
(1971) 03 BOM CK 0026
In the Bombay High Court
Case No : OCJ Appeal No. 87 of 1970

Home Insurance Co. of New York	Vs	APPELLANT
Shantikumar R. Canji		RESPONDENT

Date of Decision : 29-03-1971

Acts Referred:

Citation : (1973) MhLj 347

Hon'ble Judges : S.K. Desai, J;N.A. Mody, J

Bench : Division Bench

Advocate : A.B Diwan, R. Dada instructed by S.F.B. Tyabji and Co, for the Appellant; P.M. Mukhi instructed by Tyabji Dayabhai and Co., for the Respondent

Final Decision : Allowed

Judgement

S.K. Desai, J.—This is an appeal from the order dated July 6, 1970 made by Vimadalal J., whereby he granted leave to the plaintiff to amend the plaint as sought for by his Chamber Summons dated April 27, 1970. This was not the first application for amendment, as an earlier one had been disposed of by Kantawala J., who had partly allowed the amendment sought for and partly disallowed it.

2. Two questions arise in this appeal:- (i) whether the appeal lies, and (ii) if the appeal does He, whether Vimadalal J-ought to have allowed the amendment sought for by the plaintiff.

3. Before proceeding to deal with the two questions and in order to understand the rival contentions, some facts may be stated : The appellants before us, who are the defendants in the suit, are the Home Insurance Company of New York having their registered office in New York within the United States of America ; they have a branch office at universal Building, Sir Pherozechah Mehta Road, Fort, Bombav-1. According to the plaint, on June 1, 1947 the plaintiff was employed by the Concord of India Ltd., an Insurance Company, as an Executive Officer on a monthly salary of about Rs. 775. In June 1947 there were negotiations between the plaintiff and one P. B. Dastoor, who has been described

in the plaint as the defendant's Branch Manager. Various representations alleged to have been made by the said Dastoor to the plaintiff have been set out and after such negotiations the defendants, according to the plaint, employed the plaintiff as Executive Officer on a monthly salary of Rs. 1,500 and entertainment expenses. It was further agreed that the plaintiff would have all the benefits, advantages, privileges, amenities and facilities which the defendants used to give to their senior officers, or which the defendants would from time to time give to their senior officers. This was, it may be mentioned, an oral contract. The plaintiff worked as a senior executive officer in the defendants branch at Bombay from June 1, 1947 till December 1963. From time to time his salary was increased, and in December 1963 he was being paid by the defendants a monthly salary of Rs. 1,700 and entertainment expenses. A portion of this salary viz. Rs. 265 was free from income tax and the defendants paid the income tax in respect of this portion.

4. By their letter dated December 28, 1963" the defendants determined and terminated the plaintiff's employment in the defendant's company. According to the plaintiff, this was without any prior warning and without any reason whatsoever. Again, according to the plaintiff, no oral intimation of the proposed step was given to him by the defendants and such termination was without any justification or cause. The plaintiff was paid by the defendants his salary for the month of December 1963, and along with the said letter dated December 28, 1963 the defendants enclosed a cheque for Rs. 3,400 which consisted of two sum of Rs. 1,700 each, one being one month's remuneration for January 1964 in lieu of notice and the other sum of Rs. 1,700 being one month's in lieu of accrued leave. The defendants by their said letter further stated that if any bonus was declared for the financial year 1963-64, the plaintiff would be paid his proportionate share of such bonus. The plaintiff accepted this amount without prejudice to his rights and contentions in the matter. Thereafter by his attorneys' letter, dated February 7, 1964, he contended that the termination of his employment by the defendants was wrongful and unlawful. By the said attorneys' letter the plaintiff claimed that he should have been paid six months' salary in lieu of notice (amounting to Rs. 10,200) and gratuity at the rate of one month's salary for each year of his service (amounting to Rs. 27,200 for his 16 years of service). Correspondence thereafter ensued, in which the defendants denied their liability to pay any further amounts. Accordingly in September 1964 the plaintiff filed the present suit. In the plaint, however, the plaintiff contended that having regard to the length of his service with the defendants, the quantum of salary paid by the defendants and the senior position enjoyed by the plaintiff, the defendants were bound and liable to give to the plaintiff two years' notice before determining and/or terminating his services. It was mentioned in the plaint that the plaintiff had secured another job on March 10, 1968, after which date he was working as a senior officer in another insurance company on a monthly salary of Rs. 900 plus an amount of Rs. 450 which was being paid to him for traveling and entertainment expenses.

5. The plaintiff also claimed a sum of Rs, 3,000 as bonus for three years viz. 1963, 1964 and 1965. He also claimed gratuity on the same basis as mentioned earlier in his attorney's letter. Thus, three amounts were claimed in the plaint, viz. Rs. 27,200 for gratuity, Rs 3000 for three years' bonus at the rate of Rs. 1,000 per year and Rs. 20,199 as difference in the salary which the defendants would have paid to the plaintiff for the period of two years after giving credit for the sum of Rs. 1,700 paid by the defendants for one month's notice and the salary which the plaintiff earned after March 10, 1964.

6. In their written statement dated December I, 1964 the defendants contended that the suit against them was false, misconceived and vexatious. It was denied that the plaintiff was employed on any permanent basis. The alleged representations supposed to have been made by Dastoor to the plaintiff were also denied. The contract as set out was also denied. As far as the actual termination was concerned, according to the defendants, the plaintiff's services were found to be unsatisfactory during the last few years and the plaintiff had been verbally informed about this. According to the defendants, the two months' salary offered along with the letter of termination was adequate and reasonable and the plaintiff was not entitled to any further amount in lieu of notice. As far as bonus was concerned, it has been stated in the written statement that on or about October 27, 1964 the plaintiff was paid pro-rata bonus for the year 1963-64. The allegation in the plaint that the defendants had agreed to pay to the plaintiff one month's salary as bonus for each year, subject to the maximum of Rs. 1,000, was denied. According to the defendants, bonus was declared voluntarily and paid to their senior officers after the completion of the accounting year which was from July 1 to June 30. As far as the claim for gratuity was concerned, according to the defendants, gratuity was payable to assistants, sectional heads and lower grade staff, but there was no scheme or rules of gratuity applicable to senior officers.

7. On February 11, 1965 the usual summons for directions was taken out and necessary directions for filing affidavits of documents by the parties were given by Kantawala J, on March 5, 1965. Pursuant to these directions the parties filed their respective affidavits of documents and thereafter inspection of the documents disclosed in the affidavits was completed. Correspondence thereafter ensued in which the plaintiff's attorneys contended that the defendant's affidavit of documents was incomplete. This was denied, and the plaintiff took out a Chamber Summons on October 7, 1965 for further disclosure, by which the plaintiff wanted the defendants to disclose the scheme or schemes or rules or conditions of service framed by the American Foreign Insurance Association (hereinafter referred to as the A. F. I. A.) of which the defendants were alleged to be members and/or framed by the defendants' head office at New York, or by the defendants' office in India, which, according to the plaintiff, were applicable to the executive officers of the defendants in India. In their affidavit in reply to the said Chamber Summons the defendants stated that there was no scheme or schemes or rules or conditions of service framed by the said A. F. I. A., except a

Pension Plan for foreign branch offices, she said Chamber Summons was heard by the learned Prothonotary who made it absolute. By a subsequent order the defendants got the said Chamber Summons placed on the board of the Chamber Judge, and on November 30, 1965 the Chamber Judge set aside the order of the learned Prothonotary.

8. On December 18, 1969 the plaintiff took out a Chamber Summons for amendment of the plaint; this will hereinafter be referred to as "the first application for amendment". By this Chamber Summons the plaintiff wanted to add paras. 3A, 5A to 5E, 12A and 12B and three additional prayers (b), (c) and (d). The valuation clause (para. 14 of the plaint) was also sought to be amended. By the proposed para. 3 a factual contention was advanced pertaining to the A. F. I. A. of which the defendants along with other American Insurance Companies were members. According to the plaintiff, the defendants' office in Bombay was a foreign branch office of the A. F. I. A. Paragraph 5A of the proposed amendment pertains to the rules for payment of gratuity under a scheme or rules made by the A. F. I. A. Paragraph 5B refers to the Pension Plan applicable after retirement from active service of the employees of A. F. I. A. at the foreign branch offices. The substance of the Pension Plan is fully set out in the said paragraph. Paragraphs 5C, 5D and 5E sought to be added by the first application for amendment contain submissions regarding gratuity and pension payable under the aforesaid two schemes. In para. 12A of the proposed amendment the plaintiff submitted that the defendants were liable to pay to him during his life-time a sum of Rs. 850 per month by way of pension from February 1, 1964. A declaration to that effect was sought in prayer (b). In prayer (c), which was sought to be added, the plaintiff sought a money decree against the defendants in sum of Rs. 5,950 as and by way of alleged pension which had become payable to him from February 1, 1964 till August 31, 1964. In prayer (d) the plaintiff sought an order and decree against the defendants, directing them to pay to him Rs. 850 per month by way of pension from the date of filing of the suit till his death. Paragraph 12B proposed to be added by the first application for amendment contains submissions with regard to the three prayers.

9. The amendments sought for in the first application for amendment were opposed by the defendants on various grounds, and by an order made on January 19, 1970, Kantawala, J. partly allowed the said application and partly disallowed the same. Shortly stated, the plaintiff was not permitted to amend the plaint to make a reference to the alleged Pension Plan and to make any claim on the basis of such Plan. Thus the proposed paras. 5B, 5C, 12A and 12B and the prayers (b), (c) and (d) were disallowed. No amendment of the valuation clause became necessary, and all that the plaintiff was permitted to do was to add in the existing plaint a reference to the A. F. I. A. and to the scheme of gratuity framed by the said Association. He was, shortly stated, permitted to utilise these facts in support of his claim for 16 months' gratuity which was already there in the plaint.

10. For more than three months after this order the plaintiff kept quiet, and on April 27, 1970 he took out another Chamber Summons for amendment of the plaint, which was made returnable after the summer vacation in July 1970; this will be hereinafter referred to as the "second application for amendment." By this second application for amendment the plaintiff sought to add in the plaint paras. 5D to 5G, amend paras. 11 and 12 and also para. 14, and the prayer clauses. He also sought to amend the particulars given in exh. E to the plaint. Paragraph 5D refers to the Pension on adopted by the A. F. I. A. in 1953, and a copy of the same was sought to be annexed as exh, AA to the plaint. It was then submitted that this said Pension Plan was made applicable to the defendants" Bombay Office and that it would apply to the plaintiff and on his retirement from service in due course the defendants were bound and liable to pay monthly pension to him in accordance with the said Pension Plan. According to the submission in para 5G, the plaintiff was wrongfully dismissed and thereby prevented from continuing in service and being paid monthly pension in accordance with the said Pension Plan. As indicated in Exh. DD, which was sought to be added, the plaintiff, if allowed to complete his normal span of service, would have retired on May 31, 1975, and accordingly would have obtained pension for at least ten years thereafter, which amount, at the rate of Rs. 850 per month, would come to Rs. 1,02,000. The plaintiff, in the circumstances, claimed a sum of Rs 68,000 as "the amortised amount of damages" in relation to his right to pension which, the plaintiff claimed, was due to him consequent upon his wrongful dismissal from service. The valuation clause and the prayers were sought to be altered with the additional claim, and Exh. DD, as indicated earlier, was also sought to be added indicating the calculations for the amortised amount of damage.

11. Affidavits were filed on this second application for amendment. At this stage we do not propose to refer to the contents of these, except to say that the defendants in their affidavit in reply opposed the second application for amendment on all possible and permissible grounds. The said second application for amendment was heard by Vimadalal J., on July 6, 1970, and on the said date he made the Chamber Summons absolute and granted all the amendments applied for by the plaintiff.

12. In their affidavit in reply to the second application the defendants had contended that by reason of the order made by Kantawala J., on January 19, 1970, whereby he disallowed all the amendments which related to or relied upon the Pension Plan, the second application for amendment which pertained to the same was barred by principles of res judicata or principles analogous to res judicata. It was also submitted that the plaintiff's claim for the amortised amount as an item of damages was time-barred. There were also factual submissions and it was submitted on the basis thereof that the plaintiff was aware of the Pension Plan much earlier than the date on which he claimed that he obtained a copy thereof.

13. In deciding the first question which arises in this appeal, viz. whether the

appeal itself is competent, it will have to be considered at the outset whether the claim added by the second amendment application was time-barred on the date on which it was granted by Vimadalal J. A brave attempt was made in this behalf by Mr. Mukhi, who appears on behalf of the respondent to this appeal, who urged that there was no bar of limitation to this claim even on the date when the second application for amendment was made. He submitted that the contract of employment did not come to an end by reason of the wrongful termination thereof by the employers; to use his own words, "it would come to an end only when damages are recovered by the employee". Alternatively, he submitted that the breach by the employers was a continuing breach and, therefore, there would be no limitation operating against the employee. We have not been impressed by the submissions made in this behalf by Mr. Mukhi. Both by his attorneys letter dated February 7, 1964 and by the plaint which was filed in September 1964 the plaintiff preferred his claim for damages and did not choose to treat the contract of employment as subsisting and alive. The tenability of Mr. Mukhi's submission could be tested in another way : Suppose after exchanging correspondence, which has been exchanged in this case between the parties and their legal advisers, the plaintiff had kept quiet and had filed a comprehensive suit for damages in 1970 i. e. six to seven years after the purported termination of his service by the employers. Would his claim be in time ? It is obvious that such a suit would be time-barred. Whether the claim included in the plaint by the second application for amendment be regarded as enhancing damages already claimed for wrongful termination, or as adding a fresh head of damages (which appears to be more correct) it is obviously a fresh or a new claim. Such a claim would certainly have been barred by limitation in 1970. The result of such a claim being allowed to be added by the second amendment application is to relate it back to the date on which the plaint was first filed i. e. September 1964 (See *The New Fleming Spinning and Weaving Company, Limited v. Kessowji Naik* (1885) 1 L R. 9 Bom. 37 at p. 402..) Thus the defendants would not be entitled to plead limitation to this claim and in a sense, therefore, the defence of limitation to this head of claim has been negated or taken away by Vimadalal J. when he allowed the amendment.

14. Even if this be the result implicit in the order passed by Vimadalal J., it has been urged that the decision would not amount to a "judgment" within the meaning of clause 15 of the Letters Patent. As far as clause 15 was concerned, Mr Divan appearing on behalf of the appellants submitted the following propositions: (1) An interlocutory order can amount to a judgment within the meaning of clause 15 of the Letters Patent; (2) If an interlocutory order determines the rights of a party even pro tanto, it would be a judgment within the meaning of clause 15 ; (3) An order is appealable as a judgment if it is a decision which affects the merits of the controversy in suit between the parties; (4) An order granting an amendment may or may not be a "judgment", and this would depend upon the facts of each case, and (5) The order under appeal before us determined, so far as trial Court was concerned, the question of limitation in

relation to the claim of Rs. 68,000 (based on the Pension Plan) and, therefore, would amount to a judgment. It was also submitted that as far as the trial Court was concerned, the granting of the amendment concluded the question of the bar of *res judicata* or principles analogous to *res judicata*. According to Mr. Divan, it is well settled that if the issue of jurisdiction is decided one way or the other, the order would be appealable as a judgment; and on a parity of reasoning if an issue of limitation was decided one way or the other, the order would be a judgment.

15. On the other hand, the following propositions were made by Mr. Mukhi: (1) Every judicial pronouncement even on a right or liability cannot be regarded as a judgment; (2) By the amendment the plaintiff has only been allowed to raise the contention that his wrongful dismissal affected the privileges and benefits to which he was entitled under the contract of service, including *qua* pension, and thus no right had been decided between the parties; (3) The prescribed test, according to Mr. Mukhi, was that the judgment must be a pronouncement which puts an end to the proceeding so far as the Court dealing with it is concerned ; (4) The granting of the amendment was purely a procedural matter; and if there was any incidental effect or result, then that would not amount to determination of any right or liability ; (5) Limitation is not something concerning the merits of a case or any controversy in suit; it does not decide any right except in rare cases, and (6) It was finally submitted that the point was not directly but only indirectly involved or decided by implication. It was urged that what was material was the final and operative order and not the ground or reason for that decision. In other words, it was submitted that the true nature of an order is not determined by the ancillary issues which arise and are decided therewith.

16. A number of authorities were referred to at the Bar on this aspect of the appeal and reference may now be made to such of them as may be considered relevant on this point.

17. Clause 15 of the Letters Patent came up for consideration before the Supreme Court in *Asrumati v. Rupendra Deb* A I R 1953 B C 198. In that matter the Supreme Court was considering an order for transfer of a suit made under clause 13 of the Letters Patent, and it held that the same was not a judgment within the meaning of clause 15 and, therefore, was not appealable. In the matter before it the Supreme Court noted the divergence between the views of the High Courts of Calcutta, Madras and Rangoon on the meaning of "judgment" in clause 15 of the Letters Patent. The view taken by the Calcutta. High Court is contained in the pronouncement of Sir Richard Couch, C. J., in the well known and oft-cited case of *The Justice of the Peace for Calcutta v. The Oriental Gas Company* (1872) 8 Beng. LR. 433. where it has been observed as follows (p. 452):

...We think that "judgment" in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary, or interlocutory, the difference between

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

A Full Bench of the Madras High Court formulated its definition of "judgment" in *Tuljaram Row v. Alagappa Chettiar* (1910) I. L. R. 35 Mad. 1 F.B. where Sir Arnold White C. J., observed (p. 7)

The test seems to me to be not what is the form of the adjudication but what is its effect on the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause.

A much narrower view of "judgment" was taken by the Rangoon High Court in *Dayabhai v. Murugappa Chettyar* AIR 1935 Bam. 267, F. B. It was held by the Full Bench of the Rangoon High Court that the term "judgment" in the Letters Patent means and is decree in a suit by which the rights of the parties in the suit are determined. According to the Rangoon High Court, it implies a judgment in its final and definitive sense embodying a decree. In the matter before the Supreme Court, the Supreme Court did not think it necessary to decide or determine which of the above views was the correct one, since it was satisfied that in none of the views referred to above could an order of the character which was for consideration before the Court be regarded as a "judgment" within the meaning of clause 15 of the Letters Patent.

18. As far as Bombay is concerned, it is well settled that in this Court the definition given by Sir Richard Couch C. J. has always been followed (see *Elphinstone Etc. Mills v. Sondhi Sons* 1962 N L J 99=(1961) 53 Bom. L. R. 947, F. B. In that case a single Judge of this Court had set aside an ex parte decree earlier made by another single Judge in a suit. The result of the order no doubt was that the plaintiff was deprived of a valuable right which had accrued to him under the decree which had been passed in his favour; it also relieved the defendant of his liability under that decree. However, the order did not decide any of the matters in controversy in the suit. On that limited ground it was held by the Full Bench that such an order was not a "judgment" within the meaning of clause 15 of the Letters Patent. It was also noted in the above said Full Bench decision that the same view had been taken by the Calcutta High Court in several cases.

19. The matter came up for consideration before the Supreme Court against in *Radhe Shyam v. Shyam Behari* (1970) Civil Appeal No. 1569 of 1966, decided on August 12, 1970 (S. C.) (Unrep.) A Bench of two Judges of the Supreme Court consisting of Shelat and Vaidialingam JJ., was in that decision considering the construction of clause 10 of the Letters Patent of the Allahabad High Court, which

is similar to clause 15 of the Letters Patent of this Court. The said decision noted the earlier Supreme Court decision in *Asrumati Debt's* case, and it was observed that the earlier decision had referred to the divergence of opinion in the Calcutta, Madras and Rangoon High Courts but had not resolved that divergence. The Division Bench thereafter proceeded to observe as follows:

...For an order to be a "judgment" it is not always necessary that it should put an end to the controversy in the suit or should terminate the suit. Even the narrower definition of a "judgment" as given by Couch, C.J. in the *Justices of the Peace for Calcutta* was that it must mean a decision which affects the merits of the question between the parties by determining some right or liability and such a decision might be either final or preliminary or interlocutory.

20. We were referred to a number of other decisions of our High Court holding that an interlocutory order is appealable provided it amounts to a judgment as defined by Couch C. J. In this connection reference was made at the Bar to *Mansata Film Distributors v. Sorab Modi* 1964 57 Bom. L. R. 228 and to a recent unreported judgment of Kotval G. J., and Vaidya J., in *Syed Fazal v. Madanlal Chanderbhan* (1968) O C. J. Appeal No. 102 of 1967, decided by Kotval C. J. and Vaidya J" on October 17, 1968 (Unrep.) In view of this decision and in view of *Radhe Shyam's* case decided by the Supreme Court, it is clear that an appeal would lie from an interlocutory order provided the same amounts to a "judgment".

21. On the question of appeal ability of an order allowing amendments reference was made at the Bar to (we judgments, one of this Court and another, a later one, of the Calcutta High Court which has considered the earlier Bombay decision. In *Sheshgiridas Shanbhag v. Sunderrao* (1945) 48 Bom. L R 252. it was held that an order passed by the trial Court permitting the plaintiff in an ejectment suit to amend the plaint by impleading breaches of conditions of lease by the defendant that took place subsequent to the date of the riling of the suit is not a "judgment" within the meaning of clause 15 of the Letters Patent, and is therefore not appealable. No question of any right of the defendant or of the plea of limitation was involved, and it was observed that by the amendment allowed by the trial Court the plaintiff was merely permitted to contend at the hearing that the defendant should be ejected also on the ground that after the filing of the suit he had committed further breaches of the terms of tenancy. The effect of the amendment merely was that the plaintiff was permitted to raise additional contentions and that it did not amount to admitting that the contentions were valid or that the plaintiff would get the relief because of these contentions. No part of the defence to these contentions was adjudicated upon by the order for amendment. The learned Judges who gave the judgment and decided that no appeal lay were very careful in observing that the discussion on the appeal ability should be considered as confined to the facts before them and they were not laying down a general decision pertaining to all amendments. This would be found in the judgment of Kania, Acting C. J., at page 253 of the report.

22. This decision of the Bombay High Court came to be considered by a Division Bench of the Calcutta High Court in *M.B. Sirkar and Sons Vs. Powell and Co.*, . A Division Bench of the Calcutta High Court was in the said matter hearing an appeal from an order of P. B. Mukharji J., (as he then was), by which the learned Judge allowed the amendment of the plaint by which the original defendant in the suit, which was shown as a firm, was converted into a company of the same name. The relevant observations are to be found in paras. 8 and 9 of the judgment of Chakravarti C. J. According to this judgment, if an amendment merely allows the plaintiff to state a new cause of action or to ask a new relief or to include a new ground of relief, all that is done is that it is made possible for the plaintiff to raise certain further contentions in the suit, but it is not decided that those contentions are right. According to the Calcutta High Court written an amendment is of this character, it may be said that by allowing it the Court does no more than regulate the procedure applicable to the suit and does not decide any question which touches the merits of the controversy between the parties. However, there may be other types of amendment by which a question of substance between the parties is directly or indirectly, but nevertheless finally, so far as the suit is concerned, decided. In the amendment which was for consideration before the Calcutta High Court a new party was substituted for the party originally impleaded. The consequence was to take away from the new party so substituted his defence of limitation which would be available to him if a suit brought on the date of the amendment would be time barred. In such a case it was held that the order of amendment decided a vital question concerning the merits of the case and the rights of the party and, therefore, was a "judgment" within the meaning of clause 15 of the Letters Patent. It was observed that it would not be open for the newly added party to question the amendment before the trial Court during the subsequent stages of the suit.

23. Thus, it was held that "If an amendment either affected rights accrued to the other party or prejudiced him in any other way, the order allowing it would be an order deciding a question touching the merits of the controversy as between the parties and would be appealable." The Bombay case previously referred to was considered, and it was observed that it did not lay down that in no case would an order allowing an amendment of the plaint be appealable. It is very clear from a perusal of the Bombay case that no such general proposition was laid down nor intended to be laid down. The amendment allowed in the Bombay case merely permitted the plaintiff to raise a contention without affecting any accrued right of the defendants. Accordingly it was held not to amount to "judgment". In the Calcutta case, on the other hand, the amendment directly affected the right of the newly substituted party i. e. the company to plead limitation which it could have pleaded had it been sued on the date of the amendment and it was accordingly held that the order affecting its right amounted to a "judgment" within the meaning of clause 15 of the Letters Patent.

24. Mr. Mukhi referred us to a very recent decision (unreported) of this Court given by Kotval C. J., and Nain J. in *Mjs. R, Jaikrishna & Co, v. The Municipal*

Corporation of Greater Bombay (1970) O, C. J. Appeal No 54 of 1970, decided by Kotval C. 2. and Nain J., on July" 3, 1970(Unrep.) In this matter the Division Bench was considering an appeal against the order of Kantawala J., dismissing the plaintiff's Chamber Summons taken out for a direction that Civil Suit No. 821 of 1968 pending on the Original Side of this Court should be transferred for trial to the Bombay City Civil Court. The said suit was originally filed in the Bombay City Civil Court, but pursuant to the decision given by this Court in Civil Appeal No. 44 of 1968 it was re-filed in the High Court on December 6, 1968, and in para. 11 of the plaint the plaintiff had submitted that the relief's claimed were not susceptible to a monetary valuation. Thereafter the Maharashtra Act, IX of 1970, was passed and came into force on February 12, 1970. It was in terms intended to do away with the effect of the decision of this Court in Letters Patent Appeal No. 44 of 1968. The Chamber Summons was taken out by the plaintiffs pursuant" to the provisions contained in this Act. The short issue in the Chamber Summons before Kantawala J. was whether the subject-matter of the suit before him was capable of monetary valuation or not; he decided the issue against the plaintiffs and held that the subject-matter of the suit was capable of monetary valuation and, therefore, would not fall within the ambit of section 6 (2) (c) of the Maharashtra Act, IX of 1970. Applying the Supreme Court decision in Asrumati's case the Division Bench held that the order neither affected the merits of the controversy between the parties to the suit, nor did it terminate or dispose of the suit or any portion thereof on any ground and hence it was not appealable. There are undoubtedly some observations in the said judgment to the effect that the appeal Court should only be concerned with the final and operative order which was the decision appealed from and incidental issues decided may not be looked at. In that case, however, the order of the trial Court on the Chamber Summons merely construed the substance of the plaint and consequentially determined the basis on which the Court fees would be payable. Although important rights of the plaintiff would be affected by the determination of these two questions, still it is possible to urge that they are not the matters in controversy in suit. Again, the Division Bench make it clear in their judgment that their decision is on the facts of the case and in this they are merely following the practice normally followed in this Court (see observations of Macleod C.J. in Shri Goverdhanlalji Maharaj Vs. Shri Chandraprabhavati, . In the above decision Macleod C.J. observes (p. 1499) :

After considering very can fully what was set forward as a definition of "judgment" in that case. I prefer my Bell" to consider each decision as it conies before me, and to form my own. opinion whether it is a judgment or not for the purpose of deciding whether an appeal lies.

25. In a very recent decision, The (J. D. R. v. Dynamic Industrial Etc. 1971 Mh. L J 482=(1970) 73 Bom L R 183. it has been held that-

A decision can in certain circumstances, be a "judgment" and therefore appealable even if it affect is an independent contention raised by the defendant,

a contention which does not at all concern or raise a dispute about any part of the plaintiff's cause of action or claim in the suit.

26. In the case before us the order for amendment does not pertain to any such independent contention de hors the suit but by implication takes away or negatives the defence of limitation available to the defendants in respect of an additional claim by way of amortised damages included by the second application for amendment in the plaint. It is not possible to accept Mr. Mukhi's submission that the defence of limitation is not a defence on merits. It is true that in theory of jurisprudence the technical plea of limitation does not affect the right but merely removes it to the category of an "imperfect right", a right for the breach of which the party aggrieved will not have a remedy. However we are concerned not with an abstract theory but with the controversy between the parties to a litigation. Surely limitation is one of the points which would arise in such controversy and a decision on this, express or implied must be held to be one on the merits of the case before the Court. When the second application for amendment was allowed by the learned Chamber Judge it necessarily decided this vital question concerning the merits of a part of the plaintiff's claim. In this view of the matter the order allowing such amendment must, in our opinion, amount to a "judgment" within the meaning of clause 15 of the Letters Patent and would be appealable as such. In this regard we are inclined to agree with the statement of law to be found in the observations of a Division Bench of the Calcutta High Court in *M. B. Sirkar v. Powell & Co.*

27. The rest of the judgment is not material to this report