
(1964) 02 MP CK 0012
In the Madhya Pradesh High Court
Case No : First Appeal No. 40 of 1962

Shyamacharan Raghubar Prasad

APPELLANT

Vs

Sheojee Bhai Jairam Chattri and Another

RESPONDENT

Date of Decision : 26-02-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, Order 20 Rule 1, Order 20 Rule 12, Order 23 Rule 3, Order 40 Rule 1
Transfer of Property Act, 1882 — Section 105, 116

Citation : AIR 1964 MP 288 : (1964) JLJ 736 : (1964) MPLJ 502

Hon'ble Judges : P.V. Dixit, C.J.; K.L. Pandey, J

Bench : Division Bench

Advocate : M. Adhikari, General and J.V. Jakatdar, for the Appellant; R.S. Dabir, V.S. Dabir and B.L. Pujari for Respondent (No. 1), for the Respondent

Final Decision : Dismissed

Judgement

Dixit, C.J.

This appeal arises out of a suit filed on 25th June 1960 by the respondent No. 1, Sheoji Bhai, against the appellant Shyamacharan and the respondent No. 2 Yadav, claiming a decree for their eviction from a cinema-house known as Jairam Theatres, situated in Raipur, and a decree for arrears of rent and damages. The Additional District Judge of Raipur, who is trying the suit, has, in the circumstances stated below, given to the plaintiff a decree for the ejectment of the defendants. It is against this decree that this appeal has been filed.

The plaintiff's case was that by a registered lease-deed the defendants had taken from him the cinema house on lease for a period of ten years from 20th May 1950 at a monthly rent of Rs. 1600/-; that on the expiry of the lease by efflux of time on the midnight of 19th May 1960 he served telegraphically a notice on the defendant Shyanzacharan for vacating the leased property and delivering vacant possession thereof to him; and that instead of vacating the cinema-house, the said Shyamacharan sent a false reply alleging that according

to an oral agreement between him and the plaintiff the lease had been extended for a further period of two years. The plaintiff averred that on the expiry of the lease on the midnight of 19th May 1960, the defendants were not entitled to remain in occupation of the cinema house, and claimed a decree for ejectment, for arrears of rent amounting to Rs. 16,353/- and for damages for the period after the expiry of the lease till the date of eviction.

The appellant contested the suit pleading inter alia that the lease had not come to an end inasmuch as before the expiry of the period fixed by the registered lease-deed the plaintiff verbally agreed to extend the term of the lease by another two years and had further stipulated to execute a proper lease-deed for the extension of the term but that he had failed to do so. The other defendant" Yadav did not file any written-statement. He, however, made an application to the trial court pleading that by virtue of a partition made between Shyamacharan and him, the entire liability with regard to ejectment, payment of rent and damages was on Shyamacharan alone.

On the pleadings of the parties, the trial court framed the following issues:

"1. (a) Whether the plaintiff leased out the cinema as detailed in the map attached to the plaint to the defendant No. 1 for 10 years, commencing from 20th May 1950?

(b) Whether the lease expired by efflux of time on 19-5-1960?

OR

Whether the lease expired on 22-5-1960?

(c) Whether the lease was at Rs. 1600/- per month ?

(d) Whether the lease was verbally extended for two years?

Whether the plaintiff is the owner of Electric fittings and Seats i.e. chairs etc. of the cinema as detailed in the map attached to the plaint?

Whether, since the plaintiff has not raised any of the grounds mentioned in Section 4 of the M. P. Accommodation Control Act, the suit is not maintainable?

(a) Whether proper court-fee has not been paid?

(b) If so, what is its effect?

(a) Whether the plaintiff is entitled to ejectment?

(b) Whether the plaintiff is entitled to Rs. 16353/- as arrears of rent?

(c) Whether the plaintiff is entitled to Rs. 6000/- as damages from 19-5-60 to 19-6-60?

(d) Whether the plaintiff is entitled to future damages at Rs. 6000/- per month?

Relief and costs?"

The evidence in the suit was to have been recorded on 22nd November 1960. On this date, * the defendant-appellant Shyamacharan made an application under Order 23 Rule 3 C.P.C, stating that; on the previous night a compromise had been arrived at between the parties according to which the lease was to continue for a further period of two years commencing from 22nd May 1960 and that formal lease-deed was to be executed and registered on 22nd November 1960. In this application the appellant stated the other terms of the alleged compromise and prayed that the compromise be recorded and a decree in terms of the same be passed. The plaintiff denied the compromise set up by the appellant. The trial Court passed an order of enquiry into the alleged compromise.

On 14th April 1961 the plaintiff made an application under Order 40 Rule 1, read with Section 151. C.P.C. for the appointment of a receiver of the Income of the suit property. This application was rejected by the learned Additional District Judge. Thereupon the plaintiff preferred an appeal in this Court (M.F.A. 81 of 1961) against the order of the trial court refusing to appoint a receiver. In that appeal, a settlement was arrived at between the parties according to which Shyamacharan agreed to pay to the plaintiff Rs. 24,000/- in cash to give a solvent security to the satisfaction of the lower court for the due performance of a decree as might be passed, and to pay Rs. 1600/- p. m. as rent for the cinema house for the period subsequent to 1st October 1961. In view of this settlement, Shrivastava J., who heard M (F) A. No. 81 of 1961, dismissed the appeal on 13th October 1961 by an order embodying the conditions of the settlement referred to above.

In the meantime the enquiry into the alleged compromise continued and while it was still pending the plaintiff made an application under Order 12, Rule 6, read with Section 151 C.P.C., on 18th June 1962 stating, without prejudice to his denial of the defence set up by the appellant-Shyamacharan and of the statements made by Shyamacharan in his application under Order 23 Rule 3 C.P.C., that the period of the alleged extension of the lease had even expired on or about 23rd May 1962 and that therefore, he was entitled to a decree for possession of the cinema house forthwith on the admission of the defendant Shyamacharan who had after 23rd May 1962 no justification whatsoever for continuing to remain in possession of the property.

This application of the plaintiff was rejected by the trial court on 4th August 1962 taking the view that the statements made by the appellant Shyamacharan in his application under Order 23 Rule 3, C.P.C. about the alleged extension of the lease beyond 22nd May 1960 did not constitute an unqualified admission on his part that he was not entitled to remain in occupation of the cinema house after that date and that, therefore, no decree for possession of the cinema house could be-passed in favour of the plaintiff under Order 12 Rule 6 C.P.C.

The plaintiff Sheoji Bhai then filed a revision petition (No. 385 of 1962) in this Court against the order dated the 4th August 1962 of the trial Court. Bhargava J., who heard that revision petition formed the opinion that the statements made

by the appellant in his application under Order 23 Rule 3 C.P.C., as well as in his written-statement. embodied an unqualified and, absolute-admission that he was not entitled to remain in occupation of the cinema house after 22nd May. 1962, and that in view of this admission of the defendant Shyamacharan the plaintiff-respondent, was entitled to a decree under Order 12 Rule 6 C.P.C., for possession of the cinema house.

He also observed that the appellant could not a claim to remain in possession of the cinema house-after 22nd May 1962 as a tenant holding over u/s 116 of the Transfer of Property Act: because the plaintiff-landlord never assented to the appellant's continuing in possession after the expiry of the tenancy and that he could not also claim the protection given to a statutory tenant under the Madhya Pradesh Accommodation Control Act; 1955, as that Act did not apply to a cinema house. Accordingly, on 26th October 1962, Bhargava, J,, set aside the order dated 4th August 1962 of the learned Additional District Judge, Raipur, and directed him to "pass suitable decree for eviction of the defendant from the suit premises forthwith, and to decide other questions after making proper enquiry according to law."

The appellant then applied to the Supreme Court for special leave to appeal" against the order dated 26th October 1962 of Bhargava J;, which, was refused by the Supreme Court on 19th November 1962. On receipt of the record of the case from this court after the disposal of the aforesaid revision petition, the learned Additional District Judge recorded a brief order on 3rd November 1962 stating that the direction given by the High Court in the order dated 26th October 1962, made in C. R No. 385 of 1962, asking him to decree the plaintiff's claim for eviction was "quite clear-and mandatory", and passed on that day a decree for ejection against the defendants. It" is against this decree that the present appeal has been fied.

This appeal was first heard by a Division Bench composed of Naik and Pandey JJ., on 30th November 1962. On that day, after hearing partly the arguments of the learned counsel appearing for the parties, the Division Bench passed" an order-remitting the case to the trial court for recording its findings on the following questions, namely,

"1. Whether the lease was verbally extended for two years?

Whether the subject-matter of the suit was compromised between the parties on term am conditions as embodied in the application dated 22-11-1960?"

The learned Judges kept the appeal on their file and asked the trial court to send its findings on the above questions to this Court and further directed that the appeal should be posted before them for hearing on 19th April 1963. After taking the evidence of the parties on the above issues, the learned Additional District Judge recorded his findings on 1st April 1963. The hearing of the appeal was then resumed-before the Division Bench and it was heard on 19th, 26th and 27th April 1963, on which date, after the conclusion of the arguments, judgment in

the appeal was reserved. On 2nd May 1963, the appellant filed an application seeking leave for amending his written-statement so as to enable him to plead that a compromise made and recorded during the pendency of the suit, and acted upon, created a fresh tenancy, with the consequence that the suit, in so far as it related to ejectment, was liable to be dismissed.

On 16th July 1963 the Division Bench recorded an order granting leave to the appellant to amend his written-statement. Thereafter when the appellant amended his written-statement the plain-tiff-respondent took time for replying to the amended written-statement and for amending the plaint. Ultimately on 20th November 1963 the Division Bench recorded an order saying that Naik, J., was not in the beginning inclined to hear the appeal, that he agreed to do so when the parties stated that they had no objection to his being a member of the Division Bench hearing the appeal and that Naik J., now wished to be left out, and placing the case before the Chief Justice for constituting an appropriate Bench for the hearing of the appeal. Accordingly the appeal was heard by another Division Bench consisting of the Chief Justice and Pandey J.

The appellant's case was presented before us thus. First of all, it was said that the learned Additional District Judge acted in violation of Order 20 Rule 1 C.P.C. When he passed a decree for eviction on 3rd November 1962 on receipt of the record of the case from this Court without giving any notice to the parties that he would on that date pronounce a judgment of eviction according to the order made by this Court on 26th October 1962 in C.R. No. 385 of 1962, and without giving an opportunity to the appellant to make his submission before the drawing up of the decree.

Secondly, it was submitted that the decision of Bhargava J.. dated 26th October 1962 in C. R. No. 385 of 1962 was erroneous and could not be made the basis of an order under Order 12 Rule 6 C.P.C. It was urged that the learned Single Judge failed to notice that the necessary implication of the plaintiff's application under Order 12 Rule 6 C.P.C. was an admission on his part of the extension of lease under a verbal agreement between the parties and that as the extension was not followed by a registered instrument, there was a second lease from month to month, which required a notice u/s 106 of the Transfer of Property Act for its termination; that the plaintiff's suit having been founded on the termination of the first lease by effluxion of time on 19th May 1960, he could not get a decree for possession passed on an entirely new and different cause of action, namely, the expiry of the second lease on 22nd May 1962 by efflux of time; that in these circumstances the plaintiff, should have brought a fresh suit for eviction on the new cause of action, name the alleged termination of the second lease on 22nd May 1962 by efflux of time; and that if the plaintiff had brought a fresh suit, the provisions of the M. P. Accommodation Control Act, 1962, would have been applicable and the plaintiff would have been entitled to a decree for possession only in conformity with the provisions of Section 12(6)(b) of that Act,

Shri Adhikari, learned Advocate General appearing for the appellant, further said

that on the issue whether the lease was verbally extended for two years remitted to him for a finding, the learned Additional District Judge had held that the lease was so extended; that this finding was fully supported by the evidence on record; that this extension of lease coupled with the settlement arrived at between the parties in M.F.A. No. 81 of 1961, under which the plaintiff agreed to accept rent at the rate of Rs. 1600/- p. m. for the cinema house for the period subsequent to 1st October 1961 and allowed the appellant in occupation of the property, showed that there was a fresh tenancy u/s 116 Transfer of Property Act; that consequently the plaintiff's suit for ejectment on the expiry of the original lease or of its verbally extended period was not maintainable; and that a fresh tenancy having been created u/s 116 Transfer of Property Act, the plaintiff could not get a decree for eviction without first terminating that tenancy in accordance with Section 106 Transfer of Property Act and without making out a ground for ejectment u/s 12 of the M. P. Accommodation Control Act, 1961.

In reply, Shri Dabir, learned counsel appearing for the plaintiff-respondent contended that when this Court made an order in C. R. No. 385 of 1962 directing the lower court to pass a decree for eviction forthwith, it was not necessary for the learned Additional District Judge to hear any party before proceeding to pass a decree for eviction; that if no notice had been given by the court of the Additional District Judge to the appellant about the date on which a decree for eviction would be passed in conformity with the order made by this Court in the above-stated revision petition, that was at the most an irregularity which did not vitiate the decree; and that the decision pronounced by Bhargava J. in the aforesaid civil revision was final and conclusive as regards the lower court as well as this Court and, therefore, its correctness or that of the decree passed by the lower Court on the basis of that order, could not be questioned in this appeal.

Learned counsel took us through the evidence led by the appellant to support the story of the alleged extension of lease, and said that the finding returned by the learned Additional District Judge that there was a verbal extension of lease by another two years was erroneous and one reached without making any attempt to determine the reliability and interestedness of the appellant's witness, to weigh the probabilities of the case, and to make a proper appreciation of their evidence.

It was said that there was no reliable evidence whatsoever to support the appellant's version that the plaintiff had verbally agreed to extend the lease by two years beyond 19th May 1960 and the Settlement, which was arrived at between the parties in M.F.A, No. 81 of 1961, could in no sense be regarded as creating a fresh tenancy in favour of the appellant; that M.F.A, No. 81 of 1961 was an appeal against an order of the trial court rejecting the plaintiff's application for the appointment of a receiver and it was in connection with the matter of the appointment of a receiver that the settlement was arrived at as an interim arrangement with regard to payment of rent during the pendency of the suit; and that thus the plaintiff's averment in the plaint that the appellant was

not entitled to remain in occupation of the cinema house on the expiry of the lease by efflux of time on the midnight of 19th May 1960 had been fully substantiated and he was, therefore, entitled to a decree for eviction on the cause of action pleaded by him.

In our view, the decree for ejectment passed by the lower court cannot be held to be bad on the appellant's challenge to the course taken by the trial Judge in passing it pursuant to the direction made by this court in C.R. No. 385 of 1962 without giving any notice to the parties. This Court's order in the said revision petition was clear and unambiguous and it directed the lower court to pass a decree for eviction of the defendants from the suit premises forthwith. As a result of this order, the Additional District Judge was left with no other course open to him but to pass a decree for eviction. He was, therefore, right in passing a formal decree for ejectment against the appellant on the order, dated 26th October 1962, of Bhargava, J., being communicated to him. True, he should have followed the provisions of Order 20 Rule 1 C.P.C. and given notice to the parties before proceeding to pass the decree in conformity with the order made by this court in the revision petition. But if he did not comply with the provisions of Order 20 Rule 1 C.P.C., the decree passed by him does not become a nullity for that reason. In AIR 1933 12 (Nagpur) where it has been held by this Court that where a judgment is pronounced in open court but not in the presence of the parties and without notice to them although it is clearly an infringement of the provisions of Order 20 Rule 1 C.P.C., the judgment does not become a nullity.

The next question as to whether the order passed by Bhargava J., on 26th October 1962, in C.R. No. 385 of 1962, is final as regards this Court and whether it is open to this court to consider its correctness in this appeal, has lost all its importance and does not conclude the matter when in this appeal a consent order was made on 30th November 1962 remitting to the trial court two points for the recording of its findings thereon after taking the evidence of the parties, and when for the reasons to be stated shortly we have formed the view that the evidence tendered by the appellant to support his version that there was a verbal agreement with regard to extension of lease by two years is utterly unsatisfactory, unreliable and unworthy of any credit and does not at all establish the allegation about the extension. But it must be stated that on the question of the finality, so far as this Court is concerned, of Bhargava J.'s order dated 26th October 1962 in C.R. No. 385 of 1962, the Judgment of the Supreme Court in *Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another*, is decisive.

That, was a case where the landlords had obtained a decree for ejectment against the tenants for possession of some lands. After the decree was made the Calcutta Thika Tenancy Act, 1949, came into force. The tenants then made an application u/s 28 of that Act for rescission of the decree which was dismissed by the Munsiff holding that the tenants were not Thika tenants within the meaning of the Thika Tenancy Act. The tenants then filed a revision petition u/s 115 C.P.C. in the Calcutta High Court against the order of the Munsiff. By the

time the revision petition came up for hearing, the Thika Tenancy Act was amended in 1953. The amending Act of 1953 inter alia omitted Section 28 of the original Act.

The Calcutta High Court considered the effect of the amendment made in the Act and held that in view of the amended definition of the term "Thika tenant", and the evidence which had been recorded by the Munsiff, the tenants must be held to be Thika tenants. Accordingly the revision petition was allowed, the Munsiff's order dismissing the tenant's application u/s 28 was set aside, and the case was remitted to the Munsiff's court for disposal in accordance with law. After remand the Munsiff rescinded the decree. Then the landlords came up in revision to the Calcutta High Court against the Munsiff's order rescinding the decree.

That revision petition was rejected by the Calcutta High Court taking the view that the question of rescission of the decree as between the parties was res judicata. Subsequently the matter came up in appeal preferred by the landlords in the Supreme Court. In that appeal, it was contended on behalf of the tenant-respondents that the appellants, that is the landlords, were barred by the principle of res judicata from raising in the Supreme Court the question whether on the enactment of the Thika Tenancy (Amendment) Act, 1953, Section 28 of the original Act survived or not in respect of the proceedings pending on the date of the commencement of the Thika Tenancy Ordinance, 1952.

Dealing with this contention the Supreme Court observed:

"The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter -- whether on a question of fact or a question of law -- has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in Section 11 of the Code of Civil Procedure; but even where Section 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct."

Later in the judgment, the Supreme Court pointed out that-

"The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to reagitate the matter - again at a subsequent stage of the same proceeding."

After stating these propositions, the Supreme Court proceeded to consider the

question whether because at an earlier stage of the litigation a court has decided an interlocutory matter in one way and no appeal has been taken therefrom or no appeal did lie, a higher court is precluded from considering the matter again at a later stage of the same litigation. In connection with this question, the Supreme Court examined the decisions of the Privy Council in *Moheshur Singh v. Bengal Government* 7 Moo Ind App 283 at p. 302 (PC), "*Forbes v. Ammeroonissa Begum* 10 Moo Ind App 340 (PC) and *Sheonath v. Ramnath* 10 Moo Ind App 413 (PC), and quoted with approval the following observations of the Privy Council in *Moheshur Singh*'s case 7 Moo Ind App 283 at p. 302 (PC).

"We are of opinion that this objection cannot be sustained. We are not aware of any law or regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not so do, of forfeiting for ever the benefit of the appellate Court. No authority or precedent has been cited in support of such a proposition and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponents similar calamities. We believe there have been very many cases before this Tribunal in which their Lordships have deemed it to be their duty to correct erroneous interlocutory orders, though not brought under their consideration until the whole cause had been decided and brought hither by appeal for adjudication."

Then the Supreme Court made the observation that is material in this appeal, namely,--

"The very fact that in future litigation it will not be open to either of the parties to challenge the correctness of the decision on a matter finally decided in a past litigation makes it important that in the earlier litigation the decision must be final in the strict sense of the term. "When a court has decided the matter it is certainty final as regards that court" . " (Underlining (here into * ") is ours.)

The Supreme Court also considered the decisions of the Privy Council in *Ram Kirpal Shukul v. Rup Kuari*, u Ind App 37 (PC), *Bea Ram v. Nanhumal* 11 Ind App 181 (PC) and *Hook v. Administrator-General of Bengal* 48 Ind App 187: (AIR 1921 PC 11) and distinguished these case's from the other Privy Council cases noticed by them by saying that-

"Interlocutory orders which have the force of a decree must be distinguished from other inter-locutory orders which are a step towards the decision of the dispute between parties by way of a decree or a final order. *Moheshur Singh*'s Case, *Forbes*" case and *Sheonath*'s case dealt with inter-locutory judgments which did not terminate the proceedings and led up to a decree or final order, *Ram Kirpal Shukul*'s case 11 Ind App 37 (PC), *Beni Ram*'s case 11 Ind App 181 (PC) and *Hook*'s case 48 Ind App 187: (AIR 1921 PC 11) deal with judgments

which though called interlocutory, had, in effect, terminated the previous proceedings."

The Supreme Court held that the appellants before them were not precluded from raising in the Supreme Court the question that Section 28 of the original Thika Tenancy Act was not available to the tenants after the Thika Tenancy (Amendment) Act of 1953 came into force.

The judgment of the Supreme Court in *Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another*, makes it clear that an interlocutory order is final as regards the court making that order. But its correctness can be challenged in an appeal from the final decree or order even though no appeal had been filed against the interlocutory order either because none lay or because even though an appeal lay none was filed. On the principles laid down by the Supreme Court in *Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another*, , there can be no doubt that the order of Bhargava J., dated the 26th October 1962 made in C.R. No. 385 of 1962, was final as regards this Court. Its correctness could not be challenged in this Court. It could be challenged only before the Supreme Court in an appeal from the final decree. It is important to note in *Satyadhyan's* case, while holding that the landlord-appellants before them were not precluded from raising in the Supreme Court the question of the availability of Section 28 of the original Thika Tenancy Act to the tenants, the Supreme Court nowhere said in that decision that the view taken by the Calcutta High Court, that the landlords could not in the revision petition, they filed raise this question which was res judicata between the parties as it had been decided in the revision petition filed earlier by the tenants, was erroneous.

In support of his submission that it was open to this Court by virtue of Section 105 C. P. C. to consider in this appeal the correctness of Bhargava J.'s order, dated 26th October 1962, in C. R. No. 385 of 1962, learned Advocate General relied on *T.S. Pichu Ayyangar Vs. Sri Perarulala Ramanuja Jeer Swamigal, Dharmakarthha and Manager of Sri Alagia Nambirayar Temple*, .

In that case, in a suit filed in the Court of the District Judge, Tinnevely, with the object of obtaining the settlement of a scheme under the Madras Hindu Religious Endowments Act, 1927, the defendant's objection that the court had no power to frame a scheme was overruled by the District Judge. Thereupon, the defendant applied to the Madras High Court to reverse the order of the District Judge in exercise of its revisional powers. Venkataramana Rao J., who heard the revision petition, decided that the District Judge had erred in holding that the suit lay. He made an order allowing the revision petition and dismissing the suit. When the order of the Madras High Court was communicated to the District Judge, he passed a formal decree dismissing the suit- The plaintiff filed an appeal in the Madras High Court against the decree passed by the District Judge. In that appeal, the defendant raised the objection that the " order of Venkataramana Rao J., passed in the revision petition was final and, therefore, the appeal was not competent. The learned Judges of the Madras High Court overruled this

objection and held that the order of Venkataramana Rao J. was an interlocutory order and that it was open to the High Court by virtue of Section 105 C. P. C. to consider its correctness in the appeal from the final decree.

This decision no doubt supports the appellant's contention that the correctness of the order passed by Bhargava J., on 26th October 1962, can be considered in this appeal. But with all respects to the learned Judges of the Madras High Court, it seems to us that when Venkataramana Rao J., disposed of the revision petition before him by dismissing the plaintiff's suit that order was final as regards the Madras High Court irrespective of the question whether that order was or was not appropriate or correct u/s 115 C. P. C.

Section 105 no doubt provides that "where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal". This provision only postpones the challenge to an interlocutory order till an appeal is preferred from the final decree. But the challenge must be in an appeal from the final decree filed not in the court making the interlocutory order attacked, but in the appeal ultimately taken to the higher court, from the final decree. This follows from all that has been said by the Supreme Court in the case of Satyadhan Ghosal and Others Vs. Sm. Deorajin Debi and Another, . In our opinion, the correctness of the order passed by Bhargava J., on 26th October 1962 in C. R. No. 385 of 1962 can-not be challenged in this appeal. But, as we have stated earlier, in view of the remand order made in this appeal on 30th November 1962, the matter assumes a new aspect and the question of the finality of the order of Bhargava J., is no longer important or crucial.

The substantial matter now is whether on the evidence led in the trial Court on the issues remitted to it by this court on 30th November 1962 for findings, the appellant has succeeded in establishing that the plaintiff had verbally agreed to extend the lease for a period of two years after 19th May 1960. It is obvious that if it is held that no such agreement about the extension of lease was ever concluded between the parties, then the plaintiff is clearly entitled to a decree for possession on his own undisputed allegation that the lease granted to the appellant on 20th May 1950 expired by efflux of time on the midnight of 19th May 1960 and the decree for ejectment passed by the trial court must be upheld on the ground that on the facts pleaded by the plaintiff and on the evidence led by the parties on the issues remitted to the trial court, the plaintiff had a clear cause of action for evicting the defendants from the premises on the expiry of the lease by efflux of time on the midnight of 19th May 1960.

Before dealing with the evidence which the appellant led in the lower court in support of his story that the plaintiff had verbally agreed to extend the lease by two years, it is necessary to state at the outset that in his written-statement the defendant-Shyamacharan gave no particulars at all as regards the date on, and place at which this alleged agreement was arrived at, and the circumstances in which it was concluded. Some indication of this was given by him for the first

time in his application dated 8th September 1960, under Order 76 Rule 1, C. P. C., for examination on commission of four witnesses, namely, Dr. Tiwari, Civil Surgeon, Raipur, Gopal Prasad Rochharia, Nathubhai Narsi and Trimbakeshwar Prasad. In that application, the appellant stated that these witnesses were present "on the date when the talk of extension of lease had taken place between the plaintiff and the defendant's Manager". Out of the above four witnesses, only Dr. Tiwari gave evidence on behalf of the defendant-appellant. The other three witnesses were not examined at all. In their place, the defendant tendered in evidence his son-in-law, Durga Prasad Pateria, a pleader of Raipur, Shrikrishna Agarwal, a person owning a cinema house and a rice-mill in Bag-Bahara, Mahasamund Tehsil, and Rajabali, a dealer in tyres, cycles, kerosene oil etc. and having his shop in Raipur near the cinema premises in dispute here. The defendant-Shyamacharan himself never appeared as a witness to give evidence on his behalf.

to 20. (After examining the evidence of witnesses, their Lordships proceeded). In our judgment having regard to the inconsistency between the statements made by the appellant in his application dated 8th September 1960 under Order 26 Rule 1 C. P. C. and the evidence led by him, his omission to go into the witness box and to tender in evidence Shardacharan, and regard being had also to the incredible and unnatural statements made by Dr. Tiwari, Pateria, Shrikrishna Agrawal and Rajabali, it is impossible to conclude that the plaintiff Sheoji Bhai agreed to extend the lease by another two years. The burden of proving the issue whether the lease was verbally extended for two years was on the defendant-appellant. He failed to discharge that burden. That burden is not discharged by merely saying that Dr. Tiwari is a friend of the plaintiff also or that the plaintiff's evidence is of negative character. It was the defendant who had to prove affirmatively his allegations about the renewal. The plaintiff's evidence could not but consist in showing that there was never any talk or agreement about the extension of the lease.

On the second issue remitted to him for determination, the learned Additional District Judge has found that the defendant-appellant failed to prove that there was any compromise between the parties as alleged in the application dated 22nd November 1960 under Order 23 Rule 3. This finding was not attacked before us and nothing need be said about this. It is, however, worthy of comment that if according to the appellant the plaintiff Sheoji Bhai did agree, at the residence of Shardacharan, to the extension of the lease by another two years on the original terms, then there was no necessity for the appellant to make efforts to persuade the plaintiff to compromise the matter by extending the lease by another two years and agreeing to pay the enhanced rent of Rs. 2000/- for the extended period.

The hopelessness of the appellant's story that the plaintiff agreed to an extension of the lease at the residence of Shardacharan and that he also agreed to the adjustment of the matter on the night of 21st November 1960 becomes

further evident by the amendment which the appellant made in his written statement after obtaining leave from the Division Bench on 16th July 1963. By that amendment the appellant sought to plead that a compromise was arrived at between the parties during the pendency of M. F. A. No. 81 of 1961 creating a fresh tenancy, by pressing into service the order of Shrivastava J., dated the 13th October 1961, disposing of that appeal in accordance with the settlement arrived at between the parties in the matter of the appointment of a receiver till the disposal of the suit.

The aforesaid appeal had been filed by the plaintiff Sheoji Bhai against the order of the Additional District Judge rejecting his application under Order 40 Rule 1 C. P. C. for the appointment of a receiver of the income of the suit property. After the filing of the appeal, the plaintiff applied for the appointment of an interim receiver till the disposal of the appeal. This application was opposed by the appellant. During the course of the hearing of that appeal, a statement was made on 31st August 1961 on behalf of the defendant-appellant that he was prepared to pay Rs. 24,000/- as the amount due from him after the date of the filing of the suit until 31st August 1961, that he would also pay to the plaintiff Rs. 1600/- p. m. beginning from 1st October 1961, that he was willing to give a solvent security to the satisfaction of the trial court for the satisfaction of such decree as might be passed against him, and that the hearing of the appeal should be postponed for fifteen days to -enable him to comply with these conditions. On -this statement being made on behalf of the defendant it was stated by the counsel appearing for the plaintiff that if these conditions were fulfilled by the defendant, then the plaintiff would not press his appeal for the appointment of a receiver. The hearing of the appeal was accordingly adjourned on 31st August 1961. When the security "furnished by the defendant was verified by le trial court, Shrivastava J., passed the following order on 13th October 1961 disposing of the appeal: --

"ORDER

This miscellaneous appeal is by the plaintiff against the order of the trial court passed on 5th July 1961 rejecting the application of the appellant for appointment of a receiver.

The matter was settled between the parties on the following terms:

- (i) That respondent No. 1 Shyarnacharan do pay to the appellant Rs. 24,000/- in cash;
- (ii) That he should give solvent security to the satisfaction of the lower court for the due performance of such decree as may be passed; and
- (iii) That he should pay Rs. 1600/- per month to the appellant as rent of the cinema house " for the subsequent period commencing from 1st October 1961.

The conditions of this order have been performed by respondent No. 1 to the satisfaction of the appellant.

(3) As desired by the appellant, the appeal is dismissed with costs as incurred,"

There is nothing in the statements of the counsel recorded in M. F. A. No. 81 of 1961 by Shrivastava J, on 31st August 1961 or in the order passed by him on 13th October 1961 disposing of the appeal on the basis of those statements to furnish even a shadow of justification for regarding the order, dated the 13th October 1961, as one embodying a settlement between the parties creating a fresh tenancy.

The appeal before Shrivastava J, was an appeal against an order of the trial court refusing to appoint a receiver. In that appeal there was no question of determining finally the rights of the parties involved in the suit. The statement which was made in that appeal on behalf of the defendant-appellant expressing his willingness to do certain things was for the purpose of warding off the appointment of a receiver of the income of the cinema-house and the settlement which was ultimately arrived at between the parties was nothing but an interim arrangement till the disposal of the suit with regard to the payment of amounts due to the plaintiff and the furnishing of security for the satisfaction of the decree that might be passed against the defendant.

It is well settled that in any suit when a court appoints a receiver, there is no adjudication of the claims of the parties in any way, and the effect of the appointment is not to affect the rights inter se of the parties. The object of the appointment of a receiver is to secure and preserve the property in controversy pending litigation so that it may be subjected to such order or decree as the court may make or render. It has been stated in Woodroffe's "Law Relating to Receivers" (5th Edn. at page 95) that -

"The appointment of a receiver in limine, therefore, like the granting of a preliminary or interlocutory injunction, is not an ultimate determination of the right or title and the Court, in passing upon the application in no manner decides the questions of rights involved, nor anticipates its final decision upon the merits of the " controversy; the leading idea upon the preliminary application being merely to husband the property or fund in litigation for the benefit of whoever may be determined in the end to be entitled thereto. The decision upon the application for a receiver pendente the is, therefore, without prejudice to the final which the Court may be called upon to make, and the Court expresses no opinion as to the ultimate questions of right involved. And if the plaintiff presents a prima facie case, showing an apparent right or title to the thing in controversy and that there is imminent danger of loss without the intervention of the Court, the relief may be granted without going further into the merits upon the preliminary application."

A fortiori therefore, when a party moves for the appointment of a receiver and the opponent says that a receiver need not be appointed as he himself is willing to perform certain acts for securing the object desired by the appointment of a receiver and this offer of the opponents is accepted by the party desiring the

appointment of a receiver, and further when the court passes an order disposing of the matter of appointment of a receiver according to the settlement between the parties, it cannot be argued with any degree of force that such a settlement concluded between the parties involves the determination of the rights of the parties in controversy in the suit itself. The order of Shrivastava J., ex facie does not embody any settlement between the parties creating a fresh tenancy. The term that Shyamacharan should pay to the plaintiff Rs. 24,000/- in cash can in no sense be read as indicative of the creation of a fresh tenancy between the parties. The second term mentioned in the order, dated 13th October 1961, of Shrivastava J. that Shyamacharan should furnish a solvent security to the satisfaction of the lower court for due performance of such decree as may be passed on the other hand clinches the matter. It distinctly shows that the settlement was not with regard to any right of the defendant to remain in occupation of the property as a tenant. That matter remained to be adjudicated upon by the trial court and the security that was to be furnished by the appellant was for the due performance of the decree that might be passed by the trial court against him. The second term recorded by Shrivastava J., in his order, dated 13th October, 1961, nowhere said that the security to be furnished was for the satisfaction of the due performance of a decree that the lower court would pass according to the settlement recorded by him.

The third term is only concerned with the payment of Rs. 1600/- p.m. as rent to the plaintiff commencing from 1st October 1961. It was on the word "rent" used in this term that [learned counsel appearing for the appellant laid particular emphasis as indicating that a new relationship of landlord and tenant between the parties was brought into existence. We do not think that the mere use of the word "rent" in the third term embodied in the order, dated 13th October 1961, of Shrivastava J., leads to the conclusion suggested by the learned counsel for the appellant. : It is, in our view, giving altogether a wrong emphasis to the whole structure of the settlement arrived at between, the parties in M. F. A. No. 81 of 1961 and to the language used by Shrivastava J. in recording that settlement to regard the order of Shrivastava J., as evidencing the creation of a fresh relationship of landlord and tenant between the parties. The settlement was in the matter ;of the appointment of: a receiver and intended to secure the regular payment of the rent to the plaintiff during the pendency of the suit. When the plaintiff decided to accept the appellant's terms of settlement and accommodated him by not pressing his claim for the appointment of a receiver, it was not any recognition of the tenancy right asserted by the appellant. There was no term in the settlement concluded between the parties and in the order recorded by Shrivastava J., conferring on the defendant-appellant the right to occupy the cinema house even after the date of settlement. In deciding the question as to what was the intention of the parties in arriving at the settlement in M. F. A. No. 81 of 1961, we must look to the nature of the appeal, the statements made on behalf of the parties therein, and the order recorded by Shrivastava J., as a whole, and determine if the intention of the parties was to

create a fresh relationship of landlord and tenant by the settlement arrived at between them. In the absence of any term about the transfer of interest by the landlord in favour of the tenant in the settlement, it cannot be held on the mere use of the word "rent" that there was a demise as such.

In *Dr. H.S. Rikhy and Others Vs. The New Delhi Municipal Committee*, it has been pointed out that the mere use of the word "rent" in documents by itself is not conclusive of the matter that a relationship of landlord and tenant was created between the parties concerned and there was a transfer of interest by the landlord in favour of the tenant. In determining whether a new relationship of landlord and tenant was brought about between the parties what is material is not the use of the word "rent" but it is whether the parties were *ad idem* as to the creation of a contractual tenancy (see AIR 1949 124 (Federal Court)). The nature of the settlement arrived at between the parties in M. F. A. No. 81 of 1961, the circumstances in which it was concluded, the absence of any words in the settlement or the order of Shrivastava J., dated 13th October 1961, indicating demise as such, and the stipulation about the defendant-appellant furnishing a solvent security to the satisfaction of the trial court for the due performance of such decree as might be passed all lead to the inference that the settlement recorded by Shrivastava J., did not create a leasehold right. The truth is that at the time of the settlement arrived at between the parties in M. F. A. No. 81 of 1961, they never thought nor intended to convey to the court that the plaintiff was agreeable to the creation of a fresh relationship of landlord and tenant between the plaintiff and the defendant-appellant.

It was also suggested that the settlement reached between the parties in M. F. A. No. 81 of 1961 and the order recorded by Shrivastava J., therein were only "in furtherance" of the extension of lease to which the plaintiff had verbally agreed in 1960. This suggestion is utterly inconsistent with the amendment made by the appellant in his written-statement on 25th July 1963. Therein the aforesaid settlement and the order of Shrivastava J. were relied on as creating a fresh tenancy. The order of Shrivastava J. has no bearing whatsoever on the appellant's plea about the extension of lease. In any case, as we have held that the alleged extension of the lease has not been proved, the suggestion that the settlement between the parties in M. F. A. No. 81 of 1961 was in furtherance of the extension must fall to the ground. If, as we think there was no extension of the lease by two years after its expiration by efflux of time on the midnight of 19th May 1960 and there was no creation of a fresh tenancy by the settlement made by the parties in M. F. A. No. 81 of 1961, then the decree for eviction granted to the plaintiff must be upheld on the ground that on the evidence on record the plaintiff has fully established and substantiated the cause of action pleaded by him;" In this view of the matter, the appellant's further contention that the plaintiff could not get a decree for possession on an entirely new and different Cause of action, namely, the expiry of the extended period of the lease without bringing a fresh suit in conformity with the provisions of Section 12 of the M. P. Accommodation Control Act, 1961, does not need any determination.

It follows from what has been stated above that quite apart from the question of finality, so far as this Court is concerned, of the decree passed by the Additional District Judge pursuant to the order of Bhargava J., dated 26th October 1962 in C. R. No. 385 of 1962, the decree for eviction passed against the appellant must be upheld on the findings reached by us on the two issues remitted by this Court to the trial court on 30th November 1962. Those findings are that the plaintiff never agreed to any extension of the lease after its expiry on the midnight of 19th May 1960 and no compromise was concluded between the parties as alleged by the appellant in his application dated 22nd November 1960. In view of these findings, the appellant is clearly not entitled to remain in possession of the property after the determination on the midnight of 19th May 1960, by the efflux of time, of the lease granted to him for a period of ten years from 20th May 1950.

It was suggested on behalf of the appellant that even if there was no extension of the lease for a period after 19th May 1960, no decree for possession could be passed against the appellant so long as the issues framed in the suit relating to the ownership of fittings in the cinema-house, arrears of rent due from the appellant and mesne profits are determined. We do not agree. The plaintiff's suit being for recovery and possession of Immovable property and for rent and mesne profits, a decree for possession can be passed under Order 20 Rule 12 C. P. C. leaving the questions of rent and mesne profits to be determined at a later stage in the suit. Again, Order 20 is not exhaustive of the list of preliminary decree see: Surendranath Sarkar and Others Vs. Sree Sree Iswar Laksmi Durga and Others Established by Harachandra Kundu through their next Friend, Shebait Sailendranath Kundu and Others,). Therefore, quite independently of Order 20 Rule 12 C. P. C., the preliminary decree for possession passed in the present suit is justified on the material on record. The plaintiff's claim for possession in no way rests on the determination of the issues relating to rent, mesne profits and ownership of fittings of the cinema house.

For the foregoing reasons, the decree for ejectment passed on 3rd November 1962 by the learned Additional District Judge, Raipur, against the appellant is upheld and this appeal is dismissed with costs of the plaintiff-respondent. Sheoji Bhai.