
(1972) 09 OHC CK 0014
In the Orissa High Court
Case No : A.H.O. No. 5 of 1972

Orissa Textile Mills Ltd. and Another	APPELLANT
Vs	
Chintamani Sahu and Brothers and Others	RESPONDENT

Date of Decision : 27-09-1972

Acts Referred:

Companies Act, 1972 — Section 379, 398, 402, 403
Orissa High Court Rules, 1948 — Rule 23

Citation : (1975) 45 CompCas 76

Hon'ble Judges : R.N. Misra, J;B.K. Ray, J

Bench : Division Bench

Advocate : B.M. Patnaik and S. Patnaik, for the Appellant; M. Mohanty and D.P. Mohapatra, for the Respondent

Judgement

R.N. Misra, J.—This appeal is directed against the order dated February 17, 1972, passed by our learned brother, Mr. Justice Patra, as company judge in Company Act Case No. 5 of 1970. The opposite parties Nos. 1 and 3 in the Company Act case are the appellants and all other parties have been impleaded as respondents. This appeal purports to be under Clause 10 of the Letters Patent of the Patna High Court read with Clause 4 of the Orissa High Court Order, 1948. Though in the cause title of the memorandum of appeal, it had also been shown to be under the Companies Act of 1956 and the Rules made thereunder, Mr. Patnaik for the appellants concedes that no appeal against the impugned order would lie under the Act or its Rules.

2. Company Act Case No. 5 of 1970, was instituted in this court on August 18, 1970, and was one under Sections 397 and 398 of the Companies Act. 129 persons were shown as petitioners. The company and several of its directors entered contest and took the stand, inter alia, that the petition had not been filed in accordance with the Companies (Court) Rules and it was not verified properly. On the 17th of February, 1972, the matter stood posted before the learned company judge for considering applications for direction regarding production of

records. On that day, before the hearing was taken up, a copy of an application in Company Act Case No. 5 of 1970, labelled under Sections 397 398 402 and 403 of the Act, was served on counsel for the appellants. On the said application, counsel endorsed objection and indicated that he intended a counter to be filed. A copy of that application was also served upon counsel for opposite party No. 2 (now respondent No. 130). During the hearing of the case relating to direction for production of documents, the said application was presented before the court. Thereupon, the following order was passed :

"On August 18, 1970, an application purporting to be under Sections 397 398 402 and 403 of the Companies Act has been filed in court by Sri Mohanty, advocate, having been authorised to do so by 129 persons whose names appear in the application as petitioners. Notice of this application was served on the opposite parties and, in due course, counter-affidavits have been filed by them. One of the objections taken is that the petition is not in proper form and on that account alone the application is liable to be dismissed. To-day, an application has been filed in court by Sri Mohanty under Sections 397 398 402 and 403 of the Companies Act against the very opposite parties who are impleaded in the application filed on August 18, 1970. This application is signed by 118 persons and in paragraph 7 thereof, it is stated that the facts set out in the petition dated August 18, 1970, in paragraphs 1 to 61 thereof should be treated as part and parcel of the petition filed to-day. It is stated by Mr. Mohanty that the petition filed to-day should be treated as an independent application and the only connection it would have with the application filed on August 18, 1970, is that certain recitals made in the petition filed that day in paragraphs 1 to 61 thereof should be deemed to be incorporated in the present petition.

It is thus agreed that from today, the application filed on August 18, 1970, loses its identity and gets merged in the application filed today. All actions taken on the application dated August 18, 1970, would not avail the petitioners so far as the application filed today is concerned. Fresh notice of the application filed today has to be given to all the opposite parties.

Let the application filed today be given a separate number and it be noted against Company Act Case No. 5 of 1970, that it gets merged in the application filed to-day. Steps, as usual, be taken."

3. Counsel for the present appellants thereupon applied for clarification of the order and the learned company judge by order dated March 8, 1972, passed the following order :

" Perused the application filed by Mr. B.M. Patnaik in respect of Order No. 19 dated February 17, 1972.

The effect of that order is this : This case (Company Act Case No. 5 of 1970) was found defective in certain respects. It is, therefore, that Mr. Mohanty filed a fresh application numbered as Company Act Case No. 1 of 1972. This new case virtually contains recitals made in the previous case (Company Act Case No. 5 of

1970), after removing the defects which came to light. Instead of copying in the new application the several averments made in the old one (Company Act Case No. 5 of 1970), it was stated in the new application that the averments made in paragraphs 1 to 61 of the Company Act Case No. 5 of 1970 should be deemed to have been incorporated in the new application (Company Act Case No. 1 of 1972). This limited prayer was allowed. This was objected to by Mr. Patnaik. It was not, allowed with the agreement of Mr. B.M. Patnaik, but by the order passed by the court. What was agreed to by both parties was that all steps taken in this case (Company Act Case No. 5 of 1970) should be ignored and fresh steps, as usual, be taken in the new case (Company Act Case No. 1 of 1972)."

4. In this appeal it is contended that the order dated February 17, 1972 (as clarified by the subsequent order), brought Company Act Case No. 5 of 1950 to a close and there came into existence a new case which has now been numbered as Company Act Case No. 1 of 1972. Under Rule 88(2) of the Companies (Court) Rules, a petition u/s 397 and/or 398 shall not be withdrawn without leave of the court. In view of the fact that the old case (Company Act Case No. 5 of 1970) has now been brought to a close and has been withdrawn from the registry of this court except for the purposes indicated in the impugned order, such a situation could have been brought about either by granting permission to withdraw the application or by its dismissal. If the application had been ready for hearing there could be a third eventuality--the application being allowed. It is next contended that serious objections had been raised regarding maintainability of the petition and they were matters which go to the root of the question of maintainability. The learned company judge without deciding that question should not have received a fresh petition on the same cause of action. Even if a fresh petition was filed, the old case should not have been permitted to be merged in the new case for any purpose and the second case should have been registered as an independent application whose maintainability should have been left to be examined separately. By merging the two petitions, the opposite parties before the learned company judge have been prejudiced. The third contention raised is that the application was not one for amendment and, therefore, it could only be treated as an independent application. In that event it had to be a complete application by itself and the device which was sought to be adopted by the petitioner of the Company Act Case could not have at all been permitted. It is next contended that the new application was not ready for disposal as copies thereof had not been served on all contesting opposite parties and counsel for opposite parties Nos. 1 and 3 had stated thereupon that he intended to file an objection. Before we proceed to consider these contentions, an objection to the maintainability of the appeal raised by the respondent No. 1 must be disposed of. That objection is on the basis that the impugned order is not a " judgment " in terms of Clause 10 of the Letters Patent of the Patna High Court and, therefore, no appeal lies against it before a Bench of two judges of the same court. In fact when the matter was placed before us for admission, we were of that view also and with a lot of hesitation and reluctance, we had issued

a notice to the respondents. We shall, therefore, first deal with the question of maintainability.

5. Clause 4 of the Orissa High Court Order, 1948, provides:

" The High Court of Orissa shall have, in respect of the territories for the time being included in the Province of Orissa, all such original, appellate and the other jurisdiction as under the law in force immediately before the prescribed day, is exercisable in respect of the said territories or any part thereof by the High Court in Patna."

6. That is how the Letters Patent of the Patna High Court becomes relevant. Clause 10 of that Letters Patent as far as relevant provides :

".....and we do further ordain that an appeal shall lie to the said High Court of Judicature at Patna from the judgment of one judge of the said High Court or one judge of any division court, pursuant to Section 108 of the Government of India Act....."

7. Clause 10 of the Letters Patent of the Patna High Court is in similar terms as Clause 15 of the Letters Patent of the three Presidency High Courts, namely, those at Calcutta, Bombay and Madras. Clause 10 of the Letters Patent of the Allahabad High Court is in similar terms as Clause 10 of that of the Patna High Court. The Letters Patents of the Presidency High Courts are already a century old and for a long time what is the exact meaning of the term " judgment " appearing in the Letters Patent has engaged the attention of learned judges. Any attempt to review the authorities on the subject would immediately give one the impression that there is a complete " fog of authorities " or " a rough sea of contradictory authorities ". Yet, there stand out some decisions as landmarks which have received general approval of almost all High Courts and even of the Supreme Court. We shall refer to some of them now.

8. The first of such decisions in point of time is the one decided just one hundred years back by Sir Richard Couch C. J. in the oft cited case of Justices of the Peace for Calcutta v. Oriental Gas Co. [1872] 8 BLR 433, where the learned Chief Justice said as follows :

"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."

9. Soon thereafter, in the same court and before the same learned Chief Justice came the case of Hadjee Ismail v. Hadjee Mohomed 1874] 13 BLR 91, wherein, referring to the same term again, the learned Chief Justice stated :

" It is not a mere formal order, or an order merely regulating the procedure in

the suit, but one that has the effect of giving a jurisdiction to the court which it otherwise would not have. And it may fairly be said to determine some right between them, viz., the right to sue in a particular court, and to compel the defendants who are not within its jurisdiction to come in and defend the suit, or if they do not, to make them liable to have a decree passed against them in their absence."

10. The third decision which has stood the test of time and with passing of years has obtained celebrity is the case of *Tuljaram Row v. Alagappa Chettiar* ILR [1910] Mad 1. White C. J. laid down the following test for determination as to whether a decision amounts to "judgment":

" The test seems to me to be not what is the form of the adjudication, but what is its effect in 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. "

11. Krishnaswami Ayyar J., while generally concurring with White C.J., added :

" I would only stop here to remark that a decision which determines the cause or proceeding so far as the particular court is concerned, though it refuses to adjudge the merits, must also be deemed to be a " judgment"; for otherwise the rejection of a plaint for defect of form or insufficiency of court-fee or a return of it for want of jurisdiction would be outside the definition of the learned Chief Justice which could hardly have been his meaning. I may also observe that the "part" which is determined may be a part of the claim separable from the rest or a determination of liability generally though the actual measure of liability may be a matter of account. "

12. A cursory analysis of judicial opinion in this country on the meaning of the term " judgment" with reference to the Letters Patent shows it to be sharply divided. Some High Courts like Rangoon (*Dayabhai Jiwandas v. Murugappa Chettyar* AIR 1935 Rang 267 and Nagpur AIR 1943 282 (Nagpur) have equated the term "judgment" appearing in the Letters Patent with a decree as understood under the Code of Civil Procedure. There are others who have gone to the extent of saying that :

" A decision can in certain circumstances, be a " judgment" and, therefore, appealable even if it affects 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 *The German Democratic Republic Vs. The Dynamic Industrial Undertaking Ltd.*, "

13. These, however, seem to be extreme views and do not represent the consensus of judicial opinion.

14. On three occasions, their Lordships of the Supreme Court came to deal with the term " judgment " appearing in different Letters Patents. The first is in the case of Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others, . Dr. Mookerjee J. (as his Lordship then was), delivering the judgment of the court, stated :

" In view of this wide divergence of judicial opinion, it may be necessary for this court at some time or other to examine carefully the principles upon which the different views mentioned above purport to be based and attempt to determine with as much definiteness as possible the true meaning and scope of the word " judgment " as it occurs in Clause 15 of the Letters Patent of the Calcutta High Court and in the corresponding clauses of the Letters Patent of the other High Courts."

15. After referring to the Calcutta and the Madras cases, his Lordship observed I

" As stated already, it is not our purpose in the present case to frame an exhaustive definition of the word " judgment" as used in Clause 15 of the Letters Patent. We have indicated what the essential features of a "judgment" are according to both the Calcutta and the Madras High Courts and all that we need say is that, in our opinion, an order under Clause 13 of the Letters Patent does not satisfy the tests of a " judgment" as formulated by either of these High Courts."

Even if their Lordships of the Supreme Court did not indicate the meaning of " judgment" in definite terms, there no doubt is left in one's mind the impression, upon an analytical reading of this judgment that their Lordships were prepared to accept the test indicated either in the Calcutta decision or in the Madras decision.

16. Next is the occasion when this question came up for consideration before their Lordships of the Supreme Court in the case of State of Uttar Pradesh Vs. Dr. Vijay Anand Maharaj, . Subba Rao J., as his Lordship then was, delivered the judgment of the majority. The views expressed by the learned Chief Justice Couch, Chief Justice White and Krishnaswami Ayyar J., in the cases already referred to, were extracted at length. The views expressed by the Lahore, Allahabad and Nagpur High Courts were also referred to in brief and this is what was ultimately stated I

"The foregoing brief analysis of the judgments shows that the definition given by the Madras High Court is wider than that given by the Calcutta and Nagpur High Courts. It is not necessary in this case to attempt to reconcile the said decisions or to give a definition of our own, for, on the facts of the present case, the order of Mehrotra J. would be a "judgment" within the meaning of the narrower definition of that expression. "

Their Lordships thus did not indicate that the view of the Madras High Court in Tuljaram Row v. Alagappa Chettiar ILR 1910 Mad 1 was erroneous.

17. The last occasion was in the case of Shri Radhey Shyam Vs. Shyam Behari

Singh, . On this occasion also as on the earlier ones, Shelat J. referred to the tests laid down by Chief Justice Couch and Chief Justice White. Dealing with the earliest case of their own court, his Lordship stated :

" This court held that it was not (a judgment). In doing so, the court referred to the divergence of opinion amongst the Calcutta, Madras and Rangoon High Courts on the interpretation of the term " judgment" in Clause 15 of the Letters Patent reflected in *Justices of the Peace for Calcutta v. Oriental Gas Co.* [1872] 8 BLR 433, *Tuljaram v. Alagappa* 2 and *Dayabhai v. Murgappa Chettyar* AIR 1935 Rang 267. But without resolving the divergence it held that an order of transfer of a suit did not fall within any one of the three aforesaid views and, therefore, a Letters Patent Appeal therefrom was not maintainable. Mookerjee J., at page 1167 of the report, stated that although in such a case there would be a controversy between the parties as to whether the suit should be tried by the court where it was filed or in the High Court which had to be determined, a decision on any and every point in dispute between the parties to a suit was not a " judgment". Such an order did not affect the merits of the controversy between the parties in the suit itself, nor did it terminate or dispose of the suit on any ground, and, therefore, could not be placed in the same category as an order rejecting a plaint or one dismissing a suit on a preliminary ground. "

18. Dealing with the next case his Lordship stated :

" The question as to when an order is a judgment once again arose in the *State of Uttar Pradesh Vs. Dr. Vijay Anand Maharaj*, . The question was whether an order passed by a single judge of a High Court dismissing an application for a review of his earlier order was a " judgment" amenable to a Letters Patent Appeal. "

Having referred to both these cases, his Lordship proceeded to examine the facts of the case before the court. Thus, the matter has not yet received a final determination in the hands of their Lordships of the Supreme Court.

19. There does not seem to be much of doubt that the definitions given in the CPC of the words "judgment" and " decree " are for the purposes of the Code only. Kania C.J. (as his Lordship then was), in the case of AIR 1949 1 (Federal Court) , stated the proposition that way. The view represented by the Rangoon and the Nagpur High Courts, therefore, would not be proper to accept. As early as 1917, in the case of *Ramendranath Ray v. Brojendra Nath Dass* [1917] 41 IC 944, a Bench of that court had engaged its attention in finding out the true test of competency of an appeal under Clause 15. Sir Asutosh Mookerjee J. put the matter thus :

" It is plain that the true test to be applied in the solution of the question of the competence of the appeal is, not the form of the adjudication, but its real effect on the suit or proceeding in which it has been made. Whatever the form of the adjudication may be, there is no doubt that it does, in the present instance, put an end to the suit, so far as the trial court is concerned ; from this standpoint,

the adjudication may properly be deemed a "judgment" not merely within the test formulated by White C.J. in *Tuljaram Row v. Alagappa Chettiar* ILR [1910] Mad 1, but also within the definition given by Couch C. J. in *Justices of the Peace for Calcutta v. Oriental Gas Co.* [1872] 8 BLR 433.

20. The same learned judge in *Budhu Lal v. Chattu Gope* [1917] 39 IC 465 stated :

" It is not necessary for our present purpose to refer to the numerous judicial decisions which embody an attempt to define or elucidate the meaning of the term " judgment" as used in Clause 15 of the Letters Patent, and which were analysed by me in *Mathura Sundari Dassi v. Haran Chandra Shaha* [1916] 34 IC 634 ; ILR Cal 857, but I desire to emphasize this point that the definition given by Sri Richard Couch, while it furnishes a useful test, is not a statu-tory definition and cannot be deemed inflexible and exhaustive. In every case where the court is called upon to decide whether the decision uuder appeal is or is not a " judgment " within the meaning of Clause 15 of the Letters Patent, regard must be had to the nature and the contents of the order. "

21. In the case of *Kuppa Viswapathi Vs. Kuppa Venkata Krishna Sastry*, , a Division Bench of that court stated :

" It is now a generally accepted concept that any adjudication, which puts an end to a suit or proceeding so far as the court before which the suit or proceeding is pending is concerned, or the order which affects the merits of the controversy between the parties, is a " judgment"."

22. A Full Bench of the Delhi High Court in the case of *Begum Aftab v. S. Lal Chand* AIR 1969 Delhi 85 answered the problem thus :

" In order to decide whether an adjudication should be treated as a " judgment" within the meaning of Clause 10 of the Letters Patent, we feel that regard should be had not to the form of the adjudication, but to its effect upon the suit or the civil proceeding in which it is made. If its effect, whatever its form and whatever the nature of the proceeding in which it is made, is to put an end to the suit or proceeding, or if its effect,if not complied with, is to put an end to the suit or proceeding the adjudication is indisputably a " judgment" within the meaning of this clause. Other decisions or determinations adjudicating upon a disputed controversy on the merits in a suit or proceeding may also appropriately fall within the contemplation of the word "judgment". It is not possible to lay down any definite Rule which would meet the requirements of all cases and all that we may say is that in determining whether an order or decision constitutes a " judgment " or not, the Court has to take into consideration the nature of the order and its effect upon the suit or the civil proceeding in which it is made. Each case would thus depend on its own peculiar facts and circumstances. "

23. In a very recent case a Bench of the Calcutta High Court in *Ashoka Marketing Ltd. Vs. The Assistant Collector of Central Excise, Calcutta III and Others*, also

followed the same test, where it was stated :

" The order does not dispose of the controversy between the parties, nor does it affect the merit of the question between the parties by determining any right or liability. "

24. Mr. Patnaik for the appellants had seriously attempted to press into service a decision of the Full Bench of the Madras High Court in the case of Palaniappa Chettiar v. Krishnamurthi AIR 1968 Mad 1, where four tests have been formulated to decide whether an order of a single judge amounted to a " judgment " under the particular Clause of the Letters Patent. They are :

(1) Whether the order or judgment of the single judge terminates the suit or proceedings ?

(2) Whether it affects the merits of the controversy between the parties in the suit itself ?

(3) Whether it determines some right or liability as between the two parties? And

(4) Whether apart from the actual words in the lis or proceeding, a " conceivable order " or an order to the contrary effect would have disposed of the suit and would come within the definition of " judgment " ?

25. The correct basis for the fourth test indicated in this judgment was seriously doubted by the Gujarat High Court in the case of Indulal Kanaiyalal Yagnik v. Prasannadas D. Patwari AIR 1972 Guj 92. Bhagwati C. J., approved the counter-argument by saying :

" Now it may be pointed out straightway that this decision of a Full Bench of three judges is directly contrary to an earlier decision of a Full Bench of five judges of the same High Court in Southern Roadways (P.) Ltd. v. Veeraswami (P.M.) AIR 1964 Mad 194 . The Full Bench of five judges in this earlier decision adopted the same test which has found favour with the Bombay High Court and our High Court, namely, that a decision in order to be a judgment must either terminate the suit or proceeding, or affect the merits of the controversy between the parties in the suit or proceeding. This test was adopted by the Full Bench of five judges following a similar view taken by an earlier Full Bench of three judges in Central Brokers v. Ramnarayana Poddar & Co. AIR 1954 Mad 1057. The decision of the Full Bench of three judges in Palaniappa Chettiar v. Krishnamurthi AIR 1968 Mad 1 would, therefore, seem to be of little authority even in the State of Madras. Moreover, we fail to see how the " conceivable order test follows from the decision of the Supreme Court in Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others, . The observations of White C.J. in Tuljaram Row v. Alagappa Chettiar ILR [1910] Mad 1, which according to Anantanarayanan C.J. lend support to the " conceivable order" test, were no doubt quoted by the Supreme Court in Asrumati's case. But that was for the purpose of distinguishing an order directing removal of a suit under Clause 13 from an order refusing to rescind leave under Clause 12. The Supreme Court did not refer to these observations

for the purpose of according its approval to the line of reasoning which held that an order refusing to rescind leave under Clause 12 is a "judgment"....."

We have no mind to enter into this additional controversy in the matter and indicate our final view as to whether there is good basis for the "conceivable order" test. It is sufficient for our purpose to say that the additional test which was intended to be brought into the field in *Palaniappa Chettiar v. Krishnamurthy* AIR 1968 Mad 1 did not receive clear approval of one of the judges constituting that Full Bench and by a Division Bench of the Gujarat High Court.

26. It is useful at this stage to quote a passage from the judgment of Mootham C.J. in the case of *Standard Glass Beads Factory and Another Vs. Shri Dhar and Others*, which gives a simple analysis of the situation :

"The meaning which should be given to the word "judgment" in Clause 10 of the Letters Patent of this court and in the corresponding clauses of the Letters Patent of the other High Courts has engaged the minds of judges for close on a hundred years, and has given rise to a divergence of opinion which can now only be resolved by the Supreme Court. The question has been considered in a very large number of cases many of which have been referred to in the judgment of my learned brother, Srivastava J. Basically there are three views as to what constitutes a "judgment". A decision according to one view will amount to a "judgment" if it determines some right or liability affecting the merits of the dispute between the parties ; according to the second, the essential requirement is that it puts an end to the proceedings so far as the court in which those proceedings are pending is concerned ; and, according to the third view, a "judgment" means a decree which determines the rights of the parties in all matters in issue in the suit...."

As we have already indicated, their Lordships of the Federal Court have not considered the third view to be a proper one and in the three decisions of the Supreme Court such a test has not been indicated with any amount of approval.

27. Logical consistency, however much it may appeal to a scientific and orderly mind, has never been regarded as a virtue of the legal process because "life of the law is not logic, but experience" as indicated by Mr. Justice Holmes. It is as well that it should be so, for, otherwise, law would be deprived of much of its capacity for growth, and would cease to be an instrument or tool in the hands of society for doing real justice ; instead it would become a lifeless mechanical set of rules. We shall close our discussion on this question by concluding that an order which brings about termination of the proceeding is also "judgment" within the meaning of Clause 10 of the Letters Patent.

28. What then is the effect of the order dated February 17, 1972, on Company Act Case No. 5 of 1970 ? As we have already indicated, it was removed from the register by that order and except for the purposes of supplying the contents of paragraphs 1 to 61 of the original application to form part of the new case, it became dead. Therefore, the order dated February 17, 1972, by which the earlier

case terminated must amount to a "judgment". The preliminary objection regarding maintainability of the appeal, therefore, stands overruled. Our conclusion is that the impugned order is a " judgment " and an appeal under Clause 10 of the Letters Patent of the Patna High Court read with Clause 4 of the Orissa High Court Order is maintainable before a Division Bench of this court.

29. Under Rule 23 of Chapter 4 (Part III) of the Rules of this courts

" No affidavit shall be read at the hearing of any appeal, application or other proceedings unless a copy thereof has been served upon the other party or his pleader at least seven days before the hearing, or if the affidavit is only in answer to the opponent's affidavit, at least twenty-four hours before the hearing :

Provided that this Rule shall not apply to urgent motions or applications or to motions or applications made ex parte. "

As we have already indicated the application of the petitioner in the old case was filed before his Lordship, the company judge, on February 17, 1972, without serving copies of such petition on all the contesting opposite parties. It was filed during the midst of the hearing of that case. The petitioner could not have moved the application in view of the provisions of Rule 23 referred to above without serving its copies on counsel for the contesting opposite parties. The case was being heard by his Lordship, the company judge, on a limited question that day. It is quite possible and we have no reason to refute the contention now raised before us that some of the counsel appearing for several of the opposite parties were not before the court that day, because they were not interested in the matter of production of documents. In the circumstances it was the duty of counsel for the petitioner to ensure before moving the application that Rule 23 of this court's Rules had been complied with and it was as much the duty of the counsel for the present appellants to bring to the notice of his Lordship, the company judge, that the petitioner of the old case was not entitled to move the application as it was not in order by then. Both counsel did not act in the manner expected of them, and, therefore, the defective position was not noticed and the impugned order came to be made.

30. As we have already stated, the contesting opposite parties had taken the stand that the application as laid was not in accordance with law and was liable to be rejected. Even his Lordship, the company judge, in the clarification order has indicated that the application was defective. Therefore, without grant of an opportunity to be heard, the opposite parties in the original proceeding have indeed been prejudiced. It is a well-settled position in law and an unailing practice of this court in keeping with the legal requirement that the adversary has timely notice of any move by a litigant of applying to the court for an order or direction in a pending action. We have been told at the Bar during the hearing of this appeal that the prejudice is considerable. We do not propose to indicate the extent of prejudice because we have not the slightest intention of prejudicing

the proceeding before his Lordship, the company judge, or embarrass parties by saying one way or the other about what the prejudices are said to be and what their consequences can be.

31. It is also very difficult to understand the approach of the petitioner to the matter. The application filed that day which led to the impugned order mentioned the number of the old case at its top. It was not labelled as a petition for amendment. The prayer was somewhat peculiar. Counsel moving the petition before our learned brother clearly stated, as the impugned order shows, that it was intended to be a new proceeding. If it was intended to be a new proceeding, it could not have been assigned the old number and a new application as far as we know, is never made in the manner that application was made, namely, by saying that the entire contents of an earlier application shall be read as the contents of this new application.

32. During the hearing of the appeal when we asked the petitioner's (respondent No. 1) counsel as to what was the nature of the application made by him in the old case, he ultimately stated that he wanted an amendment, but was not prepared to say that he filed a petition for amendment. The original case had been brought by 129 persons. The later application leading to the impugned order was purported to be made by the same number of persons, but many of the petitioners did not subscribe their signatures to the petition though numbers had been put and space had been left for them. As it appears ultimately 118 of the original applicants joined. There was no prayer in the second application that the names of those persons who had not subscribed their signatures may be omitted from the category of petitioners. If it was a completely new application, certainly it was not necessary to apply to the court for that direction, but if it was meant to be a petition in the pending case and was essentially in the nature of an amendment with the intention of removing the defects, that was necessary to be specified.

33. We do not propose to discuss many other aspects which were argued before us in support of the appeal because we consider what we said above to be sufficient to justify a remittal of the proceeding to our learned brother exercising jurisdiction under the Companies Act to deal with the matter afresh. We allow the appeal, set aside the impugned order of 17th of February, 1972, and would require the application to be served upon all opposite parties and thereafter to be dealt with on the footing that it is an application for amendment in the pending case. Our learned brother is free to deal with the matter in his own discretion in accordance with law. Consequently, the direction that a new case shall be registered and leading to the registration of Company Act Case No. 1 of 1972 must stand vacated.

34. We make no order as to costs because we are satisfied that counsel for the present appellants was as much to blame as counsel for the respondent No. 1 for the making of the impugned order.

B.K. Ray, J.

35. I agree.