(1970) 06 CAL CK 0016

Calcutta High Court

Case No: Suit No, 2411 of 1968 and Appeal from the Final Order No. 159 of 1969

National Screw and Wire Products Ltd.		APPELLANT
	Vs	
Syndicate Bank Ltd.		RESPONDENT

Date of Decision: June 19, 1970

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 110
- Constitution of India, 1950 - Article 133, 226

Citation: 75 CWN 447 : (1970) 2 ILR (Cal) 483

Hon'ble Judges: S.K. Mukherjea, J; B.C. Mitra, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

S.K. Mukherjea, J.

This appeal is directed against an order or rather a couple of orders made by K. L. Roy J. in a suit which has been transferred to the list of undefended suits. By those orders, the learned- Judge refused to grant extension of time to the Defendant to file its written statement and decline to hear counsel on its behalf at the hearing of the suit.

2. It appears that on September 7, 1968, the Respondent Syndicate Bank Ltd. brought an action against the Appellant National Screw & Wire Products Ltd. claiming a decree for Rs. 39,47,241-78 P. a declaration that certain goods stand charged by way of lien or pledge in respect of the Plaintiff''s dues and for other relief�s. On an application made in the said suit by the Respondent a Receiver was appointed to take possession of those good|. By an order dated December 6, 1966, Sabyasachi Mukharji J. directed the Receiver to sell the goods of which he had taken possession and directed that the written statement should be filed within three weeks from the date of the order.

3. It appears that summons in the suit was served on the Defendant on September 18, 1968. The Defendant duly entered appearance in the suit, but in spite of the direction given by Sabyasachi Mukharji J. the Defendant did ﷿not file its written statement. Eventually, the suit was transferred to the list of undefended suits. On August 1, 1969, the suit appeared in the list of K. L. Roy J. for hearing. On that day, at the sitting of Court an oral application was made on behalf of the Defendant before the learned Judge for adjournment of the suit and for leave to file the written statement. The application was rejected. Thereafter, the suit was adjourned for hearing till 2 p.m. In the afternoon, Mr. Sankardas Banerji, appearing for the Defendant, made certain submissions before the learned Judge. The minute of the Court''s order passed in the afternoon reads as follows:

Mr. B. N. Sen (with Mr. D. Gupta and Mr. B. Sen) for the Plaintiff.

Mr. Sen makes his submission.

The Court: Heard in part and adjourned till Friday next.

4. Thereafter, the Defendant preferred the present appeal and obtained an ad interim order staying the hearing of the suit. On September 4, 1969, while the application for stay was being heard by a Bench consisting of Arun K. Mukherjea J. and myself, Mr. Banerji appearing for the Appellant submitted that the minutes of the order of K. L. Roy J. were incomplete in certain material particulars and that it should have included a statement to the effect that the learned Judge had held that Mr. Banerji, the Defendant''s counsel, had no locus standi to make submissions and declined to hear him. Mr. Banerji submitted that the appeal was directed not only against the order refusing extension of time to file written statement but also against refusal to hear counsel on behalf of the Defendant. As the minutes were silent on the latter question the Bench adjourned the hearing of the application to enable the Appellant''s counsel to speak to the minutes.

5. On September 23, 1969, the Appellant made an application before K. L. Roy J. for rectification of the minutes. By an order of the same date the learned Judge directed that the minutes of the proceedings after the mid-day recess on August 1, 1969, should be rectified to the extent that the Court did observe that Mr. Banerji did not have any locus standi and, accordingly, his appearance was not recorded.

6. It appears from the order for rectification of the minutes that K. L. Roy J. was of the view that counsel had no locus standi to make submissions on behalf of the Defendant and, therefore, declined to hear him.

7. A preliminary objection has been taken on behalf of the Respondent that no appeal lies from the orders complained of, either under the CPC or under Clause 15 of the Letters Patent. It is not in dispute that no appeal lies under the Code. Mr. Banerji contended that the orders are judgments within the meaning of Clause 15 of the Letter* Patent and the appeal is, therefore, maintainable.

8. It is common knowledge that there is a cleavage of opinion on the precise meaning of the term ''judgment'' in Clause 15. The Supreme Court has on some occasions alluded to the controversy on the subject but has not so far given its own opinion. In the absence of final determination of the question the definition of judgment, as expressed by Sir Richard Couch C.J. in Justices of the Peace for Calcutta v. Oriental Gas Co. (1872) 8 B.L.R. 433, remains good law so far as this Court is concerned. In course of his judgment the learned Chief Justice said: We think that ''judgment'' in Clause 15 means 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 a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined.

9. In Asrumati v. Rupendra AIR 195S S.C. 198 B. K. Mukherjea J., speaking for the Court, elucidated the definition given by Couch C.J. in these words:

Couch C.J., as said already, defined judgment to be a decision which determines some right or liability affecting the merits of the controversy between the parties. It is true that according to the learned Chief Justice an adjudication, in order that it might rank as a judgment need not decide the case on its merits, but it must be the final pronouncement of the Court making it, the effect of which is to dispose of or terminate the suit or proceeding.

10. In the light of the definition of ''judgment'' and the elucidation thereof by B. K. Mukherjea J. it is clear that an order which does not dispose of or terminate a suit or proceeding in its entirety or in part is not a judgment within the meaning of Clause 15 of the Letters Patent.

11. In Bonwari Lai Roy v. Sohan Lal Daga ILR (1955) Cal. 299; P.B. Chakravartti C.J., in the context of an appeal from an order granting leave to defend a suit brought under Order 37 of the CPC on certain terms, expressed the view that an order which does not result automatically, or as a matter of course in a decree, is not a judgment.

12. It may not be out of place to mention that the definition of judgment given by Sir Richard Couch C.J. is supported by the latest definition of ''judgment'' given by Hidayatullah J. in Monohar v. Baliram AIR 1952 Nag. 357 (F.B.). The learned Judge said:

A judgment means a decision in an action whether final, preliminary or interlocutory, which decides either wholly or partially but conclusively insofar as the Court is concerned, the controversy which is the subject of the action. It does -not include a decision which is on a matter of procedure, nor one which is ancillary to the action even though it may either imperil the ultimate decision or tend to make it effective. The decision need not be immediately executable per se but if left untouched must result inevitably without anything further, save a determination of

consequential details, in a decree or decrial order, that is to say, an executive document directing something to be done or not to be done or it may leave that over till after the ascertainment of some details but it must not be interlocutory having for its purpose the ascertainment of some matters or details prior to the determination of the whole or any part of the controversy.

13. In Muralidhar Chamaria v. M.R. Dalmia ILR (1917) Cal. 818 a Bench of this Court consisting of Sanderson C.J. and Woodroffe J. applied the test laid down by Sir Richard Couch C.J. to an order refusing leave to the Defendant to file his written statement and held that no appeal lies from an order made by a Judge sitting on the. Original Side, refusing an application for leave to file written statement. Such an order is not a judgment within the meaning of Clause 15 of the Letters Patent. The reasons which impelled the learned Judges to hold so were: (i) the order does not decide the merits of the question between the parties. The case has yet to be tried on merits though as an undefended suit, (ii) The Defendant has a right to appear in person and cross-examine the witnesses called for the Plaintiff. He may obtain leave of the Judge under chap. XIV, Rule 3 of the Original Side Rules to appear by counsel and to call witnesses.

14. Sanderson C.J. observed that at all events the matter has, to be investigated and judicially determined and it may be that the Plaintiff may fail in the suit.

15. Not only is this judgment of a Division Bench binding on us but we also do not see any reason why we should differ from it. It cannot be said that by reason of the Defendant''s failure to file the written statement the Plaintiff will as a matter of course or inevitably succeed in his claim. The suit may yet fail. The suit is, therefore, not disposed of or finally determined either in its entirety or in part. Many undefended suits are dismissed. In this connection reference may be made to the recent Bench decision in Howrah Chemical Works v. Calcutta Merchants and Agents Ltd. (1966) 73 C.W.N. 13 where the decision in Muralidhar Chamaria v. M.R. Dalmia (Supra) was relied on by a Bench consisting of S.P. Mitra and S.C. Ghose, JJ.

16. Mr. Banerji relied on Haji Ismail v. Haji Mohammed (1874) 13 B.L.R. 91; Mathura Sundari Dasi v. Haxran Chandra Saha ILR (1915) Cal. 857; Shorab Merwanji Modi and Another Vs. Mansata Film Distributors and Another, ; Mansata Film Distributors Vs. Sorab Merwanji Modi, ; Rupendra Deb Raikot v. Asrumati (Supra); Mohammed v. S. Mondal and Ors. AIR 1960 Gal. 582 and Mohan Lal Magan Lal Thacker Vs. State of Gujarat, .

17. Learned Counsel contended that the interpretation of the term "judgment'' expressed in the case of Oriental Gas Co. (Supra) has undergone a change as a result of the Supreme Court cases and the Bench decision of this Court in Mohammed Felumiah''s case (11). He submitted that a wider and more liberal meaning should be given to the term ''judgment'' and this Court should hold that the order refusing leave to file written statement is appealable as a judgment. In

Haji Ismail v. Haji Mohammed it was held by Sir Richard Couch C.J. that an order refusing to revoke leave granted under Clause 12 of the Letters Patent is a judgment because the order has the effect of holding that the Court has jurisdiction to proceed with the suit. In other words, the ratio of the decision was that where a question of jurisdiction of the Court is involved in an order, the order is a judgment. No question of jurisdiction is involved in the orders under appeal and the case has, therefore, no application, As regards Mathura Sundari Dasi v. Haran Chandra Saha in Muralidhar Chamaria''s case (Supra) where an''order similar to the one before us was challenged in appeal, it was pointed out by Sanderson C.J. that the facts in that case were entirely different and did not cover the case of an order refusing leave to file written statement. In the cases of Shorab Modi v. Mansata Film Distributors Ltd.;Mansata Film Distributors Ltd. v. S.M. Modi a question of jurisdiction of the Court to proceed with a suit was involved which is not the case here. In Mohammed Felumiah v. S. Mondal AIR 1960 Gal. 582 a Bench of this Court, presided over by P.N. Mookerjee J., held that an interlocutory order modifying an interim injunction restraining some of the Respondents from granting a cinema licence to a Respondent is a judgment and is appealable under Clause 15 of the Letters Patent. The application which resulted in the order under appeal was made in proceedings under Article 226 of the Constitution. It is not necessary for us to pronounce/on the contention that this decision has changed the raw on the subject. The case is readily distinguishable from the one before us. Among the reasons given by P.N. Mookerjee J. for holding that the order was a judgment were his finding that the proceedings in which the order was made were independent proceedings and the order determined a controversy in the writ proceedings for the time being, until those proceedings were finally disposed of. Neither of these considerations arises in the present case.

18. As regards the Supreme Court decisions the first in point of time is Asrumati Debt v. Rupendra Deb Raikot (Supra). In that case the Supreme Court did not seek to define the term ''judgment'' nor did it try to settle the controversy which has been raging for nearly a century. As already pointed out, B. K. Mukherjea J. elucidated the definition of ''judgment'' given by Sir Richard Couch C.J. There is nothing in the judgment of B. K. Mukherjea J. to support the view that the definition of judgment as given by the learned Chief Justice is not fully applicable or that it is defective.

19. As for Mohanlal\\. State of Gujarat (Supra) it is necessary to remember that the case was concerned with the meaning of the term ''final order'' in the context of Article 133 of the Constitution. The term ''judgment'' in Clause 15 of the Letters Patent did not come up for consideration in that case. Although there were statements or suggestions in the judgment of Shelat, J. to the effect that the expression ''final order'' may be equated with the term ''judgment'' the statements or suggestions were made not with reference to ''judgment'' in Clause 15 of the Letters Patent but with reference to ''judgment'' in Article 133 of the Constitution and Section 110 of the Code of Civil Procedure.

20. A distinction was made between "judgment" in Clause 15 and "judgment" in Article 133 of the Constitution in Mukunda Das Nandy and Others Vs. Bidhan Chandra Roy, . Moreover, it has to be remembered that in the case before the Supreme Court the order under appeal finally disposed of the controversy between the parties in proceedings leaving nothing to be disposed of in future. For these reasons the case, in our opinion, has no application to the facts of this appeal.

21. We are of opinion that the order refusing leave to file written statement is not a judgment.

22. Mr. Banerji claimed that the order by which the learned Judge declined to hear counsel on behalf of the Defendant on the ground that he had no locus standi to appear, is appealable as a judgment. In the case before us, the Defendant had entered appearance but failed to file his written statement. Rule 72 of chap. II of the Original Side Rules provides that no party having an Attorney on the record shall be heard in person except with the special leave of the Court, Judge or officer before whom the business is proceeding. Rule 70 provides that in any business which under the Rules practice or procedure of the Court is heard in Court, no party shall be heard by his Attorney where an Advocate of this Court entitled to appear and plead can be procured, but where no such Advocate can be procured, his Attorney may be heard on his behalf and may do all and every act required to be done by such Advocate. In this case, the Defendant entered appearance in the suit by an Attorney and under Rule 72 ordinarily he should not be heard in person except with the special leave of the Court. As counsel had been briefed by the Attorney, under Rule 70 normally only the counsel, not the Attorney or the Defendant in person, had the right of audience.

23. These Rules, however, do not stand in isolation. Rule 16 of chap. VIII provides that in default of an appearance being entered within the time mentioned in the writ of summons for such an appearance, or as hereinafter provided, the suit, as to the Defendant or Defendants in default, will be liable to be heard ex parte. Rule 3 of chap. IX provides that except as provided by chap. X, Rule 27, with which we are not concerned, where the written statement of a sole Defendant is, or the written statements of all the Defendants are, not filed within the time fixed by the summons, or within such further time as may be allowed, has failed to file the same within -the time fixed, the suit shall, unless otherwise ordered by the Judge, upon requisition by the Plaintiff in writing to the Registrar and production of a certificate showing such default, be transferred to the peremptory list of undefended suits. Rule 2 of chap. VIII provides that unless otherwise ordered, the Writ of Summons to a Defendant shall be in one of the Forms Nos. 2 and 3. Form No. 3 relates to summary suits and Form No. 2 to till other suits. Note 2 in Form No. 2 provides that in default of filing written statement within the time limited, the suit will be liable to be heard ex parte. In the present case, the Defendant failed to file the written statement within the, time prescribed in the Writ of Summons with the consequence

that the suit became liable to be heard ex parte as an undefended suit, the Plaintiff''s Solicitor having by requisition brought the suit to the list of undefended stilts. Chapter XIV, Rule 3 provides that where a suit is heard ex parte against any Defendant, such Defendant may be allowed to cross-examine, in person, the Plaintiff''s witnesses and to address the Court; but unless the Court otherwise specially orders, evidence will not be received on his behalf, nor will he be allowed the assistance of an Advocate or Attorney.

24. On a consideration of these Rules it seems that although where there is an Attorney on record and counsel is engaged on behalf of his client by the Attorney, only the counsel can be heard. The Defendant in person may be heard even when there is an Attorney on the record and the Attorney has engaged an Advocate, but he may be heard only with the special leave of the Court. Chapter XIV, Rule 3 on the other hand provides that where a suit is heard ex parte the Defendant may address the Court only if he is permitted to do so ; he may also instead of appearing in person use the assistance of an Advocate, but he can do so only if the Court makes a special order in that behalf.

25. In Muralidhar Chamaria v. M.R. Dalmia (Supra) it was held that Chapter 14, Rule 3 is applicable to a case where the Defendant has entered appearance but has not filed his written statement. That this was a ratio of the decision in that case was affirmed by S.P. Mitra J. presiding over a Division Bench which decided the case of Howrah Chemical v. Calcutta Merchants. In the present case, it is amply clear from the judgment of K. L. Roy J. dated September 23, 1969, that no application was made under chap. XIV, Rule 3 for leave of the Court to permit the Defendant to obtain the assistance of an Advocate. In fact, Mr. Banerji very fairly conceded that he did not make any application orally or formally under chap. XIV, Rule 3. He, however, contended that in seeking to address the Court he was in effect applying for such leave. We are unable to agree. The Rule speaks of a special order. There has therefore to be, in our opinion, a specific application, oral or formal; for leave to appear by counsel. No such application was made.

26. The question arises whether the order of the learned Judge declining to hear counsel on behalf of the Defendant is an appealable order. It cannot be said that failure to hear an Advocate or for that matter the Defendant in person will inevitably result in a decree. It will not be so. The suit may yet fail. The order refusing to hear counsel has not disposed of the suit in part or in its entirety. The order therefore, in our opinion, is not a ''judgment'' under Clause 15 of the Letters Patent.

27. In the view we have taken, neither of the orders appealed from is a ''judgment''. The appeal does not lie and is dismissed with costs.

B.C. Mitra, J.

28. I agree.