the Agreements, the Appellant, as I have already indicated, claims to be added as a party. Even if the contention of the Appellant is accepted, namely that Mr. Hoon has accepted the indemnity given by the Appellant it is difficult to see why any decision in the suit to which the Appellant is not a party will be binding on the Appellant and why the Appellant cannot in appropriate proceedings challenge any claim of Mr. Hoon to the indemnified by the Appellant. Mr. Hoon has, of course, stated in his correspondence any indemnity given by the Appellant. The suit is neither a representative suit nor is the action an action in rem. The Appellant is neither a proper nor a necessary party to the suit. It cannot be contended nor has it been contended that the presence of the Appellant is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions or any question involved in the suit. I am in entire agreement with the learned trial Judge that any decree in this suit where the Appellant is not a party cannot bind the Appellant and the Appellant cannot be prejudiced in any manner by whatever happens in this suit.

46. The Appellant contends that by the Agreement of January 27, the Appellant is entitled to have a voice in the affairs of the Defendant company which is a subsidiary of Romanigo, by giving instructions to Mr. Carmes, who is to act in the matter of management of the subsidiary companies in accordance with the

instructions to be given by the Appellant. Neither Romanigo nor the Defendant company is a party to the agreement. It is, to say the last, highly debatable whether two shareholders, by a private agreement between themselves, are entitled to appoint a stranger to direct or control the management of a subsidiary company. It is also more than uncertain whether such an agreement is valid or if valid, enforceable in law. Prima facie, I am not satisfied that such an agreement is binding on the holding company or the subsidiary company. Be that as it may, a suit has already been instituted by the Appellant in London for specific performance of the Agreement of January 27, 1968. In that suit, the Court has refused to grant an injunction which if granted might have enabled the Appellant to have a voice in the conduct of defence of the suit. By asking to be added as a party to the suit, the Appellant is, in some measure, seeking to obtain what it failed to achieve in the action in London.

47. It is well to remember that there is no allegation against Mr. Hoon who is only one of the four liquidators of the Defendant company, that Mr. Hoon has acted fraudulently, negligently or collusively in the matter of management of the Defendant company, or in the conduct of the defence on behalf of the Defendant company. The allegation is that Mr. Hoon has committed breach of the agreement of January 16 and has adopted an attitude hostile to the Appellant. In the improper manner and in the absence of any averment of facts on the basis of which it is possible to conclude prima facie that the liquidators of the Defendant company are not likely to defend the suit in a proper manner, it will not be right in my opinion to permit a third party to intervene in the suit. It appears from in the trial court the liquidators are doing all that is expected of them in the matter and there is no allegation to the contrary. Although the Plaintiff company is a subsidiary of the Defendant company it appears that the Defendant company has not control over the Plaintiff company by reason of the decree passed in Suit No. 600 of 1961. Mr. Haridas Mundra owns 49% of the shares of the Plaintiff company and the Defendant company, although the owner of 51% of the shares, has been restrained by the decree from voting in respect of its holdings in the Plaintiff company except in accordance with the instructions of Mr. Mundra. In these circumstances, it cannot be argued that the liquidators, by reason of the holdings of the Defendant in the Plaintiff company, are likely to be influenced in the conduct of the defence. Moreover, Romanigo is a holding company of the Plaintiff company as the Defendant company also is.

48. For all these reasons, I am of opinion that the Appellant is not only not a proper or necessary party to the suit but has also hardly any locus standi to be made a party. I am in entire agreement with the learned trial Judge that the presence of the Appellant is not only not necessary but its presence will be improper, embarrassing irrelevant and prejudicial to the trial of the suit.

In conclusion, I may say that I agree with my Lord that the appeal is not maintainable. In the trial court the case was argued on the basis that the application was an application under Order 1, Rule 10 of the Code of Civil

Procedure. The Plaintiff opposed the application. Before u/s it was contended that the application might be treated either as an application under Order 1, Rule 10 or alternatively as an application u/s 151 of the Code of Civil Procedure. No appeal lies from an order made under Order 1, Rule 10 or u/s 151 as such. An appeal will of course lie, if the order is a judgment within the meaning of Clause 15 of the Letters Patent. I am of opinion that the order is not a judgment on the principles laid down by Sir Richard Couch, C. J. in *Justices of Peace for Calcutta v. The Oriental Gas Co.* in accordance with the practical ratio more elaborately expressed by White, C.J. in *Tuljiram v. Alagoppa*, 35 ILR Mad 1 and in that view of the matter, I concur in the order my Lord had made.