

(2014) 11 AHC CK 0227
In the Allahabad High Court
Case No : Special Appeal No. 629 of 2014

Sri Ghisai Ram Krishak Vidyalaya Samiti	APPELLANT
Vs	
State of U.P.	RESPONDENT

Date of Decision : 05-11-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 20, Order 43 Rule 1, 2, 2(9), 80
Constitution of India, 1950 — Article 136, 226, 227

Citation : (2014) 10 ADJ 211 : (2015) 2 ALJ 163 : (2015) 1 UPLBEC 686

Hon'ble Judges : Amreshwar Pratap Sahi, J; Aditya Nath Mittal, J

Bench : Division Bench

Advocate : Sharad Pathak and L.P. Misra, Advocate for the Appellant; M.B. Singh, Santosh Shukla and Vindhyawasini Kumar, Advocate for the Respondent

Judgement

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1. The question of maintainability of a Special Appeal has intrigued this Court on many a occasion, but the one presented before us is of that genre that is rarely argued with such consuming passion, that it is difficult to resist the temptation of answering it once again. The past precedents with a renewed vigour have been tabled on the dias, praying for a turn in the law, and to cast off all doubts that shroud the legal canvas which according to the learned gentleman at the bar requires a fresh varnish.

2. The appellant complains of injustice-of not being showered with the benefit of an interim order by the learned Single Judge inspite of having a strong prima facie case and a balance of convenience in his favour with a clear threat of irreparable injury of ouster from management as the term of the appellant committee was coming to an end. Thus, the withholding of an interim order by the learned Single Judge has impelled the writ petitioner to file this appeal, which proposition is being opposed by the respondents contending that the appeal is not maintainable in the given circumstances.

3. This appeal arises out of a writ petition which is still pending before the learned Single Judge, where a challenge has been raised to the order of the Deputy Registrar, Firms, Societies and Chits dated 8.7.2014, which the appellant alleges to be without jurisdiction, and prominently in violation of the principles of natural justice, apart from other grounds on merits.

4. The petition was entertained and the contesting private parties, who are also respondents in the present appeal, and are duly represented by their counsel who had put in appearance when the following order was passed :-

"Court No. - 23

Case :- MISC. SINGLE No. - 4033 of 2014 Petitioner :- Sri Ghisai Ram Krishak Vidyalaya Samiti Thru Manager/Secy. Respondent :- State Of U.P. Thru Prin. Secy. Instt. Finance & Others Counsel for Petitioner :- Sharad Pathak Counsel for Respondent :- C.S.C., Santosh Shukla

Hon"ble Sudhir Kumar Saxena, J.

Vakalatnama filed by Sri M.B. Singh, Advocate on behalf of opposite party No. 5 and also vakalatnama filed by Sri Saurabh Shukla, Advocate on behalf of opposite party No. 3 are taken on record.

List in the next week along with W.P. No. 2979 (MS) of 2014, W.P. No. 3232 (MS) of 2014 & W.P. No. 1243 (MS) of 2014.

Prayer of interim order will be considered on the next date.

Order Date :- 24.7.2014"

5. Dr. L.P. Misra, learned counsel for the appellant contends that when the matter came up next, the contesting respondents No. 3 and 4 claimed that a consequential order has been passed by the District Basic Education Officer on 21.7.2014, which also deserved to be quashed, and an amendment application was filed challenging the said order of the Basic Education Officer which amendment was allowed, but no interim orders were passed. Sri Misra submits that the amended writ petition was directed to be supplied to the respondents and the impugned order dated 15.10.2014 was passed. The said order which is under appeal is extracted hereinunder :-

"Court No. - 26 Case :- MISC. SINGLE No. - 4033 of 2014 Petitioner :- Sri Ghisai Ram Krishak Vidyalaya Samiti Thru Manager/Secy. Respondent :- State Of U.P. Thru Prin. Secy. Instt. Finance & Others Counsel for Petitioner :- Sharad Pathak Counsel for Respondent :- C.S.C., M B Singh, Santosh Shukla, Saurabh Shukla

Hon"ble Ajai Lamba, J.

Let a copy of the amended writ petition be supplied to learned counsel for the respondents.

Let counter affidavit be filed positively within ten days from today.

Rejoinder affidavit, if any, be filed within one week thereof.

List thereafter.

Order Date :- 15.10.2014"

6. Dr. L.P. Misra, learned counsel for the appellant, submits that since the learned Single Judge did not grant any interim order, the order dated 15.10.2014, extracted above, amounts to a refusal to grant an interim relief, that was essential and urgent on the facts and circumstances of the present case and, therefore, the same amounts to a decision which will fall within the definition of the word "judgment" as understood under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952. He, therefore, prays that the interim relief of staying the operation of the order of the Deputy Registrar impugned in the writ petition should be granted as the appellant has been ousted from lawful management of the society and the institution which is a legal and fundamental right of the appellant. He, therefore, submits that such rights having been impinged, the inaction on the part of the learned Single Judge amounts to seriously affecting the rights of the appellant and, therefore, the present appeal is maintainable.

7. This argument was advanced by Dr. Misra, as a preliminary objection has been raised by the learned senior counsel for the respondent No. 4, Sri S.K. Kalia, that a special appeal is not maintainable against the order extracted hereinabove, as it does not amount to either granting an order or passing an order refusing to grant relief thereby amounting to a judgment.

8. Dr. Misra, learned counsel for the appellant, contends that such an appeal is maintainable and for this reliance has been placed on several judgments. The first decision relied on by the learned counsel is that of Shah Babulal Khimji Vs. Jayaben D. Kania and Another, where the Apex Court has extensively dealt with the previous judgments of various High Courts where the dispute had arisen as to what would be the meaning of the word "judgment" as used in the Letters Patent Appeal jurisdiction conferred on the High Courts. The Apex Court referred to a couple of decisions of the Allahabad High Court as well, and then proceeded to elaborate, laying down the foundation for understanding the meaning of the word "judgment". Their Lordships, however, while proceeding to do so extracted the judgment of Nagpur High Court in the case of Manohar Damodar Bhoot Vs. Baliram Ganpat Bhoot, AIR 1952 Nagpur Page 357 and held as follows :-

"96. Similarly, in a later Full Bench decision of the Nagpur High Court in Manohar Damodar Bhoot vs. Baliram Ganpat Bhoot, Hidayatullah, J. (as he then was) who wrote the leading judgment, very pithily described the essential requisites and the exact meaning of the word "judgment" as used in the Letters Patent and observed thus :

A judgment means a decision in an action whether final, preliminary or interlocutory which decides either wholly or partially, but conclusively in so far as the Court is concerned, the controversy which is the subject of the action. It does

not include a decision which is on a matter of procedure, nor one which is ancillary to the action even though it may either imperil the ultimate decision or tend to make it effective.

The decision need not be immediately executable "per se" but if left untouched must result inevitably without anything further, save the determination of consequential details, in a decree or decretal orders, that is to say, an executive document directing something to be done or not to be done in relation to the facts of the controversy. The decision may itself order that thing to be done or not to be done or it may leave that over till after the ascertainment of some details but it must not be interlocutory having for its purpose the ascertainment of some matters or details prior to the determination of the whole or any part of the controversy.

97. The pointed observations of the Hon"ble Judge try to synthesize the conflicting views taken by the Calcutta and the Madras High Courts and, in our opinion, they represent the true scope and import of the word "judgment" as used in the Letters Patent. The learned Judge while making these observations has made an exhaustive analysis of a large number of cases."

9. However, while analysing the judgments, the Court further went on to hold that the word "judgment" as defined under subsection (2) of Section 9 of the Code of Civil Procedure 1908, would not exactly govern the situation in matters of Letters Patent and Special Appeals as Letters Patent were drafted long before the Code of Civil Procedure 1882 was passed. For this, their Lordships approved of the Allahabad High Court judgment in the case of Mt. Shahzadi Begam Vs. Alakh Nath and Others, . The observations contained in paragraphs 110-111 are extracted hereinunder :-

"110. In Mt. Shahzadi Begam v. Alak Nath, Sulaiman, C.J., very rightly pointed out that as the Letters Patent were drafted long before even the Code of 1882 was passed, the word "judgment" used in the Letters Patent cannot be relatable to or confined to the definition of "judgment" as contained in the Code of Civil Procedure which came into existence long after the Letters Patent were given. In this connection, the Chief Justice observed as follows :

It has been held in numerous cases that as the Letters Patent were drafted long before even the earlier Code of 1882 was passed, the word "judgment" used therein does not mean the judgment as defined in the existing Code of Civil Procedure. At the same time the word "judgment" does not include every possible order, final, preliminary or interlocutory passed by a Judge of the High Court.

111. We find ourselves in complete agreement with the observations made by the Allahabad High Court on this aspect of the matter."

10. Then their Lordships proceeded to define the types of judgments in paragraph No. 113 as follows :-

"113. Thus, under the Code of Civil Procedure, a judgment consists of the reasons and grounds for a decree passed by a court. As a judgment constitutes the reasons for the decree it follows as a matter of course that the judgment must be a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy. The concept of a judgment as defined by the Code of Civil Procedure seems to be rather narrow and the limitations engrafted by sub-s. (2) of s. 2 cannot be physically imported into the definition of the word "judgment" as used in cl. 15 of the Letters Patent because the Letters Patent has advisedly not used the terms "order" or "decree" anywhere. The intention, therefore, of the givers of the Letters Patent was that the word "judgment" should receive a much wider and more liberal interpretation than the word "judgment" used in the Code of Civil Procedure. At the same time, it cannot be said that any order passed by a Trial Judge would amount to a judgment; otherwise there will be no end to the number of orders which would be appealable under the Letters Patent. It seems to us that the word "judgment" has undoubtedly a concept of finality in a broader and not a narrower sense. In other words, a judgment can be of three kinds :

(1) A final judgment-A judgment which decides all the questions or issues in controversy so far as the Trial Judge is concerned and leaves nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the Trial Judge indisputably and unquestionably is a judgment within the meaning of the Letters Patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench.

(2) A preliminary judgment-This kind of a judgment may take two forms-(a) where the Trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Here also, as the suit is finally decided one way or the other, the order passed by the Trial Judge would be a judgment finally deciding the cause so far as the Trial Judge is concerned and therefore appealable to the larger Bench. (b) Another shape which a preliminary judgment may take is that where the Trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, e.g., bar of jurisdiction, res Judicata, a manifest defect in the suit, absence of notice under section 80 and the like, and these objections are decided by the Trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the Trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an R order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be appealable to larger Bench.

(3) Intermediary or Interlocutory judgment-Most of the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of order 43 Rule 1 and have already been held by us to be judgments within the meaning of the Letters Patent and, therefore, appealable. There may also be interlocutory orders which are not covered by o. 43 R. 1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote. For instance, where the Trial Judge in a suit under order 37 of the Code of Civil Procedure refuses the defendant leave to defend the suit, the order directly affects the defendant because he loses a valuable right to defend the suit and his remedy is confined only to contest the plaintiff's case on his own evidence without being given a chance to rebut that evidence. As such an order vitally affects a valuable right of the defendant it will undoubtedly be treated as a judgment within the meaning of the Letters Patent so as to be appealable to a larger Bench. Take the converse case in a similar suit where the trial Judge allows the defendant to defend the suit in which case although the plaintiff is adversely affected but the damage or prejudice caused to him is not direct or immediate but of a minimal nature and rather too remote because the plaintiff still possesses his full right to show that the defence is false and succeed in the suit. Thus, such an Order passed by the Trial Judge would not amount to a judgment within the meaning of clause 15 of the Letters Patent but will be purely an interlocutory order. Similarly, suppose the Trial Judge passes an Order setting aside an ex parte decree against the defendant, which is not appealable under any of the clauses of Order 43 Rule 1 though an order rejecting an application to set aside the decree passed ex parte falls within Order 43 Rule 1 clause (d) and is appealable, the serious question that arises is whether or not the order first mentioned is a judgment within the meaning of Letters Patent. The fact, however, remains that the order setting aside the ex-parte decree puts the defendant to a great advantage and works serious injustice to the plaintiff because as a consequence of the order, the plaintiff has now to contest the suit and is deprived of the fruits of the decree passed in his favour. In these circumstances, therefore, the order passed by the Trial Judge setting aside the ex parte decree vitally affects the valuable rights of the plaintiff and hence amounts to an interlocutory judgment and is therefore, appealable to a larger Bench.

11. The Court further came to the conclusion that in matters of procedure the exercise of discretion by the trial judge which are purely interlocutory, do not constitute judgments and cannot be subject matter of appeal.

12. Paragraphs No. 114 to 118 of the aforesaid judgment clearly elaborates the said situations. The Court then further approved of another judgment of the High Court and held that some considerations as enumerated must prevail with the Court that are enumerated in paragraph 119 thereof. Ultimately, the conclusions drawn by the Bench are contained in paragraph nos. 120, 121 and 122 where the

Court said that the illustrations are not an exhaustive list as every possible contingency or situation cannot be contemplated and the law cannot be placed in a strait-jacket.

13. The next judgment which has been relied on by Sri Misra is in the case of Deoraj Vs. State of Maharashtra and Others, . Sri Misra submits that this judgment is peculiar and explains another uncharted area, namely, the situation where a matter remains pending without passing of an interim order which by itself would be detrimental to the interest of the parties. To explain the situation, Sri Misra has invited the attention to paragraph 12 of the said decision which is extracted hereinunder :-

"12. Situations emerge where the granting of an interim relief would tantamount to granting the final relief itself. And then there may be converse cases where withholding of an interim relief would tantamount to dismissal of the main petition itself; for, by the time the main matter comes up for hearing there would be nothing left to be allowed as relief to the petitioner though all the findings may be in his favour. In such cases the availability of a very strong prima facie case - of a standard much higher than just prima facie case, the considerations of balance of the cases totally in favour of the applicant may persuade the court to grant an interim relief though it amounts to granting the final relief itself. Of course, such would be rare and exceptional cases. The court would grant such an interim relief only if satisfied that withholding of it would prick the conscience of the court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the hearing, and at the end the court would not be able to vindicate the cause of justice. Obviously such would be rare cases accompanied by compelling circumstances, where the injury complained of is immediate and pressing and would cause extreme hardship. The conduct of the parties shall also have to be seen and the court may put the parties on such terms as may be prudent."

14. Sri Misra submits that in the instant case, where the order of the Deputy Registrar was patently without jurisdiction and was in violation of principles of natural justice whereby the appellant who was the validly elected Manager was being ousted, the interim relief ought to have been granted. He further submits that this was also urgent as the tenure of the appellant elected committee was to come to an end on 31.10.2014. The submission is that where there is a refusal to grant an interim relief which has been apparently done under the impugned order inspite of the earlier observation for consideration of grant of interim relief, a special appeal would be maintainable.

15. Sri Misra has then invited the attention of the Court to the decision in the case of S.S. Balu and Another Vs. State of Kerala and Others, to contend that the arbitrary exercise of power by the Deputy Registrar, there was substance in the allegations made by the appellant and, therefore, the Court ought to have granted an interim relief, which still continues to be denied.

16. He has then proceeded to invite the attention of the Court to a Division Bench judgment of our Court in the case of Committee of Management, A.S. Degree College Association and Another Vs. Vice-Chancellor, Choudhary Charan Singh University and Another, to urge that the Division Bench in a similar situation as the present case entertained the appeal where also a similar order had been challenged as presently involved. The Court observed therein that the refusal of the interim order should have contained some reasons, and then proceeded to grant an interim relief even though the writ petition remained pending before the learned Single Judge. He submits that the aforesaid judgment still holds the fields and consequently a special appeal against such an order was found to be maintainable which judgment should be followed.

17. He further submits that the said judgment has been referred to a larger Bench by a Co-ordinate Division Bench in the case of Ashutosh Shrotia Vs. Vice Chancellor, reported in 2008 (9) ADJ Page 538, but a mere reference does not take away the impact of the Division Bench judgment in the case of A.S. Degree College (supra). He submits that the referring order has referred to two orders whereby special appeals were dismissed in similar circumstances, but those decisions do not contain any reasons and they do not take notice of the judgment in the case of A.S. Degree College (supra), as such they are hit by the principles of per incuriam. Sri Misra urged that the ultimate test on a conspectus of the aforesaid decisions would be as to whether the rights of the appellant had been adversely affected or not and whether the impugned order refusing to grant a relief at the interim stage amounts to a judgment or not.

18. He has cited the following four decisions of the Apex Court to contend that even if a judgment has been referred to be reconsidered by a larger bench an interim order can be passed. The judgments are as follows :-

1. Mr. Ram Shiroman Mishra Vs. Mr. Vishwanath Pandey,
2. Modern Dental College and Research Centre and Others Vs. State of Madhya Pradesh and Others,
3. Modern Dental College and Research Centre and Others Vs. State of Madhya Pradesh and Others,
4. Manager, National Insurance Company Ltd. Vs. Saju P. Paul and Another, .

19. On the merits of the claim also, Sri Misra has cited the following eight judgments to contend that the order of the Deputy Registrar is without jurisdiction.

1. Committee of Management, Anjuman Kherul Almin and Another Vs. State of U.P. and Others, .
2. Committee of Management, Church City Junior High School and Another Vs. State of U.P. and Others, .
3. 2004 (3) UPLBEC Page 2603, Karya Samity and others Vs. State and others

4. 1987 UPLBEC Page 60, The Society Ganesh Baba and another Vs. Assistant Registrar

5. 1987 UPLBEC Page 333, Committee of Management and others Vs. Zila Basic Shiksha Adhikari and others

6. 1990 (1) UPLBEC Page 480, Abhay Grahst Ashram Vs. Assistant Registrar & others

7. Muslim Welfare Society, Machhlisahar and another Vs. Assistant Registrar, Firms, Societies and Chits, Varanasi and another, .

8. Committee of Management Raja Tej Singh Vidyalaya Aurandh, Mainpuri and another Vs. District Inspector of Schools, Mainpuri and others, .

20. He further submits that the person authorized to call a meeting has not called the meeting and, therefore, any such activity which has been approved of by the Deputy Registrar on the strength of such meeting is in teeth of the following decisions :-

1. 1990 UPLBEC Page 983, Om Prakash Vs. U.P. Secondary Education Service Commission

2. 2011 (4) UPLBEC Page 3538, Committee of Management Dwarika Prasad and another Vs. State of U.P.

3. Committee of Management, Church City Junior High School and Another Vs. State of U.P. and Others,

21. On the information given by Sri S.K. Kalia, learned senior counsel, that the elections have already now been held on 19.10.2014 and the contesting respondents are now in power, Dr. L.P. Misra urged that if the very existence of the fresh election is founded on an illegal order that is under challenge, and if the said order is set aside, then all consequential actions would also fall through. For this Sri Misra has relied on the following four judgments :-

1. (2001) 10 SCC Page 191, State of Kerala Vs. P.N.S.S. Karayogam & another.

2. Chairman-Cum-M.D., Coal India Ltd. and Others Vs. Ananta Saha and Others, .

3. Satyanarain Dudhani Vs. Uday Kumar Singh and Others, .

4. (2000) 9 SCC Page 480, Mahadeo Vs. G.P. Kulkarni.

22. He concluded his arguments by contending that such illegalities cannot be perpetuated by any inaction and the learned Single Judge has erroneously withheld the grant of interim relief that was urgently required in the background aforesaid. This was necessary in order to avoid any multiplicity of proceedings.

23. Replying to the said submissions, Sri Kalia has urged that firstly the appellant has been unable to show such grave urgency for grant of any interim relief or any such loss which could not have been taken care of by the learned Single

Judge after exchange of affidavits. He submits that the special appeal is clearly not maintainable and he has relied almost on the same judgments except additionally that of State of U.P. & others Vs. Kumari Renu Tiwari, 1993 (2) UPLBEC Page 1325 and a couple of more decisions which had been handed down to the Court along with the compilation, but the main argument has been advanced on the basis of the celebrated decision in the case of Shah Babu Lal Khimji (supra).

24. He further submits that so far as the Division Bench Judgment in the case of A.S. Degree College (supra) is concerned, the issue which is now sought to be raised about the maintainability of the appeal does not appear to have been argued, raised or even answered by the Division Bench. He, therefore, submits that the same is not a ratio decidendi or a binding precedent for the purpose of accepting that a special appeal would be maintainable against an order of the nature as presently involved. Sri Kalia contends that there has to be an order against which an appeal would lie inasmuch as an appeal is a creature of the statute and secondly the statutory language of Chapter VIII Rule 5 of the Allahabad Rules, 1952 clearly uses the term "judgment" and not any order or every order for maintaining an appeal. He submits that the impugned order of the learned Single Judge cannot by any stretch of imagination be termed as a "judgment" as it does not decide any matter of moment nor does it affect the rights of the parties. The issue of grant of interim relief and the exercise of discretion by the learned Single Judge is still open for consideration before the learned Single Judge himself.

25. He further submits that the issues which are there before the learned Single Judge and the other connected matters should not be heard along with this appeal in view of the decisions of the Apex Court in the case of Kishore Samrite Vs. State of U.P. and Others, .

26. Learned Standing Counsel on behalf of the State has also opposed the maintainability of the appeal on the same grounds.

27. Having heard the learned counsel for the parties and having considered the submissions raised as well as the decisions cited at the bar, the Court finds that the learned Single Judge vide order dated 24.7.2014 had indicated that the prayer for interim relief will be considered on the next date. When the matter was heard on 15.10.2014 the impugned order was passed without expressing any opinion on the prayer of interim relief with a plain and simple direction calling upon the respondent to file a counter affidavit within 10 days and a rejoinder affidavit to be filed by the writ petitioner within one week thereafter. Beyond this there is no order and it is this that makes the appellant aggrieved whereupon the ground of withholding of an interim order has been described as a decision by Dr. L.P. Misra that has resulted in grave injustice, for which he relies on the logic of the principles in such a situation as explained by the Apex Court in the case of Deo Raj (supra).

28. To our mind, the decision in the case of Shah Babu Lal Khimji (supra) has enumerated the definition of the word "judgment" and has also illustrated its conclusions with a sizeable number of situations where an order would amount to affecting the rights of the parties and also negatively where such an order does not amount to a judgment so as to maintain an appeal. For this, it would be appropriate to quote Chapter VIII of Rule 5 of the Allahabad High Court Rules, 1952 where the word "judgment" and order have been used and the interpretation whereof has been subject matter of several decisions. The same is extracted hereinunder :-

"5. Special appeal. An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of Appellate jurisdiction in respect of a decree or order made by a Court subject to the Superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of Superintendence or in the exercise of criminal jurisdiction [or in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award (a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution or (b) of the Government or any Officer or authority, made or purported to be made in the exercise or purported exercise of Appellate or Revisional Jurisdiction under any such Act] of only Judge.]

29. From a perusal of the principles laid down in the decisions above mentioned, we find that what the appellant insists is that an order which does not grant an appropriate relief at the interim stage and withholds the passing of an appropriate interim order, the same may tantamount to virtually not granting the relief to which a litigant may be legitimately entitled in such rare cases. It is the gravity of the consequences of no order being passed that is being urged to be an element deserving consideration, inferring it to be a positive indecision, amounting to a judgment, that can give rise to an appeal under Chapter VIII Rule 5 of the Rules 1952.

30. To our mind the impugned order in its plain form does not express any opinion on the merits of the claim of an interim relief. The order as it stands is no decision nor does it indicate any intention of a positive indecision. To the contrary, it is a simple order calling upon the parties to exchange affidavits in the routine course without any opinion being expressed after applying mind on the prayer for grant of interim relief. It is thus not an order which directly has any adverse impact on the appellant, but here the argument of the appellant is that there is an immediate effect, which is neither remote nor indirect, on account of the consequences of the order which was impugned before the learned Single Judge, whereby the appellant was ousted from management for a period which was in close proximity with the date of the expiry of the tenure of the Committee of Management. It may be worth repeating that the order impugned in the writ

petition is dated 8.7.2014 and the tenure of the appellant-Committee was to expire on 31.10.2014. The question is as to whether in the absence of grant of any interim relief in the aforesaid circumstances has resulted in a situation which may allow this Court to construe the order under appeal dated 15.10.2014 to be a judgment or an order for the purpose of an appeal.

31. The question that has to be primarily determined by us is, as to whether the appeal as in the present case against such an order would be competent allowing us to exercise the jurisdiction under Chapter VIII Rule 5 of the 1952 Rules. It need not be elaborated that an appeal is a creature of the statute and is neither an inherent nor a fundamental right. It is a statutory appeal offering a forum of judicial review by way of an Intra Court Appeal against a judgment or order passed by the learned Single Judge. Thus, unless there is an order that has the trappings of a judgment or a judgment, an appeal would not be maintainable, and which is the consistent legal position that has been explained in the decisions that have been cited at the bar. There has to be an order of moment adversely affecting the rights of a party touching the quality of finality or adversity.

32. The ratio in the case of Deo Raj (supra) is not a judgment interpreting the maintainability of an Intra Court Appeal and was clearly a case arising out of the rejection of an interim relief by a Division Bench of the Bombay High Court which was in appeal under Article 136 of the Constitution of India. Even though it was a matter in which fresh elections had been announced yet the Court found that the rule of discretion in such a rare case where withholding of an interim relief would render the litigation futile, the Court proceeded to grant an interim order after setting aside the order of the Division Bench of the High Court rejecting the prayer for grant of interim relief. The situation in the present case is, therefore, slightly different and therefore the aforesaid ratio can be pressed into service before the learned Single Judge for consideration for grant or otherwise of an interim relief. The issue here is can a special appeal be maintained under Chapter VIII Rule 5 of the 1952 Rules if the learned Single Judge has not passed any order at all and whether withholding of an interim relief can allow this Court to treat the appeal to be competent.

33. It is here that we have to remind ourselves of the true import of the words used in the statute, namely, Chapter VIII Rule 5 of the 1952 Rules for the purpose of assessing the competence of this appeal. The rules of interpretation, therefore, come to mind and the flexibility in the law to assess the true import of the words used in the statute up to permissible limits has to be attempted. The Apex Court judgment in the case of Shah Babu Lal Khimji (supra) has given a broader meaning with a wider import to the word "judgment", particularly, in the context of Clause 15 of the Letters Patent of the Bombay High Court. To what extent can such a liberal view be further explained, the advice and the choice in such a possible situation from one angle can be taken aid of from the liberal approach by Lord Denning in his work *The Changing Law* (1953) in the chapter

The Influence of religion in the following words :-

"The judges are too often inclined to fold their hands and blame the legislature, when really they ought to set to work and give the words a reasonable meaning, even if this does involve a departure from the letter of them. By so doing they are more likely to find the truth."

34. A further guidance to a Judge in such matters of interpretation was expressed in the following words by Lord Denning in his book *The family story* (1981 page 174) :-

" My root belief is that the proper role of a judge is to do justice between the parties before him. If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all he legitimately can do avoid that rule- or even to change it - so as to do justice in the instant case before him."

35. This view may raise a debate that may extend to the shores of judicial activism and therefore we may advert to the other jurisprudential dimensions of limitations on such liberty to courts and judges where cautions have been given right from ancient times that the law should respond to times but a concern must not give way to panic as "it is easier to be cynical than to be correct". A latin proverb forewarns us that the best law leaves the least discretion to the Judge. The great sage Aristotle (384-322 BC) in his work *The Rhetoric* has said as follows :-

"It is best, we may observe, where the laws are enacted upon right principles, that everything should, as far as possible, be determined absolutely by the laws, and as little as possible left to the discretion of the judges."

36. His opinion was explained in another way by the great thinker Horace (13 BC) where in *Carmina* he explains "A good and faithful Judge prefers what is right and not what is expedient." Following the principle that strict adherence leads to hard constructions and strained inferences, Sir Francis Bacon (1561-1626) in his *Essays "Of judicature"* in chapter LVI opined as follows :-

"Judges must beware of hard constructions and strained inferences: for there is no worse torture than the torture of the laws."

37. The temptation to which we have referred to in the opening paragraph of our judgment is not a new experience for us and the situation was explained by Lord Diplock (1907-85) in the case of *Gibson Vs. Manchester City Council*, (1979) 1 All England Reports 972 at page 976 as follows :-

"Hard cases offer a strong temptation to let them have their proverbial consequence. It is a temptation that the judicial mind must be vigilant to resist."

38. The departure in the name of progress should be viewed from another forewarning given by Sir Francis Bacon (1623) in his work "*The Argumentis Scientiarium*", where he says that when a Judge departs from the letter of the law he becomes a law breaker.

39. When it came to an interpretation by the letter of the law another exposition in a judicial pronouncement by Lord Scarman in *Duport Steels Ltd. Vs. Sirs*, (1980) I.C.R. 161 at page 189 and 190 is as follows :-

"In the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactments. In this field Parliament makes, and unmakes, the law : the judge's duty is to interpret and to apply the law, not to change it to meet the judge's idea of what justice requires.

When one is considering law in the hands of the judges, law means the body of rules and guidelines within which society requires its judges to administer justice. Legal systems differ in the width of the discretionary power granted to judges: but in developed societies limits are invariably set, beyond which the judges may not go. Justice in such societies is not left to the unguided, even if experienced, sage sitting under the spreading oak tree.

If people and Parliament come to think that the judicial power is to be confined to nothing other than the judge's sense of what is right... confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application. Society will then be ready for Parliament to cut the power of the judges. Their power to do justice will become more restricted by law than it need be, or is today."

40. The aforesaid principles, therefore, have become proverbial for the guidance of interpretation couched in the golden words that "while attempting interpretation a Court can iron out the creases but not weave a new texture." In other words the courts can "only supplement and not supplant." However, we have been able to lay hands on an exposition of law by the great American Judge Holmes (1841-1935), who drew a balance in the following words in the decision of *Southern Pacific Co. v. Jensen* (1917), 244 U.S. 205 at Page 221 :-

"I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."

41. We may like to add that the aforesaid exposition is unique as it allows the Court to fill in the gaps and to bind the cracks and interstices like mortar that is filled in a brick wall. This may be an observation relating to judicial activism but the same principle would be available for activist interpretation. It may be useful to explain that the material between cells, of all plants and animals, that binds them are called interstitial. Thus, Judges have full opportunity to live up to the ideals of a Philologist who is concerned with structures and development of languages backed up by literature and learning for the purpose of interpretation, and involved in the scientific study of the true meaning and grammatical changes in the formation of words and sentences. The above quoted extract can be manifested by this exercise as it is necessary to emphasize the importance of the essential element of bondage to keep the law intact through interpretation.

42. Keeping in view all the said principles the question is whether withholding of

the passing of an interim order would amount to a judgment for maintaining an appeal under Chapter VIII Rule 5 of the 1952 Rules. For this, we proceed to consider the meaning of the words that constitute a judgment or an order bordering judgment. The background in the case of the Shah Babu Lal Khimji (*supra*) has allowed a wider connotation to the word "judgment" as against that used in Section 2(9) of the Civil Procedure Code read with Order 20 C.P.C. Thus, we may attempt to understand the meaning of the said words used in the Rules in a more etymological way. We may observe that an indecision is essentially not a decision at all. A decision is a positive firm act with a result or a conclusion putting an end to uncertainty. It is this decisiveness which is the true characteristic of a decision. A decision is an estimated opinion that has the impression of an authoritative statement.

43. Needless to say that a decision after a due consideration is a judgment, and it is a judicial pronouncement when delivered by a Court of competent jurisdiction presided over by a Judge, as known in legal circles. This judgment is a determination or a verdict settling something. Qualitatively it has in its fold an element of resoluteness. It discloses a resolve which in turn is a disclosure of the mind being applied and a will being expressed. It is thus something explicit and unhidden.

44. There may be a situation where in order to avoid consequences, for whatever reason, a decision is taken not to decide or take a decision. Here also there is a decision which may be described as an imbalanced situation, but can the same be inferred where some matter is left altogether unattended? This can be intentional out of some prejudice or even casually unintentional. There is however another category of situations which is very common as in the present case where it is routine in procedure and is otherwise compulsory or expedient in the interest of justice to postpone or defer passing of an order for having a grip of facts and law, dependant upon cross-pleadings of the adversaries. The elements of observance of the principles of natural justice are attracted and have to be adhered. The court, therefore, has to decipher the exact situation prevailing in a particular matter before it proceeds to apply the principles attracted as each case may have different facts. However, in such types of cases, ordinarily, it would be not wrong to presume that there is no decision amounting to a judgment.

45. It is a different matter that the Court having jurisdiction must take care of the principles explained in *Deoraj's case* (*supra*) and pass an order as it may be necessary to preserve the state of affairs and not allow any disadvantage to be caused to any party pending litigation provided there is a strong and genuine *prima facie* case coupled with balance of convenience and irreparable injury. This may be required in a given case where an irreversible or irreparable injury is likely to be caused. Such facts have been alleged in the present case where the tenure of the appellant, who has been ousted was to expire on 31.10.2014. In a dispute of control over management, as presently involved, there may be a

situation that in the absence of an interim protection, the dispute itself may be rendered infructuous or may otherwise multiply the proceedings relating to a challenge to the consequential events. It is not that we are not conscious of such situations but can that be a ground to entertain an appeal?

46. It is, in our opinion, a matter of discretion for the trial judge to realise the gravity of a claim and pass orders while balancing the need of compulsion of procedure with that of any imminent situation that might manifest in injustice. The exercise of discretion is one thing but the jurisdiction to assume such exercise is another. The forum of an appeal for this exercise is available only when the judgment or order of the inferior court is available and appealable. The learned Single Judge is not a court subordinate to us. We cannot usurp the authority to exercise such discretion that is clearly subject to maintainability of an appeal before us. The different tiers of judicial review are available according to their placement and arrangement as per the statutory provisions under the 1952 Rules.

47. It is also trite to remember that the interpretation of the words used in the statute cannot be construed so as to accommodate all possible pains that are felt. It is not a common medicine for every disease and is not a remedy for every wrong. If the statute requires an appeal against a judgment then in view of the law as referred to hereinabove, the meaning has to be restricted in its operation and cannot be widened so as to cause violence to itself. The scope of expansion is to be legally sound and should appear to be lawfully predictable. We cannot be accused of not reawakening ourselves from our alleged prejudices, as we have to give a plain meaning to the words used in the statute to the extent which has been interpreted by the Apex Court as indicated above.

48. As in the present case, the order impugned on the aforesaid parameters is not a decision or an order so as to fall within the meaning of the word judgment. The case being adjourned with a direction to exchange affidavits causing a delay on account of this processual compulsory requirement, cannot be inferred to mean a refusal to pass an order. There is nothing hidden or undecipherable so as to construe it as a decision amounting to a judgment. There is, therefore, no mystery that requires any probe or discovery to unravel more than what is actually written and clearly intended. It is not possible to read between the lines when there is not even a remote exercise of discretion to make out a ground of appeal. Thus, in our considered opinion, the impugned order dated 15.10.2014 does not fall within the meaning of the word "judgment" or an order as contemplated in Chapter VIII Rule 5 of the 1952 Rules so as to make this appeal competent against such an order.

49. Yet at the same time we may put on record that it does not take away the right of the appellant to press his interim application on the principles that have been propounded in Deo Raj's case (supra). To put it simple, the proceedings before the learned Single Judge where it is alleged that the passing of an interim order has been withheld by itself in view of the terminology of the impugned

order, may not be a ground for maintaining an appeal, but at the same time it may be a ground for pressing for an interim relief or disposal of the entire dispute on issues of jurisdiction or violation of principles of natural justice before the learned Single Judge in the background of the case where the appellant was ousted and was deprived from functioning till the end of his tenure.

50. We would have considered the matter arising out of the reference in the case of A.S. Degree College (supra) made in the case of Ashutosh Shrotia (supra), but on a closure scrutiny we find that the ratio of the decision in the case of A.S. Degree College (supra) is precisely on the facts of that case holding that not giving any reason on the interim order being refused impelled the court to grant relief. We, however, find from paragraphs 9, 10 and 11 of the decision that no such ratio of maintaining an appeal against such an order was expounded.

51. The said paragraphs 9, 10 and 11 are extracted hereinunder :-

"9. Affidavits have been filed and the week when the matter is due to be listed is just one week away. At this stage, if the Court of appeal interferes then the Single Judge's discretion might be interfered with.

10. We are of the respectful opinion that since the matter was being adjourned for a month and there were repeated requests for passing of an interim order made by the learned Senior Advocate Mr. Singh himself in the Court below on more days than one, the refusal of the interim order should have contained some reasons.

11. In any event, since the matter has been argued out before us, we have to give some reasons."

52. The Division Bench in the case of Ashutosh Shrotia (supra) noticed the difficulty that is faced when interim orders are not passed at the stage of admission and the long pendency of the cases and difficulty in listing and then after considering two other orders dismissing the special appeals referred the matter to a larger bench precisely raising the same issue as involved herein. The learned Judges have indicated circumstances as mentioned above, but the said difficulty faced no doubt being a larger truth, cannot be a ground to restate the law on the present facts. The same logic would be equally attracted where interim orders are passed simply staying the operation of an impugned order, and the stay vacation prayer of the adversely affected party is not heard for a length of time. These situations by themselves may not constitute a judgment for maintaining Special Appeals. But where the order affects rights and amounts to deciding a matter of moment, an appeal cannot be refused to be entertained as explained in para 82 of Shah Babu Lal Khimji's case (supra) extracted hereinunder :-

"82. Thus, examining the tests laid down by Sir Richard Couch, C.J., it seems to us that the view taken by the learned Chief Justice appears to place a very strict and narrow interpretation on the word "judgment" under which orders deciding

matters of moment or valuable right of the parties without finally deciding the suit may not amount to a judgment and hence, not appealable. In giving this interpretation the learned Chief Justice was guided by two considerations:

(1) that a liberal interpretation may allow vexed litigants to carry any discretionary order of the Trial Court in appeal; and

(2) that it would confer more extensive right to appeal against the Judge sitting on the original side than the right of appeal given to a Trial Judge sitting in the mofussil.

We are doubtless impressed with the argument of the Chief Justice and fully appreciate the force of the reasons given by him but we feel that despite those considerations the law must be interpreted as it stands and a court is not justified in interpreting a legal term which amounts to a complete distortion of the word "judgment" so as to deny appeals even against unjust orders to litigants having genuine grievances so as to make them scapegoats in the garb of protecting vexatious appeals. In such cases, a just balance must be struck so as to advance the object of the statute and give the desired relief to the litigants, if possible. Although it is true that this decision is practically the locus classicus so far as the Calcutta High court is concerned and has been consistently followed by later decisions at the same time it cannot be denied that in a number of cases the conscience of the Judges was so shocked that they tried to whittle down or soften the rigours of this decision so much so that in one case the observations of the Chief Justice were not only not followed but were described as antiquated and in other cases the Judges strongly expressed themselves that the High court should give up its fondness to stick to the principles laid down by the learned Chief Justice. It is not necessary for us to burden this judgment with later decisions of the Calcutta High court in trying to comment on the correctness of the principles laid down by Sir Couch, C.J. but a few instances may be quite revealing."

53. The practical inconvenience complained of by the members of the bar of matters not being taken up expeditiously and delay may exist, and with the huge filing, backlog of pendency as well as unnecessary and deliberate adjournments, the situation is likely not to improve in the near future. But can that be a ground for appeals to be filed? The answer, so long as Chapter VIII Rule 5 as it stands today, is that such a situation cannot be described by any stretch of imagination to be a "judgment" and therefore an appeal to that effect would not lie to remedy this situation. If this reasoning is permitted, there would be a floodgate of as many appeals as the number of petitions, if not more.

54. The question where such orders fall within the trappings of a judgment or not within the meaning of Chapter VIII Rule 5 of the 1952 Rules, therefore, is still a matter of reference before a larger bench as all exhaustive situations have not been dealt with so far. It appears that initially the said reference was not accepted by the then Hon'ble Chief Justice (Hon'ble Mr. Justice H.L. Gokhale),

but later on the then Hon''ble Chief Justice Mr. Justice F.I. Rebello constituted a three Judges Bench of Hon''ble Mr. Justice R.K. Agarwal, Hon''ble Mr. Justice Rakesh Tiwari and Hon''ble Mr. Justice Rajesh Chandra to answer the questions raised in the reference aforesaid. It appears that the reference has not been answered till date and the matter is still pending.

55. Dr. L.P. Misra states that mere pendency of a reference cannot in any way be an impediment for grant of an interim relief by this Court in the present case, inasmuch as in view of the decision relied on by him, interim orders have been granted by the Apex Court in several cases pending references before larger benches. He further submits that the reference order in the case of Ashutosh Shrotia (supra) takes notice of two judgments of Special Appeal No. 887 and 1041 of 2008 which are no judgments in the eyes of law nor do they amount to any ratio decidendi. He further submits that they have not even taken notice of the earlier decision in the case of A.S. Degree College (supra) and, therefore, there was no occasion for reference of the decision in the case of A.S. Degree College (supra) which clearly holds the field.

56. We would not like to enter into the correctness or otherwise of the referring order but suffice it to say that we have already found that the case in A.S. Degree College (supra) does not directly answer the question raised herein even though it has granted an interim relief in a similar situation without there being any decision on the issue of maintainability of an appeal. Since the matter is already pending consideration before a larger bench, we refrain from expressing any opinion on the correctness or otherwise of the reference raised in Ashutosh Shrotia's case.

57. In view of the conclusions drawn hereinabove we find it appropriate that this order be placed before Hon''ble the Chief Justice to bring to his notice the pendency of the aforesaid reference and for an early disposal of the matter in case it is required to explain the law further. We also make a request to the learned Single Judge to either dispose of the interim application or for that matter may finally hear out the petition as the rival parties by now must have exchanged their affidavits in view of the time granted by the learned Single Judge on 15.10.2014. All the writ petitions shall now be listed before the learned Single Judge, if possible, on 10.11.2014.

58. With the aforesaid observations, having found the appeal to be incompetent, we consign the same to records.