BOMBAY HIGH COURT

Vaman Ravji Kulkarni

Vs.

Nagesh Vishnu Joshi

Letter Patent Appeal No. 30 of 1937

(N.J. Wadia and Lokur, JJ.)

06.10.1939

JUDGMENT

N.J. Wadia, J.

1. This is a Letters Patent appeal against an order mad by Mr. Justice Norman sitting singly in an appeal from an order made by the District Judge of Belgaum. The appellant before us and another had filed a suit in the Court of the Joint Subordinate Judge of Gokak for accounts and redemption of a mortgage under the Dekkhan Agriculturists' Relief Act. The suit was dismissed by the trial Judge. It related to two lands, survey No. 32 and survey No. 29: It was alleged that plaintiff No. 1 Ravji and his brother Bapuji, since deceased, had mortgaged the whole of survey No. 32 and survey No. 29, pot No. 3, to one Datto Ramchandra Kalkundri. Defendants Nos. 1 to 3 were heirs of the mortgagee. They had transferred their mortgage rights in 1925 to defendant No. 4. In darkhast No. 54 of 1922 brought in execution of a decree obtained by one Vinayak Joshi against Ravji survey Nos. 29/3 and 32/3 were sold as belonging to Ravji, and were purchased by defendant No. 5. Defendants Nos. 6 and 7 subsequently purchased the property from defendant No. 5. Plaintiffs Nos. 1 and 2, who are father and son, claimed to have purchased the equity of redemption from the heirs of plaintiff No. 1's brother Bapuji. It was alleged by them that survey No. 32/3, which had been sold in the execution proceedings against Ravji as his property, did not really belong to him, and had actually fallen to the share of his brother Bapuji, and under the assignment of his interest by Bapuji in favour of plaintiffs Nos. 1 and 2 they were entitled to redeem the lands.

2. The trial Court held that survey No. 32/3 did belong to Ravji and that the plaintiffs were estopped by their conduct in connection with the sale proceedings from denying that the sale was binding on themselves and on defendant; No. 9, the daughter and heir of Bapuji. In appeal the learned District Judge held that the plaintiffs had proved that survey No. 32/3 did not belong to them at the time of the auction-sale in the darkhast of 1922, and that the question of estoppel did noti arise in the suit. He, therefore, set aside the decree of dismissal made by the trial Court and remanded the case to that Court for recording findings on the remaining issues, Nos. 7 to 13. Against this order there was a second appeal to this Court which was heard by Mr. Justice Norman sitting singly. In dealing with the question of estoppel the learned District Judge had

found that Ravji at the time of the Court auction was really under the belief that his own share of survey No. 32 was being auctioned, and that his conduct in connection with the sale was based on a genuine mistake, and therefore there could be no question of estoppel. Mr. Justice Norman held, following the decision in *Sarat Chunder Dey v. Gopal Chunder Laha*[1], that the view1, taken by the District Judge on this point was wrong, and that it was unnecessary in order to create an estoppel that the person whose acts or declarations induced another to act must have been under no mistake himself or must have acted with an intention to mislead or deceive. He came to the conclusion that it was not open to the plaintiffs to say that survey No. 32/3 did not belong to them. Subject to these remarks he confirmed the order of the District Court remanding the suit for disposal on the remaining issues. Against this order a Letters Patent appeal has been filed.

3. A preliminary objection is raised on behalf of respondents Nos. 1 and 2, defendants Nos. 6 and 7, who are the only contesting respondents, that no appeal lies to this Court. The appeal made to this Court against the order of remand made by the District Judge of Belgaum was under Section 104(7), Civil Procedure Code, and Sub-section (2) of that Section provides that no appeal shall lie from any order passed in appeal under Sub-section (2) of the Section. It is contended, therefore, that no further appeal lies against the order made by Mr. Justice Norman. There is no doubt that an appeal would lie to a bench of two Judges of this Court against Mr. Justice Norman's order under clause 15 of the Letters Patent. It is contended, however, that the provisions of clause 15 of the Letters Patent cannot prevail against the provisions of Section 104 of the Code of Civil Procedure where there is a conflict between the two, and that the jurisdiction of the High Court as given by the Letters Patent is subject to the legislative powers of the Governor General in Council. Under the provisions of Section 22 of the Indian Councils Act of 1861, 24 & 25 Vic, c. 67, the Governor General in Council has power to make laws for all Courts of Justice in British India. Under the provisions of Section 9 of the High Courts Act of 1861, 24 & 25 Vic, c. 104, under which the High Court of Bombay is established, the High Court is to have and exercise all such civil, criminal and other powers, original and appellate, as Her Majesty may by Letters Patent grant and direct, subject and without prejudice to the legislative powers in relation to the matters mentioned in that Section of the Governor General in Council. Section 44 of the Letters Patent provides that the provisions of the Letters Patent are subject to the legislative powers of the Governor General in Council and may be in all respects amended and altered thereby. In view of these provisions it is clear that the provisions of the Letters Patent are subject to legislation by the Governor General in Council, and if there is a conflict between the provisions of Section 104 of the Civil Procedure Code, which was passed by the Indian Legislature in 1908, and clause 15 of the Letters Patent, the provisions of the Code of Civil Procedure would prevail.

4. The question, however, is whether Section 104 of the Code of Civil Procedure applies to an appeal under the Letters Patent. That Section appears in part VI1 of the Code which deals with appeals to High Courts from Courts subordinate to it, but not with appeals from a single Judge of the High Court to a bench. The Code makes no provision whatever for any right of appeal from the decision of a single Judge of the High Court to a bench. Such appeals are provided for only by clause 15 of the Letters Patent, and unless such appeals are expressly excluded by any provision in the Civil Procedure Code, the mere general provision in Section 104, Clause (2), with regard to appeals under the Code,

[1](1893) ILR 20 P.C. 296 : (1892) L.R. 19 I.A. 203

cannot be regarded as controlling appeals which are not, provided for by the Code at all. If the

Legislature had intended to bar such appeals under Section 104, that would have been expressly stated. Far from expressly barring such appeals Section 4 of the Code provides that :-

> In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect. ..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.
>
> These provisions are wide enough to cover appeals under the Letters Patent.

5. In *Bhaidas Shivdas v. Bed Gulab*[2], there was a difference of opinion between two Judges of a High Court hearing an appeal from a decision of the High Court on the original side, and the question was whether the procedure laid down in Section 98(2) of the Civil Procedure Code or that laid down in clause 36 of the Letters Patent should apply. It was contended before the Privy Council on behalf of the respondents in the appeal that the procedure laid down in clause 36 of the Letters Patent was modified by the Code of Civil Procedure and that by clause 44 of the Letters Patent there was an express provision making the Letters Patent subject to the legislative powers of the Governor General in Council. Their Lordships held that the provisions of clause 36 of the Letters Patent were not affected by Section 98 (2) of the Code of Civil Procedure, which provided a different procedure in those circumstances, and that clause 36 of the Letters Patent prevailed by virtue of Section 4 of the, Code of Civil Procedure. Clause 36 of the Letters Patent provided, in the opinion of their Lordships, a special form of procedure within the meaning of Section 4 of the Code of Civil Procedure , and the provisions of Section 98(2) could not affect this special procedure. The same argument, in my opinion, applies in the present case. The appeal provided by clause 15 of the Letters Patent from a decision of a Judge of the High Court sitting singly to a bench of the High Court is a special jurisdiction within the meaning of Section 4 of the Code, and cannot be affected by the provisions of Section 104 which deal only with appeals under the Code, that is, appeals to the High Court from decisions of Courts subordinate to it. A Judge of the High Court sitting singly is not a Court subordinate to the High Court.

6. In *Sabhapathi Chetti v. Naraymasami Chetti*[3], there was an appeal from the decision of a single Judge of the High Court sitting on the original side, dismissing a claim preferred under Section s 278 and 282 of the Code of Civil Procedure by the mortgagees of Immovable property which had been attached in execution of a decree. It was contended on behalf of the respondent that no appeal lay against the order of the single Judge because the right of appeal, if any, under clause 15 of the Letters Patent was taken away by the provisions of Section s 588 and 591 of the Code, corresponding to the present Section s 104 and 105. In holding that the objection was not well-founded, White C.J. and Bhashyam Ayyangar J. said (p. 557) :-

> We are clearly of opinion that neither of these objections is well founded. As regards the first, the matter has been practically concluded by the decision of this Court in *Chappan v. Moidin Kutti*[4], which was heard by a Bench of six Judges and

[2] AIR 1921 PC 6 : (1921) L.R. 48 I.A. 181 [4] I.L.R. (1898) Mad. 68

[3] I.L.R. (1901) Mad. 555

in which it was held by Mr. Justice Shephard, Mr. Justice Subrahmania Ayyar and Mr. Justice Moore that Section 15 of the Letters Patent is not controlled by Section s 588 and 591 of

the Civil Procedure Code. This view was dissented from only by Benson, J. A Full Bench of the Calcutta High Court in *Toolsee Money Dassee v. Sudevi Dassee*[4], unanimously held that Section 15 of the Letters Patent is not restricted by Section 588 of the Civil Procedure Code and dissented from Mr. Justice Benson's opinion that Section s 588 and 591, Civil Procedure Code, do restrict the right of appeal given by Section 15 of the Letters Patent. The above decisions of this Court and of the Calcutta High Court are in conformity with the decision of the Privy Council in *Hurrisk Chunder Chowdhry v. Kalhunderi Debi*[5], in which it was held that Section 588 of the Code of Civil Procedure restricting appeals against orders did not apply to prevent an appeal to the High Court from the order of a single Judge of that Court, and with .the canon of interpretation based on the maxim generalia specialibus non derogdnt, that a general later law does not abrogate an earlier special one by mere implication, *Thorpe v. Adams*[6], *The Queen v. Champneys*[7], and *Kunter v. Philips*[8], per A.L. Smith J. per A.L. Smith J., and that when the Legislature has already given its attention to a particular subject and provided for it, it is reasolnably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language (per *Wood v. C*, in *Fitzgerald v. Champneys*[9], also *Maharajah of Jeypore v. Papayyamma*[10], Both Section 540 of the Code of Civil Procedure relating to appeals from original decrees and Section s 588 and 591 relating to appeals from orders provide for appeals from one Court to another of higher grade. The provision made by Section 15 of the Letters Patent for appeals from one or more Judges of; the High Court, to other Judges of the same Court is entirely foreign to the provisions of the Civil Procedure Code relating to appeals from one Court to another. The matter is placed beyond all reasonable doubt, by Section 597 of the Code of Civil Procedure which occurs in the chapter relating to appeals to the King in Council. It is provided in that Section, among other things, that no appeal shall lie, to His Majesty in Council, from a judgment of one Judge of a High Court or of one Judge of a Division Court. The obvious reason for such restriction is, that the party should not be permitted to appeal directly to the King in Council, from the judgment of a single Judge of the High Court, whether passed in the exercise of ordinary original civil jurisdiction or of appellate civil jurisdiction but that he should, in the first instance, appeal, under Section 15 of the Letters Patent, to the other Judges of the High Court. The. result of holding that no appeal would lie under Section 15 of the Letters Patent, from an order of a single Judge in the exercise of original civil jurisdiction when such order is not ai decree or an order specified under Section 588 of the Code of Civil Procedure or from an order of a single Judge, passed in appeal, from any of the orders, specified in Section 588 of the Code of Civil Procedure would be that such orders would be final and no appeal would; lie, either to other Judges of the High Court or to the King in Council, although from a final order passed by; a District Judge in appeal from any of the orders mentioned in Section 588, an appeal would lie direct to the King in Council under Section 595("). The fact that Section s 588 and 591 of the Code of Civil Procedure are applicable to the High Court, does not affect the question now under consideration. They are applicable to the High Court, in that appeals from orders of the Subordinate Courts lie to the High Court under Section 588 of the Code of Civil

[4] I.L.R. 26 (1899) Cal. 361
[5] I.L.R. (1882) Cal. 482
[6](1871) L.R. 6 C.P. 125
[7](1871) L.R. 6 C.P. 384
[8](1891) 2 Q.B. 267
[9](1861) 2 J. & H. 31

[10] I.L.R. (1900) Mad. 329

Procedure and Section 591 prohibits appeals from such Courts to the High Court, except in the cases provided by Section 588.

7. The same view, was taken by the Calcutta High Court in *Debendra Nath Das v. Bibudhendra Mansingli*[11], in which Jenkins C.J. and Chatterjee J. held that a Judge of the High Court sitting singly was not a Court subordinate to the High Court, but performed a function directed to be performed by the High Court, that the Code of Civil Procedure made no provision for appeals within the High Court from a single Judge of the High Court to a bench, and that this right of appeal depended on clause 15 of the Letters Patent. The view taken in both these decisions is in conformity with the view taken by the Privy Council in *Hurrish Chunder Chowdhry v. Kali Sundari Debia*[12], In that case one of the questions was whether ari appeal lay1 from the deci-sion of a Judge of the High Court sitting singly to a bench. It was expressly contended in that case that even if a right of appeal existed in the case by reason of clause 15 of the Letters Patent, such right had been abolished by Section s 2 and 588 (present Section 104) of the Code of Civil Procedure of 1877. Their Lordships in dealing with this question said (p. 17) :-

> It only remains to observe that their Lordships dot not think that sect. 588 of Act X. of 1877, which1 has the effect of restricting certain appeals, applies to such a case as this, where the appeal is from one of the Judges of the Court to the full Court.
> The meaning to be attached to these words of their Lordships has been the subject of considerable difference between different High Courts.

8. In *Banno Bibi v. Mehdi Husain*[13], it was held by the Allahabad High Court that-

> Under Section s 588 and 591 of the Civil Procedure Code, [corresponding to present Section s 104 and 105], no appeal lies, under Section 10 of the Letters Patent for the High Court for the North-Western Provinces, from an order of a single Judge refusing an application for leave to appeal in fomat pauperis.

The decision of the Privy Council in Hurrish Chunder's case was referred to but was distinguished on the ground that their Lordships could not be understood in that case to have held that Section 588 of the Code did not apply at all to appeals attempted to be brought to the full Court from an order passed by a single Judge of the High Court. The same view was taken in two subsequent decisions of the Allahabad High Court. In *Muhammad Naim-ul-lah Khan v. Ihsm-ul-lah Khan*[14], it was held by a full bench of the Allahabad High Court that :-

> Whether an order made by a single Judge of the High Court directing the amendment of a decree passed in appeal by a Division Bench of which he had been a member is an order made under Section 206 read with Section s 582 and 632 of the Code of Civil Procedure, or by virtue of the inherent power which the High Court has in the exercise of its appellate civil jurisdiction to amend its own decrees, it is one to which the provisions of Chapter XLIII of the Code of Civil Procedure are applicable, and from such order no appeal under1 Section 10 of the

[11] I.L.R. (1915) Cal. 90 [13] I.L.R. (1889) All.375
[12](1882) L.R. 10 I.A. 4 [14] I.L.R. (1892) All.226

Letters Patent will lie.The Privy Council decision in Hurrisk Chunder's case was again referred to and distinguished. In *Piari Lal v. Madan Lap*[15], the full bench decision of the Allahabad High Court in Muhammad Naim-ul-lah's case was followed, and it was held that no appeal would lie under clause 10 of the Letters Patent from an order of a single Judge of the High Court dismissing an appeal from an order of an execution Court under Order 21, Rule 90, of the Code of Civil Procedure, in view of the provisions of Section 104 of the Code.

9. The Madras High Court had at one time held that clause 15 of the Letters Patent for that High Court, which allows1 an appeal to the High Court from the judgment of one Judge of that Court, was controlled by Section 588 of the Code of Civil Procedure , and that no appeal would therefore lie from the order of a single Judge made under Section 592 of the Civil Procedure Code rejecting an application for leave to appeal in forma pauperis [vide *Achaya v. Ratnavelu*[16], and *Sankarm v. Raman Kutti*[17], In view of the decision of the Privy Council in Hurrish Chunder's case the question was referred to a full bench in *Chappan v. Moidin Kutti*[18], and it was held by a full bench of six Judges that an appeal would lie under clause 15 of the Letters Patent against an order madel by a single Judge of the High Court under Section 622 of the Civil Procedure Code (present Section 115) and that the contention that clause 15 of the Letters Patent had been modified by Section 588 of the Code of Civil Procedure was opposed to the ruling of the Judicial Committee in Hurrisk Chunder's case. It was pointed out that the observations of the Judicial Committee in that case could not be regarded as mere obiter dicta, since the report showed that the contention that Section 588 of the Code of Civil Procedure modified the Letters Patent was not only distinctly raised but also strongly pressed by counsel in their arguments before the Judicial Committee. The question was again considered by another full bench of the Madras High Court in *Paramasivan Pillai v. Ramasami Chettiar*[19], and it was held, following the previous full bench decision in *Chappan v. Moidin Kutti*, that Section 104 of the Code of Civil Procedure does not control clause 15 of the Letters Patent, and that an appeal lies from the judgment of a single Judge of the High Court in an appeal preferred under Order 43, Rule 1, Clause (s), of the Code of Civil Procedure, to the full Court.

10. In *Toolsee Money Dasee v. Sudevi Dasee*[20], a full bench Court took the same view as was taken by the Madras High Court and held that an appeal lies under clause 15 of the Letters Patent from an order made by a single Judge of the High Court in the exercise of its original civil jurisdiction refusing to set aside an award, and that such appeal is not restricted by the provisions of Section 588 of the Code of Civil Procedure . The question was considered as having been authoritatively settled by the judgment of the Privy Council in Hurrish Chunder's case.

11. I am with respect of opinion that the view taken by the full benches of the Madras and Calcutta High Courts in the cases referred to above is correct, and that the question must be regarded as having been finally settled by the decision of the Privy Council in Hurrish Chunder's case. Section 104 of the Code of Civil Procedure , which refers only to appeals to the High Court from Courts subordinate to it, cannot apply to appeals filed under clause 15 of the Letters Patent from a single Judge of the High Court to a bench. An

[15] I.L.R. (1916) All.191 [17] I.L.R. (1896) Mad.152 [19] I.L.R. (1933) Mad. 915 F.B
[16] I.L.R. (1885) Mad. 253 [18] I.L.R. (1898) Mad. 68 [20] I.L.R. (1899) Cal. 361

appeal under the Letters Patent lies from the judgment of Norrman J. The preliminary objection raised by the respondents in this case is, therefore, overruled.

12. With regard to the merits of the appeal, the only contention urged before Norman J. was that the view taken by the learned District Judge that as Ravji's conduct at the time of the auction sale in the execution proceedings was based on an honest though mistaken belief that his own share of survey No. 32 was being sold, there could be no estoppel against him, was wrong. Norman J. held, following the decision of the Privy Council in *Sarat Chun-der Dey v. Gopal Chunder Laha*[21], that it was unnecessary in order to create an estoppel that the person whose acts or declarations induced another to act must have been under no mistake himself or must have acted with an intention to mislead or deceive. He, therefore, held that, even accepting the learned District Judge's finding of fact that survey No. 32/3 did not belong to Bapuji, it was not: open to the plaintiffs to contend that survey No. 32/3 did not belong to them.

13. The third issue framed by the learned District Judge was, Whether the question of estoppel arises in this suit, and, if so, whether it is a bar to the plaintiff's suit ?

> The learned District Judge held that the question of estoppel did not arise at all and he, therefore, remanded the whole suit for findings on the remaining issues with regard to the whole of survey No. 32y i.e. pot Nos. 1, 2 and 3. The result of the view taken by Norman J. on the point of law argued before him would be that the question of estoppel does arise in the suit, in other words, that it is open to respondents Nos. 1 and 2, defendants Nos. 6 and 7, to contend that the plaintiffs are estopped. But that does not mean that the respondents have proved that the plaintiffs are actually estopped. The learned District Judge had given no finding on the second part of the third issue raised by him, whether estoppel is a bar to the plaintiff's suit, i.e. whether the respondents have proved that the plaintiffs are actually estopped.

14. The appeal is, therefore, remanded to the District Judge for a finding on the second part of the third issue framed by him, that is, for a finding whether defendants Nos. 6 and 7 proved that the plaintiffs by their own conduct or act or those of Narayan Bapuji are estopped from contending that survey No. 32, pot No. 3, did not belong to them. If the learned District Judge finds that defendants Nos. 6 and 7 have proved estoppel, the plaintiffs' suit as regards survey No. 32, pot No. 3, will have to be dismissed and the suit remanded to the trial Court for finding, on the remaining issues Nos. 7 to 13, as regards the other two lands, survey Nos. 32/1 and 32/2. If the learned District Judge finds that estoppel has not been proved, the suit will have to be remanded as already ordered by the learned District Judge with regard to all the three lands, survey No. 32, pot Nos. 1, 2 and 3.

15. The appeal is, therefore, remanded. The parties to bear their own costs before us and before Mr. Justice Norman.

Lokur, J. –

[21](1893) ILR 20 P.C. 296 : (1892) L.R. 19 I.A. 203

16. I agree, and in view of the importance of the point raised as a preliminary objection to the

maintainability of this appeal and the divergence of judicial opinion, I should like to add a few words, even at the risk of repeating what my learned brother has already said in his judgment.

17. This is an appeal under clause 15 of the Letters Patent from the judgment of a single Judge of this Court in an appeal from an order of remand passed by the District Judge of Belgaum, That order of remand was appealable under Section 104 (I)(I) read with Order 43, Rule 1(u), of the Civil Procedure Code, 1908. Sub-section (1) of Section 104 specifies the orders from which appeals shall lie, and provides that " save as otherwise expressely provided in the body of the Code or by any law for the time being in force," no other orders are appealable. The Section contemplates only one appeal and Sub-section (2) specifically provides that " no appeal shall lie from any order passed in appeal under this Section. " It is urged by Mr. Kane on behalf of respondents Nos. 1 and 2 that clause 15 of the Letters Patent is controlled by Section 104 of the Civil Procedure Code and, therefore, no appeal lies under the Letters Patent from a judgment passed in an appeal under Sub-section (1) of Section 104 of the Civil Procedure Code, since Sub-section (2) expressely takes away the right of a second appeal. There is a mass of conflicting decisions on the question whether Section 104, (which corresponds to Section 588 of the Civil Procedure Codes of 1877 and 1882), overrides the provisions of clause 15 of the Letters Patent. It is pointed out that there was no saving clause in Section 588 of the earlier Codes, and in order to set the conflict at rest, the saving clause was deliberately added to the first sub-Section of Section 104 in the Code of 1908, so that now even an order not specified in that sub-Section, and therefore not appealable under the Code, is subject to an appeal under clause 15 of the Letters Patent, if it amounts' to a judgment; but, it is urged, as no such saving clause finds place in sub-Section (2) of Section 104, there can be no second appeal even under clause 15 of the Letters Patent against an order passed by a single Judge of the High Court in an appeal under Sub-section (1) of Section 104 of the Code. There is a good deal of force in this reasoning, but it must be remembered that even in the absence of such a saving clause in Sub-section (1), all the High Courts, (except the High Court of Allahabad), following the dictum of the Privy Council in *Hurrish Chunder Chowdhry v. Kali Sundari Debia*[22], to which I will presently refer, held the view that clause 15 of the Letters Patent was not controlled by Section 588 of the Civil Procedure Code of 1882. On the other hand, in spite of the saving clause in Sub-section (J) of Section 104 of the present Code, the Allahabad High Court has adhered td its former view in *Piari Lal v. Madam Lal*[23],

18. Before discussing the effect of the omission by the Legislature to add a saving clause in Sub-section (2) of Section 104 of the Civil Procedure Code of 1908, I think it necessary to refer briefly to the statutes and the Letters Patent by which the High Courts were constituted and from which they derive their powers. Section 9 of the Indian High Courts Act, 1861, (24 & 25 Vic. c. 104), conferred upon each of the High Courts established under that Act all such original and appellate jurisdiction and " all such powers and authority for, and in relation to, the administration of justice" as may be granted and directed by the Letters Patent, " subject and without prejudice to the legislative powers of the Governor General of India in Council." A similar provision is now contained in Section 223 of the Government of India Act, 1935, (25 & 26 Geo. V, c.

[22](1882) L.R. 10 I.A. 4 [23] I.L.R. (1916) All. 191

42). Clause 36 of the Letters Patent provides that any function, which is directed to be performed by the High Court in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any division Court thereof, appointed or constituted for such purpose. Under

Section 13 of the Indian High Courts Act, 1861, (24 & 25 Vic. c. 104), and now under Section 223 of the Government of India Act, 1935, (25 & 26 Geo. V, c. 42), the High Court can frame rules to provide for the exercise, by one or more Judges or by division Courts, of the original or appellate jurisdiction vested in such High Court, in such manner as may appear to be convenient for the due administration of justice, and under clause 15 of the Letters Patent, as amended in 1928, an appeal shall lie to the High Court " from a judgment of one Judge of the said High Court or one Judge of any division Court in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, when the Judge who passed the judgment declares that the case is a fit one for appeal." Clause 44, however, declares that all the provisions of the Letters Patent are subject to the legislative powers of the Governor General in Council, and " may be in all respects amended or altered thereby."

19. The net result of these; provisions is that the Governor General in Council can, by legislation, curtail any of the powers conferred upon the High Court by the Letters Patent; and it is urged that the power conferred by clause 15 of the Letters Patent is curtailed by Section 104, Sub-section (2), of the Civil Procedure Code, 1908, which debars a second appeal against an order appealable under Sub-section (I). This was the view taken in some of the earlier cases of the Madras High Court [like *Achaya v. Ratnavelu*[24] but their Lordships of the Privy Council, expressed a different view in *Hurrish Chunder Chowdhry v. Kali Sundari Debla*. In that case there was an appeal to the full Court under clause 15 of the Letters Patent from an order passed by a single Judge on the original side of the High Court rejecting an application for the execution of an order of the Privy Council. The full Court allowed the appeal, and before the Privy Council it was contended that the right of appeal to the full Court against the judgment of a single Judge of the High Court was in that case governed by Section 588 of the Civil Procedure Code of 1877 (which was the same as Section 588 of the Code of 1882), whereby the right of appeal given by clause 15 of the Letters Patent had been modified. In negativing this contention their Lordships of the Privy Council observed (p. 17) :-

> It only remains to observe that their Lordships do not think that sect. 588 of Act X. of 1877, which has the effect of restricting appeals, applies to such a case as this, where the appeal is from one of the Judges of the Court to the full Court.

20. The plain meaning of this is that Section 588 does not in any way cut down the right of appeal conferred by clause 15 of the Letters Patent. In *Sankarm v. Raman Kutti*[25], Benson J. treated the observation as referred to the particular facts of that case, but the question was fully considered by a bench of six Judges of the Madras High Court in *Chappan v. Moidin Kutti*[26], and full effect was given to that observation, referring to which Shephard C.J. said (p. 80) :-" The question is, in my opinion, concluded by authority which it is beyond our province to criticise." As rightly pointed out by Subramania Ayyar J. (p. 84), the observations of the Privy Council cannot be regarded as

[24] I.L.R. (1885) Mad. 253 [26] I.L.R. (1898) Mad. 68

[25] I.L.R. (1896) Mad. 152

obiter. The contention that Section 588 modified clause 15 of the Letters Patent was not only distinctly raised, but was also strongly pressed by counsel in the argument. Their Lordships had, therefore, to give a decision upon the soundness or unsoundness of that contention, and that they did in unmistakable terms. These cases were decided under Section 588 of the Code of 1882, and

in the full bench case of *Paramasivan Pilled v. Ramasami Chettiar*[27], Ramesam J. observed that there was nothing in the language of the new Code to show that the Legislature intended to lay down a principle different from that in the old Code.

21. The same view was taken by a full bench of the Calcutta High Court in *Toolsee Money Dassee v. Sudevi Dassee*[28] That was an appeal against an order of a single Judge of the High Court in the exercise of original civil jurisdiction refusing to set aside an award made in a pending suit, which order was not appealable under Section 588 of the Civil Procedure Code of 1882. After referring to the ruling of the Privy Council in *Hurrish Chunder Chow-dhry v. Kali Sundari Debia*[29], delivering the judgment of the full bench, said " I have no doubt that we are bound to follow to the fullest extent the opinion expressed by their Lordships of the Privy Council that Section 588 of the Code does not apply to the case now before us, and that the matter has thus become settled law."

22. The Allahabad High Court adopted the reasoning of the earlier Madras rulings and in *Muhammad Naim-ul-lah Khm v. Ihsan-ul-lah Khan*[30], it was held by a full bench of that Court that clause 10 of the Letters Patent of that High Court (corresponding to clause 15 of the Letters Patent of this High Court) was controlled in its operation by Section 588 of the Civil Procedure Code, and that no appeal lay under the Letters Patent from] an order made under the Code if it was not one of the orders enumerated in that Section. :

23. This High Court has, however, taken a different view, namely the view adopted by the Madras High Court since the decision of the) full bench in *Chappcm v. Moidin Kutti* and by the Calcutta High Court in *Taolsee Money Dassee v. Sudevi Dassee*. In *Secretary of State v. Jehangir*[31], an appeal under clause 15 of the Letters Patent was preferred to a division bench against an order passed by a single Judge on the original side under Section 135 of the Civil Procedure Code of 1882 (corresponding to Order 11, Rule 20, of the Code of 1908). That was not one of the orders specified in Section 588 and was, therefore, not appealable. That Section expressly said that no appeal lay from any order which was not enumerated in it. Yet Candy J. held that the appeal was maintainable and observed at p. 348 :-

> This Court has more than once followed the ruling that Section 588 of the Code of Civil Procedure has not taken away the right of appeal given by clause 15 of the Letters Patent.

24. No other reported case, in which the said ruling had been previously followed, was brought to our notice, and possibly Candy J. may have been referring to the practice then prevailing in this High Court. If so, there is no reason for departing from that practice. It is pointed out that the appeal in that case was from a judgment passed on the original side

[27] I.L.R. (1933) Mad. 915 [29](1882) L.R. 10 I.A. 4 [31](1902) 4 Bom. L.R. 342
[28] I.L.R. (1899) Cal. 361 [30] I.L.R. (1892) All. 226

; but that makes no difference, since the saving clause which now appears in Sub-section (2) of Section 104 of the Civil Procedure Code, 1908, did not then qualify Section 588. The question that had to be considered was whether an order not appealable under Section 588 of the Civil Procedure Code of 1882 was appealable under clause 15 of the Letters Patent as a judgment passed by a single Judge, and on that point the observation of the Privy Council in *Hurrish Chunder Chowdhry v. Kali Sundari Debia* is emphatic and unambiguous. Although the question is not fully discussed in the judgment of the Privy Council, the reason for the proposition laid

down is to be found in the last portion of their Lordships' observation quoted above, namely- "where the appeal is from one of the Judges of the Court to the full Court." Such an appeal is not an appeal under the provisions of the Civil Procedure Code, asl pointed out in *Debendra Nath Das v. Bibudhendra Mansingh*[32], In that case a decree of the first appellate Court was revised in second appeal by a single Judge, and an appeal was preferred to the full Court under clause 15 of the Letters Patent. The appeal was allowed and the decree of the first appellate Court was) confirmed. On an application being made for a certificate for an appeal to His Majesty in Council, a question arose whether the decree appealed from, namely the decree of the full Court, affirmed the decision of the Court immediately below it, as contemplated by para. 3 of Section 110 of the Civil Procedure Code, and it was held that it did, although in fact it had reversed the decree of the single Judge in the second appeal. The latter was regarded as wiped out, and the only effective judgment of the High Court which remained was the one which confirmed the decision of the Court immediately below, namely the first appellate Court. In coming to this conclusion, Jenkins C.J. remarked (p. 93) :-

> This appears to me to be the true result of the Letters Patent and the Code, for the Code makes no provision for an appeal within the High Court, that is to say, from a single Judge of the High Court. This right of appeal depends on clause 15 of the Charter. And here I may point out that a Judge sitting alone is not a Court subordinate to the High Court, but performs a function directed to be performed by the High Court.

25. Hence Section 104 of the Code does not apply to an appeal within the High Court from a single Judge to a full Court, and clause 15 of the Letters Patent is to determine whether such an appeal lies or not.

26. In *Bhuta Jayatsing v. Lakadu Dhansing*[33], this view was reiterated by Scott C.J., when dealing with the question whether in case of difference of opinion between two Judges of the High Court, the opinion of the senior Judge should prevail as provided in clause 36 of the Letters Patent, or the question should be referred to a third Judge as required by Section 98 of the Civil Procedure Code. At p. 176 he observed :-

> In my opinion Section 98, like Section 104, read with Order 43, Rule 1, must be taken to apply to appeals from Courts of inferior jurisdiction to the? High Court, and not to appeals from one or more Judges of the High Court.

27. After describing different kinds of appeals, Hayward J. observed in the same case at p. 180 :-

[32] I.L.R. (1915) Cal. 90

[33](1918) 21 Bom. L.R. 157

> ...the natural place to find the rules governing the exercise of the appellate civil jurisdiction over the other Judges of the High Court would be the Letters Patent; while the natural place to find the rules governing the exercise of the appellate civil jurisdiction over the civil Courts of the mofussil subject to the High Court would be the Civil Procedure Code.

28. It follows from this that the omission to insert a saving clause in Sub-section (2) of Section

104 as in Sub-section (1), is immaterial. The entire Section is to be ignored when dealing with an appeal within the High Court itself, which is governed by the Letters Patent.

29. Adverting to the words of the saving clause in Sub-section (I) of Section 104, Lord Sumner observed in *Sabitri Thakurain v. Savi*[34]*,*

> It is plain that the words in Section 104 of the Act of 1908 are inserted for the purpose of giving effect to the decisions of the full bench at Madras and of the High Court at Calcutta, for the excepting words ' save as otherwise expressly provided by any law,' cut down the general words, and thus carry out the very reasoning of those two judgments.

30. In fact after the principle was so clearly laid down by the Privy Council in *Hurrish Chunder Chowdhry v. Kali Sundari Debia*[35]*,* the saving clause was superfluous. But the inference which Mr. Kane, for the respondents, wants to be drawn from the omission to insert a similar saving clause in Sub-section (2) of Section 104 does not; necessarily follow. In Section 588 of the Code of 1882, there were no Sub-section s, and the last sentence which declared the decision in the appeal under that Section to be final is now given the form of a separate sub-Section in Section 104 of the Code of 1908. The only object of the legislature in enacting Sub-section (2) was to make it clear that there was no second appeal under the Cade from the orders specified in Sub-section (i), and not to override the express provisions of the Letters Patent [*Ruldu Singh v. Sanwal Singh*[36]*,* Of course the Allahabad High Court, which was all along taking the view that clause 15 of the Letters Patent was controlled by Section 588 of the Civil Procedure Code of 1882, has held in *Piari Lal v. Madan Lal*[37]*,* that Sub-section (2) of Section 104 makes the appellate orders final and takes away pro tanto the right of appeal conferred by the Letters Patent. The decision is, however, based on the previous rulings of that High Court under the Code of 1882, and not on the absence of the saving clause in Sub-section (2) of Section 104 of the Code of 1908. With great deference, I consider the view taken by the Lahore High Court to be more sound and in consonance with the dictum of the Privy Council in *Hurrish Chunder Chowdhry v. Kali Sundari Debia.*

31. It is true that Section 117 of the Civil Procedure Code says that the provisions of the Code shall apply to Chartered High Courts, save as provided in parts IX and X of the Code or in rules. The effect of this Section was considered in *Bhuta Jayatsing v. Lakadu Dhansing*[38]*,* and after discussing various rulings,[including the decision in *Hurrish Chunder Chowdhry v. Kali Sundari Debia*], Hayward J. observed on p. 181 :-

[34] AIR 1921 PC 80 : (1921) ILR 48 P.C. 481 : 1921-14-LW 362 : (1921) L.R. 48 I.A. 76
[35](1882) L.R. 10 I.A. [4] [36] I.L.R. (1922) Lah. 188 [38](1918) 21 Bom. L.R. 157
[37] I.L.R. (1916) All. 191

> It appears to me therefore upon these considerations and authorities including that of the Privy Council that the civil appellate jurisdiction over civil Courts subordinate to the High Court was alone in view when the Civil Procedure Codes were, by Section 632 of the Codes of 1877 and 1882 and by Section 117 of the present Code, made applicable to the Chartered High Courts by the Indian Legislature.

Following this ruling Marten J. said in *Pandu v. Janmadas*[39]*,*

> ...the Code only deals with appeals from certain Courts and it does not deal with appeals within the High Court from the decision of one Judge of the High Court to another.

32. Moreover Section 4, Sub-section (1), of the Civil Procedure Code, lays down :- " In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force 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."

> There can be no doubt that the provisions of the Letters Patent have conferred special powers regarding appeals within the High Court. Those powers are not specifically taken away by Section 104 of the Civil Procedure Code and are not, therefore, affected by it. That is the effect of Section 4, Sub-section (I), which is intended to give effect to the principle of the well-known maxim " generalia spedalibus non derogant (that is to say, general things do not derogate from special). Special enactments are not repealed by later general Acts unless there be some express reference to the previous legislation or a necessary inconsistency in the two Acts standing together, which prevents the maxim from being applied. Sub-Section (2) of Section 104 of the Civil Procedure Code does not refer to the Letters Patent and say that in spite of clause 15 of the Letters Patent no appeal lies from any order passed in an appeal under Sub-section (2). Sub-section (2) is in no way inconsistent with clause 15 of the Letters Patent and the two can stand together, the former applying to appeals under the Code, and the latter to special appeals within the High Court.

33. The case was argued very ably and exhaustively by the learned advocates on both the sides, and after a careful consideration of the authorities cited and the arguments addressed by them, I am satisfied that Section 104 of the Civil Procedure Code does not control clause 15 of the Letters Patent, and in spite of the absence of a saving clause in it, Sub-section (2) of Section 104 does not affect or cut down the right of appeal conferred by the Letters Patent. This appeal must, therefore, be held to be competent) and the preliminary objection overruled.

34. On merits, I fully concur in the view taken by my learned brother and agree to the order proposed by him.

[39] AIR 1925 Bom 113 : AIR 1925 Bom 293 : (1924) 26 BOM LR 470 : 85 Ind. Cas. 778 (p. 481)