(11) In *Chandu Naik's case* (supra), the Magistrate after the preliminary order had attached the subject-matter of the dispute under section 146(1), of the Code. Inspite of the language of section 146(1), the above observations were made by the Supreme Court. The view which I am taking on the basis of *Ram Adhin's case* (6) (supra) and (7) *D. Souza's case* (supra), is in consonance with the observations of the Supreme Court in *Chandu Naik's case* (8) (supra), that attachment under section 146(1) does not automatically lead to the termination of the proceedings.

(12) The net result of the above discussion is that attachment under section 146(1) of the new Code does not lead to the termination of the proceedings under section 145 and the Magistrate who has passed a preliminary order under section 145(1) of the Code has a right to proceed with the case and in view of the statements of the parties and the evidence led before him has to determine the possession in the light of the provisions of section 145(4) of the Code. The Magistrate in the case in hand did nothing wrong or illegal in asking the parties to produce evidence and also recording it when it was produced before him. In view of these observations, the petition is dismissed. The Magistrate is directed to proceed in accordance with the observations made above. The parties through their counsel have been directed to put in appearance before the Executive Magistrate trying the case on 25th of April, 1978.

K.T.S.

Before A. D. Koshal, Chief Justice and S S Sandhawalia, J;

FAQIR CHAND AND OTHERS—*Appellants.*

versus

THE FINANCIAL COMMISSIONER, PUNJAB, CHANDIGARH ETC.—*Respondents.*

Letters Patent Appeal No. 366 of 1977

April 7, 1978.

Letters Patent (Lahore)—Clause 10—Proceedings pending in the High Court—Grant, refusal or vacation of stay order by a single Judge during such pendency—Whether a 'judgment' within the meaning of clause 10—Appeal against such order—Whether competent.

Faqir Chand and others *v.* The Financial Commissioner, Punjab, Chandigarh, etc. (S. S. Sandhawalia, J.)

Held that to fall within the ambit of a judgment, the decision must involve the determination of some right or liability which affects the merits of the question between the parties. The two *sine qua non*, therefore, are first the determination of some right or liability and its consequent effect on the merits of the questions on which the parties are at issue. If these two basic tests are satisfied then the preliminary, interlocutory or the final nature of such a decision pales into relative insignificance. Applying these tests, the grant, refusal or vacation of stay during the pendency of proceedings obviously involves no determination of any right or liability which may ultimately affect the merits of the controversy. Once the two basic tests are not satisfied it is plain that the mere putting the parties to some terms during the pendency of a litigation before the High Court without any determination of a right or liability affecting the merits of the issues is merely an order which cannot be raised to the pedestal of a judgment. It consequently follows that no Letters Patent Appeal is competent against such an order or a decision.

(Paras 9 and 11)

Gokal Chand v. *Sanwal Das*, (1920)1 I.L.R. Lah., 348.

Firm Badri Dass, Jankidas of Delhi v. *Mathanmal and others* A.I.R. 1928 Lah., 185 and *Shibha Mal and another* v. *Rup Narain*, A.I.R. 1928 Lah., 904 Held to be no longer good law.

Letters Patent Appeal under Clause 10 *of the Letters Patent against the Judgment dated* 30*th September*, 1977, *passed by Hon'ble Mr. Justice Prem Chand Jain in Civil Writ No.* 2310 *of* 1977, *Faqir Chand etc.* v. *Financial Commissioner Punjab.*

H. L. Sarin, Sr. Advocate with M. L. Sarin, Advocate, *for appellants.*

B. R. Bahl, Advocate and A. L. Bahl, Advocate, *for the respondents.*

JUDGMENT

S. S. Sandhawalia, J.

(1) Whether the order of a learned Single Judge merely vacating an *ex-parte* stay of dispossession from agricultural land in a pending writ petition is a judgment within the meaning of Clause 10 of the Letters Patent is the significant question which has arisen at the very threshold in this appeal.

(2) The issue stems from a civil writ petition preferred by the petitioners against the orders of the Financial Commissioner, Punjab and the revenue authorities below. The Motion Bench issued notice of motion therein but as no appearance was put in on behalf of the respondents on the date of hearing the writ petition was admitted and *ad interim* stay of dispossession was granted with notice to the opposite party with regard to the stay for the 23rd of September,

1977. On the 30th of September, 1977, after hearing the learned counsel for the parties the learned Single Judge for detailed reasons recorded, held that no case for stay had been made out and accordingly the *ex-parte* stay granted by the Motion Bench was vacated. Aggrieved by this order the appellants have preferred this letters patent appeal. A notice of motion having been issued to the respondents, a preliminary objection at once was raised on their behalf challenging the very competency of the appeal primarily on the ground that the mere vacation of a stay order was not a 'judgment' and consequently no appeal lay against the same under clause 10 of the letters patent. As the question is of obvious significance we have heard full-dress arguments on the point by either side.

(3) Now the precise connotation of the word 'judgment' occurring in clause 10 of the letters patent constituting the High Court of Judicature at Lahore and the corresponding provisions relating to the other High Courts had engaged the attention and acumen of learned Judges for well-nigh a century. The quest has not ended and perhaps is unlikely to do so. We, therefore, do not propose to further contribute to the volume of judicial literature on the point. Therefore, at the very outset it may be highlighted that we intend to confine the consideration to the grant, refusal or vacation of stay orders during the pendency of an appeal or proceedings in the High Court.

(4) The relevant part of the statutory provision around which the controversy inevitably revolves is in the following terms:—

> "10. And we do further ordain that an appeal shall lie to the said High Court of Judicature at Lahore from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of the criminal jurisdiction) of one Judge of the said High Court."

(5) That there has been a wide-ranging conflict of judicial opinion in the various High Courts for nearly a century with regard to the finer naunces of the word 'judgment' as used in the Letters Patent

is in fact too manifest to be disputed. It is hence wasteful to advert to the plethora of precedent of other High Courts to which the learned counsel for the parties drew our attention. We, therefore, propose to confine ourselves to the decisions rendered within this Court and its predecessor High Court of Lahore. For the purposes of this jurisdiction it suffices to mention that the mainstay of the argument of the learned counsel for the appellants has been raised on three Division Bench judgments of the Lahore High Court, namely, *Gokal Chand* v *Sanwal Das,* (1) *Firm Badri Das Janakidas of Delhi* v. *Mathanmal and others* (2) *and Shibamel and another* v. *Rup Narain,* (3).

(6) The said authorities undoubtedly support the argument of the learned counsel for the appellants. In *Gokal Chand's case,* the Division Bench held that the order of the stay of execution of a pre-emption decree made during the pendency of a first appeal before the Court was a judgment within the meaning of Clause 10 of the Letters Patent and was, therefore, appealable. This view has been folllowed subsequently in *Badri Das Janakidas's* case (supra) which in turn as followed in *Shibba Mal's case.*

(7) We are, however, firmly of the view that the matter is now concluded against the appellants not by one but by three judgments of the final Court. It would, therefore, be an obvious exercise in futility to either examine the matter on principle afresh or to proceed to distinguish the aforesaid three cases on which primary reliance has been placed by Mr. Sarin. In *Asrumati Debi* v. *Kumar Rupindra Deb Raikot and others,* (4), their Lordships noticed the wide divergence of judicial opinion in this context but declined to resolve the same or to frame any exhaustive definition of the word 'judgment'. However, the preference for the Calcutta and the Madras High Court's view is evident on the analysis of the judgment wherein they affirmed the view that an order transferring a suit from a Subordinate Court to the original side of the High Court of Calcutta under Clause

(1) (1920) 1 I.L.R. Lah 342.

(2) A.I.R. 1922 Lah. 185.

(3) A.I.R. 1928 Lah. 904.

(4) AIR 1953 S.C. 198.

13 of its Letters Patent was not a judgment and hence not appealable. In *Radhy Shyam* v. *Shyam Bohari Singh*, (5), the question before their Lordships was whether an order under a proceeding under Order 21 Rule 90 is a judgment and whilst holding that it is so it was observed that the character of the order must be such which affected the merits of a controversy between the parties by determining some disputed right of liability.

(8) What, however, seems to set the matter at rest is the recent enunciation of their Lordships in *Shanti Kumar Ranji* v. *The Home Insurance Co. of New York*, (6). Therein whilst expressly approving and preferring the view of the Calcutta and the Madras High Courts, their Lordships accepted the following statement of law rendered more than a century back by Sir Richard Couch in *Justice of the Peace for Calcutta* v. *Oriental Gas Co.* (7).

> "We think that 'judgment' means a decision which affects the merits of the question between the parties by determining some right or liability 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."

After briefly discussing the rival views, Chief Justice Ray, speaking for the Court concluded as follows :—

> "In finding out whether the order is a judgment within the meaning of clause 15 of the Letters Patent it has to be found out that the order affects the merits of the action between the parties by determining sime right or liability. The right or liability is to be found out by the Court. The nature of the order will have to be examined in order to ascertain whether there has been a determination of any right or liability."

(5) AIR 1971 S.C. 2337.

(6) AIR 1974 S.C. 1719.

(7) (1872) 8 Bengal L.R. 433.

(9) An analysis of the aforesaid three judgments would make it manifest that the basic test which emerges and has been accepted by their Lordships is that to fall within the ambit of the judgment, the decision must involve the determination of some right or liability which affects the merits of the question betwen the parties. The two *sine qua non* if one may say so, therefore, are first the determination of some right or liability and its consequent effect on the merits of the questions on which the parties are at issue. If these two basic tests are satisfied then the preliminary, interlocutory or the final nature of such a decision pales into relative insignificance.

(10) Now it seems manifest to us that all the three judgments of the Lahore High Court relied upon by the learned counsel for the appellants do not and cannot possibly satisfy the test and the reasoning authoritatively laid down by their Lordships of the Supreme Court. Though these judgments were not cited and thus have not been referred to by their Lordships, it is plain that they can no longer hold the field against the binding precedent of the final Court. In our view they stand impliedly but clearly overruled by the ratio of the aforesaid decisions. It must inevitably be declared that these three authorities are no longer good law in view of the categoric observations finally made in *Shanti Kumar Ranji's case* (supra).

(11) Coming nearer home and applying the tests accepted by their Lordships of the Supreme Court, can it possibly be said that a mere stay order which puts the parties to some terms during the pendency of an appeal or proceeding determines any right or liability which affects the merits of the *lis* betwixt them. The answer obviously must be in the negative. Taking the specific question in hand, it is plain that whether the appellants remain in possession of the land or are divested therefrom, the ultimate result of the writ petition and the issues in dispute betwixt the parties are not even remotely affected thereby. The grant, refusal or vacation of stay during the pendency of proceedings obviously involves no determination of any right or liability which may ultimately affect the merits of the controversy. Once the two basic tests are not satisfied it appears to be plain that the mere putting the parties to some terms during the pendency of a litigation before the High Court without any determination of a right or liability affecting the merits of the issues is merely an order which cannot be raised

to the pedestal of a judgment. It consequently follows that no Letters Patent Appeal is competent against such an order or a decision.

(12) We hold that the present appeal is not competent and, therefore, dismiss the same.

N. K. S.

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