

(1960) 03 AHC CK 0044

In the Allahabad High Court

Case No : Special Appeal No. 48 of 1959

Standard Glass Beads Factory and Another

APPELLANT

Vs

Shri Dhar and Others

RESPONDENT

Date of Decision : 16-03-1960

Acts Referred:

Arbitration Act, 1940 — Section 19
Civil Procedure Code, 1882 — Section 104, 105, 107, 108, 109
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, Order 41 Rule 1, Order 41 Rule 23, 109, 2
Companies Act, 1882 — Section 169, 214
Constitution of India, 1950 — Article 132, 133, 133(1), 134, 136
Government of India Act, 1935 — Section 205, 205(1), 208
Income Tax Act, 1918 — Section 51
Limitation Act, 1963 — Section 5
Patents and Designs Act, 1911 — Section 10, 29, 29(1)
Supreme Court of Judicature (Consolidation) Rules — Rule 5

Citation : AIR 1960 All 692 : (1960) 30 AWR 366 : (1960) 30 AWR 303

Hon'ble Judges : O.H. Mootham, C.J.;Raghubar Dayal, J;A.P. Srivastava, J

Bench : Full Bench

Advocate : Ambika Prasad and S.S. Chandwaria, for the Appellant; Jagdish Swarup, Hari Swarup and D.P. Agarwala, for the Respondent

Final Decision : Disposed Of

Judgement

Mootham, C.J.—The question which has been referred to this Bench is whether an order of a learned Judge of this Court dismissing an appeal against an order granting a temporary injunction is a judgment within the meaning of Clause 10 of the Letters Patent.

2. The meaning which should be given to the word "judgment" in Clause 10 of the Letters Patent of this Court and in the corresponding Clauses of the Letters Patent of the other High Courts has engaged the minds of Judges for close on a hundred years, and has given rise to a divergence of opinion which can now only be resolved by the Supreme Court. The question has been considered in a very

large number of cases many of which have been referred to in the judgment of my brother Srivastava. Basically there are three views as to what constitutes a "judgment". A decision according to one view will amount to a judgment if it determines some right or liability affecting the merits of the dispute between the parties; according to the second, the essential requirement, is that it puts an end to the proceedings so far as the Court in which those proceedings are pending is concerned; and, according to the third view, a judgment means a decree which determines the rights of the parties in all matters in issue in the suit; the authorities are *Justices of the Peace for Calcutta v. Oriental Gas Co. Ltd.* 8 BLR 433, *Tuljaram Row v. Alaggappa Chettiar* ILR 35 Mad 1 and *Dayabhai v. Murugappa Chettiar* ILR 13 Rang 457 : (AIR 1935 Rang 267).

3. I do not think it necessary in this case to hazard a further definition of the word "judgment". It is generally accepted that "judgment" in Clause 10 includes a "final judgment", a "preliminary judgment" and an "interlocutory judgment", all of which expressions are used in the Letters Patent. It is also clear that the term "judgment" does not necessarily exclude an order. The Privy Council held in *Hurish Chunder v. Kali Sundari Debia* 10 Ind App 4 (PC) that an order refusing to transmit for execution an order of the Privy Council was a judgment within the meaning of the corresponding Clause (Clause 15) of the Letters Patent of the Calcutta High Court; and the Supreme Court in *Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others*, has expressed the opinion that an order directing a plaint to be rejected or taken off the file and an order rescinding leave granted under Clause 12 of the Letters Patent of the Calcutta High Court are judgments within the meaning of Clause 15, A Full Bench of this Court in *Sital Din and Others Vs. Annant Ram* was of the opinion that the word "judgment" should not be read in a restricted sense and would include a final order.

4. Now the order the nature of which we have to determine is an order which finally determines the right of a party to a specific temporary relief. It stems from a suit and its purpose is to make the judgment, if obtained, fully effective. It is neither an order which merely regulates procedure nor an order made on an application which is merely a step towards obtaining a final adjudication. Such an order is in my opinion neither a final judgment nor a preliminary judgment which had been assumed to mean (and I think correctly) a judgment which determines the right to the relief claimed but which requires further proceedings to be taken before the suit or appeal is finally disposed of.

5. I think however that the order in question should be held to be an interlocutory judgment. It has been generally assumed that a preliminary judgment and an interlocutory judgment are the same. With respect, I doubt whether this assumption is justified. The use of both terms in the Letters Patent suggests that they have different meanings although the meanings may overlap. In *Black on Judgments* cited by Krishnaswamy Ayyar, J., in his illuminating judgment in ILR 35 Mad I the learned author says, "A 'judgment' which is not final is called 'interlocutory', i.e. an 'interlocutory judgment' is one which

determines some preliminary or subordinate point or plea or settles some step, question or default arising in the progress of the cause but does not adjudicate the ultimate rights of the parties or finally put the case out of Court.

Thus a judgment or order passed upon any provisional or accessory claim or contention is in general merely "interlocutory" though it may finally dispose of that particular matter". In Mozley and Whitley's Law Dictionary an interlocutory judgment is defined as "a judgment in an action at law, given upon some defence, proceeding, or default, which is only intermediate, and does not finally determine or complete the action".

6. Little assistance is to be obtained from the English cases for the broad distinction which is made in English law is between final judgments and orders on the one hand and interlocutory judgments and orders on the other. Some light is however thrown I think on the problem by Clause (1) (i) of Section 31 of the Supreme Court of Judicature (Consolidation) Act, 1925, (15 and 16 Geo. V, Ch. 76) which provides that an appeal shall lie, without leave, to the Court of Appeal from an interlocutory order or interlocutory judgment made or given by a Judge in certain cases including, inter alia,

"(ii) where an injunction or the appointment of a receiver is granted or refused

(vi) In such other cases, to be prescribed as are in the opinion of the authority having power to make rules of Court of the nature of final decisions." These provisions would appear to indicate that the case of the grant or refusal of an interim injunction, whether it amounts to an interlocutory order or an interlocutory judgment, is in the nature of a final decision.

7. Some difficulty, I venture to think, has arisen on account of the fact that the term "interlocutory" has been applied generally to orders made on two kinds of applications, namely those applications which are made for the purpose of regulating the procedure in a suit or as a step towards obtaining a final decision and applications which are ancillary or accessory to the suit and are made for quite a different purpose, namely to render the judgment effective if it should be obtained. An order granting or refusing a temporary injunction falls within the latter class and in my view it is a judgment within the meaning of Clause 10. This is in accordance with the opinion of Sir Arnold White, C. J., in *Tuljaram Row's* case ILR 35 Mad 1 ;

"I think, too, an order on an independent proceeding which is ancillary to the suit (not instituted as a step towards judgment but with a view to render the judgment effective if obtained) e. g. an order on an application for an interim injunction or for the appointment of a receiver is a judgment within the meaning of the Clause".

In the same case Krishnaswami Ayyar, J. said (at page 14):

"The question still remains whether orders in incidental proceedings for attachment or arrest before judgment, for a temporary injunction or for the

appointment of a receiver are judgment within the meaning of the term as used in Clause 15. Such proceedings are not natural steps in the determination of the cause. But they are remedies, though provisional in their character, and the judicial determination of those proceedings may well be deemed to be analogous to the disposal of original petitions which determines the rights of parties. An appeal was specially provided from such orders even in the the Code of 1859 and the decisions in such cases may well be treated as interlocutory judgments."

8. Applying the test laid down in *Tuljaram Row*'s case ILR 35 Mad 1 the Madras High Court has held that an order granting an interim injunction is a judgment: *Sri Raja Vallanki Venkata Chinnayamma Rao Bahadur Zamindarini Garu Vs. Sri Raja Kotagiri Subbamma Rao Bahadur Zamindarini Garu*, and notwithstanding the earlier view of the Calcutta High Court Sir George Rankin, C J. in *Baidyanath Sein Vs. Rajendranath Sein and Others*, had "no doubt at all" that an order refusing to discharge a receiver appointed in a partition suit after probate had been granted was a judgment and therefore appealable. A Full Bench of the same Court, in another case, *Mt. Brij Coomaree v. Ramrick Dass*, 5 CWN 781 held that an order refusing to stay the issue of probate and to discharge an interim receiver in a probate action, was a judgment.

9. It is not, I think, possible to reconcile the recent decisions of this Court. In the Full Bench case of *Kunwar Sen Vs. Emperor*, the Court held that an order dismissing an application u/s 5 of the Indian Limitation Act was not a judgment, principally on the ground that such an order does not involve an automatic dismissal of the appeal which would in fact be dismissed by a separate and subsequent order. The Court considered that the test laid down by White, C. J., in ILR 35 Mad 1 was expressed in language which was too wide, but it would appear from the quotation from that judgment which immediately precedes this observation that the Court was referring to the general statement that an adjudication which puts an end to the suit or proceedings, so far as the Court before which that, suit or proceeding is pending is concerned, is a judgment; the Court did not refer to the further opinion of the learned Chief Justice that an order on a proceeding which is ancillary to the suit may be a judgment.

The Court in several cases has taken the view that a judgment means an adjudication which conclusively determines the rights of the parties (See *The Jwala Bank Ltd. Vs. Shitla Parshad Singh*, and *Rama Shankar Vs. Official Liquidator, Jwala Bank Ltd.*, and on this ground it held in *Vishnu Pratap and Others Vs. Sm. Revati Devi and Others*, that an order appointing an interim receiver is not a judgment. On the other hand it has held that an order declining to set aside an abatement *Dr. Sadiq Ali Vs. Anwar Ali and Others*, and an order of remand made under Order 41, Rule 23, *Ishwari Prasad Vs. Sheotahal Rai*, are judgments.

It has held that an order determining who has a right to be brought on the record on the death of an appellant or a respondent may amount to a judgment if the decision of that question determines the appeal itself *Gulzari Lal and*

Others Vs. Sm. Sarju Bai and Another, and that an order dismissing a petition under Article 226 of the Constitution, where the petitioner had an alternative remedy, is a judgment on the ground that the order decided the right of the petitioner to file a petition under that Article and put an end to the proceedings started on that petition, Nanak Chand and Others Vs. State of Uttar Pradesh and Others, , In the recent case of Bishambhar Nath v. Suraj Kali 1959 All LJ 313 the Court applied the Madras test and held that an order granting an interim injunction was a judgment and accordingly appealable.

10. The grant or refusal of an interim injunction may cause substantial loss to a party adversely affected by the order; and the refusal to grant this provisional relief may result in the suit becoming largely infructuous. Such an order if made by a subordinate court is appealable under Order 43 Rule 1 Clause(r) C. P.C.; it is, as we have seen an order from which in England an appeal lies, without leave, to the Court of Appeal. If the narrower view of the meaning of the word "judgment" be correct such an order when made by a Judge of a High Court in India exercising original jurisdiction would not be appealable. In the present state of the authorities I am of the view that the better opinion is that such an order is a judgment and consequently appealable under Clause 10 of the Letters patent. I think, with respect, that the case of 1959 All LJ 313 was rightly decided. I would accordingly answer the question referred to us in the affirmative.

Dayal, J.

11. I agree with the opinion of My Lord the Chief Justice and have nothing to add.

Srivastava, J.

12. I am grateful to my Lord the Chief Justice for making available to me in advance the judgment he has prepared in this reference. I have read it with the care and consideration it deserves. I consider it my misfortune that in spite of my best efforts I have not been able to persuade myself to share his opinion.

12a. The question referred, to us was : "Whether an order granting an interim injunction is a "judgment" within the meaning of Clause X of the Letters Patent of the former High Court."

13. It would in my opinion be more accurate if the question is reformulated as follows :

"Whether an order of a single Judge of this Court dismissing an appeal filed under Order XLIII, Rule 1 (r) C. P. C. issuing a temporary injunction is a judgment within the meaning of Clause 10 of the Letters Patent of the High Court."

14. The circumstances in which the question has arisen are not in dispute. The respondents filed a suit against the appellants u/s 29 of the Indian Patents and Designs Act. The suit was filed in the Court of the District Judge and the prayer was to restrain the appellants and their servants and agents by a permanent

injunction from infringing certain patents relating to the manufacture of glass beads registered in the name of the respondents. The suit was contested. The appellants denied the respondent's right to the patents and claimed their revocation. An application was filed by the respondents claiming a temporary injunction in the terms in which the permanent injunction had been claimed.

The District Judge granted the temporary injunction and restrained the appellants from manufacturing, selling or using glass beads in infringement of the respondents' patents. Against that order a first appeal from order was filed in, this Court under Order XLIII, Rule 1 (r) C. P. C. It was heard by Mr. Justice Vishnu Datta. He dismissed the appeal and maintained the order. On the same date on which the learned District Judge issued the temporary injunction he passed another order u/s 29(1) of the Indian Patents and Designs Act directing that the suit be transferred to the High Court for decision.

The suit is therefore pending in this Court. Against the order of Mr. Justice Vishnu Datta dismissing the appeal the appellants filed a Special Appeal under Ch. VIII, Rule 5 of the Rules of Court. When the hearing of the special appeal started a preliminary objection was raised on behalf of the respondents that the appeal was not maintainable. Finding that there was considerable difference of opinion in the several High Courts on the question "What is a judgment within the meaning of the Letters Patent?" and that the decisions of this Court too were not uniform on the point the Division Bench referred the question to a Full Bench. That is how the question has come up before us.

15. Originally the Allahabad High Court was constituted under a Letters Patent of Her Majesty the Queen of England and granted on the 17th of March 1866. The powers that were being conferred on the High Court and the various jurisdiction which the High Court was to exercise were mentioned in the various Clauses of the Letters Patent. Clause 10 provided for appeals to the High Court from decisions of single Judges, while Clause 30 provided for appeals from the decisions of the High Court to the Privy Council. Clause 10 corresponds to Clause 10 of the Letters Patent of the Patna High Court and to Clause 15 of the Letters Patent of the Calcutta, Madras and Bombay High Courts. Clause 30 of the Letters Patent corresponds to Clause 39 of those of the Calcutta, Madras and Bombay High Courts.

16. In the Rules of Court that were last framed in the year 1952 R. 5 of Ch. VIII was based on Clause 10 of the Letters Patent and substantially incorporated the provisions of that Clause.

17. Under Clause 10 of the Letters Patent as well as under Rule 5 of Ch. VIII of the Rules of Court an appeal can lie to the High Court from the decision of one Judge of the Court or one Judge of any Division Court only if the decision is a "judgment". For appeal to the Privy Council as of right the decision had to be a "final judgment, decree or order". Appeal to that body could, however, be preferred "with the leave of the Court" against a preliminary or interlocutory

judgment, decree or order also.

18. The terms "judgment", "final judgment", "preliminary judgment", or "interlocutory judgment" were, however, not defined in the Letters Patent. The Clause of the Letters Patent are not the only provisions of law in which the words "judgment, decree and order" have been used. We find them employed in the C. P. C., as well as in the Constitution Acts.

19. In the C. P. C., of 1882 "judgment", "decree" and "order" were defined in Section 2. According to the definitions given there "decree" means

"the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal." An "order" means:

"the formal expression of any decision of a Civil Court which is not a "decree" as defined in the Code."

"Judgment" is defined as meaning

"the statement given by the Judge of the grounds of a decree or order."

Chapter XLIII of the Code related to appeals from orders and Section 588 of that Chapter provided that! an appeal would lie only from the specific orders mentioned in that section and from no other, The last sentence of Section 588 provided that the orders passed in appeals under the section were to be final. Chapter LXV which related to appeals to the Queen in Council defined "decree" in Section 594. This definition was slightly different from the definition given in Section 2 of the Code and was meant for that Chapter only. According to that definition the expression "decree" included "judgment and order" also. u/s 595 of the same Chapter an appeal could lie to Her Majesty in Council from any final decree passed by the High Court or in the exercise of its original civil jurisdiction in its final appellate jurisdiction but from any other decree it could lie only when the case was certified as a fit one for appeal to the Privy Council.

20. In the C. P. C. of 1908, as originally enacted, "decree", "order" and "judgment" were defined in Section 2. "Decree" meant

"the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final."

The definitions of "judgment" and "order" were the same as in the Code of 1882. Section 104 provided for appeals against orders mentioned in that section and further laid down that no other orders shall be appealable. Unlike Section 588 of the Code of 1882, however, the prohibition was not absolute but was subject to the condition:

"save as otherwise expressly provided in the body of this Code or by any law for

the time being in force."

Section 105 prohibited second appeals from orders. Order XLIII, Rule 1 contained the list of orders which were appealable u/s 104, Sections 107 to 112 related to appeals to His Majesty. In the Code of 1908 there was no special definition of the term "decree" so far as appeals to His Majesty were concerned. The definition of the term "decree" as given in Section 2 was to apply with reference to those appeals also, Section 109 provided for appeals to the King in Council from decrees or final orders passed by the High Court on appeal or in the exercise of original civil jurisdiction and also from such decrees and final orders passed by any other Court of final appellate jurisdiction. The word "judgment" was not used in any of the sections dealing with appeals to His Majesty in Council.

21. In the Government of India Act of 1935 Section 205(1) referred to an appeal to the Federal Court from any "judgment, decree or final order". Section 208 which related to appeals from the Federal Court to His Majesty in Council used the words "decision and judgment" but in Section 209 again the words "judgment, decree or order" were used.

22. In the Constitution the words used in Arts. 132 and 133 are "judgment, decree or final order", while those in Article 134 are "judgment, final order or sentence". In Article 136 the words employed are "judgment, decree, determination, sentence, or order". There is an Explanation appended to Article 132 providing that for the purpose of that Article the expression "final order" includes an order deciding an issue which if decided in favour of the appellant would be sufficient for the final disposal of the case. The explanation has been expressly made applicable to Article 132 only but may be utilised for ascertaining the meaning of the term "final order" in the other articles also.

23. As a result of the coming into force of the Constitution Section 109 C. P. C., of 1908 has been amended and instead of the words "decree or final order" which were originally used in the section we now find the words "judgment, decree or final order" used. Of course, the Supreme Court has been substituted for His Majesty in Council.

24. The contention raised on behalf of the respondents in the present case being that the present special appeal is not maintainable because the decision appealed against is not a "judgment" within the meaning of Clause 10 of the Letters Patent or of Rule 5 of Ch. 8 of the Rules of Court, what we have to interpret is the word "judgment" used in, those two provisions. I have, however, referred to the other provisions of law in which the words "judgment, decree and order have been used as it is possible that the interpretation put on those words in connection with those other provisions of law may be helpful in determining the exact meaning that is to be attributed to the word "judgment" in Clause 10 of the Letters Patent.

25. It may be noted at the outset that the Letters Patent was drafted in England in the year 1866. It is therefore but natural that the words used by the

draftsmen in it were used in the sense in which they were in legal use in England at the time. What then was that sense?

25a. According to Wharton's Law Lexicon a "judgment" is

"a judicial determination putting an end to the action by any award or redress to one party or discharge of the other as the case may be." According to Stroud's Judicial Dictionary apart from the definition of the term "judgment" as given in the various enactments in which the term has been defined it means

"a sentence of the law pronounced by the Court upon the matter contained in the record, and the decision must be one obtained in Action."

26. In Daniel's "Chancery Practice", Vol. I, p. 625 (quoted in ILR 35 Mad 1 at p. 10) "judgment" is defined as

"a sentence or order of the Court, pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the cause or matter. It is either interlocutory or final."

27. Black in his book on "Judgments" (as quoted in the same decision) defined a judgment as

"the determination or sentence of the law pronounced by a competent Judge or Court as the result of an action or proceeding instituted in such Court affirming that upon the matters submitted for decision a legal duty or liability does or does not exist. An interlocutory judgment is one which determines some preliminary or subordinate point or plea or settles some step, question or default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties or finally put the case out of Court."

28. It is common in England to come across the expression "judgment for the plaintiff" or judgment for the defendant", the word being used in the sense we use the word "decree". The forms of a judgment given in the Annual Practice are similar to the forms of decree given in the C. P. C. According to *Ex parte, Chinery* 1884 12 QBD 342 a judgment is

"a decision obtained in an action, and any other decision is an order."

A "final judgment" according to the same case is

"a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established."

29. The word "judgment" was thus used in England not to mean "reasons in support of a decision" the meaning given to it in the C. P. C., but to signify the decision itself. It was in that sense that the word was presumably used in the Letters Patent. All kinds of, decisions are, however, given in a suit or proceeding from the date of its institution to the date of its termination. It is obvious that it could not have been the intention to include all these decisions in the term "judgment" and make them, appealable irrespective of their nature or

importance. If a decision amounts to a decree as defined in the C. P. C., it would certainly amount to a judgment within the meaning of the Letters Patent.

The difficulty arises in respect of decisions which are not decrees but are still decisions regarding some important point which may affect the parties seriously. The question which of such decisions are included in the term "judgment" has arisen for consideration in a large number of cases and various learned Judges have attempted to formulate tests which must be answered before a decision can be considered to be a "judgment" for the purposes of appeal.

30. Without attempting an exhaustive examination of all the numerous decisions on the point I shall only indicate below some of the lines of reasoning adopted in the more important of those decisions.

31. In some of the earlier cases of this Court when the question arose whether a decision sought to be appealed against was a judgment or not the first thing that was considered was whether it was a decision at all. Thus in *Ghasi Ram v. Mt. Muraj Begam* ILR All 31 (FB), an application was made to set aside a sale held in the execution of a decree on the ground of an alleged irregularity. The Subordinate Judge rejected the application holding that no irregularity had been proved. An appeal against the decision came before Stuart, C. J., and Spankie, J. The former wanted to remand the case for further evidence as to whether the irregularity had been committed. The latter thought that the evidence was sufficient and was in favour of dismissing the appeal.

The decree holder appealed to the Full Court against the order of remand passed by Stuart, C. J., and the question arose whether the appeal was entertainable under Clause 10 of the Letters Patent. It was held by a Full Court that as Stuart, C. J., had not decided the appeal there was no decision which could amount to a judgment and be appealed against. It appears to have been the view; of the learned Judges that the appeal could be entertained only if what was sought to be assailed had decided the appeal one way or the other.

32. If there was such a decision the test for determining the maintainability of the appeal was considered to be whether the order was one of the orders mentioned in Section 588 C. P. C., of 1882. It was considered that Clause 10 of the Letters Patent was subject to the provisions of the C. P. C. and as the Code expressly prohibited a second appeal from an order appealable u/s 588 such an appeal could not be entertained even under the Letters Patent. On this ground appeals were rejected against an order refusing an application for leave to appeal in forma pauperis (*Banno Bibi v. Mehdi Husain* ILR All 375), against an order amending a decree (*Muhammad Naim-Ul-lah Khan v. Insan-Ullah Khan* ILR All 226 (FB)) and against an order dismissing an appeal for default (*Pokhar Singh v. Gopal Singh* ILR All 361; *Mansab Ali v. Nihal Chand* ILR All 359) against an order allowing an objection to attachment and sale on the ground that it contravened S, 266 of the Code (*Bansidhar v. Gulab Kuar* ILR All 443), and against an order passed in an appeal from an order (*Piari Lal v. Madan Lal* ILR All 191 : (AIR 1917

All 325 (2)). In ILR All 226 it will be observed, Sir John Edge incidentally remarked that in his opinion "the judgment referred to in Section 10 of the Letters Patent is the express decision of a Judge of the Court which leads up to and originates an order or decree."

33. The basis of the reasoning of this line of decisions was Section 588 C. P. C. of 1882. That, section was however replaced in 1908 by Section 104 C. P. C. of that year. In the new section the provision prohibiting a second appeal from order was made subject to "any other law for the time being in force" and that expression was interpreted as including Clause 10 of the Letters Patent. After the enforcement of the Code of 1908, therefore, the basis of this line of decisions no longer held good; L. Ram Sarup Vs. Mt. Kaniz Ummehani, and AIR 1921 80 (Privy Council) .

34. In 1895 case of Wall v. Howard ILR All 438 was decided by Mr. Justice Burkitt and Mr. Justice Aikman. That was an appeal against an order made u/s 169 of the Companies Act of 1882 (Act VI of 1882) refusing to extend time for the filing of an appeal against the dismissal of a petition filed u/s 214 of the Act The question arose whether the appeal was entertainable under Clause 10 of the Letters Patent, and the ground on which it was held to be not entertainable was given by Burkitt, J., with whom Aikman, J. agreed, in these words :

"I am of opinion that no appeal lies in the present case, firstly, because the order under appeal does not decide any question at issue in the case or any right of either party, and secondly, because the order, from which no appeal is expressly given, was passed in the exercise of his judicial discretion by the learned Judge in a matter in which, as representing the whole Court, he had power to decide whether the applicants had made out sufficient cause to his satisfaction for their omission to give notice of their appeal within the time limited by law. An order such as that passed in the present case is, I hold, not a "judgment" within the meaning of Section 10 of the Letters Patent."

The learned Judges were thus of opinion that before a decision could be considered a "judgment" it should (1) decide any question at issue in the case or any right of the parties and (2) should not be an order passed in the exercise of the Judge's discretionary powers. Instances in which the second test was applied are Krishna Reddy v. Thanikachala Mudali AIR 1924 Mad 90 ; Baba Sah v. Purushottama Sah AIR 1925 Mad 167 and Kunwar Sen Vs. Emperor, .

35. The importance of the first characteristic cannot be disputed. It is but natural to expect that a decision which is appealable must relate to some issue or right in controversy between the parties. There, however appears to be little justification for excluding a decision from the category of "judgment" simply because it was given in the exercise of the discretion of the Court. The appellate Court may be reluctant to interfere with the manner in which discretion had been exercised in a particular case. But the fact that the matter was discretionary cannot be allowed to determine the appealability of the decision.

36. In the case of 8 Beng LR 433 the Calcutta High Court had at the instance of the plain tiff in the exercise of its original civil jurisdiction issued a writ of mandamus calling upon the defendants to do certain things or to show cause to the contrary. The defendants sought to appeal against the order under Clause 15 of the Letters Patent of the Court. A preliminary objection was taken that the order did not amount to a "judgment" and was on that account not appealable. The objection was up held. The main ground on which Richard Couch, C. J., who delivered the judgment of the Court based his decision was that :

"The mandamus which will be issued under it will not be a peremptory one, but merely to do certain things, or to show cause to the contrary; so that the order of the learned Judge, does not determine any question whatever between the parties; it only initiates the proceedings by which the liability of the Justices to make compensation will be ascertained and determined."

He defined "judgment" in Clause 15 of the Letters Patent as meaning

"a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined."

37. A wider interpretation of the word "judgment" was pressed for and it was pointed out that an order rejecting a plaint or holding a claim to be barred by limitation had been held to be a judgment for the purposes of appeal even though it did not decide the case on merits. The learned Judge pointed out in respect of such orders :

"For example, there is an obvious difference between an order for the admission of a plaint and an order for its rejection. The former determines nothing, but is merely the first step towards putting the case in a shape for determination. The latter determines finally so far as the Court which makes the order is concerned that the suit, as brought, will not lie. The decision, therefore, is a judgment in the proper sense of the term."

38. The test which the learned Judge thus laid down for deciding whether a decision amounted to an appealable judgment was that it must either be a decision determining some right or liability affecting the merits of the question between the parties or terminate the suit or proceeding in any manner.

39. The learned Judge apparently modified his views to a certain extent two years later in the case of Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub 13 Beng LR 91. In that case permission had been granted by a single Judge of the Court under Clause 12 of the Letters Patent for filing a suit at Calcutta though some of the defendants belonged to Bombay and urged that the whole cause of action had not arisen at Calcutta. The defendants appealed against the order granting permission. The appeal was held to be maintainable in

spite of the fact that the suit had not been terminated but had only been allowed to be filed and no question affecting the merits had been decided. The reason given for holding the order, to be appealable was :

"we do agree in the conclusion that this is an appealable order. It is of great importance to the parties. It is not a mere formal order, or an order merely regulating the procedure in the suit, but one that has the effect of giving a jurisdiction to the Court which it otherwise would not have. And it may fairly be said to determine some right between them, viz., the right to sue in a particular Court, and to compel the defendants who are not within its jurisdiction to come in and defend the suit, or if they do not, to make them liable to have a decree passed against them in their absence."

The meaning of the word "judgment" was thus considerably widened and the only thing which remained necessary for bringing a decision within that term was that it should determine some right between the parties.

40. Apparently influenced by this view of their own Court Rankin, C. J. and Ghose, J. felt no doubt in *Baidyanath Sein Vs. Rajendranath Sein and Others*, that an appeal lay against an order refusing to discharge a receiver. No reasons were given in support of this opinion. A similar view had been expressed earlier in *Mt. Brij Coomaree v. Ramrick Dass*, 5 CWN 781 and the sole ground given for that was that the order decided a very important question.

Following the same line it has been held that an order staying a suit u/s 10 C. P. C. is a "judgment" as it goes to the jurisdiction of the Court; *Shorab Merwanji Modi and Another Vs. Mansata Film Distributors and Another*, and even an order permitting or refusing an amendment of a plaint may if it affects the rights of the parties amount to a "judgment"; *M.B. Sirkar and Sons Vs. Powell and Co.*, . The Bombay High Court has followed this view in *Charan Das v. Changalal Pitambardas* AIR 1921 Bom 320 and *Maria Flaviana Almeida Vs. Ramchandra Santuram Asavle*, .

41. In a case on the original side of the Madras High Court a learned Judge declined to frame certain additional issues for which one of the parties asked. An appeal was filed under the Letters Patent against that decision. The respondent urged that the decision was not appealable. Accepting that contention Sir Arnold White, C. J. laid down in ILR Mad 1 the test for finding out what a "judgment" was in these words :

"The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect whatever its form may be and whatever be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the Clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the

suit is not, in my opinion, a judgment within the meaning of the Letters Patent. I think, too, an order on an independent proceeding which is ancillary to the suit (not instituted as a step towards judgment, but with a view to rendering the judgment effective if obtained) e.g., an order on an application for an interim injunction, or for the appointment of a receiver is a "judgment" within the meaning of the Clause."

42. It is noticeable that though the earlier view of Sir Richard Couch, C. J. in the case of 8 Beng LR 433 was cited before and considered by the Lord Chief Justice the later modified view in 13 Beng LR 91 was apparently not brought to his notice. It will be remembered that in the case of 8 Beng LR 433 two alternative tests had been insisted upon. The decision was either to effect the merits by determining "some right or liability or was to terminate the suit or proceeding. White, C. J., was not prepared to accept the first test. He said :

"I think the decision may be a judgment for the "purpose of the section though it does not affect the merits of the suit or proceeding and does not determine any question of right raised in the suit or proceeding."

43. It follows from this that the wider meaning given to the word "judgment" in 13 Beng LR 91, would also not have been acceptable to the learned Chief Justice.

44. He was obviously emphasising the second test when he laid down that a decision, would be a judgment "If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned or if its effect, if it is not complied with, is to put an end to the suit or proceeding,....."

The test which the learned Chief Justice was formulating was to be applied not only to decisions terminating a suit but also to decisions in proceedings other than suits. He therefore felt that the definition he was giving would make all sorts of orders passed on applications in course of a suit or proceeding appealable. He therefore qualified his definition by providing that:

"An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a "judgment" within the meaning of the Letters Patent."

By adding a rider to his definition he, however sought to make an exception in respect of orders terminating an independent proceeding ancillary to the suit, e. g. an order on an application for an interim injunction or for the appointment of a receiver. He gave no definite reasons for making this exception.

45. Dealing with the cases of his own and the other High Courts that were cited before him he expressed the opinion that an order under the Administrator-General's Act giving the Administrator General commission at a certain rate, an order dismissing an application by the assignee of a plaintiff to be brought on the record, an order dismissing a petition to receive a sum of money as security for

costs of an appeal, an order refusing a stay of execution, an order refusing to confirm or set aside an award, an order refusing to extend the time for giving security for costs, an order setting aside a judgment and decree and ordering a remand and in order dismissing a Judge's summons to show cause why leave granted under Clause 12 of the Letters Patent should not be rescinded were appealable, but an Order fixing a date for the hearing of a suit or an order granting or refusing an application for evidence to be taken on commission were not.

46. The other learned Judge who was a party to the decision (Krishnaswami Ayyar, J.) agreed that the order which was the subject-matter of appeal in that case was not an appealable order and did not amount to a "judgment". He, however, appears to have given only his qualified support to the test formulated by Arnold White, C. J. He noticed that the terms "interlocutory or preliminary judgments" had also been used in the Letters Patent and was of opinion that the proper view was to take the meaning of the word "judgment" as covering an interlocutory or preliminary judgment. He, however, made a distinction between a preliminary or interlocutory judgment and an interlocutory order and was emphatic that:

"Whatever width of interpretation the term "judgment" may be capable of it ought not to be so understood as to cover "interlocutory orders"." He had no doubt that

"the adjudication of a right or liability which determines a suit or appeal is a Judgment. Even a refusal to adjudicate which puts an end to a particular suit or appeal must equally amount to a "judgment"."

and that

"A decision on the merits of the controversy between the parties is not essential to the termination , of a suit or appeal."

He was also prepared to include in the term, "judgment" a decision given in a proceeding which was not a suit or appeal but was an original petition like an application for a succession certificate or the appointment of a guardian. He was, however, of the view that:

"But the right or liability with reference to which the Court adjudicates or declines to do so must be the substantive claim or liability and not as Mr. Seshagiri Ayyar tried to maintain, a right to a particular judicial procedure or a detriment suffered in being denied the benefit of a rule of procedure."

He was prepared to" extend the term "judgment" to final disposal of original petitions or proceedings in execution. Preliminary or interlocutory judgments which were appealable according to him were decisions which

"ascertain rights and direct further inquiries which determine liabilities though further directions are given for ascertaining the measure of those liabilities."

It thus appears that the real distinction between an "interlocutory judgment" and an "interlocutory order" which the learned Judge had in mind was that the former ascertained certain rights and determined certain liabilities leaving the details to be settled later while the latter did not do so. The learned Judge apparently felt some difficulty in the logical application of the distinction he was drawing when he addressed himself to the question whether orders in incidental proceedings for attachment or arrest before judgment or for temporary injunction or for the appointment of a receiver were judgments within the meaning of Clause 15 of the Letters Patent.

Such orders did not dispose of any rights or determine any liabilities in dispute in the suit or proceeding itself. Such orders only related to "a detriment suffered in being denied the benefit of a rule of procedure", e.g. the rules laid down in Orders XXXVIII, XXXIX and XL C. P. C. They therefore fell in the category of interlocutory orders and not of interlocutory judgments. It was therefore observed in a halting manner that "they may well be treated as interlocutory judgments" because the proceeding in which they are passed may

"well be deemed to be analogous to the disposal of original petition which determines the rights of parties,"

As such orders could not be easily distinguished from orders of stay of execution or security for costs these latter kinds of orders were also held to be interlocutory judgments on the ground that they "temporarily affect the rights of the parties". Speaking with the utmost respect the reasoning appears to be weak and unconvincing.

47. Two other tests for deciding whether a decision amounted to a "judgment" or not were suggested, to the learned Judge. The first was that if the order was a discretionary one it would not be a judgment. The second was that an order should be appealable only if a similar order was appealable under the C. P. C. Both these tests were found to be unacceptable. In respect of the former it was observed :

"The fact of a matter being within the discretion of the original Judge is not a ground for refusing to entertain the appeal but a sufficient reason for declining to interfere with that discretion."

With respect to the latter test it was said that the provisions as to appeals in the C. P. C. applied only to cause in which appeals lay from one Court to another and not from one member of the Court to other members of the same Court and that the interpretation of the terms used in Letters Patent should be uncontrolled by the provisions of the C, P. C,

48. The definition formulated by Sri Arnold White, C. J. in ILR Mad 1 has been adopted and followed in a large number of decisions not only of the Madras High Court (in Sri Raja Vallanki Venkata Chinnayamma Rao Bahadur Zamindarini Garu Vs. Sri Raja Kotagiri Subbamma Rao Bahadur Zamindarini Garu, "two learned

Judges of that Court held on the basis of that view without giving any reasons of their own that an order on an application for an injunction was a "judgment") but also of the other High Courts, In some cases even the Calcutta High Court seems to prefer this definition to that formulated by Richard Couch, as for instance in *Mathura Sundari Dassi v. Haran Chandra Shaha* AIR 1916 Cal 361, *Chandi Charan v. Jnanendranath Bhattacharjee* AIR 1919 Cal 667 , *Lea Badin Vs. Upendra Mohan Roy Choudhury and Others*, . Among the other cases in which this definition has been approved are *Jagannath Agarwalla Vs. State of Orissa and Another*, , *Union of India (UOI) Vs. Kanahaya Lal Sham Lal*, , *Kuldip Singh and Another Vs. Maqbul Kaur*, , *Ramji Singh Vs. Musammam Chhulghhana Kuer and Others*, , *Firm Badri Das Janakidas v. Mathanmal* AIR 1922 Lah 185, *Nanak Chand v. Sajjad Hussain* AIR 1924 Lah 412 and *Shivji Poonja Kothari Vs. Ramjimal Babulal*, .

49. This Court referred to the definition given by Sir Arnold White in *Dr. Sadiq Ali Vs. Anwar Ali and Others*, but preferred to base its decision that an order refusing to set aside an abatement was appealable on the ground that it had been the practice of this Court to entertain such an appeal. In *Emperor Vs. Shib Lal*, a Full Bench of this Court was required to consider whether an order of a single Judge dismissing an application u/s 5 of the Limitation Act was a judgment within the meaning of Clause 10 of the Letters Patent. Sulaiman, J. who delivered the judgment of the Full Bench referred to the case of ILR Mad 1 and observed:

"We would like to point out that the test laid down by the learned Chief Justice of the Madras High Court is put in too wide a language and cannot be accepted as laying down the correct criterion."

50. He pointed out that the authority of the Madras decision had been considerably shaken by the decision of the Privy Council in AIR 1925 155 (Privy Council) . He emphasised that the order under appeal before him did not decide any rights of the parties and then said:

"The order is in the form of an interlocutory order in a pending matter and the disposal of this matter does not automatically put an end to the appeal itself, which is to be dismissed subsequently. If we were to accept the contention urged on behalf of the appellant that every order passed by a Single Judge which puts an end to or terminates the proceeding or which has by implication the necessary effect resulting in such a termination is a judgment, the result would be that appeals would be permissible from dismissal for default, dismissal for want of prosecution, dismissal on non-payment of costs of printing, translation, etc., or on failure to furnish security. To hold this would be going against several decisions of this Court."

50a. In *Nanak Chand and Others Vs. State of Uttar Pradesh and Others*, , following ILR Mad 1, it was held that an order dismissing a writ petition in limine was appealable as it terminated the proceedings started on the writ petition and

no further action could be taken in the High Court. In 1959 All LJ 313, in circumstances very similar to the case before us it was held, following the same line of reasoning, that an appeal lay against an order of a single Judge modifying in appeal an injunction issued by the trial Court.

51. In some cases learned Judge endeavoured to apply both the tests formulated by the Calcutta and Madras High Courts. For instance in the case of *Firm Shaw Hari Dial and Sons, Madras v. Sohna Mal Beli Ram* AIR 1942 Lah 95 , an order transferring a case from one Court to another was held to be a judgment. According to the learned Judge it could be held to be a judgment whether the Calcutta or the Madras test was applied. The decision must, however, be considered to have been overruled by their Lordships of the Supreme Court in *Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others*, , a decision which I shall consider later in some detail.

A Full Bench (sic) of the Calcutta High Court in *Shorab Merwanji Modi and Another Vs. Mansata Film Distributors and Another*, , thought that the Madras test was really only a variant of the Calcutta test and, applying both the tests, came to the conclusion that an order refusing to stay a suit u/s 10 C. P. C., was a judgment. This view was in consonance with the view taken in an earlier case of the same Court in *Durgaprasad Vs. Kantichandra Mukerji*, . An exactly opposite view was, however, taken by the Madras High Court in *Central Brokers Vs. Ramnarayana Poddar and Co.*, . In that case Govind Menon, J., thought that two tests had been laid down by their Lordships of the Supreme Court in *Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others*, , viz., (1) whether the adjudication terminates the suit Or proceeding and (2) whether it affects the merits of the controversy between the parties in the suit itself. This decision was followed by the Madras High Court in *Union of India (UOI) Vs. S.S. Shanmugha Nadar*, .

52. An entirely new line was adopted by the Rangoon High Court in the case of ILR Rang 457: (AIR 1935 Rang 267) (FB). That was again a case in which an order had been passed by a Single Judge transferring several suits from the subordinate Courts in which they were pending to the High Court. An appeal was sought to be filed against that decision and the question was whether the order was appealable. The appeal was held not to be entertainable. Page, C. J., who delivered the judgment of the Full Bench, considered the definition given by Sir Richard Couch as well as Sir Arnold White.

He held that neither of the two definitions was acceptable, and purporting to base his view on certain decision of the Privy Council particularly the decision of AIR 1925 155 (Privy Council) , laid down that the word "judgment" in the Letters Patent meant only a "decree" and no other order.

53. Page, C. J., claimed that the view he was taking had the merit of extreme simplicity. He even wondered why the interpretation he was putting on the word "judgment" had not found favour with any other High Court till then.

54. The view he took has been followed by the Nagour High Court in AIR 1945 156 (Nagpur) , in AIR 1948 85 (Nagpur) and in AIR 1952 357 (Nagpur) . Our own Court following it held in Rama Shankar Vs. Official Liquidator, Jwala Bank Ltd., that an order holding an application for winding up a company to be within limitation was not appealable. The Patna High Court following the same line held in Gobind Lal Nakphopha Vs. The Administrator-General of Bihar and Others, , that an order refusing to recall an order appointing an administrator pendente lite was not appealable.

55. Two things are, however, noticeable in connection with this line of reasoning. In the first place the basis of the view, of Page, C. J. appears to be that the Privy Council had in the decisions relied upon by him remarked that the term "judgment" in civil cases meant a decree and not a judgment in the ordinary sense. But it appears to be clear that in those cases the Privy Council was not defining a judgment exhaustively and did not intend to lay down that a judgment meant a decree and nothing else, A decree in a civil case is undoubtedly a judgment, but can it be said on that account that an order deciding the rights of the parties which does not technically amount to a decree can never be a judgment?

Their Lordships of the Privy Council must have been aware of the serious controversy that raged around the point in various High Courts of India. Had it been their intention to settle the controversy and accept one definition of the word in preference to the other they would have referred to the conflicting decisions and would have expressly approved some of them. Apparently their Lordships were only emphasising that the word "judgment" as used in the Letters Patent did not have the same meaning as it was ordinarily understood in this country to have and that it really meant a final decision in a civil case.

56. Secondly, we cannot overlook the fact that very often cases are decided by Single Judges which involve important questions relating to rights and liabilities of the parties but which do not necessarily arise out of a civil suit which can end in a decree. There are various kinds of decisions in which such questions arise. It could not have been the intention of the framers of the Letters Patent to make all those decisions unappealable.

57. In Ishwari Prasad Vs. Sheotahal Rai, the Privy Council decision in AIR 1925 155 (Privy Council) was distinguished on the ground that that case had gone from Bombay and evidently their Lordships of the Privy Council had in their mind the Clause of the Letters Patent of that High Court which granted a right of appeal to the Privy Council. This Court, therefore, held in that case that, in spite of that decision, an appeal lay under the Letters Patent from an order of a Single Judge remanding an appeal to the lower appellate Court for re-hearing. This view was reiterated by a Full Bench of this Court in Sital Din and Others Vs. Annant Ram .

58. In some of its later decisions this Court appears to have adopted a somewhat

more stringent view about the meaning of the word "Judgment" and has insisted that it should be a final decision determining the rights" of the parties in the litigation. Thus in *Gulzari Lal and Others Vs. Sm. Sarju Bai and Another*, on the death of an appellant his reversioners applied for being brought on record in his place. Their application was rejected and the appeal consequently abated. An appeal against the decision was held to be maintainable because,

"Though, as we have already said, in case where the determination of the question as to who has the right to be brought on the record on the death of a deceased appellant or a respondent may not amount to a judgment in some cases, in those cases where the decision of that question determines the appeal itself, to our minds the order should be considered to be a judgment and therefore appealable under Clause 10, Letters Patent."

59. In *Vishnu Pratap and Others Vs. Sm. Revati Devi and Others*, , by his order the learned Single Judge had appointed an interim receiver u/s 153 of the Companies Act read with Order 41, Rule 1 C. P. C. Had the order been passed by a subordinate Court it would have been appealable u/s 104 read with Order 43, Rule 1 of the Code. It was, however, held that it was not a judgment and was on that account not appealable. Defining a "judgment" Malik, C. J., observed:

"A judgment means an adjudication which conclusively determines the rights of the parties and not a mere interlocutory order during the pendency of a case. Every order passed by a learned single Judge in the exercise of his civil jurisdiction is not a judgment. What is or what is not a judgment will have to be decided in each case considering its effect on the rights of the parties. Even if it disposes of another point in dispute between the parties to a suit which has been raised by a separate application and which may be ancillary to the suit itself, is not necessarily a judgment."

60. In *State of U. P. v. Dr. Vijaya Anand Maharaja* 1958 All LJ 61, an order rejecting an application for review was held not to be appealable on the ground that it did not by its own force determine any rights of the parties. Those rights, it was held, had been determined by the order sought to be reviewed.

61. Thus so far as the various High Courts are concerned my Lord the Chief Justice appears to be quite justified in saying that the three principal views taken about the meaning of the word "judgment" as used in the Letters Patent are those taken by Couch, C. J., in 8 Beng LR 433, White, C. J., in *Tuljaram Row*'s case ILR Mad 1 and Page C. J., in ILR Rang 457: (AIR 1935 Rang 267) (FB). All the other decisions only follow one or the other of these views either wholly or with some slight modification.

62. It is worth noticing that if we leave out of consideration for a moment the notification which, Couch, C. J., introduced in his view later in 13 Beng LR 91, and the rider which White, C. J., added to his own definition in *Tuljaram Row*'s case ILR Mad 1, all the three views have the same basic concept behind their back. That concept appears to be that before a decision can rank as a

"judgment" and become appealable as such it must possess one or both of the two essential features.

It must be in respect of some point of controversy in the litigation itself and it must terminate the whole or at least a part of the litigation. Sir Richard Cough stressed both these features in his definition. Sir Arnold White emphasised the second one. Page, C. J., gave importance only to one aspect of the first view. As shall be shown presently the Supreme Court in *Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others*, , also considered only these two tests" for deciding whether the order of transfer, which, they were considering in that case was appealable. This trend of their decision is so clear that Govind Menon, J., while delivering the judgment of the Full Bench in *Central Brokers Vs. Ramnarayana Poddar and Co.*, , thought that the two tests have been laid down by the Supreme Court itself.

63. It cannot be contended on behalf of the appellant that the order in question before us. answers either of the two tests mentioned above. It may, however, be urged that it should be held to be a "judgment" as

1. Even if it is not a judgment in the sense of a final decision there is no reason why it should not be considered to be an interlocutory judgment and appealable as such;

2. It would have been appealable under the C. P. C., if it had been passed by a subordinate Court and also in England under the Supreme Court of Judicature Act of 1925;

3. In any case it determines finally an important point of difference between the parties which is not unconnected with the suit and which can seriously affect the rights of the parties and even jeopardise the ultimate decree if one is passed in the case.

64. The word "judgment" in Clause 10 of the Letters Patent undoubtedly includes an "interlocutory judgment". It does not, however, cover all interlocutory orders. All orders passed in course of the litigation are interlocutory orders but only some of them can be considered as interlocutory judgments. On what basis then is the one to be distinguished from the other? According to the definition of Black already quoted

"An interlocutory judgment is one which determines some preliminary or subordinate point or plea or settles some step, question or default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties or finally put the case out of Court.""

The test as laid down in *Salaman v. Warner* 1891 1 QB 734 is that a "judgment" is interlocutory if it cannot be said in respect of it that if given either way it will determine the rights of the parties. Only those interlocutory orders can therefore be considered as interlocutory judgments which deal with any of the points arising in the case itself. A judgment is interlocutory only and not final because it

does not close the case and some points are still to be decided. An order granting or refusing an injunction does not appear to answer this test. It does not relate to the real controversy in the case. It leaves the case untouched altogether and does not affect its decision in any way.

65. That a similar order has been made appealable under a statute either in India or in England also appears to be an immaterial consideration. It may, however, be pointed out that even under the C. P. C., if this order which is sought to be appealed against - in the present case had been passed by a District Judge or Civil Judge in appeal as has been done by Mr. Justice Vishnu Datta it would not have been appealable.

66. The importance of the order to one of the parties or the fact that the order was passed in a proceeding not wholly unconnected with the case and could cause substantial loss to one of the parties and also affect in some manner the decree if one was ultimately passed also appear to be considerations wholly beside the point. All these features can be present in an order refusing an adjournment, granting stay of delivery of possession, admitting an appeal on certain conditions or fixing a particular date for the hearing of the case. Can it be said on that ground that all such orders are appealable as judgment? Then in almost all cases there will be appealable judgments at various stages.

67. The terms "judgment" and "final order" as used in Article 133 of the Constitution appear to have been interpreted in a similar manner. In *Jagat Ram v. Ganga* AIR 1951 Punj 30, an order rejecting an application in forma pauperis was not considered to be a judgment or final order within the meaning of Article 133. It was held that it did not in any way determine the rights of the parties with regard to the subject-matter of the appeal and was only an interlocutory order.

68. In *Daulat Ram Singh Vs. Swami Dayal and Another*, , a suit had been dismissed by the trial Court as barred by *res judicata*. In appeal the High Court had reversed the decision and remanded the case for retrial. It was held that that order was not a final order because a final order means:

"An order which finally determines the points in dispute and brings the case to an end, the test of finality being whether the order finally disposes of the rights of the parties and not whether the order decides an important or even a vital issue in the case."

69. In *Mohd. Mohmood Hasan Khan Vs. Government of Uttar Pradesh*, , a Full Bench of this Court had before it the question whether an order dismissing an application to set aside an order of dismissal for default was a final order for the purpose of Article 133. The learned Judges laid down three tests which they sought ought to be satisfied before an order could be held to be a final order. Those tests were:

1. It should not be an interlocutory order.

2. Even though it is an order which disposes of the proceedings before the Court finally, it should not be an order which leaves the original proceedings in the Court below alive.

3. There should be a final determination of the rights of the parties and the order must by its own force affect the rights of the parties.

Applying these tests they held that the order under consideration was not a final order. In another case of the same year *Janki Prasad and Others Vs. Kailash and Another*, , an auction sale had been held in respect of property worth Rs. 20,000/-. An objection was filed against the sale under O. 21, R. 90 C. P. C., but was reflected by the trial Court. In appeal that order was set aside. It was against the appellate order that a certificate of fitness for appeal under Article 133 of the Constitution was prayed for.

It was held that the order was a final order in respect of which the certificate could be granted. In *Union of India (UOI) Vs. Kanahaya Lal Sham Lal*, , Kapur, J., referred to the words "judgment, decree or final order" used in Article 133 of the Constitution, and remarked that each of the three words had a different connotation but all of them had reference to adjudication, determination or disposal of a proceeding, suit or rights of the parties".

70. In *Vallury Mangaraju v. Vallury Varahamma* AIR 1956 AP 47, it was held that "an appeal lies to the Supreme Court under Article 133 if the order complained of "finally disposes of the rights of the parties.

To put it differently, it should not be an interlocutory order, but a final order deciding the rights of the parties. The word "judgment" in the Article in the context means a final judgment in the sense that it finally decides the rights of the parties."

The same view was reiterated in *Pulavarti Venkatasubba Rao and Others Vs. Valluri Jagannadha Rao and Others*, .

71. In *Amsingh Vs. Jethmal and Another*, , a suit had been dismissed by the trial Court on the ground of limitation. In appeal the High Court reversed the decision and held that it was within limitation. It remanded the case for trial on merits. An appeal was sought to be filed to the Supreme Court against the order of remand but it was held that it was not a final order which could be appealed against under Article 133 of the Constitution. The reason given for the view was :

"In the case before us we have simply decided the question of limitation. All other questions of dispute between the parties are still to be decided by the trial Court. The suit in the trial Court is alive and it cannot be said whether its decision will be in favour of the petitioner or the non-petitioner."

72. In *Inda Devi Vs. Board of Revenue and Others*, , a petition under Article 226 of the Constitution in which an order of the Board of Revenue was sought to be quashed was dismissed. It was held, that the order dismissing the petition was

appealable because it had finally determined the rights of the parties in the proceedings.

73. In *Jagannath Agarwalla Vs. State of Orissa and Another*, , also a claim had been rejected on the ground of limitation. The High Court had been moved under Article 226 of the Constitution to quash the order by a writ of certiorari but had rejected the petition. The petition for leave to appeal to the Supreme Court against the order was allowed, and referring to the word "judgment, decree or final order" used in Article 133 of the Constitution it was observed:

"The three words "judgment, decree or final order in Article 133(1) imply the same amount of finality and also if after the order is passed the suit or proceeding is still left alive it cannot be taken to be a judgment, decree or final order; but if on the passing of the order of the High Court the matter is completely sealed and there remains nothing further to be agitated by either of the parties in respect of the self-same question of controversy, it is regarded as a final order as contemplated under Article 133."

74. In *Dhanalakshmi Animal v. income tax Officer* AIR 1958 Mad 151 , the test for determining the finality of an order laid down was whether the order had finally disposed of the rights of the parties. The same test was utilised in *Kuldip Singh and Another Vs. Maqbul Kaur*, .

75. In *Bhagwan Dass and Co. Private Ltd., Dehradun Vs. The Income Tax Officer, Dehradun*, , a writ petition had been filed against the orders of the Income Tax Authorities. The petition was rejected not on the ground that it had no merits but on the ground that proceedings under Article 226 of the Constitution were not appropriate. The High Court refused to exercise its power under the Article because the applicant had an alternative remedy. The order was held to be non-appealable under Article 133 of the Constitution because it did not conclusively determine the rights of the parties. The tests formulated in *Mohd. Mohmood Hasan Khan Vs. Government of Uttar Pradesh*, , were applied.

76. The consensus of opinion in respect of the phrase "judgment or final order" used in Article 133 of the Constitution thus appears to be that the decision can be a judgment or final order only if it finally determines the rights of the parties, puts to an end the litigation and is not an interlocutory order which leaves the real controversy between the parties alive.

77. The decisions of the Privy Council, Federal Court and the Supreme Court in which the words "judgment" or "final order" have been interpreted either with reference to the C. P. C., or with the provisions of the Constitution appear to support the view I am taking.

78. The earliest case of the Privy Council to which reference need be made is the case of *Rahimbhoy Habibbhoy v. Turner* 18 Ind App 6 (PC). An appeal in that case had been filed u/s 595 C. P. C., of 1882 which allowed an appeal against a final order. The Case was for accounts and the defendant denied his liability to

account. The High Court rejected the defendant's contention, held him liable to account and sent the case back to the trial Court for accounts to be taken.

It was against that order of remand that the appeal was filed before the Privy Council and a preliminary objection was raised that the appeal was not maintainable because the order appealed against was not a final order. The contention was not accepted, and it was observed:

"Now that question of liability was the sole question in dispute at the hearing of the cause, and it is the cardinal point of the suit. The arithmetical result is only a consequence of the liability. The real question in issue was the liability, and that has been determined by this decree against the defendant in such a way that in this suit it is final. The Court can never go back again upon this decree so as to say that, though the result of the account may be against the defendant, still the defendant is not liable to "pay anything. That is finally determined against him, and therefore in their Lordships" view the decree is a final one within the meaning of Section 595 of the Code."

79. In *Syed Muzhar Husein v. Bodha Bibi* 22 Ind App 1 (PC), an appeal had been filed before the Privy Council against an order of remand made u/s 562 C. P. C., 1882. The plaintiff based his claim on a will by which he said a valid gift had been made in his favour. The defendant contested the suit and raised several points. His principal defence was that no valid gift had been made to the plaintiff. This point was decided by the trial Court in his favour. The High Court reversed the decision of the trial Court on the question of the validity of the will and sent back the case for the decision of the other issue.

It was against that order that an appeal was filed before the Privy Council and the appeal was held to be entertainable because the cardinal point in the case was about the will and that had been decided by the High Court finally and could never be disputed again. Only certain subordinate enquiries were left to be made. In the circumstances the order of the High Court was held to be a final order.

80. In *Radha Kishan v. The Collector of Jaunpur* ILR All 220, a decree had been passed in the absence of the defendant after his counsel had stated that he had no instructions. An application was made to set aside the decree but was rejected without going into the question whether the defendant had sufficient cause for not appearing on the date of hearing. The High Court set aside the order and sent the case back for reconsideration. It was held that the order of the High Court was not appealable to the Privy Council because it was only an interlocutory order amounting only to a direction that an enquiry be made as to the cause of the defendant's absence.

81. In *Firm Ramchand Manjimal v. Firm Goverdhandas Vishandas Ratanchand* AIR 1920 PC 86, the defendants had applied in a suit u/s 19 of the Arbitration Act of 1899 for the stay of proceedings. The trial Court granted the stay. The Judicial Commissioner in Appeal reversed the order and refused to stay. An

appeal to the Privy Council was held to be not entertainable on the ground that the order under appeal was not a final order disposing of the rights of the parties. It left the rights of the parties to be determined in the ordinary way.

82. In *Tata Iron and Steel Co. Ltd. v. Chief Revenue Authority of Bombay* ILR 47 Bom 724: (AIR 1923 PC 148), a case had been sent to the High Court by the Chief Revenue Authority u/s 51 of the Income Tax Act, 1918 and the High Court had given its opinion. It was held that no appeal lay to the Privy Council against the decision, of the High Court because it was merely an advisory decision and not a final order.

83. In AIR 1925 155 (Privy Council) , a scheme for management of Dakore Temple had finally been sent by the Privy Council. It provided inter alia for the framing of certain rules by the District Judge and also contained provision that the scheme may be altered, modified or added to by an application to the High Court. The District Judge framed certain rules. An appeal was filed to the High Court against the order of the District Judge framing the rules, and an application was also made to the High Court for the modification of the rules.

The High Court felt doubtful about the maintainability of the appeal but on the application it considered the correctness of the rules framed by the District Judge. An appeal against the decision of the High Court was sought to be filed before the Privy Council but was held to be incompetent. In course of that decision it was remarked that the term "judgment" in the Letters Patent of the High Court meant in civil cases a decree and not a judgment in the ordinary sense.

84. In AIR 1933 58 (Privy Council) , the suit was dismissed without being considered on merits. In appeal the dismissal was set aside and the case was remanded for trial on its merits. Against that order an appeal was presented to the Privy Council, and the question arose whether it was a final order appealable u/s 109 C. P. C. It was observed:

"Lord Cave in delivering the judgment of the Board laid down, as the result of an examination of certain cases decided in the English Courts, that the test of finality is whether the order "finally disposes of the rights of the parties", and he held that the order then under appeal did not finally dispose of these rights, but left them "to be determined by the Courts in the ordinary way". It should be noted that the appellate Court in India was of opinion that the order it had made "went to the root of the suit, namely, the jurisdiction of the Court to entertain it", and it was for this reason that the order was thought to be final and the certificate granted. But this was not sufficient. The finality must be a finality in relation to the Suit. If, after the order, the suit is still a live suit in which the rights of the parties have still to be determined no appeal lies against it u/s 109(a) of the Code."

85. The principal question involved in AIR 1939 43 (Federal Court) , was whether an appeal lay to the Federal Court in a criminal case u/s 205 of the Government

of India Act of 1935. Sulaiman, J., considered incidentally the meaning that was to be attached to the words "judgment, decree or final order" in Section 205 of the Government of India Act in respect of civil cases also. The observations were obviously in the nature of obiter dicta, but coming as they do from a judge of the eminence of Sir Shah Mohd. Sulaiman they are entitled to the highest respect.

The learned Judge was of opinion that if the word "judgment" meant a decree the use of the word "decree or final order" in the expression "Judgment, decree or final order" would become superfluous. He reiterated the view he had taken earlier in the Full Bench case of Kunwar Sen Vs. Emperor, , that every order passed by a judge which put to an end or terminated the proceedings did not necessarily amount to a judgment. He thought that that decision alone could amount to a Judgment which finally disposed of the rights of the parties.

In respect of the term "final order" he thought that the word "final" had been used in contra-distinction to "interlocutory" and that if the effect of the order from which it was sought to appeal was not to dispose of finally the rights of the parties then even if it decided an important or vital issue in the case but left the suit alive it was not a final order. He quoted with approval the definitions of "final order" given by Lord Esher, M. R., Fry and Lopes, L. JJ., in 1891 1. QB 734. Lord Esher M; R., remarked in that case:

"If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purpose of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then, I think it is not final, but interlocutory."

Fry, L. J., had laid down;

"I conceive that an order is "final" only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is "interlocutory" where it cannot be affirmed that in either event the action will be determined."

Lopes, L. J., said:

"I think that a judgment or order would be final within the meaning of the rules, when whichever way it went, it would finally determine the rights of the parties."

Sulaiman, J., also referred "approvingly to the definition of Lord Alverstone, C. J., in *Bozson v. Altrincham Urban District Council* 1903 1 KB 547, where he had held:

"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is men, in my opinion an interlocutory order."

86. In AIR 1949 1 (Federal Court) , also the question was whether an order in a

criminal case was a judgment or a final order within the meaning of Section 205 of the Government of India Act. In that connection it was held that:

" "Final order" must be an order which finally determines the points in dispute and brings the case to an end."

It was further laid down that:

"To constitute a final order it is not sufficient merely to decide an important or even a vital issue in the case, but the decision must not keep the matter alive and provide for its trial in the ordinary way."

In respect of a judgment it was observed, that:

"The term "judgment" in itself indicates a Judicial decision given on the merits of the dispute brought before the Court."

87. In *Mohammad Amin Brothers Ltd. v. Dominion of India* AIR 1950 FC 77, a single Judge of the High Court had granted an application for the winding up, of a company. The Division Bench had set aside the order and an appeal was sought to be filed before the Federal Court against the order of the Division Bench. Holding that the appeal was incompetent as the decision sought to be appealed against did not amount to a judgment or final order, it was laid down:

"The test for determining the finality of an order is, whether the judgment or order finally disposes of the rights of the parties...."that finality must be a finality in relation to the suit".. ...The fact that the order decides an important and even a vital issue is by itself not material, unless the decision puts an end to the suit."

88. Before the Supreme Court the question as to what is a final order or judgment appears to have arisen for the first time in *Seth Premchand Satramdas Vs. The State of Bihar*, . In that case the High Court of Bihar had declined to call upon the Board of Revenue to stay a case u/s 21 of Bihar Sales" Tax Act. An appeal was sought to be filed against that order before the Supreme Court. Fazl Ali, J., held that the order of the High Court was not a judgment or a final order and observed in that connection:

"It is true that the Board"s order is based on what is stated by the High Court to be the correct legal position, but the fact remains that the order of the High Court standing by itself does not affect the rights of the parties, and the final order in the matter is the order which is passed ultimately by the Board of Revenue."

89. In *The State of Orissa Vs. Madan Gopal Rungta*, , five petitions for a writ of mandamus and directions had been filed in the High Court under Article 226 of the Constitution. The petitions related to certain mining leases. The petitioners intended to file a regular suit for the enforcement of their rights but the suit could not be filed without waiting for two months after serving a notice u/s 80 C. P. C.

They, therefore, claimed interim relief under Article 226 of the Constitution. The High Court refrained from judging the merits of the controversy but granted some interim relief for the period during which the suit could not be filed. It, therefore, allowed the petitions in part. Against that order the State appealed to the Supreme Court. A preliminary objection was raised that the appeals were not maintainable. It was, however, rejected with the remark:

"It must be noted that with the passing of the order of the 2nd of August, 1951 (the order sought to be appealed against) containing directions in the nature of interim relief the petitions were completely disposed of and have not been kept pending for disposal. These directions embody therefore the final order passed by the Court on these petitions; a preliminary objection was raised about the maintainability of the appeals on the ground that no final orders were passed on the petitions, That objection must fail in view of the fact that with these orders the petitions were disposed of finally and nothing further remained to be done in respect of the petitions. The fact that the operation of the order is limited to three months or a week after the filing of the intended suit does not prevent the order from being final."

90. The direct question as to what is the meaning of the word "judgment" as used in the Letters Patent of the Calcutta High Court arose in *Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others*, . A single Judge of the Calcutta High Court had transferred a case pending in the district Court to another Court. Against his decision an appeal was filed before a Division Bench and was dismissed on the ground that the appeal did not lie as the order of transfer was not a judgment within the meaning of the Letters Patent.

An appeal by special leave was filed in the Supreme Court against the appellate order and the question which arose for decision was whether the High Court had been right in the view that the order of the single Judge did not amount to a judgment. The different views that had been taken by the Calcutta, Madras and the Rangoon High Courts in respect of the meaning that was to be attached to the word "judgment" as used in the Letters Patent were considered and the essential features of a judgment according to the Calcutta and the Madras views were noted.

91. The learned Judges refrained from finally choosing between the three alternative views which had been taken by the various High Courts on the point. The trend of the decision, however, appears to indicate that they thought two things to be necessary before a decision could rank as an appealable judgment. It was to have something to do with the merits of the controversy and it was also to bring the controversy or at least a part of it to an end. This is clear from the following observations of Mukherjea, J. :

"It is true that unless the parties to the suit are agreed on this point, there must arise a controversy between them which has to be determined by the Court. In the present case, a single Judge of the High Court has decided this question in

favour of the plaintiff in the suit; but a decision on any and every point in dispute between the parties to a suit is not necessarily a "judgment". The order in the present case neither affects the merits of the controversy between the parties in the suit itself, nor does it terminate or dispose of the suit on any ground. An order for transfer cannot be placed in the same category as an order rejecting a plaint or one dismissing a suit on a preliminary ground as has been referred to by Couch, C. J., in his observations quoted above. An order directing a plaint to be rejected or taken off the file amounts to a final disposal of the suit so far as the Court making the order is concerned. That suit is completely at an end and it is immaterial that another suit could be filed in the same or another Court after removing the defects which led to the order of rejection. On the other hand, an order of transfer under Clause 13 of the Letters Patent is, in the first place, not at all an order made by the Court in which the suit is pending. In the second place, the order does not put an end to the suit which remains perfectly alive and that very suit is to be tried by another Court, the proceedings in the latter to be taken only from the stage at which they were left in the Court in which the suit was originally filed."

92. The first ground on which the order of transfer was held to be non-appealable therefore was that though the order was On an important point in controversy between the parties it did not affect the merits of the dispute between the parties in the suit itself. The second ground was that it left the suit untouched and alive and did not put an end to it or any part of it. An order granting or refusing a temporary injunction appears to me to share both the characteristics of an order of transfer which made the latter non-appealable.

93. It is noticeable that the only two tests which the learned Judges applied for finding out whether the order in question before them, was an appealable order or not were the tests laid down by the Madras and the Calcutta High Courts. As the order which they were considering did not answer either of the two tests it was held to be non-appealable and it became unnecessary to decide which of the two tests was to be preferred. No third test was, however, considered to be applicable and the appeal against the order of transfer was not held to be entertainable on the ground that it could be considered to be an interlocutory judgment or that it could seriously affect one of the parties to the suit.

94. In *Sardar Syedna Taher Saifuddin Saheb Vs. The State of Bombay*, , a suit had been filed for a declaration that the orders of excommunication passed by the defendant were invalid and for consequential reliefs. While the suit was pending the Bombay Legislature passed an Act prohibiting excommunication. The Act came into force during the pendency of the suit. Relying upon the Act the plaintiff contended that that Act rendered the order of excommunication ineffective. The defendant challenged the validity of the Act, A preliminary issue was raised as to whether the Act was ultra vires or not. This was decided against the defendant and the Act was held to be competent and hence retrospective in its operation. Against that decision an appeal was filed in the Supreme, Court

and the question arose whether the appeal was maintainable.

One of the grounds on which it was held that the appeal did not lie was that the decision of that particular issue, though it related to an important point in the case, did not finally dispose of the suit as there were other issues which had still to be decided. Reference was made in that connection to the Explanation to Article 132 of the Constitution according to which a final order included an order deciding an issue which if decided in favour of the appellant would be sufficient for the final disposal of the case. It was pointed out that even if the issue about the vires of the Act was decided in favour of the defendant it would not have finally disposed of the case. The appeal was therefore held to be incompetent.

95. In another case reported in the same volume, *Hanskumar Kishanchand Vs. The Union of India (UOI)*, two awards had been made by the District Judge in his capacity as an arbitrator under the Defence of India Act. Against those awards an appeal had been filed before the High Court as an appeal was provided by the provisions of the Act. The High Court having decided the appeal, the losing party wanted to appeal to the Supreme Court and the question arose whether an appeal could be entertained.

It was held that it could not, and the ground given for the decision by their Lordships of the Supreme Court was that the appeal, being a continuation of the proceedings the High Court must be held to have decided the appeal as an arbitrator and not in the exercise of its ordinary jurisdiction. An appeal could lie against its decision only if the decisions were given in the exercise of its ordinary jurisdiction.

96. It may frankly be conceded that the question is not free from difficulty. The difficulty is enhanced because every one first decides whether he would like a particular order to be appealable or unappealable and then attempts to mould the definition of the word "judgment" in such a way that it may include or exclude the particular order he had in mind. The controversy can be resolved only by a definite pronouncement of their Lordships of the Supreme Court.

The weight of judicial authority, as it stands at present, however, appears to favour the view that in order to be appealable under the Letters Patent as a "judgment" a decision must by its own force terminate the whole or part of the suit or proceeding in which it is given by determining or refusing to determine some or all of the real points of controversy for the settlement of which the litigation was started. If the decision of Mr. Justice Vishnu Datta is tested in this light it appears to me that it cannot be considered to be a judgment.

It deals only with an incidental question which arose in the case as a sort of side issue which did not touch the merits of the dispute between the parties at all. It left the entire case alive and did not bring any part of it to an end. It was, in my opinion, only an interlocutory order. The view I am taking is directly opposed to the decision in 1959 All LJ 313. That case was, however, in my opinion, and I say so with the utmost respect, not correctly decided.

97. I would therefore answer the question referred to us in the negative.

By The Court

98. The order of a single Judge of this Court dismissing an appeal against an order granting a temporary injunction is a judgment within the meaning of Clause X of the Letters Patent.