

# ALLAHABAD HIGH COURT

L. Ram Sarup

Vs.

Kaniz Ummehani

(Sulaiman , CJ. and Bennet , J.)

12.10.1936

## JUDGMENT

**Sulaiman , CJ.**

1. A preliminary objection is taken to the hearing of this appeal that no Letters Patent appeal lies. In a suit for a declaration that certain property was not liable to attachment and sale an injunction was granted by the Court below. As the valuation of the suit was more than ₹ 5,000, a first appeal from order was filed in this Court and a learned Judge of this Court has modified the order for injunction. A Letters Patent appeal has been filed from this order. Two points are urged in the objection. The first is that this is a second appeal from an order passed by the trial Court, and that accordingly under Section 104(2) no such appeal lies; the second is that the order for injunction is not a judgment and no appeal lies under Clause 10, Letters Patent. As regards the first point, reliance is placed on *Piare Lal v. Madan Lal*<sup>1</sup> in which case it was certainly held that where an order had been passed by a Single Judge of this Court in an appeal from an order no further appeal under the Letters Patent was maintainable. The learned Judges thought that the matter was concluded by the pronouncement of the Full Bench in *Muhammad Naimul Khan v. Ihsan Ullah Khan*<sup>2</sup> With great respect we may point out that the point decided by the Full Bench was not exactly the same point which arose, though it cannot be doubted that there were observations in the judgment suggesting that when an appeal is provided in the Code of Civil Procedure, there cannot be another appeal under Clause 10, Letters Patent.

2. There is however one material distinction between the provisions of the old Code and those of the new Code. In the Code of 1882 there was no exemption as regards any special law that may be in force for the time being and the Code of Civil Procedure, except as regards certain enactments mentioned in Section 4 and other similar sections, would supersede all such laws. In Clause 35 of the Letters Patent, there was a clear provision that the Letters Patents are subject to the legislative powers of the Governor-General in Council. It was accordingly thought that the Code of Civil Procedure would prevail against the provisions of the Letters Patent. In the new Code of 1908 there is a special provision in Section 4 to the effect that:

In the absence of any specified provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force

<sup>1</sup> A.I.R. 1917 All. 325

<sup>2</sup>(1892) 14 All. 226

or any special jurisdiction or power conferred, or any special form of procedure prescribed by or under any other law for the time being in force.

3. It follows that unless there is any specific provision to the contrary in this Code of Civil Procedure, it cannot affect any special law or special jurisdiction or power which is conferred on the High Court. The Letters Patent undoubtedly confers such special jurisdiction and power. It would therefore follow that the provisions of the Letters Patent are saved by virtue of Section 4, unless there is specific provision to the contrary. We do not find any specific provision in Section 104 showing that that section is intended to apply to Letters Patent appeals as well. The opinion expressed by the Division Bench in *Piare Lal's case Piare Lal v. Madan Lal*<sup>3</sup> has not been followed in other High Courts. It seems to us that it is not necessary to refer this point to a Full Bench because of one important circumstance. At the time when the case of *Piare Lal v. Madan Lal*<sup>4</sup> was decided the new Code of Civil Procedure had come into force and its provisions could be considered by the Bench to supersede the provisions of the Letters Patent. Thereafter Clause 10, Letters Patent, was amended in 1929 when a right of appeal has been allowed from every judgment of a Single Judge where leave is granted. As this latest provision in the Letters Patent has not been superseded by any provision of the Code of Civil Procedure, we think that it must prevail.

4. It may further be pointed out that Section 104(1), C.P.C., itself provides "save as otherwise expressly provided...by any law for the time being in force." Accordingly the prohibition contained in that Sub-section that an appeal shall not lie from any other order, would not apply to a case where an appeal is provided for under the Letters Patent. It may however be conceded that this saving clause does not occur in Sub-section (2), Section 104. But under the corresponding Section 588 of the old Code where the words were "orders passed in appeal under this section shall be final," their Lordships of the Privy Council in *Hurrish Chunder Chowdhry v. Kalisunderi Debi*<sup>5</sup> observed that Section 588, which has the effect of restricting certain appeals, does not apply to a case where the appeal is from one of the Judges of the High Court to the full Court. Obviously Section 104(2) was intended to apply to appeals where allowable under the Code of Civil Procedure. In any case Section 104(2) does not contain any express provision which would suggest that the provisions of the Letters Patent have been abrogated. We accordingly hold that under Clause 10, Letters Patent, an appeal lies from, the order of a Single Judge passed in appeal. It is next contended by the learned Counsel for the respondent that permission of the Judge was necessary under Clause 10. This contention cannot be accepted. Under Clause 10 an appeal lies from the judgment of a Single Judge of this Court in every case in which the judgment is not passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise

of appellate jurisdiction by a Court subject to the superintendence of the High Court, that is, not being a second appeal (or revision or exercise of power of superintendence). Where however the learned Judge has passed an order in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to its superintendence, i.e., in second appeal, the certificate of the Judge that the case is a fit one for appeal would be necessary. We accordingly overrule this preliminary objection.

<sup>3</sup> A.I.R. 1917 All. 325

<sup>5</sup>(1883) 9 Cal. 482 at p. 492

<sup>4</sup> A.I.R. 1917 All. 325

5. The only point taken in appeal is that the trial Court having imposed certain conditions before issuing the injunction, a learned Judge of this Court hearing the appeal was not competent to alter that order. This argument is wholly untenable. The learned Judge pointed out that in one case at least the Court below had passed an order without the record being before it. He has reconsidered the matter and come to the conclusion, that the injunction should be issued unconditionally. We do not think that this is a fit case in which we should interfere in a Letters Patent appeal. The appeal is dismissed with costs.

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