

LAHORE HIGH COURT

Sheikh Haji Wahid-ud-Din

Vs

Lala Makhan Lal

(Din Mohammad, J.)

28.06.1944

JUDGMENT

Din Mohammad, J.

1. The facts bearing on the questions of law involved in this reference may shortly be stated. In execution of a decree against Khan Bahadur Sheikh Wahid-ud-Din, eight items of property owned by him were sold in eight different lots for a sum of L 42,000 on 1st December 1941. Two of these properties were purchased by the decree holders themselves and the remaining six by outsiders. The judgment-debtor then moved the executing Court under Order 21, Rule 90, Civil Procedure Code, but his objections were disallowed and the sales were confirmed on 26th May 1942. Being dissatisfied with this order, the judgment-debtor preferred an appeal to this Court which came on for hearing before Abdul Eashid, J. The learned Judge set aside the sale of three properties, but maintained the order of the executing Court in respect of the remaining five. Against that decision, the judgment-debtor put in a Letters Patent appeal, but it was dismissed in limine. He then, made an application for leave to appeal to His Majesty in Council. It was resisted principally on the ground that the order of the Letters Patent Bench being one of affirmance of the order of Abdul Rashid J no leave could be granted unless a substantial question of law was involved and it was evident that no such question arose in the case. It was further urged that in any circumstances the order of Abdul Rashid, J. dismissing the judgment-debtor's appeal in respect of five items of property as confirmed by the Letters Patent Bench was one of affirmance of the order of the executing Court and the judgment-debtor consequently had no right to appeal to His Majesty in Council, merely, because the order of the executing Court had been interfered with to his benefit in respect of three items of property. The judgment-debtor, on the other hand, argued, (1) that the Court of Abdul Rashid, J. was not a Court immediately below that of the Letters Patent Bench, but was a Court of co-ordinate jurisdiction and, therefore, the dismissal of the judgment-debtor's appeal by the Letters Patent Bench did not amount to any order of affirmance as contemplated by Section 110, Civil Procedure Code; and (2) that inasmuch as Abdul Rashid, J. had varied to some extent the order of the executing Court, even if that variation benefited the judgment-debtor to the utmost extent, he had a right to appeal to His Majesty in Council.

2. On both the questions raised by the parties the state of authority was not very satisfactory. On the first question the decisions of this Court appeared to have gone too far and no decision

directly dealing with the matter was available otherwise, and on the second there was a divergence of authority not only between the different High Courts in India but even in this Court itself. The Bench hearing the application accordingly considered it advisable to refer the following two questions to a Pull Bench:

- (1) Whether for the purposes of Section 110, Civil Procedure Code, a Judge sitting singly, not on the original side, but on the appellate side can be considered to be a Court immediately below the Bench hearing the Letters Patent Appeal from his decision?
- (2) Whether for the purposes of Section 110, Civil Procedure Code, a decree or order to be appealed from is to be considered one of affirmance or of variance where it partly maintains the decision of the Court below and partly reverses it, when the appeal to be taken to His Majesty in Council is confined only to that part of the decree or order which has been affirmed.

3. So far as the second question is concerned, the controversy has been set at rest in this Court for the present by a judgment of a Pull Bench, of which I was a member, in *Brahmanand v. Sree Sanatan Dharma Sabha reported in*¹ delivered on 3rd April 1944. It has been held there that if this Court partly affirms and partly reverses the decision of a Court immediately below, the person aggrieved by the affirmed portion of the decree has no right of appeal to His Majesty in Council against that portion of the decree, merely because in the other portion of the decree a variation has been made entirely to his satisfaction and he has no appealable grievance left in respect thereof. The principal judgment in that case was written by me and no arguments that have been advanced at the bar in the present case have shaken me from that position. I am conscious of the fact that in *Raja Tasadduq Rasul Khan v. Manak Chand*² their Lordships of the Privy Council have held that the word "decision" as used in Section 110, Civil Procedure Code, does not carry the same meaning as the word "judgment" and that it means decision of the suit by the Court. But even if this were so, it does not militate against the view taken by the Full Bench in the case mentioned above. A reference to Sub-rules (1) and (2) of Rule 4 as well as to Rule 5 of Order 20, Civil Procedure Code, would make it abundantly clear that the finding of a Court upon each issue has also been characterised as a "decision" by the Legislature and it is not true that the final adjudication of the suit alone can be described as such. Adopting the same reasoning, therefore, as has been employed in the Pull Bench judgment referred to above, the answer that I would propose to the second question is that for the purposes of Section 110, Civil Procedure Code, a decree or order to be appealed from, where it partly maintains the decision of the Court immediately below and partly reverses it is deemed to be one of affirmance when the subject-matter of the appeal to His Majesty in Council is confined only to that part of the decree or order which affirms the decision of the Court below on that matter.

4. The first question does present some difficulty. Counsel for the petitioner urges that every Judge of the High Court sitting on the appellate side is in relation to the cause disposed of by him a High Court in himself and thus exercises a jurisdiction which is

¹ A.I.R. 1944 Lah. 329 (F.B)

²(03) 25 All. 109

co-ordinate with the other Judges of the High Court and can by no stretch of language, therefore, be treated as a Court below the Court of the Letters Patent Bench. Wherever any provision is made for an appeal to the High Court, it is the High Court as such that is

contemplated and not the Court of any individual Judge or a combination of different Judges. It is only for the sake of convenience or facility of disposal that some cases are required to be heard by one Judge and some by more Judges than one. The Court accordingly continues to be the same even if by any domestic arrangement an appeal from one Judge lies to a Bench of two Judges and must be taken to be the High Court in either case. It is further argued that the Code of Civil Procedure does not contemplate any appeal from an appellate decree of the High Court, nor does the Punjab Courts Act envisage any gradation in the High Court itself and consequently no question of the Court of a Single Judge being immediately below that of a Bench of more Judges than one arises in any manner. Support for this view is sought from *Debendra Nath Das v. Bibudhendra Mansingh*³ where a Bench of the Calcutta High Court composed of Sir Lawrence, C.J., and Chatterjea, J. observed that in an appeal under Clause 15, Letters Patent (which corresponds to Clause 10, Letters Patent of this Court) the cancelling of a judgment of reversal passed by a Single Judge of the High Court results in an affirmance of the decision of "the Court immediately below." On behalf of the respondents, on the other hand, it is equally strenuously urged that the very fact that an appeal is provided from an order of a Single Judge to a Bench of more Judges than one implies that the Single Judge as a Court is placed immediately below that of the Bench hearing an appeal from his order and that this idea is neither repugnant to law nor to the Letters Patent by which the High Court is constituted. Reliance in this connection is placed on *Tulai Pershat Bhakt v. Benayek Misser*⁴ *Probhawati Kunwar v. Panmal Lodha*⁵ *Minna Heatherly v. B.C. Sen*⁶ and *Gopal Lal v. Bal Kishen*⁷

5. I have given the arguments advanced before us and the authorities cited at the bar the careful consideration that they deserve but I do not feel inclined to accept the position maintained by the respondents. It is obvious that the authorities dealing with a Judge of the High Court in the exercise of his original jurisdiction can render no assistance in the disposal of this matter and it was for this reason that this distinction was emphasized when the question was formulated. A Judge sitting on the original side is merely discharging the functions of a trial Court and to all intents and purposes, therefore he is a Court of first instance and when an appeal is lodged against his order, as a Court he is immediately below the Court which hears the appeal. Such an appeal is provided for even in the Code of Civil Procedure itself as an appeal from an original decree. This, however, is not the case when the same Judge sits on the appellate side and for the purposes of that appeal is the High Court in himself. Neither the Code of Civil Procedure nor the Punjab Courts Act contemplates an appeal to another Court from an order made in the High Court whether by one Judge or more than one and consequently the same analogy cannot apply. On the grounds stated above, *Tulai Pershat Bhakt v. Benayek Misser*⁸ affords no guidance in the matter even if it be considered that their Lordships of the Privy Council while using the words "two Courts below" at p. 922 relegated the Judge sitting on the original side to the position of a Court immediately below the Bench

³ A.I.R. 1916 Cal. 973

⁵(41) 45 C.W.N. 1002

⁷ A.I.R. 1932 Lah. 121

⁴(96) 23 Cal. 918

⁶ A.I.R. 1928 Lah. 537

⁸(96) 23 Cal. 918

hearing the appeal. Nor would *Probhawati Kunwar v. Panmal Lodha* (41) 45 C.W.N. 1002 (SUPRA) be of any use as there, too, the Judge sitting alone was occupying the position of a trial Court. The point now before us was directly involved in *Debendra Nath Das v. Bibudhendra Mansingh* A.I.R. 1916 Cal. 973(SUPRA) and there Sir Lawrence Jenkins, C.J. as stated above, definitely explained that there being no provision in the Code of Civil Procedure for appeal within the High Court and the right being dependent on the Letters Patent only, the judgment of the Judge sitting singly and that of the Letters Patent Bench in fact constituted one single

judgment of the High Court.

6. Coming now to the decisions of this Court in the case reported in *Minna Heatherly v. B.C. Sen A.I.R. 1928 Lah. 537(SUPRA)*, the Judge sitting alone whose appeal had been allowed by the Letters Patent Bench, had made an order in the exercise of his original testamentary jurisdiction and the matter was thus covered by *Tulai Pershat Bhakt v. Benayek Misser (96) 23 Cal. 918(SUPRA)*. It was not necessary, therefore, to consider *Debendra Nath Das v. Bibudhendra Mansingh A.I.R. 1916 Cal. 973(SUPRA)* at all, but despite this fact the learned Judges constituting the Bench threw doubt on its correctness stating that the Privy Council judgment in *Tulai Pershat Bhakt v. Benayek Misser (96) 23 Cal. 918(SUPRA)* was not brought to the notice of the learned Judges responsible for that decision. Unfortunately, they did not apply their minds fully to the distinction that obviously existed between the case in *Debendra Nath Das v. Bibudhendra Mansingh A.I.R. 1916 Cal. 973(SUPRA)* and the one before their Lordships of the Privy Council. In *Gopal Lal v. Bal Kishen ('32) 19 A.I.R. 1932 Lah. 121(SUPRA)*, where the Judge sitting alone had exercised his appellate jurisdiction, *Minna Heatherly v. B.C. Sen A.I.R. 1928 Lah. 537(SUPRA)* was followed in preference to *Debendra Nath Das v. Bibudhendra Mansingh A.I.R. 1916 Cal. 973(SUPRA)* without any further discussion of the matter. If I may say so with all respect, on this occasion too, the distinction existing between the two cases was entirely lost sight of. It may be observed that *Debendra Nath Das v. Bibudhendra Mansingh A.I.R. 1916 Cal. 973(SUPRA)* had gone to the Privy Council itself and it is significant that their Lordships had made no comment whatever on the observations made by Sir Lawrence Jenkins, C.J., while granting leave to appeal: see *Debendra Nath Das v. Bibudhendra Mansingh*⁹ In my view, therefore, the criticism advanced in *Minna Heatherly v. B.C. Sen A.I.R. 1928 Lah. 537(SUPRA)* against *Debendra Nath Das v. Bibudhendra Mansingh A.I.R. 1916 Cal. 973(SUPRA)* was not at all justified and the principle enunciated in *Gopal Lal v. Bal Kishen A.I.R. 1932 Lah. 121(Supra)* is obviously wrong.

7. Counsel for the respondents further refers to *Bai Mangu v. Bharat Khand Cotton Mills Co. Ltd*¹⁰. and *Nagendra Nath Dey v. Suresb Chandra Dey*¹¹, in support of his contention that in all cases where an appeal is provided for, the Court whose order is appealed from must be treated as subordinate to the Court which hears the appeal. He also relies in this connexion on the definition of the word "appeal" as given in Wharton's Law Lexicon, Stroud's Judicial Dictionary and Murray's Oxford Dictionary. It is true that ordinarily the term "appeal" means the judicial examination by a higher Court of the decision of an inferior Court, but despite this definition I

⁹ A.I.R. 1918 P.C. 8

¹¹ AIR 1932 PC 165 : 1932-36-LW 36

¹⁰ A.I.R. 1932 Bom. 90, at p. 790

cannot reconcile myself to the position that a Judge sitting alone can be characterized as a tribunal inferior to the Letters Patent Bench, merely because the Bench has power to modify or reverse his judgment. It is not with an idea of implying any subordination of the Court of the Single Judge to the Letters Patent Bench that such an appeal is provided for by Letters Patent; it is merely with a view to provide a further safeguard in the interests of the litigant that the domestic rules framed by the High Court permit a case to be heard by a Judge sitting alone. It is not disputed that a Judge sitting alone may, in view of the importance of the question involved in a case, decline to dispose of it himself and refer it straightway to a larger Bench. Would this course be open to an inferior or subordinate tribunal? To the first question, therefore, my answer would be that for the purposes of Section 110, Civil Procedure Code, a Judge sitting alone on the appellate side is not a Court immediately below the Letters Patent Bench which hears an appeal

from his decision.

Blacker, J.

8. I have had the privilege of reading the judgment of my learned brother Din Mohammad, and I agree entirely with his views on the second of the two questions referred to this Bench. With regard to the first question, however, I find myself in some difficulty. Had it not been for the judgment of the Privy Council in *Tulai Pershat Bhakt v. Benayek Misser* (96) 23 Cal. 918(*supra*), I would have had the very strongest inclination to agree with his reasoning, and to follow the weighty decision of Jenkins, C.J., in *Debendra Nath Das v. Bibudhendra Mansingh A.I.R. 1916 Cal. 973(supra)*. But, though there is an obvious difference of functions, after a careful study of the provisions of Sections 109 and 110, Civil Procedure Code, and Clause 10, Letters Patent, I find myself unable to distinguish between the status of a Single Judge of the High Court who has tried a case in the exercise of the Court's original juris, diction and that of a Single Judge who has heard an appeal from a subordinate Court vis a vis the High Court sitting in appeal from his judgment in either case. If in the light of Clause 26, Letters Patent a Single Judge hearing an appeal is the High Court, equally so is a Single Judge trying a case on the original aide. I am conscious of the fact that in the Presidency High Courts the original side and the appellate side are distinct from each other. This distinction however, seems to be a matter of convenience rather than of constitution and I find it impossible to hold that for that reason a Single Judge of the High Court sitting on the original side would not be the High Court, just as much as if he were sitting on the appellate side. If he is the High Court, then he would on the same argument be no more a Court below the High Court than his brother hearing a second appeal.

9. I may say, that but for the Privy Council judgment to which I have referred I would have been inclined to think that though in one sense of the word "Court" the Single Judge could be considered to be a different Court from the Letters Patent Bench, yet both were the High Court, and that he could not for the purposes of Section 110, Civil Procedure Code, be considered to be the Court below. I would, indeed, have been inclined to go even further and to suggest that for the purposes of Section 109 of the Code in a case which has originated in the High Court, the High Court would still be exercising its original jurisdiction with regard to that case, whether it was doing it in the person of the Judge trying the case in the first instance, or in the persons of two Judges, who were acting by way of the peculiar and extraordinary procedure known as a Letters Patent appeal. But it seems to me that the decision of the Privy Council is fatal to these views. I cannot construe the judgment in *Tulai Pershat Bhakt v. Benayek Misser* (96) 23 Cal. 918(*suupra*) as meaning anything else than that the appeal was incompetent, because the High Court had affirmed the decision of "the Court immediately below" and there was no question of law involved. As I have said above, I cannot distinguish between the status vis a vis the High Court of the Single Judge trying an original case and the Single Judge hearing an appeal, and therefore I am forced to hold that the present case is determined by the judgment of the Privy Council. My answer, therefore, to the first question must be in, the affirmative.

Abdur Rahman, J.

10. I agree with my learned brother Din Mohammad, J. that a Single Judge of a High Court sitting on its appellate side cannot be held to be presiding over a "Court immediately below" the Court affirming or reversing his decision on an appeal under the Letters Patent. It is unnecessary

to deal with the original side of the Presidency High Courts historically and to show how it came into existence. Suffice it to say that those who are acquainted with its working can find no difficulty in holding that the Original Side of a High Court is quite distinct from its appellate side although broadly speaking both of them form parts of the same Court, are generally situated within the precincts of the same building and are presided over by Judges appointed by Royal Warrants to that Court. In order that an appeal may lie under para. 1 of Section 110, Civil Procedure Code, it is one of the essential conditions that the value of the suit in the Court of first instance should be ten thousand rupees or upwards. Now when a suit or proceeding is decided on the original side, it cannot but be held to have been disposed of by the Court of first instance and should be of the value of ten thousand rupees or upwards before an appeal can be taken to the Privy Council under the first paragraph of Section 110. It is this Court of first instance which would usually be covered by the expression "the Court immediately below" used in the latter part of that section. This is how I understand their Lordships' decision in *Tulai Pershat Bhakt v. Benayek Misser* (96) 23 Cal. 918(*supra*) in which the High Court had on its appellate side affirmed the decision of the High Court on its original side which was the Court of first instance or the Calcutta decision in *Debendra Nath Das v. Bibudhendra Mansingh* A.I.R. 1916 Cal. 973(*supra*) where Sir Lawrence Jenkins, C.J. was dealing with a decision of the High Court on appeal from a decision of that Court given by a Single Judge on its appellate and not on its original side. Different considerations might prevail in construing the expressions "the Court of first instance" and "the Court immediately below" when "the Court immediately below" does not happen to be the Court of first instance but as long as they are the same, the decision of the Court of the first instance whether it is by a Subordinate Judge, a District Judge or a Judge of the High Court on its original side, where such a side exists, must be held to have been given by a Court immediately below the Court which affirms or upsets that decision on appeal. Viewed thus, a Judge of a High Court sitting on the original side will be the Court immediately below the Court hearing an appeal from his decision. But the same cannot be said of a Single Judge sitting on the appellate side who is never "a Court of first instance" and cannot therefore be correctly described to have been presiding over the Court immediately below the Court hearing an appeal from his judgment under the Letters Patent. The Judges sitting on the appellate side exercise the same duties and the same functions on behalf of the Court and a case or cases pending before one Judge can be decided by another Judge sitting on the same side with-out any order of transfer by the Court.

11. The first question is answered in the negative. To the second question the answer is that the order is one of affirmance. Let the case be now sent back to the Division Bench for disposal in the light of the answers recorded above.