

(1968) 05 CAL CK 0005

In the Calcutta High Court

Case No : Civil Rules 407 and 763 of 1968 and First Miscellaneous Appeal Tender No. 991 of 1968

Sakti Ranjan Chatterjee

APPELLANT

Vs

Hindusthan Steel Ltd.
 Hindusthan Steel Ltd. Vs Sakti
Ranjan Chatterjee

RESPONDENT

Date of Decision : 28-05-1968

Acts Referred:

Bengal Municipal Act, 1932 — Section 104, 93A
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1
Transfer of Property Act, 1882 — Section 108(h), 108(j), 108(m), 108(o), 108(p)

Citation : 73 CWN 228

Hon'ble Judges : Bijayesh Mukherji, J

Bench : Single Bench

Advocate : Gouri Mitter, Ajit Panja and Samir Mookherjee in C.R. No. 407 of 1968 and F.M.A.T. No. No. 991 of 1968 and Chittatosh Mookerjee in C.R. No. 763 of 1968, for the Appellant; Gouri Mitter, Ajit Panja and Samir Mookherjee in C.R. No. 763 of 1968, Chittatosh Mookerjee in C.R. No. 407 of 1968 and F.M.A.T. No. 991 of 1968, for the Respondent

Judgement

Bijayesh Mukherji, J.—The Hindusthan Steel Limited, (for short, "Hindusthan" hereafter), carrying on business at Durgapur, is the owner of a cinema house known as Chitralaya with the fittings, fixtures, plant and machinery, situate at Sarat Chandra Avenue, Durgapur Steel Township. Pursuant to an agreement between "Hindusthan", on one hand, and Sakti Ranjan Chatterjee, on the other, - an agreement in the wake of usual invitation of tender and acceptance thereof - on or about January 27, 1965, Sakti Ranjan was put in possession of Chitralaya. On or about October 6, 1965, a formal document was executed by the parties recording the said agreement, by virtue of which Sakti Ranjan was, amongst other things, to "use the cinema" for three years ending with January 26, 1968. Though the term is so, Sakti Ranjan's right to remain in possession of Chitralaya, even on the expiry of January 26, 1968, and on the same terms and conditions as from January 27, 1965, was there, reinforced by the provisions of

the Premises Tenancy Act, 1956, affording him protection from eviction. "Hindusthan", however, was of different opinion, treating Saktiranjan as a mere licensee, bound to vacate Chitralaya on the expiry of the three-year term on January 26, 1968. Indeed, fresh tenders were invited to that end, so that other persons might be put in possession of the aforesaid cinema house. That led Sakti Ranjan to institute the suit he did on September 27, 1967, in the second court of the munsif at Asansol for, amongst others :

A. Construction of (i) the document listing all that is in Chitralaya (annexure A to the plaint), (ii) the tender document (annexure B *ibid*), (iii) the letter accepting the tender (annexure C *ibid*), (iv) the formal document dated October 6, 1965, recording the agreement (annexure D *ibid*).

B. A declaration that since January 27, 1968, he is a tenant of the cinema house under the Premises Tenancy Act, 1956, and

C. A permanent injunction restraining "Hindusthan" from interfering with his possession.

In a suit as this, the plaintiff Sakti Ranjan prayed on September 29, 1967, for a temporary injunction, restraining "Hindusthan" (who had invited fresh tenders from the public on September 8, 1967, to let out the cinema house afresh after January 26, 1968) from interfering with his possession. By an order dated December 23, 1967, the learned munsiff rejected the prayer, holding, *inter alia*, expressly or by implication :

1. The formal document of October 6, 1966, evinces a licence, not a lease.
2. Even if a lease, it has determined by efflux of time three years here : u/s 111(a) of the Transfer of Property Act.
3. No question of a tenancy under the Premises Tenancy Act can arise, as the Act does not apply to Durgapur Steel Township, not a municipality yet: just what has been held by Chatterjee, J. in (1) Harinarayan Mukherjee and others v. Suresh Chandra Gupta, Civil Rule No. 4342 of 1966, decided on May 25, 1967, not yet come into the reports.
4. There appears, therefore, to be no fair *prima facie* case in support of the right claimed by the suing party.
5. "Hindusthan" has had an offer of Rs. 21,110.05 a month, the highest ever, for the cinema house, in place of Rs. 10,121 a month the plaintiff was paying, the difference coming to Rs. 10,989.05 a month.
6. First and last, there would be greater convenience in refusing than in granting a temporary injunction.

2. The plaintiff Sakti Ranjan appealed. What the appellate judge has done appears to be so unusual, to put it mildly. The appeal still remains to be heard out. And on January 25, 1968, all he was called upon to do was to decide

whether he would grant an interim injunction or not, pending the final hearing of the appeal. Though such was the limited scope of his decision, he thought it fit to record a longish order, as if he had heard the main appeal, and granted an interim injunction, very rightly in my judgment, - (otherwise the very object of the appeal, since admitted, would have failed and various complications arisen), - but on certain terms, one of which called upon the plaintiff appellant Sakti Ranjan to furnish inside of a fortnight from January 25, 1968, "security deposit" of Rs. 4 lakhs "on account of the loss, if any," "Hindusthan" "may suffer" by having been prevented from accepting the offer of Rs. 21,110.05 a month for the cinema house.

3. Against this order of the appellate judge, granting an interim injunction on terms - and the term of security for Rs. 4 lakhs in particular - the plaintiff Sakti Ranjan has come up to this court in revision. That is Civil Rule No. 407 of 1968. He has preferred an appeal too : First Miscellaneous Appeal Tender No. 991 of 1968, Chatterjee, J. having recorded on April 3, 1968 :

Very possibly an appeal lies against the orders complained of.

"Hindusthan" has also obtained a rule against the interim injunction granted by the appellate judge. That is Civil Rule No. 763 of 1968.

4. The judgment I am rendering governs all the three matters-the two Civil Rules and the First Miscellaneous Appeal.

5. I confess, the way in which the appellate judge has proceeded in granting a mere interim injunction when the appeal, against refusal by the munsiff to grant a temporary injunction, pends, puts me in an embarrassing position. In view of the elaborate order recorded by the appellate judge at the stage of an issue of an interim injunction only, though it was wholly unnecessary for him to do so, the learned counsel appearing for both the parties will do less than justice to themselves and their clients if they do not address me on the points the judge weighs and records points touching the merit of the injunction and going indeed to its root. And I have been addressed just so. If I do not deal with such argument, I shall hardly be fair to them. But, if I do, deciding the points one way or the other, that will embarrass the learned appellate judge, when he hears the appeal, however much I say he will decide the appeal untrammelled by my observations and findings. With a view to getting myself out of this unsatisfactory position, I suggest, in the course of the hearing, I lift the term demanding security of Rs. 4 lakhs and direct the judge to decide the appeal by June 30, 1968, at the latest, so that I can enter into merits without being embarrassed, should the matter come to me from such decision of the judge. Mr. Gouri Mitter, appearing for Sakti Ranjan, accepts my suggestion. Mr. Chittatosh Mookherjee, appearing for "Hindusthan", does not, as that will mean the rule obtained by Sakti Ranjan being made absolute to that extent. Mr. Mookherjee is certainly entitled to feel so. In the circumstances, I have decided to notice all the contentions addressed to me and to point out the approach to be made in a case

of this type, and that too in the light of authorities, leaving the final decision to the learned judge himself, save that I arrive at a decision of my own, when I must, because of a jurisdictional error or errors on the part of the judge, or, for example, on the question of the appealability of the interim injunction complained against.

6. The two basic propositions the learned judge starts with, for the purpose of determining whether or no the discretionary relief of a temporary injunction should issue, appear to be above criticism. And they have not been criticised either. To put it tersely, the two broad propositions are : one, if a prima facie substantial question between the litigating parties is there, the title to injunction becomes good enough, even though the relief the plaintiff prays the Court for may ultimately fail : (2) *Nimcha Coal Co., Ltd. v. Srinivas Goenka*, (1966) 70 CWN 1108, if I may quote my own decision; two, where greater harm would result from enjoining than from refusing to enjoin, the injunction will be refused: section 417 page 363, of *Treatise on Injunctions by Spelling* (1901). Though the passage is confined to cases of private nuisances, it is a principle of universal application. To put in another way, as Woodroffe puts it in his great book on Injunctions, is there greater convenience in granting than in refusing the injunction? If yes, do grant an injunction by all means. It is what the learned appellate judge calls the principle of balance of convenience.

7. Thus, the principle of law as to what is necessary to get from the Court the discretionary relief of a temporary injunction is well-settled, though its application in the circumstances of particular cases do present difficulty from time to time. Is the present case one such? This is the matter for consideration and decision by the learned appellate judge.

8. In order to be satisfied whether or no Sakti Ranjan has a fair prima facie case in support of the right claimed,-a fair question to raise,-the judge will have to come to a finding, even though for the purpose of this interlocutory matter, what the true construction of the agreement dated October 6, 1965, leads to-a licence or a lease. Whatever be the earlier documents and conversations, they all reached their fruiting in the agreement of October 6, 1965, upon the true construction of which, therefore, must depend the fortunes of this litigation. This is why I have the benefit of getting from Mr. Gouri Mitter a comprehensive survey of the whole agreement.

9. Broadly speaking, a dichotomy is there of the terms of the agreement, clauses 1 to 18 defining the rights and liabilities of the parties inter se, and the rest (clauses 19-23) making provisions for miscellaneous matters. Such dichotomy apart, the preamble is there, defining inter alia "the licensee"-and expression which includes his heirs, executors, administrators and representatives, unless the context does not admit. Such definition fosters the contention, on one side, that this is negation of a licence which is neither heritable nor transferable, and the reply, on the other side, on the high authority of *Gale on Easements* (1959) at page 49:

Unless it (the licence) is clearly personal to the licensee it is (so it is submitted) assignable.....

A submission as this by the author is rested on, as footnote 76 reveals, (3) *Clapman v. Edwards*, (1938) 2 All. E.R. 507, a case where, it was found, in construing the terms of the grant, that there was no fetter imposed upon the freedom of the defendant in dealing, as a licensee, with the subject of the grant-flank walls of the grantor's adjoining premises-upon which he could advertise anything he chose. So, it will be for decision by the judge whether such words "heirs, executors" etc., negate a licence or make the licence, if that, assignable. To assist such a decision, comparison may be made of the *Clapman* case with two more referred to in the same foot note : (4) *In re. Vickers' Lease: Peacock v. Vickers*, (1947) 1 Ch. 420, where with the death of the owner, her contractual right of a rod in the fishing, obviously to fish by rod and line, a right personal to herself, ended; and (5) *Shayler v. Woolf*, (1946) Ch. 320, somewhat of a converse case, where the defendant, Mrs. Woolf, sold to Mrs. Peacock land, covenanting that she and her successors in title would be bound to supply water to the buyer, Mrs. Peacock, with no mention there of her successors in title. Mrs. Peacock having sold the land, along with the bungalow erected by her, to the plaintiff Shayler, it was held by the Court of Appeal that the benefit of such covenant, not personal to Mrs. Peacock, was assignable.

10. Here is a summary of the contentions by Mr. Gouri Mitter on the first part of the agreement dated October 6, 1965, consisting of clauses 1 to 18:

(i) Clause 2, enabling Sakti Ranjan to permit the use of Chitralaya by others, with the previous permission in writing of "Hindusthan", shows more than a personal privilege conferred on him, with interest in the cinema house instead of with no interest therein. That being so, it is destructive of licence. In support of such proposition, the minority judgment of Subba Rao, C.J. (then Subba Rao, J.) in (6) *Associated Hotels of India Ltd. Vs. R.N. Kapoor*, , at pages 1267-70, is referred to. Though a minority judgment, his Lordship and S. K. Das, C.J. (then S.K. Das, J.) agreed that the deed there, dated May 1, 1949, was a lease, masquerading as a licence, the other member of the Bench, Sarkar, C.J. (then Sarkar, J.) not considering it necessary to express any opinion on the construction of the document.

(ii) Clauses 3 & 4, in so far they prescribe that the so-called licensee Sakti Ranjan, shall keep the cinema house in good order and condition, being liable to return it to "Hindusthan" in the same condition in which it is at present, and that, on failure by him to keep it spick and span, "Hindusthan" shall be entitled to do so at his cost, appear to be so consistent with the mandate of section 108 (m) of the Transfer of Property Act, 4 of 1882, a statutory provision on lease; no less do they attract the ratio of (7) *Roads v. The Overseers of Trumpington*, (1871) 6 QB 56 :

An agreement, by having used the words "enter upon" and "delivered up" - in

the case in hand the words are "shall keep the cinema" and "shall be liable to return" on the expiry of the 3-year term clearly shows an intention to give the right of occupation from the time of entry until it was delivered up. This, coupled with the nature of the acts the other party had to do, in digging for coprolites, demonstrates sole and exclusive possession by the said party of the land in question. Ergo, that party was rightly held as liable to be rated to the relief of the poor for such occupation.

By parity of reasoning, the sole and exclusive possession has been of Sakti Ranjan, destroying, the very concept of licence.

(iii) Clause 5 provided inter alia that only on failure by the so-called licensee to keep the cinema house in good maintenance and repair, "Hindusthan" shall be entitled to get the repair done at the cost of the licensee-which plainly means: no such failure, no right even of "Hindusthan" to do whitewashing, colour-painting, scaffolding, plastering and the like. An indicium, not of licence, but of lease.

(iv) Clause 6 saddles the licensee with the responsibility of complying with all municipal requirements and other regulations for the running of a cinema-a consideration which suggests a lease instead of a licence.

(v) Clause 7, read with clause 1 (conferring on the licensee the right to use the cinema for a 3-year term), provides for two things. One, it is a definition clause, defining the expression "the use of the cinema" to mean "exhibition of films and the running of the restaurant attached to the cinema". Two, for no other purpose, the licensee shall utilise the cinema, and no other shop, business, trade etc., he shall carry without the permission in writing by "Hindusthan". Ergo, such permission forthcoming, he can carry that which he cannot, without permission. To state so is to find that it has close affinity to section 108(j) of the Transfer of Property Act, furnishing one more indicium of a lease.

(vi) Likewise, clause 8 enables the licensee to make alternations and additions with the previous consent of "Hindusthan" - a consent which "Hindusthan" cannot unreasonably withhold, as is the law laid down by a division of this Court in (8) Raja Kamala Ranjan Roy v. Baijnath Bajoria, (1948) 53 CWN 329, touching the assignment of a leasehold. A clause as this is just in line with section 108 (p) of the Transfer of Property Act. Still another indicium of a lease.

(vii) Clause 9 fixes inter alia the ceiling for the number of shows to be exhibited, indicating thereby that the machinery in the cinema house has been let out so.

(viii) Clause 10 confers on the licensee the liberty to add other fittings and fixtures, but with the prior approval of "Hindusthan", and entitles him to remove such additions on the termination of the agreement, just what section 108 (h) of the Transfer of Property Act authorizes the lessee to do. It is, therefore, a lease. And the parties to the agreement have put the wrong label of a licence on to such a legal relationship.

(ix) Clause 12, closely examined, foists upon the licensee the liability of paying a monthly sum for the use of all that is in the cinema house, though it opens: "In consideration of the permission granted to the licensee for the use of the cinema". Such opening words are not a mere rehash of what goes before. They signify the use of all that is there, for the purpose of the grant, as section 108 (o) of the Transfer of Property Act, enables the lessee to use the leasehold.

11. Mr. Chittatosh Mookerjee replies: Read the document as a whole, and what you find is a bare right to occupy, mere permission to make use of the property, with no interest in it. The test to go by is the intention of the parties. And what clearer manifestation of such intention can there be than what clause 19 bears:

19. This Agreement shall not be construed as to confer any right on the Licensee in regard to land, buildings and other fixtures attached thereto of the cinema but is intended to give only permission for use of the cinema for the purpose of running the cinema shows and the Licensee shall only hold custody of all the existing fittings and fixtures for which he shall be fully responsible to the company.

12. Not that Mr. Gouri Mitter passes an important clause as this by. But he sees in it wrong labelling. The clauses up to the 18th one evidence a lease. So even if "Hindusthan" had intended less than a lease, its acts, testified to by clauses 1 to 18 and the preamble, do exceed such intention overmuch. Hence, concludes Mr. Mitter, a licence it cannot be, but a lease it is, no matter that clause 19 proclaims it to be a licence.

13. That intention of the parties is the cardinal test to tell a lease from a licence is the clear, definite and settled law. Subba Rao, C.J., (then Subba Rao, J.), lays down as much in the very Associated Hotels case Mr. Mitter cites. That the key to such a matter - lease or licence - is the intention of the parties is reiterated in a subsequent decision by the Supreme Court: (9) *Mrs. M.N. Clubwala and Another Vs. Fida Hussain Saheb and Others*, which also Mr. Mitter refers me to.

14. If the "intention" test is well settled, so is another: the one about exclusive possession. A crucial test more than 100 years ago, it has by no means been decisive these days. Take (10) *Booker v. Palmer*, (1942) 2 All. ER 674. For duration of the War, certain evacuees were given permission to stay in a cottage free of rent. Theirs was exclusive possession. Still, it was held, they were licensees, not tenants. Lord Greene, M.R., laid down at page 677 of the report:

There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind.

Lord Denning went by this golden rule in (11) *Errington v. Errington and Woods*, (1952) 1 KB 290 and (12) *Isaac v. Hotel De Paris Ltd.*, (1960) 1 All ER 348. In the *Errington* case, the relationship of the suing mother-in-law and the sued daughter-in-law was found to be that of licensor and licensee, the daughter-in-

law along with her husband having a permissive occupation short of a tenancy, as respects the whole of the house, thanks to her father-in-law who was on terms of affection with her. In the *Hotel De Paris* case, the relationship between the said Hotel and one Isaac, exclusively let into occupation of Parisian Hotel or part thereof, pending the execution of a formal contract, came up for consideration. The following two tests were applied, one after another, only to be found that these would not be decisive to establish a monthly tenancy :

1. Exclusive possession ? No; there are many cases in the books where exclusive possession has been given of premises outside Rent Restriction Acts, and yet there has been held to be no tenancy : *Booker v. Palmer*, (supra), and Lord Greene, M.R.'s golden rule.

2. Payment and acceptance of rent ? A case of putting by a layman a wrong label on to a legal relationship. More, it is better to have something in hand than lose all in the long-drawn course of court proceedings.

So, what was found, upon the circumstances and the conduct of the parties, was a privilege only, conferred upon Isaac, until the formal execution of the contract, which came to be executed never.

15. Such then is the law. And it is for the learned appellate judge to apply the law when he comes to hear the appeal. If he finds that clause 19 of the agreement - part of the agreement and a specific term of the agreement itself - proclaims, clear and loud, the intention of the parties, Sakti Ranjan himself being one of the two parties, that it is a licence, not a lease, instead of leaving it to the Court to spell out what the intention is, if he finds that the clauses, which go before, make provisions for matters which are consistent as much with a lease as with a licence, only permitting Sakti Ranjan to make use of the cinema house, - provisions on which I have been addressed by Mr. Gouri Mitter -, he will have to conclude that it is a licence he is dealing with. If, however, he finds that clause 19 is no more than a wrong labelling put on to a legal relationship and that the preceding provisions are inconsistent with a licence, his conclusion must necessarily be that what he has before him is a lease. To assist his decision, I can do no better than reproduce below certain well-established propositions, formulated by Subba Rao, J. in the *Associated Hotels* case, (supra), and paraphrased by me in (13) *P. Bhaskaran v. Indian Iron & Steel Co. Ltd.*, (1967) 71 CWN 302 : ILR (1967) 1 Cal 604, in the manner following :

A. Prefer the substance of the document to the form.

B. Gather the intention of the parties - the real test in such matters.

C. Does the document create an interest in the property ? If it does, it is a lease.

D. Does the document only permit another to make use of the property, of which legal possession continues with the owner ? If it is so, find a licence.

E. Exclusive possession of the property conferred ? Then prima facie the grantee

is a tenant.

F. But weigh the circumstances. Do they negative the intention to create a lease ? If they do, find a licence, exclusive possession notwithstanding.

Or, take the case of (14) O. C. Ganguly v. Kamlapath Sing Dugar, (1946) 51 CWN 208, where Chakravartti, C.J. (then Chakravartti, J.) observes :

The border-line between a licence and a lease is exceedingly thin.- and analyses the tests to tell a lease from a licence. Such analysis I put in the form of propositions again, as I did in the Bhaskaran case :

A. Paying a monthly sum makes it a lease ? No; a licence may be for consideration too.

B. To vacate by a date certain makes a lease ? No; " a licence may well be for a term.

C. Liability to pay taxes a conclusive test evincing a lease ? No; not decisive, though it suggests a tenancy.

What is found decisive in the end is exclusive occupation by the grantee of part of the ground-floor, carved out by the grantor, in whom had vested the entire ground-floor, and in which the grantor had exclusive right of occupation. But how the test of exclusive occupation stands today has been pointed out in paragraph 15 ante. See also the recent decision of this Court by P.N. Mookerjee, J. on a reference under clause 36 of the Letters Patent in (15) Sm. Mina Ghosh Vs. Daulatram Arora and Others, .

16. This concludes the first part of my judgment laying down the law, in the light of authorities, but leaving the learned judge free to apply it in any manner he thinks fit, when he decides the appeal, save that it will not be open to him to hold, even prima facie for the purpose of the interlocutory matter, that Sakti Ranjan's will be a tenancy governed by the Premises Tenancy Act, 12 of 1956, because of the unreported decision of Chatterjee, J. which, not being per incuriam, is as much binding on me as on him (the appellate judge). Denuded of detail, the ratio of the decision is this : The Premises Tenancy Act applies to a municipality. Durgapur Steel Township is a notified area within the meaning of section 93A et seq. of the Bengal Municipal Act, 15 of 1932, but is not constituted yet a municipality u/s 93D ibid. Ergo, the Act does not apply here.

17. Now, to the furnishing of "security deposit" of Rs. 4 lakhs. Why the learned judge felt it necessary to go to that length at the interim stage beats me. Would it now have been far better to set down the appeal for peremptory hearing at a very early date and then to decide it with such directions as he thought fit ? Nobody questions the powers of the Court to put a party on terms, in granting a temporary injunction. But it is only becoming of a court of law to impose such terms as are fair and reasonable. If the terms are such as are incapable of being met, it comes to saying : what you give with one hand, you take away with the

other. That is what I see here. Who amongst us and how many amongst us, save of course the multimillionaires and the black marketeers, can furnish "security deposit" of Rs. 4 lakhs ? To order a party of Sakti Ranjan's type to do so is virtually to deny him the relief of an interim temporary injunction, and, worse, to stultify the hearing of the appeal, though the very fact, that it has been admitted, shows that it is considered fit for hearing. In (16) A. Batcha Saheb Vs. Nariman K. Irani and Another, , Mr. Gouri Mitter cites, Nayudu, J. strikes down, Mack, J. agreeing, the term (a deposit of Rs. 1,60,000) which it was impossible for the party, favoured with a temporary injunction, to comply with. Another case Mr. Mitter cites, on this point, is (17) Griffith v. Blake. (1884) 27 Ch. D. 474, where an interlocutory injunction was granted against the defendants, against whom a prima facie case of nuisance was strong, but on the usual undertaking by the plaintiffs : should it turn out at the trial that the injunction ought not to have been granted, the defendants would obtain under the undertaking full compensation for the injury done by the injunction. The defendants, however, had given notice to quit and were leaving in three weeks. Say that of Sakti Ranjan ? In no mood to leave, he would, left to himself, be staying in "Chitralaya" for as many years, if not three times as many years, and perhaps more. Therefore, in the context of facts here, a mere undertaking of that sort seems to be no answer. An offer of Rs. 21,110.05 a month is prima facie there, for what it is worth, in place of Sakti Ranjan's Rs. 10,121 a month. So, the Griffith case cannot be assimilated to the facts in hand. Still it must be held that the learned appellate judge acted, with material irregularity, in the exercise of his jurisdiction, in demanding "security deposit" of Rs. 4 lakhs, and thereby frustrating the very interim injunction he had granted.

18. On such consideration alone, the rule obtained by Sakti Ranjan (Civil Rule No. 407 of 1968) must succeed. On the further consideration that it will not be right for this Court to enter into the merits of the interim injunction proper, granted by the appellate judge, when the appeal against the order of the learned munsiff, rejecting the prayer for a temporary injunction, remains to be heard out, the rule obtained by "Hindusthan" (Civil Rule No. 763 of 1968) must fail. At the same time, it is a fit case where the learned appellate judge should be directed to expedite the hearing of the appeal before him, laying aside all other work of his, the nature of the litigation being what it is.

19. Sakti Ranjan's appeal remains : First Miscellaneous Appeal Tender No. 991 of 1968. It is incumbent upon the appellant to show that there is a statutory right of appeal : just what Lord Macnaghten lays down in (18) Rangoon Botatung Co. v. The Collector, Rangoon, (1912) LR 39 IA 197. The appellant before me does not show that. To quote further from his Lordship's judgment, -

As observed by Lord Bramwell, then Bramwell, J.A., in the case of (19) Sandback Charity Trustee v. North Staffordshire Railway Company, (1877) 3 QBD 1 : "An appeal does not exist in the nature of things. A right of appeal from any decision of any tribunal must be given by express enactment."

Where is that express enactment here ? Order 43, rule 1, clause (r), of the Code of Civil Procedure, 5 of 1908, makes an order under Order 39, rule 2, appealable. Sakti Ranjan's appeal before the Court of appeal below is an appeal thereunder. Now read section 104 *ibid*. Clause (i), sub-section (1) thereof, provides that an appeal shall lie from any order made under rules from which an appeal is expressly allowed by rules. Order 43, rule 1, clause (r), does allow such an appeal : just the appeal which now pends before the court of appeal below. Then, what calls attention is sub-section (2), section 104, prescribing :

No appeal shall lie from any order passed in appeal under this section.

Thus, it is plain to be seen that only one appeal is contemplated, not two. And the order of the lower appellate court, though interim, is an order passed in appeal. So, the appeal appears to be incompetent.

20. "Hindusthan" refers to (20) *Sito Mahton v. F.F. Christien*, (1912) 17 IC 361, where, in a suit for ejectment no injunction was issued under Order 39, rule 1, restraining the defendants from working the mica mines on the disputed property. What was issued instead was an order u/s 94, clause (e), calling upon them to furnish security to the extent of Rs. 5,000 and to submit periodic accounts. No appeal, therefore, could lie in the very nature of things. Sir Ashutosh Mookerjee, sitting with Beachcroft, J. held as much, pointing out that nothing prevented the defendants from working the mines. This is therefore, an authority the other way, with no manner of an injunction, and cannot be pressed into service to decide whether the order of an interim injunction complained against is appealable or not.

21. True it is that, in the *Sito Mahton* case, there was an alternative application u/s 115. But their Lordships saw no ground for interference with an order which the court below recorded, u/s 94, clause (e), to prevent the ends of justice from being defeated. This can hardly be equated with the case in hand. There, security of Rs. 5,000 and submission of periodic accounts, touching the work of mica mines, had nothing in it to stop the raising of mica, and thus to render the consideration shown to the defendants illusory. Here, the "security deposit" of Rs. 4 lakhs, called for, does render very much the interim injunction just that : illusory. And when a court acts so, the least that can be said is that it acts in the exercise of its jurisdiction with material irregularity. In view of all that goes before, I order as under:

1. Civil Rule No. 407 of 1968 be made absolute. The order, in so far it calls for "security deposit" of Rs. 4 lakhs, be set aside.
2. Civil Rule No. 763 of 1968 be discharged.
3. First Miscellaneous Appeal Tender No. 991 of 1968 be dismissed as incompetent.
4. This appears to be a fit matter where there ought not be costs on either side. I order so.

5. The judge in the court of appeal below will do all he can to expedite the hearing of the appeal before him, and make it a point to decide it by July 12, 1968, at the latest, reporting to this Court through the Additional Registrar, Appellate Side that that has been done.

6. A copy of this judgment be sent to the court below by May 30, 1968, the office reporting to me through the Additional Registrar, Appellate Side, compliance with the directive.