

Savitri Devi Vs. Rajul Devi and ors.

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Court : Allahabad

Decided On : Oct-10-1960

Reported in : AIR1961All245

Judge : O.H. Mootham, C.J., ;N.U. Beg and ;A.P. Srivastava, JJ.

Acts : [Constitution of India](#) - Article 133 and 133(1); [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 109 and 110 - Order 23, Rule 3 - Order 43, Rule 1

Appeal No. : Supreme Court Appln. No. 405 of 1959

Appellant : Savitri Devi

Respondent : Rajul Devi and ors.

Advocate for Def. : J. Swarup and ;S.D. Agrawala, Advs.

Advocate for Pet/Ap. : Ganesh Pd. and ;Gyan Prakash, Advs.

Judgement :

Mootham, C.J.

1. The applicant filed a suit against the respondents for the recovery of Rs. 1,39,000 due on a promissory note. The trial court ordered to be recorded a compromise which the applicant contended had been arrived at between the parties during the pendency of the suit,, and it passed a decree in the terms of the compromise save with regard to one provision thereof. Two of the defendants

appealed to this Court under Order XLIII, Rule 1 (m) C. P. C. against the order recording the compromise, and this Court by an order dated the 28th September, 1959, allowed the appeal and set aside the order of the trial court. The plaintiff then filed an application for a certificate under Article 133(1)(a) of the Constitution and the Bench hearing the application has referred to this Court the following question.

'whether the order of this Court reversing the order of the trial court recording a compromise amounts to a judgment or final order within the meaning of these terms in Article 133 of the Constitution.'

2. Now this Court has held, and the same view has been taken by other High Courts in India that an order setting aside the order of a lower court directing that a compromise be recorded is an interlocutory and not a final order within the meaning of Section 109 C. P. C. : Bhagwati Dayal v. Mst. Dhan Kunwar : AIR1926 All311 , Shanker Bharti v. Narsinha Bharti, AIR 1922 Bom 383, J. J. Srito v. Mrs. S.S. Brito, AIR 1924 Mad 701, Sourendra Nath Mitter v. Sm. Tarubala Dassi : AIR1925 Cal85 , and F.A. Savi v. Sabitri Thakurain, AIR 1927 Pat 363. All that such an order does, in the words of Crump, J. in the Bombay case, quoted with approval in Bhagwati Dayal's case : AIR1926 All311 ,

'is to decide that the manner in which the lower court disposed of this suit was incorrect and that the suit must be disposed of on the merits and not upon a certain compromise.'

3. These cases were decided before 1950 and learned counsel contends however that the order against which leave to appeal is now sought, although it may not be a final order, is a judgment within the meaning of Article 133(1) of the Constitution. Learned counsel put his argument in two ways. In the first place he sought to contend that any order which finally disposed of whatever proceedings were then before the Court was a 'judgement'. No authority was cited in support of this proposition which in my opinion is clearly untenable, for it would have the result that all interlocutory orders would be judgment and an interlocutory order is not a judgment within the meaning of this Article: Syedna Taher Saifuddin Saheb v. State of Bombay : AIR 1958 SC253 .

3. Secondly, learned counsel argued that proceedings in a suit leading up to and including the recording of a compromise are proceedings which are independent and separate from the suit: they are similar in character to proceedings resulting in the grant of an interim injunction, and as this court has recently held in *Standard Glass Beads Factory v. Shri Dhar* : AIR1960 All692 , that an order dismissing an appeal against an order granting temporary injunction is a judgment within the meaning of Clause 10 of the Letters Patent, also it should hold that the order now under consideration is a judgment for the purpose of Article 133(1).

3a. The basis of the majority decision in the *Standard Glass Beads Factory* case : AIR1960 All692 , is that the order in question was made in an independent proceeding ancillary to the suit and instituted with a view to render the judgment, if obtained, effective. The nature of an application to record a compromise, as Rankin, J. (as he then was) pointed out in : AIR1925 Cal857

'is in some ways a very special matter because it is a matter as to which a party is allowed to stand upon and to enforce an agreement which was not in existence at the date of the suit. 16 is a method whereby for convenience a party is allowed to enforce what is really a new cause of action altogether and this is done in order to avoid the necessity of abandoning one suit and starting another'.

Even if such a proceeding is independent of and ancillary to the suit it is a proceeding taken for the purpose not of rendering the judgment effective, but of bringing the suit to an immediate ends and accordingly the analogy sought to be drawn by learned counsel is false.

4. As learned counsel did not seek to base his argument that the impugned order was a 'judgment' on any other grounds than these I would prefer to reserve consideration of the general question as to what constitutes a judgment for the purpose of Article 133(1) until that matter is fully argued before us.

5. In my opinion the order under consideration, notwithstanding the doubt somewhat tentatively expressed by Sulaiman, C. J., in *Kishan Chand v. Lachhmi Chand* : AIR1933 All15 , is an interlocutory order and the answer to the question referred to this Bench must be in the negative.

Beg, J.

6. This reference arises out of an application under Article 133 of the [Constitution of India](#). The applicant had filed a suit against the opposite parties for the recovery of Rs, 1,30,000 due on a promissory note. During the pendency of the suit in the trial court, the applicant filed an application under Order 23, Rule 3. C. P. C., stating that a compromise had been arrived at between the parties, and praying that the said compromise might be recorded by the court and a decree be passed in terms thereof save with regard to one of its provisions.

On an appeal filed in the High Court by two of the defendants under Order 43, Rule I(m), C. P. C., against this order, this Court by its order dated 28-9-1959 set aside the order of the trial court recording the compromise with the result that the suit was remanded to the trial court for disposal in the ordinary . way. The applicant, thereafter, filed the present application under Article 133(1)(a) of the Constitution praying for a certificate to enable him to appeal to the Supreme Court, The Bench hearing the application has referred the following question to a larger Bench:

'Whether the order of this Court reversing the order of the trial court recording a compromise amounts to a judgment or final order within the meaning of these terms in Article 133 of the Constitution.'

7. The question, therefore, that calls for decision in the present case is whether the order of this court dated 29-9-1958 is a judgment or final order within the meaning of these terms as used in Article 133 of the Constitution. Article 133 provides for appeals from 'any judgment, decree or final order' in a civil proceeding of a High Court. The order in question is obviously not a decree. On behalf of the applicant it was argued before us that it was a 'final order', and that, in any case, it was a 'judgment' within the meaning of those words as used in Article 133. The meaning of the two expressions 'final order' and 'judgment' has been the subject-matter of numerous rulings both in India as well as in England. An enormous amount of case law has clustered round these expressions.

The views taken by different courts do not appear to be either uniform or consistent. In this judgment I propose to refer only to some of the important cases that serve as signposts pointing the various turns that the road passing through the densely overgrown jungle of cases has taken. The roots' of the controversy giving rise to these cases are deeply embedded under the soil of English law. The High Courts in India have, in trying to interpret these expressions repeatedly tried to seek shelter under the shade provided by the various views expressed in the English cases.

8. The ancestry of Article 133 of the Constitution can be traced back to Sections 595 and 596, C. P. C. (Act No. XIV of 1882). In the C. P. C. (Act No. V of 1908) the direct lineal descendants of these sections are Sections 109 and 110 of the said Code. Further, the same expression, namely, 'judgment, decree or final order' was used in Section 205 of the Government of India Act, 1935, which provided for appeals from the High Court to the Federal Court.

Article 133 of the [Constitution of India](#) is the representative of Section 205 of the Government of India Act, 1935. The Government of India Act, 1935, was promulgated by the Imperial Parliament. It was, therefore, a product of the draftsmanship of Jurists steeped in English law. The framers of Article 133 of the [Constitution of India](#) must have had the provisions of Section 205 of the Government of India Act, 1935, present before their eyes. The Courts in India have, therefore, freely drawn on English cases while interpreting these provisions of law.

9. I shall first discuss the argument of the learned counsel for the petitioner that the order in question is a 'final order'. The word 'final' is obviously used in this provision of law as opposed to the word 'interlocutory'. At the very outset, therefore, the crucial question that arises is : What is the test for determining whether an order is 'final' or 'interlocutory'? On this point, three English cases have served as guiding lights through the surrounding gloom created by the thick cloud of cases that overhang the question. Each of these cases has provided a different test,

10. The first case is that of *Shubbrook v. Tufnell*. (1882) 9 QBD 621. In this case an arbitrator, under an order of reference, had stated a case for the opinion of the Court, which provided that, if the opinion of the Court should be one way, the case was to be referred back to the arbitrator; if the other way, judgment was to be entered for the defendant with costs. The court decided in favour of the plaintiffs, and referred the case back to the arbitrator. On an appeal by the defendant, the question arose as to whether, the order passed by the court was a final or an interlocutory one for the purpose of determining whether it should be entered in the general or the interlocutory list Jessel, M.R. stated the position as follows :

'Here if we differ from the Court below, final judgment has to be entered for the defendant, and there is an end of the action. I am of opinion that this is to be treated as a final order, and the appeal must take its place in the general list.'

11. Lindley, L. J., concurred.

12. The test, therefore, that is laid down in this case is that if one of the ways in which the matter can be decided in the proceedings before- the Court might result in the final disposal of the-case in favour of a party, the order should be treated as a final and not an interlocutory order. This may hereinafter be referred to as the test in *Shubbrook's case*, (1882) 9 QBD 621.

13. The case in which the second test was laid down is that of *Salaman v. Warner*, (1891) 1 QB 734. In this case, the defendants had in their defence raised a point of law that the statement of claim filed by the plaintiff did not disclose any cause of action. The Divisional court before which the case came up for hearing upheld the defendants' plea, and dismissed the action with costs. In appeal, a question having arisen as to whether the order in question was a final order or an interlocutory one, Lord Esher, M. R. laid down the test for determining the question as follows :

'The question must depend on what would be the result of the decision of the Divisional Court assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes 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. expounded the same test in the following words :

'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. Applying this test to the present case, it is obvious that the order here was made on an application of which the result would not in one event be final. Therefore this is an interlocutory order.'

Lopes, L. J. enunciated the same test thus :

'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.'

The test laid down in this case will hereinafter be referred to as the test in Salaman's case, (1891), 1 QB 734.

13a. It may be noted that although this case was decided in 1891, neither in the arguments of the counsel nor in any of the judgments' of the Court any reference appears to have been made to the earlier case of Shubbrook, (1882) 9 QBD 621, which was decided in 1882. It may also be noted that the test laid down in this case appears to be just the reverse of the one laid down in Shubbrook's case, (1882) 9 QBD 621.

14. The case in which the third and the last test was laid down is that of Bozson v. Altrincham Urban District Council, (1903) 1 KB 547. In this case an order was made in an action brought to recover damages for breach of contract that the question of liability and breach of contract only was to be tried, and that the rest of the case, if any, was to go to an official referee. The trial Judge held that there was no binding contract between the parties, and made an order dismissing the action. The plaintiff having appealed against the order, the obvious conflict between the test laid down in Shubbrook's case, (1882) 9 QBD 621, and that in Salaman's case,

(1891) 1 QB 734, was brought to the notice of the Court of Appeal. Lord Alverstone, C. J. then proceeded to lay down a third test in the following words :

'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 then, in my opinion, an interlocutory order.'

The Earl of Halsbury L. C. also took the view that the order appealed from was a final order. This test may hereinafter be described as the test laid down in Bozson's case.

15. It may be noted at this stage that if the first test viz. the test laid down in Shubbrook's case, (1882) 9 QBD 621, is applied to the present case, the order in question would be a final order, because if the decision had been the other way, it would have resulted in entering a final judgment in favour of one of the parties. On the other hand, if the test laid down in Salaman's case, (1891) 1 QB 734, or that laid down in Bozson's case, (1903) 1 KB 547, is applied, then the order cannot be considered to be a final order.

It cannot be a final order according to the-test laid down in Salaman's case, (1891) 1 QB 734, because although one of the ways in which the proceedings could be disposed of might result rather final disposal of the matter in dispute, yet its decision the other way would allow the action to go on. It is also not a final order according to the test laid down in Bozson's case, (1903) 1 KB 547, because the rights of the parties have not been. finally disposed of by the order in question. Although for the purposes of the present case it is immaterial whether the test laid down in Salaman's-case. (1891) 1 QB 734, or the test laid down in Bozson's case, (1903) 1 KB 547, is applied, it may be mentioned that the test which seems to possess the most surviving capacity appears to be the last one, viz. the one laid down in Bozson's case, (1903) 1 KB 547.

16. Coming now to the Indian cases, there are two cases of their Lordships of the Privy Council under the C. P. C. of 1882 which can be relied on in support of the present petition and deserve to be noted.

17. The first case is that of *Rahimbhoy Habibhoy v. Turner*, 18 Ind App 6 (PC). This case arose out of a case for accounting in respect of several claims made by the plaintiff. The defendant denied altogether his liability to account, and further pleaded that, in any case, he had 'legal' defences to every claim, made by the plaintiff. The cardinal point, therefore, in the case was whether the defendant was accountable to the plaintiff at all.

The trial court decreed the plaintiffs suit holding that the defendant was liable to account, and directed that accounts should be taken of the various items of claims according to certain directions given by it. In appeal, the High Court affirmed the trial court's conclusion regarding the defendant's liability to account, but varied the directions as to the extent and mode of accounting.

The High Court having refused to grant the petition for leave to appeal, the question was raised before the Privy Council. In this situation Lord Hobhouse made the following significant observations :

'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.'

18. The next case to be noted is that of *Syed Muzhar Husain v. Bodha Bibi*, 22 Ind App 1 (PC) In this case the plaintiff's suit rested on the validity of the Will of one Ibn Ali which was the cardinal point in the suit. There were other pleas also raised by the defendant. The trial court decided the question of the validity of the Will against the plaintiff. It, therefore, considered it unnecessary to give judgment on other issues. The plaintiff having appealed, the High Court decided in favour of the validity of the will, and remanded the case to the trial court to be disposed of on other issues according to law. In his judgment Lord Hob-house again made the following observations :

'In this case the will of Ibn Ali is the cardinal point of the suit, and as after, the decision of the High Court that can never be disputed again, their order is final,

notwithstanding that there may be subordinate inquiries to make,' (p. 4.)

19. The above two cases of the Privy Council can no doubt be justifiably invoked to lend some support to the contention on behalf of the applicant in this case in so far as they lay down the proposition of law that the decision of a cardinal point in a suit would entitle a party to pray for the necessary certificate on its basis. This position, however, which rests on these two Privy Council cases has become altogether untenable after the clear pronouncement of their Lordships of the Privy Council made in the case of Abdul Rahman v. D.K. Cassim and Sons, reported in . In this case it would appear that the suit was dismissed by the trial court on a preliminary point.

The High Court, reversed the decision of the trial court, and passed an order remanding the suit for trial on other issues. The High Court therefore granted the necessary certificate under Section 109 C. P. C. (Act No. 5 of 1908) relying on the two cases of the Privy Council mentioned above, namely, 18 Ind App 6 and 22 Ind App 1. Before the Privy Council, however, a preliminary objection as taken on behalf of respondent No. 1 that the certificate was wrongly granted and the appeal was incompetent.

Their Lordships of the Privy Council held that the order of remand did no doubt decide an important and even a vital issue in the case, but, in spite of it, it could not be treated to be a final order within the meaning of that expression under Section 109, C. P. C, (Act No. V of 1908), as it left the suit alive and provided for its trial in the ordinary way. This preliminary objection was, accordingly, allowed by their Lordships of the Privy Council and the appeal dismissed. With regard to the two cases mentioned above, Sir George Lowndes made the following significant observations :

'Two other cases before this Board were relied on by the learned Judges, viz. 18 Ind App 6, and 22 Ind App 1. But both of these cases were decided with reference to C. P. C. of 1882, in which the wording of the relevant sections differed materially from that of the Code of 1908. Special leave to appeal was given in each of these cases on the ground that the suit had been fully tried in the lower Court, and 'the cardinal point' decided leaving, in the one case, only a reference for accounts,

and, in the other, only subordinate points for decision which should have been dealt with by the appellate Court.' (pp. 59 and 60).

The two previous cases relied on in support of the petition were, therefore, distinguished by the Privy Council on the ground that the principle laid down therein was no longer good law under the new Code i.e. the Code of 1908 as well as on the ground that they were cases of special leave.

20. With regard to the test for determining the finality of the order, in this case their Lordships of the Privy Council after referring to the judgment of Lord Cave in the case of *Firm Ramchand Manjimal v. Firm Goverdhandas Vishindas*, AIR 1920 PC 86 clearly accepted the test laid down in *Bozson's case*, (1903) 1 KB 547 mentioned above. The relevant portion of their judgment is as follows:

'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 those 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 under Section 109(a) of the Code.' (p. 60)

21. Their Lordships' attention was also drawn to the divergence of views on the point in the English law. Referring to it they observed as follows:

'It was pointed out in argument that there is some divergence in the views expressed in the English cases upon which the judgment in *Ramchand Manjimal's case*, AIR 1920 PC 86 founds and that no doubt is so, but the rule deduced for guidance under the Indian Act is clear and unambiguous, and must, their Lordships think, be decisive in all cases where the question is whether an order is appealable to His Majesty in Council under the provisions of the section in

question, (p. 60, col. 2).

22. To put the matter beyond the pale of doubt, their Lordships again clarified the position by applying the same test to the facts of the case before them thus:--

'The effect of the order from which it is here sought to appeal was not to dispose finally of the right of the parties. It no doubt decided an important and even a vital issue in the case, but it left the suit alive, and provided for its trial in the ordinary way. Their Lordships have thought it right to deal with this matter at some length, as there seems to have been a considerable divergence of opinion in some of the Indian Courts as to what is a final order under Section 109(a), and they think that the decision in Ramchand Manjimal's case, AIR 1920 P C 86 must have been either overlooked or misunderstood. For these reasons their Lordships think that the appeal is incompetent, and they will humbly advise His Majesty that it should be dismissed with costs.' (p. 60)

23. In the case of Ramchand Manjimal, AIR 1920 PC 86 referred to above, an application was made to the trial court under Section 19 of the Indian Arbitration Act of 1899 for a stay of proceedings with a view to the issues being referred to arbitration. The first Court granted a stay, but on appeal the Judicial Commissioner of Sind reversed the order and refused a stay of proceedings. The Court, however, granted the necessary certificate on the ground that the order refusing the stay was a final order.

On preliminary objection having been taken on behalf of the respondents, Viscount Cave, J. who pronounced the Judgment in that case held that the order was not a final order, and the appeal, therefore was incompetent. Viscount Cave, J. in his judgment referred both to the test in Salaman's case, (1891) 1 QB 734 as well as to the test laid down in Bozson's case, (1903) 1 KB 547 and observed as follows:--

'The effect of those and other judgments is that an order is final if it finally disposes of the rights of the parties. The orders now under appeal do not finally dispose of those rights, but leave them to be determined by the Courts in the ordinary way', (p. 87)

It may be mentioned that the second and the third tests were both mentioned in this case, because, probably, it was immaterial in the case which test was applied to the particular circumstances of the case. This would be borne out by a reference to the arguments of Sir John Simon K.C., who appeared for the respondents. Sir John Simon's arguments as reproduced in ILR 47 Cal 918 at p. 921: (AIR 1920 PC 86) show that after inviting the attention of the Board to the tests laid down both in the Salaman's case, (1891) 1 QB 734 as well as in the Bozson's case, (1903) 1 KB 547 he submitted:

'But under either test the order appealed from in the present case was not 'a final order'. '

The portion of the judgment, where the test is actually laid down and which is quoted above, however, shows a definite leaning towards the acceptance of the test laid down in Bozson's case, (1903) 1 KB 547. In any case, the position appears to have been fully clarified in the subsequent case of V. M. Abdul Rahman where Sir George Lowndes finally laid down the test formulated in Bozson's case, (1903) 1 KB 547 as the test to be adopted by the Courts in India for their guidance in future. It may, therefore, be taken that, whatever might have been the position under the Code of Civil Procedure, 1882, as a result of the decision given by the Privy Council in the following propositions of law stand firmly established by the Privy Council so far as the position under the Code of Civil Procedure, 1908, is concerned:

- (1) That an order is final only if it finally disposes of the rights of parties;
- (2) That the finality of the order must be determined in relation to the suit;
- (3) That the order cannot be treated to be a final order if the suit is still left a live suit for the purpose of determining the rights and liabilities of the parties in the ordinary way;
- (4) That the mere fact that a cardinal point in the suit has been decided or even a vital and important issue determined in the case is not) enough to make the order a final one. It may be noted in passing that, even under the C. P. C. 1882, the

Privy Council had in 28 Ind App 28, *Raj Radha Kishen v. Collector of Jaunpore*, held that an order by the High Court reversing the order of the trial court dismissing the application to set aside the decree and remanding the case to it for disposal of the same on merits was not considered to be a final order. The relevant portion of the judgment of Lord Robertson in the said case runs as follows:-- 'Now it does not in their Lordships* Judgment admit of doubt, that, assuming the order to have the meaning which they ascribe to it, it is in no sense of the term a final order. It is a purely interlocutory order directing procedure. Accordingly their duty is to advise Her Majesty to dismiss the appeal', (p. 34).

23a. I have dealt at length with the judgment of the two Privy Council cases reported in and AIR 1920 PC 86, because these two cases have set at rest any doubts that might have been created by the two earlier Cases of the Privy Council reported in 18 Ind App 6 and 22 Ind App 1. I do not think it necessary to deal at length with the cases of the High Courts in India after this, as the entire law in India seems to have revolved round these two cases. In fact that authority of these cases does not appear to have been shaken so far in India. The cases of the Federal Court as well as of the Supreme Court of India may now be examined from this point of view.

24. The Federal Court of India clearly accepted both these cases as laying down good and sound law, and followed them in a number of their judgments. At this stage I may refer to four cases of the Federal Court in which this point appears to have been considered.

They are:- *Hori Ram Singh v. Emperor* ; *Kuppuswami Rao v. The King* ; *Sridhar Achari v. The King* ; *Mohamad Amin Bros. Ltd. v. Dominion of India*, AIR 1950 FC 77. It may be mentioned that in all these four cases, the question at issue before the Court arose under Section 205 of the Government of India Act, 1935, in which the same expression, namely, 'judgment, decree or final order' was used.

25. The first Federal Court case is that of . In this case Sulaiman, J. referred to the pronouncement of Sir George Lowndes in the Privy Council case of *Abdul Rahman* thus:-

'In , Sir George Lowndes distinguished the two earlier cases of their Lordships on the ground that they had been decided under Section 596 of the old Code where the wording was materially different and also because in both special leave had been given, and then laid down that the test of finality is whether the order finally disposes of the rights of the parties", (p. 49).

25a. Referring to the other Privy Council case namely, AIR 1920 FC 86 : 47 Cal 918, Sulaiman, J. observed as follows:-

'In 47 Cal 918 : (AIR 1920 PC 86) the Appellate Court in India had been of the opinion that the order had gone 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. But their Lordships held that 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 have still to be determined, no appeal lies.' (p. 49).

26. In the same case, namely , Sulaiman, J, noted the fact that the divergence of views on the point had been noted by the Privy Council and they laid down the law for guidance of the Courts in India under the present C. P. C. in terms which are clear and unambiguous. The learned Judge then went on to lay down the law himself in the following words:-

'If the effect of the order from which it is sought to appeal is not to dispose finally of the rights of the parties, then even though it decides an important and even a vital issue in the case, it leaves the suit alive and provides for its trial in the ordinary way. As the 'final order' may be either in a civil or criminal case the definition given by their Lordships in the Civil case must by analogy be applied to a criminal case as well.' (p. 49).

It is, therefore, obvious that in this case the Federal Court accepted the law laid down in the two Privy Council cases of AIR 1920 PC 86 and . Both these Privy Council cases may, therefore, be taken to be the pivots of law on the point. It is also obvious that the test laid down by the learned Judge himself is the one enunciated in Bozson's case cited above.

27. The next Federal Court case is reported in . In this case Kanin, C. J. referred to the same two Privy Council cases, and, after noting that they had been followed by the Federal Court in laid down the same law in the following words:-

'We have noticed above the meaning given to the expression 'final order' by the English and Indian Courts. These decisions were in civil cases. We think that the same meaning should be given to that expression in criminal cases also, that is to say, it must be an order which finally determines the points in dispute and brings the case to an end.' (p. 4).

28. In , Kania C. J. did not think it necessary to discuss the law on the point any further, and merely affirmed the view taken by him in by a mere reference to that case.

29. The fourth case of the Federal Court to which reference might be made is reported in AIR 1950 FC 77. In this case B.K. Mukherjee, J. also referred to the previous Federal Court case, namely and the two Privy Council cases, namely, AIR 1920 PC 86 and , and held that the test for determining the finality of an order is whether the order in question finally disposes of the rights of the parties. The 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. The learned Judge proceeded to apply this test in the following manner:-

'Judged by that test, the order appealed from in the present case cannot certainly rank as a 'final order.' The order of the trial Judge did dispose of the rights of the parties that were in controversy in the proceedings, but the judgment of the appellate court left the entire case undecided,' (p. 79),

The learned judge then went on to observe as follows:

'The High Court did obviously dispose of one principal point in controversy, between the parties, namely, whether Section 226(1), Government of India Act was a bar to the entertainment of the winding up petition by the original Side of the Court, but the decision on that issue is a purely interlocutory decision which merely

determines that the proceeding is triable by the Court. There has been no adjudication on the rights of the parties and that is still to be made under the terms and Conditions set out in the order of the appeal Court.' (p, 79). In this view of the law it was held that the order in question was not a final order.

30. The four judgments of the Federal Court are, therefore, nothing- but a reiteration of the view of their Lordships of the Privy Council in the two cases, namely, AIR 1920 PC 86 and .

31. Coining now to the cases of the Supreme Court, the first case to which reference might be made is reported in : [1951]19ITR108(SC) Prem Chand Satramdas v. The State of Bihar. In this case Fazl Ali, J. while dealing with the order of the High Court declining to call upon the Board of Revenue to state a case to it under Section 21(3) of the Bihar Sales Tax Act (Act VI of 1944) observed as follows:-

'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.' (p. 16).

The above judgment would indicate that an order in order to rank as a final order must proprio vigore affect the rights of the parties. This would be in consonance with the line of reasoning adopted by the Privy Council as well as by the Federal Court in the cases referred to above.

32. In : [1953]4SCR1159 , Asrumati Devi v. Rapendra Deb, B.K. Mukherjea, J. while determining the question whether an order of transfer passed by a single Judge of the Calcutta High Court under Clause 13 of the Letters Patent is appealable to a Bench as a judgment under Clause 15 of the Letters Patent, distinguished such an order from an order directing a plaint to be rejected or taken off the file or an order dismissing a suit on a preliminary ground for two reasons.

Firstly, an order of transfer does not dispose of or put an end to the suit which remains perfectly alive to be tried by another Court from the stage at which it was

left in the court where it was initially filed. Secondly, such an order was not made by the Court in which the suit was pending. It may be noted in this connection that in this case the learned Judge made the above remarks while dealing with the meaning of the term 'judgment' under Clause 15 of the Letters Patent.

He noticed the difference between the Madras view and the Calcutta view on the point, and did not think it necessary to resolve the controversy in this case or to express any opinion on their merits, because, according to either view the order in question would not be judgment. The learned Judge merely wanted to lay down that whichever test was applied, an order of transfer could not be considered to be a judgment within the meaning of Clause 15 of the Letters Patent of the Calcutta High Court. Referring to the order of the transfer in that case, the learned Judge observed thus-

'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.'

I shall refer to this case again in the subsequent portion of my judgment while dealing with the meaning of the word 'judgment' in Article 133 of the [Constitution of India](#) where, as I shall indicate later, different considerations might apply. This case also therefore, does not go against the view taken in the two Privy Council cases.

33. In : [1953]4SCR1144 , Election Commission v. Venkata Rao, Patanjali Sastri C. J. observed that the object of the Explanation appended to Article 132 of the Constitution was to supersede the decision of the Federal Court in , and thus to secure a speedy determination of' an issue going to the root of the case. The reference to in this manner would indirectly indicate that the law laid down therein was probably approved of by the learned judge.

34. In : AIR 1955 SC576 , Shiromani Gurdwara Parbandhak Committee v. Shiv Rattan Deo Singh, an order of remand passed by the High Court was held by their Lordships of the Supreme Court to be a final order. This case arose out of a suit filed by Raja Shiv Rattan Deo Singh (respondent) against Shiromani Gurdwara

Parbandhak Committee Amritsar (appellant) and others for a declaration to the effect that certain properties mentioned in the plaint were the private properties of the plaintiff, and that they were not a Sikh Gurdwara.

The suit was dismissed by the trial court on certain preliminary issues. This dismissal was reversed on First Appeal, and the suit was remanded. On Second Appeal therefore to the High Court, the dismissal by the trial court was restored by a learned Single Judge. Against this decision there was a Letters Patent appeal to a Bench. The Bench reversed the judgment of the learned Single Judge, allowed the appeal and remanded the case to the trial court 'for proceeding in accordance with law.' It was against this order of the High Court that an appeal to the Supreme Court was brought. At the hearing of the appeal, a preliminary objection was taken on behalf of the respondents that the appeal was incompetent, as the order of the High Court appealed against was not a final order within the meaning of Article 133 of the Constitution. This objection was, however, repelled by the Supreme Court and the relevant portion of the judgment runs as follows:-

'The question that remains for further consideration is as to the maintainability of this appeal before us on the certificate granted by the High Court. As has been stated, at the outset, this has been raised' as a preliminary objection. The High Court granted the certificate under Sections 109 and 110 and Order 45, Rule 2, C. P. C. read with Article 133 of the Constitution.

The question raised is that since what all the High Court did was to remand the suit to the trial Court for proceeding in accordance with law, there is no final order within the meaning of the above provisions against which a certificate could be granted by the High Court. The learned Judges have considered the matter and have pointed out that though the order purports to be by way of a remand, they did in fact finally decide the matter. They say as follows:-

'It was finally decided that the building in dispute was merely a private property, and it was neither a Gurdwara nor a Sikh Gurdwara, and that no claim could be made by the 56 worshippers merely because it was a Gurdwara and that the notification of 1929 was inconsistent with the notification under S, 3 of 1927. The decision on these three points finally determines the rights of the parties in regard

to the ownership of the property. If it is private property, as it has been held by this Court, then a declaration must be given as prayed for by the plaintiff and as a consequence the injunction will follow. In fact this was the very view of the effect of that order which has been taken to this view the trial court did nothing except passing a decree in terms of this order. There is, therefore, no substance in the preliminary objection. On the facts of this case the judgment of the High Court appealed against does amount to a final order.' (p. 582).

All that can be said is that, according to this case it is not strictly necessary that the suit should terminate altogether. It is enough if all the substantive rights and liabilities of the parties have been finally decided by the High Court. This principle is not in conflict with any of the four propositions of law laid down by the Privy Council in Abdul Rahman's case. Even if the suit was left alive, there were no rights and liabilities to be determined by the trial court, as all the substantive rights and liabilities were already determined by the High Court.

The suit remained alive not for the purpose of determining any rights and liabilities left undetermined by the High Court, but only for the purpose of implementing the rights and liabilities already determined by the High Court by doing the formal act of making a declaration to that effect and granting the consequential relief of injunction which necessarily followed from their adjudication by the High Court. What is, however, important to note is that the observations quoted above clearly show that in this case their Lordships of the Supreme Court accepted the test formulated in *Bozson's case* (1903) 1 KB 547 which was also the test laid down by the Privy Council in Abdul Rahman's case.

35. In : AIR 1958 SC253 their Lordships were dealing with the Explanation appended to Article 132 of the [Constitution of India](#) where the same expression viz. 'judgment, decree or final order' was used. In that connection they made the following observations:-

'But apart from this, there is another formidable obstacle in the way of the appellant. Under Article 132 an appeal lies to this Court only against judgments, decrees or final orders. That was also the position under Section 205 of the Government of India Act. Now, the order appealed against is Only a decision on

one of the issues, and it does not dispose of the suit. In *United Provinces v. Mst. Atiqah Begum* there was a decree, and the requirements of Section 205 were satisfied. Here, there is only a finding on a preliminary issue, and there is no decree or final order. The Explanation to Article 132 provides that:

'For the purposes of this 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.' Applying this test, even if we accept the contention of the appellant that the impugned Act is bad, that would not finally dispose of the suit, as there are other issues, which have to be tried. We are clearly of opinion that the appeal is not competent under Art, 132 and the fact that a certificate has been given does not alter the position. It is said that the certificate is also under Article 133, but under that Article also, an appeal lies only against judgments, decrees or final orders, and no certificate could be granted in respect of an interlocutory finding.' (p. 255)

Although the above observations were made in connection with the Explanation to Article 132, the line of reasoning applies a fortiori to Article 133. It is again important to note that the principle enunciated in this case is identical with the one formulated in the two Privy Council cases.

36. The various High Courts in India have also followed the principle laid down in the two Privy Council cases. Some, important cases which might be referred to in this connection are enumerated below:-

AIR 1927 Pat 363; : AIR1936 Mad311 , *Annamalai Chettiar v. Ramanathan Chettiar* : AIR1945 All401 , *Narain Das v. Alia Uddin Khan* : AIR1950 Mad215 , *Rayarappen v. Madhavi Amma* : AIR1951 Mad1051 , *Ramaswami v. Official Receiver* : AIR1953 Mad727 , *Chandanmull and Co, v. Mohan Lal M. Mehta* : AIR1954 Cal424 , *West Jamuria Coal Co. v. Bholanath Roy* : AIR1956 All457 , *Mahmood Hasan v. Government of U. P.* , *Union of India v. Kanhaya Lal*; AIR 1958 Mad 151, *Dhana Lakshmi v. Income-tax Officer and* , *Kuldip Singh v. Maqbul Kaur*. So far as the Allahabad Full Bench case in : AIR1956 All457 is Concerned, it may be mentioned that out of the three conditions of a 'final order' mentioned therein, condition No. 2 viz. that 'it should not be an order which leaves the original

proceedings in the court below alive' would have to be modified in view of the Supreme Court decision in : AIR 1955 SC576 mentioned earlier. The attention of the learned Judges in that case does not appear to have been drawn to the earlier Supreme Court case.

In fact this condition does not appear to have been examined by them in the light of the Supreme Court case, as the judgment itself mentions that the point was not disputed before them. Condition No. 2 should, therefore, be more correctly replaced by the condition that the suit should not be left a live suit in the court below 'for the purpose of determining the rights and liabilities of the parties in the ordinary way.' This is mentioned above as condition No. 3 laid down in the Privy Council case of Abdul Rahman . The Supreme Court case, therefore, is only an affirmation of the Privy Council view.

37. To sum up, the entire law on this aspect of the case is summarised in two Privy Council cases, or rather, in one Privy Council case of Abdul Rahman 58. The four propositions laid down in that case have been adhered to by the Federal Court, indirectly supported by the Supreme Court and adopted by all the High Courts.

38. The entire structure of the vast amounts of case law in India on this aspect of the matter can, therefore, be rested on the single Privy Council case of Abdul Rahman which stands as it were, a solitary pillar supporting the whole fabric buttressed on the one side by clear pronouncements in four Federal Court cases, and on the other, by strong indications in a number of Supreme Court cases. Applying, therefore, the test laid down in the Privy Council case of Abdul Rahman it must be held that the decision in question is not a 'final order' within the meaning of Article 133 of the Constitution, as it does not determine the rights and liabilities of the parties; but, on the other hand, leaves them to be determined in the ordinary way in the suit which still remains alive for the aforesaid purpose.

39. The alternative argument of the learned counsel for the petitioner was that, in any case, the order in question should be considered to be a 'judgment'. In this connection it may be noted that the word 'judgment' did not find a place originally in Section 109, C. P. C. (Act No. V of 1908). It was added before the words

'decree or order' by the Adaptation of Laws Order, 1950. It was the addition of the word 'judgment' to this provision that provided a handle to the learned counsel for the petitioner to argue that the right of appeal to the Supreme Court has been enlarged thereby. The same words 'judgment, decree or final order' are to be found in Article 133 of the Constitution' of India.

In advancing this argument, the learned counsel relied strongly on a Full Bench decision of this Court reported in : AIR1960 All692 ; That was a case in which the meaning of the word 'judgment' in Clause 10 of the Letters Patent of the Allahabad High Court came up for consideration before this Court. The majority judgment in this case accepted the view taken in Tulja Ram Row v. Alagappa Chetty, ILR 35 Mad 1 as the correct one for the interpretation of the term 'judgment'. Learned counsel for the petitioner argued that if the same interpretation is placed on the word judgment' in Article 133 of the Constitution, the order in question would be a judgment.

40. Before dealing with this argument, at the very outset it may be pointed out that in Clause 10 of the Letters Patent the word 'judgment' is used simpliciter. On the other hand, the word 'judgment' in Article 133 is used in conjunction with two other words, namely, 'decree or final order'. The effect of the juxtaposition of the three words in Article 133 is necessarily to lead to the conclusion that the word 'judgment' is used therein to mean final judgment and not an interlocutory judgment. Both according to the majority as well as the minority view taken in : AIR1960 All692 , the word 'judgment' in Clause 10 of the Letters Patent would include an interlocutory judgment.

On the other hand, I am of opinion that under Article 133 of the Constitution no interlocutory judgment can be the subject-matter of a petition under this provision of law. Although the word 'final' is not used before the word 'judgment', that qualification must be appended to the word 'judgment' not only as a result of the collocation of the words 'decree or final order' with the word 'judgment' in Article 133, but also as a result of a number of other considerations arising out of the remaining portion of Article 133, as well as by an approach to Article 133 from the point of view of Explanation appended to Article 132 which precedes it. None of

these considerations can possibly apply to Clause 10 of the Letters patent.

41. It may also be pointed out in this connection that Article 133 being a part of the Constitution is the overriding law, and if the order in question cannot be considered to be a final judgment within the meaning of this Article, a mere resort to Section 109 C. P. C. or Section 2(9) of the C. P. C. which gives the definition of the term 'judgment' will be of no avail.

42. AS already pointed out above. Article 133 of the Constitution is a counter-part of Sec, 205 of the Government of India Act, 1935, which in turn was the work of English draftsmen. It would, therefore, be both instructive as well as relevant to refer to the meaning of the expression 'final judgment' in English cases. Three leading English cases on the point may now be referred to.

43. The first English case to which reference might be made is that of *Ex parte Chinery*, (1884) 12 Q.B.D. 342. In this case the meaning of the expression 'final judgment' arose for consideration in connection with the interpretation of the meaning of Sub-section I(g) of Section 4 of the Bankruptcy Act, 1883 (46 and 47 Vict. c. 52). Cotton, LJ who delivered the judgment in the Case expounded its meaning as follows :-

'Now, in legal language, and in Acts of Parliament, as well as with regard to the rights of the parties, there is a well-known distinction between a 'judgment' and an 'order'. No doubt the Orders under the Judicature Act provide that every order may be enforced in the same manner as a judgment, but still judgments and orders are kept entirely distinct. It is not said that the word 'judgment shall in other Acts of Parliament include an 'order', I think we ought to give to the words 'final judgment' in this sub-section, their strict and proper meaning i.e. a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established --unless there is something to show an intention to use the words in a more extended sense.' (p. 345)

Applying the above principle to Article 133, one would find that there is nothing to indicate, that the term, 'judgment' was used therein in an extended sense. On the other hand, as pointed out by me above, its immediate association with the words

'decree or final order.' and the setting and composition of the entire Article in which it is used as well as the contents of the preceding Article and the explanation appended thereto point to the conclusion that it is used therein in a strictly restricted sense, or as the English Jurists would like to say in the strict technical sense.

44. The second English case to which reference might be made is that of *Ex parte Moore*, (1885) 14 Q. B. D. 627. In this case again the meaning of the expression 'final judgment' in Section 4, Sub-section (1) (g) of the same Act came up for consideration before the learned Judges. In This judgment the Earl of Selborne, L. C. expounded its meaning in the following words :

'To constitute an order a final judgment nothing more is necessary than that there should be a proper *litis contestatio*, and a final adjudication between the parties to it on the merits.' (p. 632) Cotton L. J. agreed with the said view holding that in the context of the word 'judgment' under that provision of law, a strict meaning should be given to that expression, and confirmed the view which he had taken earlier in (1884) 12 QBD 342.

45. The third English case to which reference might be made is that of *Onslow v. Commissioner of Inland Revenue*, (1890) 25 QBD 465. In this case the meaning of the expression 'final judgment' as distinguished from the word 'order' within the meaning of Order LVIII, Rules 3, 15(2) came up for consideration before the learned Judges. Lord Esher, M. R. who delivered the leading judgment stated that he entirely adopted the position of Cotton L. J. in (1884) 12 QBD 342, a decision which was supporter by Bowen and Fry L. J. He further observed as follows :

'I think we ought to give to the words 'final judgment' in this sub-section their strict 'and proper meaning, i.e. 'a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established, unless there is something to show an intention to use the words in a more extended sense.' In the same case Bowen, L.J., says that there is an inherent distinction between judgments and orders, and that the words 'final judgment' have a professional meaning; by which expression I think he meant to say, as Cotton, L. J., had previously said that a 'judgment' is a decision obtained in an action; and it

that was his meaning, both those learned lords justices gave judgment to the same effect, and Fry, L. J., agreed with them. A 'judgment', therefore, is a decision obtained in an action, and every other decision is an order', (p. 466)

The definition of 'judgment' in English Law as stated by Black in his book on Judgments will appear from the following quotation from the judgment of Sulaiman, J. in :

'Black in his book on Judgments 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 of 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', (p. 46)

46. Coming now to the Indian cases, I propose to follow the same line as I did while dealing with the meaning of the expression 'final order' i.e. I shall first take up the main Privy Council cases, then Federal Court cases, then Supreme Court cases, and finally High Court cases, so far as possible in chronological order. Their Lordships of the Privy Council had occasion to interpret the meaning of the words 'final judgment' in the 39th clause of the Letters Patent of the High Court of Bombay in AIR 1923 PC 148, *Tata Iron and Steel Co. Ltd. v. Chief Revenue Authority of Bombay*.

This 39th clause provided for appeals to the Privy Council from 'any final judgment, decree, or order' made in the exercise of its original jurisdiction by the judges of the High Court or of any Division Court from which an appeal did not lie to the High Court under the 15th clause. In order to ascertain the meaning of this expression, at the very outset their Lordships posed the following question before themselves : 'Now what is a final judgment as understood in English litigation?' After referring to the three cases mentioned above, namely, (1) (1884) 12 QBD 342 (2) (1885) 14 QBD 627 and (3) (1890) 25 QBD 465, and giving extensive quotations from them, they concluded as follows :

'It is evident from this case of (1890) 25 QBD 465 that the use of the words 'determine' and 'decide' or the direction that money paid in excess is to be refunded or the awarding of costs against the unsuccessful party, are not things which distinguish a judgment from an order where questions are referred to the Courts by case stated, (p. 152)

47. Their Lordships then went on to distinguish the technical or legal meaning of the word 'judgment' from its popular meaning in the following passage:

'The word judgment is indeed popularly used in many different sense, as when one says a certain man is a man of sound judgment, meaning that he is possessed of the intellectual faculty of deciding rightly on fact or circumstances, or where even in legal matters the expression of the opinion formed in a case by a judge who dissents from his colleague is commonly called his judgment, though it can have no effect whatever on the determination of the suit or action in which it is delivered.' (pp. 152 and 153).

After an exhaustive discussion of the point, their Lordships finally accepted the test laid down in the case of (1890) 95 QBD 465, and, applying the same test came to the conclusion that the decision before them could not be construed to be a 'final judgment' within the meaning of the said expression, as the said decision, being in the nature of an opinion, was merely advisory, and could not, therefore, be treated as finally adjudicating the points in dispute between the parties on merits.

48. In *S.J. Bhogilal v. Dakore Temple Committee*, their Lordships of the Privy Council made the following observations:-

'The term 'judgment' in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense'. (p. 156).

The two aforementioned decisions as well as a third one reported in AIR 1921 PC 80, *Sabitri Thakurain v. Savi*, were referred to by Sulaiman, J. in the case of , and the effect of the expression of views by the Privy Council in the aforementioned cases was summarised by the learned Judge in the following words:-

'In view of the observations, made by their Lordships of the Privy Council, the word 'judgment' cannot now be taken in its widest possible' sense so as to include every order which terminates a proceeding pending in High Court so far as that court is concerned. In criminal cases the position is still stronger,' (pp. 47 and 48),

The part of the judgment of the learned judge, however, which is relevant for our present purpose is the one which deals with the meaning of the word 'judgment' as used in Section 205(1) of the Government of India Act, 1935. This was the real question in issue before him, and, in answering it Sulaiman, J. noted the association of the word 'judgment' with 'final order' in this provision of law and its effect in the following words:-

'In Section 205(1) of the Act, the word 'judgment' does not occur by itself but is used in conjunction with final order. When . both the terms judgment and final order are used together in One expression, they undoubtedly connote different and distinct meanings, and judgment cannot be interpreted as embracing even interlocutory orders, which would make the category 'final order' wholly superfluous and unnecessary.' (p. 48).

49. The meaning of the word 'judgment' in Section 205 of the Government of India Act, 1935, was again considered by Kania, C. J. in . For the purpose of determining the question, the learned Judge referred to the case of (1890) 25 Q. B. D. 465 and other English cases and observed as follows:-

'These and other English decisions make it clear that in England when the word judgment or decree is used, whether it is preliminary or final, it means the declaration or final determination of the rights of the parties in the matter brought before the Court.' (p. 4 Col. 2).

As to the meaning of this expression in India, the learned Judge observed as follows:-

'In our opinion, the decisions of the Courts in India show that the word 'judgment', as in England, means the determination of the rights of parties in the matter brought before the Court.' (p. 4, Col.2).

What is, however, most important to note for our present purpose is the fact that in this case the attention of the learned Judges was drawn to the fact that whereas in Clause 39 of the Letters Patent of the High Courts of Calcutta, Bombay and Madras, which provided for appeals to His Majesty-in-Council, the words used were 'any final judgment, decree, or order', the words used in Section 205, of the Government of India Act were 'any judgment, decree or final order', and it was argued that the absence of the qualifying word 'final' before the word 'judgment' and its removal from the governing position occupied by it in Clause 39, had the effect of enlarging the scope of judgments which could be appealed against so as to include not only final orders but also preliminary or interlocutory judgments within the purview of Section 205(1) of the Government of India Act, 1935. This argument was emphatically repelled by the learned Chief Justice in the following words:-

'Our attention was called, to O. 39, Letters Patent of the High Courts of Calcutta, Bombay and Madras which provides for appeals to his Majesty-in-Council from 'any final judgment, decree or order' and it was urged that in the absence of the qualifying word, 'judgment' in Section 205(1), Constitution Act must be held to include a preliminary or interlocutory judgment and that the order now under appeal fell under that category. We are unable to accede to this view. In our opinion, the term 'judgment' at itself indicates a judicial decision given on the merits of the dispute brought before the Court', (pp. 4 and 5).

The effect of the close juxtaposition of the expressions 'judgment' and 'final order' was again noted 'by the learned Judge in the following words.-

'Indeed, if 'judgment' were to mean or include an interlocutory order, the words 'final order' in Section 205(1), Government of India Act, 1935, will be superfluous.' (p. 5).

50. The third case of the Federal Court to which reference might be made in this connection, and in which the meaning of Section 205(1) of the Government of India Act, 1935, came up for consideration is that of AIR 1950 FC 77. When considering the alternative argument that the decision, if not a final order, might be treated as a judgment, the Court again referred to the English cases on the

meaning of the word 'Judgment', and was again impressed by the Conjunction of the three expressions, namely, 'judgment', 'decree' and 'final order' in this provision of law. The concluding portion of the judgment of B.K. Mukherjea, J. which is relevant for our purposes runs as follows:

'Lastly, it was urged by Mr. Setalvad, though somewhat faintly, that even if the order appealed against is not a final one, it could still be regarded as a judgment and as such would come within the purview of Section 205(1), Government of India Act. In English Courts the word 'Judgment' is used in the same sense as a 'decree' in the Civil Procedure Code and it means the declaration or final determination of the rights of the parties in the matter brought before the Court; vide . According to the definition given in the C. P. C., a judgment is the statement of reasons given by a Judge on which a decree or order is based. If the order which is made in this case is an interlocutory order, the Judgment must necessarily be held to be an interlocutory judgment and the collocation of the words 'judgment, decree or final order' in Section 205(1), Government of India Act makes it clear that no appeal is provided for against an interlocutory judgment or order. The result is that the appeal fails on the preliminary ground and is dismissed'. (P. 79).

51. The effect of the three Federal Court cases mentioned above is necessarily to lead to the conclusion that the word 'judgment' in Section 205, Government of India Act, 1935, meant a final judgment, because the said word was associated with the words 'decree' and 'final order'. The position under Article 133 of the Constitution appears to be exactly the same. The cases of the Indian High Courts, after 1950, relating to the interpretation of the word 'judgment' under Article 133 of the [Constitution of India](#) have merely referred to the two Privy Council and the three Federal Court cases mentioned above, and followed the line of reasoning chalked out in them. Before, however, referring to them, it may be pointed out that no case of the Supreme Court dealing directly with this point was brought to our notice. There are only indications in some cases showing their indirect approval of the view taken by the Privy Council and the Federal Court. '

52. In : [1953]4SCR1159 , while interpreting the meaning of the word 'judement' in Clause 15 of the Letters patent of the Calcutta High Court, their Lordships held that an order of transfer made under Clause 13 of the Letters patent is not a judgment within the meaning of Clause 15 of the Letters Patent, and is not appealable, as such an order 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.

53. It may, however, be noted that this case is not strictly relevant for two reasons. First, because, as already observed, in this case their Lordships took particular care to state that they had no intention of giving any positive definition of the term 'judgment', and that they were merely referring to certain illustrative cases of orders for the negative purpose of determining whether the order in the case before them fulfilled either of the tests laid down in the Calcutta or the Madras cases. Secondly, they were construing Clause 15 of the Letters Patent in which the word 'judgment' is used simpliciter, and not in conjunction with other words.

54. In : [1959]1SCR1177 , Hanskumar v. Union of India, their Lordships of the Supreme Court dealt with a case in which the Court had given a decision as an arbitrator acting under a statute. The question that arose before them was whether such a decision could be considered to be a judgment, decree or final order within the meaning of Sections 109 and 110, C. P. C. In that connection T.L. Venkatarama Aiyar, J, made the following observations:-

'There is thus a sharp distinction between a decision which is pronounced by a Court in a cause which it hears on merits, and one which is given by it in a proceeding for the filing of an award. The former is a judgment, decree or order rendered (in the exercise of its normal jurisdiction as a Civil Court, and that is appealable under the general law as for example, under Sections 96, 100, 104, 109 and 110 C. P. C. The latter is an adjudication of a private tribunal with the imprimatur of the Court stamped on it, and to the extent that the award, is within the terms of the reference, it is final and not appealable .' (p. 947).

55. This case again indirectly emphasises the aspect that a judgment within the meaning of Sections 109 and 110 G. P. C. is a judicial adjudication of the rights

and liabilities of parties by the Court which has applied its own mind to the merits of the matter, and not a mere decision of a matter by an extra-judicial body on which the Court has merely put its formal seal of approval without applying its own mind to its merits.

56. In AIR 1980 SC 278, Commissioner of Income-tax, Bombay North v. Patel and Co., Jamnagar, their Lordships of the Supreme Court held that a judgment of the High Court answering the questions of law which were referred for its decision under Section 108(1) of the Saurashtra Income-tax Ordinance having been given in the exercise of its advisory or consultative jurisdiction cannot be considered to be a judgment within the meaning of Article 133 of the [Constitution of India](#).

57. No other case of the Supreme Court relevant to the point was brought to our notice. None of the aforementioned Supreme Court cases overrule or even doubt the correctness of the view indicated by the Privy Council cases and clearly expressed in the Federal Court cases that judgment in such a context must be construed to mean a final and not an interlocutory judgment

58. Reference may now be made to some important High Court cases. In : AIR1951 Pat29 , Tobacco . v. State, which is a Full Bench case of the Patna High Court, it was held that the term 'judgment' in Article 133 has been used in the same sense as in Section 205, Government of India Act, 1935, and the dropping of the word 'final' before the word 'judgment' did not make any difference whatsoever.

59. In : AIR1951 Cal300 , Chandra Singh v. Midnapore Zamindary Co. Ltd., it was observed as follows:-

'To give the word 'judgment' too wide a meaning would be to give a right of appeal from an order which was not final and from a formal adjudication which could not be described as a decree. Whatever meaning is given to the word 'judgment' it must be some meaning which would give effect to the words following, namely, 'decree or final order'.' (p. 302).

60. In : [1952]22ITR150(Bom) , Jamnadas v. Commr. of Income-tax, it was held by Chagla, C. J.:

'The expression 'judgment, decree or final order' used in Article 133(1) is used in its technical English sense, which means a final declaration or determination of the rights of parties and it also means a decision given on merits. 'Judgment, decree or final order' is a compendious expression, and each one of the parts of this expression bear the same connotation, viz. that there is an adjudication by the Court upon the rights of the parties who appear before it. 'Judgment' must not be read in this context in contradistinction to 'decree or final order'.' (p. 481).

61. In a Full Bench case of the Saurashtra High Court reported in AIR 1953 Sau 166, Bombay Steam Navigation Company Limited v. Damodar Savailal, it was held that 'the term 'judgment' indicates a final decision on the merits of the dispute before the Court.'

62. In : AIR1953 Mad727 it was held that it is only the final judgment that is referred to in Article 133 of the Constitution, and an interlocutory judgment would be excluded from the category of judgments referred to therein.

63. In : AIR1954 Cal424 it was held by Chakravarti, C. J. that 'the word 'judgment' was not intended to bring in orders, not final.' The learned Judge in his judgment, which I may say with respect, is highly illuminating and instructive, referred to the internal indications in the Constitution itself pointing to that conclusion. In this connection he referred to the Explanation attached to Article 132 which is conspicuous by its absence in Article 133 of the [Constitution of India](#). He then went on to observe as follows:-

'The above indication of the scope of Article 133(1) is of a negative kind, but I might refer to a positive indication within the Article itself. The concluding paragraph of Article 133(1) speaks of cases 'where the judgment, decree or final order affirms the decision of the Court immediately below' and the paragraph applies to Clauses (a) and (b). There was a similar paragraph in Section 110 of the Code of 1908, applicable to Clauses (a) and (b) of Section 109, but there the expression was 'decree or final order.'

A decree or an order finally terminating the suit or proceeding may affirm the 'decision' of the court below and the language used was appropriate. But if an order does not terminate the suit or proceeding, it is difficult to conceive of its affirming the 'decision' of the lower Court by which certainly, an interlocutory order of that Court is not meant, This appears to me to be another indication that orders, not terminating the suit or proceeding, are not contemplated by Clauses (a) and (b) of Article 133(1) and that by the use of the words 'judgment, decree or final order', nothing more than 'decree or final order' has been included.' (pp. 429 and 430).

64. In : AIR1957 Ori42 , Jagannath Agarwalla v. State of Orissa, it was held that the three words 'judgment, decree or final order' imply the same amount of finality.

65. In , Amsingh v. Jethmal, it was held that the reversal by the High Court of the decision of the trial court on the plea of limitation does not come within the purview of the term 'judgment', because it is not a final decision of the matters in dispute, nor can such a decision amount to a decree within the meaning of the term 'decree' under Section 2(2), C. P. C., for the term 'determination of the rights of the parties' mentioned therein refers to the substantive rights of the parties with regard to the merits of the case, and not to other disputes between the parties which are ancillary to the subject-matter of the suit.

66. In : AIR1960 Cal77 Mukunda Das v. Bidhan Chandra Roy,' an application under Article 133 of the Constitution was directed against an order of the High Court refusing to entertain an appeal on the ground that it lay to the District Judge, and directing the return of the memorandum of appeal for presentation to the proper court. Dr. Gupta, learned counsel appearing for the petitioner, contended before the Division Bench that the said decision being a judgment under the provisions of Clause 15 of the Letters Patent should also be treated to be a judgment under Art: 133 of the Constitution, Clause 15 of the Letters Patent of the Calcutta High Court corresponds to Clause 10 of the Letters Patent of the Allahabad High Court. The argument in that case was, therefore, exactly the same as that advanced by the learned counsel in this case before us. This argument was repelled by the learned Judge thus:-

'Dr. Gupta, however, contends that it is a judgment; and according to him the word 'judgment' in Article 133 must be given the same meaning as it bears in Clause 15 of the Letters Patent and he further contends that since under Clause 15 of the Letters Patent an order determining the forum of a suit has been held to be a judgment so also an order determining the forum of appeal must be held to be a judgment. This point, however, is no longer open for argument. It is well-known that under Clause 15 of the Letters Patent any decision which affects the merits of the question between the parties by determining some right or liability is a judgment. That judgment may be an interlocutory judgment, for example an order appointing or refusing to appoint a receiver or an order granting or refusing to grant a temporary injunction. But the word 'judgment' as used in Article 133 of the Constitution cannot include an interlocutory order.' (p, 55),

67. In this case the learned counsel for the petitioner has tried to revive the same argument, which was rejected by the Calcutta High Court, by relying strongly on the Full Bench decision of this Court reported in : AIR1960 All692 . This case, in fact, is the sheet-anehor of his arguments. In this case a learned Judge of this Court had dismissed an appeal filed in this Court under Order 43, Rule 1(r), C. P. C. against an order of the District Judge granting a temporary injunction against the defendant-appellants.

Dissatisfied with the said order, the defendant-appellants filed a Special Appeal under Ch, 8, Rule 5 of the Rules of Court which is a substantial reproduction of Clause 10 of the Letters Patent of the Allahabad High Court. At the time of the hearing of the Special Appeal, a preliminary objection was taken by the respondents that the appeal was not maintainable, as the decision of the learned Single Judge was not a judgment within the meaning of Ch. 8, Rule 5 of the High Court Rules or Clause 10 ,of the Letters Patent.

Under Clause 10 of the Letters Patent as well as' under Ch. 8, Rule 5 of the rules of this Court an appeal can lie to the' High Court from a decision of a single Judge only if the decision is a judgment. Two of the learned Judges constituting the Bench rejected the contention holding that the decision was a 'judgment' within the meanine of Clause 10 of the Letters Patent of the Allahabad High Court. On the

other hand, the third Judge was of the view, that the decision in question was not a judgment. but merely an interlocutory order.

68. In my opinion,-the Full.Bench case cited by the learned counsel is distinguishable from the present case. In that case the provision of law that was considered by the learned Judges Was Clause 10 of the Letters Patent or Ch. 8 Rule 5 which is materially a reproduction of the same. In Clause 10 of the Letters Patent as well as in Ch. 8, Rule 5 the word used is 'judgment' simpliciter. This is not so in Article 133 of the Constitution. In Article 133 of the Constitution as already observed, the word 'judgment' is used in conjunction with two other expressions namely, 'decree or final order,'

It is the collocation of these three expressions that has been repeatedly emphasised by the Federal Court of India in coming to the conclusion that the word 'judgment' in this setting must necessarily be construed to mean final judgment as distinguished from an interlocutory judgment. In view of the close juxtaposition of the three expressions, any mode of interpretation that seeks to isolate them will frustrate the very purpose of the legislature.

The interpretation to be put on each of the three expressions used therein should not be such as to make the others superfluous or redundant, nor should it be such as to make the one destructive of the other. The three expressions seem to have been fused into one, and this intermingling has, in spite of their apparently separate identity, given them a common colour. The prominent feature of Article 133, therefore, is that the three expressions, namely, 'judgment', 'decree' and 'final order' stand together firmly clasping and lending strength to each other.

Any mode of -interpretation, therefore, that would have the effect of relaxing or releasing their common bond or hold would defeat the purpose of the framers of this provision of law. It might be that the Constitution-makers realised that under Article 133 of the Constitution they were providing for an appeal to the highest Court of law in the land, and their purpose was to see that the entire dust of controversy raised in the lower courts settled down on the ground and the atmosphere cleared up completely before the stage was set for the final battle which would be fought out in the Court of the last resort.

They therefore used all the three expressions together for the purpose of embracing within the ambit of this provision of law the entire range of multifarious forms in which the claims are initiated and finally adjudicated by the courts of law. Whatever their intention might have been, one thing that is clear is that they intended that the decision which should be the subject-matter of appeal under this provision of law must be a final and not an interlocutory one.

69. As contrasted with it, in Clause 10 of the Letters Patent the term 'judgment' stands in a solitary form bereft of its companions under Article 133 of the [Constitution of India](#). The appeal under Clause 10 of the Letters Patent is not to the higher Court nor even to a different court. The appeal here is to the same Court, and the judgment remains the judgment of one and the same court viz. the High Court.

70. Apart from the difference in the setting of the word 'judgment' in the two provisions and the purpose of these two provisions of law, there are other differences as well. Thus, for example, the Explanation appended to Article 132 of the Constitution is conspicuous by its absence in Article 133 which stands next door to it. Further, even within the body of Article 133 of the Constitution there are inherent and positive indications that lead one to the conclusion that the decision contemplated therein was meant to be 'final and not interlocutory'.

The features of Article 133 which point to this conclusion have already been referred to by me earlier. None of these features can, however, be found in Clause 10 of the Letters Patent. It can also be argued that although the expression 'final, judgment', is used in other parts of the same document (vide CL 30 of the Letters Patent), in this particular part (i.e. Clause 10 of the Letters Patent) as contrasted with Clause 30 of the same Chapter, the phraseology employed is a different one in so far as the qualifying word 'final' is omitted.

No such contrasting features or Contra indications are presented in the case of Article 133. On the other hand, all the indications in Article 133 itself as well as in the surrounding or the neighbouring articles converge in pointing towards finality. The word 'final', therefore, although not explicitly mentioned before it is implicit within it. It is no doubt true that the area of controversy covered by the two

provisions viz. Clause 10 and Article 133 overlaps at certain points.

The area, however, cannot be said to be identical. There still remains a portion which is occupied exclusively by the aspect of the matter under Article 133, and on the basis of which it can be argued that the word 'judgment' used therein stands on a footing of its own. For the reasons given above, it can be argued and held that the meaning of the term 'judgment' under Article 133 is narrower than the one under Clause 10 of the Letters Patent. For the same reasons, it can be justifiably held that the meaning to be ascribed to the word 'judgment' in Clause 10 is wider than the one in Article 133 of the Constitution.

71. The majority judgment in : AIR1960 All692 relied on the principle laid down in ILR 35 Mad 1. According to the said principle it appears to me that the present decision would be a 'judgment'. If a decision in proceedings under Order 23. Rule 3 C. P. C. is to be treated as a separate or a miscellaneous proceeding partaking of the nature of or analogous to an original petition, then, as envisaged by Krishna Swami Iyar, J. in his judgment in that case, it would be a 'judgment' because the said proceedings have finally, terminated.

On the other hand, if they are treated as ancillary proceedings, even then, it would be a 'judgment' because, although the proceedings were not taken for the purpose of rendering the final judgment effective, they were taken for a much stronger purpose viz. to have the final judgment itself passed on its basis. The instances of decisions enumerated by Sir Arnold White C. J. himself clearly indicate that the present decision would have been treated as a judgment under Clause 15 of the Letters Patent of the Calcutta High Court which corresponds to Clause 10 of the Letters Patent of the Allahabad High Court. In fact an order setting aside a judgment and decree and ordering a remand is cited by the learned Chief Justice himself in his judgment as an instance of a decision that would be a judgment.

Other instances cited are of a much weaker type. They are e.g. an order giving commission to the Administrator General under the Administrator General's Act, an order refusing a stay, of execution, an order refusing to extend time for giving, security for costs, an order refusing to confirm or set aside an award and an order based on a refusal to exercise a discretion if the effect of such order is to dispose

of proceedings before the Court. If, therefore, this very decision had been the subject-matter of an appeal under Clause 10 of the Letters Patent of this Court, then, it seems to me that, on the view taken in Tuljaram's case ILR 35 Mad 1 it could be considered to be. a judgment appealable under that clause.

72. Even according to the view taken in the minority judgment, the word 'judgment' in Clause 10 of the Letters Patent includes an interlocutory judgment as would appear from the following passage:-

'The word 'judgment' in Clause 10 of the Letters Patent undoubtedly includes an 'interlocutory judgment.' (p. 402).

The learned Judge who gave the minority judgment in the end observed as follows;-

'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.'

On the other hand, it appears to me that an interlocutory judgment which leaves a part of the dispute undecided or a decision covering only a part of the suit or proceedings or only some of the real points of controversy in a suit or proceeding is not one that can rank as a final judgment under Article 133 of the [Constitution of India](#). I may, however, mention that I do not wish to express any opinion on the merits of the controversy raised in : AIR1960 All692 . It is neither proper nor necessary for me to do any such thing in this case.

I have read the judgments of the learned Judges in that case and, so far as I can see all the learned Judges in that case themselves intended to confine the effect of their decision in that case to the interpretation of CL 10 of the Letters Patent alone. The Full Bench case reported in : AIR1960 All692 , therefore, appears to me to be distinguishable from the present case.

73. In the end, the crucial question, that calls for answer is 'What is the meaning of the term 'judgment' in Article 133 of the Constitution?' I venture to suggest that, as

a result of the afore-mentioned discussion, it follows that a 'judgment' as contemplated therein should fulfil the following three conditions:

1. It should terminate the proceedings in the High Court.
2. It should determine the rights and liabilities of the parties.
3. The determination of the rights and liabilities as envisaged in condition No. 2 should be on merits, and should further be final and conclusive So as to cover the entire range of substantive rights and liabilities which formed the subject-matter of real controversy in the suit or proceedings which initially gave rise to the dispute.

It is only when all the three aforementioned conditions are fulfilled that a decision is entitled to rank as a, final, judgment within the meaning of Article 133 of the [Constitution of India](#). It may be noted that condition No. 1 was emphasised in Tuljaram Row's case reported in ILR 35 Mad 1 which was relied on in the majority judgment in : AIR1960 All692 . Condition No. 2, on the other hand, represents an aspect which was brought into prominence in the Calcutta case reported in 8 Beng L. R. 433, Justices of the Peace for Calcutta v. Oriental Gas Co. Ltd. and was emphasised in the minority judgment.

The third and the last condition is a condition which is imposed on the word 'judgment' neither by the operative portion of the majority judgment nor of the minority judgment, but has necessarily to be imported in the word 'judgment' in Article 133 by virtue of the special features presented by the setting and context of this word in Article 133 and the purpose for which it was framed.

It may be said to be a reminiscence of the test laid down in the Full Bench case of the Rangoon High Court reported in AIR 1935 Rang 267, Dayabhai Jiwan Das v. Murugappa Chettiyan The test, therefore, that is to be applied for the determination of the question whether a decision is a judgment under Article 133 is a combination of both the Madras as well as the Calcutta test, and comprises something more, which is incorporated in condition No. 3, and which, in its turn, is an echo of the Rangoon test.

The test laid down above is, no doubt, stricter than the one usually applied for the definition of the term 'judgment' in Clause 10 of the Letters Patent, but it is a test which is warranted by the setting and the context of term in Article 133, and appears also to be the most salutary one from the point of view of the interests of justice as well as the convenience of parties. If this test is applied to the impugned decision, then the only condition which is fulfilled in the present case is condition No. 1. The decision in question obviously fails to fulfil conditions Nos. 2 and 3 specified above. It cannot therefore be treated as a 'judgment'.

74. For the above) reasons I am of opinion that the decision against which the present petition is directed is neither a 'final order' nor a 'judgment' within the meaning of the said expressions as used in Article 133 of the [Constitution of India](#).

Srivastava, J.

75. I agree that we must answer the question referred to us in the negative. It is not suggested that the order sought to be appealed against is a decree. It cannot be a final order as it does not have the essential features required in respect of a final order by the Full Bench decision in : AIR1956 All457 . In respect of one of the requirements laid down by the Full Bench viz. that the order should not leave the controversy alive the Supreme Court, it is suggested, took a different view in (S) AIR 1955 SC 578 as it entertained in that case an appeal against an order of remand.

If the facts of the latter case are borne in mind however it will not be difficult to see that it leaves the weight of the Full Bench decision entirely unaffected. In the Gurdwara Parbandhak Committee case : AIR 1955 SC576 the order against which the appeal had been filed was treated as a final order as while granting the certificate under Article 133 the High Court had made it clear that though in form the order it had passed was an order of remand the real controversy in the case had in fact been determined and what remained for the trial court to do on remand was only to pass a formal decree in accordance with the findings of the High Court.

It was on account of that feature of the order that the Supreme Court rejected the preliminary objection that it did not amount to a final order. The decision of the Supreme Court cannot, therefore, be interpreted as laying down that any of the three essential features required by the Full Bench was unnecessary. It is not suggested on behalf of the applicant that the order now in question possesses any of those features.

76. The word 'judgment' having been used in Article 133 together with the words 'decree' and 'final order' it appears to be implied that some sort of finality must be present in the case of a 'judgment' also if it is to be appealable under the Article. The order in question is not final in any sense. It cannot be considered to be 'judgment' on the view which I expressed in : AIR1960 All692 . It cannot be a judgment even according to the majority view in that case as it was passed not in a proceeding which was meant for rendering the final judgment in the case effective but in one intended to bring the suit to an immediate end without being decided on merits.

77. BY THE COURT: The question referred to this Court is answered in the negative.

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