

(1963) 02 CAL CK 0008
In the Calcutta High Court

Case No : A.F.O.O. of Jt. Controller of Patents and Designs No. 135 of 1961

Farbenfabriken Bayer Aktiengesellschaft	APPELLANT
Vs	
Joint Controller of Patents and Designs and Another	RESPONDENT

Date of Decision : 20-02-1963

Acts Referred:

Constitution of India, 1950 — Article 133(1)
Patents and Designs Act, 1911 — Section 22, 23(1), 23F

Citation : AIR 1963 Cal 433 : (1963) 1 CALLT 238 : 67 CWN 743

Hon'ble Judges : H.K. Bose, C.J;G.K. Mitter, J

Bench : Division Bench

Advocate : Shah, for the Appellant; E.R. Meyer, for the Respondent

Final Decision : Dismissed

Judgement

Miiter, J.—This is an application for a certificate under Article 133(1)(c) of the Constitution.

2. The matter arises out of a decision of the Controller of Patents under the Indian Patents and Designs Act, 1911, holding that the respondent Arlabs Private Limited should be granted the licences they seek. An appeal preferred there from by the patentee Farbenfabriken Bayer Aktiengesellschaft to this Court was dismissed. The patentee now desires to go up to the Supreme Court. Various points were canvassed at the bar on the different aspects of Article 133(1) of the Constitution, namely, (a) whether the proceeding was a civil proceeding (b) whether the order was a final order, (c) whether Article 133 was at all applicable to a case which had not been before two Courts including the High Court, (d) whether in hearing the appeal the High Court was acting as a persona designata, and lastly (e) whether the case was a fit one for appeal to the Supreme Court.

3. Before dealing with the applicability of Article 133(1) of the Constitution it is necessary to refer in brief to the facts of the case and the provisions of Patents and Designs Act which arose for consideration therein.

4. The petitioner is the patentee of two patents Nos. 43678 and 43679 which were sealed on July 30, 1952 and August, 6, 1952 respectively. Patent No. 43679 was in respect of an invention described as

"production of new intermediate products of Phthalocyanine synthesis"

and patent No. 43678 was described as "process of dyeing and printing." It is necessary to note that in order to get the colour of the "intermediate products"" covered by patent. No. 43679 effectively, fixed on textile and ether materials it was absolutely necessary that the process of dyeing and printing which was the subject matter of patent No. 43673 should be used. It is admitted on all hands that the said intermediate products were not being manufactured in India at all by the patentee but were being imported from Germany. Patent No. 43675 was, however, being utilised in this country. The respondent, Arlabs Private Limited, made two applications for the grant of compulsory licences of the said two patents on September 28, 1956. After bearing the parties at some length, the Controller took the view that a case had been made out for the grant of licences to the said respondent. As the patentee had made it clear that it would not co-operate in the matter of settlement of the terms and conditions on which the licence should be granted the Controller directed the respondent to file a draft licence setting out the terms and conditions which the said respondent considered reasonable in order that he should be better able to decide the terms of the licence. Before the Controller had an opportunity of considering the matter further the patentee preferred an appeal to this Court and a Division Bench composed of the learned Chief Justice and D. Mookerjee, J., upheld the decision of the Controller. The patentee desires to go up to the Supreme Court from the said decision.

5. The relevant sections of the Patents and Designs Act 1911 (hereinafter referred to as the Act) may now be considered.

6. Provision for the grant and sealing of patents is made in Section 10 of the Act. The terms of a patent and the extension thereof are governed by Sections 14 and 15 of the Act. u/s 22 (1) of the Act-

"At any time after the expiration of three years from the date of the sealing of a patent any person interested may apply to the Controller upon any one or more of the grounds specified in Sub-section (2) for a licence under the patent." Under Sub-section "(2) the grounds upon which an application under Sub-section (1) may be made are inter alia as follows:

(a) that the patented invention, being capable of being commercially worked in India, has not been commercially worked therein or is not being so worked to the fullest extent that is reasonably practicable;

(b) that a demand for the patented article in India is not being met to an adequate extent or on reasonable terms, or is being met to a substantial extent by importation of the patented article from other countries;

(c) that the commercial working of the invention in India is being prevented or hindered by the importation of the patented article from other countries;

The reliefs which can be granted on an application u/s 22 are laid down in Section 23(1) of the Act which provides:

"Where an application is made u/s 22, the Controller may make an order granting any of the following reliefs, that is to say, the Controller may-

(a) grant a licence to the applicant upon such terms as the Controller thinks fit. and may also where the circumstances so require direct that all other existing licences in respect of the patent shall be revoked, or that the patentee shall forfeit any right which he may have as a patentee, to make, use, exercise or vend the invention or to grant licences under the patent;

(b) revoke any existing licence held by the applicant and grant a new licence upon such terms as the Controller thinks fit, or amend any licence held by the applicant in such manner as the Controller may think fit;

(c) grant a licence under the patent to such customers of the applicant and on such terms as the Controller thinks fit, if the Controller is satisfied that the manufacture, use or sale of materials not protected by the patent is unfairly prejudiced by reason of conditions imposed by the patentee upon the grant of licences under the patent or upon the purchase, hire or use of the patented article or process:

Provided that where the application is made on the ground that the patented invention is not being commercially worked in India or is not being worked to the fullest extent that is reasonably practicable and it appears to the Controller that the time which has elapsed since the granting of the patent has for any reason been insufficient to enable it to be so worked, he may, by order, adjourn the application for such period as will, in his opinion give sufficient time for the invention to be so worked."

7. Section 23C of the Act lays down that upon an application u/s 22, the Controller must exercise his powers with a view to securing the following general purposes;

"(a) that inventions which can be worked on a commercial scale in India and which should in the public interest be so worked shall be worked therein without undue delay and to the fullest extent that is reasonably practicable;

(b) that the inventor or other person beneficially entitled to a patent shall receive reasonable remuneration having regard to the nature of the invention;

(c) that the interests of any person for the time being working or developing an invention in India under the protection of a patent is not unfairly prejudiced;" Sub-section (2) of Section 23C provides-

"Subject to the provisions of Sub-section (1), the Controller shall, in determining

whether to make an order in pursuance of any such application or not, take account of the following matters, that is to say,--

(a) the nature of the invention, the time which has elapsed since the sealing of the patent and the measures already taken by the patentee or any licensee to make full use of the invention;

(b) the ability of any person to whom a licence is to be granted under the order to work the invention to the public advantage; and

(c) the risks to be undertaken by that person in providing capital and working the invention if the application is granted;

but shall not take "account of matters subsequent to the making of the application."

8. The procedure on an application u/s 22 is laid down in Section 23D under which the patentee or any other person desiring to oppose the application must give notice thereof to the Controller, setting out grounds of opposition. The Controller shall then give all the parties concerned an opportunity to be heard before deciding the case. u/s 23F(1)

"an appeal shall lie to the High Court at Calcutta from any order of the Controller made u/s 23 or Section 23A or under clause (a) or clause (b) of Sub-section (1) of Section 23B or u/s 23CC."

Under Section 23G(1)-

"When an appeal has been preferred to the High Court at Calcutta u/s 23F it shall be heard by a Bench of not less than two Judges."

9. The respondent Arlabs Private Limited pressed their application u/s 22 on grounds specified in Clauses (a), (b) and (c) of Subsection (2). The patentee opposed the application for licence under patent No. 43678 on inter alia the following grounds:

(1) the commercial working of the invention in India had not been prevented or hindered by the importation of the patented article;

(2) that the patented invention had been and was being commercially worked in India to the fullest extent that is reasonably practicable;

(3) that the demand for the patented article in India was being met to an adequate extent;

(4) that the applicants had not the ability to Work the invention to the public advantage;

(5) that the applicants were not persons interested within the provisions of Section 22. Grounds (1), (3), (4) and (5) were also taken in opposition to the application for licence under patent No. 43679.

10. Before the Controller it was admitted by the representative of the patentee-

"that in spite of a very large demand for the intermediates in India the patentee had not manufactured them in this country but had satisfied the demand by importation from Germany."

The Controller also recorded that the respondent had approached the patentee for a licence to manufacture the intermediates in this country but such requests had been turned down. It was further noted by the Controller that as early as 1954 the patentee had proposed to collaborate with the respondent for the manufacture of a number of the patentee's products in this country but for certain reasons the proposal did not fructify. On the evidence before him and the submissions made the Controller was satisfied that the grounds specified in Clauses (a), (b) and (c) of Sub-section (2) of Section 22 with respect to patent No. 43679 had been made out. He then proceeded to consider the objection of the patentee, viz., that the applicants were not "persons interested" because they did not possess either the technical or financial ability to work the patented invention. Reference was made to the decision in the case of *In re J. L. Cathro*'s application reported in (1934) 51 RPC 75 where considering Section 27(1) of the United Kingdom Patents and Designs Act, 1907 which corresponds to Section 22 of the Indian Act, it had been held that

"a person could be said to be interested for this purpose in respect of the reliefs asked for, particularly, if he is prepared, if he obtains the necessary relief under the section, to take steps to remedy the defect alleged to constitute the abuse."

Great stress was laid by the patentee before the Controller on the fact that the Government of India had refused to permit the respondent to collaborate with the patentees in 1955. The controller held that he was in no way bound by that decision of the Government but had to guide himself by the terms of the Act. On consideration of the evidence before him the Controller was of the opinion that the objection as to want of technical and financial ability of the respondent had not been established. The Division Bench of this Court upheld the view of the Controller taking into consideration all the material on record including certain balance sheets which had not been referred to by the Controller. The patentee also contended before the Controller that the application of the respondent was not bona fide because they had not made full disclosure of facts in relation to the alleged collaboration offered in 1954 to the respondent to expand their industry for the manufacture of the patentee's products in India which proved abortive. The Controller negatived this plea.

11. The patentee further urged that the respondent had not been able to establish an abuse of monopoly rights in patent No. 43678 and that patent No. 43679 could not be worked without infringing the other patent. According to the Controller

"for appreciating the true legal position it was necessary to examine the essence of the indention of the two patents."

He came to the conclusion that notwithstanding that the imported intermediates covered by patent No. 43679 have been used by dyers in India and converted into dyestuffs by following certain well-known processes indicated in patent specification No. 43678 such use does not establish that there has been no abuse of monopoly rights or that the terms of clause (a) of Section 22(2) have not been satisfied. In arriving at this conclusion he took note of the fact that when an application for patent No. 22140 of 1949 had been made in the (United Kingdom, the provisional specification filed with it covered the subject-matter of both the patents Nos. 43678 and 43679 and that only a year afterwards the provisional specification was altered by filing two separate complete specifications dividing the original invention and praying for the grant of two patents for the inventions set out in the respective specifications. According to the Controller

"the plurality of patents granted for the invention, however, should not obscure the fact that the inventions covered by the two patents constitute a single invention."

In this connection the Controller had to consider a similar objection raised in Cathro's application :(1934) 51 RFC 75 already mentioned. The view of the Controller " was upheld in appeal by this Court and it was observed

"the two patentsconstitute one continuous process and a single invention, and hence the abuse of monopoly rights in respect of Patent No. 43679 is sufficient to justify the grant of a licence in respect of Patent No. 43678".

12. Apart from the technical objection raised I think this is pre-eminently a matter where it would be desirable to have the points of law involved settled, by the Supreme Court of India. The true meaning of the expression "person interested" in Section 22(1), the scope of the grounds in Section 22(2), the effect of the proviso to Section 23(1) and the limit of the powers of the Controller u/s 23C are substantial questions of law which affect not only the patentee and the respondent but the general public in India as well. These sections do not seem to have come up for interpretation in India at all and with the growth of industry more frequent resort may be made thereto.

13. I now proceed to consider the technical objections raised under Article 133(1) of the Constitution. The first is that the proceeding before the High Court was not a "civil proceeding" but arose out of the special statutory jurisdiction conferred on it by Section 23F of the Act. A "civil proceeding" according to the respondent is one which comes up for consideration by the civil Courts in the ordinary way. It was argued that the Controller acting u/s 22 and Section 23 of the Act was only a statutory tribunal and the High Court of Calcutta was "persona designata" on which jurisdiction to hear an appeal had been granted specially. We had to consider this question recently in the case of G. Basu v. S. P. Ghosal, S. C. A. T. No. 3759 of 1962 (Cal) where the question was whether the proceeding before the High Court under Article 227 of the Constitution in appeal from the decision of the Election Tribunal was a civil proceeding or not. Broadly

speaking it was there held that a proceeding in which a person's right to property of any kind, reputation, status or office was involved was a civil proceeding. In this connection it may be useful to refer to a judgment of the full Bench of the Punjab High Court in *Sardar Kapur Singh Vs. Union of India (UOI)*, where Kapur, J. observed

"a civil proceeding may be defined as a judicial process to enforce a right and includes any remedy employed to vindicate that right x x x x It is a prescribed course of action for enforcing a legal action and embraces the requisite steps by which judicial action is invoked."

In *Budhi Nath Jha Vs. Manilal Jadav*, , a Full Bench of the Patna High Court relied on the definition of a civil proceeding given in Stroud's Judicial Dictionary as a

"process for the recovery of individual right or redress of individual wrong: inclusive in its proper legal sense of suits by the crown".

There the High Court was of the opinion that the right of a person to stand for election was a civil right and a petition challenging the election of a successful candidate raised an issue relating to civil right. Reference in this connection may also be made to the Madras High Court in *C. Dhanalakshmi Ammal v. Income Tax Officer*, AIR 1958 Mad 151 and *Dhanalakshmi Vilas Cashew Co. and Others Vs. President, Cashew Industries Staff Association and Others*, .

14. The right of a patentee to the exclusive user of the patent for the period of its protection under the Act is a right to property. An application for compulsory licence thereof is a process which affects that right to property and consequently an appeal from the determination of the Controller granting the licence would be a proceeding of a civil nature.

15. I am not further impressed by the argument against the application on the ground that in order that Article 133(1) may be invoked it is necessary that there should be two Courts, namely, the Court of first instance and a Court sitting on appeal which would be the High Court. It was argued by Mr. Shah on behalf of the respondent that Article 133(1) showed that even in cases not covered by sub-Clauses (a) and (b) thereof "the judgment, decree or final order" of the High Court must affirm or reverse "the decision of the Court immediately below". I find myself unable to accept this interpretation. Sub-Clauses (a), (b) and (c) are clearly disjunctive and the words

"and where the judgment, decree or final order appealed from affirms a decision of the Court immediately below in any case other than a case referred to in Sub-section (c)",

go to show that where the High Court certifies that the case is a fit one for appeal to the Supreme Court the other considerations will not apply. In my view, the High Court is competent to grant a Certificate under any of the sub-Clauses (a), (b) and (c) and the effect of the portion quoted above is that where the High Court certifies under Clause (a) or (b) in a matter where the judgment, decree or

final order in appeal is of an affirmative nature, the appeal involves some substantial question of law. A case may be fit one for appeal to the Supreme Court quite apart from the question as to whether it involves a substantial question of law. Construing Section 109(c) of the Code of Civil Procedure, the Judicial Committee had observed in *Radhakrishna Aiyar v. Swami Natha Aiyar* 48 I A 31 : (AIR 1921 PC 25):

"There may be certain cases in which it is impossible to define in money value the exact character of the dispute; there are questions, as for example, those relating to religious rites and ceremonies, to caste and family rites, or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject-matter in dispute cannot be reduced into actual terms of money."

In this case, there are undoubtedly substantial questions of law involved in the appeal the determination of which will show whether the patent has been worked commercially in India or not or whether it was being worked to the fullest extent and whether the demand for the patented article in India was being met to an adequate extent. These are questions in which not only the parties to the litigation but the community in general have some interest. Reference in this connection may be made to the judgment of the Federal Court in AIR 1944 23 (Federal Court) .

16. In aid of his contention that the High Court was only acting as a *persona designata* in hearing an appeal from the decision of the Controller counsel for the respondent relied on certain observations of the Supreme Court in *Hanskumar Kishanchand Vs. The Union of India (UOI)*, . There on the requisition of a property under the Defence of India Act the determination of the compensation payable was referred by the Central Government to an Additional District Judge of Khandwa u/s 19(1)(b) of the said Act. Against the award made by the said Judge there was an appeal to the High Court of Nagpur u/s 19(1)(f) of the Act. The appellant applied for and obtained leave to appeal from the decision of the High Court. A preliminary objection was taken as to the maintainability of the appeal on the ground that the judgment of the High Court u/s 19(1)(f) was an award and not a judgment, decree or order within the meaning of Sections 109 and 110 of the Code of Civil Procedure. It was pointed out by the Supreme Court that u/s 19(1) (b) it was competent to the Central Government to appoint an arbitrator where no agreement could be reached as to the compensation payable and the appeal u/s 19(1)(f) lay to the High Court as an appeal against an award of an arbitrator. The Supreme Court referred to Section 28 of the Indian Contract Act and various sections of the Indian Arbitration Act and observed

"there is thus a sharp distinction between a decision which is pronounced by a Court in a cause which it hears on the merits, and one which is given by it in a proceeding for the filing of an award. The former is a judgment, decree or order rendered in the exercise of its normal jurisdiction as a Civil Court, and that is appealable under the general law * * * The latter is an adjudication of a private

tribunal with the imprimatur of the Court stamped on it, and to the extent that the award is within the terms of reference it is final and not appealable. The position in law is the same when the reference to arbitration is made not under agreement of parties but under provisions of the statute. * Nor does it make any difference in the legal position that the reference under the statute is to a Court as arbitrator. In that case the Court hears the matter not as a Civil Court but as *persona designata*, and its decision will be an award not open to appeal under the ordinary law applicable to decisions of Courts. A statute, however, might provide for the decision of a dispute by a Court as Court and not as arbitrator, in which case its decision will be a decree or order of Court in its ordinary civil jurisdiction, and that will attract the normal procedure governing the decision of that Court, and a right of appeal will be comprehended therein".

The Supreme Court went on to consider a number of cases some of which were cited at the bar before us namely, *Rangoon Botatoung Co. Ltd. v. Collector of Rangoon*, 39 Ind App 197 (PC) and *Special Officer Salsette Building Sites v. D. Bezonji* ILR 37 Bom 506 of which no special mention is necessary. I may however refer to the case of the *Secy. of State for India v. Chelikani Rama Rao* 43 I A 192: (AIR 1916 PC 21) where some provisions of the Madras Forest Act V of 1882 had to be considered. The Act laid down that the Governor in Council might constitute any land at the disposal of the Government a reserved forest and that he should publish a notification containing this declaration. Provision was also made for objections being raised thereto, for an enquiry by the Forest Settlement Officer and recording of evidence, passing an order specifying the particulars of claims made and admitting or rejecting the same wholly or in part. If the claim was rejected in part or in toto the claimant had the right to prefer an appeal to the District Court in respect of the rejection only. The Judicial Committee observed that

"when proceedings of this character reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders and decrees the ordinary rules of the CPC apply".

The *Rangoon Botatoung Co.*'s case, 39 Ind App 197 (PC) was distinguished by the Judicial Committee on the ground that

"the claim was the assertion of a legal right to possession of and property in land; and if the ordinary Courts of the country are seized of a dispute of that character, it could require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation."

According to the Supreme Court

"it is not every decision given by a Court that could be said to be a judgment, decree or order Within, the provisions of the CPC or the Letters Patent. Whether it is so or not will depend on whether the proceeding in which it was given came before the Court in its normal civil jurisdiction, or *de hors* it as a *persona designata*."

17. In order to find out whether the matter came up to this Court in its normal civil jurisdiction or de hors it we have to examine the provisions of the Patents and Designs Act. A Patent is not a right known to the common law of the land but is the creature of a statute so far as India is concerned. An application for a patent has to be left at the patent office u/s 3 of the Act. The procedure upon such an application is laid down in Section 5. The application has to be advertised u/s 6. The right of opposition to the grant of a Patent is given by Section 9. Under Sub-section (2) of Section 9 the Controller after hearing the applicant and the opponent must decide the case. Under Sub-section (3) his decision is subject to appeal to the Central Government. The patent is sealed by the Controller u/s 10. An application for revocation of patent may be made to the High Court u/s 26 of the Act which also shows that a patentee may file a suit for infringement of patent. In such a suit the Court may allow the patentee to amend his specifications by way of disclaimer, correction or explanation u/s 18 of the Act. The application for licence and allied matters which have already been noted beginning from Section 22 to Section 23-E do not concern the Courts. An appeal is only allowed u/s 23-F and the procedure for hearing of the appeals is not the normal procedure of the High Court. The appeal cannot be preferred before any High Court other than this High Court. u/s 23-G (2) the bench of the High Court hearing the appeal may call in the aid of an assessor and hear the appeal wholly or partially with his assistance.

18. It would therefore appear that the High Court of Calcutta in hearing appeals u/s 23F acts as *persona designata* and the matter does not come to this Court under its normal civil or supervisory jurisdiction.

19. In my opinion, there has been no final order in this case which can be made the subject-matter of appeal to the Supreme Court. Indeed it is doubtful whether any order u/s 23 of the Act was at all made by the Controller. We are here concerned only with Clause (a) of Sub-section (1) of Section 23 under which it is open to the Controller to grant a licence to the applicant upon such terms as the Controller thinks fit. Scanning the decision of the Controller one would look in vain for an order u/s 23. After dealing with the submissions made before him the Controller notes at the end of paragraph 31 of his decision that

"in the face of these circumstances I hold that the applicant should be granted the licences they seek."

He then goes on to consider practice relating to the settlement of the terms and conditions on which the licences should be granted and directs the respondent to file within one month from the date of his decision a draft licence setting out the terms and conditions which they consider reasonable adding that

"the applicant shall serve a copy of the draft licence on the opponents and I shall then decide what shall be the reasonable terms upon which the compulsory licence should be granted. The licence will be granted on determining its terms and conditions".

Note must also be made of the award of costs by the Controller to the respondent. In my view the decision of the Controller notwithstanding the award of costs did not amount to an order granting any of the reliefs specified in Clauses (a), (b) and (c) of Sub-section (1) of Section 23 with the necessary consequence that no appeal lay at that stage to this Court u/s 23F. Curiously however no objection on this ground was raised at the hearing of the appeal before this Court and the opening sentence of the judgment on appeal goes to show as if compulsory licences had been granted in favour of the respondents. When the attention of counsel for the patentee was drawn to this he argued that even if no order in terms of Section 23 had been made the respondent was precluded from taking the point and the Court also could not go into the question under the doctrine of res judicata as contained in Section 11 of the CPC of principles analogous thereto. A number of decisions were cited in aid of the contention that a previous order even though wrongly made could not be challenged in subsequent stage of the proceedings and reference was made to explanation 1 to Section 11 which contained a widely recognised doctrine. In my opinion, it is not necessary to examine that contention at length because even assuming that some order within the ambit of Section 23 of the Act had been made there was no final order by the Controller. A large number of decisions of the Supreme Court, the Judicial Committee of the Privy Council and of different High Courts were cited in this connection. It is not necessary to refer to all of them.

20. The first case before the Judicial Committee on the interpretation of Section 109 of the CPC to which reference may be made is that of *Firm Ramchand Manjimal v. Firm Goverdhandas Vishindas Ratanchand* 47 I A 124: (AIR 1920 PC 86). In this case suits for breaches of contracts for sale of cotton were stayed u/s 19 of the Indian Arbitration Act of 1899 by the Court of first instance. The Judicial Commissioner of Sind reversed the orders in appeal and refused stay. Although a certificate was refused u/s 109(c) but granted u/s 110 the Judicial Committee upheld the preliminary objection as to the maintainability of the appeal and referring to the judgments in *Salaman v. Warner* (1891) 1 QB 734, *Bozson v. Altrincham Urban District Council* (1903) 1 KB 547 and *Issacs and Sons v. Salbstein*, (1916) 2 KB 139, Lord Cave observed that

"the effect of those and other judgments is that an order is final if it finally disposes of the rights of the parties. The orders now under appeal do not finally dispose of those rights, but leave them to be determined by the Courts in the ordinary way."

In AIR 1933 58 (Privy Council) the Judicial Committee had to interpret the meaning of the expression "final order" in Section 109 of the Code of Civil Procedure. The respondent firm had instituted a suit claiming damages from the appellant and the second respondent. After commencement of the hearing the firm was adjudicated insolvent whereupon the Official Assignee was joined as a plaintiff. On his declining to proceed with the suit in the absence of security a

decree was made dismissing it. On an appeal therefrom the High Court held that the cause of action was personal and did not vest in the Assignee. Accordingly they set aside the decree and remanded the suit for trial. The Rangoon High Court gave leave to appeal to the Privy Council and a certificate that the case was a fit one for appeal. Delivering judgment of the Judicial Committee Sir George Lowndes referred to Ram Chand's case 47 I A124: (AIR 1920 PC 86) and said

"the appellate Court in India was of opinion that the order 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."

Although of the opinion that the decision of the High Court was on a vital issue in the case, the Board held that it left the suit alive and provided for its trial in the ordinary way. In AIR 1949 1 (Federal Court) although the case arose in the criminal jurisdiction reference was made to many civil cases and Kania, C. J. said that the expression "final order" should be given the same meaning in criminal cases as in civil cases and such an order

"must be an order which finally determines the points in dispute and brings the case to an end."

Again in Mohammad Amin Bros. Ltd. v. Dominion of India AIR 1950 FC 77 where the appeal was preferred from a decision of a Division Bench of this Court setting aside an order for winding up of a company and directing the application to be taken up after the final determination of the Income Tax and excess profits tax cases which were then pending, the Federal Court observed

"the High Court did obviously dispose of one principal point in controversy between the parties namely whether Section 226(1) of the Government of India Act 1935 was a bar to the entertainment of the winding up petition by the Original Side of the Court, but the decision on that issue is a purely interlocutory decision which merely determines that the proceeding is triable by the Court. There had been no adjudication on the rights of the parties and that is still to be made under the terms and conditions set out in the order of the appeal Court."

In Chandra Singh Dudhoria and Others Vs. The Midnapore Zemindary Co. Ltd., the facts were as follows: The Midnapore Zemindary Co. Ltd. brought a suit claiming possession of large tracts of land which had emerged from the river Padma. The trial Court dismissed the suit but a Division Bench of this Court held that the company was entitled to recover possession of the lands but instead of going into the question of mesne profits themselves they directed the lower Court to start an enquiry into the same holding at the same time that it would be open to the Court below to decide whether there was any liability for mesne profits and if so ascertain the quantum thereof. The Subordinate Judge held that

the plaintiff was entitled to mesne profits up to the date of the delivery of possession but as the proposed appellant had a right of set off for rents no amount was due to the company. When the matter came up to this Court in appeal the case was again remanded to the Subordinate Judge to ascertain the amount of mesne profits. It was from this order that the proposed appellant asked for leave to appeal to the Supreme Court. It was argued that

"the matter decided by this Court went to the root of the whole case and therefore although there was a remand the order can be regarded as a final order."

This contention was negatived and Harries, C. J. observed

"all that this Court held was that the learned Subordinate Judge was wrong in holding that a set off made a decree impossible. After the judgment of this Court the extent of the liability has still to be determined".

21. The above judgments make it clear that an order is not a final order even if it disposes of the most vital issue before a Court. If the proceedings do not come to an end with the adjudication of the most important issue but there is something still left over for that Court itself to accomplish the order cannot be a final one within the meaning of Article 133(1) of the Constitution. In this case the determination by the Controller that the respondent was a person interested, that grounds specified in Section 22 of the Patents and Designs Act had been made out calling for the exercise of power u/s 23 and the determination that a compulsory licence should be granted did not bring the case to an end so far as he was concerned. He still had to consider the terms and conditions of the licence and make an order directing the issue of the licence thereon. It was argued on behalf of the proposed appellant that this was really a matter of no moment. I find myself unable to accept that view. The terms and conditions imposed by the Controller may be so onerous that the respondent would feel disinclined to work on the licence. On the other hand they may be so lenient that the patentee might think that the respondent was having the benefit of its patent without sufficient compensation. In any event so long as the terms and conditions are not settled the Controller cannot be said to have concluded the proceedings before him and the order cannot be described as an order u/s 23 of the Act or a final order within the meaning of Article 133(1) of the Constitution.

22. Learned counsel for the proposed appellant drew our attention to two old Privy Council decisions as against those cited by the respondent and contended that the order of the Controller was a final order. In *Rahimbhoy Habibhoy v. Turner* 18 I A 6 (PC) there was a preliminary decree declaring the defendant liable to account to the plaintiff but the amount of the liability was not determined. The defendant applied for special leave to appeal. The question turned on the interpretation of Section 595 of the old Code of Civil Procedure. The Judicial Committee observed

"that 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 real 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. The Court can never go back again upon this decree so as to say that, though the result of the account may be against the defendant, still the defendant is not liable to pay anything. That is finally determined against him, and therefore in their Lordship's view the decree is a final one within the meaning of Section 595 of the Code."

This case was followed in *Syed Mazhar Husein v. Bodha Bibi* 22 I A 1 (PC). Here the plaintiff's case was that one Ibn Ali by his will gave the property in suit to certain persons impleaded as defendants, who had in their turn conveyed the same to the plaintiff. One of the defences raised was a denial that Ibn Ali had made any gift to the grantors of the plaintiff. The other defences were all of a subordinate character. The Subordinate Judge took evidence and decided against the plaintiff on the question of Ibn Ali's will which defeated the suit and made it unnecessary to give judgment on the other issues. The plaintiff appealed from this decree to the High Court which decided that Ibn Ali had made a valid gift and remanded the case u/s 562 of the Code of Civil Procedure, to be disposed of on the other issues. The petitioner applied for leave to appeal which was refused by the High Court. In granting special leave the Judicial Committee observed that the decree of the High Court was final, the will of Ibn Ali being the cardinal point of the suit which after the decision of the High Court could not be disputed again, notwithstanding that there might be subordinate enquiries to be made.

23. With regard to both these cases it can be said that there were decrees which would be covered by Article 133. So far as the question of an order being final on the test formulated in the later cases of the Judicial Committee the proposed appellant cannot succeed.

24. Mr. Meyer also relied on a judgment of the Supreme Court in *Shiromani Gurdwara Parbandhak Committee and Others Vs. Raja Shiv Rattan Dev Singh and Others*, . There a suit had been filed by the respondents against the appellants Shiromani Gurdwara Parbandhak Committee, Amritsar, the Local Gurdwara Parbandhak Committee of Sri Darbar Sahib, Amritsar and 57 other persons for a declaration to the effect that a house in Amritsar and four shops appurtenant thereto belonged to him and were his private property and were not a Shik Gurdwara. There had been prior litigation in respect of the property. The trial Court framed the four preliminary issues:

- (1) Is the plaintiff in possession of the property in suit other than the shops?
- (2) If this is not proved, can the suit proceed in the present form with respect to the above property?
- (3) Has not this Court jurisdiction to try the suit?
- (4) Is the suit barred by time? The trial Court held issue Nos. 1 and 2 in favour

of the plaintiff and issues Nos. 3 and 4 against him. The first appellate Court held entirely in favour of The plaintiff. When the matter went to the High Court before a single Judge there was no contest with regard to the issues 1, 2 and 4. From the decision of the single Judge an appeal was heard by a bench of two Judges who allowed the same and returned the case back to the trial Court for proceeding in accordance with law. It was against this order of the High Court that the appeal was brought to the Supreme Court. The matter involved the interpretation of various sections of the Shik Gurdwaras Act, 1925 and the Supreme Court decided finally on the facts of the case that the civil Court had the jurisdiction to entertain the suit and to decide the material issues raised therein. It was contended that all that the High Court had done was to remand the suit to the trial Court for proceeding in accordance with law and there was no final order. The Supreme Court negatived this contention and said that although the order purported to be by way of remand the High Court did in fact finally decide the matter. They referred, with approval to the observation of the High Court that

"the decision on issue 3 finally determined the rights of the parties in regard to the ownership of the property. If it is private property, as it has been held by this Court, then a declaration must be given as prayed for by the plaintiff and as a consequence the injunction will follow."

As there was no stay the trial Court decided the matter before the hearing by the Supreme Court. The trial Court did nothing except passing an order in terms of the order of the High Court. Negating the preliminary objection the Supreme Court observed

"on the facts of this case the judgment of the High Court appealed against does amount to a final order."

25. It will be noticed that on the peculiar facts of the case the Supreme Court took the view that really there was nothing for the trial Court to do after the adjudication by the High Court but to draw up a decree in terms of the High Court's order. Although the High Court remanded the matter to the trial Court it had in fact disposed of the rights of the parties. In my view, this case does not help the proposed appellant.

26. Reliance was also placed on the judgment in the case of *Ganeshdas Kishnaji v. Murlidhar* AIR 1956 Mad 151. There a preliminary decree was passed in favour of the plaintiff by the trial Judge permitting him to surcharge and falsify the accounts kept by the defendant. In appeal therefrom the decree was substituted by the High Court for one directing the defendant to render accounts to the plaintiff. The defendant asked for leave to appeal to the Supreme Court. Although the cases in AIR 1933 58 (Privy Council) were discussed by the bench of the Madhya Bharat High Court, in my opinion, once it was found that there was a decree the matter was covered by Article 133 of the Constitution and it did not matter whether it is preliminary or final.

27. Lastly Mr. Meyat argued that in England appeals were allowed to be preferred even before the settlement of the terms and conditions of the compulsory licence. In this connection it is to be noted that in the corresponding English Section 37 there is a substantial departure from its Indian counterpart. Sub-sections (1) and (2) of the Indian Act follow Sub-sections (1) and (2) of Section 37 of the English Act but Sub-section (3) of the English Act provides that;

"Subject as hereinafter provided, the Controller may, if satisfied that any of the grounds aforesaid are established, make an order in accordance with the application; and where the order is for the grant of a licence, it may require the licence to be granted upon such terms as the Controller thinks at."

28. Clearly this envisages two orders. The Controller may at first make an order that a licence should be granted and he may incorporate in that order a direction that the licence should be granted upon such terms as the Controller thinks fit. Clearly the transaction may be completed in two stages: first an order granting a licence and secondly settlement of the terms and conditions of the licence.

29. In the result the application must fail, first because the order is not a final order and secondly because the High Court sitting in appeal from the decision of the Controller merely acted as *persona designata*. But for these two impediments the proposed appellant would be entitled to a certificate under Article 133(1) because the matter is one of general public importance inasmuch as in considering the application for a licence the Controller has "to consider whether the patent has not been commercially worked in India to the fullest extent reasonably practicable and whether the demand for the patented article was not being met to an adequate extent or on reasonable terms as also whether the commercial working of the invention in India was being prevented or hindered by the importation of the patented article. These are matters which affect not only the patentee and the applicant for the licence but the general public as well. I see no merit in the contention that if the Controller decides in favour of the grant of a licence then the appeal from the decision of the High Court confirming the Controller's judgment is against public interest. In other words public interest would suffer if the appeal were to succeed. "This argument is clearly fallacious. Public interest is involved in all stages of the proceedings. It is the duty of the Controller as also of the High Court to see that a licence is given on proper terms when conditions mentioned in Section 22 of the Act exist. On the other hand public interest is bound to suffer if the licence is granted to a person who is not fit and proper for then the market might be flooded with articles of inferior quality and workmanship than that provided by the patentee.

30. The application is dismissed and the certificate is refused.

31. The appellant must pay the costs of this application.

32. Certified for 2 counsel.

Bose, C.J.

33. I agree.