
(1961) 02 BOM CK 0006

Bombay High Court

Case No: Appeal No. 65 of 1960

J.K. Chemicals Ltd.

APPELLANT

Vs

Kreba and Co. Ltd. and
Others

RESPONDENT

Date of Decision: Feb. 1, 1961

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 48 Rule 1, 104

Citation: AIR 1967 Bom 56 : (1966) 68 BOMLR 209 : (1966) ILR (Bom) 761

Hon'ble Judges: V.S. Desai, J; Abhyankar, J

Bench: Division Bench

Advocate: S.V. Gupte and A.B. Diwani, for the Appellant; Murzban J. Mistree and J.R. Joshi, for the Respondent

Judgement

V.S. Desai, J.

(1) This is an appeal from the order passed by Mr. Justice K. K. Desai dismissing the Notice of Motion taken out by the plaintiff's in suit No. 303 of 1960 in the Ordinary Original Civil Jurisdiction of this Court.

(2) The Plaintiffs are the purchasers of a sulphur dioxide plant agreed to be sold to them by the defendants, 1, 2 and 3 who are foreign corporations. The plaintiffs have paid to the defendants 85 per cent of the price agreed for the sulphur dioxide plant and for the balance of the purchase price they have executed promissory notes in favour of defendants 1 to 3. These promissory notes have been "backed" for the plaintiffs by the State Bank of India, which is the 4th defendant in the suit. The present suit of the plaintiffs is on the basis that the defendants have committed a breach of the contract and the plaintiffs have, therefore, been entitled to the reliefs, which they have claimed in the suit. These reliefs are for recovery of certain amounts from the defendants, for cancellation of the promissory notes and also for an order restraining the 4th defendant from making payments on the

promissory notes to defendants 1 to 3. the plaintiffs have also prayed for appropriate interim reliefs. The suit was filed on the 13th September 1960 and on the same day the plaintiffs took out a Notice of Motion for interim injunctions restraining defendants 1 to 3 from receiving any amount under the outstanding promissory notes and/or from presenting the promissory notes for payment to the 4th defendant or from otherwise enforcing from the 4th defendant, the bank, payment of the promissory notes amount and for a further injunction restraining the 4th defendant from making payment to defendants 1-3 under the outstanding promissory notes. This Notice of Motion was dismissed by Mr. Justice K.K. Desai on 22nd November 1960 and aggrieved by the said order the plaintiffs have filed the present appeal.

(3) A preliminary point has been raised by the learned counsel appearing for the respondents that no appeal lies. It is contended that the order refusing an interim injunction is not a judgment within the meaning of clause 15 of the Letters Patent and the appeal from the order, therefore, is not competent. In support of the submission he has relied on *Vanichand Rajpal v. Lakhmichand Maneckchand* 21 Bom LR 955: AIR 1920 Bom 309; [Jai Hind Iron Mart Vs. Tulsiram Bhagwandas](#) ; [Salemahomed Haji Haroon Kably Vs. Mahomed Taher Jaffrani](#), and an unreported decision of this Court in Appeal No. 71 of 1958 from an order in a suit on the Original side, decided on 12th March 1959 (Bom), by Chainani, C. J. and S. T. Desai, J.

(4) In 21 Bom LR 955; AIR 1920 Bom 309 it was held that order refusing to restrain the defendant by an order and injunction from prosecuting his suit in a foreign Court is not a judgment within the meaning of clause 15 of the Letters Patent and no appeal lies from such an order. It was observed by Macleod C. J. that a judgment in Clause 15, according to the decision in *Justices of the Peace for Calcutta v. Oriental Gas Co.* (1872) 8 Beng LR 433 which has been followed in this Court, means a decision which affects the merits of the question between the parties by determining some right or liability. The order refusing an injunction restraining the defendant from prosecuting his suit instituted in a foreign Court did not affect the merits of the question between the parties by determining some right or liability. It was suggested in that case that the refusal to grant the injunction was likely to oust the jurisdiction of the Court by reason of the suit in the foreign Court having been decided earlier, and the order, therefore, was one which affected the merits of the question between the parties involved in the suit. This argument was not accepted and it was pointed out that that was not the direct consequence of the order and the mere possibility of such a consequence resulting at a future time did not make the order one which determined some right or liability involved in the suit.

(5) In [Jai Hind Iron Mart Vs. Tulsiram Bhagwandas](#), the plaintiff had prayed for an injunction restraining the defendant from proceeding with the suit, which the defendant had filed earlier in the Calcutta High Court. The interim injunction prayed for was refused by the learned trial Judge and in the appeal from the said order it was held, following the decision in 21 Bom LR 955; AIR 1920 Bom 309 to which we have already referred, that the order was not a judgment within the meaning of Clause 15 of the Letters Patent and

no appeal lay from the said order.

(6) In [Salemahomed Haji Haroon Kably Vs. Mahomed Taher Jaffrani](#), it was held that an order refusing to appoint a Receiver was not a judgment within the meaning of Clause 15 of the Letters Patent and, therefore, no appeal lay from such order. It was observed in that case that an order refusing to appoint a Receiver appeared to stand on the same footing as an order refusing to grant an injunction so far as it affected any alleged right of the party and an order refusing to grant an injunction is not a judgment for the purpose of Clause 15 of the Letters Patent as held in 21 Bom LR 955: AIR 1920 Bom 309.

(7) In Appeal No. 71 of 1958 decided by Chainani, c. J. and S. T. Desai, J. on 12th March 1959 (Bom), the order appealed from was one dismissing the Notice of Motion taken out by the plaintiffs for restraining the defendants from dealing with or alienating the suit properties or from taking further steps in execution of the decree which had been passed in an earlier suit during the pendency of the suit, which the plaintiffs had filed to obtain certain declarations and consequential reliefs relating to his title to the suit property. It was held in that case that the order refusing temporary injunction prayed for involved no decision in regard to the rights of the parties to the suit. In view of these decisions, it is contended that no appeal lies from the order passed by the learned trial Judge in the present case.

(8) In answer to the preliminary point raised by the learned counsel for the respondents, Mr. S. V. Gupte, the learned counsel for the appellants, has submitted two replies. His first reply is that the order passed in the present case is a judgment within the meaning of Cl.15 of the Letters Patent. He has argued that it cannot be said of every order refusing an injunction that it does not amount to a judgment. It is well settled that even interlocutory orders can be judgments and it is not necessary that a Court should pass a final decree or a final order in order that an appeal could lie. If an interlocutory order determines the right of a party even pro tanto then the party whose right has been affected, would have the right to appeal against that order. The real test, therefore, to determine whether the order passed is a judgment within the meaning of Clause 15 of the Letters Patent is to see whether, as observed by Couch, C. J. in (1872) 8 Beng LR 433, it is a decision which affects the merits of the question between the parties by determining some right or liability. Applying this test to the order passed in the present case, Mr. Gupte has argued that the order affects the merits of the question between the parties and determines pro tanto, at any rate, their rights and liabilities. The interim injunction prayed for by the plaintiffs in the present suit is on the basis that, by reason of the breach of the contract, the defendants have been disentitled to obtain payments on the promissory notes and the plaintiffs have, on the other hand, been entitled to recover from the defendants large amounts as claimed by them in the suit. The interim reliefs claimed for by the plaintiffs, therefore, are of great importance to them and are essential and necessary in order that they should get the fruit of the decree, which would be passed in the suit by safeguarding this rights during the pendency of the suit. When an application for a temporary injunction is made during the pendency of the suit, the Court has to

determine whether the plaintiff has a prima facie case made out so that the interim relief may be granted. A refusal of the interim relief, therefore, involves a pro tanto determination that the plaintiff has failed to make out a prima facie case and, therefore, affects the decision of the question involved in the suit. It also affects his right to have his right safeguarded during the pendency of the suit. He has, therefore, urged that the refusal to grant an injunction in a case like the present one amounts to a judgment within the meaning of Clause 15 of the Letters Patent.

(9) His second reply is that whether the order amounts to a judgment or not within clause 15 of the Letters Patent, it is an order, which is expressly included in O. 43, R. 1 of the CPC and an appeal from the said order is specifically provided for under S. 104 of the Civil Procedure code. The order thus being made expressly appealable under the provisions of the Civil Procedure code, an appeal from the said order is competent.

(10) In our opinion neither of the two replies urged by Mr. Gupte is tenable. The order refusing the injunction in the present case cannot be said to be a judgment as it is not a decision, which affects the merits of any question between the parties in the suit by determining some right or liability.

(11) The questions involved in the suit are whether there was a breach of the contract; who has committed the said breach and what are the consequences thereof. None of these questions are affected by the order passed by the learned trial Judge nor has the order determined any right or liability of the parties. The order, on the other hand, has left the position as it existed before the filing of the suit unaltered in any way. The interim injunctions were asked for restraining the defendants from enforcing their rights under the promissory notes, which were executed in their favour and if the interim injunction as prayed for were granted, it would undoubtedly have affected the rights of the defendants and the order would have amounted to a judgment. The refusal to grant the injunction however, does not affect the rights of either party and leaves the parties at large in the same position in which they were at the institution of the suit. It may be, as Mr. Gupte argues, that the interim reliefs prayed for are important in the interest of his clients, but as observed by Tendolkar, J. in the case of 59 Bom LR 1193: AIR 1958 Bom 2100 to which we have already referred, that because the order passed is of great importance to the parties, it does not amount to a judgment and become appealable, as one can conceive of numerous orders, which are not judgments but doubted of great importance to the parties. It cannot also be argued that the plaintiffs having filed a suit were entitled to have the ultimate rights which may be decreed in their favour safeguarded during the pendency of the suit and so to have the status quo maintained during the pendency of the suit, by restraining the defendants from enforcing their rights, under the promissory notes. The relief by way of an interim injunction during the pendency of the suit is not a matter of right but in the discretion of the Court. The discretion undoubtedly has to be exercised judiciously on a consideration of the entire circumstances of the case. But it cannot be said that a party can as of right claim interim reliefs. The refusal to grant the interim injunction cannot, therefore, be said to be a denial of the plaintiff's right.

(12) As to the further argument of Mr. Gupte that since in considering whether the interim relief, which has been prayed for by a party should be granted or not, the Court has to consider whether a prima facie case has been made out by a party, the refusal to grant a temporary relief involves a decision pro tanto at any rate that the party has failed to make out a prima facie case also is not tenable. Whether the party has a prima facie case or not is not the sole consideration for determining whether the interim relief prayed for should be granted or not. Where the party fails to make out a prima facie case he will not be entitled to such relief, but it does not mean that if the plaintiff has a prima facie case, he must be granted a temporary relief that he has prayed for. That, as we have already pointed out, is in the discretion of the Court and must be determined on a consideration of all the circumstances in the case.

(13) In the present case, we find, the learned trial Judge has not found it necessary to consider the question as to whether the plaintiff has a prima facie case or not because in his opinion, there is no reason to grant the temporary injunctions prayed for in the case irrespective of the merits of the plaintiff's case. There is, therefore, no pro tanto decision involved in the order passed by the learned trial Judge as contended by Mr. Gupte. It may be that by the refusal of temporary injunctions, the defendants may be at liberty to deal with the promissory notes and such dealings may result in some inconvenience or complication to the plaintiffs at a future date in case they succeed in the suit, but the possibility of certain complications or consequences occurring at a future date by reason of the refusal to grant interim reliefs is not the direct consequence of the order passed as pointed out in 21 Bom. L. R. 955: AIR 1920 Bom 309. In view of the foregoing discussion, we are of the opinion that the order passed by the learned trial Judge in the present case is not a judgment within the meaning of Clause 15 of the Letters Patent and is, therefore, not appealable.

(14) Coming then to the second reply of Mr. Gupte that an appeal lies because the order passed is appealable under O. 43, R. 1 and s. 104 of the Civil Procedure Code, we are of the opinion that the said reply also is not tenable. Mr. Gupte's argument in this connection is the under S. 117 of the Code of civil Procedure, the provisions of the Code are made applicable to the High Courts says as provided in Part IX or Part X of the Code or in the rules. Under S. 120, which occurs in Part X, Ss. 16, 17 and 20 alone are made inapplicable to the High Court in the exercise of its original civil jurisdiction. Under R. 3 of O. 49 certain rules of the orders in the 1st schedule of the Code have been made inapplicable to the Chartered High Courts in their exercise of ordinary or extraordinary civil jurisdiction. Order 43, R. 1, however, is not amongst such excluded rules. The result, therefore, is that both O. 43, r. 1 and S. 104 of the CPC are applicable to the High Courts even in the exercise of the ordinary civil jurisdiction. since an appeal is specifically provided for from an order refusing to grant a temporary injunction under s. 104 read with O. 43, R. 1 of the Code, both of which are applicable to the High Court in the exercise of its ordinary original civil jurisdiction the appeal from the present order passed by the learned trial Judge is competent.

(15) The reply to the said argument is that the provisions of s. 104 and O. 43, R. 1 provide for an appeal only from the subordinate Court to the Higher Court and not from one part of the court to the other. It has been held that the provisions relating to appeals contained in the CPC deal with appeals from subordinate Courts to higher Courts and do not deal with appeals from the decisions and decrees of the High Court in the exercise of its ordinary or extra-ordinary civil jurisdiction except so far as the appeal to the Supreme Court is concerned. The subject of an appeal from the decision of a single Judge of the High Court to a Division Bench of the same High Court is dealt with only under the Letters Patent and such right is not governed by the provisions of the CPC relating to appeals. This view has been taken consistently by the High Courts in India and also by the Privy Council (see *Hurrish chunder v. Kalisunderi Debi* ILR (1883) Cal 482 : *Chapman v. Moidin Kutti* ILR (1899) 22 Mad 68 , *Sabhapathi Chetti v. Narayansami chetti* ILR (1902) 25 Mad 555, *Toolsee Money Dassee v. Sundevi Dassee* ILR (1899) 26 Cal 361 , [Vaman Ravji Kulkarni Vs. Nagesh Vishnu Joshi](#), and *Ganpati Wadgoo v. Pilaji Kothuji* AIR 1956 Nag 211, to quote only a few of the decisions)

(16) Mr. Gupte has invited out attention to a division bench of the Calcutta High Court in *Mathura Sundari Dasi v. Haran Chandra* ILR 43 Cal 857: AIR 1916 Cal 361 , where a contrary view appears to have been taken. The said decision, however, cannot help Mr. Gupte because in [Bhuta Jayatsing Vs. Lakadu Dhansing](#), a Full bench of our High Court, after having considered the said decision and after having considered the question, has held that s. 104 read with O. 43, R. 1 of the CPC applies only to Courts of inferior jurisdiction to the High court, and not to appeals from one or more Judges of the High Court.

(17) Mr. Gupte has argued that all those cases in which the said view has been taken were cases where the question primarily to be considered was whether S. 104 controlled the provisions of Clause 15 of the Letters Patent so that even in cases where the order passed was a judgment within the meaning of Clause 15 an appeal did not lie because the order passed is not such as came within the purview of S. 104 or O. 43, R. 1 of the Civil Procedure Code. The question whether when the order passed was one, which was appealable under s. 104 or O. 43, R. 1 of the CPC an appeal did not lie because the order was passed by a Single Judge of the High Court in the exercise of the ordinary civil jurisdiction of the High Court and was not a judgment within the meaning of Clause 15 of the Letters Patent, was not considered in any of those cases. It may be, says Mr. Gupte, that in view of these decisions, orders passed by a Single Judge of the High Court which are not appealable under the CPC may be appealable by reason of the special provisions contained in Clause 15 of the Letter Patent, but where the appeals are provided against the orders under the Civil Procedure Code, the right of appeal cannot be denied because the order does not amount to a judgment within the meaning of Clause 15 of the Letters Patent. The argument, in our opinion, is untenable because it assumes that the appeals provided under the CPC are also from orders passed by a single Judge of the High Court in the exercise of his ordinary civil jurisdiction. That assumption is not correct having

regard to the view, which has been consistently taken by the different High Courts in the decisions, which have been referred to by us above. As has been held in those cases, the question whether an appeal lies from the decision or order passed by the single Judge of the High Court in the exercise of his ordinary civil jurisdiction must be determined not by reference to the provisions relating to appeals contained in the CPC but by the provisions of Clause 15 of the Letters Patent only. The argument, therefore, that the order passed being an order appealable under S. 104 and O. 43, R. 1 of the Code of Civil Procedure, an appeal lies therefrom, cannot be accepted.

(18) In our opinion, therefore, neither of the two replies, which Mr. Gupte has advanced in answer to the preliminary point raised by the learned counsel for the respondents is capable of being sustained and the result, therefore, is that preliminary point must be accepted and the appeal held to be incompetent.

(19) The appeal is accordingly dismissed with costs. The respondents' attorney will be entitled to withdraw the deposit which has been made by them. the undertaking given by the respondents No. 1 to 3 should be discharged. Notice of motion also is dismissed with costs.

(20) Appeal dismissed.