(1991) 08 CAL CK 0020

Calcutta High Court

Case No: Suit No. 192 of 1986 and Appeal No. 201 of 1991

Indrajmal Shyamaukha and Others		APPELLANT
	Vs	
Bhagat Singh Dugar and Others		RESPONDENT

Date of Decision: Aug. 27, 1991

Acts Referred:

- Arbitration Act, 1940 - Section 17
- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 3, Order 43 Rule 1, Order 43 Rule 1(d), 104, 2
- Hindu Adoptions and Maintenance Act, 1956 - Section 11(i), 11(v)
- West Bengal Premises Tenancy Act, 1956 - Section 2(h)

Citation: 96 CWN 441

Hon'ble Judges: A.N. Ray, J; A.M. Bhattacharjee, J

Bench: Division Bench

Advocate: Anindya Mitra, Pratap Chatterjee, Barin Ghosh, P.K. Roy and P. Nath, for the Appellant;S. Pal, Ranjan Deb, Shyamal Sarkar and Bidyut Dutt, for the Respondent

Final Decision: Dismissed

Judgement

A.M. Bhattacharjee, J.

Both the impugned Orders must and do survive these appeals though with a little alteration by way of addition as indicated in the Judgment of Ray, J., following hereinafter, I agree with the Order proposed by Ray. J. But a few words on some of the questions involved.

1. Under the law as it stood before the enactment of the Hindu Adoption and Maintenance Act, 1956, one could not adopt two persons simultaneously, as ruled by the Privy Council in Akhoy Chunder Bagchi vs. Kala Pahar Haji (12 IA 198) and then in Surendra Keshub vs. Doorgasoonderi (19 IA 108). The decisions of the Privy

Council were severely criticized as erroneous and as wrong exposition of law arrived at by "lawyers without Sanskrit", as there was no provision anywhere in any of the Smritis or the Nibandhas prohibiting such adoption, while some of the provisions of the Codes of Atri Ushana, Brihaspati and Likhita could reasonably be interpreted to permit, or even encourage, plurarity of sons, whether aurasa (natural), dattaka (adopted), or otherwise. (See, among others, Sarkar-Sastris Tagore Law Lectures on the Hindu Law of Adoption).

The present Act of 1956, in prescribing the conditions for a valid adoption, has provided in Section 11(i) that while adopting a Son, the adopter must not already have another Son, whether natural or adopted, living at the time of adoption. This clearly rules out what used to be called successive adoptions, i.e., the adoption of one after another has already been adopted and is in existence. But does not, at least expressly, rule out simultaneous adoption of two sons at a time and at one go, if that is otherwise possible in fact in accordance with the requisite rites. The express prohibition in Section 11(v) against simultaneous adoption of the same child by two or more adopters and the conspicuous absence of such a direct prohibition in respect of simultaneous adoption of two or more sons by the same adopter, may be of great significance. At any rate now that under the present Act a childless person Can adopt a son and also a daughter, a simultaneous adoption of two children of different sex would be permissible. And, but for the binding decisions of the Privy Council referred to hereinabove, I would have ventured to think that in view of the absence of any express prohibition in the earlier Hindu Law against plurarity of adopted sons, the mad craze for sons among the early Hindus leading to recognition of twelve kinds of sons, including Dattaka and Aurasha and the serious threat in our scriptural laws of banishment to hell to a childless person, eulogizing the Rahuputra and demonizing a Putraheena, a simultaneous adoption of more sons than one would not have been illegal.
But accepting that simultaneous adoption of two or more sons was illegal, and the award was wrong in holding such adoption to be legal, an award, even if liable to be set aside on the ground of such an error apparent, does not and cannot become a nullity on the ground of any such error, as no question of any jurisdictional error, Which alone can make an award a nullity, is involved. And where, as here, such an award, far from being set aside or attempted to be set aside by appropriate proceedings, has become a rule of the Court in the form of a decree, an execution thereof can no longer be resisted.

An impression has not only gained ground but is very much deeprooted that anything relating to or covered by a testament is beyond the reach of Arbitration. I am afraid that this is too broad a statement.

True, it is only Civil Court (the so called Probate Court is obviously a Civil Court) which can grant or refuse to grant Probate or cancel one already granted. Nothing extra-ordinary. For it is Civil Court, only, however labelled, which can grant

matrimonial relief, or decree ejectment of tenant, or appoint guardians for minors. But from that alone, it cannot and does not follow that all disputes relating to spouses, or landlord and tenant, or custody of miners are ''no-entry'' area for arbitration.

The crucial words in the observations extracted by Ray, J., from the Supreme Court decision in Bahadur Singh and Another Vs. Muni Subrat Dass and Another, are "without satisfying itself that a ground of eviction exist". The relevant Premises Tenancy legislation countermanded any decree in favour of a landlord and against a tenant except on one or more of the grounds specified in the Statute and, therefore, any decree for eviction passed by a Court, even though on the basis of a compromise between the parties or an award by an arbitrator, was held to be nullity, if there was nothing to show, from the compromise or the award or otherwise, that the Court was or could be satisfied as to the existence of a statutory ground of eviction. But a long catena of post-Bahadur Singh decisions of the Supreme Court, and also of this Court, has now settled it beyond doubt that if there were materials before the Court, whether in the petition of compromise, or in the award, or elsewhere, to how that a statutory ground of eviction existed, a decree of eviction on the basis of compromise between the parties or an award by the arbitrator would not be a nullity.

Suppose, on coming to know about a Will adverse to his interest, in respect of which no probate has been applied for, an heir on intestacy files a suit for a declaration that the deceased died intestate and that he is entitled to the estate by inheritance. And the dispute between the heir on intestancy and the testamentary heirs or legatees is settled out of Court with division of the estate between the person claiming on intestacy and the persons claiming under the Will. 1 do not know why such a settlement or compromise would be unlawful and why a compromise decree cannot be passed thereon under Order 23, Rule 3 of the Code of Civil Procedure, even though such a compromise and the decree thereon would be in derogation of the provisions of the Will and would considerably affect the Will and virtually set it aside, at least in part. Whether, after such compromise and decree, the legatee can still take steps for enforcing the Will or would be estopped from doing so, is a different matter. But is such a compromise and decree thereon are permissible under the law, then it is difficult to understand as to why the same would be impermissible if done through arbitration.

But even though I have my doubts as to whether anything and everything relating to or covered by a Will is necessarily a prohibited Zone or forbidden ground for arbitration, I do not as I need not, decide the point, because, as rightly pointed out by Ray, J., the validity or otherwise of the Will would have had no effective bearing on the dispute before us and any determination to that effect by or in the award may very well be ignored in this case, as done by Ray, J.,.

2. The expressions ''Judgment'', "Order". ''Decision'' and ''Decree'' are very often used synonymously. Going by the definitions in the Code of Civil Procedure. Section 2 while ''Decree'' or ''Order'' is the formal expression of an adjudication or decision, ''Judgment'' is the statement of the grounds or reasons for the adjudication or decision. But otherwise, the expression judgment would include any decision on a matter in dispute, whether reasoned or unreasoned.

I agree with Ray, J., that in view of the ratio of the decision of the Supreme Court in Shah Babulal Khimji Vs. Jayaben D. Kania and Another, the Orders assailed before us are to be held as appealable. It is true that as a result of the amendment of the definition of "decree" in the Code of Civil Procedure, the Orders under appeal would no longer be appealable as "decree" and those were never appealable as "Orders" u/s 104 read with Order 43 of the Code. An apparent disparity -- because Orders in execution in the original jurisdiction of the High Court may be appealable as "Judgment" under Clause 15 of the Letters Patent, but such Orders in other Courts are no longer appealable. This apparent anomaly was sought to be mollified by Mr. Mitra by pointing out that such Orders in other Courts would be open to revision, while no revision is available in respect of Order in execution passed by this Court in the Original Jurisdiction. True. But 1 wonder whether a revision can at all be a substitute for anneal on facts as well as law. But in view of the Supreme Court decision in Khimji (supra), it may not be permissible for us to project the legislative Amendment of 1976 of the CPC in Clause 15 of the Letters Patent of 1865 by way of superimposition and thus to cut down the amplitude of the expression "Judgment" as amplified in Khimji, on the ground that such circumscription would appear to be in tune with "felt necessities" of time.

I agree with the view followed by Ray, J., that if two views are possible relating to appeal ability of an Order, the one in favour of appeal is generally to be accepted. But to agree with Ray, J., in holding that whenever the cause of justice appears to be in distress, the Judges, like Knight-Errants of yore, must go into miltant action to exercise appellate jurisdiction to rescue justice in jeopardy, unless the Order assailed is expressly labelled as non-appealable may be going too far. That would upset the settled principle that appeal must be creature of statute and not of Judge''s predilection, to be or not to be according to the mental process of the concerned Judge. With respect, I do not think appealability can be allowed to stand or fall on something like Chancellor''s foot in the old Equity Jurisdiction of the United Kingdom.

As already stated, I agree with the Order proposed by Ray. J., as hereinbelow.

Ajoy Nath Ray, J.

3. I think that the two appeals from the two Orders of Justice Suhas Chandra Sen, respectively dated 29.4.91 and 6.5.91 should both be dismissed.

By the first Order his Lordship has refused to interfere with an earlier Order dated 18.5.89 passed in execution of a decree passed on an award. The award was the result of a reference made in the above suit no. 192 which had been filed by the Dugars against the Shyamsukhas.

The suit was filed in March 1986, the Order of reference in suit was made on 31.3.87, the award was passed exactly after one year and is dated 31.3.88: the decree upon award was passed on 29.9.88 after due notice to the Shyamsukhas. The Order in execution of the decree was passed on 18.5.89. By this, the Shyamsukhas were directed to hand over possession of the flat in question, situated on the first floor of No. 5A Lord Sinha Road, Calcutta to the Dugars. I should mention here that the floor area of the flat is about 5000 sq. feet, that the owners of the flat are the Jhunjhunwallas (who form the third of this three group litigation amongst the Shyamsukhas, the Dugars and the Jhunjhunwallas) and that the rent of this huge flat in the heart of Calcutta is about a thousand rupees only. The seeds of today''s litigation germinated when, on 20.3.86'', Srimati Suwat Kunwar Dugar, an admitted tenant of the flat, died.

4. The suit between the Dugars and the Shyamsukhas concerned family property. It was held in the award that two adoptions made by the husband of the said lady, Srimati Dugar, i.e., by Sohanlal Dugar, of his two nephews, namely Ratan Lal Dugar and Subhkaran Dugar, were valid. The present party Dugars are the successors to the two adopted sons who died in 1979 and 1985 respectively. By reason of the adoptions being held to be valid, the Dugars succeed to the property of the lady''s husband. The Dugars say that even otherwise they would have succeeded to the family property as the two adoptees were the two sons of the brother of the adopter Sohanlal. The lady did not have any property of her own of which we have given much detail, except of course, the tenancy itself.

5. The award also purported to set aside two Wills of the lady, whereby she had bequeathed property, or purported to bequeath property, to a charitable trust. We are told that one of the Shyamasukhas was a named trustee of that trust, but no longer is; and that the trustees of the trust are now another set of Dugars who are different from the main Dugars involved in this litigation, the identity of the surname being merely coincidental.

6. Apart from declaring the two adoptions to be valid and setting aside the Wills of the lady, the award also gave away the flat to the Dugars from the Shyamsukhas. The Shyamsukhas are now in possession of the flat and were living with the lady at the time of her death. The clause in the award regarding the flat i; as follows :-

5. We hold and award that the Defendants no. 1, 2, 3 and 4 (four Shyamsukhas) were at the request of the deceased Smt. Suwat Kunwar Dugar staying with her as her guests in the first Floor of the old Block and other portions of Premises No. 5A, Lord Sinha Road, Calcutta and they may continue to live there in like manner upto 28.2.89

but shall hold the possession thereof until (sic) such time as legally permitted to hand over possession to the plaintiffs herein (the Dugars) in terms of Suit No. 325 of 1986 in the High Court at Calcutta. We clarify that the plaintiffs are the rightful successors and inheritors of the Tenancy Rights of the deceased in the said premises.

It is this clause that hurts the Shyamsukhas. They want to stay on in the big flat with the low rent in the fact of this clause in the award which has ripened into a decree. The question in these two appeals is whether that is permissible now.

7. The suit, being no. 325 of 1986 referred to in the above clause is the suit filed by the owners, Jhunjhunwallas, against the Shyamsukhas alleging the latter to be trespassers. The Shyamsukhas say that they are statutory tenants, as they were living with the lady at the time of her death and because they are brothers of the lady. They rely on Section 2(h) of the West Bengal Premises Tenancy Act, 1956 which confers on heirs, living with the tenant at the time of his death, the status of statutory tenancy. Whether they are tenants or not, or statutory tenants or not will be finally decided in the suit itself.

The order for appointment of two receivers for taking of possession of the flat was passed on 18.5.89. It was not passed in the eviction suit filed by the Jhunjhunwallas, but was passed in the award-suit of the Dugars.

In this award-suit, the Jhunjhunwallas applied to be made parties, but by on Order dated 13.5.1987 they were not made parties and it was said that the award, if any passed (as it had not until then been passed) would not be binding upon the Jhunjhunwallas. We have attempted to avoid causing any prejudice to the Jhunjhunwallas, as far as possible, in the circumstances of this case.

8. Learning of the Order dated 18.5.89 regarding appointment of receivers and giving of possession of the flat to the Dugars from the Shyamsukhas, the Jhunjhunwallas applied in their suit, no. 325 of 1986 on 22.8.90, praying inter alia for stay of any further action by the receivers. This application of the Jhunjhunwallas resulted in the second Order of Justice Sen dated 6.5.91 which is under appeal. By that Order his lordship refused to stay the hands of the joint receivers, but instead, set a specific date for taking of possession of the flat by them.

The Dugars, who'' were never in possession had earlier applied to be made parties to the eviction suit of the Jhunjhunwallas against the Shyamsukhas. They got a limited Order of addition; by the Order dated 9.7.1987, they were added, but were permitted only to agitate the question of maintainability of the suit.

9. The Shyamsukhas have said :-

1.1 The arbitrator had no jurisdiction to decide on adoption or validity of a Will, and that this lack of jurisdiction can be put up in defence of execution proceedings, even without challenging the award under the provisions of the Arbitration Act, 1940,

because the award being a nullity, the same remains unenforceable even when it has ripened into a decree.

1.2 The permission under the above quoted clause of the award has not been yet given, and even if the second impugned Order of Justice Sen dated 6.5.91 is construed as such permission, the same should be set aside.

The Jhunjhunwallas have also supported the above stand no. 1.2 of the Shyamsukhas. We could not, we must say, smell any collusion amongst the true groups, who appear to be truely fighting in their own self interest. The Jhunjhunwallas say that in their eviction suit, the Dugars are only pro-forma defendants and that their suit structure would radically change if the factual position regarding possession of the flat is totally altered during the pendency of the suit. They resist the giving of permission in their suit no. 325 of 1986. We take this as objection no. 2.1.

The Dugars support the Order passed by Justice Sen, and raise a point of appealability. As an Order in execution (passed u/s 47 of the Code of Civil Procedure) has ceased to be appealable as a decree by reason of the amendment of the definition of a decree in Section 2(2) of the Code and as an Order u/s 47 was never appealable under the present Code except as a decree, Mr. S. Pal argued on behalf of the Dugars that neither of the two impugned Orders is appealable, both being passed in execution proceedings, and under situations clearly envisaged u/s 47. Mr. Anindya Mitter for the Shyamsukhas did not have much to say about the two impugned Orders being passed u/s 47 - situations, but he said that the Orders would be appealable to the Division Bench, as Judgments, within the meaning of Clause 15 of the Letters Patent. The point of appealability I shall deal under paragraphs 3.1.

10. Now for the pointwise discussion.

1.1(a) Mr. Mitter relied upon the case of Bahadur Singh and Another Vs. Muni Subrat Dass and Another, for citing an instance where an award can be resisted as a nullity even at the stage of execution of a decree upon the award. The case is indeed such an instance. Mr. Pal sought to distinguish that case by pointing out the violation of an express statutory provision of the tenancy laws which weighed with the Court there. Mr. Pal said that if an award is contary to an express provision of statutory law, it could be resisted in execution only, but that there existed no such violation of express statutory provision in this Case. I am unable to read the Supreme Court Case as limited to violations of express statutory provisions only. Justice Bachwat, who was considered be an authority on the technicalities of arbitration law at the bar, on the Calcutta Bench, on the Supreme Court Bench, as well as an author, said (at p. 436, CD.) : -

Now the decree in the present case is on the face of it one for recovery of possession of the premises in favour of a landlord against a tenant. The Court

passed the decree according to an award u/s 17 of the Arbitration Act, 1940 in a proceeding to which the landlord was not a party without satisfying itself that a ground of eviction existed. On the plain wording of Section 13(1) the Court was forbidden to pass the decree. The decree is a nullity and cannot be enforced in execution.

It is quite clear therefore, that if the decree on the award is a nullity either because of the absence of a vital party, or because of the breach of an express statutory provision, or, I dare say, because of any other reason, going in a similar manner, to the root of the validity of the decree, then, the decree can be resisted even in execution.

11. 1.1(b) Thus, on the above authority, any glaring violation of established law, which is not merely a ground for setting aside an award, but goes to the root of the validity of a decree, by whatever technical process obtained, can be raised as an objection of nullity of the award even at the stage of execution of the decree passed pursuant to the award.

12. 1.1(c) I also agree with Mr. Mitter that invalidation of a Will by an award is such an objection to the award as goes to the root of the (in) validity of a decree passed upon it. A Will is not validated or invalidated save by a Court of probate. No other process of validation or invalidation is known to the law. There is a terrifying mass of authorities as-to how and when probate is refused This is the only instance I can now recall where a Court acts upon mere suspicion and refuses probate, The Court''s satisfaction of the genuineness of a Will is a precondition to grant of probate. Aprobate cannot be had by consent of parties. It is just like a mere consent being insufficient as such to permit the passing of a decree for eviction under the West Bengal Premises Tenancy Act. Wherever parties are prohibited from obtaining a decree by mere consent, the arbitrator has to be specially shown to have, in law jurisdiction to entertain such disputes and pass valid awards thereon. This is because public policy prohibits consent decrees in many cases, and public policy cannot be got round merely by taking recourse to a decree upon award, over the making and publishing, of which there is no supervision of a Court of law.

1.1(d) Though the declaration of invalidity of the Wills of Smt. Dugar in the award may be an infirmity going to its root, yet the Court will not stop any execution unless such invalidity can be shown to be causing some prejudice to the party resisting execution. The Shyamsukhas have utterly nothing to gain by the invalidity or validity of the Wills alone. If the Wills are good, the property of the lady goes thereunder to the charitable trust; even assuming that an heir living with the tenant is to include an heir taking under a Will, the Shyamsukhas gain nothing by the Will being validated. Also, if the Wills are invalidated, as held by the arbitrators, the Shyamsukhas again lose nothing, because the property passes to the adopted soils and their heirs, since Ratanlal and Subhkaran had been adopted by both Sohanlal and his wife Smt. Dugar, and the adopted line furnishes the heirs of both of then- to

the exclusion of the Shyamsukhas, because Hindu sons exclude Hindu brothers as heirs.

1.1 (e) Probate proceedings of Smt. Dugar''s Wills are pending. The declaration of invalidity of the Wills by the arbitrators cannot have any effect on the probate proceedings. Under these circumstances, even in an application for setting aside of the award the question of severing the portion regarding the Will would have to be considered. In an application for resistance to execution only, such severance is a must, under the circumstances of this case. In the above case of Bhadur Singh also a severance of the invalid portion of the award was effected.

See (1969) 2 S.C.R. 437 C where it was said : -

As the decree for the delivery of possession of the premises to the landlord is a nullity it cannot be enforced or executed either by the landlord or by the landlord''s son Muni Subrat. The decree in so far as it directs the removal of the machinery from the premises is clearly valid and separable from the rest of the decree and may be executed by Muni Subrat.

13. In our case I have no hesitation in severing the invalid portion of the award regarding the Will from the portion dealing with the tenancy, and, after this mental exercise, in keeping my attention directed towards the other portions of the award dealing with the tenancy etc., to see if the same are liable to resistance in execution or not.

1.1 (f) If, however, the award regarding adoption also suffers from the same fundamental defect as the portion in the award regarding the Will, the case of Shyamsukhas would somewhat improve. That is because the Dugars, without the adoptions, would be closer heirs to Sohanlal Dugar, the husband of Smt. Suwat Kunwar Dugra, but the Shyamsukhas, again without the adoptions, would be closer heirs to Smt. Dugar herself. But an award as to an adoption is quite good in law. There is nothing to prevent a consent decree from being good and binding in a suit where heirship by adoption is in issue. There is no public policy which forbids parties from agreeing by way of a consent decree to validate an adoption. No law to the contrary was shown to us. Of course, such a decree may be challenged for collusion, but that is irrelevant, because every decree can be challenged on such grounds as fraud or collusion. No authorities were cited to show that an arbitrator has no inherent jurisdiction to enter into disputes as to adoption.

1.1(g) It was said by Mr. Mitter that both the adoptions are bad because they were simultaneous; under the old Hindu law, an adoption was invalid if a son were already there and thus a simultaneous adoption of two sons was said to be mutually destructive. If there is no exactly simultaneous adoption attempted, at least one of the two adoptions will remain valid.

14. Authorities in this regard were produced by Mr. Mitter. Even if Mr. Mitter is right (and I must mention that facts are not so clear as to the simultanity of the two adoptions as might appear from the short paragraph 1 have written about them) the arbitrator merely went wrong. For such wrong awards, resistance to execution is not a permitted remedy. The authorities are too numerous and too well known to all for any special reference, but an apposite passage can be seen in Bahadur Singh''s case itself at page 435 F, G of the report cited above.

1.1(h) In conclusion, the Shyamsukhas fail in their objection under 1.1 because the adoptions cannot be now challenged and because the award about invalidation of Smt. Dugar''s Wills is severable and irrelevant to the issue of tenancy, as arising between the Dugars and the Shyamsukhas. However, it is theoretically conceivable that the Jhunjhunwallas may succeed against the Dugars, and the Shyamsukhas may succeed against the Jhunjhunwallas, so that the Shyamsukhas go back into possession after completion of a full circle; the Order we propose to pass will not prejudice even that extreme contingency regarding the final results of the many suits now pending.

1.2 (a) Mr. P.K. Roy for the Jhunjhunwallas stated that his clients applied on 22.8.1990 for staying the hands of the joint receivers and that application had the (reverse) effect of the joint receivers being directed to take possession. Mr. Pal said that the history of the permission clause in the award is as follows. On 22.5.86 and 16.3,87 the Jhunjhunwallas obtained protective Orders against the Shyamsukhas restraining them in effect from parting with possession and undertakings to that effect were also obtained from them. The award could not simply direct possession to be handed over by the Shyamsukhas to the Dugars in spite of these subsisting Orders. A prior permission of the Court which had passed the Orders was thus necessary.

1.2 (b) Mr. Pal rightly submitted that a permission was all that the award called for and it mattered little as to on whose application the permission was granted.

15. 1.2(c) Mr. Roy and his learned Junior Mr. Nath pointed out that there were other Orders in other suits and contended that these other Orders would be broken if possession is given to the Dugars. They pointed out the Order dated 10.4.89 in their suit against the Dugars (Suit no. 914 of 1988) and the Order dated 12.11.88 in their suit (Suit No. 915 of 1988) against the second (and different) set of the trustee Dugars, who are trustees of the charitable trust benefiting under Smt. Dugar''s Wills. I do not find these Orders to be in the way at all. The first Order expressly permitted the parties to proceed with the matter in accordance with law, and nothing illegal is now being sought-to be done. So far as the second Order is concerned, the same directs status quo as against the trustee Dugars, which status quo is not being altered at all the trustee Dugars are out of possession and will also remain out of possession.

1.2 (d) Mr. Mitter said that there was no express permission granted as envisaged in the award. He also said that the permission if any granted by the second impugned order dated 6.5.91 was not there when the first impugned Order dated 29.4.91 was passed and thus the first Order was passed in violation of the award itself which was being sought to be executed. Mr. Pal said rightly that now the sequence of the two Orders is no longer relevant, as both are in appeal before us. He also said, again correctly, that the second Order of 6.5.91 docs something more than mere grant of permission; it directs possession to be taken from the Shyamsukhas by the receivers. It protects the Shyamsukhas throughly against any possible risk of their being in any violation of any undertaking that they might have given to Court of not parting with possession. The taking of possession by officers of Court is no voluntary action on the part of the Shyamsukhas who can thus be said neither to have violated any Order of injunction, nor to have broken any undertaking given to Court.

2.1 (a) If possession is given to Dugars, the Jhunjhunwallas may have to alter the scheme of their suits. That is invitable. The Dugars have a decree of possession as against the Shyamsukhas. That decree cannot be resisted in execution merely because it may call for some amendment in pleadings of certain other parties.

2.1 (b) It is important however to see to it that the Jhunjhunwallas are not in any way prejudiced (sic) suits at the final hearing. If possession is simply taken by the joint receivers and handed over to the Dugars, the same might affect the result of the many pending suits among the parties. Such a handing over of possession simpliciter would have the effect of decreeing in part the suit of the Dugars against the Jhunjhunwallas. (suit no 146 of 1989) where possession is claimed by the Dugars of the very same flat. Thus, whatever is done must be done under the protective umbrella of the possession of the joint receivers, who will possess de jure for all, even though the Dugars may be allowed to occupy under them de facto, and even though the Shyamsukhas may, for the time being de facto, with respect to make a slight addition to Justice Sen''s Order, as indicated later on.

16.3.1(a) I do not agree with Mr. Pal that the Orders are not appealable under Clause 15 of the Shah Babulal Khimji Vs. Jayaben D. Kania and Another, has now settled beyond all doubt that there is a body of Orders appealable under clause 15 even though not appealable under the Code. See in this regard paragraph 80 of the Judgment at page 1808. The word "Judgment" in Clause 15 is such a one as escapes definition. The more one tries to pin it down, the more slippery it proves itself to be. If an Order is to be held as appealable, then it is better to hold it so on the grounds of the importance of the Order to the parties and the justice of the case, rather than to try and formulate principles which will fit the type of Order then under examination by the Court, but will be of no real assistance in future cases. A century of principle enunciation has achieved less certainty than can be had from the simple and practical (with respect) approach of the Supreme Court - (see paragraph 83 of the above judgment) : -

... a Court is not justified in interpreting a legal term which amounts to a complete distortion of the word "Judgment" so as to deny appeals even against unjust orders to litigants having genuine grievances so as to make them scapegoats in the garb of protecting vexations appeals. In such cases, a just balance must be struck so as to advance the object of the statute and give the desired relief to the litigants, if possible.

17. 3.1(b) On the above basis I hold the two Orders to be appealable because they affect substantially, and it would be unjust to shut out a hearing of appeal even if a case for interference can be made out. I would go so far as to say that a judgment of a judge is appealable unless it has either already been held to be otherwise, or is clearly not so prejudicial to a party as to call for an appellate remedy. I am aware that that leaves appealability to the assessment of the appellate Court; I am also equally aware that is a more just and appropriate solution than trying to create a division amongst types of Orders, branding one type as always appealable and another type to be always unappealable. This scheme of Order 43 of the Code need and should not be imported into the Letters Patent any more than has already been done. There is nothing to gain by losing the flexibility, when experience has shown the word "judgment" to be quite incapable of exact definition.

3.1 (c) While the point of appealability was being argued, we were referred to the Division Bench decision in S.C. Sons (P) Ltd. Vs. Sm. Brahma Devi Sharma and Others, It was held there that no appeal would lie from an Order setting aside a dismissal of a suit for default (see paras 2 and 73) though Khimji"s case states the law to be exactly the opposite in case of setting aside of an ex parte decree (see AIR 1981 SC at 1816 left Column). The Calcutta case held that holding an Order setting aside an ex parte dismissal to be a judgment would amount to nullifying the provisions of Order 43, Rule 1. The Supreme Court said that even if the Order setting aside an ex parte decree does not fall within Order 43, Rule 1(d). yet the serious Question arises whether the Order is a judgement under the Letters Patent. I have stated the above oddity as manifesting the utter confusion that is often involved in trying to reason out whether an Order is a judgment or not. The Supreme Court view, I think, is, that if it is clear, that if the Order stands, it will be the cause of a genuine grievance to a party, then the Order is appealable as a judgment under Clause 15.

The Order in appeal will thus be a dismissal of the appeal from either of the two Orders, dated 29.4.91 and 6.5.91 with only this addition, that the joint receivers shall also be receivers in the Suit No. 325 of 1986 (Jhunjhunwalla vs. Shyamsukhas & Dugars) and that after taking over vacant possession of the flat on the first floor of 5A Lord Sinha Road from the Shyamsukhas on or before Wednesday, 18th September. 1991, the joint receivers shall fortwith thereafter permit the Dugars, being the plaintiffs in suit 192 of 1986, subject to further decrees of Court, to occupy the flat under them. The rest of the two Orders under appeal shall stand affirmed.

No Order as to costs.

Ajoy Nath Ray, J.

I agree.